

## AMENDED SETTLEMENT AGREEMENT

This Amended Settlement Agreement is entered into between Plaintiff David Machlan (“Plaintiff”), on the one hand, and Nehemiah Manufacturing Company LLC (“Nehemiah”) and The Procter & Gamble Company (“P&G”), collectively “Defendants”, on the other hand. This Agreement supersedes the Settlement Agreement executed by the parties and filed with the Court on October 14, 2016.

### **I. RECITALS**

1.1. On March 21, 2014, Plaintiff filed a complaint against Defendants in the Superior Court of California, County of San Francisco (“State Court”), Case No. GCG 14-538168. Plaintiff alleged that Defendants had marketed and sold two brands of pre-moistened wipes products with the representation “flushable,” when such wipes were not suitable for flushing down the toilet. Plaintiff alleged claims for violations of the California Consumer Legal Remedies Act (“CLRA”), false advertising under California Business and Professions Code sections 17500, *et seq.*; and unfair business practices under California Business and Professions Code sections 17200, *et seq.*; and misrepresentation. Plaintiff sought to pursue these claims on behalf of himself and all purchasers of the two wipes in California between March 21, 2010 and the present.

1.2. On April 29, 2014, Defendants jointly removed the action to the United States District Court for the Northern District of California (“District Court”), where it was assigned the case number 3:14-cv-01982-JD and assigned to the Honorable James Donato. Case No. CGC 14-538168 pending in the State Court and Case Number 3:14-cv-01982-JD pending in the District Court are jointly referred to as the “Litigation.”

1.3. On June 18, 2014, each Defendant filed a motion to dismiss the complaint in the District Court. Defendants argued, *inter alia*, that Plaintiff lacked standing to seek injunctive relief; that Plaintiff lacked standing to sue about any wipes other than the Kandoo® wipes; and that P&G was not a proper defendant in this case because it had licensed the Kandoo® wipes to Nehemiah in 2009 and sold the Kandoo® brand to Nehemiah in 2013, and accordingly Kandoo® wipes were not a P&G product during the putative class period. Plaintiff opposed both motions.

1.4. On January 6, 2015, the District Court issued an order granting in part and denying in part Defendants' motions to dismiss. In particular, the District Court dismissed all claims regarding wipes other than Kandoo® wipes, declined to dismiss the remaining claims against P&G, and severed and remanded to the State Court Plaintiff's claim for injunctive relief. The claims remanded to State Court were assigned for all purposes to the Honorable Mary E. Wiss.

1.5. Defendants deny all of Plaintiff's allegations and all charges of wrongdoing or liability against them arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged against either or both of them, in the Litigation. In particular, Nehemiah contends, and P&G concurs, that all versions of the Kandoo® wipes marketed or sold as "flushable" have indeed been suitable for flushing and compliant with appropriate industry standards. P&G contends that it licensed the Kandoo® wipes product to Nehemiah in 2009, sold the Kandoo® brand to Nehemiah in 2013, and accordingly lacked any type of relevant control or authority over Kandoo® wipes during the putative class period, including but not limited to how the product was designed, manufactured, packaged, labeled, and marketed. Defendants also deny that the Litigation meets the requirements for certification as a

class action, except for purposes of settlement, or that the evidence is sufficient to support a finding of liability or monetary or equitable relief to Plaintiff or any member of the Settlement Class.

1.6. During the Litigation, Defendants produced to Plaintiff's Counsel over 240,000 pages of documents. Plaintiff's counsel also deposed eight of Defendants' employees and requested and received written discovery responses from Defendants and several third parties.

1.7. Since the filing of the Litigation, the Parties have engaged in several rounds of settlement discussions. On February 26, 2016, the State Court ordered the parties to attend a settlement conference with the Honorable Curtis E. A. Karnow. That conference was held on April 1, 2016. Subsequent settlement conferences with Judge Karnow were held on May 19 and August 4, 2016. There also were multiple written and telephonic communications between the Parties and Judge Karnow. On August 23, 2016, the Parties agreed to the material terms of a settlement, as more fully set forth in this Agreement.

1.8. The undersigned Parties agree, subject to approval by the State Court, that the Litigation between Plaintiff, on the one hand, and Defendants, on the other hand, shall be fully and finally compromised, settled and released on the terms and conditions set forth in this Agreement.

1.9. Plaintiff's Counsel has analyzed and evaluated the merits of all Parties' contentions and this Settlement as it affects all Parties and the Settlement Class Members. Among the risks of continued litigation are the possibility that the State Court and/or District Court will not certify the case as a class action; that summary judgment will be entered against

Plaintiff and the class; and/or that Plaintiff will be unable to prove liability, damages or entitlement to injunctive relief at trial on a classwide or individual basis.

1.10. Plaintiff and Plaintiff's Counsel, after taking into account the foregoing, along with the risks and costs of further litigation, are satisfied that the terms and conditions of this Agreement are fair, reasonable, adequate, and equitable, and that a settlement of the Litigation and the prompt provision of effective relief to the Settlement Class are in the best interests of the Settlement Class Members.

1.11. Defendants, while continuing to deny all allegations of wrongdoing and disclaiming any liability with respect to any and all claims, consider it desirable to resolve the Litigation on the terms stated herein, in order to avoid further expense, inconvenience, and interference with ongoing business operations, and to dispose of burdensome litigation. Therefore, Defendants have determined that settlement of this Litigation on the terms set forth herein is in their best interests.

1.12. This Agreement is contingent upon the issuance by the State Court of both Preliminary Approval and Final Approval. Should the State Court not issue Preliminary Approval and Final Approval, Defendants do not waive, and instead expressly reserve, their rights to defend this Litigation, including, *inter alia*, challenging the continuation of this case as a class action and the sufficiency and propriety of all claims alleged.

1.13. This Agreement reflects a compromise between the Parties, and shall in no event be construed as or be deemed an admission or concession by any Party of the truth, or lack thereof, of any allegation or the validity, or lack thereof, of any purported claim or defense asserted in any of the pleadings or filings in the Litigation, or of any fault on the part of any Defendant, and all such allegations are expressly denied. Nothing in this Agreement shall

constitute an admission of liability or be used as evidence of liability, by or against any Party hereto.

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein, and of the releases and dismissals of claims described below, the Parties agree to this Agreement, subject to State Court approval, under the following terms and conditions:

## **II. DEFINITIONS**

Capitalized terms in this Agreement shall be defined as follows:

2.1. “Agreement” means this Amended Settlement Agreement, including all exhibits hereto.

2.2. “Business” means any school, day-care center, child-care center, firm, business, corporation, partnership, association, proprietorship, organization, or any other legal or business entity.

2.3. “Claim Administrator” means Heffler Claims Group, unless another third-party administrator is later agreed to by the Parties in writing and approved by the State Court.

2.4. “Claim Filing Deadline” means twenty-eight (28) days prior to the initially scheduled hearing date on Final Approval.

2.5. “Claim Form” means a form in substantially the same form as Exhibit A hereto.

2.6. “Claim Period” means the period beginning on the Notice Date and continuing until the Claim Filing Deadline.

2.7. “Class Period” means March 21, 2010 to the date of Preliminary Approval.

2.8. “Class Representative” means Plaintiff David Machlan.

2.9. “District Court” means the United States District Court for the Northern District of California.

2.10. “Court of Appeal” means the California Court of Appeal for the First Appellate District.

2.11. “Effective Date” means the later of: (i) 60 days after entry of Final Approval or (ii) if an appeal is filed, but the Final Approval is affirmed or the appeal is dismissed, the date upon which the Court of Appeal issues its remittitur.

2.12. “Email Notice” means the State Court-approved abbreviated form of notice to Settlement Class Members in substantially the same form as Exhibit B2.

2.13. “Escrow Account” means the settlement fund account as described in Section 6.4 of this Agreement.

2.14. “Excluded Persons and Businesses” are (1) the Honorable Judges James Donato, Mary E. Wiss, and Curtis E. A. Karnow; (2) any member of their immediate families; (3) any governmental entity, district, or agency; (4) Nehemiah; (5) P&G; (6) any entity in which Nehemiah or P&G has a controlling interest; (7) any of Defendants’ subsidiaries, parents, affiliates, and officers, directors, employees, legal representatives, heirs, successors, or assigns; and (8) any Persons or Businesses who timely exclude themselves from the Settlement Class.

2.15. “Exclusion Deadline” means twenty-eight (28) days prior to the initially scheduled hearing date on Final Approval.

2.16. “Final Approval” means issuance of an order granting final approval of this Agreement as binding upon the Parties; holding this Agreement to be final, fair, reasonable, adequate, and binding on all Settlement Class Members who have not excluded themselves as

provided below; ordering that the settlement relief be provided as set forth in this Agreement; ordering the releases as set forth in Part VIII, below; and entering judgment in this case.

2.17. “Household” means any number of Persons occupying the same dwelling unit.

2.18. “Litigation” means *Machlan v. Procter & Gamble Co., et al.*, State Court Case No. CGC 14-538168, and District Court Case No. 3:14-cv-01982-JD, collectively.

2.19. “Long Form Notice” means the State Court-approved form of notice to Settlement Class Members in substantially the same form as Exhibit B1.

2.20. “Nehemiah” means Nehemiah Manufacturing Company LLC, a Delaware corporation.

2.21. “New Formulation Kandoo Wipes” means the Products using the new substrate formulation, which Nehemiah began to ship in or around July 2015.

2.22. “Notice Date” means the day on which the Claim Administrator initiates the Email Notice.

2.23. “Objection Deadline” means twenty-eight (28) days prior to the initially scheduled hearing date on Final Approval.

2.24. “Online Advertisement Notices” means the State Court-approved forms of notice to Settlement Class Members in substantially the same form as Exhibit B3.

2.25. “P&G” means The Procter & Gamble Company, an Ohio corporation.

2.26. “Parties” means Plaintiff and Defendants, collectively.

2.27. “Party” means any one of Plaintiff, Nehemiah or P&G.

2.28. “Person(s)” means, without limitation, any natural person.

2.29. “Plaintiff” means David Machlan.

2.30. “Plaintiff’s Counsel” means the law firm of Gutride Safier LLP.

2.31. “Preliminary Approval” means issuance of an order, granting preliminary approval to this Agreement as within the range of possible Final Approval; approving Class Notice to the Settlement Class Members as described in Part V below; and setting a hearing to consider Final Approval of the settlement and any objections thereto.

2.32. “Products” means any pre-moistened wipes bearing the word “flushable” and the brand name “Kandoo®” on the package label. (For avoidance of doubt, this definition includes flushable wipes that bear two or more brand names on the package label, as long as at least one of the brand names is “Kandoo®.”)

2.33. “Proof of Purchase” means an itemized retail sales receipt or retail store club or loyalty card record showing, at a minimum, the purchase of a Product, the purchase price, and the date and place of the purchase.

2.34. “Released Claims” means the claims released as set forth in Sections 8.1 through 8.3 of this Agreement.

2.35. “Released Parties” means each of the Defendants and each and all of their respective predecessors in interest, former, present and future direct and indirect subsidiaries, divisions, parents, successors, and affiliated companies and each and all of their respective present and former officers, directors, shareholders, successors, partners, employees, agents, representatives, suppliers, resellers, retailers, wholesalers, distributors, customers, insurers, assigns, servants, attorneys, assignees, heirs, and executors, whether specifically named and whether or not participating in the settlement by payment or otherwise.

2.36. “Settlement Benefit” means the benefits provided to Settlement Class Members as set forth in Section 4.4 of this Agreement.



2.37. “Settlement Class” or “Settlement Class Members” means all Persons and Businesses who, on or after March 21, 2010 and before the date of Preliminary Approval, purchased, in California, other than for purpose of resale, any pre-moistened wipes bearing the word “flushable” and the brand name “Kandoo®” on the package label. (For avoidance of doubt, this includes flushable wipes that bear two or more brand names on the package label, as long as at least one of the brand names is “Kandoo®.”)

2.38. “Settlement Website” means an internet website created and maintained by the Claim Administrator. The URL of the Settlement Website shall be “www.calwipeselement.com”.

2.39. “State Court” means the Superior Court of California, County of San Francisco.

2.40. “Valid Claim” means a claim submitted in compliance with Part IV of this Agreement, and as further described in that Part.

### **III. CHANGED PRACTICES AND INJUNCTIVE RELIEF**

3.1. Plaintiff and Nehemiah agree that in or around July 2015, in part as a result of the Litigation, Nehemiah modified the formulation of the substrate (i.e., the paper) used in its Products by adopting the New Formulation Kandoo Wipes. Nehemiah contends, and Plaintiff and his expert have confirmed, that when placed in water and subjected to sloshing forces, the New Formulation Kandoo Wipes deteriorate and disperse in significantly less time than the prior formulation of the Products.

3.2. Nehemiah represents that as a result of this Litigation, and prior to the date of the original Settlement Agreement (October 14, 2016), it began to change the labels and the

marketing of its Products to remove the phrases “sewer safe” and “septic safe” and to add the warning: “Flush only 1-2 wipes at a time. Use only in well-maintained toilets, drain lines, sewer lines and septic systems.” Nehemiah further represents that (1) prior to the date of Preliminary Approval, it designed systems such that Nehemiah will not ship, for distribution in California, Products bearing the previously existing labels and (2) it will have implemented those systems prior to the date of Final Approval.

3.3. Nehemiah agrees that, for a period beginning on the Effective Date and continuing for two years thereafter, it shall be enjoined by the State Court:

(a) Not to market as “flushable” or distribute for sale in California the formulation of the Products that was being sold prior to the introduction of the New Formulation Kandoo Wipes;

(b) To Not to use, on labeling and marketing of any Products intended for sales in California, the phrases “sewer safe,” “septic safe,” or substantially similar language;

(c) To include, on the labeling of all Product packages intended for sale in California, the following warning: “Flush only 1-2 wipes at a time. Use only in well-maintained toilets, drain lines, sewer lines and septic systems.”

3.4. For avoidance of doubt, the distribution or sales by third parties of residual Products provided to such third parties by Nehemiah prior to Final Approval shall not constitute a violation of this Agreement or the injunction issued pursuant hereto.

3.5. Neither this Settlement nor the injunction issued pursuant hereto shall be interpreted to impose any limitations on the future marketing or sale of the Products except as expressly set forth in section 3.3. Similiarly, neither this Settlement nor the injunction issued

pursuant hereto shall be interpreted to impose any limitations on the composition, manufacture, marketing, labeling, advertising, and/or sale of any product or products other than those falling within the definition of “Products” set forth in section 2.32.

3.6. Nothing in this Part III shall be interpreted to interfere with Defendants’ obligations to comply with all applicable state and federal laws, including, without limitation, the Federal Trade Act, or to respond to any enforcement actions issued thereunder by the Federal Trade Commission.

#### **IV. SETTLEMENT BENEFITS AND CLAIMS ADMINISTRATION**

4.1. Every Settlement Class Member shall have the right to submit a claim for Settlement Benefits. A claim shall be a Valid Claim only if submitted on the Claim Form pursuant to, and in compliance with, the procedures set forth herein. Submission of a claim, regardless of whether it is determined to be a Valid Claim, shall confer no rights or obligations on any Party, any Settlement Class Member, or any other Person or Business, except as expressly provided herein.

4.2. At the election of the Settlement Class Member, Claim Forms may be submitted in paper via first class mail or online at the Settlement Website. Claim Forms must be mailed such that they are received by the Claim Administrator (not just postmarked) or submitted online no later than the Claim Filing Deadline, and Claim Forms received or submitted online after that date will not be Valid Claims.

4.3. On the Claim Form, the Settlement Class Member must certify the truth and accuracy of the following under the penalty of perjury, or the claim will not be considered a Valid Claim:

- (a) The Settlement Class Member's name and physical address;
- (b) The Settlement Class Member's email address, if the Settlement

Class Member elects to provide the information;

- (c) The number of Products purchased during the Class Period; and
- (d) That the claimed purchases were not made for purposes of resale.

4.4. Each Settlement Class Member who submits a Valid Claim shall receive a refund of One Dollar (\$1.00) for each Product package purchased in California during the Class Period, regardless of the price the class member paid for the package or the number of wipes contained in each package, subject to the following limitations:

- (a) Proof of Purchase is not required to obtain the refund for up to 10 Product packages purchased (i.e., refund up to \$10.00).

- (b) Proof of Purchase is required to obtain the refund of more than \$10.00 (i.e., for more than 10 Product packages purchased).

- (c) A maximum of \$50.00 will be paid to any Household or Business.

4.5. The Claim Administrator shall be responsible for processing Claim Forms and administering the Settlement Website, exclusion process, and Settlement Benefit claims process described herein. If any claim is submitted by a Person or Business from an IP or postal address outside the State of California, or if the claim requests delivery of a settlement payment to an address outside the State of California, the Claim Administrator may, in its discretion, require the claimant to provide additional information or documentation to substantiate the location in California where the Products were purchased. For online purchases, a purchase shall be deemed in California if the Products were delivered to a California address.

4.6. No later than fourteen (14) days prior to the hearing on Final Approval, the Claim Administrator shall provide a declaration to the Court regarding the number and dollar amount of claims received.

4.7. The determination of claims shall occur within sixty (60) days of the end of the Claim Period. The Claim Administrator shall approve or deny all claims, and its decision shall be final and binding, except that Plaintiff's Counsel and Defendants shall have the right to audit claims and to challenge the Claim Administrator's decision by motion to the State Court. Plaintiff's Counsel's or Defendants' choice not to audit the validity of any one or more Claim Forms shall not constitute or be construed as a waiver or relinquishment of any audit or other rights as to any other Claim Forms, individually or as a group, and similarly shall not be construed as a waiver or relinquishment by the Party as to any of its audit and other rights under this Agreement. No Person or Business shall have any claim against Plaintiff, Defendants, Plaintiff's Counsel, Defendants' counsel or the Claim Administrator based on any determination of a Valid Claim, distributions or awards made in accordance with this Agreement and the Exhibits hereto.

4.8. Within thirty (30) days after the Effective Date, the Claim Administrator shall email all Settlement Class Members whose claims are denied to state the reasons for denial, at the email address (if any) provided by the Settlement Class Member on the Claim Form. If no email address is provided by the Settlement Class Member on the Claim Form, the Administrator shall not have an obligation to provide the Settlement Class Member any notification of the denial of the claim or the reasons for denial.

4.9. Valid Claims shall be paid by direct deposit into the Settlement Class Member's bank account, if the Settlement Class Member elects direct deposit and provides a

valid bank account number. In all other cases, Valid Claims shall be paid by check to the Settlement Class Member and mailed to the address provided on the Claim Form, as updated in the National Change of Address Database. All Valid Claims shall be paid by the Claim Administrator within sixty (60) days after the Effective Date except that, in the event of an appeal from Final Approval that challenges only the award of attorneys' fees, costs and expenses and/or the payment to the Class Representative and does not challenge any other aspect of the settlement, all Valid Claims shall be paid within ninety (90) days after Final Approval, unless otherwise ordered by the State Court.

4.10. All settlement checks shall be subject to a one hundred eighty (180) day void period, after which the checks shall no longer be negotiable. If a settlement check is not negotiated within this period, the Settlement Class Member shall not be entitled to any further payment under this Agreement.

4.11. No deductions for taxes will be taken from any Settlement Benefit at the time of distribution. Settlement Class Members are responsible for paying all taxes due on such Settlement Benefits. All Settlement Benefit payments shall be deemed to be paid solely in the year in which such payments are actually issued. Counsel do not purport to provide legal advice on tax matters. To the extent this Agreement, or any of its exhibits or related materials, is interpreted to contain or constitute advice regarding any U.S. Federal or any state tax issue, such advice is not intended or written to be used, and cannot be used, by any Person or Business for the purpose of avoiding penalties under the Internal Revenue Code or any state's tax laws.

4.12. Nehemiah shall bear all fees and expenses incurred by the Claim Administrator as well as the cost of paying Valid Claims. P&G shall have no liability or other obligation for the payment of any fees or expenses of the Claims Administrator; nor shall P&G

be responsible for the payment of any Valid Claim, Settlement Benefits, or any other amounts incurred by or on behalf of, or owed to, any Person or Business in connection with this Agreement.

## **V. NOTICE**

5.1. Prior to the Notice Date, the Claim Administrator shall establish the Settlement Website, which shall contain the Long Form Notice in both downloadable PDF format and HTML format with a clickable table of contents; answers to frequently asked questions; a Contact Information page that includes the address for the Claim Administrator and addresses and telephone numbers for Plaintiff's Counsel and Defendants' Counsel; the Agreement; the signed order of Preliminary Approval; a downloadable and online version of the Claim Form; a downloadable and online version of the form by which Settlement Class Members may exclude themselves from the Settlement Class; and (when it becomes available) Plaintiff's application for attorneys' fees, expenses and/or a payment to the Class Representative.

5.2. Not later than seven (7) days following Preliminary Approval, Nehemiah shall provide the Claim Administrator with information that is in its customer service and e-commerce databases regarding the names and email addresses of any Settlement Class Members.

5.3. As soon as reasonably practicable, but not later than fourteen (14) days following Preliminary Approval, the Claim Administrator shall send the Email Notice via electronic mail to each Settlement Class Member at the email address provided by the Parties.

5.4. The Settlement Website shall remain accessible until one hundred eighty (180) days after all Settlement Benefits are distributed.

5.5. The Claim Administrator shall purchase approximately \$50,000 (worth six (6) million impressions) of online notice via Conversant and/or Facebook advertisements,

substantially in the form of Exhibit B3, which shall be directed at likely Settlement Class Members. To the extent reasonably practicable, advertisements shall be targeted to California residents who, based on demographic and other information reasonably available to the Claim Administrator, are most likely to have purchased the Products during the Class Period. Such advertisements shall be delivered in both personal computer (e.g., desktop and laptop) and mobile (e.g. smart phone and tablet) formats and shall hyperlink to the Settlement Website. They shall be run during the period from fourteen (14) to thirty-five (35) days after Preliminary Approval. In addition, fourteen (14) days following Preliminary Approval, a press release regarding the settlement, substantially in the form of Exhibit C, shall be distributed on the PR Newswire-California wire service (including the Hispanic PR Wire – California Hispanic Circuit), which is designed to reach more than 500 California newspapers, magazines, radio stations, and television stations.

5.6. Plaintiff shall have the obligation to supervise the Claim Administrator in the performance of the notice functions set forth in this Part V. Nehemiah shall pay all costs of notice as set forth in this Part V. P&G shall have no obligation to pay any notice costs or to supervise or participate in the notice process.

5.7. At least fourteen (14) days prior to the final approval hearing referenced in Part VII of this Agreement, Nehemiah and the Claim Administrator shall certify to the State Court that they have complied with the notice requirements set forth herein.

## **VI. ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE PAYMENT**

6.1. Attorneys' Fees, Costs, and Expenses. No later than forty-two (42) days prior to the initially scheduled hearing on Final Approval, Plaintiff's Counsel may apply to the State Court for an award from Nehemiah of their attorneys' fees and expenses in a total amount



not to exceed \$650,000. Plaintiff's Counsel shall seek no fees, costs, expenses, or other amounts from P&G, which shall have no liability for any awards made against Nehemiah.

6.2. Class Representative Payment. No later than forty-two (42) days prior to the initially scheduled hearing on Final Approval, the Class Representative may additionally apply to the State Court for a payment from Nehemiah of up to \$5,000 as compensation for (a) the time and effort undertaken in and risks of pursuing this Litigation, including the risk of liability for the Parties' costs of suit, and (b) the general release set forth in Section 8.2.

6.3. Defendants agree not to oppose or to submit any evidence or argument challenging or undermining Plaintiff's application for attorneys' fees, costs, expenses, or a payment to the Class Representative. Defendants shall not be in violation of this term if their attorneys provide the State Court with evidence, including evidence of their lodestars, that is specifically requested by the State Court; however, no Party shall prompt or encourage such a request. The attorneys' fees and expenses awarded by the State Court as set forth under Section 6.1 shall be the total obligation of Defendants to pay attorneys' fees and expenses of any kind to Plaintiff's Counsel in connection with this Litigation and this Settlement. Any payment awarded to the Class Representative by the State Court as set forth in Section 6.2 shall be the total obligation of Defendants to pay money to any Plaintiff, in connection with the Litigation and this Settlement, other than amounts due to any Plaintiff for any Valid Claims submitted pursuant to Part IV of this Agreement. Plaintiff's Counsel and Plaintiff agree that the denial, downward modification or failure to grant the request for attorneys' fees, costs or a payment to the Class Representative shall not constitute grounds for modification or termination of the Settlement.

6.4. Within ten (10) days following Final Approval of the Settlement, and an award of fees, costs and/or a payment to the Class Representative or his counsel, Nehemiah will

pay to the Claim Administrator the amount of fees, costs and payments awarded, and the Claim Administrator shall deposit that amount into a neutral, insured, interest-bearing qualified settlement fund account (“Escrow Account”). So long as the principal balance of the Escrow Account is preserved, Plaintiff’s Counsel shall have the right to designate the escrow agent and to provide instructions regarding the investment of funds contained in the Escrow Account. The banking and administration fees, if any, shall be paid from the Escrow Account.

6.5. The balance of the Escrow Account, including accrued interest, returns and dividends, shall be paid to Plaintiff and Plaintiff’s Counsel within seven (7) days of the Effective Date, in proportion to the amounts awarded, respectively, to Plaintiff as a payment for his service as a Class Representative and to Plaintiff’s counsel as fees and costs. If Final Approval is reversed on appeal, then the balance of the Escrow Account, including accrued interest, returns and dividends, shall be returned to Nehemiah. If Final Approval is not reversed on appeal but the award of fees, costs or a payment to the Class Representative is reversed in whole or in part on appeal, then the Claim Administrator shall distribute the balance of the Escrow Account consistent with the instructions of the appellate court and the State Court upon remand.

## **VII. CLASS SETTLEMENT PROCEDURES**

7.1. Dismissal of District Court Action. The Parties have agreed to and filed a Joint Stipulation dismissing without prejudice the District Court Action.

7.2. Amendment of State Court Complaint. Within three (3) days of the execution of this Agreement, the Parties shall sign, and Plaintiff shall file in the State Court, a stipulation that Plaintiff be granted leave to file a Second Amended Complaint. The stipulation

shall provide that Defendants' deadlines and any other obligations to respond to the Second Amended Complaint shall be held in abeyance and shall be triggered only upon the denial of Preliminary Approval or Final Approval of settlement of this action or upon issuance of a remittur reversing an award of Final Approval. Defendants waive any rights they may have, and will not seek, to remove the case to the District Court upon filing of the Second Amended Complaint, except that Defendants shall retain any right that may exist to remove the case and/or to challenge the Second Amended Complaint on any otherwise applicable ground if the State Court does not approve the Agreement, or the settlement reflected in this Agreement is not fully concluded and made final for any other reason.

7.3. Settlement Approval. As soon as practicable after the signing of this Agreement, Plaintiff shall move for an order granting Preliminary Approval to this Agreement as within the range of possible Final Approval; approving Class Notice to the Settlement Class Members as described in Part V above; and setting a hearing to consider Final Approval of the settlement and any objections thereto. Defendants shall have no obligation to make separate filings in support of the motion. Defendants shall appear at the hearing to confirm their agreement with the terms of the settlement as provided herein.

7.4. Final Approval Order and Judgment. No later than forty-two (42) days prior to the hearing on Final Approval, Plaintiff shall move for entry of an order of Final Approval, granting Final Approval of this Settlement and holding this Agreement to be final, fair, reasonable, adequate, and binding on all Settlement Class Members who have not excluded themselves as provided below, and ordering that the settlement relief be provided as set forth in this Agreement, ordering the releases as set forth in Part VIII, below, and entering judgment in this case. Defendants shall have no obligation to make separate filings in support of the motion.

Defendants shall appear at the hearing to confirm their agreement with the terms of the settlement as provided herein.

7.5. Exclusions and Objections. The Long Form Notice and the Email Notice shall advise prospective Settlement Class Members of their rights to forego the benefits of this Settlement and pursue an individual claim; to object to this Settlement individually or through counsel; and to appear at the final approval hearing.

7.6. If any Settlement Class Member wishes to object to the settlement, the Settlement Class Member must submit a written objection to the Claim Administrator. The written objection may be submitted by mail, express mail, electronic transmission, or personal delivery, but to be timely, it must be *received by* the Claim Administrator (not just postmarked or sent) prior the Objection Deadline. Each objection must include the name, address and telephone number of the Settlement Class Member; shall provide documents or testimony sufficient to establish membership in the Settlement Class; and shall provide a detailed statement of any objection asserted, including the grounds therefor and reasons, if any, for requesting the opportunity to appear and be heard at the final approval hearing. Failure to include documents or testimony sufficient to establish membership in the Settlement Class shall be grounds for overruling the objection on grounds that the objector lacks standing to make the objection. Failure to include any of the information set forth in this paragraph also shall be grounds for overruling an objection.

7.7. If any Settlement Class Member wishes to be excluded from (in other words, opt out of) this Settlement, the Settlement Class Member may do so by completing the exclusion form at the Settlement Website; downloading and submitting to the Claim Administrator a completed exclusion form; or submitting a valid request to exclude themselves,

as described in the Notice, to the Claim Administrator. Requests to exclude themselves must be *received by* the Claim Administrator (not just postmarked) by the Exclusion Deadline or they shall not be valid. A Settlement Class Member who elects to exclude themselves from this Settlement shall not be permitted to object to this Settlement or to intervene.

7.8. The proposed Preliminary Approval order and Long Form Notice will provide that any Settlement Class Member wishing to object or exclude themselves who fails to properly or timely file or serve any of the requested information and/or documents will be precluded from doing so.

7.9. Immediately upon receipt of any objection, the Claim Administrator shall forward to the objection and all supporting documentation to counsel for the Parties. At least fourteen (14) days prior to the hearing on Final Approval, Plaintiff's Counsel shall file all such objections and supporting documentation with the State Court.

7.10. At least fourteen (14) days prior to the hearing on Final Approval, the Claim Administrator shall prepare a list of the names of the Persons and Businesses who, pursuant to the Long Form Notice, have excluded themselves from the Settlement Class in a valid and timely manner, and Plaintiff's Counsel shall file that list with the State Court.

7.11. If a Settlement Class Member submits both a Claim Form and an exclusion request, the Claim Form shall take precedence and be considered valid and binding, and the exclusion request shall be deemed to have been sent by mistake and rejected.

7.12. A Settlement Class Member who objects to the settlement may also submit a Claim Form on or before the Claim Filing Deadline, which shall be processed in the same way as all other Claim Forms. A Settlement Class Member shall not be entitled to an

extension to the Claim Filing Deadline merely because the Settlement Class Member has also submitted an objection.

7.13. Effect if Settlement Not Approved or Agreement is Terminated. This Agreement was entered into only for purposes of settlement. In the event that Preliminary or Final Approval of this settlement and this Agreement does not occur for any reason, or if Final Approval is reversed on appeal, then no term or condition of this Agreement, or any draft thereof, or discussion, negotiation, documentation, or other part or aspect of the Parties' settlement discussions shall have any effect, nor shall any such matter be admissible in evidence for any purpose in the Litigation, or in any other proceeding; and the Litigation shall continue as if the settlement had not occurred. The Parties agree that all drafts, discussions, negotiations, documentation or other information prepared in relation to this Agreement, and the Parties' settlement discussions, shall be treated as strictly confidential and may not, absent a court order, be disclosed to any Person other than the Parties' counsel, and only for purposes of the Litigation.

## **VIII. RELEASES**

8.1. Nature of Release. To the extent set forth in Sections 8.2 and 8.3 below, the obligations incurred by Defendants pursuant to this Agreement shall be a full and final disposition and settlement of all claims, actions, suits, obligations, debts, demands, rights, causes of action, liabilities, controversies, costs, expenses, and attorneys' fees, known or unknown, which actually were, or could have been, asserted in the Litigation against either or both of them, whether individual, class, representative, legal, equitable, administrative, direct or indirect, or any other type or in any other capacity, all of which shall be finally and irrevocably

compromised, settled, released, and discharged with prejudice, as set forth in Sections 8.2 and 8.3 below.

8.2. Release Regarding Plaintiff and Released Parties. Upon Final Approval, Plaintiff (for purposes of this Section 8.2, Plaintiff includes Plaintiff and his agents, assigns, attorneys and members of his family) on the one hand, and the Released Parties on the other hand, shall mutually release and forever discharge each other from and shall be forever barred from instituting, maintaining, or prosecuting:

(a) any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that actually were, or could have been, asserted in the Litigation, based upon any violation of any state or federal statutory or common law or regulation, and any claim arising directly or indirectly out of, or in any way relating to, the claims that actually were, or could have been, asserted in the Litigation, that Plaintiff, on the one hand, and either or both Defendants, on the other hand, have had in the past, or now have, related in any manner to the Released Parties' products, services or business affairs;

(b) any and all other claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, whether legal or equitable or otherwise, known or unknown, that Plaintiff, on the one hand, and either or both Defendants, on the other hand, have had in the past or now have, related in any manner to any and all Released Parties' products, services or business affairs, or otherwise. Plaintiff and Defendants expressly understand and acknowledge that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. Plaintiff and Defendants explicitly took that into account in entering into this Agreement, and a portion of the

consideration and the mutual covenants contained herein, having been bargained for between Plaintiff and Defendants with the knowledge of the possibility of such unknown claims, were given in exchange for a full accord, satisfaction, and discharge of all such claims. Consequently, Plaintiff and Defendants expressly waive all provisions, rights and benefits of California Civil Code section 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). **Section 1542 provides:**

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”**

(c) Each and every term of this Section shall be binding upon, and inure to the benefit of Plaintiff and the Released Parties, and any of their successors and personal representatives, which Persons and Businesses are intended to be beneficiaries of this Section.

8.3. Release Regarding Settlement Class Members and Released Parties.

(a) Upon Final Approval, Settlement Class Members (except any such Person or Business that has filed a proper and timely request for exclusion from the Settlement Class) shall release and forever discharge the Released Parties from any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever, known or unknown, whether arising under any international, federal, state or local statute, ordinance, common law, regulation, principle of equity or otherwise, that arise out of or relate to purchases of the Products in California and were, or could have been, asserted in the Litigation regarding (a) the flushability or (b) the safety for sewer and septic of the Products and statements concerning their (a) flushability or (b) safety for sewer and septic, **except that there shall be no**



**release of claims for personal injury or property damage allegedly caused by use of the Products.** As part of this Release, the Settlement Class Members agree that consideration provided under this Agreement, including the Injunctive Relief set forth in Part III of the Agreement, satisfies and resolves all allegations in the Litigation relating to deceptive labeling and advertising of the Products during the Class Period as “flushable” and “sewer or septic safe.”

(b) With respect **only to the released claims set forth in Section 8.3(a)**, each Settlement Class Member shall be deemed to have waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of California Civil Code section 1542 (and equivalent, comparable, or analogous provisions of the laws of the United States or any state or territory thereof, or of the common law). **Section 1542 provides:**

**“A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.”**

(c) Each and every term of this Section shall be binding upon the Settlement Class Members and any of their successors and personal representatives, and inure to the benefit of the Released Parties, and any of their successors and personal representatives, who are intended to be beneficiaries of this Section.

(d) The Parties shall be deemed to have agreed that the release set forth herein will be and may be raised as a complete defense to and will preclude any action or proceeding based on the Released Claims.

(e) Nothing in this Section 8.3 shall operate to bar or release any claim for personal injury or property damage (for example, costs of plumbing repairs) arising out of the

use of the Products, nor shall anything in this Section 8.3 operate to bar any defense, cross-claim or counter-claim in any action initiated by any of the Released Parties against any Settlement Class Member.

8.4. Effectuation of Settlement. None of the above releases include releases of causes of action to enforce the terms of the Settlement.

8.5. No Admission of Liability. This Agreement reflects, among other things, the compromise and settlement of disputed claims among the Parties hereto, and neither this Agreement nor the releases given herein, nor any consideration therefor, nor any actions taken to carry out this Agreement are intended to be, nor may they be deemed or construed to be, an admission or concession of liability, or the validity of any claim, or defense, or of any point of fact or law (including but not limited to matters respecting class certification) on the part of any Party. Defendants expressly deny the allegations of the complaints in the Litigation. Neither this Agreement, nor the fact of settlement, nor the settlement proceedings, nor settlement negotiations, nor any related document, shall be used as an admission of any fault or omission by the Released Parties, or be offered or received in evidence as an admission, concession, presumption, or inference of any wrongdoing by the Released Parties in any proceeding, other than such proceedings as may be necessary to consummate, interpret, or enforce this Agreement.

## **IX. ADDITIONAL PROVISIONS**

9.1. Best Efforts. Subject to the limitations expressed herein, the Parties' counsel shall use their best efforts to cause the State Court to give Preliminary Approval to this Agreement and settlement as promptly as practicable, to take all steps contemplated by this Agreement to effectuate the settlement on the stated terms and conditions, and to obtain Final Approval of this Agreement.

9.2. Changes of Time Periods; Termination Rights. The time periods and/or dates described in this Agreement with respect to the giving of notices and hearings are subject to approval and change by the State Court or by the written agreement of Plaintiff's Counsel and Defendants' Counsel, without notice to Settlement Class Members except that the Claim Administrator shall ensure that such dates are posted on the Settlement Website. All other terms and limitations set forth in this Agreement and in the documents referred to or incorporated herein (including but not limited to the Long Form Notice, the Email Notice, the Online Notice and the Claim Form) shall be deemed material to the Parties' agreement, and in the event any such other term is altered or amended by the State Court, District Court, or any other court, any Party whose rights or obligations are affected by the alteration or amendment may terminate this Agreement upon written notice provided within ten (10) business days of the court's order or five (5) business days of receipt of actual notice of the court's order, whichever is later. In the event the Parties wish to negotiate a possible amendment to this Agreement in lieu of termination, the time period for such Notice of Termination may be extended pursuant to written consent of all the Parties.

9.3. Time for Compliance. If the date for performance of any act required by or under this Agreement falls on a Saturday, Sunday or court holiday, that act may be performed on the next business day with the same effect as if it had been performed on the day or within the period of time specified by or under this Agreement.

9.4. Governing Law. This Agreement is intended to and shall be governed by the laws of the State of California, without regard to conflicts of law principles.

9.5. Entire Agreement. The terms and conditions set forth in this Agreement constitute the complete and exclusive statement of the agreement between the Parties hereto

relating to the subject matter of this Agreement, superseding all previous negotiations and understandings, and may not be contradicted by evidence of any prior or contemporaneous agreement. The Parties further intend that this Agreement constitutes the complete and exclusive statement of its terms as between the Parties hereto, and that no extrinsic evidence whatsoever may be introduced in any agency or judicial proceeding, if any, involving this Agreement. Any amendment or modification of the Agreement must be in writing signed by each of the Parties and their counsel.

9.6. Advice of Counsel. The determination of the terms of, and the drafting of, this Agreement have been by mutual agreement after negotiation, with consideration by and participation of all Parties hereto and their counsel. The presumption found in California Civil Code section 1654 that uncertainties in a contract are interpreted against the party causing an uncertainty to exist is hereby waived by all Parties.

9.7. Binding Agreement. This Agreement shall be binding upon and inure to the benefit of the respective heirs, successors and assigns of the Parties hereto.

9.8. No Waiver. The waiver by any Party of any provision or breach of this Agreement shall not be deemed a waiver of any other provision or breach of this Agreement.

9.9. Execution in Counterparts. This Agreement shall become effective upon its execution by all of the undersigned. The Parties may execute this Agreement in counterparts and/or by fax or electronic mail, and execution of counterparts shall have the same force and effect as if all Parties had signed the same instrument.

9.10. Captions. Captions and section numbers herein are inserted merely for the reader's convenience, and in no way define, limit, construe, or otherwise describe the scope or intent of the provisions of this Agreement.

9.11. Extensions of Time. The Parties reserve the right, by agreement and subject to the State Court's approval, to grant any reasonable extension of time that might be needed to carry out any of the provisions of this Agreement.

9.12. Enforcement of this Agreement. The State Court shall retain jurisdiction to enforce, interpret, and implement this Agreement.

9.13. Plaintiff to be Included in Settlement Class. Plaintiff hereby agrees not to request to exclude himself or otherwise be excluded from the Settlement Class. Any such request shall be void and of no force or effect.

9.14. Notices. All notices to the Parties or counsel required by this Agreement, shall be made in writing and communicated by mail and fax or email to the following addresses:

If to Plaintiff or Plaintiff's Counsel:

Adam Gutride, Esq.  
Seth Safier, Esq.  
Kristen Simplicio, Esq.  
Gutride Safier LLP  
100 Pine Street, Suite 1250  
San Francisco, CA 94111  
Telephone: (415) 639-9090  
Fax: (415) 449-6469  
Email: adam@gutridesafier.com, seth@gutridesafier.com,  
kristen@gutridesafier.com

If to Nehemiah's Counsel:

William C. Wilka  
Dudnick Detwiler Rivin & Stikker LLP  
351 California St., 15th Floor  
San Francisco, CA 94104  
Telephone: (415) 982-1400  
Facsimile: (415) 982-1401  
Email: bwilka@ddrs.com

If to P&G's Counsel:

Emily Johnson Henn, Esq.  
Cortlin H. Lannin, Esq.  
Covington & Burling LLP  
333 Twin Dolphin Drive, Suite 700  
Redwood Shores, CA 94061  
Telephone: (650) 632-4700  
Fax: (650) 632-4800  
Email: ehenn@cov.com, clannin@cov.com

IN WITNESS HEREOF the undersigned, being duly authorized, have caused this Agreement to be executed on the dates shown below and agree that it shall take effect on the last date it is executed by all of the undersigned.

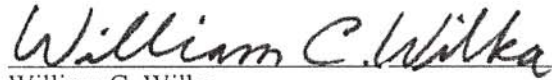
**APPROVED AS TO FORM:**

DATED: December \_\_, 2016      GUTRIDE SAFIER LLP

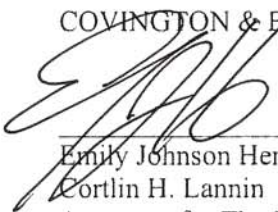
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Adam Gutride  
Seth A. Safier  
Kristen Simplicio  
Attorneys for Plaintiff

DATED: December 7, 2016      DUDNICK DETWILER RIVIN & STIKKER LLP

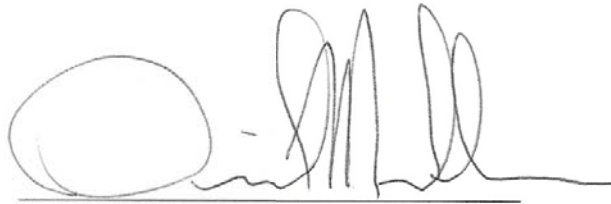
  
William C. Wilka  
Attorneys for Nehemiah Manufacturing Company, LLC

DATED: December 8, 2016      COVINGTON & BURLING LLP

  
Emily Johnson Henn  
Cortlin H. Lannin  
Attorneys for The Procter & Gamble Company

**APPROVED AND AGREED:**

DATED: December 7, 2016



David Machlan

DATED: December \_\_, 2016

NEHEMIAH MANUFACTURING COMPANY, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

: DATED: December \_\_, 2016

THE PROCTER & GAMBLE COMPANY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**APPROVED AND AGREED:**

DATED: December \_\_, 2016

\_\_\_\_\_  
David Machlan

DATED: December 7, 2016

NEHEMIAH MANUFACTURING COMPANY, LLC

By: \_\_\_\_\_  
*Richard Palmer*

Name: Richard Palmer

Its: President

DATED: December \_\_, 2016

THE PROCTER & GAMBLE COMPANY

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_



**APPROVED AND AGREED:**

DATED: December \_\_, 2016

\_\_\_\_\_  
David Machlan

DATED: December \_\_, 2016

NEHEMIAH MANUFACTURING COMPANY, LLC

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

DATED: December 7, 2016

THE PROCTER & GAMBLE COMPANY

By: Ken Patel

Name: KEN PATEL

Its: VICE PRESIDENT & GENERAL COUNSEL