

SETTLEMENT AND RELEASE AGREEMENT BETWEEN ECOLOGICAL  
ALLIANCE, LLC AND ACI BRANDS INC.

1. INTRODUCTION

1.1. The Parties

This Settlement and Release Agreement ("Agreement") is entered into by and between Ecological Alliance, LLC ("Ecological") and ACI Brands Inc. ("ACI"). Together, Ecological and ACI are collectively referred to as the "Parties." Ecological alleges that ACI is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. ("Proposition 65").

1.2. General Allegations

Ecological alleges that ACI has exposed individuals to the chemical Di(2-ethylhexyl)phthalate [DEHP] from its sales of cases of manicure kits and substantially similar products, including but not limited to Item # 026089610 (the "Products"), to consumers in California without first providing a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3. Notice of Violation

On March 2, 2020, Ecological issued ACI, Marshall's of CA, LLC, 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 "Notice of Violation...of California Health & Safety Code Section 25249.6" (the "Notice"). The Notice provided ACI and such others, including public enforcers, with notice that ACI was allegedly in violation of California Health & Safety Code section 25249.6 for failing to warn California consumers that use of the Products will expose them to DEHP in amounts above regulatory safe harbor levels. To the Parties' knowledge, no public enforcer has commenced or is diligently prosecuted the allegations set forth in the Notice.

#### 1.4. No Admission

The Parties enter into this Agreement to settle disputed claims between them as set forth herein and in the Notice concerning ACT's compliance with Proposition 65. ACI denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that it has manufactured for distribution and sale in California, including the Products, have been and are in compliance with Proposition 65 and all other applicable laws. Nothing in this Agreement shall be construed as an admission by ACI of any fact, finding, issue of law, or violation of law; nor shall compliance with this Agreement constitute or be construed as an admission by ACI of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by ACI. However, nothing in this section shall diminish or otherwise affect the Parties' obligations, responsibilities, and duties under this Agreement. Notwithstanding the allegations in the Notice, ACI maintains that it has not knowingly manufactured, distributed, or sold the Products for sale in California in violation of Proposition 65.

#### 1.5. Effective Date

For purposes of this Agreement, the term "Effective Date" shall mean the date on which a complete and fully executed copy of this Agreement is delivered to each Parties' counsel.

## 2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

### 2.1. Reformulation of Products

As of the Effective Date, and continuing thereafter, ACI agrees to manufacture for sale to California consumers Products that either: (a) contain less than or equal to 1,000 parts per million (ppm) by weight of DEHP ;or (b) bear a clear and reasonable exposure warning pursuant to §§ 2.3 and 2.4, or as provided by the California Code of Regulations, tit. 27, div. 4, chap. 1, art. 6 (commencing at § 25600), as those regulations may be amended from time to time. The warning requirement set forth in §§ 2.3 and 2.4 shall not apply to any Reformulated Product.

### 2.2. Reformulation Standard

"Reformulated Products" shall mean Products that contain concentrations less than or equal to 1,000 ppm of DEHP by weight. To determine whether a Product is a Reformulated Product, it

is to be analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization, and the testing sample shall be prepared and extracted using Consumer Product Safety Commission (CPSC) methodology CPSC-CH-C1001.09.3 and analyzed using U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other scientifically valid methodologies utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance. The Parties agree that Reformulated Products shall be deemed to comply with Proposition 65 and be exempt from any Proposition 65 warning requirement.

### 2.3. Clear and Reasonable Warning

For all Products that are not Reformulated Products, which are manufactured after the Effective Date, ACI shall provide a clear and reasonable exposure warning as set forth herein or as defined by the California Code of Regulations, tit. 27, div. 4, chap. 1, art. 6 (commencing at § 25600). There shall be no obligation for ACI to provide an exposure warning for Products that entered the stream of commerce prior to the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(a) or (b), respectively:

#### (a) **Warning**

The "Warning" shall consist of the statement:

**⚠ 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 info go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

#### (b) **Alternative Warning**

ACI may alternatively use the short-form warning as set forth in this § 2.3(b) ("Alternative Warning") as follows:

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

2.4. A Warning or Alternative Warning should include the word "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Product does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the

height of the word "WARNING:". The warning shall be affixed to or printed on the Products' packaging, labeling or hangtag, or on a placard, shelf tag, sign or electronic device or automatic process, provided that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Products and shall have at least the same size font as those other safety warnings. In addition, for any Products sold over the internet to a California address, the warning shall appear on the Product's primary display page or checkout page. If the warning is provided on the checkout page, it must be clearly linked to the Product by use of an asterisk or other identifying method. If the warning is provided on the Product's primary display page, it must be inserted either directly onto the Product's primary display page or with a conspicuous hyperlink stating "WARNING" in all capital and bold letters so long as the hyperlink goes directly to a page prominently displaying the warning. Given ACI's lack of control over third-party websites, the online warning requirements expressed in this Section apply only to Products sold through a website under ACI's direct control.

**2.5. Compliance with Warning Regulations.**

The Parties agree that ACI shall be deemed to be in compliance with this Agreement by either adhering to §§ 2.3 and 2.4 of this Agreement or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

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

In settlement of all the claims referred to in this Agreement, ACI shall pay \$100 as a civil penalty in accordance with this Section. The civil penalty payment shall be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the penalty remitted to OEHHA and the remaining 25% of the penalty remitted to Ecological. Ecological's counsel

shall be responsible for delivering OEHHA's portion of any penalty payment made under this Agreement.

**4. REIMBURSEMENT OF FEES AND COSTS**

The Parties have reached an accord on the compensation due to Ecological and its counsel under the private attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of the Agreement. Under these legal principles, ACI shall reimburse Ecological's counsel for fees and costs, incurred as a result of investigating and bringing this matter to ACT's attention, and negotiating a settlement in the public interest. ACI shall pay Ecological's counsel \$8,400 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. The payments set forth in Section 3 and Section 4 are the exclusive payments due between the Parties.

**5. PAYMENT INFORMATION**

By October 15, 2020, ACI shall make a total payment of Eight Thousand Five Hundred Dollars (\$8,500) for the civil penalties and attorney's fees / costs by wire transfer to Plaintiff's counsel Custodio & Dubey LLP:

Bank: Bank of America, N.A.

Routing No.: 026009593

Account No.: 325104702031

Beneficiary: Custodio & Dubey LLP

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

**6. TAX DOCUMENTATION**

ACI agrees to provide a completed IRS 1099 for its payment to Ecological, and Ecological agrees to provide IRS W-9 form to ACI for its payment under this Agreement.

7. RELEASE OF ALL CLAIMS

7.1. Release of ACI and Downstream and Upstream Entities

This Agreement is a full, final and binding resolution between Ecological, acting on its own behalf, and ACI, of any violation of Proposition 65 that was or could have been asserted by Ecological or on behalf of its past and current agents, representatives, attorneys, successors, and/or assigns ("Releasers") for failure to provide Proposition 65 warnings relating to the Products, and Releasers hereby release any such claims against ACI 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 ACI, and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom ACI, directly or indirectly manufactures, distributes or sells the Products, including but not limited to each of ACI's downstream distributors (including but not limited to Marshall's of CA, LLC), wholesalers, vendors, licensors, licensees, auctioneers, retailers, franchisees, dealers, shareholders, cooperative members, customers, owners, purchasers, users, and ACI's parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"), from all claims for violations of Proposition 65 for Products manufactured through the Effective Date.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Ecological on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands

against any of the Releasees of any nature, character or kind, whether known or unknown, suspected or unsuspected, related to the Products.

**7.2. ACI's Release of Ecological**

ACI, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees hereby waives any and all claims against Ecological, its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ecological and/or its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

**8. CALIFORNIA CIVIL CODE § 1542**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Ecological, on one hand, and ACI, 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. The Parties acknowledge that the Claims released in §§ 7.1 and 7.2, 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.

Ecological and ACI each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

9. DEEMED COMPLIANCE WITH PROPOSITION 65

The Parties agree that compliance by ACI with this Agreement constitutes compliance with Proposition 65 with respect to exposure to DEHP from use of the Products.

10. PUBLIC BENEFIT

The Parties understanding that the commitments ACI has agreed to herein, and actions to be taken by ACI under this Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of the Parties that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to ACI's failure to provide a warning concerning exposure to DEHP prior to use of the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Agreement, provided that ACI is in material compliance with this Agreement.

11. SEVERABILITY

If, subsequent to the execution of this Agreement, any of the provisions of this Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Agreement being contrary to the intent of the Parties in entering into this Agreement.

12. GOVERNING LAW

The terms of this 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 or limited by reason of law generally, or as to the Products, ACI shall have no further obligations pursuant to this Agreement.



13. NOTICES

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

For ACI: Will Wagner, Esq.  
Greenberg Traurig, LLP  
1201 K Street, Suite 1100  
Sacramento, CA 95814

For Ecological: Vineet Dubey, Esq.  
Custodio & Dubey LLP  
448 S. Hill St., Suite 615  
Los Angeles, CA 90013

Either 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.

14. COUNTERPARTS; FACSIMILE/E-SIGNATURES

This Agreement may be executed in counterparts and by facsimile, .pdf signatures, 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.

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

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

16. ENTIRE AGREEMENT



This 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.

17. MODIFICATION

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

18. AUTHORIZATION

The undersigned are authorized to execute this Agreement and have read, understood and agreed to all of the terms and conditions contained in this Agreement. Each Party warrants to the other that it is free to enter into this Agreement and is not subject to any conflicting obligations that will or might prevent or interfere with the execution of performance of this Agreement by said Party.

<b>AGREED TO:</b> Date: September <u>17</u> 2020  By:  On Behalf of Ecological Alliance, LLC	<b>AGREED TO:</b> Date: September <u>21</u> , 2020  By:  On Behalf of ACI Brands Inc.
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