

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Ema Bell (“Bell”), Anthony Ferreiro (“Ferreiro”) (collectively, the “Enforcers”) and Merchsource, LLC (“Merchsource”). Together, Enforcers and Merchsource are collectively referred to as the “Parties.” Enforcers are individuals who reside in the State of California, and seek to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Enforcers allege that Merchsource is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. (“Proposition 65”).

1.2 General Allegations. Bell alleges that Merchsource has exposed individuals to the chemical di-isodecyl phthalate (DIDP) from its sales of FAO Schwarz bags without first providing users and consumers of the product with a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. DIDP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

Ferreiro alleges that Merchsource has exposed individuals to the chemical Bisphenol A (BPA) from its sales of Sharper Image earbuds without first providing users and consumers of the product with a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. BPA is listed under Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

1.3 Product Description. The products covered by this Settlement Agreement include but are not limited to (1) plastic cosmetic and accessory bags including the FAO Schwarz branded bags (“FAO Bags”) and (2) Sharper Image earbuds (“SI Earbuds”) (collectively, the “Products”) that have been imported, distributed, offered for sale and/or sold in California by Merchsource.

1.4 Notices of Violation. On December 28, 2021 (FAO Bags/Bell), and March 8, 2021 (SI Earbuds/Ferreiro), Enforcers each served Merchsource, LLC, and various public enforcement agencies with documents entitled “Notice of Violation of California Health & Safety Code § 25249.6,

et seq.” (collectively, the “Notices”) alleging that Merchsource was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of FAO Bags will expose them to DIDP, and use of SI Earbuds will expose them to BPA. No public enforcer has diligently prosecuted the allegations set forth in the Notices.

1.5 No Admission. Merchsource denies the material factual and legal allegations contained in the Notices and maintains that, to the best of its knowledge, all products that are or have been 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 Merchsource of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Merchsource of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Merchsource. However, this § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notices, Merchsource maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

1.6 Effective Date. For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Agreement is last executed by the Parties.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNING


2.1 Reformulation of the Products. As of the Effective Date, and continuing thereafter, Products that Merchsource directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 2.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 2.3, below. For purposes of this Settlement Agreement, a “Reformulated Product” is a Product that is in compliance with the standard set forth in § 2.2, below. The warning requirement set forth in §§ 2.3 shall not apply to any Reformulated Product or Product that entered the stream of commerce prior to the Effective Date of this Agreement.

2.2 Reformulation Standard. “Reformulated Products” shall mean FAO Bags that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DIDP when

analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance; and shall mean any SI Earbuds that are demonstrated via an exposure assessment conducted in accordance with applicable Proposition 65 laws and regulations to result in a dermal exposure to BPA from solid materials that does not exceed the Maximum Allowable Dose Level (“MADL”) for BPA of 3 micrograms per day. Any such exposure assessment shall, as part of the assessment incorporate the use of BPA wipe testing of the Product to quantify BPA migration.

2.3 Clear and Reasonable Warning. As of the Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.3 and 2.4 must be provided for all Products that Merchsource manufacturers, imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation for Merchsource to provide an exposure warning for Products that entered the stream of commerce prior to the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(a), or (b), respectively:

(a) **Warning**¹. The “Warning” shall consist of the statement:

 **WARNING:** This product can expose you to chemicals including di-isodecyl phthalate (DIDP), which are known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(b) **Alternative Warning:** Merchsource may, but is not required to, use the alternative short-form warning as set forth in this § 2.3(b) (“**Alternative Warning**”) as follows:

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

2.4 A **Warning** or **Alternative Warning** provided pursuant to § 2.3 and 2.6 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. 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 sign or label for the Products does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height

¹ In the § 2.3(a) **Warning**, the language “Bisphenol A (BPA)” shall be substituted in place of “di-isodecyl phthalate (DIDP)” if use of the Product creates an exposure to only BPA.

of the word “**WARNING:**”. The warning shall be affixed to or printed on the Products’ packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Product and shall be at least the same size as those other safety warnings.

If Merchsource sells Products via an internet website to customers located in California, the warning requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

2.5 Compliance with Warning Regulations. The Parties agree that Merchsource shall be deemed to be in compliance with this Agreement by adhering to §§ 2.1 – 2.4 of this Agreement, or by complying with warning requirements adopted by the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) applicable to the product and the exposures at issue after the Effective Date.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, Merchsource shall pay \$4,000.00 as a Civil Penalty in accordance with this Section. The Civil Penalty payment shall be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the Penalty remitted to OEHHA and the remaining 25% of the Penalty remitted to Enforcers. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

3.1 Civil Penalty. Within ten (10) days of the Effective Date, Merchsource shall issue two (2) separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$3,000.00; and to (b) “Brodsky & Smith in Trust for Enforcers” in the amount of \$1,000.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

3.2 Payment Procedures.

(a) **Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Enforcers, pursuant to § 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire
Brodsky & Smith
Two Bala Plaza, Suite 805
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to § 3.1 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

(b) **Copy of Payments to OEHHA.** Merchsource agrees to provide Enforcers’ counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Enforcers, to be delivered to the address provided in § 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** Merchsource agrees to provide a completed IRS 1099 for its payments to, and Enforcers agree to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

(i) “Ema Bell” whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(ii) “Anthony Ferreiro” whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(iii) “Brodsky & Smith” (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iv) “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA 95814.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Enforcers and their counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Enforcers and their counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Merchsource shall reimburse Enforcers’ counsel for fees and costs incurred as a result of investigating and bringing this matter to Merchsource’s attention, and negotiating a settlement in the public interest. Within ten (10) days of the Effective Date, Merchsource shall issue a check payable to “Brodsky & Smith” in the amount of \$36,000.00 for delivery to the address identified in § 3.2(a)(i), above.

5. RELEASE OF ALL CLAIMS

5.1 Release of Merchsource and Downstream Customers and Entities. This Settlement Agreement is a full, final and binding resolution between Enforcers, acting on their own behalf, and Merchsource, of any violation of Proposition 65 that was or could have been asserted by Enforcers or on behalf of their past and current agents, representatives, attorneys, successors, and/or assigns (“Releasers”) for failure to provide warnings for alleged exposures to DIDP and/or BPA from use of the Products, and Releasers hereby release any such claims against Merchsource and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Merchsource directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Lowe’s Home Centers, LLC, LF, LLC, Saks & Company, LLC, and each of their respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on exposure to DIDP and BPA from use of the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Enforcers, on behalf of themselves, their past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DIDP and BPA from use of the Products.

5.2 Merchsource’s Release of Enforcers. Merchsource, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Enforcers, their attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Enforcers and/or their attorneys

and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

5.3 California Civil Code § 1542. It is possible that other claims not known to the Parties arising out of the facts alleged in the Notices and relating to the Products will develop or be discovered. Enforcers on behalf of themselves only, on one hand, and Merchsource, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in §§ 5.1 and 5.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads 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.

Enforcers and Merchsource each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

5.4 Deemed Compliance with Proposition 65. The Parties agree that compliance by Merchsource with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposure to DIDP and BPA from use of the Products.

5.5. Public Benefit. It is Merchsource's understanding that the commitments it has agreed to herein, and actions to be taken by Merchsource under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Merchsource that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Merchsource failure to provide a warning concerning exposure to DIDP and/or BPA prior to use of the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the

general public as to those Products addressed in this Settlement Agreement, provided that Merchsource is in material compliance with this Settlement Agreement.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the law 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 or limited by reason of law generally, or as to the Products, Merchsource shall provide written notice to Enforcers of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Product is so affected.

8. NOTICES

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

For Merchsource:

Elizabeth V. McNulty, Esq.
Evans Fears & Schuttert LLP
4440 Von Karman Avenue, Suite 250
Newport Beach, CA 92660

For Enforcers:

Evan J. Smith, Esq.
Brodsky & Smith
Two Bala Plaza, Suite 805

Bala Cynwyd, PA 19004

Either 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.

9. COUNTERPARTS: SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

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

Enforcers agree to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

11. MODIFICATION

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

12. 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.

13. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 7-7-2022

Date: July 7, 2022

By: 
Ensa Bell

By: 
Merchsource, LLC

AGREED TO:

Date: 7-18-2022

By: 
Anthony Ferreiro