

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and D.M. Merchandising, Inc. (“D.M. Merchandising”). Johnson and D.M. Merchandising shall each be referred to as a “Party” and collectively as the “Parties.” Johnson is alleged to be 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. Johnson alleges that D.M. Merchandising 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 D.M. Merchandising manufactures, sells, and/or distributes for sale in California, pill cases 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 D.M. Merchandising 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 specifically defined as, and limited to, the “*Wellness Keeper Pill Case*”; *PB7M2-BLK*, manufactured, sold, or distributed for sale in California by D.M. Merchandising (hereinafter the “Products”).

1.4 Notices of Violation

On March 13, 2024, Johnson served D.M. Merchandising, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that the notice recipient violated Proposition 65 by failing to warn customers and consumers in

California of the health hazards associated with exposures to DEHP from the Products. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

D.M. Merchandising 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 D.M. Merchandising 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 D.M. Merchandising of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by D.M. Merchandising. This Section shall not, however, diminish or otherwise affect D.M. Merchandising'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 when D.M. Merchandising received a copy of the Settlement Agreement executed by Johnson..

2. INJUNCTIVE RELIEF

2.1 Reformulation/Warning Commitment

As of the Effective Date, D.M. Merchandising shall not manufacture, import, distribute, sell, or offer the Products for sale in the State of California unless: (i) the Products are Reformulated Products pursuant to Section 2.2; or (ii) D.M. Merchandising provides a clear and reasonable warning pursuant to Section 2.3. The Parties agree and intend that D.M. Merchandising's compliance with the terms of this Settlement Agreement shall constitute compliance by D.M. Merchandising with Proposition 65 with respect to exposures to DEHP from the Products. Products that are already in the stream

of commerce do not need to comply with the injunctive relief requirements forth in Section 2.

2.2 Reformulated Products

“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.


2.3 Warnings.

To the extent that Products manufactured, imported, or otherwise acquired by D.M. Merchandising after the Effective Date do not meet the standard for Reformulated Products, a clear and reasonable warning shall be provided, as set forth herein.

2.3.1 Warning Content. For purposes of this Settlement Agreement, the parties agree that a clear and reasonable warning shall consist of either of the following warning statements:

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

OR

 **WARNING:** This product can expose you to chemicals, including di(2-ethylhexyl) phthalate (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

The above warning statements 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 of the word “**WARNING:**”

2.3.2 Method of Transmission

Product Labeling. D.M. Merchandising shall affix one of the foregoing warning statements to the packaging, labeling or directly to a specific Product. The warning statement shall be affixed to the Products, or the Products' packaging or labeling, and placed 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. Where the short-form warning statement is provided on the label, the entire warning must be in a type size no smaller than the largest type size used for other consumer information on the product label. In no case shall the short-form warning statement appear in a type size smaller than six-point type.

Internet. In addition to the product labeling, where D.M. Merchandising offers Products to California customers via its own proprietary internet website or any third-party website over which D.M. Merchandising has control, D.M. Merchandising shall provide a clear and reasonable internet, web page warning to customers located in California. The warning statement shall appear either: (i) on the same web page on which a Product is displayed and/or described; (ii) on the same page as the price for the Product; or (iii) on one or more web pages displayed to a California purchaser prior to completion of the checkout process. Alternatively, the warning statement shall be provided using a clearly marked hyperlink using the word "WARNING" on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If the product label warning is provided using the short-form warning statement, the warning provided on the website may use the same content. A warning is not prominently displayed if the purchaser must search for it in the general content of the website. Where D.M. Merchandising does not have control over the content of third-party internet sellers, D.M. Merchandising shall provide such sellers with written notice, in accordance with Title 27, California Code of Regulation, Section 25600.2, of their

warning obligations. Third-party internet sellers who receive notice pursuant to 25600.2 and fail to provide a clear and reasonable Proposition 65 warning pursuant to this section shall not be deemed in compliance with this Settlement Agreement and shall not receive any benefit or protection afforded hereunder.

Catalog. In addition to the product labeling, where D.M. Merchandising offers Products for sale in California via its own proprietary catalog or a catalog over which it has control, one of the foregoing warnings statements must also be provided in the catalog in a manner that clearly associates it with the *specific* Product being purchased. The catalog warning statement shall be placed 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. If a short-form warning is being provided on the label, the warning provided in the catalog may use the same content. Where D.M. Merchandising does not have control over the content of third-party catalog sellers, D.M. Merchandising shall provide such sellers with written notice, in accordance with Title 27, California Code of Regulation, Section 25600.2, of their warning obligations. Third-party catalog sellers who receive notice pursuant to 25600.2 and fail to provide a clear and reasonable Proposition 65 warning pursuant to this section shall not be deemed in compliance with this Settlement Agreement and shall not receive any benefit or protection afforded hereunder.

Languages. Where a label or tag used to provide a warning statement includes consumer information about a product in a language other than English, the warning must also be provided in accordance with applicable warning regulations adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA").

2.3.3 Safe Harbor Warnings. The parties acknowledge that the warnings required by this section are not the exclusive methods of providing Proposition 65 warnings and agree that D.M. Merchandising may utilize "safe harbor" warning

language and methods promulgated by the Office of Environmental Health Hazard Assessment and contained in 27 CCR §§ 25602-25603, applicable to DEHP and the Products, in effect on or after the Effective Date, without being deemed in breach of this Settlement Agreement.

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, D.M. Merchandising agrees to pay \$1,200 in civil penalties within 14 days after the Effective Date. 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. D.M. Merchandising shall make its payment in two checks, delivered to the address in Section 3.3, as follows: (1) to “OEHHA” in the amount of \$900; and (2) to “Dennis Johnson” in the amount of \$300.

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 his counsel, 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, D.M. Merchandising 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, D.M. Merchandising agrees to pay, within 14 days of the Effective Date, \$13,600, 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 D.M. Merchandising'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
839 Emerson Street
Palo Alto, CA 94301

Johnson shall provide IRS W-9 forms for: (i) "Office of Environmental Health Hazard Assessment"; (ii) Dennis Johnson; and (iii) Voorhees & Bailey, LLP. D.M. Merchandising shall issue complete IRS 1099 forms to each payee for their respective payment amount if appropriate.

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 D.M. Merchandising, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom D.M. Merchandising directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, importers, licensors, and licensees (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date relating to 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 D.M. Merchandising.

4.2 Johnson's Individual Release of Claims

Johnson, in his individual capacity only and not in her 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 D.M. Merchandising 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 D.M. Merchandising. Johnson acknowledges that the claims released 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 HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HIS, WOULD HAVE MATERIALLY AFFECTED HIS OR HIS SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

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

4.3 D.M. Merchandising's Release of Johnson

D.M. Merchandising 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 that relates to seeking to enforce Proposition 65 against it in this matter 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 D.M. Merchandising 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 D.M. Merchandising:

Myles Marks
D.M. Merchandising, Inc.
70 W. Madison St., Ste 3500
Chicago, IL 60602

With a copy to:

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

For Johnson:

Dennis Johnson
c/o Voorhees & Bailey, LLP
Proposition 65 Coordinator
839 Emerson Street
Palo Alto, CA 94301

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: 7/16/2024

Date: _____

By: 
_____ DENNIS JOHNSON

By: _____
D.M. MERCHANDISING, INC.

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:

Date: 7/16/2024

By: 
DENNIS JOHNSON

AGREED TO:

Date: 7/22/24

By: 
D.M. MERCHANDISING, INC.