

Tanya E. Moore, SBN 206683
MOORE LAW FIRM, P.C.
332 North Second Street
San Jose, California 95112
Telephone (408) 298-2000
Facsimile (408) 298-6046
E-mail: service@moorelawfirm.com

Attorneys for Plaintiff
Safe Products for Californians, LLC

Filed
February 21, 2020
Clerk of the Court
Superior Court of CA
County of Santa Clara
19CV350532
By: jviramontes

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

SAFE PRODUCTS FOR CALIFORNIANS,
LLC,

Plaintiff,

vs.

RAWR NATURALS, INC., et al.;

Defendants.

No. 19CV350532

~~PROPOSED~~ CONSENT JUDGMENT

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

1. INTRODUCTION

1.1 Parties

This Consent Judgment (“Consent Judgment”) is entered into by and between plaintiff Safe Products for Californians, LLC (“SPFC”), defendant RAWR Naturals, Inc. (“RAWR”), and defendant Primarch Manufacturing, Inc. (“PRIMARCH”). SPFC, RAWR and PRIMARCH are each referred to individually as a “Party” and collectively as the “Parties.” Defendant Amazon.com, Inc. (together with RAWR and PRIMARCH, “Defendants”) is an intended third-party beneficiary of this Consent Judgment.

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~~PROPOSED~~ CONSENT JUDGMENT

1 **1.2 SPFC**

2 SPFC is a limited liability California company with its principal place of business
3 within the State of California, County of Santa Clara, who seeks to promote awareness of
4 exposures to toxic chemicals and to improve human health by reducing or eliminating
5 hazardous substances contained in consumer products.

6 **1.3 RAWR**

7 SPFC alleges, and, for purposes of this Consent Judgment, RAWR does not dispute,
8 that RAWR qualifies as a “person in the course of doing business” within the meaning of the
9 Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code
10 section 25249.5 *et seq.* (“Proposition 65”).

11 **1.4 PRIMARCH**

12 SPFC alleges, and, for purposes of this Consent Judgment, PRIMARCH does not
13 dispute that PRIMARCH is a business entity that has employed ten or more persons at all times
14 relevant to this action, and qualifies as a “person in the course of doing business” within the
15 meaning of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
16 and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

17 **1.5 General Allegations**

18 SPFC alleges that powdered dietary supplements that RAWR and PRIMARCH
19 manufactures, imports, sells and/or distributes for sale in California cause exposure to lead and
20 lead compounds (hereinafter referred to as “lead”) and that they do so without providing the
21 health hazard warning that SPFC alleges is required by Proposition 65.

22 **1.6 Product Description**

23 The products that are covered by this Consent Judgment are powdered dietary
24 supplements manufactured, imported, distributed, sold and/or offered for sale by RAWR,
25 identified in SPFC’s Notice of Violation as: “Milkdrunk Energy Bar – Honey-nut Chocolate
26 Chip,” UPC# 6-49906-98137-4, ASIN# B018VDLTUC; “Milkdrunk Protein Powder – Vanilla
27 Deliciousness,” UPC# 6-49906-98146-6, ASIN# B01N95RKNR; “Milkdrunk Protein Powder
28 – Mama Mocha,” UPC# 6-49906-98164-0, ASIN# B078NJ6C24; and “Milkdrunk Protein

Powder – Because Chocolate,” UPC# 6-49906-98151-0, ASIN# B06XSLB2Q5, that are manufactured, imported, distributed, sold and/or offered for sale by RAWR and/or its customers in the state of California, hereinafter the “Covered Products.”

1.7 Notices of Violation

On or about October 23, 2018 and July 19, 2019, SPFC served Defendants, and certain requisite public enforcement agencies, with 60-Day Notices of Violation (“Notices”), alleging that Defendants violated Proposition 65 when they failed to warn their customers and consumers in California that the Covered Products expose users to lead and lead compounds. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

1.8 Complaint

On June 27, 2019, SPFC commenced the instant action against Defendants for the alleged violations of Proposition 65 that are the subject of the Notices (“the Complaint”).

1.9 No Admission

RAWR and PRIMARCH deny the material, factual and legal allegations contained in the Notices and Complaint and maintain that, to the best of their knowledge, all products that has been 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 RAWR or PRIMARCH 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 RAWR or PRIMARCH of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by RAWR and PRIMARCH. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Consent Judgment.

1.10 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over RAWR and PRIMARCH 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

1 and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of
2 Civil Procedure section 664.6.

3 **1.11 Effective Date**

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

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Product Removal**

8 As of the Effective Date, RAWR shall be permanently enjoined from manufacturing for
9 sale in the State of California, “Distributing into the State of California,” or directly selling in
10 the State of California, any Covered Products manufactured after the Effective Date which
11 expose a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per
12 day, unless it meets the warning requirements under section 2.3.

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

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

24 **2.2 Reformulated Covered Products**

25 Reformulated Covered Products are Covered Products manufactured after the Effective
26 date for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per
27 day.

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1 **2.3 Clear and Reasonable Warnings**

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

6 **OPTION 1:**

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

10 OR:

11 **OPTION 2:**

12 **WARNING:** [Cancer and] Reproductive Harm – www.P65Warnings.ca.gov/

13 In connection with providing a cancer warning for lead and lead compounds, RAWR
14 shall use the phrase “cancer and” in the warning if RAWR has reason to believe that the “Daily
15 Lead Exposure Level” is greater than 15 micrograms of lead as determined pursuant to the
16 quality control methodology set forth in Section 2.1.2. RAWR also may include the reference
17 to cancer if RAWR has reason to believe that another Proposition 65 chemical is present which
18 may require a cancer warning. The words “chemicals including” may be deleted from the
19 warning content if the warning is being provided for an exposure to a single chemical.

20 The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed
21 on the Covered Product’s packaging or label with such conspicuousness, as compared with
22 other words, statements, or designs as to render it likely to be read and understood by an
23 ordinary individual under customary conditions of purchase or use. In addition, for any
24 Covered Product sold over the internet where a California delivery address is indicated, the
25 warning shall be provided either by including the warning on the product display page, by
26 otherwise prominently displaying the warning to the purchaser during the checkout process
27 prior to completing the purchase, or by any other means authorized under Section 25607.1 of
28

1 Title 27 of the California Code of Regulations. An asterisk or other identifying method must be
2 utilized to identify which products on the checkout page are subject to the warning.

3 In the event RAWR provides the warning pursuant to OPTION 2, above, the entire
4 warning must be in a type size no smaller than the largest size used for other consumer
5 information on the product, and in no case shall the warning appear in a type size smaller than
6 6-point type. For all warnings, the word “WARNING” shall be in all capital letters in bold
7 print. Any additional statements in the warning shall comply with Title 27, California Code of
8 Regulations, Section 25601(e).

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

11 Pursuant to Health and Safety Code section 25249.7(b), RAWR shall pay civil penalties
12 in the amount of \$3,500.00. The penalty payment shall be allocated according to Health and
13 Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the
14 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
15 25% of the penalty paid to SPFC. SPFC’s counsel shall be responsible for remitting RAWR’s
16 penalty payment under this Consent Judgment to OEHHA. RAWR shall issue a check payable
17 to “Safe Products for Californians, LLC” in the amount of \$875.00, and a check payable to
18 OEHHA in the amount of \$2,625.00. These penalty payments shall be delivered to the address
19 listed in Section 3.3 below on or before February 12, 2020.

20 **3.2 Reimbursement of Attorneys’ Fees and Costs**

21 For all work performed as a result of investigating, bringing this matter to RAWR’s
22 attention and negotiating a settlement in the public interest through the mutual execution of this
23 Consent Judgment and the Court’s approval of the same, but exclusive of fees and costs on
24 appeal, if any, RAWR shall reimburse SPFC and its counsel \$16,000.00. The Parties
25 negotiated this resolution of the compensation due to SPFC and its counsel under general
26 contract principles and the private attorney general doctrine codified at California Code of
27 Civil Procedure § 1021.5. RAWR’s payment shall be made in three installments and delivered
28 to the address in Section 3.3 in the form of checks payable to “Moore Law Firm, P.C.,” due as

follows: \$6,500.00 by December 12, 2019; \$6,500.00 by January 13, 2020; and \$3,000.00 by February 12, 2020. The reimbursement shall cover all fees and costs incurred by SPFC investigating, bringing this matter to RAWR's attention, litigating, and negotiating a settlement of the matter in the public interest.

3.3 Payment Procedures

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

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

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

4. CLAIMS COVERED AND RELEASED

4.1 SPFC's Release of Proposition 65 Claims

This Consent Judgment is a full, final and binding resolution between SPFC, on behalf of itself and in the public interest, its past and current agents, representatives, attorneys, successors, and assignees, and RAWR, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, attorneys, and each entity to whom RAWR directly or indirectly distributes or sells Covered Products, including, but not limited to, Amazon.com, Inc., downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, marketplace hosts and licensees (collectively, "Releasees"), from all claims for any violation of Proposition 65 through the Effective Date that were or could have been asserted by SPFC relating to the Covered Products. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to

1 lead and lead compounds from the Covered Products, as set forth in the Notices. This Section
2 4.1 release shall also extend to PRIMARCH, its parents, subsidiaries, affiliated entities under
3 common ownership, directors, officers, agents, employees, attorneys, representatives,
4 successors, and assignees.

5 **4.2 SPFC's Individual Release of Claims**

6 SPFC, on behalf of itself, its past and current agents, representatives, attorneys,
7 successors, and assignees, provides a release herein which shall be effective as a full and final
8 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
9 attorneys' fees, damages, losses, claims, liabilities, and demands of SPFC of any nature,
10 character, or kind, whether known or unknown, suspected or unsuspected, limited to and
11 arising out of alleged or actual exposures to lead and lead compounds in the Covered Products
12 manufactured, imported, distributed, or sold by RAWR or PRIMARCH prior to the Effective
13 Date. Nothing in this section affects SPFC's right to commence or prosecute an action under
14 Proposition 65 against a Releasee that does not involve RAWR's Covered Products.

15 In further consideration of the promises and agreements herein contained, and for the
16 payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current
17 agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and
18 waives any right to institute, participate in, directly or indirectly, any form of legal action and
19 releases all claims that it may have, including without limitation, all actions and causes of
20 action in law and in equity, all obligations, expenses (including without limitation all
21 attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and
22 demands against any of the Releasees of any nature, character, or kind, whether known or
23 unknown, suspected or unsuspected, limited to and arising out of the allegations made in the
24 Notices and Complaint.

25 **4.3 RAWR's Release of SPFC**

26 RAWR, on behalf of itself, its past and current agents, representatives, attorneys,
27 successors, and assignees, hereby waives any and all claims against SPFC and its attorneys and
28 other representatives, for any and all actions taken or statements made (or those that could have

1 been taken or made) by SPFC and their attorneys and other representatives, whether in the
2 course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
3 matter with respect to the Covered Products.

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5 **4.4 PRIMARCH's Release of SPFC**

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

12 **4.4 Waiver of Civil Code Section 1542**

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

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

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court
25 and shall be null and void if, for any reason, it is not approved and entered by the Court within
26 one year after it has been fully executed by all Parties, unless the Parties mutually agree to
27 extend that time period due to what they mutually agree are reasonably unforeseeable
28 circumstances. SPFC, RAWR and PRIMARCH agree to support the entry of this agreement as
a judgment, and to obtain the Court's approval of their settlement in a timely manner. The

Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which motion SPFC shall draft and file and RAWR and PRIMARCH shall support, appearing at the hearing if so requested.

6. SEVERABILITY

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

7. GOVERNING LAW

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

8. NOTICE

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

To RAWR:

To SPFC:

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

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

9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

10. COMPLIANCE WITH REPORTING REQUIREMENTS

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

11. MODIFICATION

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

12. OTHER TERMS

12.1 No Other Agreements

This Consent Judgment 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 and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements addressing compliance with Proposition 65 as to the Covered Products not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

12.2 Construction

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

11 **13. AUTHORIZATION**

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

15
16 Dated: Nov 13, 2019


KR Moore (Nov 13, 2019)

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

17
18
19
20 Dated: _____

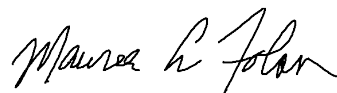
RAWR Naturals, Inc.
By: _____

21
22
23 Dated: _____

Primarch Manufacturing, Inc.
By: _____

24
25
26 **IT IS SO ORDERED.**

27 Dated: February 19, 2020



JUDGE OF THE SUPERIOR COURT

1 The Parties, including their counsel, have participated in the preparation of this Consent
2 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
3 Consent Judgment was subject to revision and modification by the Parties and has been
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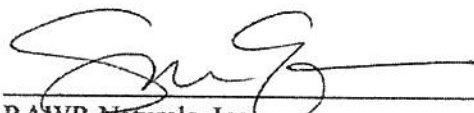
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13 respective Parties and have read, understood, and agree to all of the terms and conditions of
14 this Consent Judgment.


15
16 Dated: _____

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

17
18
19 Dated: 11-13-19


RAWR Naturals, Inc.
By: Sissy Engelke, owner

20
21
22
23 Dated: 11-13-19


Primarch Manufacturing, Inc.
By: Douglas Smith, owner

24
25
26 **IT IS SO ORDERED.**

27 Dated: _____

28 JUDGE OF THE SUPERIOR COURT

~~PROPOSED~~ CONSENT JUDGMENT