

BZA RESOLUTION NO. 2024-001
A RESOLUTION APPROVAL A SETTLEMENT AGREEMENT

WHEREAS, the individual members of the Board of Zoning Appeals for the City of Noblesville, Indiana (the “BZA” and “City” respectively) were named as defendants in a lawsuit under case number 1:23-cv-00001-TWP-TAB (the “Lawsuit”); and

WHEREAS, the Lawsuit was brought by Plaintiffs MIB, LLC d/b/a My Inner Baby, Ryan Polokoff, and Sabine Kisse (collectively referred to herein as “Plaintiffs”); and

WHEREAS, the individual members of the BZA were named on the basis of their official roles as BZA members, and not as any action taken as individuals; and

WHEREAS, the Lawsuit concerned Plaintiffs’ operation of a business located at 15480 Herriman Boulevard in the City; and

WHEREAS, the Plaintiffs’ and the City reacted a resolution concerning the Lawsuit; and

WHEREAS, a form of a copy of a Release and Settlement Agreement is attached hereto as Exhibit A (Agreement); and

WHEREAS, the individual members of the BZA acting collectively as the Board desire to approve the Release and Settlement Agreement and authorize the Deputy Mayor to sign the same on their behalf.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF ZONING APPEALS OF THE CITY OF NOBLESVILLE, HAMILTON COUNTY, INDIANA, AS FOLLOWS:

Section 1. The Agreement, in substantially final form attached hereto as Exhibit A, is hereby approved and the Deputy Mayor of the City is hereby authorized to execute said Agreement on behalf of the City. The Deputy Mayor of the City is hereby authorized and empowered to approve any such amendments, additions, deletions or changes are not inconsistent with the purpose and intention of the Agreement as attached, and his approval shall be signified by his execution of the Agreement.

Section 2. The Deputy Mayor, the Controller and the Clerk of the City, and such other staff members, service providers and firms as they may direct are hereby authorized and directed to take any and all other actions on behalf of the City as may be necessary or appropriate to carry out the purposes of this resolution.

Section 3. This resolution shall be in full force and effect after its passage and execution by the Deputy Mayor.

All of which is approved by the Board of Zoning Appeals of the City of Noblesville this _____
day of _____ 2024.

Chairman

ATTEST:

Secretary

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (the "Agreement") is entered into this _____ day of November, 2023, by and between **MIB, LLC d/b/a My Inner Baby, Ryan Polokoff, and Sabine Kisse** (collectively referred to herein as "Plaintiff") and **Mike Field, Dave Burtner, Jim Hanlon, Dan MacInnis, Lauren Wahl, Caleb Gutshall, Aaron Smith, Darren Petersen, Brian Ayer, Mark Boice, Mike Davis, Pete Schwartz, Dan Spartz, Greg O'Conner, and Megan Wiles** in their official and individual capacities (collectively referred to herein as "Defendant" and, by virtue of the official-capacity claims, including the City of Noblesville, Indiana). Plaintiff and Defendant are collectively referred to herein by name or as "the Parties."

WHEREAS, a dispute had arisen between the Parties relating to Plaintiff's desire to operate its business at 15480 Herriman Boulevard in the City of Noblesville where the City had determined the business is not permitted to operate due to the zoning classification (the "dispute");

WHEREAS, the dispute was subject to litigation in the Hamilton County, Indiana Circuit Court under cause number 29C01-2208-PL-005996, which case was dismissed (the "prior litigation");

WHEREAS, the dispute subsequently resulted in litigation in the United States District Court for the Southern District of Indiana under case number 1:23-cv-00001-TWP-TAB (the "Lawsuit");

WHEREAS, the dispute is currently pending before the Seventh Circuit Court of Appeals under case number 23-2839 (the "Appeal"); and

WHEREAS, the Parties desire to resolve and settle the dispute and forever put all of the claims to rest.

NOW, THEREFORE, in consideration of the covenants and promises contained herein, the Parties agree as follows:

1. Parties' Obligations.

- a. Upon execution of this Agreement, Plaintiff agrees to dismiss the Appeal, with prejudice, and Defendant agrees to withdraw its pending motion for attorneys' fees in the Lawsuit, which withdrawal Defendant agrees will be without leave to refile. Each party shall bear its own costs, expenses, and legal fees.

- b. Plaintiff, and its members, directors, officers, employees, agents, heirs, executors, assigns, and successors in interest will (1) cease all operations and use of (but for to accomplish its obligations incurred under this Agreement) and remove any and all inventory from the property at 15480 Herriman Boulevard, Noblesville, IN 46060 (the "Herriman Property"), by on or before January 1, 2024; and (2) not conduct any operations at or from the Herriman Property on or after that date.
- c. Plaintiff will remove all signage at the Herriman Property by December 1, 2023.
- d. Plaintiff will not conduct any retail or in-person sales activities associated with MIB in the zoning district in which the Herriman Property is located.
- e. Plaintiff shall be permitted to operate its warehouse/e-commerce facility at the RISE Commercial District, located at 605 Sheridan Road, Noblesville, IN 46060 (the "RISE Property"), without being classified as a "sex shop" under the City of Noblesville's Uniform Development Ordinance, so long as Plaintiff complies with the following conditions:
 - i. Does not conduct any in-person sales from the RISE Property (retail or otherwise);
 - ii. Does not permit any in-person pick-up of products sold from or permit or encourage customers to come onto the RISE Property; and
 - iii. Complies with all other applicable zoning laws, permitting requirements, and any other relevant ordinances or statutes applicable to the RISE Property.

2. Mutual Release. Each Party, for itself and any shareholders, partners, members, directors, officers, employees, agents, heirs, executors, assigns, and successors in interest, hereby fully and completely releases and forever discharges the other Party and all of its present and future elected officials, directors, officers, employees, agents, heirs, executors, assigns and successors in interest from any and all known or unknown claims, demands, rights of action, damages, costs, loss of services, expenses (including attorneys' fees), or liabilities that arise out of or relate to Plaintiff's use of the Herriman Property, regardless of whether those claims were or could have been asserted in the Lawsuit, the Appeal, or the prior litigation. The beneficiaries of this release shall be referred to herein as "Released Parties." For the avoidance of doubt, the City of Noblesville and all of its departments, agencies, boards, directors, officers, employees,

agents, heirs, executors, assigns, insurers, attorneys, and successors in interest, and the Plaintiff's members, directors, officers, employees, agents, attorneys, representatives, insurers, heirs, executors, assigns, and successors in interest are, each and all, Released Parties.

3. **Non-Admission.** The Parties acknowledge that this Agreement represents a compromise and settlement of disputed claims and neither Party admits or denies any liability on the claims asserted. This Agreement should not be construed as an admission of any liability or wrongdoing by either Party.

4. **No Third Party Beneficiaries.** The Parties agree that no provision of this Agreement is intended to establish any other person as a third-party beneficiary except as stated explicitly herein or to authorize any non-party to this Agreement to maintain any action under its terms.

5. **Public Disclosure Obligations.** Nothing in this Agreement shall be construed to relieve the City of Noblesville of its legal duties to provide access to public records as required and/or permitted by law, including this Agreement.

6. **Further Legal Action; Fee Shifting.** If either Party institutes any further legal or equitable action in any state, federal, or local court or tribunal and such action is determined to have been released pursuant to Paragraph 2 of this Agreement, the initiating party shall be liable for all attorneys' fees and costs incurred by the Released Parties in defending that action. Moreover, should litigation arise regarding any other alleged breach of this Agreement, the prevailing party in such litigation shall be entitled to recover all reasonable costs and attorneys' fees incurred.

7. **Severability.** In the event that any provision of this Agreement is held invalid, the remainder of this Agreement shall remain fully enforceable. No ruling or finding that any term or provision of this Agreement is invalid or unenforceable shall affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other jurisdiction.

8. **Negotiation & Joint Drafting.** The Parties acknowledge and agree that this Agreement is the result of negotiations between them and that no party shall be deemed the drafter of the Agreement. The language of the Agreement shall in all cases be construed according to its fair meaning, not strictly for or against any Party.

9. **Voluntary Execution.** Each Party acknowledges that it has voluntarily executed this Agreement after having an opportunity to (1) read and carefully study the entire Agreement and (2) consult with counsel if so inclined. Each Party further acknowledges that it enters into this Agreement of its own free will and volition.

10. **Authority; Signature.** Plaintiff represents and warrants that the person executing this Agreement on its behalf has authority to do so. Defendant represents and warrants that the person signing on its behalf is a representative of the City of Noblesville and has the authority to settle all official and individual capacity claims made in the Lawsuit.

11. **Applicable Law and Forum Selection.** The Agreement shall be construed in accordance with the laws of the State of Indiana. The Parties agree that any action brought to enforce any term or terms of this Agreement shall be brought and exclusively maintained in the state or federal courts situated in Hamilton County, Indiana. Plaintiff consents to the personal jurisdiction and venue of those courts.

12. **Copies/Counterparts.** A copy of this fully executed Agreement shall have the full force and effect of the original signed Agreement. This Agreement may be executed in any number of counterparts, transmitted or signed via facsimile, DocuSign, SignRequest, AdobeSign, Email, or any other electronic means, each such signature shall be deemed an original signature and, together, such signatures constituting one and the same instrument.

13. **ENTIRE AGREEMENT.** IT IS EXPRESSLY WARRANTED THAT THIS AGREEMENT CONSTITUTES THE COMPLETE AND FINAL AGREEMENT BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER HEREOF AND SUPERSEDES AND CANCELS ALL PRIOR OR CONTEMPORANEOUS AGREEMENTS, UNDERSTANDINGS, DISCUSSIONS, OR REPRESENTATIONS REGARDING THE SUBJECT MATTER OF THIS AGREEMENT, WHETHER ORAL OR WRITTEN. EACH PARTY REPRESENTS AND WARRANTS THAT NO PROMISE OR INDUCEMENT NOT CONTAINED HEREIN HAS BEEN OFFERED TO IT, THAT THIS AGREEMENT IS EXECUTED WITHOUT RELIANCE UPON ANY STATEMENT OR REPRESENTATION NOT EXPLICITLY SET FORTH HEREIN, AND THAT IT HAS HAD THE OPPORTUNITY, IF SO INCLINED, TO SEEK THE ADVICE OF AN ATTORNEY REGARDING THE MEANING AND LEGAL EFFECT OF ALL CONDITIONS AND TERMS CONTAINED IN THIS AGREEMENT, INCLUDING THIS SECTION. THIS AGREEMENT MAY NOT BE MODIFIED OR AMENDED, NOR ANY OF ITS TERMS WAIVED, EXCEPT BY WRITTEN INSTRUMENTS SIGNED BY EACH OF THE PARTIES.

This Release and Settlement Agreement is executed on this _____ day of November, 2023.

Plaintiff

Ryan Polokoff

Sabine Kisse

Ryan Polokoff
On behalf of MIB, LLC d/b/a
My Inner Baby

Michael Cooley
Counsel for Plaintiff
(Agreed as to Form only)

Defendant

Matt Light
Deputy Mayor
City of Noblesville
for the benefit of Mike Field, Dave
Burtner, Jim Hanlon, Dan MacInnis,
Lauren Wahl, Caleb Gutshall, Aaron
Smith, Darren Petersen, Brian Ayer,
Mark Boice, Mike Davis, Pete Schwartz,
Dan Spartz, Greg O'Conner, and Megan
Wiles in their official and individual capacities

Beth Copeland
Counsel for Defendant
(Agreed as to Form only)