

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and Prima Donna Design (“Prima Design”), with Johnson and Prima Design each individually referred to as a “Party” and collectively as the “Parties.” Johnson 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. Johnson alleges that Prima Design 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

Johnson alleges that Prima Design manufactures, sells, and/or distributes for sale in California, glassware with exterior decorations containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Johnson alleges that Prima Design failed to provide the health hazard warning required by Proposition 65 for exposures to lead. Prima Design denies these allegations, contending that its products do not violate Proposition 65.

1.3 Product Description

The products covered by this Settlement Agreement are “Fig & Fern” brand glassware with exterior decorations containing lead, that are manufactured, sold, or distributed for sale in California by Prima Design including, but not limited to, the “*Fig & Fern/Pen + Paint Stemless Wineglass With Plaid Reindeer Decoration*”, SKU: 400201959563; “Seasonal”; D1048 C6548 (hereinafter referred to as the “Products”).

1.4 Notice of Violation

On December 20, 2019, Johnson served Ross Stores and the requisite public enforcement agencies with 60-Day Notices of Violation, alleging that Ross Stores 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. Thereafter, counsel for Prima Design contacted Jonson's counsel and indicated that Prima Design was the upstream supplier of the Products and wanted to resolve the claims contained in the Notice. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Prima Design 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 Prima Design 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 Prima Design of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Prima Design. This Section shall not, however, diminish or otherwise affect Prima Design'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 the date this Settlement Agreement is fully executed by the Parties.

2. INJUNCTIVE RELIEF: REFORMULATION/WARNING

2.1 Reformulation / Warning Commitment

As of the Effective Date, Prima Design shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are Reformulated

Products pursuant to Section 2.2 or contain appropriate health hazard warnings pursuant to Section 2.3.

2.2 Reformulation Standards

“Reformulated Products” are defined as those Products that: (a) contain no more than 90 parts per million (“ppm”) lead in any decoration, colored artwork, designs and/or marking on the surface of the Products when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3050B or equivalent methodologies utilized by federal or state agencies for the purpose of determining lead content in a solid substance; (b) yield a result of non-detect (defined as no more than 25 ppm (0.0025%) by weight of lead) for any decorations located in the upper 20 millimeters of a Product, i.e., the “Lip-and-Rim” area, when analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies used by state and federal agencies to determine lead content in a solid substance; *and* (c) yield no more than 1.0 microgram of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol.


If the decoration is tested after it is affixed to the Product, the percentage of the lead by weight must related only to the decorating materials and must not include any quantity attributable to non-decorating material (e.g., ceramic substrate).

2.3 Clear and Reasonable Warnings

As of the Effective Date, all Products Prima Design sells and/or distributes for sale in California that do not qualify as Reformulated Products, per Section 2.2, shall bear a clear and reasonable warning pursuant to this Section. 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, 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.

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, Prima Design agrees to pay \$2,500 in civil penalties no later than thirty (30) days of the Effective Date, or within thirty (30) days after Johnson provides Prima Design with W-9 forms for each payee identified in this Section 3.1, whichever is later. 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 collectively paid to Johnson, and delivered to the address in Section 3.3 herein. Prima Design will provide its payment in two checks as follows: (1) “OEHHA” in the amount of \$1,875; and (2) “Dennis Johnson” in the amount of \$625.

3.2 Attorneys’ Fees and Costs

The Parties acknowledge that Johnson and his 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, Prima Design expressed a desire to resolve Johnson’s fees and costs. The Parties reached an accord on the compensation due to Johnson’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, within thirty (30) days of the Effective Date, or within thirty (30) days after Johnson provides Prima Design with

W-9 forms for the payee identified in this Section 3.2, whichever is later, Prima Design agrees to pay \$17,000, 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 Prima Design’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

Johnson agrees to transmit the civil penalty payment issued to OEHHA to OEHHA.

4. CLAIMS COVERED AND RELEASED

4.1 Johnson’s Release of Proposition 65 Claims

Johnson, acting on his own behalf, and *not* on behalf of the public, releases Prima Design, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Prima Design directly or indirectly distributes or sells the Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, importers, and licensees, including but not limited to Ross Stores, Inc., (collectively, “Releasees”), from all claims for violations of Proposition 65 arising from the sale of Products by Prima Design at any time 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 Prima Design.

4.2 Johnson’s Individual Release of Claims

Johnson, in his individual capacity only and *not* in his representative capacity, provides a release herein which shall be effective as full and final accords and

satisfactions, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of Johnson 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 Prima Design 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 Prima Design. Nothing in this Section affects Johnson's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Prima Design's Products.

4.3 Prima Design's Release of Johnson

Prima Design, 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 Johnson and his attorneys and other representatives, for any and all actions taken or statements made by Johnson and his 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 unless contrary to the intent of the parties in entering this Settlement Agreement.

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 Prima Design may provide written notice to Johnson 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 Prima Design:

Evan Hakimi
PRIMA DESIGN
41 Madison Avenue – 8th Floor
New York NY 10010

For Johnson:

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

With copy to:
Jeff Margulies
Norton Rose Fulbright US LLP
555 S. Flower Street, 41st Floor
Los Angeles, CA 90071

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)

Johnson 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 of the Parties.

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:

Date: October 1, 2020

By: 
Dennis Johnson

AGREED TO:

Date: October 5, 2020

By: 
EVAN HAKIMI, President/CEO
Prima Donna Design