

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 Parties

This Settlement Agreement is entered into by and between The Earthly Way, Inc. (“The Earthly Way”) and Whitney R. Leeman, Ph.D. (“Leeman”), with Leeman and The Earthly Way collectively referred to as the “Parties” and individually as a “Party.” Leeman is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. .

#### 1.2 General Allegations

Leeman alleges that The Earthly Way has manufactured, distributed and/or sold in the State of California vinyl gloves containing concentrations of di(2-ethylhexyl)phthalate (“DEHP”) above the allowable state limits without the requisite warning under California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or other reproductive harm. The Earthly Way denies Leeman’s claims and maintains that Proposition 65 warnings are not required for the Products (as hereinafter defined).

#### 1.3 Product Description

The “Products” that are covered by this Settlement Agreement are defined as vinyl/PVC gloves including, but not limited to, the *Star Kitchen & Home True Blues The Ultimate Household Gloves* (UPC #7 22470 17659 6), manufactured, imported and/or distributed for sale in the State of California by The Earthly Way.

#### 1.4 Notice of Violation

On or about December 30, 2013, Leeman served The Earthly Way and various public enforcement agencies with a “60-Day Notice of Violation” (the “Notice”) that provided the recipients with notice of alleged violations of Proposition 65 based on The Earthly Way’s failure to warn consumers that the Products exposed users in the State of California to DEHP. To the

best of the Parties' knowledge, no public enforcer has prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

The Earthly Way denies all factual and legal allegations contained in Leeman's Notice, and maintains that all of the products it has sold and/or offered for sale in the State of California, including the Products, have been and are in compliance with all federal, state, or local laws. Nothing in this Settlement Agreement shall be construed as an admission by The Earthly Way 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 Earthly Way of any fact, finding, conclusion of law, issue of law or violation of law. However, this Section shall not diminish or otherwise affect The Earthly Way'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 the date on which it is fully executed by the Parties.

## **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION STANDARD**

### **2.1 Reformulation Standard**

Reformulated Products are defined as Products containing concentrations less than 0.1 percent (1000 parts per million) of DEHP, di-n-butyl ("DBP") and butyl benzyl phthalate ("BBP") in each Accessible Component when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance. For purposes of this Settlement Agreement, an Accessible Component refers to a component of a Product that could be touched by a person during normal and reasonably foreseeable use. By entering into this Settlement Agreement, the Parties do not intend to expand or restrict any obligations or responsibilities that may be imposed upon The Earthly Way by

laws other than Proposition 65, nor do the Parties intend this Settlement Agreement to affect any defenses available to The Earthly Way under laws other than Proposition 65.

**2.2 Vendor Notification Requirement**

To the extent it has not already done so, within thirty (30) days of the Effective Date, The Earthly Way shall provide the reformulation standard specified in Section 2.1 to each of its then-current Vendors of Products that will be sold or offered for sale to California citizens and shall instruct each Vendor to use reasonable efforts to provide Products that comply with the reformulation standard for Reformulated Products in Section 2.1 above. For purposes of this Settlement Agreement, the term “Vendor” means a person or entity that manufactures, imports, distributes, sells, or otherwise supplies the Products or component parts of the Products to The Earthly Way, its parents, assignees, subsidiaries and/or affiliated entities under common ownership.

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

In settlement of all the claims referred to in this Settlement Agreement, The Earthly Way shall pay a total of \$12,500 in accordance with this Section. Each 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 Leeman, as follows:

**3.1 Initial Civil Penalty**

The Earthly Way shall pay an initial civil penalty in the amount of \$2,500 within five (5) days of the Effective Date. The Earthly Way shall issue two separate checks made payable as follows: (a) “OEHHA” in the amount of \$1,875; and (b) “Whitney R. Leeman, Ph.D., Client Trust Account” in the amount of \$625. All penalty payments shall be delivered to the addresses listed in Section 3.5.1 below.

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### **3.2 Final Civil Penalty**

The Earthly Way shall pay a final civil penalty of \$10,000 on or before November 30, 2014. The final civil penalty shall be waived in its entirety if an officer of The Earthly Way provides Leeman with written certification that The Earthly Way has met and continues to meet the Reformulation Standard specified in Section 2.1 above such that all Products manufactured, produced, assembled, imported, distributed, shipped, sold or offered for sale in State of California as of the Effective Date and continuing into the future are Reformulated Products. Leeman must receive any such certification on or before November 15, 2014; time is of the essence.

If the Earthly Way does not provide a timely certification pursuant to this Section 3.2, then the Earthly Way shall issue two separate checks for the final civil penalty, with 75% of the funds remitted to OEHHA and 25% of the funds remitted to “Whitney R. Leeman, Ph.D., Client Trust Account” The Earthly Way shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing under this Section that are not received within two business days of the due date.

### **3.3 Reimbursement of Fees and Costs**

The Parties acknowledge that Leeman and her 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. Leeman 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 Leeman and her 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 Settlement Agreement. The Earthly Way shall pay \$22,000 for fees and costs incurred as a result of investigating, bringing this matter to The Earthly Way’s attention, and negotiating a settlement in the public interest. The Earthly Way shall tender a check payable to “The Chanler Group,” within five (5) days of the Effective Date.

**3.5 Payment Procedures**

**3.5.1 Issuance of Payments.** Payments shall be delivered as follows:

(a) All payments owed to Leeman and her attorneys pursuant to Sections 3.1 through 3.3, shall be delivered to the following payment address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

(b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections 3.1 through 3.2, 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

**3.5.2 Proof of Payment to OEHHA.** The Earthly Way shall mail a copy of each check payable to OEHHA, simultaneous with payment, to The Chanler Group at the address set forth in Section 3.5.1(a) above, as proof of payment to OEHHA.

**4. RELEASE OF ALL CLAIMS**

**4.1 Leeman's Release of The Earthly Way**

This Settlement Agreement is a full, final, and binding resolution between Leeman and The Earthly Way of any violation of Proposition 65 that was or could have been asserted by Leeman on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, against The Earthly Way, its parents, subsidiaries, affiliated entities under

common ownership (including Garden Works, Inc.), directors, officers, employees, attorneys and each entity to whom The Earthly Way directly or indirectly distributes or sells the Products including, but not limited to, downstream distributors, wholesalers, customers, franchisees, cooperative members, licensees and retailers including, but not limited to, Tuesday Morning Corporation, Tuesday Morning, Inc., and their present and former agents, attorneys, representatives, shareholders, directors, officers, and employees, and their respective predecessors, successors, parent, affiliates, and subsidiaries (collectively referred to as “Releasees”), based on the alleged failure to warn about potential exposures to DEHP contained in the Products distributed, sold and/or offered for sale by The Earthly Way in the State of California before the Effective Date as set forth in the Notice.

In further consideration of the promises and agreements herein contained, Leeman on behalf of herself, her 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 she may have against The Earthly Way and Releasees, including, without limitation, all actions, causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses including, but not limited to, investigation fees, expert fees, and attorneys’ fees (collectively, “Claims”) arising under Proposition 65 with respect to DEHP, DBP, or BBP in the Products distributed, sold and/or offered for sale by The Earthly Way before the Effective Date. The Earthly Way and Leeman, in her individual capacity only, and *not* in her representative capacity, agree that compliance by The Earthly Way with the terms of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to any DEHP, BBP, or DBP in the Products.

#### **4.2 The Earthly Way’s Release of Leeman**

The Earthly Way waives any and all claims against Leeman, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Leeman and her attorneys and other representatives, whether in the course of

investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter and/or with respect to the Products.

#### **4.3 The Parties' Mutual General Release**

It is the intention of the Parties that this Settlement Agreement shall be effective as a full accord and satisfaction and release of the claims released by Leeman pursuant to Section 4.1, above, and of the claims released by The Earthly Way pursuant to Section 4.2, above. In furtherance of this intention, the Parties are familiar with California Civil Code § 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Earthly Way and Leeman in her individual capacity only, and *not* in her representative capacity, acknowledge and understand the significance and consequences of this waiver of California Civil Code § 1542.

#### **5. POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve (12) months of the complete execution of this Settlement Agreement by the Parties, The Earthly Way may send Leeman a written request to draft and file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment with a release of claims for all Releasees provided by Leeman in a representative capacity in the public interest, and to seek court approval of this Settlement Agreement in the form of a consent judgment pursuant to California Health & Safety Code § 25249.7, or as may be otherwise allowed by law. If requested, Leeman agrees to reasonably cooperate with The Earthly Way and to use her best efforts, and that of her counsel, to obtain approval of the Parties' settlement by a Superior Court in California and an entry of judgment in accordance with the terms set forth herein.

Pursuant to California Code of Civil Procedure §§ 1021 and 1021.5, The Earthly Way will reimburse Leeman and her counsel for the reasonable fees and costs incurred in drafting and filing the complaint, converting this Settlement Agreement into a proposed consent judgment, and

seeking judicial approval of the settlement, in an amount not to exceed \$15,000, exclusive of fees and costs that may be incurred on any appeal of any such Court-approved consent judgment.

**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 and/or DEHP, then The Earthly Way shall provide written notice to Leeman 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, the Products are so affected.

**7. NOTICES**

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

For The Earthly Way:

Curt Bingham, President  
The Earthly Way, Inc.  
3680 SW 74th Ave.  
Ocala, FL 34474

With a copy to:

Sarah Esmaili  
Arnold & Porter LLP  
Three Embarcadero Center, 10th Floor  
San Francisco, CA 94111

For Leeman:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

Any 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.

**8. COUNTERPARTS; FACSIMILE/PDF 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. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

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

Lee man agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 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:**

Date: 5/6/14

By: Whitney R. Lee man  
Whitney R. Lee man, Ph.D.

**AGREED TO:**

Date: May 6, 2014

By: Curt Bingham  
Curt Bingham, President  
The Earthly Way, Inc.