

## **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 American Textile Company, Inc. (“American Textile”), on the other hand, with EHA and American Textile 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. American Textile 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 American Textile manufactures, sells, and distributes for sale in California waterproof vinyl mattress protectors that contain Di(2-ethylhexyl) phthalate (“DEHP”) and that it did so without first providing the health hazard warning 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 product covered by this Settlement Agreement is defined as, and expressly limited to, Waterproof Vinyl Mattress Protectors Full, that contains DEHP and that is manufactured, sold or distributed for sale in California by American Textile (“Product”).

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

On November 17, 2020, EHA served Big Lots Stores, Inc., the California Attorney General and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that Big Lots Stores, Inc. 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 Product.

On February 8, 2021, EHA served Big Lots Stores, Inc., American Textile Company, Inc., the California Attorney General and other requisite public enforcers with an Amended 60-Day Notice of Violation (“Amended Notice”) including American Textile Company, Inc. as a manufacturer.

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 American Textile.

**1.5 No Admission**

American Textile 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 Product, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by American Textile 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 American Textile of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by American Textile. This Section shall not, however, diminish or otherwise affect American Textile’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 sixty (60) days following the execution of this Settlement Agreement by the Parties.

**2. INJUNCTIVE RELIEF**

**2.1 Clear and Reasonable Warnings**



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

**2.2 Warning Requirements**

American Textile agrees that a Proposition 65 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. Each warning shall be provided in a manner such that the consumer or user understands to which

*specific* Product the warning applies, so as to minimize the risk of consumer confusion.

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

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

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 American Textile websites where the Products are sold in California.

### **2.3 Point of Sale Warnings**

American Textile and/or its downstream retailers may also provide a point-of-sale warning. Such warning, if used, shall be presented in any of the following forms:

- (a) **In-store sales.** Customers purchasing the Product directly from California retail stores will receive the Proposition 65 warnings set forth in Section 2.2 via an electronic product-specific notification at the time of purchase.
  
- (b) **Internet sales.** California Customers purchasing the Product via internet websites will receive the Proposition 65 warnings set forth in Section 2.2 above via (1) the “Product Details” section of the Product page; (2) on the same webpage as the order form for the Product; or (3) be otherwise prominently displayed to a purchaser prior to purchase.

EHA agrees that any such Point of Sale warning described in this Section comply with both Proposition 65 and the terms of this Settlement Agreement.

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

The injunctive requirements of Section 2 shall not apply to Products that are manufactured and/or already in the stream of commerce as of the Effective Date, which Products are expressly subject to the releases provided in Section 4.1.

## **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, American Textile agrees to pay two thousand five hundred dollars (\$2,500.00) 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 ten (10) days of the date this Settlement Agreement is executed by the Parties, American Textile shall issue two separate checks for the initial civil penalty payment to (a) “OEHHA” in the amount of one thousand eight hundred and seventy-five dollars (\$1,875.00) and (b) Environmental Health Advocates, in the amount of six hundred and twenty-five (\$625.00).

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 ten (10) days of the date this Settlement Agreement is executed by the Parties, American Textile agrees to pay twenty-two thousand five hundred dollars (\$22,500.00) to EHA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of American Textile, and negotiating a settlement. American Textile's payment shall be delivered in the form of two checks: (1) one check for \$11,250.00 payable to "Glick Law Group"; and (2) one check for \$11,250.00 payable to "Nicholas & Tomasevic LLP."

### **3.3 Payment Addresses**

All payments required under this Section shall be delivered:

The Glick Law Group Payment to:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 1900  
San Diego, CA 92101

The Nicholas & Tomasevic, LLP Payment to:

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

### **3.4 Tax Documentation**

American Textile 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 American Textile cannot issue any settlement payments pursuant to Section 3.1 and 3.2 above until after American Textile receives the requisite W-9 forms from EHA's counsel.

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

##### **4.1 EHA's Release of American Textile**

This Settlement Agreement is a full, final, and binding resolution between EHA, on its own behalf and not on behalf of the public, and American Textile 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 American Textile and each of its respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, members, employees, attorneys, each upstream entity from whom the Product was purchased by American Textile, and each entity to whom American Textile directly or indirectly distributed or sold the Product, including, but not limited to, its downstream distributors, wholesalers, customers, retailers (including, but not limited to, Big Lots Stores, Inc.), franchisees, cooperative members and licensees ("Releasees"), based on the failure to warn about exposures to DEHP in the Product manufactured, sold or distributed for sale in California by American Textile before the Effective Date, 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 American Textile 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 Product manufactured, distributed, sold or offered for sale by American Textile, before the Effective Date.

##### **4.2 American Textile's Release of EHA**

American Textile, 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 Product.

**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 American Textile, 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 Products. EHA and American Textile each acknowledge that they are each familiar with Section 1542 of the California Civil Code, 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, WOULD 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 American Textile:

Robert Niemann  
Keller and Heckman, LLP  
Three Embarcadero Center, STE 1420  
San Francisco, CA 94111

For EHA:

Noam Glick  
Glick Law Group, 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.

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**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:**

Date: March 18, 2021.

By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

**AGREED TO:**

Date: March 22, 2021

By:   
AMERICAN TEXTILE COMPANY, INC.

