

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Audrey Donaldson (“Donaldson”) and Bay Island, LLC (“Bay Island”), with Donaldson and Bay Island each individually referred to as a “Party” and collectively as the “Parties.” Donaldson is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Donaldson alleges that Bay Island employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Donaldson alleges that Bay Island manufactures, sells, and distributes for sale in California, ceramic mugs with exterior decorations containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Donaldson alleges that Bay Island failed to provide the health hazard warning required by Proposition 65 for exposures to lead.

1.3 Product Description

The products covered by this Settlement Agreement are ceramic mugs with exterior decorations containing lead that are manufactured, sold, or distributed for sale in California by Bay Island including, but not limited to, the “*Daily Blessings Tea, Plaque & Mug*”; UPC: 7 21776 18096 2 (hereinafter referred to as “Products”).

1.4 Notice of Violation

On December 20, 2019, Donaldson served Bay Island and the requisite public enforcement agencies with a 60-Day Notice of Violation, alleging that Bay Island violated Proposition 65 when it failed to warn its customers and consumers in California

of the health hazards associated with exposures to lead from its Products. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Bay Island denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Bay Island of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Bay Island of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Bay Island. This Section shall not, however, diminish or otherwise affect Bay Island's obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean April 10, 2020.

2. INJUNCTIVE RELIEF: REFORMULATION/WARNINGS

2.1 Reformulation Standards

"Reformulated Products" or "Reformulated Product" are defined as those Products that yield no more than 1.0 microgram of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol or other equivalent methodologies utilized by state or federal agencies.


2.2. Clear and Reasonable Warnings

As of the Effective Date, all Products Bay Island sells and/or distributes for sale in California that do not qualify as Reformulated Products, shall bear a clear and reasonable warning pursuant to this Section. Bay Island further agrees that the warning will be prominently placed with such conspicuousness when compared with other words,

statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed directly to the product or product packaging, label, or tag, for Products sold in California and contain one of the following statements:

 **WARNING:** Reproductive Harm- www.P65Warnings.ca.gov

OR

 **WARNING:** This product can expose you to chemicals including lead, which are known to the State of California to cause birth defects and other reproductive harm. For more information go to www.P65Warnings.ca.gov.

The warning requirements set forth herein are imposed pursuant to the terms of this Settlement Agreement, and are recognized by the Parties as not being the exclusive manner of providing a warning for the Products.

In the event that the Office of Environmental Health Hazard Assessment (“OEHHA”) promulgates one or more regulations requiring or permitting specific safe harbor warning text and/or methods of transmission relevant to the Products that are different than those set forth above, Bay Island shall be entitled to use, at its discretion, such other specific safe harbor warning text and/or methods of transmission without being deemed in breach of this Agreement.

2.3 Point of Sale and Internet Warnings

The warning requirements of Section 2.2 shall also be satisfied if retailers of the Products, including but not limited to Big Lots Stores, Inc. (“Big Lots”), provide a warning to Customers at the point-of-sale. Customers purchasing Products directly from California retail stores that do not otherwise contain a warning, shall receive the Proposition 65 warning via register display and on customers’ printed receipts.

If retailers of the Products including, but not limited to Big Lots, sell Products via its own proprietary internet website to customers located in California, the warning requirements of this section, and Section 2.2, shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or

described; (b) on the same page as the price for the Product; (c) on one or more web pages displayed to a California purchaser prior to completion of the checkout process; or (d) via the “specifications” section of the Product page. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

2.4 Reformulation/Warning Commitment

As of the Effective Date, Bay Island shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are either Reformulated Products pursuant to Section 2.1 or contain a clear and reasonable warning pursuant to Sections 2.2 and 2.3. The injunctive requirements of Section 2 shall not apply to Products that were in the stream of commerce as of the Effective Date, which products are subject to the releases provided in Section 4, and have been included in the calculation of civil penalty contained in Section 3.1 below.

2.5 Compliance with Warning Regulations

The Parties intend and agree that Bay Island, Big Lots and the Products shall be deemed to be in compliance with the injunctive relief provisions of this Settlement Agreement by adhering to Sections 2.2, 2.3 and 2.4 of this Settlement Agreement.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Bay Island agrees to pay \$2,500 in civil penalties no later than the Effective Date. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Donaldson, and delivered to the address in Section 3.3 herein. Bay Island will provide its payment in two checks as follows: (1) “OEHHA” in the amount of \$1,875; and (2) “Audrey Donaldson” in the amount of \$625.

3.2 Attorneys' Fees and Costs

The Parties acknowledge that Donaldson and her counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been reached, Bay Island expressed a desire to resolve Donaldson's fees and costs. The Parties reached an accord on the compensation due to Donaldson's counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, on or before the Effective Date, Bay Island agrees to pay \$15,250, in the form of a check made payable to "Voorhees & Bailey, LLP," for all fees and costs incurred investigating, bringing this matter to the attention of Bay Island's management, and negotiating a settlement.

3.3 Payment Address

All payments under this Settlement Agreement shall be delivered to the following address:

Voorhees & Bailey, LLP
990 Amarillo Avenue
Palo Alto, CA 94303

4. CLAIMS COVERED AND RELEASED

4.1 Donaldson's Release of Proposition 65 Claims

Donaldson acting on her own behalf, and *not* on behalf of the public, releases Bay Island, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Bay Island directly or indirectly distributes or sells the Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers (including but not limited to Big Lots Stores, Inc., franchisees, cooperative members, importers, and licensees (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to lead in the Products. The Parties understand and agree

that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Bay Island.

4.2 Donaldson's Individual Release of Claims

Donaldson, in her individual capacity only and *not* in her representative capacity, provides a 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 Donaldson of any nature, character, or kind, whether known or unknown, suspected or unsuspected, including but not limited to all failure to warn claims, arising out of alleged or actual exposures to lead in the Products manufactured, imported, distributed, or sold by Bay Island prior to the Effective Date. The Parties understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to Bay Island. Nothing in this Section affects Donaldson's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Bay Island's Products.

4.3 California Civil Code § 1542.

It is possible that other claims not known to Donaldson arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Donaldson, on behalf of herself only, on one hand, and Bay Island, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. Donaldson acknowledges that the claims released in §§ 4.1 and 4.2 above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads as follows:

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

Donaldson acknowledges and understands the significance and consequences of this specific waiver of California Civil Code § 1542.

4.4 Bay Island's Release of Donaldson

Bay Island, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Donaldson and her attorneys and other representatives, for any and all actions taken or statements made by Donaldson and her attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

5. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected, except that the releases set forth in Section 4, which are not severable.

6. 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 Products, then Bay Island may provide written notice to Donaldson of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

7. **NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Bay Island:

Brett N. Taylor
Cozen O'Connor
601 S. Figueroa St., Suite 3700
Los Angeles, CA 90017

For Donaldson:

Voorhees & Bailey, LLP
990 Amarillo Avenue
Palo Alto, CA 94303

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

8. **COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Donaldson and her attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

10. **MODIFICATION**

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

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11. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: April __, 2020

Date: April 13, 2020

By: _____
Audrey Donaldson

By: 

PRESIDENT, President/CEO
Bay Island, LLC

11. **AUTHORIZATION**


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

AGREED TO:

AGREED TO:

Date: April 7, 2020

Date: April __, 2020

By: 

Audrey Donaldson

By: _____
_____, President/CEO
Bay Island, LLC