

# 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 Fusion Unlimited, LLC dba Vissla (“**Fusion Unlimited**”), with KASB and Fusion Unlimited 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). KASB alleges Fusion Unlimited 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 Fusion Unlimited, imports, sells, and distributes for sale in California packs with vinyl material containing diisononyl phthalate (“**DINP**”) including, but not limited to, *VISSLA 7 SEAS 20L DRY PACK, Style# MABGQSEA, UPC 4 00028 30995 4, RN# 142312*, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Packs with vinyl material 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 Notice of Violation

On June 23, 2022, KASB served Fusion Unlimited, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging Fusion Unlimited 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

Fusion Unlimited denies the factual and legal allegations contained in the Notice and maintains that it has not knowingly manufactured, or caused to be manufactured, the Products

for sale in California in violation of Proposition 65 and that the Products it sold or distributed for sale in California, do not violate Proposition 65. Nothing in this Agreement shall constitute or be construed as, nor shall compliance with this Agreement constitute or be construed as, an admission by Fusion Unlimited of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Fusion Unlimited's obligations, responsibilities, and duties under this Agreement.

### **1.5 Effective Date**

For purposes of this Agreement, “**Effective Date**” shall mean the date this Agreement is last executed by the Parties.

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

### **2.1 Commitment to Reformulate or Warn**

Commencing on the Effective Date and continuing thereafter, all Products Fusion Unlimited 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 either (a) meet the Reformulation Standard for Reformulated Products, as defined by Section 2.2, or (b) be labeled with a clear and reasonable exposure warning pursuant to section 2.3. The warning requirement set forth in Section 2.3 shall not apply to any Reformulated Product.

### **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 or equal to 0.1 percent (1,000 parts per million) in any accessible component (i.e. any component that may be touched 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-C1001.09.4 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 Clear and Reasonable Warnings**

As of the Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth below must be provided for all Products that Fusion Unlimited manufactures, imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation for Fusion Unlimited to provide an exposure warning for Products that entered the stream of commerce prior to the Effective Date. The warning shall consist of either the Warning or Alternative Warning described in Subsection (a) or (b), below. The 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](http://www.P65Warnings.ca.gov).

**(b) Alternate Warning.** Fusion Unlimited may, but is not required to, use the following alternate short-form warning as set forth in this subsection 2.3(b), and subject to the additional requirements in Section 2.5, 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.

### **2.4 Product Warnings**

Fusion Unlimited 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.

## **2.5 Internet Warnings**

If, after the Effective Date, Fusion Unlimited 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, Fusion Unlimited shall provide warnings for each Product both on the Product label in accordance with Section 2.4, and by prominently displaying the warning on its own website and affiliated websites, and shall include in its terms of sale a provision requiring its customers that maintain e-commerce websites or sell through a third-party website to provide the internet warning, as a condition of sale of the Products 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: (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 alternate short-form warning content described in Section 2.3(b) if the warning provided on the Product label also uses the alternate short-form warning content.

## **2.6 Compliance with Warning Regulations**

The Parties agree that Fusion Unlimited shall be deemed to be in compliance with this Settlement Agreement by either adhering to Sections 2.3 through 2.5 of this Settlement Agreement or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

## **2.7 Public Benefit**

It is Fusion Unlimited's understanding that the commitments it has agreed to herein, and actions to be taken by Fusion Unlimited under this Settlement Agreement, would 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 Fusion Unlimited that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Fusion Unlimited's failure to provide a warning concerning exposure to DINP 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 Fusion Unlimited is in material compliance with this Settlement Agreement.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty**

Pursuant to Health and Safety Code § 25249.7(b), Fusion Unlimited agrees to pay a civil penalty of \$2,500 within seven (7) business days of the Effective Date. Fusion Unlimited'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. Fusion Unlimited shall issue its payment in two checks made payable to: (a) "OEHHA" in the amount of \$1,875; and (b) "Seven Hills LLP in Trust for

KASB” 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 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.

Fusion Unlimited shall pay a total sum of \$19,000 for all fees and other costs incurred investigating, bringing this matter to Fusion Unlimited’s attention, negotiating a settlement in the public interest, and reporting its terms to Office of the California Attorney General pursuant to Section 9. The attorneys’ fees and costs payments shall be made as detailed in subsection (a) and shall be deposited according to the schedule detailed there and subject to its terms.

#### **(a) Attorneys’ Fees & Costs: Installment Agreement Terms & Timing**

Fusion Unlimited agrees to provide all attorneys’ fees and costs payments due under this Agreement within seven (7) business days of the Effective Date. The Parties agree the payment of attorneys’ fees and costs, totaling \$19,000, shall be broken into four equal installment payments of \$4,750. All payments under this Section shall be made in the form of individual checks payable to “Seven Hills LLP” and delivered to the address below, in Section 3.3. Upon receipt, Seven Hills LLP shall immediately deposit the initial payment of \$4,750. Seven Hills LLP agrees to hold the remaining payments and deposit them on the following schedule. Seven Hills LLP shall deposit the remaining (3) installment payments each roughly thirty days apart or on or about the 1<sup>st</sup> of each of the following months: July 2023, August 2023, and September 2023.



Fusion Unlimited agrees and understands, should any installment payment due under this Section or this Agreement fail due to insufficient funds, KASB shall advise Fusion Unlimited in the manner set forth in Section 7, and will provide Fusion Unlimited ten (10) business days, calculated from the date notice is provided, to cure any non-compliance under this Agreement, pursuant to this Section, before any remaining payments become due and payable. In the event Seven Hills LLP incurs fees for any returned checks, Fusion Unlimited agrees to reimburse KASB's counsel for such fees.

Fusion Unlimited acknowledges that, until the last installment payment is deposited and clears with sufficient funds, KASB reserves the right to institute a proceeding under Proposition 65, including the filing of a complaint based on the allegations in the Notice, a suit based on breach of or failure to perform under a contract, or any other remedy allowable under law. In the event any such action is brought, Fusion Unlimited retains all defenses and does not hereby waive any potential defenses.

### **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: Kimberly Gates Johnson  
4 Embarcadero Center, Suite 1400  
San Francisco, CA 94111

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 KASB's Release of Fusion Unlimited**

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and Fusion Unlimited, 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 Fusion Unlimited, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Fusion Unlimited 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 under Proposition 65 about alleged exposures to DINP contained in the Products manufactured, distributed, sold and/or offered for sale by Fusion Unlimited 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, expenses, investigation fees, expert fees, and attorneys’ fees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising under Proposition 65 with respect to DINP in Products, as that term is specifically defined in Section 1.2, *supra*, that were manufactured, distributed, sold and/or offered for sale by Fusion Unlimited in or into California, prior to the Effective Date (collectively, “**Claims**”), against Fusion Unlimited 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 Fusion Unlimited. Nothing in this Section affects KASB’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Fusion Unlimited’s Products.

#### **4.2 Fusion Unlimited’s Release of KASB**

Fusion Unlimited, 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**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Except as provided in Section 4.1, KASB, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, in its respective individual capacity only and not in its representative capacity, and Fusion Unlimited, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads 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.

#### **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 Fusion Unlimited 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 Fusion Unlimited 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 Fusion Unlimited:

Paul Naude, CEO  
Fusion Unlimited, LLC dba Vissla  
18B Journey  
Aliso Viejo, CA 92656

For KASB:

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

*With a copy to:*

James Stroffe, Esq.  
FSG Lawyers PC  
19800 MacArthur Blvd., Suite 1100  
Irvine, CA 92612

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: 05/31/2023

By: 

My Nguyen, COO  
Keep America Safe and Beautiful

**AGREED TO:**

Date: 5/26/2023

By: 

Paul Naude, CEO  
Fusion Unlimited, LLC dba Vissla