

# 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 Performance Health Supply, LLC (“**Performance Health**”), with KASB and Performance Health 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 Performance Health 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 Performance Health manufactures, imports, sells, and distributes for sale in California tongs with vinyl components containing diisononyl phthalate (“**DINP**”) including, but not limited to, *Sammons Preston-Independent Toilet Aid, Item Model No. 35067, UPC 8 85914 05148 1, ASIN B06W5MS3GZ*, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Tongs with vinyl components are referred to hereinafter as the “**Products**.” DINP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

### 1.3 Notices of Violation

On March 3, 2021, KASB served Madison Dearborn Partners, LLC, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging Madison Dearborn Partners, LLC violated Proposition 65 by failing to warn its customers and consumers in California that its Products can expose users to DINP. On October 8, 2021, KASB served Performance Health, the California Attorney General, and the requisite public enforcement agencies with an Amended 60-Day Notice of Violation (“**Amended Notice**”), alleging Performance Health violated Proposition 65 by failing to warn its customers and consumers in California that its Products can expose users to DINP.

The Notice and Amended Notice are collectively referred to hereinafter as the “**Notices.**” No public enforcer has commenced and is diligently prosecuting an action to enforce the allegations in the Notices.

#### **1.4 No Admission**

Performance Health denies the factual and legal allegations contained in the Notices 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 Performance Health of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Performance Health’s obligations, responsibilities, and duties under this Agreement.

#### **1.5 Effective Date**

For purposes of this Agreement, “**Effective Date**” shall mean the date this by which this agreement has been signed by both Parties.

## **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

### **2.1 Reformulation Commitment**

Commencing within thirty (30) days of the Effective Date and continuing thereafter, all Products Performance Health 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 Section 2.3.

### **2.2 Reformulation Standard**

For purposes of this Agreement, “**Reformulated Products**” are defined as Products which, if they contain diisononyl phthalate (“**DINP**”), contain such chemical 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 or 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 Specification to Suppliers**

Performance Health shall directly or through its supply chain issue specifications to its suppliers of Products and grip components used in any Product requiring that such products shall use grip components reformulated to contain none of the following phthalate chemicals which are known carcinogens or developmental and/or reproductive toxins: diisononyl phthalate (“DINP”), di(2-ethylhexyl) phthalate (“DEHP”), di-n-butyl phthalate (“DBP”), butyl benzyl phthalate (“BBP”), di-isodecyl phthalate (“DIDP”) and di-n-hexyl phthalate (“DnHP”). In addressing the obligation set forth in the preceding sentence, Performance Health shall not in any way mention or suggest a supplier delay compliance with the Reformulation Standard.

### **2.4 Warnings**

Commencing on or before the Effective Date, Performance Health shall provide clear and reasonable warnings for all Products, that are not Reformulated 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 diisononyl phthalate (“DINP”), which is known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(b) **Short-Form Warning.** Performance Health 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](http://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.

(d) **Product Warnings**

Performance Health shall affix a warning to the Product label or otherwise directly on Products, that are not Reformulated 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.

(e) **Internet Warnings**

If, after the Effective Date, Performance Health sells Products, that are not Reformulated 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, Performance Health shall provide warnings for each Product both on the Product label in accordance with Section 2.3(d), 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.

### **2.5 Customer Notification**

No later than five (5) business days after the Effective Date, Performance Health shall send a letter, electronic or otherwise (“**Notification Letter**”) to Anatomy Supply Products LLC (“ASP”), Performance Health’s distributor of the Product between March 3, 2018, and the Effective Date, for sale to consumers in California. The Notification Letter shall advise ASP that the Products contain DINP, a chemical known to the State of California to cause cancer. The Notification letter shall inform ASP 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 Civil Penalty**

Pursuant to Health and Safety Code § 25249.7(b), Performance Health agrees to pay a civil penalty of \$2,500 within ten (10) business days of the Effective Date. Performance Health’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. Performance Health shall issue its payment in two checks made payable to: (a) “**OEHHA**” in the amount of \$1,875; and (b) “**Keep America Safe and Beautiful**” in the amount of \$625. 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 Notices 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 ten (10) days of the Effective Date, Performance Health 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 Performance Health'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 Performance Health**

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and Performance Health, 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 Performance Health, its parents, holding company, subsidiaries, affiliated entities under common ownership including: directors, officers, employees, attorneys, and each entity to whom Performance Health 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 Performance Health in California before the Effective Date, as alleged in the Notices.

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 Performance Health, before the Effective Date (collectively, “**Claims**”), against Performance Health 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 Performance Health. Nothing in this Section affects KASB’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Performance Health’s Products.

#### **4.2 Performance Health’s Release of KASB**

Performance Health, 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 Performance Health 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 Performance Health 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 Performance Health:

Kelley Chube  
General Counsel & Corporate Secretary  
Performance Health Supply, LLC  
28100 Torch Parkway  
Warrenville, IL 60555

For KASB:

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

*With a copy to:*

Todd O. Maiden, Esq.  
Reed Smith LLP  
101 Second Street  
Suite 1800  
San Francisco, CA 94105

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.

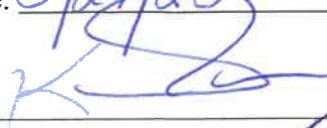

**AGREED TO:**

Date: 03/29/2023

By:   
My Nguyen, CFO  
Keep America Safe and Beautiful

**AGREED TO:**

Date: 3/29/23 3/29/23

By:    
Kellee Chube  
General Counsel & Corporate Secretary  
Performance Health Supply, LLC  
Amy Beckler