

# PROPOSITION 65 SETTLEMENT AGREEMENT

60-Day Notice Number 2020-02577

## 1. INTRODUCTION

### 1.1 The Parties

This Settlement Agreement (“**Agreement**”) is entered into by and between Keep America Safe and Beautiful (“**KASB**”) and Sebada USA, Redwood Ecom LLC *dba* Kody’s Mercantile, Big Fly, JP-AW, LLC and 11b, LLC *dba* Globally Good (collectively, the “**Settling Entities**”) with KASB and the Settling Entities each, individually, referred to as a “**Party**” and, collectively, the “**Parties.**” KASB is a California-based non-profit organization proceeding in the public interest pursuant to California Health & Safety Code § 25249.7(d) to ensure that chemicals known to the State of California to cause cancer, birth defects or other reproductive harm are disclosed in or eliminated from consumer products sold in California. The Settling Entities are responsible entities selling products to consumers in the State of California and/or to downstream entities who are persons in the course of doing business for purposes of the California Health & Safety Code § 25249.11(b).

### 1.2 Consumer Product Description

KASB alleges the Settling Entities manufacture, import, sell, distribute, or otherwise facilitate for sale, in or into California, tools with vinyl grips containing di(2ethylhexyl) phthalate (“**DEHP**”) without providing the health hazard warning KASB alleges is required by the Safe Drinking Water & Toxic Enforcement Act of 1986. California Health & Safety Code §§ 25249.5 et seq. The “**Products**” covered by this Settlement Agreement are limited to the following Amazon.com ASIN: the *Army Painter Miniature & Model File Set; Product No. X002J49KBB, ASIN B001AE7RRO* sold by the Settling Entities. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm. The Settling Entities enter into this Settlement Agreement on behalf of the Noticed Recipient, defined in Section 1.3, and from whom the Settling Entities have accepted a tender of defense pursuant to a contractual clause to indemnify and defend the Notice Recipient for alleged liability for the sale of the Products, defined in this Section 1.2. To that end, the

Settling Entities contacted KASB and seek a resolution in the public interest, pursuant to the terms detailed in the following Section 2.

### **1.3 Notice of Violation**

On November 18, 2020, KASB served The Army Painter ApS, Amazon.com, Inc. (“Amazon” or the “Notice Recipient”), the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging Amazon violated Proposition 65 by failing to warn its customers and consumers in California the Products can expose users to DEHP. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations in the Notice.

### **1.4 No Admission**

The Settling Entities deny the factual and legal allegations contained in the Notice and maintain all Products they sold, caused to be sold, or distributed for sale in California have been, and are, in compliance with all laws. Nothing in this Agreement shall constitute or be construed as, nor shall compliance with this Agreement constitute or be construed as, an admission by any of the Settling Entities of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect the Settling Entities’ obligations, responsibilities, and duties under this Agreement.

### **1.5 Effective Date**

For purposes of this Agreement, “Effective Date” shall mean March 17, 2023.

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

### **2.1 Reformulation Commitment**

Commencing on the Effective Date and continuing thereafter, for all Products the Settling Entities manufacture, import, sell, ship, distribute for sale, or cause to be sold through the Notice Recipient, in or into California, shall either: (a) meet the Reformulation Standard for Reformulated Products, as defined by Section 2.2; or (b) be accompanied by a compliant health hazard warning, pursuant to Sections 2.3 through 2.5.

## 2.2 Reformulation Standard & Reformulated Products Defined

For purposes of this Agreement, “**Reformulated Products**” are defined as Products containing di(2-ethylhexyl) phthalate (“DEHP”) in a maximum concentration of less than 0.1 percent (1,000 parts per million) in any “**accessible component**” (i.e., any component that may be touched during a reasonably foreseeable use) when analyzed by a laboratory certified or accredited by the State of California, the United States Food and Drug Administration/Environmental Protection Agency, the National Environmental Laboratory Accreditation Program, or a member accreditation body of the International Laboratory Accreditation Cooperation (“ILAC”). For purposes of compliance with this **Reformulation Standard**, testing samples shall be prepared and extracted using Consumer Product Safety Commission (“CPSC”) methodology CPSC-CH-C1001.09.4 and analyzed using U.S. Environmental Protection Agency methodology 8270D, or other methodologies utilized by federal or state government agencies to determine phthalate content in a solid substance.

## 2.3 Clear and Reasonable Warnings

Commencing on or before the Effective Date, for Products that are not Reformulated Products, the Settling Entities shall provide clear and reasonable warnings for all Products provided for sale to consumers in California in accordance with this Section, pursuant to Title 27 California Code of Regulations § 25600, et seq. Each warning shall be prominently placed with such conspicuousness as 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 before purchase or use and shall be provided in a manner such that it is clearly associated with the specific Product to which the warning applies.

(a) **Warning.** The Warning shall consist of the following statement:

- **⚠WARNING:** This product can expose you to DEHP, which is known to the State of California to cause birth defects and other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(b) **Foreign Language Requirement.** Where a consumer product sign, label or shelf tag used to provide a warning includes consumer information in language(s) other than English, the warnings must also be provided in those other language(s).

## **2.4 Product Warnings**

The Settling Entities shall affix a warning to the Product label or otherwise directly on Products provided for sale to consumers located in California and to customers with retail outlets in California or nationwide distribution. For the purpose of this agreement, “**Product label**” means a display of written, printed or graphic material printed on or affixed to each of the Products or its immediate container or wrapper. A warning provided pursuant to section 2.3(a) must print the word “**WARNING:**” in all capital letters and in bold font. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except if the labeling does not use the color yellow, the symbol may be in black and white. The entire warning shall appear in at least 6-point type and no smaller than the largest type size used for other consumer information on the Products.

## **2.5 Internet Warnings**

If, after the Effective Date, the Settling Entities offer the Products, that are not Reformulated Products, for sale through Amazon, ecommerce platforms, through downstream vendors with ecommerce platforms or online storefronts, or on their own websites to consumers located in California, then the Settling Entities shall provide warnings for each Product, both on the Product label, in accordance with Section 2.4, and by prominently displaying, or requiring the warning to be prominently displayed on affiliated websites, third party websites or by retail customers, to the consumer prior to or during the purchase of the Products without requiring customers to seek out the warning. The warning or a clearly marked hyperlink to the warning using the word “**WARNING**” given in conjunction with the sale of the Products via the internet shall appear: (a) on the same web page on which the Products are displayed; (b) on the same web page as the virtual cart displaying the Products; (c) on the same page as the price for the Products; or (d) on one or more web pages displayed to a purchaser during the checkout process. The warning shall appear in any of the above instances adjacent to or immediately following the display, description or price of the Products for which it is given in the same type size or larger than other consumer information provided for the Products.

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

#### **3.1 Civil Penalty**

Pursuant to Health and Safety Code § 25249.7(b), the Settling Entities agree to pay a civil penalty of \$2,500 within five (5) business days of the Effective Date. The Settling Entities' civil penalty payment will be allocated according to Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) retained by KASB. Each Settling Entity shall remit payments in two separate checks made payable to: (a) "OEHHA" in the amount of \$375; and (b) "Keep America Safe and Beautiful" in the amount of \$125. KASB's counsel shall deliver to OEHHA and KASB their respective portion of the penalty payment.

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

KASB and its counsel offered to resolve the allegations in the Notice without reaching terms on the amount of reimbursement of attorneys' fees and costs. Shortly after the Parties finalized the other material settlement terms, they negotiated and reached an accord on the amount of reimbursement to be paid to KASB's counsel, under general contract principles and the private attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution and reporting of this Agreement to the Office of the California Attorney General. Within five (5) business days of the Effective Date, each Settling Entity agrees to issue a check made payable to "Seven Hills LLP" in the amount of \$4,000, totaling \$20,000, for reimbursement of a proportional share of the fees and costs incurred investigating, bringing this matter to the Notice Recipient's attention, negotiating a settlement in the public interest, and reporting the terms of this Agreement to Office of the California Attorney General pursuant to Section 9.

#### **3.3 Payments**

All payments payable and due under this Agreement shall be delivered to KASB's counsel, with an accompanying tracking number, at following address:

Seven Hills LLP  
Attn: Kimberly Gates Johnson  
4 Embarcadero Center, Suite 1400  
San Francisco, CA 94111

The obligations under this Section shall be satisfied only upon payment in full by all Settling Entities. In the event any individual Settling Entity fails to comply with these Section 3 terms, KASB reserves the right to pursue all options to enforce this agreement, including bringing an action for breach of contract or seeking a judgment to enforce the terms herein.

### **3.4 Representations**

The Settling Entities represent the sales data, product reformulation and/or knowledge of DEHP they provided to KASB in negotiating this Settlement Agreement was truthful and a material fact upon which KASB relied to determine the amount of civil penalties assessed, pursuant to Health & Safety Code § 25249.7. If, within nine months of the Effective Date, KASB discovers and presents to the Settling Entities, or any of them, evidence demonstrating the preceding representation was materially inaccurate, then the Settling Entities shall have 30 days to meet and confer regarding KASB's contention. In the event the 30-day meet and confer period passes without any such resolution between KASB and the Settling Entities, or any of them, then KASB shall be entitled to make an appropriate motion to the Court to cure any breach of this Section, pursuant to Code of Civil Procedure § 664.6. The prevailing Party on the motion shall be entitled to its reasonable attorneys' fees as approved by the Court. The parties hereby stipulate to and request that the Superior Court of California retain jurisdiction over the Parties to enforce the settlement, until the expiration of the nine (9) months following the Effective Date, pursuant to Code of Civil Procedure § 664.6. The Settling Entities stipulate the Superior Courts of California shall have personal jurisdiction over each of them for the sole and limited purpose of an action to enforce the terms of this Settlement Agreement brought without joinder of other claims. Nothing in this Settlement Agreement is intended or interpreted to relieve the Settling Entities from other obligations to comply with pertinent State or Federal laws.

#### 4. CLAIMS COVERED AND RELEASED

##### 4.1 **KASB's Release of the Settling Entities**

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and the Settling Entities, of any violation of Proposition 65 that was or could have been asserted by KASB on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, against the Settling Entities, their directors, officers, employees, attorneys, and each entity to whom the Settling Entities directly distributes or sells Products, including Amazon.com, Inc., downstream distributors, wholesalers, and (collectively, “**Releasees**”), based on the failure to warn under Proposition 65 about alleged exposures to DEHP from Products, as that term is specifically defined in Section 1.2, above, sold or offered for sale in or into California prior to the Effective Date by the Settling Entities and Releasees, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, KASB as an individual and *not* on behalf of the public, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of KASB's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that KASB may have, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to DEHP in the specifically defined Product that was sold or offered for sale by the Settling Entities, before the Effective Date (collectively, “**Claims**”), against the Settling Entities and Releasees.

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 any of the Settling Entities. Nothing in this Section affects KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve the Settling Entities' Products.

#### **4.2 Settling Entities' Releases of KASB**

Each Settling Entity, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against KASB and its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by KASB and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

#### **SEVERABILITY**

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

#### **5. GOVERNING LAW**

The terms of this Agreement shall be governed by the laws of the State of California and apply within California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then the Settling Entities may provide KASB with written notice of any asserted change in the law, and shall have no further injunctive obligations pursuant to this Agreement, with respect to, and to the extent that, the Products are so affected. Nothing in this Agreement shall be interpreted to relieve the Settling Entities from their obligations to comply with any pertinent state or federal law or regulation.

#### **6. NOTICE**

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

**For the Settling Entities:**

Chris Maillet, CEO/Founder  
BigFly  
3161 State Road Unit 1A  
Bensalem, PA 19020

**For KASB:**

Kimberly Gates Johnson, Partner  
Seven Hills LLP  
4 Embarcadero Center, Suite 1400  
San Francisco, CA 94111



For JP-AW, LLC; and  
For 11b dba Globally Good:  
Paul S. Rafelson, Esq.  
Rafelson Law, PLLC  
2255 Glades Rd., Ste. 319A  
Boca Raton, FL 33431-7383

For Redwood Ecom LLC:  
Jeff H. Schick, Esq.  
Jeff Schick Legal, PLLC  
3801 PGA Blvd., Ste. 600  
Palm Beach Gardens, FL 33410

For Sebada USA:  
Ryan S. Landis, Esq.  
Gordon Rees Scully Mansukhani, LLP  
5 Park Plaza, Ste. 1100  
Irvine, CA 92614

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

**7. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

This Agreement may be executed in counterparts and by 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.

**8. COMPLIANCE WITH REPORTING REQUIREMENTS**

KASB and its counsel agree to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

**9. ENTIRE AGREEMENT**

This Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto.

**10. MODIFICATION**


This Agreement may be modified only by a written agreement of the Parties.

**11. AUTHORIZATION**

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


**AGREED TO:**

Date: 03/16/2023

By:   
My Nguyen, COO  
Keep America Safe and Beautiful

**AGREED TO:**

Date: 3/14/23

By:   
Chris Maillet, CEO/Founder  
BigFly

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**12. AUTHORIZATION**

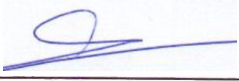
The undersigned are authorized to execute this Agreement on behalf of their respective Parties and have read, understood, and agreed to all of the terms and conditions of this Agreement.

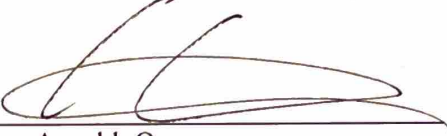
**AGREED TO:**

Date: March 16, 2023

**AGREED TO:**

Date: MARCH 16, 2023

By:   
My Nguyen, COO  
Keep America Safe and Beautiful

By:   
Adam Arnold, Owner  
Sebada USA

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**13. AUTHORIZATION**

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

**AGREED TO:**

Date: \_\_\_\_\_

**AGREED TO:**

Date: \_\_\_\_\_

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

My Nguyen, COO  
Keep America Safe and Beautiful

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

{Name} {Title}  
11b dba Globally Good

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**14. AUTHORIZATION**

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

**AGREED TO:**

Date: 03-20-2023

**AGREED TO:**

Date: 3-17-23

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

My Nguyen, COO  
Keep America Safe and Beautiful

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

{Name} {Title}  
JP-AW, LLC

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**15. AUTHORIZATION**


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

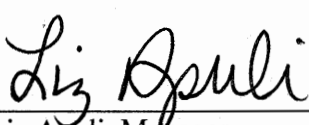
**AGREED TO:**

Date: 03/31/2023

**AGREED TO:**

Date: 3-28-2023

By:   
My Nguyen, COO  
Keep America Safe and Beautiful

By:   
Liz Apuli, Manager  
Redwood Ecom LLC dba Kodys'  
Mercantile