

1 LAW OFFICES OF JEREMY FIETZ
Jeremy Fietz, State Bar No. 200396
2 4241 Montgomery Drive, #123
Santa Rosa, CA 95405
3 Telephone: (707) 236-0088

4 LAW OFFICE OF DAVID R. BUSH
David R. Bush, State Bar No. 154511
5 321 South Main Street #502
Sebastopol, CA 95472
6 Telephone: (707) 321-5028
drbush@drbushlaw.com

7 Attorneys for Plaintiff
8 Michael DiPirro

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12

13 MICHAEL DIPIRRO,

14 Plaintiff,

15 vs.

16 WHITNEY MUSEUM OF AMERICAN ART;
and DOES 1-150,

17 Defendants.
18
19

Case No. 24CV097032

**[PROPOSED][AMENDED] CONSENT
JUDGMENT**

Dept. 17
Hon. Sarah Sandford-Smith

Complaint filed: October 23, 2024

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Michael DiPirro
4 ("DiPirro"), and Defendant WHITNEY MUSEUM OF AMERICAN ART ("Defendant" or
5 "Whitney"), with DiPirro and Defendant individually referred to as a "Party" and collectively as
6 the "Parties."

7 **1.2 Plaintiff**

8 DiPirro is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Defendant**

12 Defendant employs ten or more persons and is a person in the course of doing business
13 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
14 Code section 25249.6 *et seq.* ("Proposition 65").

15 **1.4 General Allegations**

16 DiPirro alleges that Defendant sells or distributes for sale in the State of California
17 Upcycled Banner Pouches that expose users to Diethylhexyl phthalate ("DEHP"), a toxic
18 chemical, without first providing the clear and reasonable exposure warnings required by
19 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the
20 State of California to cause cancer and birth defects or other reproductive harm (hereinafter the
21 "Listed Chemical").

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are Upcycled Banner Pouches that are
24 sold or distributed for sale in California by Defendant (the "Products").

25 **1.6 Notices of Violation**

26 On or about May 28, 2024, DiPirro served Defendant and certain requisite public
27 enforcement agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed
28 the recipients of DiPirro's allegation that Defendant violated Proposition 65 by failing to warn its

1 customers and consumers in California that the Products that the Products expose users to the
2 Listed Chemical. To the best of DiPirro's knowledge, no public enforcer has commenced and is
3 diligently prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On or about October 23, 2024, DiPirro filed the instant action against Defendant for
6 the alleged violations of Health & Safety Code § 25249.6 that are the subject of the May 28,
7 2024, Notice.

8 **1.8 No Admission**

9 The Parties enter into this Settlement Agreement to settle disputed claims between them as
10 set in the Complaint concerning Defendant's compliance with Proposition 65. Defendant
11 explicitly denies all material, factual, and legal allegations contained in the Notice and Complaint
12 and maintain that all of the products it has manufactured, sold, or distributed for sale in
13 California, including the Products, have been, and are, in compliance with all applicable laws and
14 regulations. Nothing in this Consent Judgment shall be construed as an admission by Defendant
15 of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance
16 with this Consent Judgment constitute or be construed as an admission by the Defendant of any
17 fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically
18 denied by the Defendant. This section shall not, however, diminish or otherwise affect
19 Defendant's obligations, responsibilities, and duties under this Consent Judgment.

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
23 Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this
24 Consent Judgment.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
27 which Notice is served that the Court approves this Consent Judgment.
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Product Warnings.** Commencing within thirty (30) days of the Effective Date
3 ("Compliance Date") for any of the Defendant's Products that contain more than 0.1 percent
4 (1,000 parts per million) of the Listed Chemical (which Defendant will determine through its
5 own independent testing using a laboratory accredited by the State of California, a federal
6 agency, the National Environmental Laboratory Accreditation Program, or similar nationally
7 recognized accreditation program) and are shipped to any California resident consumer, or
8 any agent, distributor, or affiliated company working on behalf of Defendant, for potential
9 sale to California consumers, Defendant shall provide a clear and reasonable warning on the
10 label of each Product as set forth in Section 2.3. Each warning shall be prominently placed
11 with such conspicuousness as compared with other words, statements, designs, or devices as
12 to render it likely to be read and understood by an ordinary individual under customary
13 conditions before purchase or use. Each warning shall be provided in a manner such that the
14 consumer or user understands to which specific Product the warning applies, so as to
15 minimize the risk of consumer confusion.

16 **2.2 Internet Warnings.** For all Products that Defendant offer for sale directly to
17 consumers located in California via the internet, the warning requirements of this Section 2 shall be
18 satisfied if the warning set forth below in Section 2.3 appears on one or more of the following:
19 (a) on the same web page on which a Product is displayed; (b) on the same web page as the
20 order form for a Product; (c) on the same web page as the price for any Product; or (d) on one
21 or more web pages displayed to a purchaser with a California delivery address prior to or during
22 the checkout process. The internet warning described above can also be delivered through a
23 hyperlink using the word "[California Prop 65] WARNING" (language in brackets optional)
24 which then takes the user to a display of the warning set out in Paragraph 2.3.

25 **2.3 Text of the Warning.** Defendant shall use one of the warning options
26 set forth below, which shall include a symbol consisting of a black exclamation point in a
27 yellow equilateral triangle with a bold black outline as shown below (the symbol may be
28

black or white if the color yellow is otherwise not used on the Product's packaging or webpage):




WARNING: This product can expose you to chemicals including diethylhexyl phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

OR




WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

Beginning no later than January 1, 2028, when current changes to California law go into effect, Defendant shall use one of the following forms if using the short form warning. Defendant may use the above short form warning for Products manufactured and labeled prior to January 1, 2028:

 **WARNING [CA WARNING] [CALIFORNIA WARNING]:** Risk of cancer and reproductive harm from exposure to diethylhexyl phthalate (DEHP).
See www.P65Warnings.ca.gov.

or

 **WARNING [CA WARNING] [CALIFORNIA WARNING]:** Can expose you to diethylhexyl phthalate (DEHP), a carcinogen and reproductive toxicant.
See www.P65Warnings.ca.gov.

Foreign Language Requirement. Where a product sign, label or shelf tag used to provide a warning includes consumer information in a language other than English, the Warning must also be provided in that language in addition to English.

2.4 Changes in Warning Regulations or Statutes. In the event that the Office of Environmental Health Hazard Assessment ("OEHHHA") promulgates one or more regulations requiring or permitting Proposition 65 warning text and/or methods of transmission applicable to the Products and the chemical at issue, which are different than those set forth above, the Noticed Party shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Settlement Agreement.

1 Likewise, the Noticed Party shall amend the warning to comply with the regulation if
2 additional requirements or changes are promulgated by OEHHA.

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

5 **Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).** Defendant
6 shall make a civil penalty payment of \$ 6000.00, as a component of this settlement. The penalty
7 payment will be allocated by in accordance with California Health & Safety Code §
8 25249.12(c)(1) & (d), with 75% of the penalty funds remitted to the California Office of
9 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
10 remitted to DiPirro. DiPirro’s counsel shall be responsible for delivering OEHHA’s portion of
11 any penalty payment made under this Consent Judgment. The penalty payment shall be remitted
12 in accordance with the procedure set out in Section 5.

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

14 In addition to the Penalties in Section 3, the Parties reached an agreement on the
15 compensation due to DiPirro and his counsel under general contract principles and the private
16 attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work
17 performed through the mutual execution of this agreement. Defendant shall pay a total of \$59,000
18 for fees and costs incurred as a result of investigating, working with toxicology experts, bringing
19 this matter to the Defendant’s attention, document preparation, negotiating a settlement in the
20 public interest, and post judgment compliance audit.

21 **5. PAYMENT AND FORM 1099**

22 **5.1 Payment.** The complete settlement payment in the amount of \$65,000 shall be
23 delivered within ten (10) business days of the Effective Date and after Defendant is provided with
24 all relevant W-9 forms, to the bank account of Jeremy Fietz, Attorney at Law (via wire transfer,
25 or ACH payment) or by physical check to the office of Jeremy Fietz, Attorney at Law, 4241
26 Montgomery Drive, #123, Santa Rosa CA 95405, and for the latter option shall be in the form of
27 a check made payable to: “Jeremy Fietz, Attorney at Law”. For any payment that is returned for
28 any reason, including insufficient funds, a payment must be made by Defendant in form of a

1 cashier's check within three (3) calendar days of notification of insufficient funds, plus a 10%
2 service fee paid to DiPirro's attorneys. Any payment that is not actually received by the due date
3 will also be subject to a 10% late fee.

4 **5.2 Issuance of 1099 Form.** Defendant shall provide DiPirro's counsel, Jeremy
5 Fietz, Attorney-at-Law, with one 1099 form for the entire settlement amount. Such 1099
6 shall be made on the Form 1099 MISC with the amount reported in box 10 ("Gross proceeds
7 paid to an attorney"). The Noticed Party acknowledges that 1099 shall NOT be issued under
8 form 1099 NEC. A W9 shall be provided by Jeremy Fietz, Attorney-at-Law before or
9 promptly after the Effective Date.

10 **6. CLAIMS COVERED AND RELEASED**

11 **6.1 DiPirro's Public Release of Proposition 65 Claims.**

12 This Consent Judgment is a full, final, and binding resolution of the claims between
13 DiPirro and Defendant regarding Proposition 65 that was or could have been asserted by DiPirro,
14 on behalf of himself, or on behalf of his past and current agents, representatives, attorneys,
15 successors, and assignees. DiPirro, acting on his own behalf and *in the public interest*, and on
16 behalf of his past and current agents, representatives, attorneys, successors and assignees,
17 releases Defendant, its parents, subsidiaries, affiliated entities under common ownership, trustees,
18 directors, officers, employees, attorneys, agents, successors, assigns and each entity to whom
19 they directly or indirectly obtains, distributes or sells the Products ("Releasees") ("Defendant
20 Releasees"), including its downstream distributors and retailers , but not including its upstream
21 suppliers and manufacturers, ("Downstream Releasees"), from all claims for violations of
22 Proposition 65 for unwarned exposures to the Listed Chemical from the Products manufactured,
23 distributed, sold or distributed for sale to consumers in the State of California by Defendant
24 Releases prior to the Effective Date.

25 **6.2 DiPirro's Individual Release**

26 In further consideration of the promises and agreements herein contained, including
27 for the payments to be made pursuant to Section 5 above, DiPirro, on his own behalf and on
28 behalf of his past and current agents, representatives, attorneys, successors, and/or assignees,

1 hereby covenants not to sue and waives all rights to institute or participate in, directly or
2 indirectly, any form of legal action, and releases all claims that he may have against
3 Defendant and Releasees, including, without limitation, all actions and causes of action in law
4 and in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,
5 or expenses, including, without limitation, investigation fees, expert fees, and attorneys' fees
6 arising under Proposition 65 for exposures to the Listed Chemical from Products distributed,
7 sold, or distributed for sale in California by the Noticed Party prior to the Effective Date.

8 **6.3 Defendant's Release of DiPirro**

9 Defendant, on its own behalf and on behalf of its past and current agents,
10 representatives, attorneys, successors, and assignees, hereby waives any and all claims that it
11 may have against DiPirro and his attorneys and other representatives, for any and all actions
12 taken or statements made (or those that could have been taken or made) by DiPirro and his
13 attorneys and other representatives, whether in the course of investigating claims, otherwise
14 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

15 **6.4 Compliance with Proposition 65**

16 Defendant's compliance with the terms of this Consent Judgment constitutes
17 compliance with Proposition 65 with respect to warning obligations for the Products.

18 **7. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved and entered by the Court
20 and shall be null and void if, for any reason, it is not approved and entered by the Court. If
21 this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall
22 not be introduced into evidence or otherwise used in any proceeding for any purpose.

23 **8. SEVERABILITY**

24 If, subsequent to the entry of this Consent Judgment, any provision of this Consent
25 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
26 be adversely affected.

27 **9. GOVERNING LAW**

28 The terms of this Consent Judgment shall be governed by the laws of the State of

1 California and apply within the State of California. In the event that Proposition 65 is
2 repealed or is otherwise rendered inapplicable by reason of law generally, or as to the
3 Products, then Defendant may move for modification of the Consent Judgment and have the
4 Court approve the modification to relieve it of any further duties pursuant to the Consent
5 Judgment. Nothing in this Consent Judgment shall be interpreted to relieve Defendant from
6 any obligation to comply with any pertinent state or federal toxics control laws.

7 **10. NOTICES**

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

12 For Whitney Museum of American Art:

13 Nicholas S. Holmes
14 Whitney Museum of American Art
15 99 Gansevoort St.
New York, NY, 10014

16 With copy to:

17 Lauren Michals, Esq.
18 Nixon Peabody LLP
19 One Embarcadero Center, 32nd Floor
San Francisco, CA 94111

20 AND

21 For Michael DiPirro:

22 Jeremy Fietz, Attorney-at-Law
23 4241 Montgomery Drive, #123
Santa Rosa CA 95405

24 Any party may, from time to time, specify in writing to the other party a change of
25 address to which all notices and other communications shall be sent.

26 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

27 This Settlement Agreement may be executed in counterparts, and by facsimile or
28 portable document format (PDF) signature, each of which shall be deemed an original, and all

1 of which, when taken together, shall constitute one and the same document.

2 **12. POST-EXECUTION ACTIVITIES**

3 DiPirro agrees to comply with the reporting form requirements referenced in Health and
4 Safety Code section 25249.7(f) and to distribute the portion of the civil penalties owed to the
5 State of California. The Parties further acknowledge that, pursuant to Health & Safety Code
6 Section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement.
7 DiPirro's counsel shall prepare and file a Motion for Approval of this Consent Judgment. In
8 furtherance of obtaining such approval, DiPirro and Defendant agree to mutually employ their
9 best efforts, and that of their counsel, to support the entry of this agreement as a Consent
10 Judgment, and to obtain judicial approval of the settlement in a timely manner.

11 **13. MODIFICATION**

12 This Consent Judgment may be modified only by a written agreement of the parties to
13 this agreement and upon entry of a modified consent judgment by the Court thereon; or (ii)
14 upon a successful motion or application of any Party and the entry of a modified consent
15 judgment by the Court.

16 **14. BENEFICIARIES**

17 This Consent Judgment shall be binding upon and shall benefit the Parties and their
18 respective owners, principals, shareholders, members, managers, officers, directors, employees,
19 subsidiaries, customers, distributors, wholesalers, retailers, and their successors and assigns.

20 **15. RETENTION OF JURISDICTION**

21 This Court shall retain jurisdiction of this matter to implement or modify this Consent
22 Judgment.

23
24
25 ///

1 **16. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective parties and have read, understood and agree to all of the terms and conditions of
4 this Settlement Agreement.

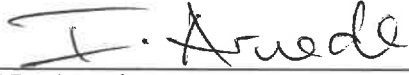
5
6 **AGREED TO:**

7 Date: March 31, 2025

8
9 By: 
10 Michael DiPirro

6 **AGREED TO:**

7 Date: April 1, 2025

8
9 By: 
10 I.D. Aruede
11 Deputy Director
12 Whitney Museum of American Art

