

PROPOSITION 65 SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (“**Agreement**”) is entered into by and between My Nguyen (“**Nguyen**”) and Wagan Corporation (“**Wagan**”), with Nguyen and Wagan each individually referred to as a “**Party**” and collectively, as the “**Parties.**” Nguyen, is a person in the State of California proceeding in the public interest pursuant to California Health & Safety Code §§ 25249.7(d) to ensure that chemicals known to the State of California to cause cancer, birth defects or other reproductive harm are disclosed in or eliminated from consumer products sold in California. Wagan is a person in the course of doing business for purposes of California Health & Safety Code §§ 25249.11(b).

1.2 Consumer Product Description

Nguyen alleges that Wagan manufactures, imports, sells and distributes for sale in California the Black 12V Faux Leather Deluxe Heated Seat Cushions, IN2282, containing di(2-ethylhexyl) phthalate (“**DEHP**”) referred to hereinafter as the “**Products**” without providing the health hazard warning that Nguyen alleges is required by California Health & Safety Code §§ 25249.5 *et seq.* (“**Proposition 65**”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.3 Notice of Violation

On August 19, 2020, Nguyen served Wagan, the California Attorney General and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging Wagan violated Proposition 65 when it failed to warn its customers and consumers in California that its seat cushions with power cords can expose users to DEHP. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations in the Notice.

1.4 No Admission

Wagan denies the material, factual, and legal allegations contained in the Notice, and maintains that all products it has sold or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Agreement shall be

construed as, nor shall compliance with this Agreement constitute or be construed as, an admission by Wagan of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Wagan’s obligations, responsibilities, and duties under this Agreement.

1.5 Effective Date

For purposes of this Agreement, the term “**Effective Date**” shall mean November 10, 2020.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Reformulation Commitment

Commencing on the Effective Date and continuing thereafter, all Products Wagan manufactures, imports, or distributes for sale in or into California shall meet the Reformulation Standard for Reformulated Products, as defined by Section 2.2, or be accompanied by a clear and reasonable warning pursuant to Section 2.3.

2.2 Reformulation Standard


For purposes of this Agreement, “Reformulated Products” are defined as Products which, if they contain di(2-ethylhexyl)phthalate (“**DEHP**”), di-n-butyl phthalate (“**DBP**”), diisononyl phthalate (“**DINP**”), butyl benzyl phthalate (“**BBP**”), di-isodecyl phthalate (“**DIDP**”) and di-n-hexyl phthalate (“**DnHP**”), contain any or all such chemicals each in a maximum concentration of less than 0.1 percent (1,000 parts per million) in each and every accessible component when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization. For purposes of compliance with this reformulation standard, testing samples 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 methodology 8270D, or other methodologies utilized by federal or state government agencies to determine phthalate content in a solid substance.

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2.3 Clear and Reasonable Warnings

Commencing on or before the Effective Date, Wagan shall provide clear and reasonable warnings for all Products provided for sale to customers in California in accordance with this Section pursuant to Title 27 California Code of Regulations§ 25600, et seq. Each warning shall be prominently placed 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 and shall be provided in a manner such that it is clearly associated with the specific Product to which the warning applies.

(a) **Warning.** The Warning shall consist of the following statement:

 **WARNING:** This product can expose you to DEHP, which is known to the State of California to cause birth defects and other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(b) **Short-Form Warning.** Wagan may, but is not required to, use the following short-form warning as set forth in this subsection 2.3(b) (“**Short-Form Warning**”), and subject to the additional requirements in Sections 2.5 and 2.6, as follows:

 **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

(c) **Foreign Language Requirement.** Where a consumer product sign, label or shelf tag used to provide a warning includes consumer information in a language other than English, the warning must also be provided in that language in addition to English.

2.4 Product Warnings

Wagan shall affix a warning to the Product label or otherwise directly on Products provided for sale to customers with retail outlets in California or sold via mail order catalog and/or the internet to customers located in California. For the purpose of this agreement, “**Product label**” means a display of written, printed or graphic material that is printed on or affixed to each of the Products or its immediate container or wrapper. A warning provided pursuant to section 2.3(a) or (b) must print the word “**WARNING:**” in all capital letters and in bold font. 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 labeling does not use the color yellow, then the symbol may be in black and white. The entire warning shall appear in a type size of at least 6-point type and no smaller than the largest type size used for other consumer information on the Products. The warning shall consist of either the Warning, or the Short-Form Warning described in subsection 2.3(a) or (b), respectively.

2.5 Mail Order Catalog Warnings

In the event that, after the Effective Date, Wagan prints new catalogs and sells the Products through such catalogs to customers located in, or with retail outlets located, in California, Wagan shall provide a warning for each of Products both on the Product label in accordance with Section 2.4, and in the catalog in a manner that clearly associates the warning with the *specific* Product being purchased. Any warning provided in a mail order catalog shall be in the same type size or larger than other consumer information provided for the Products within the catalog and shall be provided on the same page and in the same location as the display and/or description of the Products. The catalog warning may use the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-Form Warning content.

2.6 Internet Warnings

If, after the Effective Date, Wagan sells Products via the internet to customers located in California, Wagan shall provide warnings for each Product both on the Product label in accordance with Section 2.4, and by prominently displaying the warning to the customer prior to completing the purchase or during the purchase of the Products without requiring customers to seek out the warning. The warning or a clearly marked hyperlink to the warning using the word “**WARNING**” given in conjunction with the sale of the Products via the internet shall appear either: (a) on the same web page on which the Products are displayed; (b) on the same web page as the order form for the Products; (c) on the same page as the price for the Products; or (d) on one or more web pages displayed to a purchaser during the checkout process. The warning shall appear in any of the above instances adjacent to or immediately following the display,

description or price of the Products for which it is given in the same type size or larger than other consumer information provided for the Products. The internet warning may use the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-Form Warning content.

3. MONETARY SETTLEMENT TERMS

3.1 Initial Civil Penalty

Pursuant to Health and Safety Code § 25249.7(b), Wagan agrees to pay a civil penalty of \$1,000 within five (5) days of the Effective Date. Wagan's civil penalty payment will be allocated according to Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) retained by Nguyen. Wagan shall issue its payment in two checks made payable to: (a) "OEHHA" in the amount of \$750; and (b) "My Nguyen" in the amount of \$250. Nguyen's counsel shall deliver to OEHHA and Nguyen their respective portion of the penalty payment.

3.2 Final Waivable Civil Penalty

Wagan shall pay a second civil penalty of \$2,500. However, the second civil penalty shall be waived in its entirety, if, on or before November 30, 2020, an officer of Wagan certifies (a) to having conducted a good faith search for the Products online, to having repurchased all remaining Products available for sale without a clear and reasonable warning to consumers in California through retailers with e-commerce sites, and to having applied a clear and reasonable warning pursuant to Section 2.3 on Products repurchased pursuant to this Section, or (b) as of the Effective Date, and continuing thereafter, any and all Products made available for sale in California by Wagan are Reformulated Products as defined by Section 2.2. Unless the second civil penalty is waived, on or before November 30, 2020, Wagan shall issue a check made payable to "OEHHA" in the amount of \$1,875 and a check made payable to "My Nguyen" in the amount of \$625.

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3.3 Reimbursement of Attorneys' Fees and Costs

Nguyen and his counsel offered to resolve the allegations in the Notice without reaching terms on the amount of reimbursement of attorneys' fees and costs. Shortly after the Parties finalized the other material settlement terms, they negotiated and reached an accord on the amount of reimbursement to be paid to Nguyen's counsel under general contract principles and the private attorney general doctrine, codified at California Code of Civil Procedure § 1021.5. On or before the fifth (5th) day after the Effective Date, on or before the thirty-fifth (35th) day after the Effective Date, and on or before the sixty-fifth (65th) day after the Effective Date, Wagan shall issue separate checks each in the amount of \$6,000 payable to "Seven Hills LLP" for a total amount of \$18,000 in reimbursement for the fees and costs incurred investigating, bringing this matter to Wagan's attention, negotiating a settlement in the public interest, reporting its terms to Office of the California Attorney General pursuant to Section 9, and monitoring compliance with its terms. For amounts due and owing under this Section received more than ten (10) days after the issuance due date, simple interest shall accrue at a rate of 10%.

3.4 Payments

All payments payable and due under this Agreement shall be delivered to Nguyen's counsel at following address:

Seven Hills LLP
Attn: Laralei Paras
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

4. CLAIMS COVERED AND RELEASED

4.1 Nguyen's Release of Wagan

This Agreement is a full, final and binding resolution between Nguyen, as an individual and *not* on behalf of the public, and Wagan, of any violation of Proposition 65 that was or could have been asserted by Nguyen on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against Wagan, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom

Wagan directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, Releasees), based on their failure to warn about alleged exposures to DEHP contained in the Products that were manufactured, distributed, sold and/or offered for sale in California before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Nguyen as an individual and *not* on behalf of the public, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of Nguyen's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that Nguyen may have, 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 exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to DEHP in the Products manufactured, distributed, sold and/or offered for sale before the Effective Date (collectively, Claims), against Wagan and Releasees.

The Parties further 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 Wagan. Nothing in this Section affects Nguyen's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Wagan's Products.

4.2 Wagan's Release of Nguyen

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

5. SEVERABILITY

If, subsequent to the execution of this Agreement, any provision of this 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 Agreement shall be governed by the laws of the State of California and apply within California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Wagan may provide Nguyen with written notice of any asserted change in the law, and shall have no further injunctive obligations pursuant to this Agreement, with respect to, and to the extent that, the Products are so affected. Nothing in this Agreement shall be interpreted to relieve Wagan from its obligation to comply with any pertinent state or federal law or regulation.

7. NOTICE

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

For Wagan:

Lance Kotsubo, V.P.
Wagan Corporation
31088 San Clemente Street
Hayward, CA 94544

For Nguyen:

Laralei Paras, Partner
Seven Hills LLP
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

Any Party may, from time to time, specify in writing to the other Party a change of address to which all notices and other communications shall be sent.

8. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

This Agreement may be executed in counterparts and by 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.

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9. COMPLIANCE WITH REPORTING REQUIREMENTS

Nguyen and his counsel agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

10. ENTIRE AGREEMENT

This 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. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto.

11. MODIFICATION

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

12. AUTHORIZATION

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

AGREED TO:

Date: 11/05/2020

By: 
My Nguyen

AGREED TO:

Date: _____

By: _____
Lance Kotsubo, V.P.
Wagan Corporation

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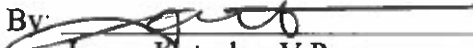
AGREED TO:

Date: _____

By: _____
My Nguyen

AGREED TO:

Date: 11/10/2020

By:  _____
Lance Kotsubo, V.P.
Wagan Corporation