

PROPOSITION 65 SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (“**Agreement**”) is entered into by and between Keep America Safe and Beautiful (“**KASB**”) and A.D. Sutton & Sons, Inc. (“**A.D. Sutton**”) with KASB and A.D. Sutton each individually referred to as a “**Party**,” and collectively as the “**Parties**.” KASB, is a person residing in the State of California proceeding in the public interest pursuant to California Health & Safety Code §§ 25249.7(d). KASB seeks to improve human health by reducing or eliminating hazardous substances used in consumer products. KASB alleges A.D. Sutton 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 Allegations and Chemical

KASB alleges A.D. Sutton manufactures, imports, sells, and/or distributes for sale in California pencil pouches with vinyl/PVC components containing di(2-ethylhexyl) phthalate (“**DEHP**”) without first providing California consumers with a Proposition 65 warning, as required by California Health & Safety Code §§ 25249.5 et seq. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

1.3 Product Description

The products covered by this Settlement Agreement are all pencil pouches with vinyl/PVC components containing DEHP that are manufactured, imported, distributed, sold, offered for sale, and/or sold in California by A.D. Sutton, including, but not limited to, the *Big 3 Ring Pencil Pouch (12 Pack), Part Number 76617676, B07YF45YQD, RN 93551* (hereinafter the “**Products**”).

1.4 Notice of Violation

On November 18, 2020, KASB served A.D. Sutton, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”),

alleging A.D. Sutton violated Proposition 65 by failing to provide a warning to consumers in California that the Products can expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

1.5 No Admission

A.D. Sutton enters into this Settlement Agreement to resolve the claims alleged in the Notice and to avoid prolonged and costly litigation. A.D. Sutton denies the material factual and legal allegations contained in the Notice; maintains it is not a person subject to Proposition 65; and maintains all products it manufactured, imported, sold, or distributed for sale in California, including the Products, have been, and are, in compliance with all laws, and are completely safe for their intended use. Nothing in this Agreement shall be construed as, nor shall compliance with this Agreement constitute or be construed as, an admission by A.D. Sutton of any fact, finding, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by A.D. Sutton of any or the above, such being specifically denied by A.D. Sutton. Nothing in this Settlement Agreement shall prejudice, waive or impair any right, remedy, argument or defense A.D. Sutton may have in this or any other future legal proceeding. This Settlement Agreement is the product of negotiation and compromise and is accepted by A.D. Sutton solely for purposes of settling, compromising, and resolving issues disputed in the Notice. However, this Section 1.5 shall not diminish or otherwise affect the Parties' obligations, responsibilities, and duties under this Agreement.

1.6 Effective Date

For purposes of this Agreement, the term "**Effective Date**" shall mean December 10, 2021.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Commitment to Reformulate or Provide Warnings

As of the Effective Date and continuing thereafter, A.D. Sutton shall not manufacture, import, distribute, sell, or offer the Products for sale in the State of California, unless they are

either: (1) Reformulated Products in accordance with and as defined by the Reformulation Standard in Section 2.2 below; or (2) Products bearing a clear and reasonable Proposition 65 warning as provided by the following Sections 2.3 through 2.6.

2.2 Reformulation Standard & Reformulated Products Defined

For purposes of this Agreement, “**Reformulated Products**” are defined as Products containing less than 0.1 percent (1,000 parts per million (“ppm”)) each of di(2-ethylhexyl)phthalate (“**DEHP**”), di-n-butyl phthalate (“**DBP**”), diisononyl phthalate (“**DINP**”), butyl benzyl phthalate (“**BBP**”), di-isodecyl phthalate (“**DIDP**”) and/or di-n-hexyl phthalate (“**DnHP**”) in each and every accessible component (i.e. a component that may be touched or utilized during a reasonably foreseeable use) when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization. For purposes of compliance with this reformulation standard, testing samples shall be prepared and extracted using Consumer Product Safety Commission (“**CPSC**”) methodology CPSC-CH-C1001.09.3 and analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other methodologies utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance (“**Reformulation Standard**”).

2.3 Clear and Reasonable Warnings

Commencing on or before the Effective Date, A.D. Sutton shall provide clear and reasonable warnings for all Products A.D. Sutton manufactures, imports, distributes, sells, and/or offers for sale in or into California that are not Reformulated Products or do not meet the Reformulation Standard. 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 prior to purchase or use and shall be provided in such a manner as to clearly associate the warning with the specific Product to which it applies. Each warning shall consist of either the Warning or Short-Form Warning described in §§ 2.3(a) or (b), respectively:

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

⚠ **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl) phthalate (DEHP), which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(b) **Short-Form Warning.** A.D. Sutton may, but is not required to, use the following short-form warning (“**Short-Form Warning**”):

⚠ **WARNING:** Cancer and Reproductive Harm-www.P65Warnings.ca.gov.

2.4 On-Product Warnings: Placement & Requirements

For Products not meeting the Reformulation Standard and manufactured, distributed, sold, or offered for sale in California after the Effective Date, warnings appearing on Products, in compliance with the preceding Section 2.3, shall be affixed to or printed directly on the Product itself, its packaging, container, or labeling, provided the warning is displayed with such conspicuousness, as compared with other words, statements, or designs, as to render it reasonably likely to be read and understood by an ordinary individual under customary conditions of purchase or use, such that the consumer does not have to search for it. At its option, A.D. Sutton may use either the Warning or the Short-Form Warning to comply with this Section.

The warning may be contained in the same section of the packaging, container, or labeling where other safety warnings are printed, if any, concerning the use of the Product and shall be at least the same size as those other safety warnings. Any warning given pursuant to this Section must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. 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, then the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The entire warning shall appear in a type size of at least 6-point font and, in no event, shall the warning be smaller than the type size used for other consumer information on the product. The warning shall consist of either the Warning

or the Short-Form Warning, as set forth above.

2.5 Internet Warnings: Placement & Requirements

If, after the Effective Date, A.D. Sutton sells Products that are not Reformulated Products via the internet directly to customers located in California, then A.D. Sutton shall provide warnings for each such Product, both on the Product, in compliance with Section 2.4, and by prominently displaying the warning to the customer during the Product purchase process or prior to completing the Product purchase without requiring customers to seek out the warning.

The warning or a clearly marked hyperlink to the warning and using the word “WARNING”, given in conjunction with the sale of the Products via the internet, shall appear either: (a) on the same web page where the Product is displayed; (b) on the same page as the Product price; or (c) on one or more web pages displayed to a purchaser during the checkout process. Alternately, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies. A.D. Sutton may use the Short-Form Warning for internet Product sales, if the warning provided on the Product label is also the Short-Form Warning.

For third-party internet retailers who offer Products for sale in California that are not Reformulated Products, AD Sutton shall notify them that the Products require an internet warning for sales to customers with a California ship to address in accordance with the placement and requirements set forth above.

2.6 Compliance with Warning Regulations

The Parties agree A.D. Sutton shall be deemed to be in compliance with this Agreement by adhering to the preceding Sections 2.1 through 2.5. In the event 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 for DEHP different than those set forth

above, A.D. Sutton shall be entitled to use such other specific safe harbor warning text and/or methods of transmission without being deemed in breach of this Agreement or in breach of Sections 2.3 through 2.5.

2.7 AD Sutton Understanding of Public Benefit.

It is A.D. Sutton's understanding the commitments it has agreed to herein, and the actions it has agreed to take under this Settlement Agreement, confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of A.D. Sutton that to the extent any other private party serves a notice and/or initiates an action alleging a violation of Proposition 65 with respect to A.D. Sutton's alleged failure to provide a warning concerning actual or alleged exposure to DEHP or other listed phthalates prior to use of the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that A.D. Sutton is in material compliance with this Settlement Agreement.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalties

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, A.D. Sutton agrees to pay a total of \$1,500 in civil penalties. The Parties agree A.D. Sutton's commitments under this Agreement confer a significant public benefit to the general public, as set forth in California Code of Civil Procedure § 1021.5. Penalty payments shall be allocated in accordance with Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty amount retained by KASB. A.D. Sutton will provide its payment within 5 business days of the Effective Date in two separate checks, made payable as follows: (1) "OEHHA" in the amount of \$1,125; and (2) "Keep America Safe and Beautiful" in the amount of \$375. A.D. Sutton shall

send its civil penalty payments to the address listed in Section 3.3 below. KASB's counsel shall be responsible for timely remitting OEHHA's civil penalty payment under this Settlement Agreement.

3.2 Attorneys' Fees and Costs

The Parties acknowledge KASB and its counsel offered to resolve this dispute without reaching terms on the amount of attorneys' fees and expenses to be reimbursed to them, thereby leaving the issue to be resolved after the Parties settled the material terms of this Agreement. Shortly after the Parties finalized all other settlement terms, they negotiated and reached an accord to resolve KASB's fees and costs. The Parties thereafter reached an accord on the compensation due 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 in this matter through the mutual execution and reporting of this Agreement to the Office of the Attorney General, pursuant to Section 9. Under these legal principles, A.D. Sutton shall reimburse KASB \$16,750 for its attorney's fees and expenses, including, but not limited to, all investigative, expert, and testing expenses incurred as a result of investigating and bringing this matter to A.D. Sutton's attention and negotiating this Agreement, as of the date of execution of this Agreement. Within five (5) business days of the Effective Date, A.D. Sutton shall issue a check in the amount of \$16,750 payable to "Seven Hills LLP" for delivery to the address identified in § 3.3 below.

3.3 Payments

All settlement payments due under this Agreement shall be delivered to KASB's counsel at following address:

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

Upon full execution of this Settlement Agreement, counsel for KASB shall promptly provide Federal Form W9s for all payee recipients to counsel for A.D. Sutton for purposes of

processing the required settlement payments.

4. CLAIMS COVERED AND RELEASED

4.1 KASB's Release of A.D. Sutton

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and A.D. Sutton, 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 (“**Releasors**”), against A.D. Sutton, its parents, subsidiaries, affiliated entities under common ownership, shareholders, marketplaces, directors, officers, employees, attorneys, and each entity to whom A.D. Sutton directly or indirectly distributes or sells Products, including, but not limited, to its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (collectively, **Releasees**) from all claims for actual or alleged violations of Proposition 65 based on exposures to DEHP and the failure to provide warnings for Products containing DEHP, as specifically defined by Section 1.3, as alleged in the Notice, that were manufactured, imported, sold, or distributed for sale prior to and through the Effective Date relating to unwarned exposures to alleged or actual DEHP in the Products.

In further consideration of the promises and agreements herein contained, KASB on behalf of itself, as an individual and not on behalf of the public. 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 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, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to actual or alleged DEHP, DBP, DINP, BBP, DIDP and DnHP in Products manufactured, distributed, sold and/or offered for sale by A.D. Sutton prior to the Effective Date (collectively, “**Claims**”), against A.D. Sutton and the 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 to any distributors or suppliers who sold the Products or any component parts thereof to A.D. Sutton. Nothing in this Section affects KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve A.D. Sutton's Products.

4.2 A.D. Sutton's Release of KASB

A.D. Sutton, 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.

4.3 Mutual Waiver of California Civil Code § 1542.

The Parties each acknowledge familiarity with Section 1542 of the Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Parties, each on their own behalf, and each on behalf of their past and current agents, representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which it/they may have under, or which may be conferred upon it/them by the provisions of Civil Code Section 1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters, as specifically defined by Sections 4.2 and 4.3, above. Nothing in this section shall affect KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve the Products.

4.4 Deemed Compliance with Proposition 65.

The Parties agree that A.D. Sutton's compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to actual or alleged exposures to DEHP, DBP, DINP, DIDP, DnHP, and/or BBP from use of the Products.

5. 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.

6. 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 Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then A.D. Sutton 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 A.D. Sutton from its obligation to comply with any pertinent state or federal law or regulation.

7. NOTICE

Unless otherwise 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 A.D. Sutton:

Steven Sutton, Chief Executive Officer
A.D. Sutton & Sons, Inc.
20 West 33rd Street, Suite 1100
New York, NY 10001

With a Copy to:

J. Robert Maxwell, Esq.
Rogers Joseph O'Donnell, P.C.

Robert Dollar Building
311 California Street, 10th Floor
San Francisco, CA 94104

For KASB:

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

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.

8. 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.

9. 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).

10. ENFORCEMENT

The Parties mutually agree, before any Party may take action to enforce the terms of this Agreement for alleged breach, the Party seeking enforcement must give the other Party written notice of such alleged breach and a good faith opportunity to respond and cure. Thereafter, the Parties agree to meet and confer for a period of no less than 30 days to attempt to resolve any alleged violation or breach. If KASB alleges a breach of the terms of this Agreement based on a violation under Section 2, then, if A.D. Sutton produces a test result showing compliance with the Reformulation Standard defined in Section 2.2 taken within one year of the Product's date of sale by A.D. Sutton in California without a Proposition 65 warning, A.D. Sutton shall be deemed not to be in breach, provided the Parties can also agree on appropriate corrective actions to be taken by A.D. Sutton. If the alleged violation cannot be resolved after good faith attempts to correct the violation or breach and after meeting and conferring as required under this Section

then the Party alleging a violation may thereafter move to enforce the terms of this Settlement Agreement, including through the filing of a formal enforcement action or any other remedy available under the law. On any motion to enforce the terms of this Settlement Agreement in compliance with this section, the prevailing party shall be entitled to its reasonable attorney's fees and costs according to proof.

11. JOINT PREPARATION

The Parties jointly participated in the preparation of this Agreement, and this Agreement is the result of the joint efforts of the Parties. Accordingly, any uncertainty or ambiguity existing in this Agreement shall not be interpreted against any Party as a result of the manner of the preparation of this Agreement. The Parties to this Settlement agree any statute or rule of construction providing that ambiguities should be interpreted against the drafting Party shall be waived, and, in this regard, the Parties hereby waive California Civil Code § 1654.

12. 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.

13. MODIFICATION

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

14. AUTHORIZATION

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

AGREED TO:


Date: 12/19/2021

By: 

Ngoc-Bich Hoang Vo, CEO
Keep America Safe and Beautiful

AGREED TO:

Date: Dec 15, 2021

By: 

Steven Sutton, CEO
A.D. Sutton & Sons, Inc.