

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 Consumer Protection Group, LLC and PEM-America, Inc.**

This Settlement Agreement is entered into by and between Consumer Protection Group, LLC ("CPG"), on the one hand, and PEM-America, Inc. ("PEM"), on the other hand, with CPG and PEM collectively referred to as "Parties."

#### **1.2 General Allegations**

CPG alleges that PEM manufactured and distributed and offered for sale, Charisma Paisley Embossed Pillow Reusable Cover (the, "Subject Product") in the State of California containing Di (2-ethylhexyl) phthalate ("DEHP") and Diisononyl phthalate ("DINP), that such product did not include warnings pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code sections 25249.6 *et seq.* ("Proposition 65"). On January 1, 1988, the Governor of California added DEHP to the list of chemicals known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP to the list of chemicals known to the State to cause developmental male reproductive toxicity. Further, on December 20, 2013, the Governor of California added DINP to the list of chemicals known to the State to cause cancer. PEM denies violation of Proposition 65, and contends that its products have been in conformance with the law.

#### **1.3 Product Description**

The product that is covered by this Settlement Agreement is defined as Charisma Paisley Embossed Pillow Reusable Cover (the "Subject Product") that PEM has sold, offered for sale or distributed in California and that contains DEHP and DINP.

1.4 **Notice of Violation**

On December 28, 2018 (AG No. 2018-02332), CPG served PEM and Tuesday Morning, Inc., and the requisite public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California, with a document entitled "60-Day Notice of Violation" (the "Notice") that provided PEM, Tuesday Morning, Inc., and such public enforcers with notice that PEM was allegedly in violation of California Health & Safety Code section 25249.6 for failing to warn consumers and customers that the Subject Product exposed users in California to DEHP and DINP. To the best of the Parties' knowledge, no public enforcer has commenced or is diligently prosecuting the allegations set forth in the Notice.

1.5 **No Admission**

By execution of this Settlement Agreement, PEM, Tuesday Morning, Inc., and each of their respective affiliates and subsidiaries, parents, directors, officers, agents, employees, attorneys, representatives, shareholders, successors, and assigns and each entity to whom PEM and Tuesday Morning, Inc. directly or indirectly distributes or sells the Subject Product, including but not limited to downstream distributors, wholesalers, customers, retailers, marketplace retailers, franchisees, cooperative members and licensees (collectively, the "Releasees"), do not admit any facts or conclusions of law, including, but not limited to, any facts or conclusions of law regarding any violation of Proposition 65, or any other statutory, regulatory, common law, or equitable doctrine. Nothing in this Settlement Agreement shall be construed as an admission by the Releasees of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Settlement Agreement, nor compliance with its terms, shall constitute or be construed, considered, offered, or

admitted as evidence of an admission or evidence of fault, wrongdoing, or liability by the Releasees in any administrative or judicial proceeding or litigation in any court, agency, or forum. Except for the allegations settled and compromised, nothing in this Settlement Agreement shall prejudice, waive, or impair any right, remedy, argument, or defense that CPG or PEM, may have against one another in any other pending legal proceeding as to allegations unrelated to the dispute or claims released herein. Notwithstanding the allegations in the Notices, Releasees maintain that they have not knowingly manufactured or distributed, or caused to be manufactured or distributed, the Subject Product for sale in California in violation of Proposition 65.

1.6 **Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean April 15, 2020.

2. **INJUNCTIVE RELIEF: WARNING**

2.1 **Reformulation Standards**

"Reformulated Products" are defined as those Products containing DEHP in concentration no more than 0.1 percent (1,000 parts per million) and DINP in concentrations no more than 0.1 percent (1,000 parts per million).

2.2 **Commitment to Reformulate or Warn**

As of the Effective Date, PEM shall not sell or offer the Subject Product for sale in the State of California unless they are Reformulated Products or PEM provides warnings that comply with Proposition 65 law.

### 2.3 **Warning**

If not reformulated, the Subject Product if sold by PEM shall be accompanied by a warning as described in Section 2.4 below as of the Effective Date. The warning requirements set forth in Section 2.4 below shall apply only to the Subject Product that are distributed, marketed, sold or shipped for sale in the State of California. PEM further agrees, promises and represents that, as of the Effective Date, to the extent it ships or sells any of the Subject Product in its existing inventory that have not been reformulated, it will provide warnings that comply with Proposition 65 law. The warning requirement shall not apply to any of the Subject Product that is already in the stream of commerce as of the Effective Date.

### 2.4 **Warning Language**

The warnings shall be provided in such a conspicuous and prominent manner that will ensure the message is made available and likely to be read, seen, or heard by the consumer prior to, or at the time of, the sale or purchase. Where required, PEM shall have an option to provide any one of the following Proposition 65 warnings:

**⚠ WARNING:** This product can expose you to [chemicals including] Di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

**Or**

**⚠ WARNING:** Cancer and Reproductive Harm [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)



**Or**

**⚠ WARNING:** This product can expose you to [chemicals including] Diisononyl Phthalate (DINP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

**Or**

**⚠ WARNING:** Cancer [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

This shall constitute compliance with Proposition 65 with respect to the chemical in the Subject Product for any Subject Product in existing inventory.

If the California State Legislature, the Government of the United States of America, the voters of California, the Office of Environmental Health Hazard Assessment or any other state or Federal regulatory agency with authority to do so enacts legislation or issues regulations authorizing or requiring other applicable texts or transmission methods for warnings concerning carcinogenicity and/or reproductive toxicity concerning DEHP or DINP, or providing that no such warnings are necessary as to the Subject Products and these chemicals, PEM's compliance with this legislation or these regulations will constitute compliance with Section 2 of this Agreement.

3. **PENALTIES PURSUANT TO HEALTH & SAFETY CODE SECTION 25249.7(b)**

In settlement of all the claims referred to in this Settlement Agreement, PEM shall pay a total of Three Thousand Dollars (\$3,000.00) in civil penalties in accordance with this Section. The penalty payment will be allocated in accordance with California Health & Safety Code section 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to CPG. CPG's counsel shall be responsible for delivering OEHHA's portion and CPG's portion of any penalty payment made under this Settlement Agreement.

4. **REIMBURSEMENT OF FEES AND COSTS**

The Parties reached an accord on the compensation due to CPG and its counsel under the Private Attorney General doctrine and principles of contract law. Under these legal principles, PEM shall reimburse CPG's counsel for fees and costs, incurred as a result of investigating and bringing this matter to PEM' attention. PEM shall pay Consumer Protection's counsel Twenty-seven thousand Dollars (\$27,000.00) for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice.

5. **PAYMENT INFORMATION**

Within thirty (30) days of the Effective Date, PEM shall make a total payment of Thirty-Thousand Dollars (\$30,000.00) for the civil penalties and attorney's fees/costs by

check to Plaintiff's counsel, Blackstone Law APC addressed to: *Blackstone Law APC Attorney Client Trust Account*. The checks should be delivered to the address as mentioned in Section 8 of this Settlement Agreement.

Other than this payment, each side is to bear its own attorneys' fees and costs.

**6. RELEASE OF ALL CLAIMS**

**6.1 Release of PEM, Downstream Customers and Upstream Vendors**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3, 4 and 5 above, CPG, in its representative capacity, and on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims relating to the Subject Product, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against (a) PEM (b) each of PEM' downstream distributors (including Tuesday Morning, Inc.), wholesalers, vendors, licensors, licensees, auctioneers, retailers, franchisees, dealers, shareholders, cooperative members, customers, owners, purchasers, users, and (c) PEM' parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities.

CPG also, in its capacity, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees and *not* in its representative capacity, provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, against PEM and the Releasees with regards to the Subject Product. PEM acknowledges that it is familiar with California Civil Code section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

PEM in its individual capacity only, and on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. The release in this section shall have no force or effect until checks in good and sufficient funds for the full amount of payments set forth in above Sections 3, 4 and 5 are delivered to Blackstone Law APC by PEM.

6.2 **PEM-America, Inc. Release of Consumer Protection Group, LLC.**

PEM waives any and all claims against CPG, its attorneys and other representatives, for any and all actions taken, or statements made (or those that could have been taken or made) by CPG and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Subject Product. PEM represents that its signatory to this Settlement Agreement has full authority to enter into and legally bind PEM to this Settlement Agreement.

7. **GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Subject Product, then PEM shall have no further obligations pursuant to this Settlement Agreement, but shall have no recourse to claw back payments already made in accordance with Section 3, 4 and 5 of this Settlement Agreement.

8. **NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the other party at the following addresses:

For PEM: Bruce G. Nye, Esq.  
Scali Rasmussen APC  
1901 Harrison Street, Suite 1400  
Oakland, CA 94612-3523

For CPG: Jonathan M. Genish, Esq.  
Blackstone Law APC  
8383 Wilshire Blvd., Suite 745  
Beverly Hills, CA 90211

Any party, from time to time, may specify in writing to the other party a change of address to which all notices and other communications shall be sent.

**9. COUNTERPARTS; FACSIMILE/E-SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or e-signatures, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

CPG agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

**11. ENTIRE AGREEMENT**


This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments and understandings. No other agreements, oral or otherwise, exist to bind either of the Parties.

**12. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement signed by the Parties.

**13. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

<b>AGREED TO:</b>  Date: April 15, 2020  By: <u>Jonathan Genish</u> On Behalf of Consumer Protection Group, LLC	<b>AGREED TO:</b>  Date: April 15, 2020  By: <u></u> On Behalf of PEM-America, Inc.
--	--