

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and D.M. Merchandising, Inc. (“DMM”). Johnson and DMM shall each be 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. DMM 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 DMM manufactures, sells, and distributes for sale in California, certain retractable badge holders and pen toppers with PVC components containing the phthalate chemical di(2-ethylhexyl) phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Johnson alleges that DMM failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP.

### 1.3 Product Description

The products covered by this Settlement Agreement are defined as, and limited to: (i) retractable badge holders with PVC components manufactured, sold, or distributed for sale in California by DMM including, but not limited to the *ID Mate Retractable Badge Holder*, UPC: 7 22950 29596 0 and; (ii) pen toppers with PVC components manufactured, sold, or distributed for sale in California by DMM including, but not limited to the DM Merchandising “Poof” Pen, UPC: 7 22950 32823 1, (hereinafter collectively referred to as the “Products”).

#### **1.4 Notices of Violation**

On December 2, 2020, Johnson served DMM and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that DMM violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from the retractable badge holders with PVC components.

On December 23, 2020, Johnson served DMM and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that DMM violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from the pen toppers with PVC components.

The December 3 and December 23 Notices shall hereinafter collectively be referred to as the “Notices”. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

#### **1.5 No Admission**

DMM denies the material, factual, and legal allegations contained in the Notices 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 DMM 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 DMM of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by DMM. This Section shall not, however, diminish or otherwise affect DMM’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 July 23, 2021.

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

### **2.1 Reformulation Standards**

“Reformulated Products” are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or any other methodologies utilized by federal or state agencies for the purpose of determining the DEHP content in a solid substance.

### **2.2 Reformulation/ Warning Commitment**


As September 23, 2021, DMM shall not 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 warning as set forth in Section 2.3 below. The Parties agree and intend for compliance with the terms of this Settlement Agreement to constitute compliance with Proposition 65 with respect to exposures to DEHP from the Products.

### **2.3 Warnings**

As of September 23, 2021, all Products DMM sells and/or distributes for sale in California that do not qualify as Reformulated Products, shall bear a clear and reasonable warning pursuant to this Section. DMM further agrees that the warning shall be prominently placed 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 containing one of the following statements:

 **WARNING:** Reproductive Harm- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

OR

 **WARNING:** This product can expose you to chemicals, including DEHP, which are known to the State of California to cause birth defects and other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

The above warning statements shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the label is not printed using the color yellow, the symbol may be printed in black and white. 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.” DMM may comply with the warning content requirement of this Section 2.3 by complying with any amended Proposition 65 safe harbor warnings authorized by regulation adopted after the Effective Date.

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

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

Pursuant to Health and Safety Code section 25249.7(b)(2), and as consideration for the releases contained in Sections 4.1 and 4.2 below, DMM agrees to pay, no later than ten business days after the Effective Date, \$3,000 in civil penalties. 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. DMM will provide its payment, on or before the Effective Date, in two checks as follows: (1) “OEHHA” in the amount of \$2,250; and (2) “Dennis Johnson” in the amount of \$750.

#### **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, DMM 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, DMM agrees to pay, no later than the Effective Date, \$26,900, 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 DMM'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 DMM, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom DMM directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers including, but not limited to FedEx Corporation and The Savemart Companies, Inc., franchisees, cooperative members, importers, and licensees (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date relating to unwarned exposures to DEHP in the Products. 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 DMM.

#### **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, arising out of alleged or actual exposures to DEHP in the Products manufactured, imported, distributed, or sold by DMM prior to the Effective Date. The Parties further 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 DMM.

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

DMM, 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.

#### **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 DMM 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 DMM:

Myles Marks  
Executive Vice President  
D.M. Merchandising, Inc.  
835 N. Church Ct.  
Elmhurst, IL 60126

For Johnson:

Voorhees & Bailey, LLP  
Proposition 65 Coordinator  
535 Ramona Street; Suite 1  
Palo Alto, CA 94301

Jeffrey Margulies  
Norton Rose Fulbright US LLP  
555 South Flower Street  
Forty-First Floor  
Los Angeles, CA 90071

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.

**11. ENTIRE AGREEMENT**

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.

**12. 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: July 26, 2021

Date: July\_\_\_\_, 2021

By: \_\_\_\_\_  
DENNIS JOHNSON

By: \_\_\_\_\_  
D. M. MERCHANDISING, INC.



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By:  \_\_\_\_\_  
D. M. MERCHANDISING, INC.