

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 DJO, LLC (“**DJO**”), with KASB and DJO 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 DJO 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 DJO manufactures, imports, sells, and distributes for sale in California vinyl/PVC bags containing diisononyl phthalate (“**DINP**”) as a component of the *Chattanooga Stabilizer Pressure Bio-feedback*, Item model #: CH153PA01, Stock #: 6515-01-422-6205, ASIN: B010E7MCJU, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). The Chattanooga Stabilizer Pressure Bio-feedback item is referred to hereinafter as the “**Product.**” DINP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 Notice of Violation

On March 12, 2021, KASB served DJO, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging DJO violated Proposition 65 by failing to warn its customers and consumers in California that its Products can expose users to DINP. No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations in the Notice.

1.4 No Admission

DJO denies the factual and legal allegations contained in the Notice and maintains that all products it has sold or distributed for sale in California, including the Products, 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 DJO of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect DJO's obligations, responsibilities, and duties under this Agreement.

1.5 Effective Date

For purposes of this Agreement, "**Effective Date**" shall mean the date six months after the second party signs the Agreement.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Reformulation Commitment

Commencing on the Effective Date and continuing thereafter, all Products DJO manufactures, imports, sells, ships, or distributes 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, or be accompanied by a clear and reasonable warning pursuant to Sections 2.3, 2.4 and 2.5.

2.2 Reformulation Standard


For purposes of this Agreement, "Reformulated Products" are defined as 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 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 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, DJO 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.

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

 **WARNING:** This product can expose you to DINP, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

(b) Short-Form Warning. DJO may, but is not required to, use the following short-form warning as set forth in this subsection 2.3(b) (“**Short-Form Warning**”), and subject to the additional requirements in Sections 2.5 and 2.6, as follows:

 **WARNING:** Cancer - 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

DJO 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) 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, DJO sells Products 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, DJO 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 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 either: (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. The internet warning

may use the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-Form Warning content.

2.6 Customer Notification

No later than the Effective Date, DJO shall send a letter, electronic or otherwise (“**Notification Letter**”) to: (1) each retailer or distributor in California to which it supplied Products between March 12, 2020 and March 12, 2021; and (2) any other retailer or distributor that DJO reasonably understands or believes has any inventory of Products, which DJO supplied between March 12, 2018 and March 12, 2021, for sale to consumers in California. The Notification Letter shall advise the recipient that the Products contain DINP, a chemical known to the State of California to cause cancer. The Notification letter shall inform the recipient that all Products must have a label attached to the packaging of each Product expressly referring to the Product, which contains one of the warning statements in Section 2.3 (a) or Section 2.3 (b), before it is sold in the California market or to a customer in California.

3. MONETARY SETTLEMENT TERMS

3.1 Initial Civil Penalty

Pursuant to Health and Safety Code § 25249.7(b), DJO agrees to pay a civil penalty of \$3,000 within thirty (30) calendar days of the date that the second party signs the Agreement. DJO’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. DJO shall issue its payment in two checks made payable to: (a) “**OEHHA**” in the amount of \$2,250; and (b) “**Keep America Safe and Beautiful**” in the amount of \$750. KASB’s counsel shall deliver to OEHHA and KASB their respective portion of the penalty payment.

3.2 Final Waivable Civil Penalty

DJO shall pay a second civil penalty of \$6,000. However, the second civil penalty shall be waived in its entirety, if, on or before 30 days after the Effective Date, an officer of DJO certifies, as of the Effective Date, and continuing thereafter, that: a) any and all Products manufactured or imported by DJO for sale to consumers in California directly including through its own website, affiliated websites or a third party website, to consumers located in California, and to customers with nationwide distribution and e-commerce websites, are Reformulated Products as defined by Section 2.2; or b) DJO has discontinued all sales of the Product. Unless the second civil penalty is waived, on or before 30 days after the Effective Date, DJO shall issue a check made payable to “OEHHA” in the amount of \$4,500 and a check made payable to “Keep America Safe and Beautiful” in the amount of \$1,500. KASB’s counsel shall deliver to OEHHA and KASB their respective portions of the final waivable civil penalty.

3.3 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 thirty (30) days of the date that the second party signs the Agreement, DJO agrees to issue a check in the amount of \$20,000 payable to “Seven Hills LLP” for all fees and costs incurred investigating, bringing this matter to DJO’s attention, negotiating a settlement in the public interest, and reporting its terms to Office of the California Attorney General pursuant to Section 9.

3.4 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
415/926-7247

4. CLAIMS COVERED AND RELEASED

4.1 KASB's Release of DJO

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and DJO, 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 DJO, its parents, subsidiaries, affiliated entities under common ownership including: directors, officers, employees, attorneys, and each entity to whom DJO 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 their failure to warn about alleged exposures to DINP contained in the Products that were manufactured, distributed, sold and/or offered for sale by DJO 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, 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 DINP in the Products manufactured, distributed,

sold and/or offered for sale by DJO, before the Effective Date (collectively, “**Claims**”), against DJO 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 DJO. Nothing in this Section affects KASB’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve DJO’s Products.

4.2 DJO’s Release of KASB

DJO, 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 DJO 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 DJO from its obligation to comply with any pertinent state or federal law or regulation.

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 DJO:

Joe Martinez, General Counsel
DJO, LLC
5919 Sea Otter Place, Suite 200
Carlsbad, CA 92010
760/734-3007
joe.martinez@djoglobal.com

For KASB:

Laralei Paras, Partner
Seven Hills LLP
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111
415/926-7247
laralei@sevenhillslp.com

With a copy to:

James Geocaris, Esq.
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626
714/966-3129
james.geocaris@lewisbrisbois.com

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. POST EXECUTION TO CONSENT JUDGMENT

Within twelve months of the Effective Date of this Agreement, DJO may ask KASB, in writing, to file a complaint, incorporate the terms of this Agreement into a proposed consent

judgment, and seek the court's approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If so requested, KASB agrees to reasonably cooperate with DJO and to use its best efforts, and that of its counsel, to seek the entry of a consent judgment by a California court. Pursuant to Code of Civil Procedure sections 1021 and 1021.5. DJO will reimburse KASB and its counsel for their reasonable fees and costs incurred in filing the complaint, converting the Agreement into a proposed consent judgment, and seeking judicial approval of the consent judgment, in an amount not to exceed \$10,000, exclusive of fees and costs that may be incurred on appeal. DJO will remit payment to Seven Hills LLP, at the address set forth in Section 3.4 above. These additional fees shall be paid by DJO to Seven Hills LLP within thirty (30) business days after its receipt of any invoice from Seven Hills LLP for work performed under this paragraph. DJO understands KASB and its counsel will not file a motion to approve any proposed consent judgment absent payment for the work performed under this paragraph.

11. 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 Parties to this Agreement. No other agreements between the Parties not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto.

12. MODIFICATION


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

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: 04-Jan-2022

By: 

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

AGREED TO:

Date: 01-Jan-2022

By: 

Jason Maxwell, Vice President, Litigation
DJO, LLC