

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Whitney R. Leeman, Ph.D. (“Leeman”) and Marianna Industries, Inc. (“Marianna”), with Leeman and Marianna each individually referred to as a “Party” and collectively as the “Parties.” Leeman 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. Marianna 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

Leeman alleges that Marianna manufactures, sells, and distributes for sale in California, vinyl/PVC hoses containing di(2-ethylhexyl)phthalate (“DEHP”) and metal hose fittings containing Lead, and that it does so without first providing the health hazard warning required by Proposition 65. DEHP and lead are each listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

### 1.3 Product Description

The products covered by this Settlement Agreement are components of Marianna’s spray hoses including (i) vinyl/PVC hose or tubing components containing DEHP; and/or (ii) metal hose fittings containing lead that are manufactured, sold, or distributed for sale in California by Marianna including, but not limited to, the vinyl/PVC hose and metal fitting components of the *Mark IV Wonder Flow Shampoo Spray, Item No. 08518, #265900, UPC #6 66425 08518 5* (collectively “Products”).

### 1.4 Notice of Violation

On December 29, 2015, Leeman served Marianna, the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that



Marianna violated Proposition 65 when it failed to warn its customers and consumers in California of the health risks associated with exposures to DEHP and lead from the Products. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

### **1.5 No Admission**

Marianna denies the material, factual, and legal allegations in the Notice, and maintains that all of the products that it has manufactured, 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 Marianna 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 Marianna of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Marianna. This Section shall not, however, diminish or otherwise affect Marianna'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 July 1, 2016.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

### **2.1 Commitment to Reformulate or Provide Warnings**

Commencing on the Effective Date and continuing thereafter, Marianna agrees to only manufacture for sale, import for sale, or purchase for sale in California: (a) Reformulated Products as defined by Section 2.2, below; or (b) Products sold with a clear and reasonable warning in accordance with Section 2.3 below.

### **2.2 Reformulated Products**

"Reformulated Products" are defined as: (a) Products containing DEHP in a maximum concentration of 1,000 parts per million (.01%) in any component analyzed pursuant to U.S. Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C; **and** (b)

Products that (i) contain no more than 90 ppm lead content by weight when sampled and analyzed pursuant to EPA testing methodologies 3050B and 6010B and (ii) yield no more than 1.0 micrograms of lead when sampled according to NIOSH 9100 protocol and analyzed pursuant to EPA test methodology 6010B. In addition to the above-stated test protocols, the Parties may use equivalent methods utilized by state or federal agencies for the purpose of measuring DEHP and/or lead content in a solid substance.

### **2.3 Clear and Reasonable Warnings**

Commencing on the Effective Date and continuing thereafter, for any Products sold or distributed for sale in California by Marianna that are not Reformulated Products, Marianna will only offer such Products for sale with a clear and reasonable warning in accordance with this Section. Marianna further agrees that any warning used will be prominently placed in relation to the Product with such conspicuousness when 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 of purchase or use. For purposes of this Settlement, a clear and reasonable warning for the Products satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying labeling or packaging sold in California containing one of the following statements, as appropriate:

**WARNING:** This product contains DEHP, a chemical known to the State of California to cause birth defects or other reproductive harm.

Or

**WARNING:** This product contains Lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

Or



**WARNING:** This product contains Lead and DEHP, chemicals known to the State of California to cause birth defects or other reproductive harm.

In the event that Marianna sells Products via an internet website to customers located in California, the warning requirements of this Section shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, provided that the warning statement also appears elsewhere on the same web page and a consumer is reasonably likely to understand which product(s) on the website are associated with the warning symbol.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Marianna agrees to pay \$12,000 in civil penalties in accordance with this Section. Each 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 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by Leeman. Leeman’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment(s) made under this Settlement Agreement to OEHHA.

##### **3.1.1 Initial Civil Penalty**

Within five days of the Effective Date, Marianna shall make an initial civil penalty payment of \$3,000. Marianna shall provide its payment in two checks made payable to: (a) “Whitney R. Leeman, Client Trust Account” in the amount of \$750; and (b) “OEHHA” in the amount of \$2,250.

### **3.1.2 Final Civil Penalty; Waiver**

On February 1, 2017, Marianna will make a final civil penalty payment of \$9,000. Pursuant to title 11 Cal. Code Regs. section 3203(c), the final civil penalty will be waived in its entirety if, by January 15, 2017, an officer of Marianna provides Leeman's counsel with signed declaration certifying that, as of the date of the declaration, all Products Marianna is shipping for sale, or distributing for sale in California are Reformulated Products, and that Marianna will continue to offer only Reformulated Products in California in the future. The option to provide a declaration certifying complete reformulation in lieu of making the final civil penalty payment required by this Section is a material term, and time is of the essence.

### **3.2 Attorneys' Fees and Costs**

The Parties reached an accord on the compensation due to Leeman and her 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, within five days of the Effective Date, Marianna agrees to pay \$22,000 to Leeman and her counsel for all fees and costs incurred investigating, bringing this matter to the attention of Marianna's management, and negotiating the terms of this Settlement Agreement. Marianna's payment shall be delivered in the form of a check 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 Leeman's Release of Marianna**

This Settlement Agreement is a full, final, and binding resolution between Leeman and Marianna, of any violation of Proposition 65 that was or could have been asserted by Leeman on her own behalf or on behalf of her past and current agents, representatives, attorneys, successors,



and assignees, against Marianna, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Marianna directly or indirectly distributes or sells Products, including, but not limited, to its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (“Releasees”), based on the failure to warn about exposures to DEHP and/or Lead in Products manufactured, sold or distributed for sale in California by Marianna before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Leeman on her own behalf and on behalf of her past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all rights that she may have to institute or participate in, directly or indirectly, any form of legal action, and releases all claims against Marianna and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys’ fees arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP and/or Lead in Products manufactured, distributed, sold or offered for sale by Marianna, before the Effective Date.

The releases provided by Leeman under this Settlement Agreement are provided solely on Leeman’s behalf and are not releases on behalf of the public.

#### **4.2 Marianna’s Release of Leeman**

Marianna, 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 Leeman and her attorneys and other representatives, for any and all actions taken or statements made, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

**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 Marianna may provide written notice to Leeman 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 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 Marianna:

Ben LaCrosse, CFO  
Marianna Industries, Inc.  
11222 I Street  
Omaha, NE 68130

with a copy to:

Dana P. Palmer, Esq.  
McGuireWoods LLP  
1800 Century Park East, 8th Floor  
Los Angeles, CA 90067

For Leeman:

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)**

Leeman and her 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. 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: 6/30/16

Date: June 27 2016

By:   
WHITNEY R. LEEMAN, PH.D.

By:   
Ben LaCrosse, CFO  
MARIANNA INDUSTRIES, INC.