

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and Almar Sales Co., Inc. (“Almar”), with Johnson and Almar 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 Almar 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 Almar manufactures, sells, and/or distributes for sale in California, PVC totes containing the phthalate chemical di(2-ethylhexyl) phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and other reproductive harm. Johnson alleges that Almar failed to provide a required Proposition 65 warning to California consumers for alleged exposures to DEHP caused by PVC totes.

### 1.3 Product Description

The products covered by this Settlement Agreement are PVC totes sold with “*Princess Accessory Set*”; UPC: 0 24576 77899 6, manufactured, sold, and/or distributed for sale in California by Almar (hereinafter referred to as the “Products”).

### 1.4 Notice of Violation

On December 20, 2019, Johnson served Almar and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Almar violated Proposition 65 when it failed to warn consumers in California concerning

alleged exposures to DEHP from the Products. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Almar enters into this Settlement Agreement solely to avoid prolonged and costly litigation. Almar denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has manufactured, imported, sold and/or distributed in California, including the Products, have been, and are, in compliance with all laws, and are completely safe for their intended use. Nothing in this Settlement Agreement shall be construed as an admission by Almar 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 Almar of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Almar. This Section shall not, however, diminish or otherwise affect Almar's obligations, responsibilities, and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Almar maintains that it has not knowingly manufactured, or caused to be manufactured, any products (including but not limited to the Products) 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 August 26, 2020.

## **2. INJUNCTIVE RELIEF: REFORMULATION/WARNINGS**

### **2.1 Reformulation Standards**

"Reformulated Products" shall mean Products that contain concentrations less than or equal to 0.1% (1,000 parts per million ("ppm")) each of DEHP, dibutyl phthalate ("DBP"), diisononyl phthalate ("DINP"), diisodecyl phthalate ("DIDP"), di-n-hexyl phthalate ("DnHP"), and butyl benzyl phthalate ("BBP"), in any accessible

components when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other methodologies utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance.

## **2.2 Reformulation/Warning Commitment**


As of the Effective Date, Almar shall not distribute for sale, sell or offer the Products for sale in the State of California unless they are Reformulated Products or contain a Proposition 65 warning as set forth in Section 2.3, below. The Parties agree and intend that compliance with the terms of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to alleged or actual exposures to DEHP, DBP, DINP, DIDP, DnHP, and BBP from the Products.

## **2.3 Product Warnings**

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

 [California Proposition 65] WARNING: Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

Or

 [California Proposition 65] **WARNING:** This product can expose you to chemicals including di(2-ethylhexyl)phthalate (DEHP), which are 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).

Language in brackets is optional.

### **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 for monetary relief of any kind alleged in the Notice or referred to in this Settlement Agreement, Almar agrees to pay, within 10 days of the Effective Date, a total sum \$500 in civil penalties. 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 Johnson, and delivered to the address in Section 3.3 herein. Almar will provide its payment in two checks, as follows: (1) “OEHHA” in the amount of \$375; and (2) “Dennis Johnson” in the amount of \$125.

#### **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 attorneys’ fees and expenses to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of this Settlement Agreement had been agreed. Shortly after the other settlement terms had been reached, Almar expressed a desire to resolve Johnson’s fees and expenses incurred in this matter. The Parties then reached an accord on the total compensation due to Johnson’s counsel as attorney’s fees and expenses 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 whether before or after the execution of this Settlement Agreement. Under these legal principles, Almar agrees to pay, within 10 days of the Effective Date, \$4,500, in the form of a check made payable to “Voorhees & Bailey, LLP,” for all attorney’s fees and expenses of any kind incurred in this matter, including but not limited to, any investigative, testing, expert, or other expenses, bringing

this matter to the attention of Almar's management, and negotiating a settlement in this matter in the form of this Settlement Agreement.

### **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

The transmission of any payment due to OEHHA under this Settlement Agreement shall be the exclusive responsibility of Johnson and/or his counsel.

## **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 Almar, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Almar directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers including, but not limited to The TJX Companies, Inc., franchisees, cooperative members, importers, licensors, and licensees (collectively, "Releasees"), from all claims for actual or alleged violations of Proposition 65 through the Effective Date relating to unwarned exposures to DEHP in the Products.

### **4.2 Johnson's Individual Release of Claims**

Johnson, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, in his individual capacity only and *not* in his 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, penalties, liabilities, and demands of Johnson of any nature, character, or kind, whether known or unknown, suspected or

unsuspected, arising out of Products manufactured, imported, distributed, or sold by Almar prior to the Effective Date. Nothing in this Section affects Johnson's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Almar's Products.

With respect to the foregoing waivers and releases in this paragraph, Johnson, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, hereby specifically waives any and all rights and benefits which he now has, or in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides 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.

Johnson, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, expressly waives and relinquishes any and all rights and benefits that he or they may have under, or that may be conferred upon them by, the provisions of California Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters.

#### **4.3 Almar's Release of Johnson**

Almar, 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.

With respect to the foregoing waivers and releases in this paragraph, Almar, on

behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby specifically waives any and all rights and benefits which it now has, or in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides 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.

Almar, on behalf of itself, its past and current agents, representatives, attorneys, and successors and/or assignees, expressly waives and relinquishes any and all rights and benefits that it or they may have under, or that may be conferred upon them by, the provisions of California Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters.

**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.

**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 Almar 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 Almar:

President/CEO  
Almar Sales Co., Inc.  
320 5<sup>th</sup> Avenue  
New York, NY 10001

For Johnson:

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

With copy to:

J. Robert Maxwell  
ROGERS JOSEPH O'DONNELL  
Professional Law Corporation  
311 California Street, 10th Fl.  
San Francisco, CA 94104

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. **INTEGRATION**

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

9. **JOINT PREPARATION**

The Parties have jointly participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties. Accordingly, any uncertainty or ambiguity existing in this Settlement Agreement shall not be interpreted against any Party as a result of the manner of the preparation of this Settlement Agreement. Each Party to this Settlement Agreement agrees that any statute



or rule of construction providing that ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Settlement Agreement and, in this regard, the Parties hereby waive California Civil Code § 1654.

**10. 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.

**11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

**12. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties. No Party shall bring a motion to enforce the terms of this Settlement Agreement without first providing notice to the other party and meeting and conferring in good faith about the alleged violation for a period of at least 30 days.

**13. 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:**

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Date: August 28, 2020

Date: August 25, 2020

By:   
DENNIS JOHNSON

By:   
ALMAR SALES CO., INC.