

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between the California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and Brush And Pencil, LLC (Brush And Pencil), with its principal location at 25005 Hudson Knoll Drive, Porter, Texas 77365 (collectively, the "Parties," or individually, "Party").

LEGAL BACKGROUND

- (1) **Purpose.** The California Health and Safety Code mandates CARB adopt regulations to achieve the maximum feasible reduction in volatile organic compounds (VOCs) and Reactive Organic Compounds (ROCs) in consumer products. (Health & Saf. Code § 41712.)
- (2) **Regulation.** CARB adopted the *Regulation for Reducing the Ozone Formed from Aerosol Coating Product Emissions* (Aerosol Coating Regulation) to reduce ROCs from aerosol coating products. (Cal. Code Regs., tit.17, §§ 94520 et seq.)
- (3) **Regulatory Provisions.** Any person who sells, supplies, offers for sale, applies, or manufactures for use in California, any aerosol coating products shall comply with the standards set forth in the Aerosol Coating Regulation, including the reactivity or ozone limits; prohibitions on products containing ozone depleting substances, methylene chloride, perchloroethylene, or trichloroethylene; labeling; reporting; dating; and other administrative requirements. (Cal. Code Regs., tit.17, §§ 94520–94526.) If anywhere on the container of any aerosol coating product, the manufacturer represents that the product may be used or is suitable for a specific use in which a lower limit applies, the lowest applicable limit shall apply. (Cal. Code Regs., tit.17, § 94524(a).)
- (4) **Penalty Provisions.** Failure to comply with the regulatory requirements is a violation of state law that may result in penalties up to ten thousand four hundred seventy dollars (\$10,470) for strict liability violations; twenty-six thousand one hundred seventy-five dollars (\$26,175) for negligent violations; and forty-one thousand eight hundred eighty dollars (\$41,880) for failing to take corrective action, and seventy-eight thousand five hundred twenty-five dollars (\$78,525) for willful and intentional violations, respectively, for each day in which the violation occurs. (Cal. Code Regs., tit.17, § 94507 et seq.; Health & Saf. Code §§ 39674, 39675, 42400 et seq., 42402 et seq., 42402.1, 42402.2, 42402.3, and 42410.)

CASE BACKGROUND

- (5) **Corporate Entity.** At all relevant times, Brush And Pencil was organized under the laws of Texas as a limited liability company and conducted business in California.

- (6) Allegations. This Settlement Agreement settles Notice of Violation (NOV) AE21-07-01, which was issued on July 20, 2021. CARB alleged Brush And Pencil violated the Aerosol Coating Regulation by selling, supplying, offering for sale, applying, or manufacturing for use in California, Advanced Colored Pencil Textured Fixative and failing to properly label the product as outlined in Notice of Violation AE21-07-01. CARB alleges that if the allegations described in Paragraph 6 were proven, civil penalties could be imposed against Brush And Pencil for each and every day the noncompliant product was offered for sale or manufactured for use in California.
- (7) Acknowledgment. Brush And Pencil admits to the facts in Paragraphs 5 and 6, but denies any liability resulting from said allegations.
- (8) Consideration. In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Settlement Agreement. In order to resolve the violations described herein, Brush And Pencil has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, CARB accepts this Settlement Agreement in termination and full settlement of this matter.

TERMS AND CONDITIONS

In consideration of CARB not filing a legal action against Brush And Pencil for the alleged violations referred to above in Paragraph 6, and in consideration of Brush And Pencil's agreement to complete all terms and conditions set forth below, CARB and Brush And Pencil agree as follows:

- (9) Settlement Amount. Brush And Pencil shall pay a civil penalty of one thousand five hundred dollars (\$1,500.00 USD). Brush And Pencil shall make all payments in accordance with the payment schedule in Paragraph 10 (Payment Plan and Schedule).
- (10) Payment Plan and Schedule. Pursuant to this Settlement Agreement, Brush And Pencil shall make payments below.

Payment Due Date:	In the Amount Of and Payable To:
30 days after Brush And Pencil is notified of full execution of the settlement agreement	\$500.00 California Air Resources Board

60 days after Brush And Pencil is notified of full execution of the settlement agreement	\$500.00	California Air Resources Board
90 days after Brush And Pencil is notified of full execution of the settlement agreement	\$500.00	California Air Resources Board

- (11) Civil Penalty Payment Method. Brush And Pencil shall pay the civil penalty by check, credit card, wire transfer, or portal, payable to CARB, using instructions provided separately by CARB in a Payment Transmittal Form. Brush And Pencil is responsible for all payment processing fees. Payments shall be accompanied by the Payment Transmittal Form to ensure proper application. CARB shall deposit the civil penalty amount into the Air Pollution Control Fund for the purpose of carrying out CARB's duties and functions to ensure the integrity of its air pollution control programs. Should payment instructions change, CARB will provide notice to Brush And Pencil in accordance with Paragraph 14 (Notices).
- (12) Acceleration. If any payment is more than thirty (30) calendar days late from the payment schedule deadline, the entire remaining balance is accelerated to become due and payable immediately without notice or demand.
- (13) Documents. Brush And Pencil shall promptly email or mail the signed and dated Settlement Agreement to the address or email in Paragraph 14 (Notices).
- (14) Notices. Unless otherwise specified in this Settlement Agreement, whenever notifications, submissions, or communications are required by this Settlement Agreement, they shall be submitted in writing to the address or email below:

As to CARB:

California Air Resources Board
Enforcement Division / Settlement Agreements
Vehicle, Parts, and Consumer Products Enforcement Branch / Consumer
Products Enforcement Section
P.O. Box 2815
Sacramento, California 95812-2815
Settlement_Agreement@arb.ca.gov

As to Brush And Pencil:
Brush And Pencil, LLC
25005 Hudson Knoll Drive
Porter, Texas 77365
alyona@brushandpencil.com

Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. Notices submitted pursuant to this section shall be deemed submitted upon emailing or mailing.

- (15) Recovery of Costs. If the Attorney General files a civil action to enforce this Settlement Agreement, Brush And Pencil shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorneys' fees, and costs.
- (16) Repeat Violations. Brush And Pencil agrees to comply with all regulatory requirements and acknowledges that repeat violations could result in increased penalties in the future.
- (17) Entirety. This Settlement Agreement constitutes the entire agreement and understanding between the Parties concerning the Case Background and supersedes and replaces any and all prior negotiations and agreements of any kind, whether written or oral, between the Parties concerning the Case Background hereof. This Settlement Agreement consists of 7 pages and 34 paragraphs.
- (18) Binding Effect. This Settlement Agreement binds Brush And Pencil, and any principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations and CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Settlement Agreement.
- (19) Effective Date. The effective date shall be the date upon which this Settlement Agreement is fully executed.
- (20) Modification and Termination. No agreement to modify, amend, extend, supersede, terminate, or discharge this Settlement Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all Parties to this Settlement Agreement.

- (21) Severability. Each provision of this Settlement Agreement is severable, and in the event that any provision of this Settlement Agreement is held to be illegal, invalid or unenforceable in any jurisdiction, the remainder of this Settlement Agreement remains in full force and effect.
- (22) Choice of Law. This Settlement Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (23) Non-Discharge. It is further agreed that the penalties described in this Settlement Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.
- (24) Not Tax Deductible. For purposes of this Settlement Agreement, Brush And Pencil shall not deduct any monies spent to comply with any provision of this Settlement Agreement in calculating and submitting its federal, state, or local income tax.
- (25) Rules of Construction. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Settlement Agreement.
- (26) Non-Waiver. The failure to enforce any provision of this Settlement Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Settlement Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Settlement Agreement or otherwise provided by law.
- (27) Intent to be Bound. The Parties represent that: They have participated fully in the review and drafting of this Settlement Agreement; understand and accept all terms; enter into this Settlement Agreement freely and voluntarily; have had an opportunity to consult with legal counsel; are fully informed of the terms and effect of this Settlement Agreement; have agreed to this Settlement Agreement after independent investigation and agree it was not arrived at through fraud, duress, or undue influence; and knowingly and voluntarily intend to be legally bound by this Settlement Agreement.
- (28) Venue. The Superior Court of California, located in the County of Sacramento, shall hear any dispute between the Parties arising from this Settlement Agreement.

- (29) Counterparts and Electronic Signatures. This Settlement Agreement may be executed in counterparts. Electronic, facsimile or photocopied signatures shall be considered as valid signatures.
- (30) Release. In consideration of the full completion of civil penalty, and all other undertakings above, CARB hereby releases Brush And Pencil and its principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations, from any claims CARB may have based on the circumstances described in all paragraphs contained in the Case Background above.
- (31) Authority. The undersigned represents that he or she has full authority to enter into this Settlement Agreement.

PENALTY BASIS

- (32) Per Unit Penalty. The strict liability per unit penalty in this case is a maximum of ten thousand four hundred seventy dollars (\$10,470.00) per violation per day under Health and Safety Code section 42400 et seq., 38580 for violations of the Aerosol Coating Regulation.
- (33) Aggravating and Mitigating Factors. The penalties in this matter were determined in consideration of all relevant circumstances, including statutory factors as described in CARB's Enforcement Policy. CARB considered whether the violator came into compliance quickly and cooperated with the investigation; the extent of harm to public health, safety and welfare; nature and persistence of the violation; compliance history; preventative efforts taken; innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods; efforts to attain, or provide for, compliance prior to violation; action taken to mitigate the violation; financial burden to the violator; voluntary disclosure; and any other relevant circumstances. The penalties are set at levels sufficient to deter violations, to remove any economic benefit or unfair advantage from noncompliance, to obtain swift compliance, and the potential costs, risks, and uncertainty associated with litigation. Penalties in future cases might be smaller or larger depending on the unique circumstances of the case.
- (34) Confidential Business Information. CARB may have based this penalty in part on confidential business information provided by Brush And Pencil and or confidential settlement communications.

ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

Signature: /S/

Name: Todd P. Sax, D.Env.

Title: Chief, Enforcement Division

Date: 10/29/2021

Brush And Pencil, LLC

Signature: /S/

Name: Alyona Nickelsen

Title: owner

Date: 10/21/2021