

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement is hereby entered into by and between Evelyn Wimberley (“Wimberley”) and Gymax, LLC (“Gymax”). Wimberley and Gymax are collectively referred to as the “Parties” and each of them as a “Party.” Wimberley is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.2 Allegations and Representations

(a) Wimberley alleges that Gymax is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code § 25249.6 et seq., and has offered for sale in the State of California and sold in California the “18.5-inch Kettle Charcoal Grill” that when used as intended produces combustion byproducts carbon monoxide and soot, and that such sales have not been accompanied by Proposition 65 warnings. Carbon Monoxide and Soot are listed under Proposition 65 as chemicals known to the State of California to cause cancer and reproductive harm. Wimberley has cited the “18.5-inch Kettle Grill” as a specific example of the Grills that are the subject of her allegations.

(b) Gymax does not admit and denies the material, factual, and legal allegations contained in the Notice, and maintains that all products sold, distributed, or offered for sale in California have been and are in compliance with all laws, including, without limitation, Proposition 65.

(c) The Parties enter into this Settlement Agreement to resolve all Proposition 65 claims concerning the Covered Products (defined below) set forth in Wimberley’s Notice, including claims against manufacturers, distributors, customers, retailers, and affiliates, who allegedly violated Proposition 65 by distributing the Covered Products in California.

1.3 Covered Products

The products that are covered by this Settlement Agreement are defined as Gymax “18.5-inch Kettle Grill,” manufactured, distributed, sold, or offered for sale by Gymax in the State of California (“Covered Products”).

1.4 Notice of Violation

On or about June 12, 2020 Wimberley served Gymax, Target Corporation and all public

enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Gymax, Wal-Mart Stores, Inc., and such public enforcers with notice that alleged that Gymax and Wal-Mart Stores, Inc. were in alleged violation of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed users in California to carbon monoxide and soot. No public enforcer diligently prosecuted the claims alleged in the Notice within sixty days plus service time relative to the provision of the Notice to them by Wimberley.

1.5 No Admission

Gymax denies the material allegations contained in Wimberley's Notice and maintains that it has not violated Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Gymax of any fact, finding, issue of law, or violation of law, or any other statutory, regulatory, common law, or equitable doctrine; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Gymax of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Gymax. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Gymax under this Settlement Agreement.

1.6 Execution/Effective Date

1.6.1 For purposes of this Settlement Agreement, the term "Execution Date" shall mean the date this Settlement Agreement is fully executed.

1.6.2 For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date that the Parties agreed in writing to the injunctive relief measures of this Settlement Agreement ("Injunctive Relief"). Such Injunctive Relief shall be implemented pursuant to Article 2.

2. INJUNCTIVE RELIEF: WARNINGS

2.1 Commencing ninety (90) days after the Execution Date, Gymax shall not sell, offer for sale, ship for sale or otherwise distribute or allow to be distributed in California any Covered Products, unless the sales and distribution of the Covered Products are in full compliance with California Code of Regulations, Title 27, Article 6, Clear and Reasonable Warning Requirements § 25601-25603 (see also: "www.P65Warnings.ca.gov."). Covered Products that were manufactured, packed, or labeled prior to the Execution Date shall be permitted to be sold as previously manufactured, packed or labeled.

3. CIVIL PENALTY & REIMBURSEMENT OF FEES AND COSTS

3.1 Payment pursuant to Health & Safety Code Section 25249.7(b). Gymax shall pay a Civil Penalty of \$1,250.00 to be apportioned in accordance with California Health & Safety Code Section 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment (CCR Title 11 Div 4-Proposition 65 Private Enforcement) and the remaining 25% of the penalty remitted to Wimberley, as provided by California Health & Safety Code Section 25249.7. Gymax will deliver its civil penalty payment to the address in Section 7 by overnight courier, with a tracking number, such that payment is received by Wimberley's counsel no later than ten (10) days following the Execution Date. Gymax shall provide two checks made payable to: (a) "OEHHA" in the amount of \$937.50; and (b) "Evelyn Wimberley" in the amount of \$312.50. Thereafter, Wimberley's counsel shall send OEHHA's portion of the penalties paid by Gymax to OEHHA.

3.2 Gymax shall pay Wimberley's counsel \$16,750.00 for attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice and incurred as a result of investigating, bringing this matter to Gymax's attention, and negotiating a settlement. Payment of said monies shall be made via bank wire to the "Law Offices of Stephen Ure, PC" (tax identification number 42-1641673) no later than ten (10) days following the Execution Date.

3.3 The Law Offices of Stephen Ure, PC agrees to provide Gymax with tax identification information within one (1) day following the Execution Date.

3.4 Other than the payment specified herein, each side is to bear its own attorneys' fees and costs.

4. CLAIMS COVERED AND RELEASED

4.1 Release of and Downstream Customers

Wimberley, on behalf of herself, releases Gymax and all entities and persons from whom they obtain and to whom they directly or indirectly distribute or sell the Products, including but not limited to each of its manufacturers, distributors, marketplace hosts, wholesalers, licensors, licensees, auctioneers, retailers (including Walmart, Inc.), franchisees, dealers, customers, owners, purchasers, and users, and their respective parent companies, corporate affiliates, subsidiaries, officers, directors, attorneys, representatives, shareholders, agents, successors, and employees, and sister entities (collectively "Releasees") from all claims for violations of Proposition 65 through the Effective Date based on exposure to carbon monoxide and soot and

from the Covered Products.

In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, and successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other claims, actions, causes of action, demands, rights, suits, liabilities, damages, losses, costs, expenses, and attorney's fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future that she could make against Gymax or the other Releasees relating to or arising from the Covered Products. With respect to the foregoing waiver and release in this paragraph, Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the future may have, conferred by virtue of Section 1542 of the California Civil Code, which provides:

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.

4.2 Gymax' Release of Wimberley

Aside from any potential dispute relating to this Settlement Agreement, Gymax waives any and all claims against Wimberley, her attorneys and other representatives, for any and all actions taken or statements made by Wimberley and her attorneys and other representatives in the course of investigating the claims or otherwise seeking enforcement of Proposition 65 against it in this matter with respect to the Products.

5. SEVERABILITY AND MERGER

If subsequent to the execution of this Settlement Agreement any of the provisions of this document are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

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.

6. GOVERNING LAW

6.1 This Settlement Agreement shall be interpreted in accordance with the plain English meaning of its terms and the construction thereof shall be governed by the laws in force

in the State of California, USA without regard to conflicts of law principles. This Settlement Agreement resolves any issue, now or in the future, with the requirements of Proposition 65 with respect to alleged exposures to carbon monoxide and soot arising from the Covered Products. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then Gymax shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Products are so affected.

6.2 This Settlement Agreement shall apply to and be binding upon Wimberley and Gymax, its divisions, subdivisions, and subsidiaries, if any, and the Parties' successors and assigns.

6.3 The Parties, including their counsel, have participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties. This Settlement Agreement was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. 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.

7. NOTICES

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

For GYMAX:

Eudeen Y. Chang, Esq.
Troutman Pepper Hamilton Sanders LLP
5 Park Plaza, Suite 1400
Irvine, CA 92614

For Wimberley:

Stephen Ure, Esq.
Law Offices of Stephen Ure, PC.
11622 El Camino Real, Suite 100
San Diego, California 92130

Any 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.

8. COUNTERPARTS; FACSIMILE SIGNATURES

The stipulations to this Settlement Agreement may be executed in counterparts and by means of facsimile and/or portable document format (pdf), which taken together shall be deemed to constitute one document.

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

Wimberley agrees to promptly comply with the requirements set forth in California Health & Safety Code §25249.7(f).

10. MODIFICATION

This Settlement Agreement may be modified only by further written agreement of the Parties.

11. ENFORCEMENT OF SETTLEMENT AGREEMENT

Either Party may bring an action to enforce the terms of this Settlement Agreement. A Party who unsuccessfully brings or contests an action arising out of this Settlement Agreement may be ordered by the court to pay the prevailing Party's reasonable attorney's fees and costs.

12. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Settlement Agreement have been made by any Party hereto. No supplementation, modification, waiver, or termination of this Settlement Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Settlement Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

13. AUTHORIZATION

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

AGREED TO:

WIMBERLEY:

12/7/2020



EVELYN WIMBERLEY, an individual

GYMAX:

By: 

Name: Sabine Sun

Its: Sales Director