

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN LIP BALM PRODUCTS,
CONTAINERS FOR LIP BALM, AND
COMPONENTS THEREOF**

Inv. No. 337-TA-961

**ORDER No. 9: INITIAL DETERMINATION GRANTING MOTION TO
TERMINATE ORALABS BASED ON SETTLEMENT
AGREEMENT**

(August 31, 2015)

INTRODUCTION

On August 28, 2015, Complainants eos Products, LLC and The Kind Group LLC moved, pursuant to 19 C.F.R. § 210.21(b), to terminate the investigation as to Respondent OraLabs, Inc. based on a settlement agreement. (Motion Docket No. 961-004.) None of the parties opposes Complainants' motion.

STANDARDS OF LAW

Under Commission Rule 210.21(a)(2),

[a]ny party may move at any time for an order to terminate an investigation in whole or in part as to any or all respondents on the basis of a settlement, a licensing or other agreement.

19 C.F.R. § 210.21(a)(2).

Commission Rule 210.21(b)(1) further specifies that the motion to terminate must include: (1) copies of the licensing or other settlement agreement; (2) any supplemental agreements; and (3) a statement that there are no other agreements, written or oral, express or implied, between the parties concerning the subject matter of the investigation. 19 C.F.R. § 210.21(b)(1).

Pursuant to Commission Rule 210.50(b)(2), I must also consider and make appropriate findings regarding the effect of the proposed termination on the public interest. 19 C.F.R. § 210.50(b)(2).

DISCUSSION

Complainants' motion to terminate was publicly filed and included an unredacted copy of the settlement agreement with OraLabs (Exhibit 1, hereto). Complainants have also represented that "there are no other agreements, written or oral, express or implied, between Complainants and OraLabs concerning the subject matter of this Investigation." (*See* Complainants' Mot. at 2.) Accordingly, I find that the requirements of Commission Rule 210.50(b)(1) have been met.

With regard to the public interest, I do not find any information indicating that termination of this investigation on the basis of the settlement agreement is contrary to the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, or U.S. consumers. To the contrary, I find that termination of Respondent OraLabs is in the public interest and will conserve public and private resources. *See, e.g., Certain Consumer Elecs., Including Mobile Phones and Tablets*, Inv. No. 337-TA-839, Order No. 35, 2013 WL 453756, *2 (Feb. 4, 2013) ("[T]ermination of litigation under these circumstances as an alternative method of dispute resolution is generally in the public interest and will conserve public and private resources.").

CONCLUSION

Accordingly, for the reasons above, it is my Initial Determination to GRANT Complainants' motion to terminate (Motion Docket No. 961-004), and Respondent OraLabs is hereby terminated from this investigation.

This Initial Determination, along with any supporting documentation, is hereby certified to the Commission. Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Thomas B. Pender", written over a horizontal line.

Thomas B. Pender
Administrative Law Judge

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into and effective on the date of last signature hereof ("Effective Date") between **The Kind Group LLC** and **eos Products, LLC** (collectively, "EOS"), each a New York corporation having its principal place of business at 19 W. 44th Street, Suite 811, New York, New York 10036, and **OraLabs, Inc.** ("OraLabs"), a Colorado corporation having its principal place of business at 18685 East Plaza Drive, Parker, Colorado 80134. EOS and OraLabs are sometimes referred to individually as a "Party" and collectively as the "Parties."

WHEREAS, the Parties are presently involved in (i) *OraLabs, Inc. v. The Kind Group LLC*, Civil Action 1:13-cv-00170-PAB-KLM (D. Colo.) ("Colorado Litigation"); (ii) *eos Products, LLC v. OraLabs, Inc.*, Civil Action No. 1:15-cv-00453-GMS (D. Del.) ("Delaware Litigation"); (iii) *Certain Lip Balm Products, Containers for Lip Balm, and Components Thereof*, United States International Trade Commission Investigation No. 337-TA-961 ("ITC Litigation"); and (iv) *In the Matter of Trademark Application Serial No. 85/974,868*, Opposition No. 91218755 in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board ("Opposition") (collectively, "Litigations"), which Litigations are now pending; and

WHEREAS, the Parties hereto desire to settle the Litigations and enter into this Agreement solely as a settlement between the Parties.

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, EOS and OraLabs agree to the following terms and conditions:

1. Definitions. As used in this Agreement:

- (a) **"Mounded Lip Balm"** means any lip balm packaging wherein the lip balm as sold extends above the top surface of the open container.
- (b) **"Non-Mounded Lip Balm"** means any lip balm packaging wherein the lip balm as sold is at or below the top surface of the open container.
- (c) **"Primary Packaging"** means the container that holds the lip balm.
- (d) **"Secondary Packaging"** means packaging in which the Primary Packaging is positioned for sale at retail.

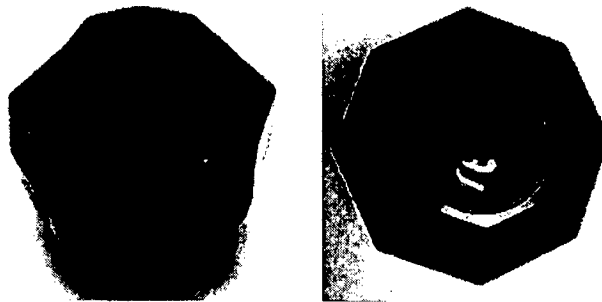
2. Prohibited and Permitted Products.

(a) OraLabs agrees that it shall not make, have made, use, sell, offer for sale, advertise, market, distribute, export or import (i) any substantially egg-shaped Primary Packaging or components thereof of any size, or (ii) any Mounded Lip Balm products or components intended for Mounded Lip Balm products of any size, anywhere in the world, including but not limited to the products depicted below (collectively, **"Prohibited Products"**):

Figure 1: Exemplary Prohibited Lip Balm Items



(LEFT TO RIGHT) (i) smooth shape Lip Revo regular size, (ii) smooth shape Lip Revo mini size, (iii) COVERGIRL® without upper portion and (iv) Twist & Pout® without upper portion;

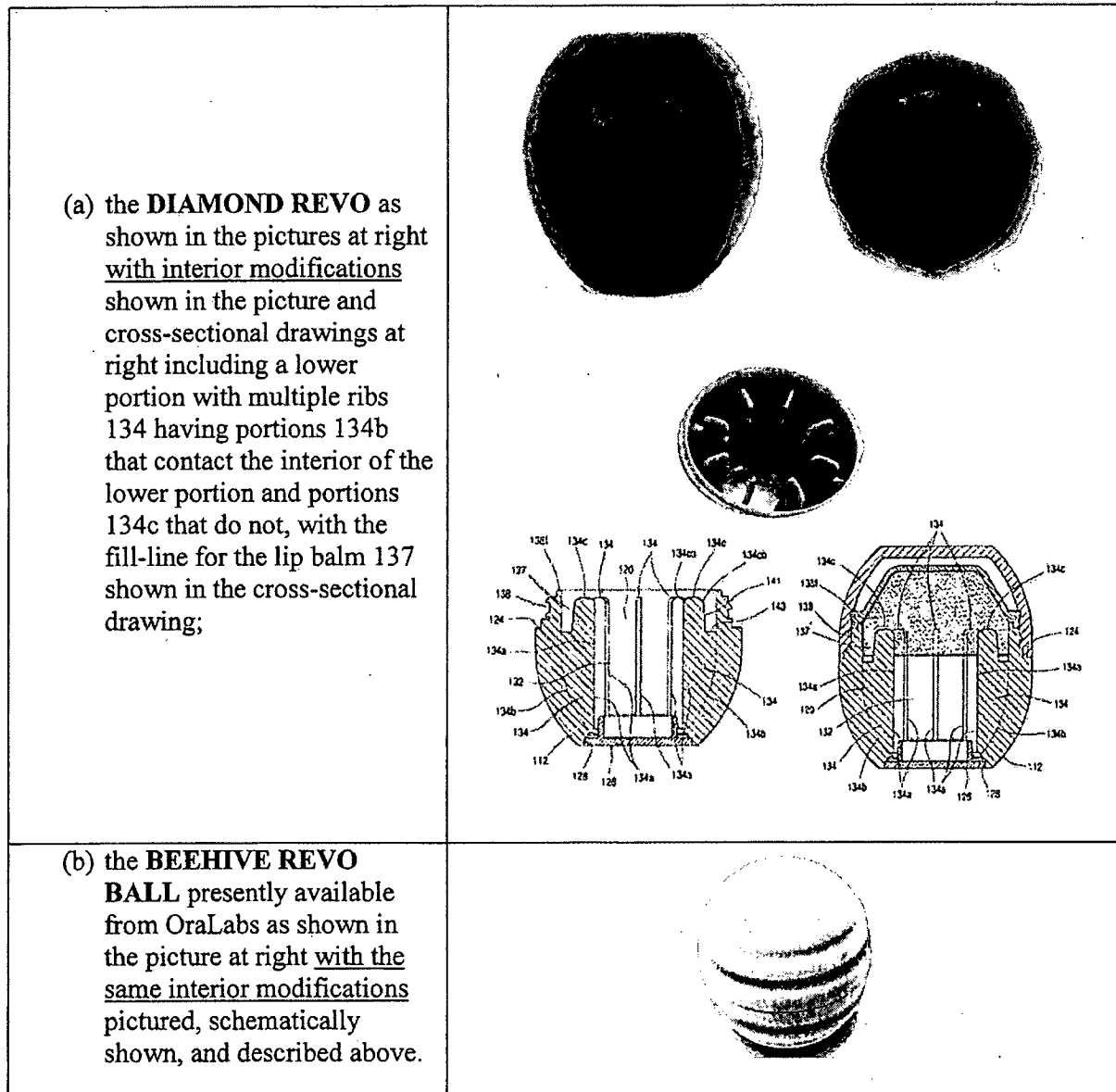


(v) Flat Diamond Revo (two views)

(b) Notwithstanding the foregoing, OraLabs may make, cause to be made, use, sell, offer for sale, advertise, market, and import the spherical Twist & Pout lip balm product with a Mounded Lip Balm (illustrated in Fig. 1, above, on the right) ("Allowed Product"), anywhere in the world until October 31, 2015. After that date, the Twist & Pout product with Mounded Lip Balm is a Prohibited Product.

(c) Notwithstanding the above prohibitions, and despite their egg shape, OraLabs may make, cause to be made, use, sell, offer for sale, advertise, market, and import the two Mounded Lip Balm products pictured and described below ("Permitted Products"). For the sake of clarity, a Non-Mounded Lip Balm product in the Primary Packaging pictured below constitutes a Prohibited Product.

Figure 2: Permitted Products



3. Permitted Shape and Size of Lip Balm Mound. The Permitted Products shall only include a lip balm mound that is identical in shape and size to the mound presently included in the regular-sized versions of the Permitted Products as shown by the images below:

Figure 3: Shape of Lip Balm Mound



4. Permitted Color of Lip Balm Mound. The Permitted Products shall only include a lip balm mound that has a color other than white or off-white (e.g., the off-white color shown above with the BEEHIVE REVO BALL is not permitted). OraLabs shall have until December 31, 2015 to sell its existing inventory of BEEHIVE REVO BALL with the off-white color shown above. OraLabs represents and warrants that the amount of BEEHIVE REVO BALLS with off-white color lip balm in inventory as of the Effective Date is 250,000 units.

5. Dimensions of Permitted Products.

(a) The Permitted Products shall only be of a size that is identical to dimensions of prior, regular-sized products. Specifically, the Permitted Products shall only have the dimensions pictured and described below. The following measurements are derived from engineering drawings provided by OraLabs and/or have been made by Oralabs' counsel, John Posthumus, using a digital caliper. Where no measurement is provided, it has been determined that the measurement at issue could not be made with accuracy using the available equipment.

Figure 4: Dimensions of Permitted Products

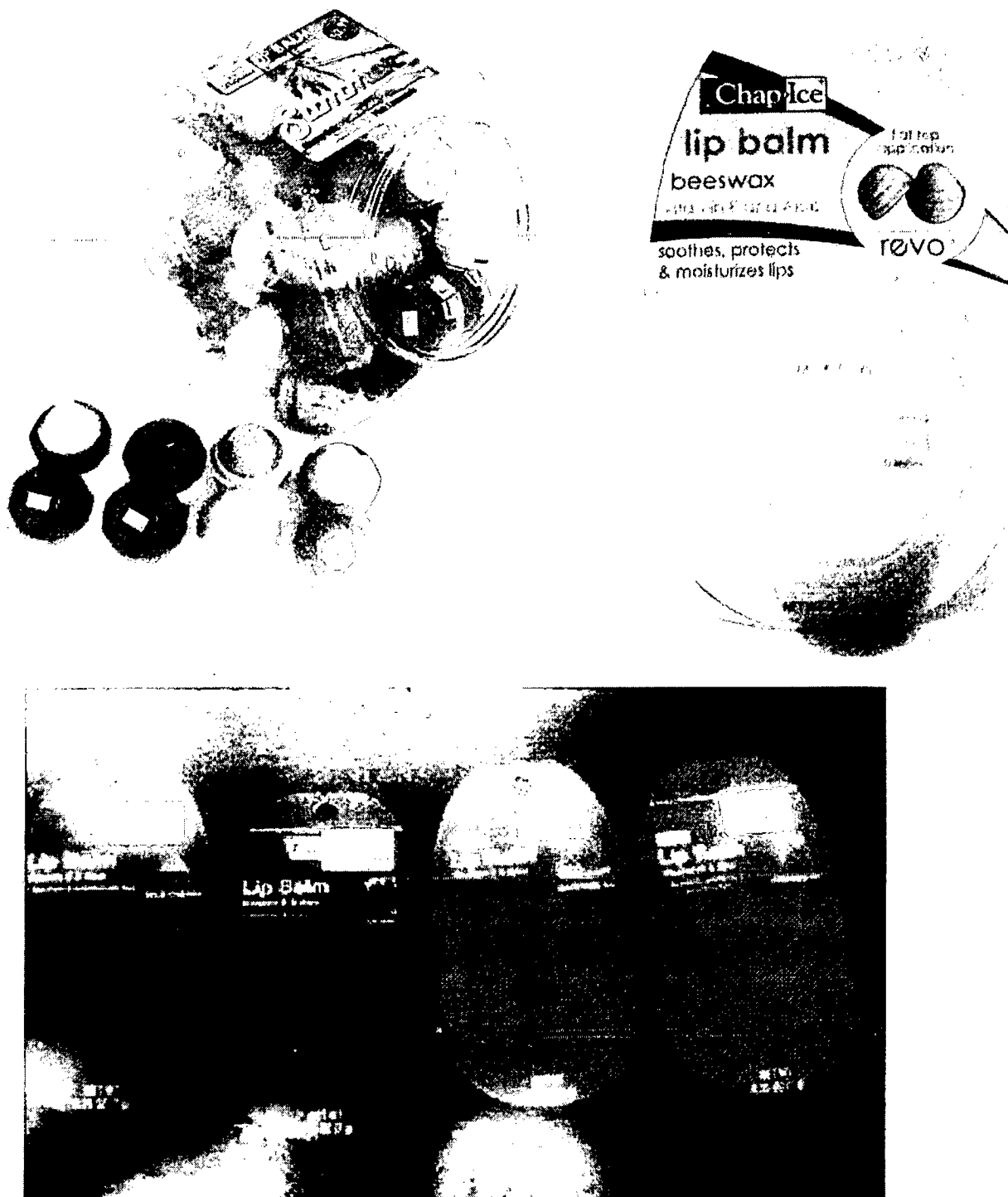
H1: 43.60 mm ± 0.6 mm	H6: 43.10 mm ± 0.6 mm
H2: 23.00 mm ± 0.3 mm	H7: 22.9 mm ± 0.3 mm
H3: 38.9 mm ± 0.6 mm	H8: 38.2 mm ± 0.6 mm
H4:	H9:
H5: 11.5 mm ± 0.3 mm	H10: 11.3 mm ± 0.3 mm
H11: 27.40 mm ± 0.3 mm	H12: 26.90 mm ± 0.3 mm

W1: 41.60 mm \pm 0.3 mm (as measured from panel surface to panel surface);	W5: 41.50 mm \pm 0.3 mm
W2:	W6:
W3: 26.5 mm \pm 0.3 mm	W7: 26.5 mm \pm 0.3 mm
W4:	W8:

(b) Additionally, prior to the Effective Date, counsel for OraLabs has provided to counsel for EOS five (5) samples of the prior, regular sized products (i.e., without the interior modifications describe above). OraLabs agrees that EOS shall have the right to have an independent engineering consultant use professionally accepted methods of measurement to verify and/or complete the measurements set forth in the table above based on the samples provided. Upon EOS providing notice to OraLabs of a certified report from the independent engineering consultant, any measurements so obtained will automatically supersede the measurements above or fill in any measurements missing.

6. Permitted Blister Cards. The Secondary Packaging used with the Permitted Products cannot be similar in overall image or impression to any Secondary Packaging first used by EOS. Notwithstanding the above prohibition, and notwithstanding any similarity to EOS's Secondary Packaging, OraLabs may continue to use its current Secondary Packaging (i.e., Secondary Packaging already displayed in retail stores in the United States) as of the Effective Date, shown in the representative images below:

Figure 5: Secondary Packaging



7. Sales of Permitted Products Limited to United States Only. OraLabs agrees that it shall only sell or offer for sale the Permitted Products in the United States, for resale within the United States. All sales by OraLabs to any third party reseller must include a written term mandating that the Permitted Products shall only be sold or offered for sale in the United States. Willful blindness to resale abroad shall be considered a breach of this paragraph.

8. Discontinued Activities by OraLabs.

(a) Except with respect to the Permitted Products, **OraLabs** shall immediately (but by October 31, 2015 for the Allowed Product): (1) discontinue making, having made, exporting, and importing all Prohibited Products, (2) destroy all molds used to make the Primary Packaging for the Prohibited Products, and (3) certify the foregoing by an affidavit signed by a corporate officer of OraLabs no later than thirty (30) calendar days following the Effective Date. Notwithstanding the prohibitions in paragraph 8(a)(1), and subject to the restrictions in paragraph 8(b), OraLabs may import and/or fill Primary Packaging that was in transit or imported prior to the Effective Date.

(b) Except with respect to the Permitted Products, OraLabs shall have until December 31, 2015 to (1) discontinue using, selling, and offering for sale any Prohibited Products, (2) destroy its existing inventory of Prohibited Products, and (3) certify the foregoing by an affidavit signed by a corporate officer of OraLabs no later than January 15, 2016.

9. Manufacturer Obligations. Except for the Permitted Products and the Allowed Product, OraLabs shall immediately (but by October 31, 2015 for the Allowed Product) instruct its **manufacturers**—including those manufacturers involved in the Delaware Litigation and the ITC Litigation, i.e., Wuxi Sunmart Science and Technology Co., Ltd. a/k/a Wuxi Sunmart Group Co., Ltd. a/k/a Wuxi Shengma Science & Technology Co., Ltd., and Wuxi Sunmart Plastic Products Co., Ltd. (collectively, “Wuxi”)—to (a) discontinue making, having made, using, selling, offering for sale, or importing all Prohibited Products on behalf of OraLabs, (b) destroy their existing inventory of Prohibited Products offered for sale or sold to OraLabs, (c) destroy all molds used to make the Prohibited Products on behalf of OraLabs, and (d) certify the foregoing by an affidavit signed by a corporate officer of Wuxi and any other manufacturers no later than thirty (30) calendar days following the Effective Date. OraLabs shall promptly thereafter provide a copy of its manufacturers’ certifications to EOS.

10. Retailer Obligations. Except for the Permitted Products, OraLabs shall make good-faith efforts to ensure that all **retailers**, including those retailers involved in the Delaware Litigation and the ITC Litigation—CVS Health Corporation, CVS Pharmacy, Inc., Walgreens Boots Alliance, Inc., Walgreen Co., Five Below Inc., and Five Below Merchandising, Inc.—shall sell or destroy their existing inventories of Prohibited Products by no later than May 30, 2016.

11. No IP Challenges. OraLabs agrees not to challenge validity, enforceability, ownership or rights of or in any EOS intellectual property (“IP”) (e.g., granted/registered, pending, or common law; United States or foreign; patent, trademark, copyright, trade secret, or other) related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm, or components thereof, or methods of using, manufacturing, or packaging the same. For the sake

of clarity, a non-exhaustive list of EOS's IP includes: the validity and enforceability of EOS's United States Patent No. 8,888,391, EOS's United States Design Patent No. D644,939, and any other applications or patents, United States or foreign, claiming any common priority therewith; and the validity and enforceability of EOS's Trade Dress (including, but not limited to, TM Reg. No. 3,788,970, as product packaging and/or in connection with the promotion, marketing, advertising, offer for sale, and sale of products) or any colorable imitation thereof, or any similar trade dress, with EOS's Trade Dress defined as the overall appearance or image of the combination of a generally egg-shaped plastic container composed of interlocking portions which join around the middle to encase a product with a Mounded Lip Balm.

12. No Cooperation. Except with regard to OraLabs's duty to defend and indemnify its retailers and Wuxi in the Delaware Litigation and the ITC Litigation, OraLabs agrees not to assist or cooperate with any third party in challenging or defending against claims of infringement, validity, enforceability, ownership or rights of or in any EOS IP, and shall not disclose to any such third party any information that it obtained, or that it developed through the Litigations, aimed at or concerning the same, other than as required by law. If any of OraLabs or its counsel is served with a subpoena about the same, they shall provide reasonable notice to EOS concerning the subpoena and EOS shall assume the obligation to challenge the subpoena, including but not limited to requesting a protective order.

13. No Assignment of this Agreement. OraLabs shall not assign, transfer, license, or pledge any rights or obligations in this Agreement to any third party, except that this Agreement may be assigned or transferred by OraLabs, without the prior written consent of EOS, to a third party that succeeds to all or substantially all of the business or assets of OraLabs whether by sale, merger, operation of law, other transaction involving a change of control of OraLabs's business, or otherwise, and provided that such assignee or transferee promptly agrees in a signed writing delivered to EOS to be bound by the terms and conditions of this Agreement. For the sake of clarity, all rights granted by EOS herein are limited to OraLabs only.

14. Transfer of Certain OraLabs IP. OraLabs hereby assigns all rights, title and interest to EOS to U.S. Patent No. D681,278. In addition, all rights, title and interests to all patents and pending applications which OraLabs owns, or otherwise has rights in such as through a license or covenant not to sue, for which Dennis Green and/or Mary Lou Green are an inventor (U.S. Patent Nos. D564,900 and D534,076) and U.S. Trademark Registration No. 3049450 (collectively, "Green IP") are hereby assigned to EOS. OraLabs represents that the Green IP listed above constitutes all such IP rights owned or assigned to OraLabs, or for which OraLabs otherwise has rights. In turn, EOS hereby grants to OraLabs, Inc. (but not OraLabs Affiliates, as defined below) a royalty-free, exclusive license to the Green IP to exclusively enjoy the rights therein in the field of use of Non-Mounded Lip Balm provided in purely spherical containers. OraLabs shall mark its products with any applicable patent numbers associated with the Green IP.

15. Non-Exclusive License. EOS hereby grants to OraLabs, Inc. (but not OraLabs Affiliates, as defined below) a non-exclusive license to EOS's past, present and future lip-balm-related IP to make, have made, use, sell, offer for sale, or import the Permitted Products.

16. Patent Marking Regarding EOS IP. OraLabs shall mark all Permitted Products with any applicable patent numbers associated with the number of any applicable patent(s) licensed hereunder in accordance with Title 35, U.S. Code, or, if such marking is not practicable, shall so mark the accompanying outer box, product insert, or packaging for Permitted Products accordingly. EOS shall cooperate with OraLabs to identify applicable patent numbers for such marking purposes.

17. Dismissal of Litigations. Firstly, upon complete execution of the Agreement, EOS shall within ten (10) business days (a) dismiss all claims with prejudice against OraLabs in the Delaware Litigation and (b) terminate OraLabs from the ITC Litigation as appropriate in view of any instructions from the ITC concerning how to remove OraLabs as a respondent in the ITC Litigation. Secondly, upon execution of the Agreement, the Parties shall within five (5) business days dismiss all claims and counterclaims against one another with prejudice in the Colorado Litigation. Thirdly, upon execution of the Agreement, OraLabs shall within ten (10) business days withdraw or otherwise terminate the Opposition. The Parties agree to provide any necessary consent to achieve these dismissals.

18. Disposal of Discovery and Other Materials from Litigations: In addition to the applicable provisions and requirements in protective orders entered in the Litigations, the parties agree further to return or destroy, at the option of the adverse party, all copies of discovery materials provided in the Litigations.

19. Release. Each Party, for itself, its successors and assigns, and all persons or entities claiming by, through or under them, shall, upon execution of the Agreement, forever and irrevocably release, absolve and discharge the other Party, its past, current and future subsidiaries, parents, affiliates, and past, current and future officers, directors, employees, shareholders, attorneys, agents, representatives and heirs, successors and assigns from any and all claims, demands, charges, complaints, actions, suits, causes of action, damages, judgments and liabilities of whatever kind or nature, in law, equity or otherwise, whether known or unknown, whether suspected or unsuspected, foreseen or unforeseen, which the respective Party now has, owns or holds, or claims to have or hold or which the respective Party at any time heretofore had, owned or held, or claimed to have, own or hold, against the other Party relating to any event, act or omission or claim occurring prior to or as of the Effective Date of the Agreement arising out of or relating to any of the Parties' claims pled or that could have been pled in the Litigations or otherwise. For the sake of clarity, EOS shall, upon execution of the Agreement, release OraLabs from any damages for past infringement. EOS retains all rights to assert that any of OraLabs' present or future products, other than the Permitted Products, infringe EOS's IP rights ("Future Claims") and/or breach this Agreement.

20. Injunctive Relief for Material Breach. In the event EOS brings suit as permitted by Paragraph 23 for a material breach, EOS shall also have a right to temporary, preliminary and permanent injunctive relief from that breach and OraLabs will not oppose such injunctive relief. In the event of a material breach by OraLabs, irreparable injury will result from lost sales which are difficult to quantify, the threat of continued actual confusion as to source in the marketplace, and EOS's loss of control over its trade dress identity.

21. Liquidated Damages for Material Breach. Notwithstanding Paragraph 19 (Release) hereof, in the event EOS brings suit as permitted by Paragraph 23, OraLabs agrees that any material breach of this Agreement by OraLabs will cause EOS to incur substantial economic damages and losses of types and in amounts which are impossible to compute and ascertain with certainty as a basis for recovery by EOS of actual damages, and that liquidated damages represent a fair, reasonable and appropriate estimate thereof. Accordingly, in lieu of actual damages for such material breach, OraLabs agrees that liquidated damages may be assessed and recovered by EOS as against OraLabs in the event of material breach and without EOS being required to present any evidence of the amount or character of actual damages sustained by reason thereof; therefore, OraLabs shall be liable to EOS for payment of liquidated damages in the amount of an indivisible \$1 million per month or \$3 per unit, whichever is greater, for material breach of this Agreement. OraLabs acknowledges that such liquidated damages are intended to represent estimated actual damages and are not intended as a penalty.

22. Costs and Attorney's Fees. The Parties shall bear their own costs and attorneys' fees relating to the Litigations and negotiation of settlement. In the event that any Party brings suit as permitted by Paragraph 23, the prevailing Party shall be entitled to recover from the non-prevailing Party, in addition to any other relief awarded, all reasonable attorneys' fees and costs incurred by the prevailing Party in such suit.

23. Disputes. The Parties shall endeavor to amicably settle any dispute that may arise under this Agreement. Disputes under this Agreement ("**Dispute**") shall be referred first to senior management of the respective parties who have applicable decision making authority for good faith dispute resolution. The Party's senior management will be required to discuss the Dispute via telephone or in-person (the "**Initial Meeting**") within ten (10) days of receiving written notice of the Dispute. If senior management is unable to resolve the Dispute within a reasonable time not less than ten (10) business days after the Initial Meeting, the Parties agree (a) that all disputes and litigation regarding this Agreement, its construction and matters connected with its performance be subject to the exclusive jurisdiction of the federal court in the Southern District of New York (the "Court"), and (b) to submit any disputes, matters of interpretation, or enforcement actions arising with respect to the subject matter of this Agreement exclusively to the Court. The Parties hereby waive any challenge to the jurisdiction or venue of the Court over these matters.

24. EOS Representations and Warranties. EOS represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of EOS.

25. OraLabs Representations and Warranties.

(a) OraLabs represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of OraLabs. OraLabs further represents and warrants that the amount of Prohibited Products either in the United States or in transit as of the Effective Date and thus subject to the sell-off provisions in paragraph 8(b) is 3,606,145 units, consisting of the following quantities of specific

products: smooth shape Lip Revo – regular (1,500,000), smooth shape Lip Revo – mini (700,000), diamond – mini (222,000), flat diamond – regular (240,000), flat diamond – mini (0), beehive – regular (250,000), beehive – mini (0), Twist & Pout w/ Mounded Lip Balm (350,000) and Covergirl (344,145). The Parties agree that the sale of any Prohibited Product in excess of the number of units listed above for that product, by even one unit, constitutes a material breach of this Agreement. OraLabs further represents and warrants that no drafts of any petition or request for Inter Partes Review, Post Grant Review, or Reexamination concerning any EOS patent, or portion of such petition or request, have been disclosed to any third party (excluding retained expert(s)) other than EOS, and that no such petitions or requests have been filed by OraLabs with the United States Patent and Trademark Office.

(b) OraLabs will maintain relevant records to support the representations and warranties in paragraph 25(a). The records will be retained and made available for two (2) years from the Effective Date. If EOS requests, OraLabs will make these records available on a confidential basis to an independent certified public accountant chosen and compensated (other than on a contingency basis) by EOS. EOS's request will be in writing, will provide OraLabs seven (7) days' prior notice, and will not occur more than once every three (3) months. The audit will be conducted during normal business hours at OraLabs's office and in such a manner as not to interfere with OraLabs's normal business activities.

26. Affiliates. As used in this Agreement, "EOS" and "OraLabs" each shall include Affiliates thereof, and the term "Affiliate(s)" shall mean any corporation, partnership or other business organization which EOS or OraLabs as the case may be, directly or indirectly controls, or any corporation, partnership or other business organization by which EOS or OraLabs, respectively, is controlled or is under common control with. Affiliates of OraLabs also shall include, but not be limited to, Gary Schlatter or his relatives, OraLabs's owners, directors, officers, employees, or relatives thereof, and any present or future entities in which each of them may have a current or future direct or indirect interest.

27. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be delivered by hand, or if dispatched by prepaid air courier with package tracing capabilities or by registered or certified airmail, postage prepaid, addressed as follows:

If to EOS:

Jonathan Teller, Managing Partner
The Kind Group LLC and eos Products, LLC
19 W. 44th Street, Suite 811
New York, New York 10036

with copies to

Louis S. Mastriani, Esq.
Adduci, Mastriani & Schaumborg LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
mastriani@adduci.com

and

John G. Froemming, Esq.
Jones Day
51 Louisiana Ave, NW
Washington, DC 20001
jfroemming@jonesday.com

If to OraLabs:

Gary Schlatter
OraLabs, Inc.
18685 East Plaza Drive
Parker, Colorado 80134

with copies to:

Todd P. Blakely, Esq.
Sheridan Ross P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
tblakely@sheridanross.com

and

Jeremy A. Younkin, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
JYounkin@foleyhoag.com

Such notices shall be deemed to have been served when received by addressee. Either Party may give written notice of a change of address and, after notice of such change has been received, any notice or request shall thereafter be given to such Party as above provided at such changed address.

28. Governing Law. This Agreement and matters connected with the performance thereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of the United States of America and the State of New York, without reference to conflict of law principles.

29. No Partnership. This Agreement shall not be construed as creating any partnership, joint venture or other legal relationship between the Parties.

30. Document Jointly Drafted. This Agreement was jointly drafted by each of the Parties and their counsel.

31. Sophisticated Parties Represented by Counsel. The Parties each acknowledge, accept, warrant and represent that (i) they are sophisticated Parties represented at all relevant times during the negotiation and execution of this Agreement by counsel of their choice, and that they have executed this Agreement with the consent and on the advice of such independent legal counsel, and (ii) they and their counsel have determined through independent investigation and robust, arm's-length negotiation that the terms of this Agreement shall exclusively embody and govern the subject matter of this Agreement. Each Party acknowledges that it has entered into this Agreement freely and voluntarily and that it had the opportunity to seek the benefit of counsel in entering into this Agreement.

32. Severability. If any provision of this Agreement is held to be illegal or unenforceable, such provision shall be limited or eliminated to the minimum extent necessary so that the remainder of this Agreement will continue in full force and effect and be enforceable. The Parties agree to negotiate in good faith an enforceable substitute provision for any invalid or unenforceable provision that most nearly achieves the intent of such provision.

33. Entire Agreement. This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any prior agreements between them as related to the subject matter of this Agreement. This Agreement can only be amended or altered in a writing signed by the Parties. The failure of any Party to insist on the performance of any obligation hereunder shall not act as a waiver of such obligation. No waiver, modification, release or amendment of any obligation under this Agreement shall be valid or effective unless in writing and signed by the Parties hereto.

34. Interpretation and Successors-in-Interest. This Agreement is for the benefit of and is binding on the Parties and their respective heirs, administrators, representatives, agents, successors, assigns and Affiliates. The language of all parts of this Agreement will in all cases be interpreted as if each Party were the drafter of this Agreement, and according to its fair meaning.

35. Delay. No Party to this Agreement shall be liable for delay or failure in the performance of any of its obligations hereunder if such delay or failure is due to causes beyond its reasonable control, including, without limitation, acts of God, fires, earthquakes, strikes and labor disputes, acts of war, civil unrest, or intervention of any governmental authority, but any such delay or failure shall be remedied by such Party as soon as is reasonably possible.

36. Headings. Titles or headings of paragraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or prescribe the scope of this Agreement or the intent of any provision.

37. Counterparts. This Agreement may be executed in counterparts or duplicate originals, all of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This Agreement may be executed by facsimile signatures and such signatures shall be deemed to bind each Party as if they were original signatures.

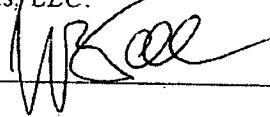
38. No Admission of Liability. This Agreement is a compromise and settlement of disputed claims and such compromise and settlement shall not be taken as an admission of

liability on the part of any Party to this Agreement, but rather, any such liability is expressly denied. Neither this Agreement nor any of the terms hereof shall be offered or received in evidence in any action or proceeding, or be otherwise used, as an admission or concession of liability of wrongdoing of any nature on the part of any of the Parties.

39. Discussion Purposes Only Until Executed. Any draft or unexecuted version of this Agreement is for discussion purposes only, and does **not** represent a final or binding agreement between the Parties to settle any of the disputes between them until signed and dated by all Parties. No rights or obligations accrue as a result of this Agreement until signed and dated by all Parties.

Dated: 8/16/15

*The Kind Group LLC and
eos Products, LLC:*

By 
Signature

Jonathan Teller
Managing Partner

Dated: 8/15/15

OraLabs, Inc.:

By 
Signature

Gary Schlatter
President / CEO

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into and effective on the date of last signature hereof ("Effective Date") between **The Kind Group LLC** and **eos Products, LLC** (collectively, "EOS"), each a New York corporation having its principal place of business at 19 W. 44th Street, Suite 811, New York, New York 10036, and **OraLabs, Inc.** ("OraLabs"), a Colorado corporation having its principal place of business at 18685 East Plaza Drive, Parker, Colorado 80134. EOS and OraLabs are sometimes referred to individually as a "Party" and collectively as the "Parties."

WHEREAS, the Parties are presently involved in (i) *OraLabs, Inc. v. The Kind Group LLC*, Civil Action 1:13-cv-00170-PAB-KLM (D. Colo.) ("Colorado Litigation"); (ii) *eos Products, LLC v. OraLabs, Inc.*, Civil Action No. 1:15-cv-00453-GMS (D. Del.) ("Delaware Litigation"); (iii) *Certain Lip Balm Products, Containers for Lip Balm, and Components Thereof*, United States International Trade Commission Investigation No. 337-TA-961 ("ITC Litigation"); and (iv) *In the Matter of Trademark Application Serial No. 85/974,868*, Opposition No. 91218755 in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board ("Opposition") (collectively, "Litigations"), which Litigations are now pending; and

WHEREAS, the Parties hereto desire to settle the Litigations and enter into this Agreement solely as a settlement between the Parties.

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, EOS and OraLabs agree to the following terms and conditions:

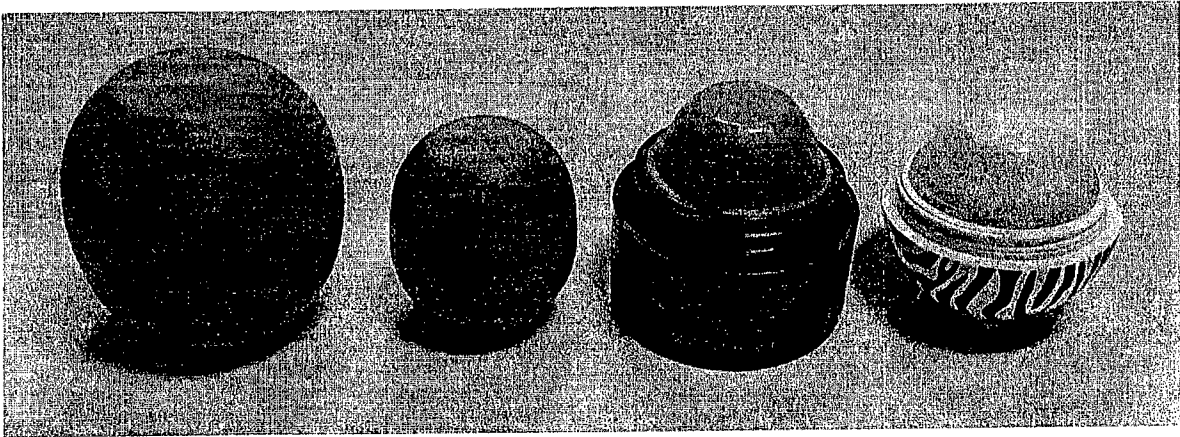
1. Definitions. As used in this Agreement:

- (a) **"Mounded Lip Balm"** means any lip balm packaging wherein the lip balm as sold extends above the top surface of the open container.
- (b) **"Non-Mounded Lip Balm"** means any lip balm packaging wherein the lip balm as sold is at or below the top surface of the open container.
- (c) **"Primary Packaging"** means the container that holds the lip balm.
- (d) **"Secondary Packaging"** means packaging in which the Primary Packaging is positioned for sale at retail.

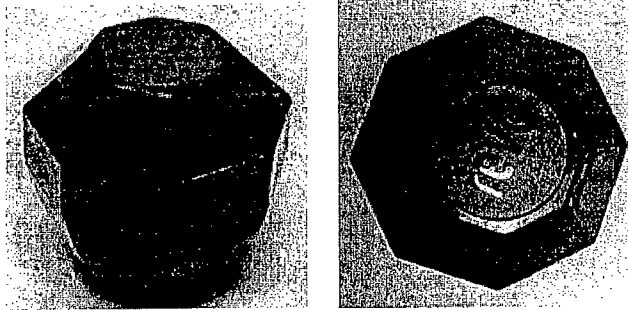
2. Prohibited and Permitted Products.

(a) OraLabs agrees that it shall not make, have made, use, sell, offer for sale, advertise, market, distribute, export or import (i) any substantially egg-shaped Primary Packaging or components thereof of any size, or (ii) any Mounded Lip Balm products or components intended for Mounded Lip Balm products of any size, anywhere in the world, including but not limited to the products depicted below (collectively, **"Prohibited Products"**):

Figure 1: Exemplary Prohibited Lip Balm Items



(LEFT TO RIGHT) (i) smooth shape Lip Revo regular size, (ii) smooth shape Lip Revo mini size, (iii) COVERGIRL[®] without upper portion and (iv) Twist & Pout[®] without upper portion;

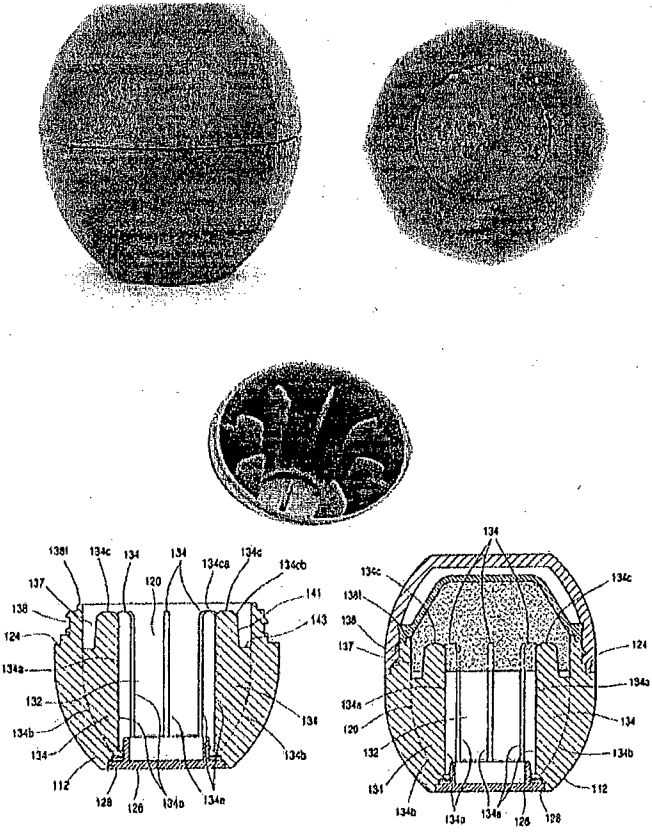
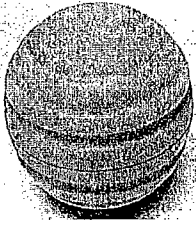


(v) Flat Diamond Revo (two views)

(b) Notwithstanding the foregoing, OraLabs may make, cause to be made, use, sell, offer for sale, advertise, market, and import the spherical Twist & Pout lip balm product with a Mounded Lip Balm (illustrated in Fig. 1, above, on the right) (“Allowed Product”), anywhere in the world until October 31, 2015. After that date, the Twist & Pout product with Mounded Lip Balm is a Prohibited Product.

(c) Notwithstanding the above prohibitions, and despite their egg shape, OraLabs may make, cause to be made, use, sell, offer for sale, advertise, market, and import the two Mounded Lip Balm products pictured and described below (“Permitted Products”). For the sake of clarity, a Non-Mounded Lip Balm product in the Primary Packaging pictured below constitutes a Prohibited Product.

Figure 2: Permitted Products

<p>(a) the DIAMOND REVO as shown in the pictures at right with <u>interior modifications</u> shown in the picture and cross-sectional drawings at right including a lower portion with multiple ribs 134 having portions 134b that contact the interior of the lower portion and portions 134c that do not, with the fill-line for the lip balm 137 shown in the cross-sectional drawing;</p>	
<p>(b) the BEEHIVE REVO BALL presently available from OraLabs as shown in the picture at right <u>with the same interior modifications</u> pictured, schematically shown, and described above.</p>	

3. Permitted Shape and Size of Lip Balm Mound. The Permitted Products shall only include a lip balm mound that is identical in shape and size to the mound presently included in the regular-sized versions of the Permitted Products as shown by the images below:

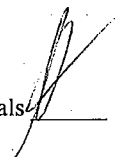
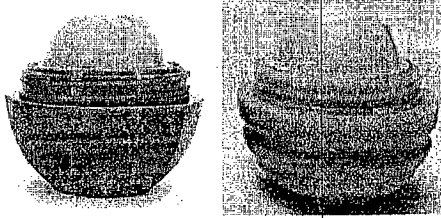


Figure 3: Shape of Lip Balm Mound



4. Permitted Color of Lip Balm Mound. The Permitted Products shall only include a lip balm mound that has a color other than white or off-white (e.g., the off-white color shown above with the BEEHIVE REVO BALL is not permitted). OraLabs shall have until December 31, 2015 to sell its existing inventory of BEEHIVE REVO BALL with the off-white color shown above. OraLabs represents and warrants that the amount of BEEHIVE REVO BALLS with off-white color lip balm in inventory as of the Effective Date is 250,000 units.

5. Dimensions of Permitted Products.

(a) The Permitted Products shall only be of a size that is identical to dimensions of prior, regular-sized products. Specifically, the Permitted Products shall only have the dimensions pictured and described below. The following measurements are derived from engineering drawings provided by OraLabs and/or have been made by Oralabs' counsel, John Posthumus, using a digital caliper. Where no measurement is provided, it has been determined that the measurement at issue could not be made with accuracy using the available equipment.

Figure 4: Dimensions of Permitted Products

H1: 43.60 mm ± 0.6 mm	H6: 43.10 mm ± 0.6 mm
H2: 23.00 mm ± 0.3 mm	H7: 22.9 mm ± 0.3 mm
H3: 38.9 mm ± 0.6 mm	H8: 38.2 mm ± 0.6 mm
H4:	H9:
H5: 11.5 mm ± 0.3 mm	H10: 11.3 mm ± 0.3 mm
H11: 27.40 mm ± 0.3 mm	H12: 26.90 mm ± 0.3 mm

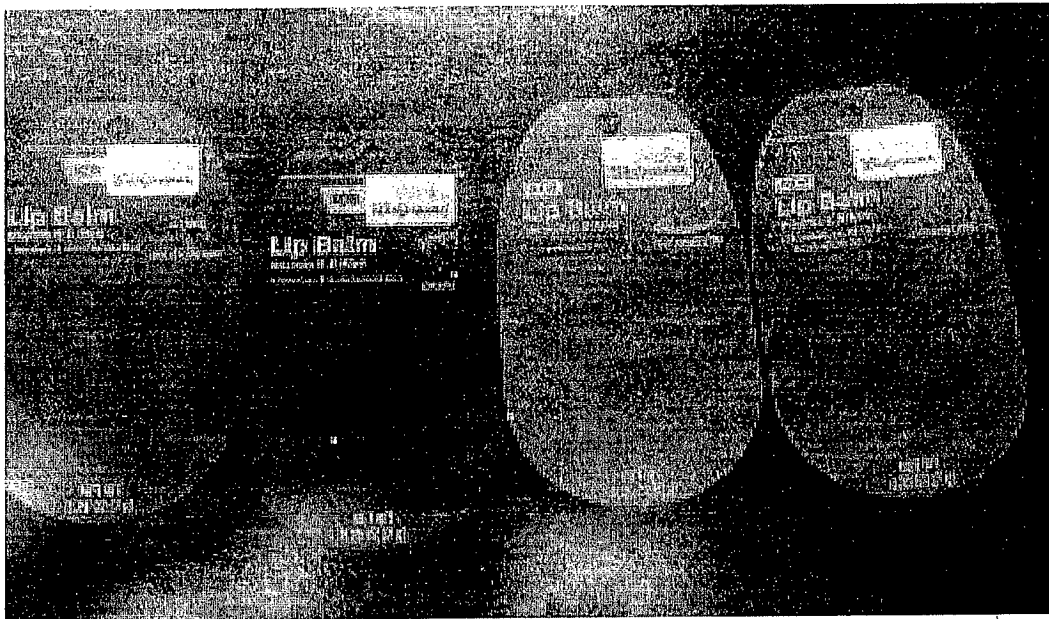
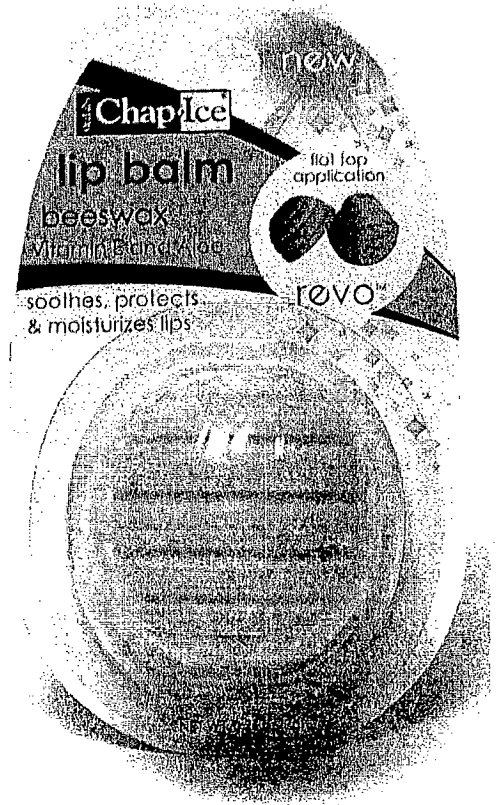
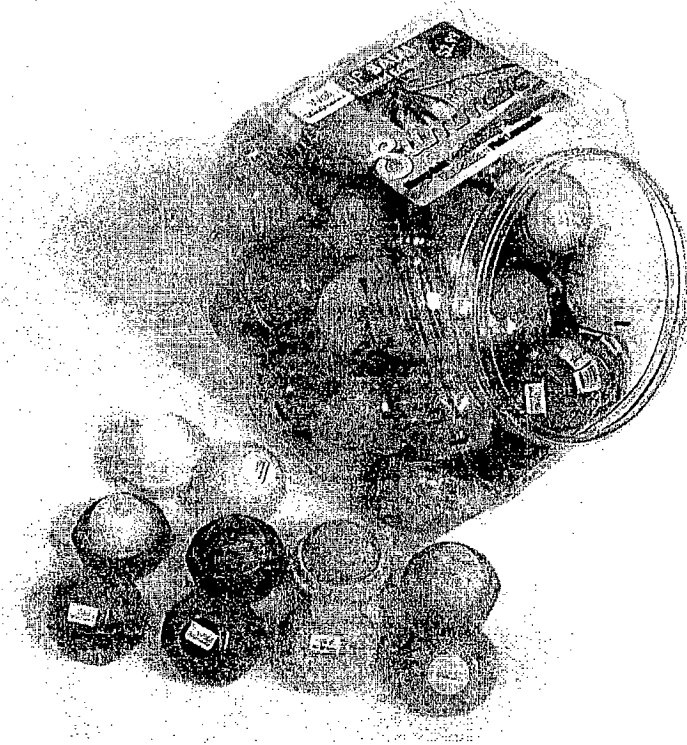
W1: 41.60 mm \pm 0.3 mm (as measured from panel surface to panel surface);	W5: 41.50 mm \pm 0.3 mm
W2:	W6:
W3: 26.5 mm \pm 0.3 mm	W7: 26.5 mm \pm 0.3 mm
W4:	W8:

(b) Additionally, prior to the Effective Date, counsel for OraLabs has provided to counsel for EOS five (5) samples of the prior, regular sized products (i.e., without the interior modifications describe above). OraLabs agrees that EOS shall have the right to have an independent engineering consultant use professionally accepted methods of measurement to verify and/or complete the measurements set forth in the table above based on the samples provided. Upon EOS providing notice to OraLabs of a certified report from the independent engineering consultant, any measurements so obtained will automatically supersede the measurements above or fill in any measurements missing.

6. Permitted Blister Cards. The Secondary Packaging used with the Permitted Products cannot be similar in overall image or impression to any Secondary Packaging first used by EOS. Notwithstanding the above prohibition, and notwithstanding any similarity to EOS's Secondary Packaging, OraLabs may continue to use its current Secondary Packaging (i.e., Secondary Packaging already displayed in retail stores in the United States) as of the Effective Date, shown in the representative images below:



Figure 5: Secondary Packaging



7. Sales of Permitted Products Limited to United States Only. OraLabs agrees that it shall only sell or offer for sale the Permitted Products in the United States, for resale within the United States. All sales by OraLabs to any third party reseller must include a written term mandating that the Permitted Products shall only be sold or offered for sale in the United States. Willful blindness to resale abroad shall be considered a breach of this paragraph.

8. Discontinued Activities by OraLabs.

(a) Except with respect to the Permitted Products, **OraLabs** shall immediately (but by October 31, 2015 for the Allowed Product): (1) discontinue making, having made, exporting, and importing all Prohibited Products, (2) destroy all molds used to make the Primary Packaging for the Prohibited Products, and (3) certify the foregoing by an affidavit signed by a corporate officer of OraLabs no later than thirty (30) calendar days following the Effective Date. Notwithstanding the prohibitions in paragraph 8(a)(1), and subject to the restrictions in paragraph 8(b), OraLabs may import and/or fill Primary Packaging that was in transit or imported prior to the Effective Date.

(b) Except with respect to the Permitted Products, OraLabs shall have until December 31, 2015 to (1) discontinue using, selling, and offering for sale any Prohibited Products, (2) destroy its existing inventory of Prohibited Products, and (3) certify the foregoing by an affidavit signed by a corporate officer of OraLabs no later than January 15, 2016.

9. Manufacturer Obligations. Except for the Permitted Products and the Allowed Product, OraLabs shall immediately (but by October 31, 2015 for the Allowed Product) instruct its **manufacturers**—including those manufacturers involved in the Delaware Litigation and the ITC Litigation, i.e., Wuxi Sunmart Science and Technology Co., Ltd. a/k/a Wuxi Sunmart Group Co., Ltd. a/k/a Wuxi Shengma Science & Technology Co., Ltd., and Wuxi Sunmart Plastic Products Co., Ltd. (collectively, “Wuxi”)—to (a) discontinue making, having made, using, selling, offering for sale, or importing all Prohibited Products on behalf of OraLabs, (b) destroy their existing inventory of Prohibited Products offered for sale or sold to OraLabs, (c) destroy all molds used to make the Prohibited Products on behalf of OraLabs, and (d) certify the foregoing by an affidavit signed by a corporate officer of Wuxi and any other manufacturers no later than thirty (30) calendar days following the Effective Date. OraLabs shall promptly thereafter provide a copy of its manufacturers’ certifications to EOS.

10. Retailer Obligations. Except for the Permitted Products, OraLabs shall make good-faith efforts to ensure that all **retailers**, including those retailers involved in the Delaware Litigation and the ITC Litigation—CVS Health Corporation, CVS Pharmacy, Inc., Walgreens Boots Alliance, Inc., Walgreen Co., Five Below Inc., and Five Below Merchandising, Inc.—shall sell or destroy their existing inventories of Prohibited Products by no later than May 30, 2016.

11. No IP Challenges. OraLabs agrees not to challenge validity, enforceability, ownership or rights of or in any EOS intellectual property (“IP”) (e.g., granted/registered, pending, or common law; United States or foreign; patent, trademark, copyright, trade secret, or other) related in any way to Mounded Lip Balm, or egg-shaped Primary Packaging for lip balm, or components thereof, or methods of using, manufacturing, or packaging the same. For the sake

of clarity, a non-exhaustive list of EOS's IP includes: the validity and enforceability of EOS's United States Patent No. 8,888,391, EOS's United States Design Patent No. D644,939, and any other applications or patents, United States or foreign, claiming any common priority therewith; and the validity and enforceability of EOS's Trade Dress (including, but not limited to, TM Reg. No. 3,788,970, as product packaging and/or in connection with the promotion, marketing, advertising, offer for sale, and sale of products) or any colorable imitation thereof, or any similar trade dress, with EOS's Trade Dress defined as the overall appearance or image of the combination of a generally egg-shaped plastic container composed of interlocking portions which join around the middle to encase a product with a Mounded Lip Balm.

12. No Cooperation. Except with regard to OraLabs's duty to defend and indemnify its retailers and Wuxi in the Delaware Litigation and the ITC Litigation, OraLabs agrees not to assist or cooperate with any third party in challenging or defending against claims of infringement, validity, enforceability, ownership or rights of or in any EOS IP, and shall not disclose to any such third party any information that it obtained, or that it developed through the Litigations, aimed at or concerning the same, other than as required by law. If any of OraLabs or its counsel is served with a subpoena about the same, they shall provide reasonable notice to EOS concerning the subpoena and EOS shall assume the obligation to challenge the subpoena, including but not limited to requesting a protective order.

13. No Assignment of this Agreement. OraLabs shall not assign, transfer, license, or pledge any rights or obligations in this Agreement to any third party, except that this Agreement may be assigned or transferred by OraLabs, without the prior written consent of EOS, to a third party that succeeds to all or substantially all of the business or assets of OraLabs whether by sale, merger, operation of law, other transaction involving a change of control of OraLabs's business, or otherwise, and provided that such assignee or transferee promptly agrees in a signed writing delivered to EOS to be bound by the terms and conditions of this Agreement. For the sake of clarity, all rights granted by EOS herein are limited to OraLabs only.

14. Transfer of Certain OraLabs IP. OraLabs hereby assigns all rights, title and interest to EOS to U.S. Patent No. D681,278. In addition, all rights, title and interests to all patents and pending applications which OraLabs owns, or otherwise has rights in such as through a license or covenant not to sue, for which Dennis Green and/or Mary Lou Green are an inventor (U.S. Patent Nos. D564,900 and D534,076) and U.S. Trademark Registration No. 3049450 (collectively, "Green IP") are hereby assigned to EOS. OraLabs represents that the Green IP listed above constitutes all such IP rights owned or assigned to OraLabs, or for which OraLabs otherwise has rights. In turn, EOS hereby grants to OraLabs, Inc. (but not OraLabs Affiliates, as defined below) a royalty-free, exclusive license to the Green IP to exclusively enjoy the rights therein in the field of use of Non-Mounded Lip Balm provided in purely spherical containers. OraLabs shall mark its products with any applicable patent numbers associated with the Green IP.

15. Non-Exclusive License. EOS hereby grants to OraLabs, Inc. (but not OraLabs Affiliates, as defined below) a non-exclusive license to EOS's past, present and future lip-balm-related IP to make, have made, use, sell, offer for sale, or import the Permitted Products.

16. Patent Marking Regarding EOS IP. OraLabs shall mark all Permitted Products with any applicable patent numbers associated with the number of any applicable patent(s) licensed hereunder in accordance with Title 35, U.S. Code, or, if such marking is not practicable, shall so mark the accompanying outer box, product insert, or packaging for Permitted Products accordingly. EOS shall cooperate with OraLabs to identify applicable patent numbers for such marking purposes.

17. Dismissal of Litigations. Firstly, upon complete execution of the Agreement, EOS shall within ten (10) business days (a) dismiss all claims with prejudice against OraLabs in the Delaware Litigation and (b) terminate OraLabs from the ITC Litigation as appropriate in view of any instructions from the ITC concerning how to remove OraLabs as a respondent in the ITC Litigation. Secondly, upon execution of the Agreement, the Parties shall within five (5) business days dismiss all claims and counterclaims against one another with prejudice in the Colorado Litigation. Thirdly, upon execution of the Agreement, OraLabs shall within ten (10) business days withdraw or otherwise terminate the Opposition. The Parties agree to provide any necessary consent to achieve these dismissals.

18. Disposal of Discovery and Other Materials from Litigations: In addition to the applicable provisions and requirements in protective orders entered in the Litigations, the parties agree further to return or destroy, at the option of the adverse party, all copies of discovery materials provided in the Litigations.

19. Release. Each Party, for itself, its successors and assigns, and all persons or entities claiming by, through or under them, shall, upon execution of the Agreement, forever and irrevocably release, absolve and discharge the other Party, its past, current and future subsidiaries, parents, affiliates, and past, current and future officers, directors, employees, shareholders, attorneys, agents, representatives and heirs, successors and assigns from any and all claims, demands, charges, complaints, actions, suits, causes of action, damages, judgments and liabilities of whatever kind or nature, in law, equity or otherwise, whether known or unknown, whether suspected or unsuspected, foreseen or unforeseen, which the respective Party now has, owns or holds, or claims to have or hold or which the respective Party at any time heretofore had, owned or held, or claimed to have, own or hold, against the other Party relating to any event, act or omission or claim occurring prior to or as of the Effective Date of the Agreement arising out of or relating to any of the Parties' claims pled or that could have been pled in the Litigations or otherwise. For the sake of clarity, EOS shall, upon execution of the Agreement, release OraLabs from any damages for past infringement. EOS retains all rights to assert that any of OraLabs' present or future products, other than the Permitted Products, infringe EOS's IP rights ("Future Claims") and/or breach this Agreement.

20. Injunctive Relief for Material Breach. In the event EOS brings suit as permitted by Paragraph 23 for a material breach, EOS shall also have a right to temporary, preliminary and permanent injunctive relief from that breach and OraLabs will not oppose such injunctive relief. In the event of a material breach by OraLabs, irreparable injury will result from lost sales which are difficult to quantify, the threat of continued actual confusion as to source in the marketplace, and EOS's loss of control over its trade dress identity.

21. Liquidated Damages for Material Breach. Notwithstanding Paragraph 19 (Release) hereof, in the event EOS brings suit as permitted by Paragraph 23, OraLabs agrees that any material breach of this Agreement by OraLabs will cause EOS to incur substantial economic damages and losses of types and in amounts which are impossible to compute and ascertain with certainty as a basis for recovery by EOS of actual damages, and that liquidated damages represent a fair, reasonable and appropriate estimate thereof. Accordingly, in lieu of actual damages for such material breach, OraLabs agrees that liquidated damages may be assessed and recovered by EOS as against OraLabs in the event of material breach and without EOS being required to present any evidence of the amount or character of actual damages sustained by reason thereof; therefore, OraLabs shall be liable to EOS for payment of liquidated damages in the amount of an indivisible \$1 million per month or \$3 per unit, whichever is greater, for material breach of this Agreement. OraLabs acknowledges that such liquidated damages are intended to represent estimated actual damages and are not intended as a penalty.

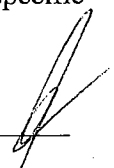
22. Costs and Attorney's Fees. The Parties shall bear their own costs and attorneys' fees relating to the Litigations and negotiation of settlement. In the event that any Party brings suit as permitted by Paragraph 23, the prevailing Party shall be entitled to recover from the non-prevailing Party, in addition to any other relief awarded, all reasonable attorneys' fees and costs incurred by the prevailing Party in such suit.

23. Disputes. The Parties shall endeavor to amicably settle any dispute that may arise under this Agreement. Disputes under this Agreement ("**Dispute**") shall be referred first to senior management of the respective parties who have applicable decision making authority for good faith dispute resolution. The Party's senior management will be required to discuss the Dispute via telephone or in-person (the "**Initial Meeting**") within ten (10) days of receiving written notice of the Dispute. If senior management is unable to resolve the Dispute within a reasonable time not less than ten (10) business days after the Initial Meeting, the Parties agree (a) that all disputes and litigation regarding this Agreement, its construction and matters connected with its performance be subject to the exclusive jurisdiction of the federal court in the Southern District of New York (the "**Court**"), and (b) to submit any disputes, matters of interpretation, or enforcement actions arising with respect to the subject matter of this Agreement exclusively to the Court. The Parties hereby waive any challenge to the jurisdiction or venue of the Court over these matters.

24. EOS Representations and Warranties. EOS represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of EOS.

25. OraLabs Representations and Warranties.

(a) OraLabs represents and warrants that it is empowered with the full right and corporate authority to enter into the terms and fully perform its obligations under this Agreement and that the individual executing this Agreement is authorized to sign on behalf of OraLabs. OraLabs further represents and warrants that the amount of Prohibited Products either in the United States or in transit as of the Effective Date and thus subject to the sell-off provisions in paragraph 8(b) is 3,606,145 units, consisting of the following quantities of specific



products: smooth shape Lip Revo – regular (1,500,000), smooth shape Lip Revo – mini (700,000), diamond – mini (222,000), flat diamond – regular (240,000), flat diamond – mini (0), beehive – regular (250,000), beehive – mini (0), Twist & Pout w/ Mounded Lip Balm (350,000) and Covergirl (344,145). The Parties agree that the sale of any Prohibited Product in excess of the number of units listed above for that product, by even one unit, constitutes a material breach of this Agreement. OraLabs further represents and warrants that no drafts of any petition or request for Inter Partes Review, Post Grant Review, or Reexamination concerning any EOS patent, or portion of such petition or request, have been disclosed to any third party (excluding retained expert(s)) other than EOS, and that no such petitions or requests have been filed by OraLabs with the United States Patent and Trademark Office.

(b) OraLabs will maintain relevant records to support the representations and warranties in paragraph 25(a). The records will be retained and made available for two (2) years from the Effective Date. If EOS requests, OraLabs will make these records available on a confidential basis to an independent certified public accountant chosen and compensated (other than on a contingency basis) by EOS. EOS's request will be in writing, will provide OraLabs seven (7) days' prior notice, and will not occur more than once every three (3) months. The audit will be conducted during normal business hours at OraLabs's office and in such a manner as not to interfere with OraLabs's normal business activities.

26. Affiliates. As used in this Agreement, "EOS" and "OraLabs" each shall include Affiliates thereof, and the term "Affiliate(s)" shall mean any corporation, partnership or other business organization which EOS or OraLabs as the case may be, directly or indirectly controls, or any corporation, partnership or other business organization by which EOS or OraLabs, respectively, is controlled or is under common control with. Affiliates of OraLabs also shall include, but not be limited to, Gary Schlatter or his relatives, OraLabs's owners, directors, officers, employees, or relatives thereof, and any present or future entities in which each of them may have a current or future direct or indirect interest.

27. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be delivered by hand, or if dispatched by prepaid air courier with package tracing capabilities or by registered or certified airmail, postage prepaid, addressed as follows:

If to EOS:

Jonathan Teller, Managing Partner
The Kind Group LLC and eos Products, LLC
19 W. 44th Street, Suite 811
New York, New York 10036

with copies to

Louis S. Mastriani, Esq.
Adduci, Mastriani & Schaumborg LLP
1133 Connecticut Avenue, NW
Washington, DC 20036
mastriani@adduci.com

and

John G. Froemming, Esq.
Jones Day
51 Louisiana Ave, NW
Washington, DC 20001
jfroemming@jonesday.com

If to OraLabs:

Gary Schlatter
OraLabs, Inc.
18685 East Plaza Drive
Parker, Colorado 80134

with copies to:

Todd P. Blakely, Esq.
Sheridan Ross P.C.
1560 Broadway, Suite 1200
Denver, Colorado 80202-5141
tblakely@sheridanross.com

and


Jeremy A. Younkin, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, Massachusetts 02210-2600
JYounkin@foleyhoag.com

Such notices shall be deemed to have been served when received by addressee. Either Party may give written notice of a change of address and, after notice of such change has been received, any notice or request shall thereafter be given to such Party as above provided at such changed address.

28. Governing Law. This Agreement and matters connected with the performance thereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of the United States of America and the State of New York, without reference to conflict of law principles.

29. No Partnership. This Agreement shall not be construed as creating any partnership, joint venture or other legal relationship between the Parties.

30. Document Jointly Drafted. This Agreement was jointly drafted by each of the Parties and their counsel.



31. Sophisticated Parties Represented by Counsel. The Parties each acknowledge, accept, warrant and represent that (i) they are sophisticated Parties represented at all relevant times during the negotiation and execution of this Agreement by counsel of their choice, and that they have executed this Agreement with the consent and on the advice of such independent legal counsel, and (ii) they and their counsel have determined through independent investigation and robust, arm's-length negotiation that the terms of this Agreement shall exclusively embody and govern the subject matter of this Agreement. Each Party acknowledges that it has entered into this Agreement freely and voluntarily and that it had the opportunity to seek the benefit of counsel in entering into this Agreement.

32. Severability. If any provision of this Agreement is held to be illegal or unenforceable, such provision shall be limited or eliminated to the minimum extent necessary so that the remainder of this Agreement will continue in full force and effect and be enforceable. The Parties agree to negotiate in good faith an enforceable substitute provision for any invalid or unenforceable provision that most nearly achieves the intent of such provision.

33. Entire Agreement. This Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof and supersedes any prior agreements between them as related to the subject matter of this Agreement. This Agreement can only be amended or altered in a writing signed by the Parties. The failure of any Party to insist on the performance of any obligation hereunder shall not act as a waiver of such obligation. No waiver, modification, release or amendment of any obligation under this Agreement shall be valid or effective unless in writing and signed by the Parties hereto.

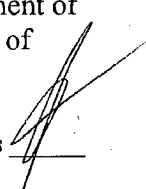
34. Interpretation and Successors-in-Interest. This Agreement is for the benefit of and is binding on the Parties and their respective heirs, administrators, representatives, agents, successors, assigns and Affiliates. The language of all parts of this Agreement will in all cases be interpreted as if each Party were the drafter of this Agreement, and according to its fair meaning.

35. Delay. No Party to this Agreement shall be liable for delay or failure in the performance of any of its obligations hereunder if such delay or failure is due to causes beyond its reasonable control, including, without limitation, acts of God, fires, earthquakes, strikes and labor disputes, acts of war, civil unrest, or intervention of any governmental authority, but any such delay or failure shall be remedied by such Party as soon as is reasonably possible.

36. Headings. Titles or headings of paragraphs contained in this Agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend or prescribe the scope of this Agreement or the intent of any provision.

37. Counterparts. This Agreement may be executed in counterparts or duplicate originals, all of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This Agreement may be executed by facsimile signatures and such signatures shall be deemed to bind each Party as if they were original signatures.

38. No Admission of Liability. This Agreement is a compromise and settlement of disputed claims and such compromise and settlement shall not be taken as an admission of



liability on the part of any Party to this Agreement, but rather, any such liability is expressly denied. Neither this Agreement nor any of the terms hereof shall be offered or received in evidence in any action or proceeding, or be otherwise used, as an admission or concession of liability of wrongdoing of any nature on the part of any of the Parties.

39. Discussion Purposes Only Until Executed. Any draft or unexecuted version of this Agreement is for discussion purposes only, and does **not** represent a final or binding agreement between the Parties to settle any of the disputes between them until signed and dated by all Parties. No rights or obligations accrue as a result of this Agreement until signed and dated by all Parties.

Dated: _____

*The Kind Group LLC and
eos Products, LLC:*

By _____
Signature

Jonathan Teller
Managing Partner

Dated: 8/15/15

OraLabs, Inc.:

By _____
Signature

Gary Schlatter
President / CEO

**IN THE MATTER OF CERTAIN LIP BALM PRODUCTS,
CONTAINERS FOR LIP BALM, AND COMPONENTS THEREOF**

337-TA-961

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 09** has been served upon the **Commission Investigative Attorney, Peter Sawert, Esq.**, and the following parties as indicated on **August 31st, 2015**.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANTS EOS PRODUCTS, LLC & THE KIND GROUP LLC:

Louis S. Mastriani, Esq.
ADDUCI, MASTRIANI & SCHAUMBERG, LLP
1133 Connecticut Avenue, N.W., 12th Floor
Washington, DC 20036

() Via Hand Delivery
(☒) Via Express Delivery
() Via First Class Mail
() Other: _____

**FOR RESPONDENTS ORALABS, INC., CVS HEALTH CORPORATION, CVS
PHARMACY, INC., WALGREENS BOOTS ALLIANCE, INC., WALGREEN CO.,
WUXI SUNMART SCIENCE AND TECHNOLOGY CO., WUXI SUNMART PLASTIC
CO., LTD., & FIVE BELOW INC.**

Jeremy Younkin, Esq.
FOLEY HOAG LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210

() Via Hand Delivery
(☒) Via Express Delivery
() Via First Class Mail
() Other: _____