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FILED

FEB 14 2020

Clerk of the Court
Superior Court of CA County of Santa Clara
BY J. TURNER DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

11 SAFE PRODUCTS FOR CALIFORNIANS,)
12 LLC,)

13 Plaintiff,

14 vs.

15 AMAZON.COM, INC., et al.;

16 Defendants.
17
18

No. 18CV336010

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5, *et seq.*)

19 **1. INTRODUCTION**

20 **1.1 Parties**

21 This Consent Judgment ("Consent Judgment") is entered into by and between Plaintiff
22 Safe Products for Californians, LLC ("SPFC") and Kiva Health Brands LLC ("Kiva"). SPFC
23 and Kiva are each referred to individually as a "Party" and collectively as the "Parties."
24 Defendant Amazon.com, Inc. ("Amazon") is an intended third-party beneficiary of this Consent
25 Judgment.

26 **1.2 SPFC**

27 SPFC is a limited liability California company with its principal place of business within
28 the State of California, County of Santa Clara, who seeks to promote awareness of exposures to

[PROPOSED] CONSENT JUDGMENT

1 toxic chemicals and to improve human health by reducing or eliminating hazardous substances
2 contained in consumer products.

3 **1.3 Kiva**

4 SPFC alleges, and for the purpose of this Consent Judgment only, Kiva does not dispute,
5 that Kiva is a person in the course of doing business for purposes of the Safe Drinking Water
6 and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.5 *et seq.*
7 (“Proposition 65”).

8 **1.4 General Allegations**

9 SPFC alleges that powdered dietary supplements that Kiva and Amazon manufacture,
10 import, sell and/or distribute for sale in California cause exposure to cadmium and lead and lead
11 compounds (hereinafter referred to as “lead”) and that they do so without providing the health
12 hazard warning that SPFC alleges is required by Proposition 65.

13 **1.5 Product Description**

14 The products that are covered by this Consent Judgment are those powdered dietary
15 supplements manufactured, imported, distributed, sold and/or offered for sale by Kiva identified
16 in SPFC’s Notice of Violation as “Kiva Moringa Powder,” ASIN X000TNNOVB; “Kiva Cacao
17 Powder,” ASIN X000IHOZ39; and “Kiva Maca Powder,” ASIN X000JAA76T, that are
18 manufactured, imported, distributed, sold and/or offered for sale by Kiva and/or its customers in
19 the state of California, hereinafter the “Covered Products.”

20 **1.6 Notice of Violation**

21 On or about May 25, 2018, SPFC served Kiva, Amazon, and certain requisite public
22 enforcement agencies, with a 60-Day Notice of Violation (“Notice”), alleging that Kiva and
23 Amazon violated Proposition 65 when they failed to warn their customers and consumers in
24 California that the Covered Products expose users to cadmium and lead. To the best of the
25 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the
26 allegations set forth in the Notice.

27 On or about March 26, 2019, the Center for Environmental Health served Kiva and others
28 including requisite public enforcement agencies, with a 60-Day Notice of Violation (“Notice

2”), alleging that Kiva violated Proposition 65 when it failed to warn its customers and consumers in California that one of the Covered Products listed in SPFC’s Notice—namely “Kiva Moringa Powder,” ASIN X000TNNOVB—exposes users to cadmium and lead. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in Notice 2, either.

1.7 Complaint

On October 5, 2018, SPFC commenced the instant action against Amazon for the alleged violations of Proposition 65 that are the subject of the Notice (“the Complaint”). The Center for Environmental Health has not commenced any action for the alleged violations of Proposition 65 that are the subject of Notice 2 and has represented to counsel for SPFC that it intends to withdraw Notice 2 as to Kiva.

1.8 No Admission

Kiva denies the material, factual and legal allegations contained in the Notice and Complaint and maintains that, to the best of its knowledge, all products that it has manufactured, imported, sold and/or distributed for sale in California, including the Covered Products, have been and are in compliance with all applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Kiva of any fact, finding, and issue of law or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Kiva of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Kiva. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Consent Judgment.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Kiva as to the allegations contained in the Complaint, that venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean thirty (30)
3 days from the date on which the Court enters this Consent Judgment.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Product Removal**

6 As of the Effective Date, Kiva shall not manufacture for sale in the State of California,
7 “Distribute into the State of California,” or directly sell in the State of California, any Covered
8 Products manufactured after the Effective Date which expose a person to a “Daily Lead Exposure
9 Level” of more than 0.5 micrograms of lead per day and/or “Daily Cadmium Exposure Level”
10 of more than 4.1 micrograms per day, unless it meets the warning requirements under section
11 2.3.

12 **2.1.1** As used in this Consent Judgment, the term “Distribute into the State of
13 California” shall mean to directly ship a Covered Product into California for sale in California
14 or to sell a Covered Product to a distributor Kiva knows or has reason to know will sell the
15 Covered Products in California.

16 **2.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure Level” shall
17 be measured in micrograms, and shall be calculated using the following formula: micrograms of
18 lead per gram of product, multiplied by grams of product per serving of the product (using the
19 largest serving size appearing on the product label), multiplied by servings of the product per
20 day (using the largest number of recommended daily servings appearing on the label), which
21 equals micrograms of lead exposure per day. If the label contains no recommended daily
22 servings, then the number of recommended daily shall be one.

23 **2.1.3** For purposes of this Consent Judgment, the “Daily Cadmium Exposure Level”
24 shall be measured in micrograms, and shall be calculated using the following formula:
25 micrograms of cadmium per gram of product, multiplied by grams of product per serving of the
26 product (using the largest serving size appearing on the product label), multiplied by servings of
27 the product per day (using the largest number of recommended daily servings appearing on the
28

1 label), which equals micrograms of cadmium exposure per day. If the label contains no
2 recommended daily servings, then the number of recommended daily shall be one.

3 **2.2 Reformulated Covered Products**

4 Reformulated Covered Products are Covered Products manufactured after the Effective
5 date for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per
6 day and/or “Daily Cadmium Exposure Level” is no more than 4.1 micrograms of cadmium per
7 day.

8 **2.3 Clear and Reasonable Warnings**

9 For any Covered Products manufactured after the Effective Date that do not qualify as
10 Reformulated Covered Products and are directly sold or offered for sale in California by Kiva
11 after the Effective Date, Kiva shall only sell or offer said non-reformulated Covered Products
12 for sale in California when accompanied with one of the following warnings:

13 **OPTION 1:**

14 WARNING: Consuming this product can expose you to chemicals including [lead] [and]
15 [cadmium] which is [are] known to the State of California [cancer and] birth defects and other
16 reproductive harm. For more information go to: www.P65warnings.CA.gov/food

17 OR:

18 **OPTION 2:**

19 WARNING: [Cancer and] Reproductive Harm – www.P65Warnings.ca.gov/food

20 Kiva shall use the phrase “cancer and” in the warning if Kiva has reason to believe that
21 the “Daily Lead Exposure Level” is greater than 15 micrograms of lead or if Kiva has reason to
22 believe that another Proposition 65 chemical is present which may require a cancer warning. As
23 identified in the brackets, the warning shall appropriately reflect whether there is lead or
24 cadmium present in each of the Covered Products. The words “chemicals including” may be
25 deleted from the warning content if the warning is being provided for an exposure to a single
26 chemical.

27 The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed
28 on the Covered Product’s packaging or label with such conspicuousness, as compared with other

1 words, statements, or designs as to render it likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use. If the warning is provided on the label,
3 it must be set off from other surrounding information and enclosed in a box. In addition, for any
4 Covered Product sold over the internet where a California delivery address is indicated, the
5 warning shall be provided either by including the warning on the product display page, by
6 otherwise prominently displaying the warning to the purchaser during the checkout process prior
7 to completing the purchase, or by any other means authorized under Section 25607.1 of Title 27
8 of the California Code of Regulations. An asterisk or other identifying method must be utilized
9 to identify which products on the checkout page are subject to the warning.

10 In the event Kiva provides the warning pursuant to OPTION 2, above, the entire warning
11 must be in a type size no smaller than the largest size used for other consumer information on
12 the product, and in no case shall the warning appear in a type size smaller than 6-point type. For
13 all warnings, the word "WARNING" shall be in all capital letters in bold print. Any additional
14 statements in the warning shall comply with Title 27, California Code of Regulations, Section
15 25601(e).

16 **3. MONETARY SETTLEMENT TERMS**

17 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

18 Pursuant to Health and Safety Code section 25249.7(b), Kiva shall pay civil penalties in
19 the amount of \$3,000.00. The penalty payment shall be allocated according to Health and Safety
20 Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California
21 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
22 penalty paid to SPFC. SPFC's counsel shall be responsible for remitting Kiva's penalty payment
23 under this Consent Judgment to OEHHA. Within five (5) business days of all Parties signing
24 this Consent Judgment, Kiva shall issue a check payable to "Safe Products for Californians,
25 LLC" in the amount of \$750.00, and a check payable to OEHHA in the amount of \$2,250.00.
26 These penalty payments shall be delivered to the address listed in Section 3.3 below.

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1 **3.2 Reimbursement of Attorneys' Fees and Costs**

2 For all work performed as a result of investigating, bringing this matter to Kiva's
3 attention and negotiating a settlement in the public interest through the mutual execution of this
4 Consent Judgment and the Court's approval of the same, but exclusive of fees and costs on
5 appeal, if any, Kiva shall reimburse SPFC and its counsel \$17,000.00. The Parties negotiated
6 this resolution of the compensation due to SPFC and its counsel under general contract principles
7 and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5.
8 Kiva's payment shall be due within five (5) business days of all Parties signing this Consent
9 Judgment and delivered to the address in Section 3.3 in the form of a check payable to "Moore
10 Law Firm, P.C." The reimbursement shall cover all fees and costs incurred by SPFC
11 investigating, bringing this matter to Kiva's attention, litigating, and negotiating a settlement of
12 the matter in the public interest.

13 **3.3 Payment Procedures**

14 The payments pursuant to Sections 3.1 and 3.2 shall be delivered to the following
15 address:

16 Safe Products for Californians, LLC
17 Attn: Moore Law Firm
18 332 North Second Street
 San Jose, California 95112

19 If for any reason this Consent Judgment is not entered by the Court within one year of
20 the date the Consent Judgment is executed by all Parties, SPFC shall meet and confer with Kiva
21 about mutually agreeable steps the Parties can take to ensure entry of the Consent Judgment. If
22 such steps cannot be agreed between the Parties, SPFC shall promptly return to Kiva any and all
23 monies paid by Kiva herein under Sections 3.1 and 3.2 upon Kiva's written request.

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 SPFC's Release of Proposition 65 Claims**

26 This Consent Judgment is a full, final and binding resolution between SPFC, on behalf
27 of itself and in the public interest, its past and current agents, representatives, attorneys,
28 successors, and assignees, and Kiva and Amazon, and their parents, subsidiaries, affiliated

1 entities under common ownership, directors, officers, agents, employees, attorneys, and each entity to whom
2 Kiva directly or indirectly distributes or sells Covered Products, including, but not limited to, downstream
3 distributors, wholesalers, customers, retailers, franchisees, cooperative members, marketplace hosts and
4 licensees including, but not limited to, Walmart.com USA, LLC, Walmart Inc., and their respective subsidiaries,
5 affiliates and parents, franchisees, cooperative members, licensees, shareholders, marketplaces, directors, officers,
6 agents, employees, attorneys, successors and assignees, insurers, and each entity to whom they directly or indirectly
7 distribute or sell the Covered Products (collectively, "Releasees"), from all claims for any violation of
8 Proposition 65 through the Effective Date that were or could have been asserted by SPFC relating to the
9 Covered Products. Compliance with the terms of this Consent Judgment constitutes compliance with
10 Proposition 65 with respect to exposures to cadmium and lead from the Covered Products, as set forth in
11 the Notice. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to
any entities that manufactured the Covered Products or any component parts thereof, or any distributors or
suppliers who sold the Covered Products or any component parts thereof to Kiva.

12 **4.2 SPFC's Individual Release of Claims**

13 SPFC, on behalf of itself, its past and current agents, representatives, attorneys,
14 successors, and assignees, provides a release herein which shall be effective as a full and final
15 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
16 attorneys' fees, damages, losses, claims, liabilities, and demands of SPFC of any nature,
17 character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising
18 out of alleged or actual exposures to cadmium or lead in the Covered Products manufactured,
19 imported, distributed, or sold by Kiva prior to the Effective Date ("Released Claim"), including
20 but not limited to any Released Claim against Amazon.com Inc. The Parties further understand
21 and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured
22 the Covered Products, or any component parts thereof, or any distributors or suppliers who sold
23 the Covered Products, or any component parts thereof to Kiva.

24 Nothing in this section affects SPFC's right to commence or prosecute an action under
25 Proposition 65 against a Releasee that does not involve Kiva's Covered Products.

26 In further consideration of the promises and agreements herein contained, and for the
27 payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current agents,
28 representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives

1 any right to institute, participate in, directly or indirectly, any form of legal action and releases
2 all claims that it may have, including without limitation, all actions and causes of action in law
3 and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert
4 fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of
5 the Releasees of any nature, character, or kind, whether known or
6 unknown, suspected or unsuspected, limited to and arising out of the allegations made in the
7 Notice and Complaint.

8 **4.3 Kiva's Release of SPFC**

9 Kiva, on behalf of itself, its past and current agents, representatives, attorneys,
10 successors, and assignees, hereby waives any and all claims against SPFC and its attorneys and
11 other representatives, for any and all actions taken or statements made (or those that could have
12 been taken or made) by SPFC and their attorneys and other representatives, whether in the course
13 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter
14 with respect to the Covered Products.

15 **4.4 Waiver of Civil Code Section 1542**

16 With respect to the foregoing waivers and releases in this Consent Judgment, SPFC
17 hereby specifically waives any and all rights and benefits which it now has, or in the future may
18 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
19 provides as follows:

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
21 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT
22 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
23 RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
24 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
25 DEBTOR OR RELEASED PARTY.

26 **5. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved and entered by the Court and
28 shall be null and void if, for any reason, it is not approved and entered by the Court within one
year after it has been fully executed by all Parties, unless the Parties mutually agree to extend
that time period due to what they mutually agree are reasonably unforeseeable circumstances.

1 SPFC and Kiva agree to support the entry of this agreement as a judgment, and to obtain the
2 Court's approval of their settlement in a timely manner. The Parties acknowledge that, pursuant
3 to California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial
4 approval of this Consent Judgment, which motion SPFC shall draft and file and Kiva shall
5 support, appearing at the hearing if so requested.

6 **6. SEVERABILITY**

7 If, subsequent to the execution of this Consent Judgment as a judgment, any provision of
8 this Consent Judgment is held by a court to be unenforceable, the validity of the remaining
9 provisions shall not be adversely affected.

10 **7. GOVERNING LAW**

11 The terms of this Consent Judgment shall be governed by the laws of the state of
12 California and apply within the state of California. In the event that Proposition 65 is repealed
13 or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of
14 this Consent Judgment are rendered inapplicable or no longer required as a result of any such
15 repeal or preemption or rendered inapplicable by reason of law generally as to the Covered
16 Products, then Kiva shall provide written notice to SPFC of any asserted change in the law and
17 shall have no further injunctive obligations pursuant to this Consent Judgment with respect to,
18 and to the extent that, the Covered Products are so affected. If the Office of Environmental Health
19 Hazard Assessment promulgates one or more regulations governing the provision of Proposition
20 65 warnings for foods, Kiva may comply with such regulations as to the Covered Products
21 without being deemed in breach of this Consent Judgment. Nothing in this Consent Judgment
22 shall be interpreted to relieve Kiva from any obligation to comply with any pertinent state or
23 federal toxics control law.

24 **8. NOTICE**

25 Unless specified herein, all correspondence and notices required to be provided pursuant
26 to this Consent Judgment shall be in writing and: (i) personally delivered, (ii) sent by first-class
27 (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one
28 Party by the other Party at the following addresses:

1 To Kiva:

To SPFC:

2 Tchad Henderson
3 Kiva Health Brands LLC
4 1136 Union Mall Suite 301
Honolulu, HI 96813

Safe Products for Californians, LLC
c/o Moore Law Firm
332 North Second Street
San Jose, California 95112

5 *With a copy to* Sarah Brite Evans
6 Schwartz Semerdjian Cauley & Moot LLP
7 101 W. Broadway, Suite 810
San Diego, CA 92101

8 Any Party, from time to time, may specify in writing to the other Party a change of
9 address to which all notices and other communications shall be sent.

10 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

11 This Consent Judgment may be executed in counterparts and by facsimile or .pdf
12 signature, each of which shall be deemed an original, and all of which, when taken together,
13 shall constitute one and the same document.

14 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

15 SPFC agrees to comply with the reporting requirements referenced in Health & Safety
16 Code section 25249.7(f).

17 **11. MODIFICATION**

18 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
19 and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful
20 motion of any Party and the entry of a modified Consent Judgment by the Court thereon.

21 **12. OTHER TERMS**

22 **12.1 No Other Agreements**

23 This Consent Judgment contains the sole and entire agreement and understanding of the
24 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
25 negotiations, commitments and understandings related hereto. No representations, oral or
26 otherwise, express or implied, other than those contained herein have been made by any party
27 hereto. No other agreements addressing compliance with Proposition 65 as to the Covered
28

1 Products not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind
2 any of the Parties.

3 **12.2 Construction**

4 The Parties, including their counsel, have participated in the preparation of this Consent
5 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent
6 Judgment was subject to revision and modification by the Parties and has been accepted and
7 approved as to its final form by all Parties and their Counsel. Accordingly, any uncertainty or
8 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
9 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
10 agrees that any statute or rule of construction providing that ambiguities are to be resolved
11 against the drafting Party should not be employed in the interpretation of this Consent Judgment
12 and, in this regard the Parties hereby waive California Civil Code section 1654.

13 **13. AUTHORIZATION**

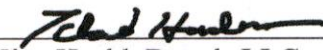
14 The undersigned are authorized to execute this Consent Judgment on behalf of their
15 respective Parties and have read, understood, and agree to all of the terms and conditions of this
16 Consent Judgment.

17
18 Dated: Oct 8, 2019


KRMGOORE (Oct 8, 2019)


Safe Products for Californians, LLC
By: Randy Moore, Operating Manager

19
20
21 Dated: 10-4-2019


Kiva Health Brands LLC
By: Tchad Henderson

22
23
24 *Good case appearing,*
25 **IT IS SO ORDERED.**

26 Dated: 2/13/20


Judge of the Superior Court

Sunil R. Kulkarni