

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Peter Englander ("Englander") and Prima Marketing Inc. ("Prima Marketing"), with Englander and Prima Marketing each individually referred to as a "Party" and, collectively, as the "Parties." Englander is 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. Prima Marketing employs ten or more individuals and 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

Englander alleges that Prima Marketing manufactures, imports, sells, and distributes for sale in California, cuffs or bracelets containing lead, and that it does so without first providing the health hazard warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

1.3 Product Description

The products covered by this Settlement Agreement are cuffs or bracelets containing lead that are manufactured, imported, sold, or distributed for sale in California by Prima Marketing, including, but not limited to, the *Ruby Violet by Lilla Rogers Reversible Cuff, Item #940768, UPC #6 55350 94076 8* (hereinafter, "Products").

1.4 Notice of Violation

On May 31, 2017, Englander served Prima Marketing, the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation ("Notice"), alleging that Prima Marketing violated Proposition 65 by failing to warn its customers and consumers in California of the health risks associated with exposures to lead from the

Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.5 No Admission

Prima Marketing denies the material, factual, and legal allegations in the Notice, and maintains that all of the products that it has manufactured, imported, sold, and 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 Prima Marketing 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 Prima Marketing of any fact, finding, conclusion, issue of law, or violation of law, the same being specifically denied by Prima Marketing. This Section shall not, however, diminish or otherwise affect Prima Marketing'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 February 7, 2018.

2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS

Commencing on the Effective Date and continuing thereafter, Prima Marketing agrees to only manufacture for sale, import for sale, sell, or distribute for sale, in or into California, Reformulated Products. For purposes of this Settlement Agreement, "Reformulated Products" are defined as Products that (a) contain lead in concentrations that do not exceed 90 parts per million ("ppm"), equivalent to 0.009%, in any exterior decorations, when analyzed pursuant to U.S. Environmental Protection Agency ("EPA") testing methodologies 3050B and 6010B; and (b) yield a result of no more than 1.0 micrograms of lead, when sampled and analyzed according to NIOSH 9100 protocol and analyzed according to EPA 6010B. In addition to the above test methodologies, the Parties may use equivalent methodologies utilized by a state or federal agency for the purpose of determining lead content in a solid substance.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Prima Marketing agrees to pay \$4,000 in civil penalties. Prima Marketing's penalty payment will be allocated in accordance with Health and Safety Code §§ 25249.12(c)(1) and (d), with 75% of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty amount retained by Englander. Prima Marketing shall delivery its payment within five days of the Effective Date in two checks for the following amounts and made payable to (a) "OEHHA" in the amount of \$3,000; and (b) "Peter Englander, Client Trust Account" in the amount of \$1,000. Englander's counsel shall be responsible for delivering OEHHA's portion of the penalties paid under this Settlement Agreement.

3.2 Attorneys' Fees and Costs

The parties acknowledge that Englander 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 the issue to be resolved after the other material terms of this Settlement Agreement. After the Parties reached an agreement as to all other settlement terms, the Parties then reached an accord on the compensation due to Englander 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 Settlement Agreement.

Under these legal principles, the Parties agree that Prima Marketing shall make three installment payments, as set forth in the following payment schedule, for a total of \$25,000, to Englander and his counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Prima Marketing's management, and negotiating a settlement in the public interest.

Within five days of the Effective Date, Prima Marketing shall make the first of its

three installment payments, in the amount of \$8,334, concurrent with the civil penalty payment, due under Section 3.1, *supra*. Prima Marketing shall make the final two installment payments, each in the form of a separate check in the amount of \$8,333, on or before each due date below:

- March 5, 2018; and
- April 4, 2018.

Prima Marketing's payments shall be delivered in the form of checks payable to "The Chanler Group."

3.3 Payment Address

All payments required by this Settlement Agreement shall be delivered to:

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

4. CLAIMS COVERED AND RELEASED

4.1 Englander's Release of Prima Marketing

This Settlement Agreement is a full, final, and binding resolution between Englander and Prima Marketing, of any violation of Proposition 65 that was or could have been asserted by Englander, on his own behalf, and on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Prima Marketing, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Prima Marketing directly or indirectly distributes or sells the Products including, but not limited, to its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensees, Tuesday Morning, Inc., Tuesday Morning Corporation, and Tuesday Morning Partners, Ltd. ("Releasees"), based on the alleged exposures to lead in Products manufactured, imported, sold or distributed for sale by Prima Marketing before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Englander, on his own behalf and on behalf of his past and current agents, representatives, attorneys,

successors, and assignees, hereby waives any and all rights that he may have to institute or participate in, directly or indirectly, any form of legal action, and releases all claims against Prima Marketing and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, claims, rights, judgments, duties, obligations, damages, costs, fines, penalties, losses, expenses, investigation fees, expert fees, and attorneys' fees for claims arising under Proposition 65 or any other statute or the common law with respect to the alleged or actual failure to warn about exposures to lead in Products imported, manufactured, distributed, sold or offered for sale by Prima Marketing, before the Effective Date, as alleged in the Notice.

The Parties agree that compliance with the terms of this Settlement Agreement by Prima Marketing shall be deemed to be compliance with Proposition 65 by Releasees with respect to any exposures to lead in Products manufactured, distributed or sold by Prima Marketing after the Effective Date.

The releases provided by Englander under this Settlement Agreement are provided solely on Englander's behalf and are not releases on behalf of the public in California.

4.2 Prima Marketing's Release of Englander

Prima Marketing, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Englander and his attorneys and other representatives, for any and all actions taken or statements made by Englander and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.3 Mutual Waiver of California Civil Code § 1542

The Parties each acknowledge he/it is familiar with §1542 of the Civil Code, 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 Parties, each on his/its own behalf, and on behalf of his/its past and current agents, representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon them by the provisions of Civil Code §1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits pertaining to the released matters, as specifically defined by Sections 4.1 and 4.2, above.

5. **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.

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 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Prima Marketing may provide written notice to Englander of any asserted change in the law, and 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 Prima Marketing:

Pom Chou, President
Prima Marketing Inc.
5564 Edison Avenue
Chino, CA 91710

For Englander:

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

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)

Englander and plaintiff's attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

10. MODIFICATION

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

11. 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: 2/9/2018

Date: 02-06-18

By:


PETER ENGLANDER

By:


Pom Chou, President
PRIMA MARKETING INC.