

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and Boston Warehouse Trading Corp. (“BWTC”), with Johnson and BWTC 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 BWTC 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 BWTC 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. Johnson alleges that BWTC 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 BWTC including, but not limited to, the “*Best Friends Forever*” Ceramic Mug; UPC 0 26602 99355 7”; “*3oz Stacking Espresso Mugs S/4 Donut*”; UPC 0 26602 46906 9”; and “*3oz Stacking Espresso Bees White Mug S/4*”; UPC 0 26602 63013 1” (hereinafter referred to as “Products”).

#### **1.4 Notice of Violation**

On March 27, 2020, Johnson served BWTC and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that BWTC 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**

BWTC 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 BWTC 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 BWTC of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by BWTC. This Section shall not, however, diminish or otherwise affect BWTC’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 August 21, 2020.

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

### **2.1 Reformulation Standards**

“Reformulated Products” are defined as those Products that yield no more than 1.0 microgram of lead per wipe sample collected by wiping the exterior decorations of the Product as outlined in the NIOSH Method 9100 or other equivalent methodologies utilized by state or federal agencies.

## 2.2 Reformulation Commitment


Effective upon the Effective Date, BWTC 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 2.1 or contain a Clear and Reasonable Warning, as defined in Section 2.3. For purposes of clarity, Products that were supplied to third parties by BWTC prior to the Effective Date are not subject to the requirements of Section 2 and are permitted to be sold through as previously manufactured, packaged and labeled.

## 2.3 Clear and Reasonable Warnings

As of the Effective Date, all Products BWTC manufactures, sells and/or distributes for sale in California that do not qualify as Reformulated Products, per Section 2.1, shall bear a Clear and Reasonable Warning pursuant to this Section. BWTC further agrees that the warning will be prominently placed on the Product or Product packaging, label, or tag, 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:** Cancer and Reproductive Harm – [www.P65Warnings.ca.gov](http://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 cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

In the event that the Office of Environmental Health Hazard Assessment (“OEHHA”), the California State Legislature, or the voters of the State of California, promulgate 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, BWTC 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.

### **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, BWTC agrees to pay \$2,000 in civil penalties no later than 20 days after 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 Johnson, and delivered to the address in Section 3.3 herein.

BWTC will provide its payment in two checks as follows: (1) “OEHHA” in the amount of \$1,500; and (2) “Dennis Johnson” in the amount of \$500. Johnson’s counsel shall be responsible for delivering any penalty payment made under this Settlement Agreement to OEHHA.

#### **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, BWTC 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, no later than 20 days after the Effective Date, BWTC agrees to pay \$15,000, 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 BWTC’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 Johnson’s Release of Proposition 65 Claims**

Johnson acting on his own behalf, and *not* on behalf of the public, releases BWTC and each of its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, shareholders, attorneys, and each entity to whom BWTC directly or indirectly distributes or sells the Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers (including, but not limited to, The TJX Companies, Inc. and Ross Stores, Inc.), franchisees, cooperative members, importers, and licensees (collectively, “Releasees”), from all claims for violations arising under Proposition 65 based on any alleged exposure to lead from Products manufactured, imported, sold, distributed and/or offered for sale or use by BWTC prior to the Effective Date. The parties understand and agree that compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to lead from Products manufactured, imported, sold, distributed and/or offered for sale or use by BWTC. 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 BWTC.

#### **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 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 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 BWTC directly or through other Releasees 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 BWTC. Nothing in this Section affects Johnson's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve BWTC's Products.

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

BWTC, 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.

#### **4.4 Mutual Waiver of California Civil Code 1542**

The Parties each acknowledge that he/they is/are familiar with Section 1542 of the Civil Code, 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.

The Parties, each on his/their own behalf (and Johnson in his individual capacity only and *not* in any representative capacity), and on behalf of his/their past and current agents, representatives, counsel, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon them by the provisions of 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 he/they may lawfully waive such rights or benefits pertaining to the released matters, as defined by Sections 4.2 and 4.3, above.

**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 BWTC 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 BWTC:**

Boston Warehouse Trading Corp  
c/o Peter Jenkins  
59 Davis Avenue  
Norwood, MA 02062

**For Johnson:**

Dennis Johnson  
c/o Voorhees & Bailey, LLP  
990 Amarillo Avenue  
Palo Alto, CA 94303

With a copy to:

Stuart I Block, Esq.  
Stice & Block LLP  
2335 Broadway, Suite 201  
Oakland, CA 94612

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 his 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.

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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: 8/25/20

Date:

By:   
Dennis Johnson

By:   
Boston Warehouse Trading Corp