

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 NOW Health Group, Inc. (“**NOW**”), with KASB and NOW 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 NOW 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 NOW manufactures, imports, sells and distributes for sale in California flax seed meal containing the heavy metal cadmium (Cd), including, but not limited to, *NOW Real Food[®] Organic Flax Seed Meal, 12 oz (340 g); UPC #7 33739 06266 6; Product Code NOW-06266*, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Flax seed meal is referred to hereinafter as the “**Products.**” Cadmium (Cd) is listed pursuant to Proposition 65 as a chemical known to the State of California to cause developmental toxicity and male reproductive toxicity.

1.3 Notice of Violation

On May 9, 2022, KASB served NOW, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging NOW violated Proposition 65 by failing to warn end-consumers in California (“**Consumers**”) that its Products can expose users to cadmium (Cd). To the Parties’ knowledge, no public enforcer has commenced nor is diligently prosecuting an action to enforce the allegations in the Notice.

1.4 No Admission

NOW 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 NOW of any fact, finding, conclusion of law, issue of law, or violation of law. This Section 1.4 shall not, however, diminish or otherwise affect NOW's obligations, responsibilities, and duties under this Agreement.

1.5 Effective Date

For purposes of this Agreement, "**Effective Date**" shall mean the date on which the Agreement is fully executed by the Parties.

1.6 Compliance Date

For purposes of this Agreement, "**Compliance Date**" refers to the date that is one hundred twenty (120) days after the Effective Date.

2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS

2.1 Commitment to Reformulate or Warn

Commencing on or before the Compliance Date and continuing thereafter, all Products NOW manufactures, imports, sells, ships, distributes or causes to be distributed for sale, in or into, California, directly or through one or more third party retailers, downstream distributors or wholesalers, licensees, or e-commerce marketplaces (collectively, "**NOW Customer(s)**"), shall either meet the standard for Reformulated Products, as defined by Section 2.2, or be accompanied by a clear and reasonable health hazard warning, pursuant to Sections 2.3 through 2.5.

2.2 Reformulation Standard Defined

For purposes of this Agreement, "**Reformulated Products**" are defined as Products which contain cadmium (Cd) in no more than 4.1 micrograms in a "single serving", per day, when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization, that employs inductively coupled plasma mass spectrometry ("**ICP-MS**") utilizing scientifically appropriate adherence to the protocols set forth in AOAC Method 2015.01 or 2013.06 (21st Ed., 2019) with a LOD/LOQ of 0.10 ppm or less.

“**Single serving**” is defined as 16 grams, or 2 ½ teaspoons, of the Product (“**Reformulation Standard**”).

2.3 Clear and Reasonable Warnings

a. **Safe Harbor Warning.** Commencing on or before the Compliance Date, and continuing thereafter, NOW shall provide clear and reasonable health hazard warnings for all Products NOW manufactures, imports, distributes, sells or offers for sale to Consumers in California that do not meet the Reformulation Standard. For purposes of this Agreement, a warning shall be deemed clear and reasonable if it meets the criteria set forth in California Health & Safety Code § 25249.5 *et seq.* and Title 27 California Code of Regulations § 25600 *et seq.*, as may be amended from time to time. NOW shall use the following warning:

WARNING: Consuming this product can expose you to chemicals, including cadmium, which are known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

b. **Foreign Language Requirement.** Where a consumer product sign, label or tag used to provide a warning includes “consumer information”, as the term is defined in Title 27 California Code of Regulations § 25600.1(c) (“**Consumer Information**”), in languages other than English, then the accompanying warnings must also be provided in those languages.

2.4 On-Product Warning Requirements

NOW shall affix a warning on the Product Label, its packaging or directly on each Product that is manufactured, imported, distributed, sold or otherwise provided for sale to Consumers in California. “**Product Label**” is defined as a display of written, printed or graphic material that is printed on or affixed to a Product or its immediate container or wrapper. The entire warning shall appear in at least 6-point type, and in no event shall it be smaller than the largest type size used for other Consumer Information on the Product.

Warnings must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning may be contained in the same section of the packaging, labeling, or instruction booklet stating other safety warnings, if any, concerning the use of the Products and shall be at least the same size as those other safety warnings.

2.5 Internet Product Warning Requirements

For all Products manufactured, imported, distributed, sold or offered for sale after the Compliance Date via the internet to Consumers located in California, or sold in or into California, by NOW directly or through NOW Customers, NOW shall provide warnings for each Product, both on the Product Label, in accordance with Section 2.4, and by prominently displaying the warning to Consumers residing in California prior to purchase or during the checkout process such that the Consumer does not have to seek out the information being provided. The warning or a clearly marked hyperlink to the warning, using the word “WARNING” and given in conjunction with the sale of Products via the internet, shall appear on: (a) the same web page on which the Product is displayed; (b) the same web page as the order form for the Product; (c) the same page as the price for any Product; or (d) 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 Product for which it is given in the same type size or larger than other Consumer Information provided for the Product. For third-party websites, as a term of sale, NOW shall notify the NOW Customer that the Products must be accompanied by a warning, prior to and as a term of sale, in or into California, and shall supply the warning requirements, pursuant to this Section 2.5.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty

Pursuant to Health and Safety Code § 25249.7(b), NOW agrees to pay a civil penalty of \$3,000 within five (5) business days of the Effective Date or NOW’s receipt of W-9 forms for Seven Hills, KASB and OEHHA, whichever is later. NOW’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. NOW shall issue its payment in two checks made payable to: (a) “OEHHA” in the amount of \$2,250; and (b) “Seven Hills in Trust for Keep America Safe and Beautiful” in the amount of

\$750. KASB's counsel shall deliver to OEHHA and KASB their respective portions of the penalty payments.

3.2 Reimbursement of Attorneys' Fees and Costs

The Parties 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 or NOW's receipt of a W-9 form for Seven Hills, whichever is later, NOW agrees to issue a check in the amount of \$21,000 payable to "Seven Hills LLP" for all fees and costs incurred investigating, bringing this matter to NOW's attention, negotiating a settlement in the public interest, and reporting its terms to the 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 the following address:

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

Counsel for KASB shall deliver W-9 forms for Seven Hills, KASB and OEHHA to counsel for NOW by email, upon full execution of this Agreement; delivery of all W-9 forms cuing an obligation to remit payments under Section 3.1 and this Section 3.3 being deemed completed at the time the message is delivered.

4. CLAIMS COVERED AND RELEASED

4.1 KASB's Release of NOW

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and NOW, 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 NOW, its parents, subsidiaries, and affiliated entities under common ownership including: directors, officers, employees, attorneys, and each

NOW Customer to whom NOW directly or indirectly distributes or sells Products (collectively, “**Releasees**”), based on their failure to warn, arising under Proposition 65, about alleged exposures to cadmium (Cd) contained in Products manufactured, imported, distributed, sold and/or offered for sale by NOW and sold in or into California before the Compliance 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, investigation fees, expert fees, and attorneys’ fees arising under Proposition 65 with respect to cadmium (Cd) in the Products manufactured, imported, distributed, sold and/or offered for sale by NOW and sold in or into California, before the Compliance Date (collectively, “**Claims**”), against NOW and Releasees.

This Section 4.1 release shall not extend upstream to any producers of the Products or any ingredients thereof, or any distributors or suppliers who sold the Products or any ingredients thereof to NOW, nor shall this Section 4.1 release extend downstream to any third-party websites who fail to provide warnings pursuant to Section 2.5 after the Compliance Date. Nothing in this Section 4.1 affects KASB’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve NOW’s Products.

4.2 NOW’s Release of KASB

NOW, 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 Section 1542

The Parties each acknowledge familiarity with Section 1542 of the California 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 California 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 it/they may lawfully waive such rights or benefits pertaining to the released matters, as specifically defined by preceding Sections 4.1 and 4.2. Nothing in this Section 4.3 shall affect KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve the Products.

KASB and NOW each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code Section 1542.

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 NOW 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 NOW 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: (a) first-class registered or certified mail, return receipt requested; or (b) a recognized overnight courier to any Party by the other at the following addresses:

For NOW:

Jim Emme, CEO
NOW Health Group, Inc.
244 Knollwood Dr.
Bloomington, IL 60108

For KASB:

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

With a copy to:

David Barnes, Esq.
Hogan Lovells US LLP
Four Embarcadero Center, Suite 3500
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 herein.

AGREED TO:

Date: 09/12/2023

By: 
My Nguyen, Chief Operating Officer
Keep America Safe and Beautiful

AGREED TO:

Date: 12 SEPT 2023

By: 
Jim Emme, Chief Executive Officer
NOW Health Group, Inc.