

## 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 Otto Frei-Jules Borel, Inc. (“**Otto Frei**”), with KASB and Otto Frei 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. For purposes of this Agreement, Parties will treat Otto Frei as 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 Otto Frei manufactures, imports, sells, and distributes for sale in California tools with vinyl/PVC grips containing diisononyl phthalate (“**DINP**”) including, but not limited to, *Otto Frei Mirror Polished Stone Setting Pliers-German Made*, without providing the health hazard warning that KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Tools with vinyl/PVC grips 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 March 17, 2023, KASB served Otto Frei, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging Otto Frei 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**

Otto Frei: (1) denies the material factual and legal allegations contained in the Notice; (2) maintains that it did not knowingly or intentionally expose California consumers to DINP through the reasonably foreseeable use of the Product; and (3) maintains that all products it has sold or distributed for sale in California, including the Products, have been, and are, in compliance with all applicable laws and regulations, including 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 Otto Frei of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Otto Frei'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 fully executed by all Parties.

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

### **2.1 Reformulation or Warnings Commitment**

Commencing on the Effective Date and continuing thereafter, all Products Otto Frei 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 or equal to 0.1 percent (1,000 parts per million) when analyzed by a laboratory certified or accredited by the State of California, the United States Food and Drug Administration/Environmental Protection Agency, the National Environmental Laboratory

Accreditation Program, or a member accreditation body of the International Laboratory Accreditation Cooperation ("ILAC"). 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.

### **Section 2.3 Clear and Reasonable Warnings**

No later than the Effective Date, Otto Frei shall provide clear and reasonable warnings for all Products provided for sale or distributed for sale to consumers in California in accordance with this Section and 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) The warning for the Products 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).

In addition, if and where appropriate, Otto Frei may follow the notification procedure set out in Title 27, California Code of Regulations, section 25600.2 to provide warnings for the Product consistent with this agreement, including the Short-Form warning:

**⚠ WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

The Parties recognize that the foregoing warnings do not constitute the exclusive manner of providing clear and reasonable warnings for exposures from the Products. Warnings may be provided as specified in the Proposition 65 regulations (Title 27, California Code of Regulations, section 25600.2) to provide warnings for the Product consistent with this Agreement.

**(b) 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**

A Warning or Short-Form Warning provided pursuant to § 2.3 must print the word “**WARNING:**” 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, except that if the sign or label for the Products 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. Otto Frei shall affix a warning to the Product label or otherwise directly on Products or on the Product’s immediate container, wrapper, or packaging for those Products provided for sale to consumers located in California and to customers with retail outlets in California. For purposes 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. The warning must be displayed 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 of purchase or use. The warning may be contained in the same section of the packaging or labeling that states other safety warnings, if any, concerning the use of the Product and shall be at least the same size as those other safety warnings.

#### **2.5 Internet Warnings**

If, after the Effective Date, Otto Frei 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, Otto Frei shall provide warnings for the Products both on the Product label, in accordance with Section 2.3, and by prominently displaying, or requesting the warning to be prominently displayed on affiliated websites, third party websites or by retail customers, if any, 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 Product via the Internet shall appear either: (a) on the same web page on which the Product is displayed; (b) on the same web page as the virtual cart displaying the Product; (c) on the same page as the price for the Product; or (d) on one or more web pages displayed to a purchaser prior to or 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. The Internet warning may use the Short-Form described in Section 2.3. If Otto Frei sells, ships, or distributes Products, that are not Reformulated Products, to third-party retailers or e-commerce marketplaces, Otto Frei shall advise them of the internet Warning requirements under this Agreement as a condition of sale of the Products.

## **2.6 Customer Notification**

Otto Frei represents that it functions as a retailer and, to its knowledge, did not sell the Otto Frei Mirror Polished Stone Setting Pliers-German Made to any customer that it reasonably believes may resell it to consumers in California; all sales of this product have been to end users. No later than the Effective Date, Otto Frei shall send a letter, electronic or otherwise (“**Notification Letter**”) to each customer in California to which it supplied Products between March 17, 2022 and March 17, 2023. The Notification Letter shall advise the recipient that the Products contain DINP, a chemical known to the State of California to cause cancer.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty**

Pursuant to Health and Safety Code § 25249.7(b), Otto Frei agrees to pay a civil penalty of \$1,000 within thirty (30) business days of the Effective Date. Otto Frei'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. Otto Frei shall issue its payment in two checks made payable to: (a) "OEHHA" in the amount of \$750; and (b) "Seven Hills LLP in Trust for KASB" in the amount of \$250. 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.

Otto Frei shall pay a total sum of \$16,000 for all fees and other costs incurred investigating, bringing this matter to Otto Frei'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**

Otto Frei agrees to provide all attorneys' fees and costs payments due under this Agreement within ten (10) business days of the Effective Date. The Parties agree the payment of attorneys' fees and costs, totaling \$16,000, shall be broken into four equal installment

payments of \$4,000. 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 \$4,000. 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: October 2023, November 2023, and December 2023.

Otto Frei agrees and understands, should any installment payment due under this Section or this Agreement fail due to insufficient funds, KASB shall advise Otto Frei in the manner set forth in Section 7, and will provide Otto Frei 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, Otto Frei agrees to reimburse KASB’s counsel for such fees.

Otto Frei 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, Otto Frei 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 Otto Frei

This Agreement is a full, final and binding resolution between KASB, as an individual and *not* on behalf of the public, and Otto Frei, 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 Otto Frei, its parents, subsidiaries, affiliated entities under common ownership including: directors, officers, employees, attorneys, and each entity to whom Otto Frei 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 that were manufactured, distributed, sold and/or offered for sale by Otto Frei 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 Otto Frei, before the Effective Date (collectively, "**Claims**"), against Otto Frei and Releasees.

The Parties further understand and agree that this Section 4.1 release shall neither extend (a) 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 Otto Frei, nor (b) to Releasees who have been instructed by Otto Frei pursuant to Section 2.5 to provide a



warning on Products that are not Reformulated Products and have failed to do so. Nothing in this Section affects KASB's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Otto Frei's Products.

#### **4.2 Otto Frei's Release of KASB**

Otto Frei, 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, on the one hand, and Otto Frei, on behalf of itself and its agents, attorneys, representatives, successors, and assigns, on the other hand, each acknowledge that this Agreement is expressly intended to cover and include all known and unknown claims relating to Products sold in California before the Effective Date, and each waive the provisions of California Civil Code § 1542 as to any such unknown claims that may have existed prior to and including the Effective Date. 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.

The Parties acknowledge and understand the significance and consequences of this

specific waiver of California Code § 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 Otto Frei 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 Otto Frei 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 Otto Frei:

Steven Frei, CEO  
Otto Frei-Jules Borel, Inc.  
126 2<sup>nd</sup> Street  
Oakland, CA 94607

For KASB:

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

*With a copy to:*

Kamran Javandel, Esq.  
Allen Matkins Leck Gamble  
Mallory & Natsis LLP  
Three Embarcadero Center, 12<sup>th</sup> Floor  
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 of this Agreement.

**AGREED TO:**

Date: 08/27/2023

By:   
My Nguyen, COO  
Keep America Safe and Beautiful

**AGREED TO:**

Date: 8/24/2023

By:   
Steven Frei, CEO  
Otto Frei-Jules Borel, Inc.