

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This settlement agreement (“Settlement Agreement”) is entered into by and between Keep America Safe and Beautiful, Inc., (“KASB”), on the one hand, and Tomahawk Power, LLC (“TP” or “Defendant”) on the other hand, with KASB and TP each individually referred to as a “Party” and collectively as the “Parties.”

1.2 General Allegations

KASB alleges in a 60-Day Notice of Violation dated January 4, 2023, that TP sells and/or distributes the “Tomahawk Power FG Foundation Gun Attachment for Pest Control Backpack Sprayer” in California that contains Di(2-ethylhexyl) Phthalate (DEHP) without a warning required by Health and Safety Code §§ 25249.5 *et seq.* (“Proposition 65”) (collectively the “Notice”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm.

1.3 Product Description

The product covered by this Settlement Agreement is defined as, and expressly limited to “Tomahawk Power FG Foundation Gun Attachment for Pest Control Backpack Sprayer” (hereinafter the “Product”) that contains DEHP and that is manufactured, sold or distributed for sale in California by TP.

1.4 Notice of Violation

On April 13, 2023, KASB served the Notice on TP, the California Attorney General and the other requisite public enforcers, alleging that TP and others violated Proposition 65 when they failed to consumers in California of the alleged exposures to DEHP from the Product.

To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.5 Lawsuit

On March 17, 2023, KASB filed a lawsuit against TP in the Superior Court of Los Angeles, Case No. 23TRCV00777 alleging that its sales of the Product were in violation of Proposition 65.

1.6 No Admission

TP denies the material, factual and legal allegations in the Notice and the Lawsuit and maintains that all of the products it sold and/or distributed for sale in California, including the Product, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by TP or any of its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, finding, conclusion, issue of law or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by TP or any of its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by TP. This Section shall not, however, diminish or otherwise affect TP’s obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date on which the Court approves this Settlement Agreement.

2. INJUNCTIVE RELIEF

2.1 Clear and Reasonable Warnings

For Product manufactured after the Effective Date, and Shipped for Sale in California, such Covered Product shall either bear a warning as set forth in Paragraphs 2.2 or have a maximum concentration of less than 0.1 percent (1,000.00 parts per million) DEHP 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 performed by using a laboratory method that is approved by the Consumer Product Safety Commission ("CPSC"), U.S. Environmental Protection Agency ("USEPA"), or other federal or state government agency approved testing method.

"Shipped for Sale in California" means the Product that TP either directly ships to California for sale in California, or that it sells to a distributor or retailer who TP knows will sell the Covered Product to consumers in California.

2.2 General Warning Requirements

TP agrees that each warning shall be prominently placed with such conspicuousness, as compared with other words, statements, designs, or devices, as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

For purposes of this Settlement Agreement, a clear and reasonable warning for the Product shall consist of a warning affixed to the packaging, label, tag, or directly to each of the Product sold or distributed in California by TP that contains one of the following statements:

1) **⚠WARNING:** This product can expose you to Di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

2) **⚠WARNING:** Cancer and Reproductive Harm-www.P65Warnings.ca.gov.

The warning shall be offset in a box with black outline. The word "**WARNING:**" shall be in all capital letters and in bold font, followed by a colon. 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. The same warning shall be posted on any websites where the Product is sold in California.

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.

(i) Changes in Warning Regulations or Statutes

In the event that the Office of Environmental Health Hazard Assessment promulgates one or more

regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, TP shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement. If regulations or legislation are enacted or issued providing that a Proposition 65 warning for the product is no longer required, a lack of warning will not thereafter be a breach of this Agreement.

2.3 Grace Period for Existing Inventory of Products

The injunctive requirements of Section 2 shall not apply to Product that is already in the stream of commerce as of the Effective Date, which Product is expressly subject to the releases provided in Section 4.1.

3. MONETARY SETTLEMENT TERMS

3.1 Total Settlement Payment

In full satisfaction of all potential civil penalties, attorneys' fees, and costs, TP shall make a total settlement payment of Twenty-Five Thousand and Five Hundred Dollars (**\$25,500.00**) ("Total Settlement Amount"). The Total Settlement Amount shall be apportioned into a Civil Penalty and Attorney's Fees and Costs as set forth in Sections 3.2 and 3.3 below.

3.2 Civil Penalty Payment

Pursuant to Health and Safety Code§ 25249.7(b)(2), and in settlement of all claims alleged in the Notice, the Lawsuit and/or referred to in this Settlement Agreement, TP agrees to pay Two Thousand Five Hundred and Fifty Dollars (**\$2,550.00**) in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code§§ 25249.12(c)(1) & (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty amount retained by KASB. Within ten (10) days of the Effective Date, TP shall issue a check to "OEHHA" in the amount in the amount of One Thousand Nine Hundred and Twelve Dollars and Fifty Cents (**\$1,912.50**) and shall, pursuant to the instructions below, wire to KASB the amount of Six Hundred and Thirty-Seven Dollars and Fifty Cents (**\$637.50**).

All payments owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Delivery Service:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010, MS 19B
Sacramento, CA 95812-4010

For Non-United States Postal Delivery Service:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1001 I Street MS #19B
Sacramento, CA 95814

All penalty payments owed to KASB shall be sent via wire to:

Wire & ACH Instructions:

Account Name: The Law Offices of Joseph R. Manning
Bank Name: J.P. Morgan Chase Bank, N.A.
Bank Address: 270 Park Ave. New York, NY. 10017
ACH Routing / ABA Number: 322271627
Wire Routing / ABA Number: 021000021
Account Number: 802922919

For further benefit of: Civil Penalty Payment File No. P65-02-0005-L

3.3 Attorney Fees and Costs

The Parties reached an accord on the compensation due to KASB and its counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, within ten (10) days of the Effective Date, TP agrees to pay Twenty-Two Thousand Nine Hundred and Fifty Dollars (**\$22,950.00**) to KASB and its counsel for all fees and costs incurred in the Lawsuit including, but not limited to, pre-litigation activities, investigating, bringing this matter to the attention of TP, the Notice, negotiating and preparing this Settlement Agreement, and obtaining approval of this Settlement Agreement from the Court.

The payment shall be sent via wire to:

Wire & ACH Instructions:

Account Name: The Law Offices of Joseph R. Manning
Bank Name: J.P. Morgan Chase Bank, N.A.
Bank Address: 270 Park Ave. New York, NY. 10017
ACH Routing / ABA Number: 322271627
Wire Routing / ABA Number: 021000021
Account Number: 802922919

For further benefit of: Attorney's Fees and Costs File No. P65-02-0005-L

3.4 Tax Documentation

TP agrees to provide a completed IRS 1099 form for its payments to, and KASB and Manning Law agree to provide IRS W-9 forms for, each of the payees under this Settlement Agreement. The Parties acknowledge that TP cannot issue any settlement payments pursuant to Section 3 above until after TP receives the requisite W-9 forms from KASB's counsel.

4. CLAIMS COVERED AND RELEASED

4.1 KASB's Release of TP

KASB, acting on its own behalf and on behalf of the public, fully releases and discharges TP and its respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,

divisions, affiliates, franchisees, licensees, customers, suppliers, distributors (the "Defendant Releasees") and all entities to which Defendant Releasees directly or indirectly distribute or sell the Product, and any other distributors, wholesalers, customers, retailers, franchisees, licensors, and licensees, (collectively, the "Released Parties" and individually, a "Released Party"). KASB, on behalf of itself and its officers, directors, shareholders, employees, agents, parent companies, subsidiaries and divisions hereby fully releases and discharges the Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted based on or related to the handling, use, sale, distribution or consumption of the Product in California, as to any alleged violation of Proposition 65 or its implementing regulations, including without limitation any failure to provide Proposition 65 warnings on the Product with respect to exposures to DEHP.

4.2 TP's Release of KASB

TP on behalf of 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 by KASB and its attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Product.

4.3 California Civil Code Section 1542

It is possible that other claims not known to the Parties, arising out of the Notice, the Lawsuit or relating to the Products, will develop or be discovered. KASB on behalf of itself only, and TP on behalf of itself only, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefore. KASB and TP acknowledge that the claims released in Sections 4.1 and 4.2 above may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 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

In the event that any of the provisions of this Settlement Agreement are held by a court of competent jurisdiction to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

6. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California, without regard to its conflicts of law principals.

7. NOTICE

When any Party is entitled to receive any notice under this Settlement Agreement, the notice shall be sent by first class mail or electronic mail to the address set forth in this Paragraph. Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice by certified mail, return receipt requested. Said change shall take effect on the date the return receipt is signed by the Party

receiving the change.

Notices shall be sent to:

For KASB

Joseph R. Manning, Jr.
26100 Towne Center Drive
Foothill Ranch, CA 92610
Tel: Office (949) 200-8757 Fax: (866) 843-8309
p65@manninglawoffice.com

For TP

BWA Law Group APC
1901 E 4th St., Suite 150
Santa Ana CA 92705
Tel: (714) 581-8838
Fax: (714) 581-8836

8. COUNTERPARTS: FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or 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. Signatures by scanned and emailed image or facsimile transmission shall have the same force and effect as original signature and as an electronic record adopted and executed by a Party with the intent to sign the electronic record pursuant to Civil Code §§ 1633.1 *et seq.*

9. COMPLIANCE WITH HEALTH AND SAFETY CODE §25249.7(f)

KASB and its attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code §25249.7(f).

10. MODIFICATION

The Settlement Agreement may be modified only by written agreement of the Parties.

11. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Agreement have been made by, or relied on, any Party.

12. INTERPRETATION

No inference, assumption or presumption shall be drawn, and no provision of this Agreement shall be construed against any Party, based upon the fact that one of the Parties and/or their counsel prepared or drafted any portion of this Agreement. The Parties waive the provisions of Civil Code § 1654. It is conclusively presumed that the Parties participated equally in the drafting of this Agreement.

13. AUTHORIZATION


The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

14. COURT APPROVAL

KASB shall obtain approval of this Settlement Agreement from the court in Superior Court of Los Angeles, Case No. 23TRCV00777 pursuant to the requirements of Health and Safety Code § 25249.7 (f) (4). The obligations of the parties under this Settlement Agreement shall be conditioned on the approval of this Settlement Agreement by the court in Superior Court of Los Angeles, Case No. 23TRCV00777.

AGREED TO:

Date: 12/27/2023

By:  Nguyen Chi My

Keep America Safe and Beautiful, Inc.

AGREED TO:

Date: 12/19/23

By: 

Tomahawk Power, LLC