

PROPOSITION 65 SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (“**Agreement**”) is entered into by and between Keep America Safe & Beautiful (“**KASB**”) and EC Design LLC (“**EC Design**”), with KASB and EC Design 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. KASB alleges EC Design is a person in the course of doing business for purposes of California Health & Safety Code § 25249.11(b).

1.2 Consumer Product Description

KASB alleges that EC Design imports, sells and distributes for sale in California vinyl storage pouches which may contain di(2-ethylhexyl) phthalate (“**DEHP**”) including, but not limited to, *Erin Condren Fine Tip Wet Erase Marker Set, 0.5MM Fine Point Markers, Earth Tones*, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Vinyl storage pouches are referred to hereinafter as the “**Products.**” DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.3 Notice of Violation

On March 3, 2021, KASB served EC Design, the California Attorney General and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging EC Design violated Proposition 65 by failing to warn its customers and consumers in California that its Products can expose users to DEHP. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations in the Notice.

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1.4 No Admission

EC Design denies the factual and legal allegations contained in the Notice. Nothing in this Agreement shall constitute or be construed as, nor shall compliance with this Agreement constitute or be construed as, an admission by EC Design of any fact, finding, conclusion of law, issue of law, or violation of law. Nothing in this Agreement shall prejudice, waive, or impair any right, remedy, argument, complaint, or defense EC Design may have in any other or future legal proceeding unrelated to this specific proceeding. This section shall not, however, diminish or otherwise affect EC Design's obligations, responsibilities, and duties under this Agreement.

1.5 Effective Date

For purposes of this Agreement, "**Effective Date**" shall mean, once the agreement is signed by both parties, the date on which the last party signed.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Reformulation Commitment

Commencing on the Effective Date and continuing thereafter, all Products EC Design imports or purchases (for resale) for sale in or into California, directly or through one or more third party retailers or e-commerce marketplaces, shall meet the Reformulation Standard for Reformulated Products, as defined by Section 2.2.

2.2 Reformulation Standard

For purposes of this Agreement, "Reformulated Products" are defined as either (1) marker sets without vinyl pouches or (2) Products which, if they contain di(2-ethylhexyl) phthalate ("**DEHP**"), di-n-butyl phthalate ("**DBP**"), diisononyl phthalate ("**DINP**"), butyl benzyl phthalate ("**BBP**"), di-isodecyl phthalate ("**DIDP**") or di-n-hexyl phthalate ("**DnHP**"), contain any or all such chemicals each in a maximum concentration of less than 0.1 percent (1,000 parts per million) 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 the second option in this reformulation standard, testing samples shall be prepared and

extracted using Consumer Product Safety Commission (“CPSC”) methodology CPSC-CH-C1001-09.3 and analyzed using U.S. Environmental Protection Agency methodology 8270C or other equivalent methodologies utilized by federal or state government agencies to determine phthalate content in a solid substance.

2.3 Clear and Reasonable Warnings

Commencing on the Effective Date, for all Products that do not qualify as Reformulated Products as defined by Section 2.2, EC Design shall provide clear and reasonable warnings for all Products provided for sale to customers 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, or designs 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. There shall be no obligation for EC Design to provide warning for Products that enter the stream of commerce prior to the Effective Date of this Agreement.

(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.

(b) Short-Form Warning. EC Design may, but is not required to, use the following short-form warning (“**Short-Form Warning**”), and subject to the additional requirements in Section 2.5 as follows:



WARNING: Reproductive Harm - www.P65Warnings.ca.gov.

(c) 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 warning must also be provided in the other language(s) in addition to English.

2.4 Product Warnings

For all Products that do not qualify as Reformulated Products as defined by Section 2.2 provided for sale to consumers located in California and to customers with retail outlets in California or nationwide distribution, EC Design shall print or affix a warning on or to the Product's packaging or labeling, or on a placard, shelf tag, sign, or electronic device or automatic process. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Product and shall be at least the same size as those other safety warnings. A warning provided pursuant to section 2.3(a) or (b) 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, EC Design sells Products that do not qualify as Reformulated Products as defined by Section 2.2 via the internet, through its own website, affiliated websites or a third party website, to consumers located in California or to customers with nationwide distribution and e-commerce websites, the warning requirements of Sections 2.3 and 2.4 shall be satisfied if the foregoing warning appears either: (a) on the same web page on which the Products are displayed and/or described; (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. Alternatively, a symbol consisting of a black exclamation point in a yellow equilateral triangle (or white equilateral triangle if the labeling does not use the color yellow) 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.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty

Pursuant to Health and Safety Code § 25249.7(b), EC Design agrees to pay a civil penalty of \$3,500 within ten (10) business days of the Effective Date. EC Design's 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. EC Design shall issue its payment in two checks made payable to: (a) "OEHHA" in the amount of \$2,625; and (b) "Keep America Safe & Beautiful" in the amount of \$875. 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 by reaching terms on an amount of reimbursement of attorneys' fees and costs of \$18,500 for all work performed through the mutual execution and reporting of this Agreement to the Office of the California Attorney General. Within ten (10) days of the Effective Date, EC Design agrees to issue a check in the amount of \$18,500 payable to "Seven Hills LLP" for all fees and costs incurred investigating, bringing this matter to EC Design's attention, negotiating a settlement in the public interest, and reporting its terms 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 at following address:

Seven Hills LLP
Attn: Laralei Paras
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

4. CLAIMS COVERED AND RELEASED

4.1 KASB's Release of EC Design

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and EC Design, of any violation of Proposition 65 that was or could have been asserted by KASB on behalf of itself, its past and current agents, parents, shareholders, members, directors, officers, managers, employees, representatives, attorneys, partners, sister companies, and affiliates, and their successors, predecessors, and/or assignees, against EC Design, its parents, subsidiaries, affiliated entities under common ownership including: directors, officers, employees, attorneys, and each entity to whom EC Design directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, “**Releasees**”), based on alleged exposure to DEHP and EC Design’s alleged failure to warn about alleged exposures to DEHP contained in the Products that were distributed, sold and/or offered for sale by EC Design in California before the Effective Date, 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, parents, shareholders, members, directors, officers, managers, employees, representatives, attorneys, partners, sister companies, and affiliates, and their successors, predecessors, 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, known or unknown, of any nature whatsoever, in law or in equity, fixed or contingent, that KASB may now have, including, without limitation, all actions, causes of action, 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 the Products distributed, sold and/or offered for sale by EC Design, before the Effective Date (collectively, “**Claims**”), against EC Design and Releasees.

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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 EC Design. Nothing in this Section affects KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve EC Design's Products.

4.2 EC Design's Release of KASB

EC Design, 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.

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

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7. 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 EC Design:

Alexandra Dapolito Dunn, Partner
Baker Botts L.L.P.
700 K Street, NW
Washington, DC 20001

For KASB:

Laralei Paras, 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. 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.

11. MODIFICATION


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

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: June 24, 2021

By: 

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

AGREED TO:

Date: June 24, 2021

By: 

Tonia Misvaer, CEO
EC Design LLC