

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Michael DiPirro and his attorneys Law Office of David R. Bush and Jeremy Fietz, Attorney-at-Law, on the one hand, (“DiPirro”) and Aluminum Athletic Equipment Company (“AAEC”) and its attorneys Cozen O'Connor, on the other hand, with DiPirro and AAEC individually referred to as a “Party” and collectively as the “Parties.” AAEC is also referred to as the “Noticed Party.” DiPirro is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. AAEC employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

DiPirro alleges that the Noticed Parties manufacture, import, sell, or distribute for sale, in the State of California products containing Diisononyl Phthalate (“DINP”) without first providing the clear and reasonable exposure warning required by Proposition 65. DINP is listed pursuant to Proposition 65 as a chemical that is known to the State of California to cause cancer (hereinafter the “Listed Chemical”).

### 1.3 Product Description

The products covered by this Settlement Agreement are Vinyl Sandbags with Zipper containing the Listed Chemical that are manufactured, sold, or distributed arm rests for sale in California by the Noticed Parties, including, but not limited to *Vinyl Sandbag with Zipper, Yellow; model #VSZ-Y* (the “Products”).

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

On or about December 13, 2022, DiPirro served AAEC and certain requisite public enforcement agencies with a 60-Day Notice of Violation (the "Notice"), a document that informed the recipients of DiPirro's allegation that AAEC violated Proposition 65 by failing to warn its customers and consumers in California that the Products expose users to the Listed Chemical. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

#### **1.5 No Admission**

The Noticed Parties deny the material, factual, and legal allegations contained in the Notice and maintain that all of the products they have manufactured, sold, or distributed for sale 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 the Noticed Parties of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by the Noticed Parties of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by the Noticed Parties. This section shall not, however, diminish or otherwise affect the Noticed Parties' obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date the final requisite signature is applied to the Settlement Agreement.

## **2. INJUNCTIVE RELIEF: PRODUCT WARNINGS**

As of the Effective Date, AAEC, at its sole discretion, agrees to either (a) cease selling or offering for sale the Covered Products in California, (b) manufacture, distribute, sell or offer for sale in California only Reformulated Products, as defined pursuant to Section 2.1. below, or (c) provide a clear and reasonable Proposition 65 warning for the Products pursuant to Section 2.2.

below.

**2.1 Reformulation Standards.** The Products shall be deemed to comply with Proposition 65 with regard to DINP and be exempt from any Proposition 65 warning requirements for DINP if the Products do not exceed the No Significant Risk Level (“NSRL”) of 146 µg/day (“Reformulated Products”).

**2.2 Product Warnings.** Within thirty days of the Effective Date, for all Products that do not meet the warning exemption standard set forth in Section 2.1 above, and are shipped to a California address for sale by the Noticed Parties, or any agent, distributor, or affiliated company working on behalf of the Noticed Parties, the Noticed Parties shall provide a clear and reasonable warning on each Product as set forth below in Section 2.4 or by complying with the Proposition 65 warning requirements adopted by the State of California Office of Environmental Health Hazard Assessment (“OEHHA”) as of or after the Effective Date. 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. 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.

The warning requirements set forth above, are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations. AAEC shall be deemed to be in compliance with the warning requirements of this Settlement Agreement by either adhering to this Section 2.2 or by complying with the Proposition 65 warning requirements adopted by the State of California Office of Environmental Health Hazard Assessment (“OEHHA”) as of or after the Effective Date.

**2.3 Internet Warnings.** In addition to the warning specified in Section 2.2 above, for all Products that Settling Defendant offers for sale directly to consumers in California via the internet, Settling Defendant shall provide a warning for such Products by including the warning set forth below in Section 2.4 on one or more of the following: (a) on the same web page on which a Covered Product is displayed; (b) on the same web page as the order form for a Covered Product; (c) on the same web page as the price for any Covered Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The internet warning described above can also be delivered through a hyperlink using the word “[California Prop 65] WARNING” (language in brackets optional) ; or by complying with the Proposition 65 warning requirements adopted by the State of California Office of Environmental Health Hazard Assessment (“OEHHA”) as of or after the Effective Date.

**2.4 Text of the Warning.** The text of the warning shall be printed in black ink on a light background, in a font that is easy to read and legible, but in no case less than a size 12 font. The Noticed Parties shall use one of the two warning language as set forth below, which shall include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline as shown below (the symbol may be black or white if the color yellow is otherwise not used on the Product’s packaging).



**WARNING: This product can expose you to DINP, a chemical known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).**

Or



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

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

**3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).** The Noticed Parties shall make a civil penalty payment of \$1,000.00, in accordance with this section, within ten (10) business days from the Effective Date. The penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to DiPirro in accordance with Section 3.2 below. The penalty payment shall be remitted in accordance with the procedure set out in Section 3.2.

**3.2 Payments.** All payments shall be delivered within ten (10) business days of the Effective Date to the bank account of (via Zelle, wire transfer, or ACH payment; number provided upon settlement) or the office of Jeremy Fietz, Attorney at Law, 4241 Montgomery Drive #123, Santa Rosa, CA, 95405, and for the latter option shall be in the form of three checks for the following amounts made payable to:

- (a) “Jeremy Fietz, Attorney at Law” in the amount of \$750.00 (seven hundred fifty dollars) for payment of civil penalty to OEHHA. Counsel for DiPirro agree to forward such funds to OEHHA in a timely manner. Alternatively, at Defendant’s option, it can choose to deliver a certified or cashier’s check made payable to “Office of Environmental Health Hazard Assessment.”
- (b) “Jeremy Fietz, Attorney at Law ” in the amount of \$250.00 (two hundred fifty dollars), as payment of civil penalty to Michael DiPirro. Counsel for DiPirro agree to forward such funds in a timely manner. Alternatively, at Defendant’s option, it can choose to deliver a certified or cashier’s check made payable to “Michael DiPirro.”
- (c) “Jeremy Fietz, Attorney at Law ” in the amount of \$43,500. (forty three

thousand five hundred dollars) as payment for attorneys' fees and costs pursuant to Section 4 below.

For any payment that is returned for any reason, including insufficient funds, a payment must be made by AAEC in form of a cashier's check within three (3) calendar days of notification of insufficient funds, plus a 10% service fee paid to DiPirro's attorneys. Any payment that is not actually received by the due date will also be subject to a 10% late fee.

**3.3 Issuance of 1099 Forms.** The Noticed Parties shall provide DiPirro's counsel with a separate 1099 form for each of its payments under this Agreement to:

- (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
- (b) "Michael DiPirro," whose address and tax identification number shall be furnished upon request after this Agreement has been fully executed by the Parties for his portion of the civil penalties paid; and
- (c) "Jeremy Fietz, Attorney at Law" whose address and tax identification number shall be furnished upon request after this Agreement has been fully executed by the Parties, for fees and costs reimbursed pursuant to Section 4.

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that DiPirro 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 this fee issue to be resolved after the material terms of the agreement had been settled. The Noticed Parties then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to DiPirro and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. The Noticed Parties shall

together pay a total of \$ 43,500. (forty three thousand five hundred dollars) for fees and costs incurred as a result of investigating, bringing this matter to the Noticed Parties' attention, and negotiating a settlement in the public interest. The Noticed Parties shall issue a separate 1099 for fees and costs, shall make the check payable to "Jeremy Fietz, Attorney at Law" and shall deliver payment within ten (10) business days of the Effective Date to the address listed in Section 3.2 above.

## **5. CLAIMS COVERED AND RELEASED**

### **5.1 DiPirro's Release of AAEC**

This Settlement Agreement is a full, final, and binding resolution between DiPirro and the Noticed Parties of any violation of Proposition 65 that was or could have been asserted by DiPirro, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against either of the Noticed Parties, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom either Noticed Party directly or indirectly distributes or sells the Products ("Releasees"), including its downstream distributors and retailers and its upstream suppliers and manufacturers, for unwarned exposures to the Listed Chemical from the Products manufactured, distributed, sold or distributed for sale in California by the Noticed Parties prior to the Effective Date.

In further consideration of the promises and agreements herein contained, DiPirro, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against the Noticed Parties and Releasees, including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 for exposures to the Listed Chemical from Products distributed, sold, or distributed for sale in California by the Noticed Parties prior to the Effective Date.

**California Civil Code § 1542.** It is possible that other claims not known to DiPirro arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. DiPirro on behalf of himself acknowledges that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. DiPirro acknowledges that the claims released in Section 5.1, above, may include unknown claims, and nevertheless waives 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.**

DiPirro acknowledges and understands the significance and consequences of this specific waiver of California Civil Code § 1542.

#### **5.2 Noticed Parties Release of DiPirro**

Each Noticed Party, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims that it may have against DiPirro 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 DiPirro and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **6. 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.



**7. 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, modified, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then the Noticed Parties may provide written notice to DiPirro of any asserted change in the law and have no further obligations pursuant to this Settlement Agreement, with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve Noticed Parties from any obligation to comply with any pertinent state or federal toxics control laws.

**8. NOTICES**

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

For AAEC:

Brett Taylor, Esq  
Cozen O'Connor  
601 South Figueroa Street, Suite 3700  
Los Angeles, CA 90017  
BTaylor@cozen.com

For Michael DiPirro:

Jeremy Fietz, Attorney-at-Law  
1510 Fourth Street  
Santa Rosa CA 95404  
jeremy@superawesomelawyer.com

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.

9. **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.

10. **POST-EXECUTION ACTIVITIES**

DiPirro agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

11. **MODIFICATION**

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

12. **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: 04/19/2023

Date: 4/19/23

By: 

Michael DiPirro

By: 

Aluminum Athletic Equipment Company

Print Name: Timothy W. Driscoll

Title: President