

PROPOSITION 65 SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement (“**Agreement**”) is entered into by and between Blue Sky Forever (“**BSF**”) and RX Smart Gear, Inc. (“**RX Smart Gear**”), with BSF and RX Smart Gear each individually referred to as a “**Party**” and, collectively, the “**Parties.**” BSF 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. RX Smart Gear is a person in the course of doing business for purposes of California Health & Safety Code § 25249.11(b).

1.2 Consumer Product Description

BSF alleges that RX Smart Gear manufactures, imports, sells, and distributes for sale in California medicine ball covers containing diisononyl phthalate (“**DINP**”), including, but not limited to, *RX Med Ball Cover, Black, SKU: GMB2-K, UPC: 8 40831 10614 0*, without providing the health hazard warning that BSF alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition 65**”). Medicine ball covers 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 15, 2024, BSF served RX Smart Gear, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging RX Smart Gear 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

RX Smart Gear 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 RX Smart Gear of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect RX Smart Gear'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 AND INTERIM WARNINGS

2.1 Reformulation Commitment

By December 31, 2024, and continuing thereafter, all Products RX Smart Gear 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. In the interim, all Products that are not Reformulated Products which RX Smart Gear distributes, ships, sells, or offers for sale in or into California must 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 di(2-ethylhexyl) phthalate ("DEHP"), di-n-butyl phthalate ("DBP"), diisononyl phthalate ("DINP"), butyl benzyl phthalate ("BBP"), di-isodecyl phthalate ("DIDP") or di-n-hexyl phthalate ("DnHP"), contain any or all such chemicals each in a maximum concentration of less than 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.

2.3 Interim Product Warnings

Commencing on or before the Effective Date, for all Products manufactured, imported, or packaged prior to the Effective Date, that are not Reformulated Products, sold to consumers in California or offered for sale, RX Smart Gear shall provide clear and reasonable warnings 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.

(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.

(c) **On-Product Warnings.** RX Smart Gear shall affix a warning to the Product label or otherwise directly on Products provided for sale to consumers located in California and to customers with retail outlets in California, nationwide distribution, or e-

commerce platforms. 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) 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 be set off from other surrounding information, enclosed in a box and appear in at least 6-point type but no smaller than the largest type size used for other consumer information on the Products.

(d) **Internet Warnings.** RX Smart Gear shall provide warnings for each Product both on the Product label in accordance with Section 2.3(c), and by prominently displaying the warning, or requiring the warning to be prominently displayed on affiliated websites, third party websites or by retail customers, to consumers in California 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 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 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. Where RX Smart Gear sells, ships, or distributes Products to third-party retailers or e-commerce marketplaces, RX Smart Gear will advise them of the internet Warning requirements under this Agreement as a condition of sale of the Products.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty

Pursuant to Health and Safety Code § 25249.7(b), RX Smart Gear agrees to pay a civil penalty of \$3,000 within five (5) business days of the Effective Date. RX Smart Gear'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 BSF. RX Smart Gear 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 BSF" in the amount of \$750. BSF's counsel shall deliver to OEHHA and BSF their respective portion of the penalty payment.

3.2 Reimbursement of Attorneys' Fees and Costs

BSF 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 BSF'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, RX Smart Gear agrees to issue a check in the amount of \$16,000 payable to "Seven Hills LLP" for all fees and costs incurred investigating, bringing this matter to RX Smart Gear'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 BSF'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 **BSF's Release of RX Smart Gear**

This Agreement is a full, final and binding resolution between BSF, as an individual and *not* on behalf of the public, and RX Smart Gear, of any violation of Proposition 65 that was or could have been asserted by BSF on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, against RX Smart Gear, its parents, subsidiaries, affiliated entities under common ownership including: directors, officers, employees, attorneys, and each entity to whom RX Smart Gear 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 RX Smart Gear in California before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, BSF 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 BSF's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that BSF 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 RX Smart Gear, before the Effective Date (collectively, "**Claims**"), against RX Smart Gear 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 RX Smart Gear, nor (b) to Releasees who have been instructed by RX Smart Gear pursuant to Section 2.3(d) to provide a warning on Products that are not Reformulated Products and have failed to do so. Nothing in this Section affects BSF's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve RX Smart Gear's Products.

4.2 RX Smart Gear's Release of BSF

RX Smart Gear, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against BSF 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 BSF 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

BSF, on behalf of itself only and not in the public interest, on the one hand, and RX Smart Gear, on the other hand, each acknowledge that the claims in this Agreement include all known and unknown claims pertaining to DINP contained in the Products that were sold in California before the Effective Date, except as provided in Section 4.1 hereinabove, and each waive the provisions of California Civil Code Section 1542 as to any unknown claims pertaining to DINP contained in the Products that were sold in California that may have existed prior to and including the Effective Date, except as provided in Section 4.1. California Civil Code Section 1543 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 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 RX Smart Gear may provide BSF 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 RX Smart Gear 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 RX Smart Gear:

Stefanie Warren, Esq.
Trails Law Group
2870 Fourth Ave., Suite 201
San Diego, CA 92103

For BSF:

Kimberly Gates Johnson, Partner
Seven Hills LLP
4 Embarcadero Center, Suite 1400
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**

BSF 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: 08/28/2024

By: 
Anthony Nguyen, CEO
Blue Sky Forever

AGREED TO:

Date: 8/27/23

By: 
David Newman, CEO
RX Smart Gear, Inc.