

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Audrey Donaldson (“Donaldson”) and Fit & Fresh, Inc. (“Fit & Fresh”), with Donaldson and Fit & Fresh each individually referred to as a “Party” and collectively as the “Parties.” The Settlement Agreement is accepted and agreed by Barnes & Noble Booksellers, Inc. (“B&N”), a downstream releasee of Donaldson. Donaldson is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Fit & Fresh employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Donaldson alleges that Fit & Fresh manufactures, sells, and distributes for sale in California, lunch bags with PVC handles containing the phthalate chemical Diisononyl Phthalate (“DINP”). DINP is listed pursuant to Proposition 65 as a chemical known to cause cancer. Donaldson alleges that Fit & Fresh failed to provide the health hazard warning required by Proposition 65 for exposures to DINP.

### 1.3 Product Description

The products covered by this Settlement Agreement are specifically identified as, and limited to, the “*The Foundry Insulated Lunch Bag*”, *UPC 7 00522 22753 3* and *UPC 7 00522 22751 9*, that are manufactured, sold, or distributed for sale in California by Fit & Fresh (hereinafter referred to as “Products”).

#### **1.4 Notice of Violation**

On September 22, 2020, Donaldson served Fit & Fresh and B&N, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Fit & Fresh violated Proposition 65 when it failed to warn its customers and consumers in California of the health hazards associated with exposures to DINP from its Products. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

#### **1.5 No Admission**

Nothing in this Settlement Agreement shall be construed as an admission by Fit & Fresh or B&N of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Fit & Fresh or B&N of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Fit & Fresh and B&N, respectively. This Section shall not, however, diminish or otherwise affect Fit & Fresh’s obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean December 1, 2020.

## **2. INJUNCTIVE RELIEF: REFORMULATION/WARNING**

### **2.1 Reformulation Standards**

“Reformulated Products” are defined as those Products containing DINP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or any other methodologies utilized by federal or state agencies for the purpose of determining the DINP content in a solid substance.

## **2.2 Reformulation/Warning Commitment**


As of the Effective Date, Fit & Fresh shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 or labeled with the appropriate warning label pursuant to Section 2.3 or contain a warning as set forth in Section 2.3 below. The Parties agree and intend for compliance with the terms of this Settlement Agreement to constitute compliance with Proposition 65 with respect to exposures to DINP from the Products.

## **2.3 Warnings**

As of the Effective Date, all Products Fit & Fresh sells and/or distributes for sale in California which do not qualify as Reformulated Products, shall bear a clear and reasonable warning pursuant to this Section. Fit & Fresh further agrees that the warning shall be prominently placed with such conspicuousness when compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed directly to the product or product packaging, label, or tag, for Products sold in California and containing one of the following statements:

 **WARNING:** Cancer- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

OR

 **WARNING:** This product can expose you to chemicals, including DINP, which are known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

The above warning statements shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the label is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING.”

The requirements for warnings set forth in this Section, are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations. In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting specific safe harbor warning text and/or methods of transmission different than those set forth above, Fit & Fresh shall be entitled to use, at their discretion, such other specific safe harbor warning text and/or methods of transmission without being deemed in breach of this Agreement. If Proposition 65 warnings for DINP should no longer be required, Fit & Fresh and Barnes & Noble, shall have no further obligations pursuant to this Settlement Agreement.

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

#### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Fit & Fresh agrees to pay \$2,800 in civil penalties no later than the Effective Date. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Donaldson, and delivered to the address in Section 3.3 herein. Fit & Fresh will provide its payment in two checks as follows: (1) “OEHHA” in the amount of \$2,100; and (2) “Audrey Donaldson” in the amount of \$700.

#### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Donaldson and her counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been reached, Fit & Fresh

expressed a desire to resolve Donaldson's fees and costs. The Parties reached an accord on the compensation due to Donaldson and her counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, on or before the Effective Date, Fit & Fresh agrees to pay \$15,900, in the form of a check made payable to "Voorhees & Bailey, LLP," for all fees and costs incurred investigating, bringing this matter to the attention of Fit & Fresh's management, and negotiating a settlement.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to the following address:

Voorhees & Bailey, LLP  
990 Amarillo Avenue  
Palo Alto, CA 94303

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Donaldson's Release of Proposition 65 Claims**

Donaldson acting on her own behalf, and *not* on behalf of the public, releases Fit & Fresh, their parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Fit & Fresh directly or indirectly distribute or sell Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers including, but not limited to, Barnes & Noble Booksellers, Inc. (together with its parents, shareholders, subsidiaries, affiliates, directors, officers, employees and agents), franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to DINP in the Products. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof,

or any distributors or suppliers who sold the Products or any component parts thereof to Fit & Fresh.

#### **4.2 Donaldson's Individual Release of Claims**

Donaldson, in her individual capacity only and *not* in her representative capacity, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of Donaldson of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to DINP in the Products manufactured, imported, distributed, or sold by Fit & Fresh and B&N prior to the Effective Date. The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to Fit & Fresh. Nothing in this Section affects Donaldson's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Fit & Fresh's Products.

#### **4.3 Fit & Fresh's Release of Donaldson**

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

### **5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Fit & Fresh may provide written notice to Donaldson of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Fit & Fresh:

Mr. Chuck Miga  
Fit & Fresh, Inc.  
295 Promenade St.  
Providence, RI 02908

For Donaldson:

Voorhees & Bailey, LLP  
Proposition 65 Coordinator  
990 Amarillo Avenue  
Palo Alto, CA 94303

For B&N  
Barnes & Noble Booksellers, Inc.  
122 Fifth Avenue  
New York, NY 10011  
Attn: Legal Department

Any Party may, from time to time, specify in writing to the other a change of address to which all notices and other communications shall be sent.

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Donaldson and her attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

10. **MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties and B&N.

11. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and B&N and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.


**AGREED TO:**

**AGREED TO:**

Date: 12/2, 2020

Date: 12/1, 2020

By:   
AUDREY DONALDSON

By:   
Chuck Mige, President  
Fit & Fresh, Inc.

Accepted and Agreed:

Barnes & Noble Booksellers, Inc.

By: **Bradley A Feuer**  
Bradley A. Feuer  
Vice President, Corporate Secretary and General Counsel  
Date:

Signature: Bradley A Feuer  
Bradley A Feuer (Dec 1, 2020 09:49 CST)  
Email: bfeuer@bn.com