

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 Parties**

This Settlement Agreement is entered into by and between Environmental Health Advocates, Inc., (“EHA”), on the one hand, and Portwest Unlimited Company (“Portwest”), on the other hand, with EHA and Portwest each individually referred to as a “Party” and collectively as the “Parties.” EHA is a California corporation acting in the interest of the general public. EHA seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Portwest employs ten or more individuals 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 § 25249.6 *et seq.* (“Proposition 65”).

#### **1.2 General Allegations**

EHA alleges that Portwest manufactures, sells, and distributes for sale in California rain jackets that contain Di(2-ethylhexyl) phthalate (“DEHP”) and that it does so without first providing health hazard warnings required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm.

#### **1.3 Product Description**

The products covered by this Settlement Agreement are defined as, and expressly limited to, rain jacket units that contain DEHP Di(2-ethylhexyl) phthalate (“DEHP”) however manufactured, sold or distributed for sale in California by Portwest (“Covered Product(s)").

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

On June 23, 2020, EHA served Portwest, Amazon.com, Inc., the California Attorney General and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that Portwest violated Proposition 65 when it failed to warn its customers and consumers in California of the health risks associated with exposures to DEHP from the Covered Product. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice against Portwest.

### **1.5 No Admission**

Portwest denies the material, factual, and legal allegations in the Notice and maintains that all of the product it sold and/or distributed for sale in California, including the Covered Product, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Portwest 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 Portwest of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Portwest. This Section shall not, however, diminish or otherwise affect Portwest'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 ninety (90) days following the execution of this Settlement Agreement by the Parties.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation or Warnings**

Commencing on the Effective Date, and continuing thereafter, Portwest agrees to only manufacture for sale, purchase for sale, import for sale, and/or distribute for sale in California Covered Products that are either "Reformulated Products" as defined in Section 2.2 below, or that are sold with a Proposition 65 warning as provided for in Section 2.3 below.

### **2.2 Reformulation Standard**



"Reformulated Products" shall mean Covered Products that contain concentrations less than or equal to 0.1% (1,000 parts per million ("ppm")) of DEHP in any accessible component 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.

### **2.3 Warning Requirements**

For Covered Products that are not Reformulated Products that will be manufactured or distributed for sale in California, Portwest agrees that a Proposition 65 warning shall be prominently placed on such Covered Product or its packaging with such conspicuousness, as 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 before purchase or use.

For purposes of this Settlement Agreement, a clear and reasonable warning for shall consist of a warning affixed to the packaging, label, tag, or directly to each Covered Product sold in California that contain the following statements:

- 1)  [California Prop 65] **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, birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).
- 2)  [California Prop 65] **WARNING:** Cancer and Reproductive Harm – [www.P65Warnings.cs.gov](http://www.P65Warnings.cs.gov)

Language in brackets is optional. The warning shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING”. The same warning shall be posted on any websites in the control of Portwest where Covered Products are sold into California.

#### **2.4 Grace Period for Existing Inventory of Products**

The injunctive requirements of Section 2 shall not apply to Covered Products that are manufactured and/or already in the stream of commerce as of the Effective Date, which Covered Products are expressly subject to the releases provided in Section 4.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Portwest agrees to pay three thousand five hundred dollars (\$3,500.00) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code §§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the

remaining 25% of the penalty amount retained by EHA. Within thirty (30) days of the date this Settlement Agreement is executed by the Parties, Portwest shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of two thousand six hundred and twenty-five dollars (\$2,625.00) and (b) Environmental Health Advocates, in the amount of eight hundred and seventy-five (\$875.00).

All payments owed to OEHHA (EIN: 68-0284486), pursuant to this Section shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

All penalty payments owed to EHA shall be sent to:

Environmental Health Advocates  
225 Broadway, Suite 1900  
San Diego, CA 92101

### **3.2 Attorney Fees and Costs**

The Parties reached an accord on the compensation due to EHA and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within thirty (30) days of the date this Settlement Agreement is executed by the Parties, Portwest agrees to pay thirty-one thousand five hundred dollars (\$31,500) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Portwest, and negotiating a settlement. Portwest's payment shall be delivered in the form of two wire or bank transfers: (1) one

wire or bank transfer for fifteen thousand seven hundred and fifty dollars (\$15,750.00) to “Glick Law Group”; and (2) one wire or bank transfer for fifteen thousand seven hundred and fifty dollars (\$15,750.00) to “Nicholas & Tomasevic LLP.” Upon execution of this Settlement Agreement, EHA’s counsel will provide Portwest’s counsel with instructions on how to effectuate the wire or bank transfers to each firm’s account.

### **3.3 Tax Documentation**

Portwest agrees to provide a completed IRS 1099 for its payments to, and EHA agrees to provide IRS W-9 forms for, each of the payees under this Settlement Agreement. The Parties acknowledge that Portwest cannot issue any settlement payments pursuant to Section 3.1 and 3.2 above until after Portwest receives the requisite W-9 forms from EHA’s counsel.

### **3.4 Public Benefit**

The commitments Portwest has agreed to herein, and actions to be taken by Portwest under this Agreement, confer a significant benefit to the general public, as set forth in Code of Civil Procedure Section 1021.5. As such, Portwest maintains that to the extent any other private party initiates an action with allegations substantively the same as those alleged by EHA, such private party action would not confer a significant benefit on the general public.

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 EHA’s Release of Portwest**

This Settlement Agreement is a full, final, and binding resolution between EHA, on its own behalf and not on behalf of the public, and Portwest of any violation of Proposition 65 that was or could have been asserted by EHA, on its own behalf, on behalf of its past and current agents, representatives, attorneys, successors and assignees, against Portwest and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, each upstream entity from whom the Covered Products were purchased by Portwest, and each entity to whom Portwest directly or indirectly distributed or sold the Covered Product, including, but not limited to Amazon.com, Inc., and any other downstream distributors,

wholesalers, customers, retailers, franchisees, cooperative members and licensees (“Releasees”), based on the failure to warn about exposures to DEHP in the Covered Products, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, EHA on its own behalf and not on behalf of the public, on behalf of its past and current agents, representatives, attorneys, successors and assignees hereby waives any and all rights it may have to institute or participate in, directly or indirectly, any form of legal action and releases all claims against Portwest and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not exclusively, investigation fees, expert fees and attorney fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP in the Covered Products manufactured, distributed, sold or offered for sale by Portwest, before the Effective Date.

#### **4.2 Portwest’s Release of EHA**

Portwest, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other representatives, for any and all actions taken or statements made by EHA and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in connection with the Covered Products.

#### **4.3 Mutual Release of Known and Unknown Claims**

EHA, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, in its respective individual capacity only and not in its representative capacity, and Portwest, each provide a general release of the other including the Releasees herein which shall be effective as a full and final accord and satisfaction, as a bar to all claims of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65 with respect to the Covered Products. EHA and Portwest each acknowledge that they are each familiar with Section 1542 of the California Civil Code and expressly waive Section 1542, 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 must have materially affected his or her settlement with the debtor or released party.**

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held 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.

**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 Portwest:

Shelley Hurwitz  
Holland & Knight  
400 S. Hope St.  
8<sup>th</sup> Floor  
Los Angeles, CA  
90071

For EHA:

Jake Schulte  
Nicholas & Tomasevic, LLP  
225 Broadway, Suite 1900  
San Diego, CA 92101

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)**

EHA and its attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code § 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, understood, and agree to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: 12/10/2020.

Date: 12/11/2020

By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

By:   
PORTWEST UNLIMITED COMPANY