

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

KATHERINE LEE BUCKLAND, *et al.*,

Plaintiffs,

v.

THRESHOLD ENTERPRISES, LTD., *et al.*

Defendants.

Case No. BC 344046
[Hon. Robert L. Hess]

**[PROPOSED] CONSENT JUDGMENT
ONLY AS TO DEFENDANT
BOTANICAL LABORATORIES,
INC.**

Complaint Filed: December 7, 2005
Location: Dept. 24, Room 314

This Consent Judgment is entered into by and between Katherine Lee Buckland, a plaintiff in this matter (hereinafter "Ms. Buckland" or "Plaintiff"), and defendant Botanical Laboratories, Inc. (hereinafter "Defendant").

1. Definitions. As used in this Consent Judgment, the following definitions shall apply:

1.1 "Products" include consumer creams, gels and/or lotion products, manufactured by or on behalf of Defendant for sale in California, containing progesterone as an ingredient. Progesterone is a chemical known to the State of California to cause cancer ("Progesterone").

1.2 "Products" shall also include any future Products that are manufactured by or on behalf of Defendant for sale in California under any product name or brand, whether a current or new name and/or brand.

1.3 Plaintiff and Defendant will be referred to collectively as the "Parties" or individually as a "Party."

1 **2. Background.**

2 **2.1** Plaintiff Katherine Lee Buckland is the Executive Director of the California
3 Women's Law Center ("CWLC"), a non-profit California corporation. Prior to joining the
4 CWLC as its Executive Director, Ms. Buckland served as a Special Assistant to Los Angeles
5 City Attorney Rocky Delgadillo. She also oversaw media and public affairs as City Attorney
6 Delgadillo's Communications Director. Since its founding in 1989, CWLC has served as a
7 unique advocate in California, working in collaboration with others to protect, secure and
8 advance the comprehensive civil rights of women and girls. The CWLC works to ensure,
9 through systemic change, that life opportunities for women and girls are free from unjust social,
10 economic, and political constraints. CWLC is based in Los Angeles, and was incorporated
11 under the laws of the State of California in 1989.

12 **2.2** Ms. Buckland is a "consumer" within the meaning of California Civil Code
13 ("Civil Code") § 1761(d). Ms. Buckland is also a "person" within the meaning of California
14 Business and Professions ("B&P") Code §§17201, 17204 and 17506. She brought and settles
15 this lawsuit on her own behalf and, to the fullest extent permitted by law, on behalf of the
16 general public.

17 **2.3** Defendant manufactures, distributes and sells topical creams containing
18 progesterone. Since 2003, Defendant has made a good faith effort to warn California consumers
19 that the Products contain Progesterone and that Progesterone is a chemical that may cause
20 cancer. Defendant is a Washington corporation in good standing.

21 **2.4** On or about October 5, 2005, Plaintiff, pursuant to Civil Code § 1782 served
22 Defendant with a notice letter (the "Notice") via certified mail, return receipt requested, stating
23 *inter alia* as follows:

24 These Products have been sold to literally millions of California
25 consumers without any of the noticed companies providing a clear
26 and reasonable warning prior to their purchase by a consumer that
27 the Progesterone, Medroxyprogesterone acetate, Testosterone and
28 its esters, Methyltestosterone, Testosterone cypionate, and/or
Testosterone enanthate in these Products are chemicals known to be
carcinogens and/or reproductive toxins by the State of California.
Nor has any of the noticed companies disclosed the potential
adverse health effect risks posed by exposure to these chemicals in
these Products because Progesterone, Medroxyprogesterone acetate,

1 Testosterone and its esters, Methyltestosterone, Testosterone
2 cypionate, and/or Testosterone enanthate in these Products are
3 chemicals regulated as drugs by the U.S. Food and Drug
4 Administration under the federal Food, Drug and Cosmetic Act.
5 These omissions of material facts constitute deceptive
6 representations and misrepresentations, failure to disclose that the
7 product is a regulated drug, and misbranding in violation of § 1770
8 of the CLRA.

9 **2.5** On December 7, 2005, Plaintiff filed the complaint entitled *Buckland et al. v.*
10 *Threshold Enterprises Ltd. et al.*, No. BC 344046, in the Los Angeles County Superior Court
11 (the "Complaint").

12 **2.6** For purposes of this Consent Judgment only, the Parties stipulate that this Court
13 has jurisdiction over the allegations of the violations contained in the Notice and the Complaint,
14 and personal jurisdiction over Defendant as to the acts or omissions alleged in the Complaint;
15 that venue is proper in the County of Los Angeles; and that this Court has jurisdiction to enter
16 this Consent Judgment.

17 **2.7** Defendant denies that the Products have been or are in violation of any law, and
18 further contends that all Products have been and are safe for use as directed. However, the
19 Parties desire to resolve this matter (including the Notice, Complaint and all related matters)
20 without further litigation or cost.

21 **2.8** The Parties enter into this Consent Judgment to settle certain disputed claims as
22 alleged in the Notice and the Complaint, to avoid prolonged and costly litigation, and to promote
23 the public interest. By executing and complying with this Consent Judgment, no Party admits
24 any facts or conclusions of law including, but not limited to, any facts or conclusions of law
25 regarding any violations of the California Legal Remedies Act (Civil Code §1750 *et seq.*), the
26 Unlawful Competition Law (B&P Code §17200 *et seq.*), the False Advertising Law (B&P Code
27 §17500 *et seq.*), or any other statutory, common law or equitable claim or requirement relating to
28 or arising from Defendant's Products. This Consent Judgment shall not be construed as an
admission by Defendant as to any of the allegations in the Notice or the Complaint.

///

///

1 **3. Injunctive Relief.**

2 **3.1 Sale of Products Requires a Warning.**

3 Defendant has voluntarily exited the market for the Products. No Products have been
4 shipped for sale in California since August 24, 2005. If Defendant chooses to re-enter the
5 market for the Products, Defendant and Products will comply with the provisions set forth below
6 in paragraph 3.2.

7 **3.2 Sale of Products Requires a Warning.**

8 Pursuant to Civil Code § 1782(d) and B&P Code § 17203, if Defendant elects to ship
9 products for sale to California consumers on or after January 1, 2006, Defendant shall place the
10 following warning prominently on the label of each of its Products and, at that time, also, and,
11 prior to shipment for sale in California, shall revise accordingly Defendant's advertising,
12 marketing, catalog or Internet-based descriptions of each of its respective Products:

13 "WARNING: This product contains Progesterone, a chemical
14 known to the State of California to cause cancer. Consult with your
15 physician before using this product."

16 Defendant shall not ship any products for sale in California prior to
17 January 1, 2006.

18 **4. Financial Settlement and Attorneys' Fee Payments.**

19 **4.1** Defendant shall pay to the CWLC the sum of \$136,636.45 ("settlement amount"),
20 and shall make that payment to the Trust Account of the Carrick Law Group P.C., by wire
21 transfer, certified or bank check in immediately available funds. This settlement amount shall be
22 due and payable within five (5) calendar days after the date of notice of entry of this Consent
23 Judgment. This settlement amount shall be disbursed promptly thereafter by the Carrick Law
24 Group P.C. to the CWLC.

25 **4.2 Attorneys Fees and Costs.** The Parties shall each bear their own attorneys' fees
26 and costs.

27 ///

28 ///

1 **5. Claims Covered and Released.**

2 This Consent Judgment includes the resolution of actual and potential claims that were
3 considered or could have been brought by Plaintiff regarding the Progesterone in Defendant's
4 Products. This Consent Judgment is a final and binding resolution between Plaintiff and
5 Defendant of any and all alleged violations of the California Consumer Legal Remedies Act,
6 Unlawful Competition Law, False Advertising Law, Civil Code §§1709 and 1710, or any other
7 law that was or could have been asserted by Plaintiff arising from or related to Defendant's
8 Products up through the date of entry of this Consent Judgment, including, but not limited to any
9 claims for attorneys' fees and costs. Plaintiff hereby releases Defendant and Defendant's
10 predecessors, successors, affiliates and assigns, the officers, directors, employees, shareholders,
11 and counsel of each of them, from and against the claims described in this paragraph to the
12 extent such claims do, did, or could arise from or relate to Defendant's Products; however,
13 Plaintiff cannot and expressly does not release any other claims, including specifically and
14 without limitation any personal injury or directly related claims, that could be brought by any
15 other individual or organization. Defendant hereby releases Ms. Buckland and CWLC from and
16 against any claims arising out of Ms. Buckland's filing or prosecution of this action. Each Party
17 respectively waives any right to appeal or other review of this Consent Judgment, except as
18 expressly provided in this Consent Judgment.

19 **6. Covenant Not To Sue.** Plaintiff and Defendant covenant and agree that with regard to
20 those matters that Ms. Buckland has herein released and that are described above, neither Ms.
21 Buckland, CWLC nor Defendant will ever institute a lawsuit or administrative proceedings
22 against the other, nor shall Ms. Buckland, Defendant or CWLC assert any claim of any nature
23 against any person or entity hereby released with regard to any such matters which have been
24 released. However, nothing in this paragraph shall be interpreted to preclude enforcement of this
25 Consent Judgment pursuant to Section 7 below.

26 **7. Enforcement of Consent Judgment.** Any Party may, by noticed motion or order to
27 show cause before the Superior Court of Los Angeles, enforce this Consent Judgment. To
28 enforce this Consent Judgment, any Party must first give written notice of any violation of this

1 Consent Judgment alleged to have occurred to the Party alleged to be in violation. The Parties
2 shall meet and confer in good faith and attempt to resolve the alleged violation. If a resolution is
3 not reached within thirty (30) days of the date of the notice, the aggrieved Party may move the
4 Court to hear and resolve the dispute. The prevailing Party in any proceeding brought to enforce
5 this Consent Judgment shall be entitled to recover from the other Party the prevailing Party's
6 reasonable attorneys' fees and costs incurred in the investigation and prosecution of such an
7 enforcement proceeding.

8 **8. Application of Consent Judgment.** Sections 3, 5 and 6 of this Consent Judgment shall
9 apply to, be binding upon and inure to the benefit of the Parties and the CWLC, their divisions,
10 subdivisions, subsidiaries, affiliates, successors, predecessors and assigns, and the directors,
11 officers, employees, legal counsel, and agents of each of them, as applicable, and will inure to
12 the benefit of the Parties' parent companies, all suppliers, distributors, wholesalers, retailers and
13 contract manufacturers, and all of their respective directors, officers, employees, legal counsel,
14 and agents.

15 **9. Modification/Termination of Consent Judgment.** This Consent Judgment may be
16 modified or terminated upon written agreement of Defendant and Ms. Buckland, with approval
17 of the Court, or upon noticed motion for good cause shown.

18 **10. Governing Law.** This Consent Judgment shall be governed by, and construed in
19 accordance with, the laws of the State of California.

20 **11. Entire Agreement.** The Parties declare and represent that no promise, inducement or
21 other agreement has been made conferring any benefit upon any party except those contained
22 herein and that this Consent Judgment contains the entire agreement pertaining to the subject
23 matter hereof. This Consent Judgment supersedes any prior or contemporaneous negotiations,
24 representations, agreements and understandings of the Parties with respect to such matters,
25 whether written or oral. Parol evidence shall be inadmissible to show agreement by, between or
26 among the Parties to any term or condition contrary to or in addition to the terms and conditions
27 contained in this Consent Judgment. The Parties acknowledge that each has not relied on any
28 promise, representation or warranty, expressed or implied, not contained in this Consent

1 Judgment except with regard to that certain declaration executed under penalty of perjury by the
2 Defendant providing information that induced Ms. Buckland to enter into the financial terms of
3 this Consent Judgment, which declaration may be used solely as evidence in any future
4 enforcement proceeding brought pursuant to Section 7 above.

5 **12. Challenges.** Subject to their rights to apply for a modification of this Consent Judgment
6 for good cause shown under Section 9 hereof, the Parties agree that they, individually or
7 collectively, will not seek to challenge or to have determined invalid, void or unenforceable any
8 provision of this Consent Judgment or this Consent Judgment itself. The Parties understand that
9 this Consent Judgment contains the relinquishment of legal rights and each Party has, as each
10 has deemed appropriate, sought the advice of legal counsel, which each of the Parties has
11 encouraged the other to seek. Further, no Party has reposed trust or confidence in any other
12 Party so as to create a fiduciary, agency or confidential relationship.

13 **13. Construction.** This Consent Judgment has been jointly negotiated and drafted. The
14 language of this Consent Judgment shall be construed as a whole according to its fair meaning
15 and not strictly for or against any Party.

16 **14. Authority to Stipulate to Consent Judgment.** Each signatory to this Consent Judgment
17 represents and warrants that each signatory has all requisite power, authority and legal right
18 necessary to execute and deliver this Consent Judgment and to perform and carry out the
19 transactions contemplated by this Consent Judgment. Each signatory to this Consent Judgment
20 represents that each has been duly authorized to execute this Consent Judgment. No other or
21 further authorization or approval from any person will be required for the validity and
22 enforceability of the provisions of this Consent Judgment, except entry by the Court.

23 **15. Cooperation and Further Assurances.** The Parties hereby will execute such other
24 documents and take such other actions as may be necessary to further the purposes and fulfill the
25 terms of this Consent Judgment.

26 **16. Counterparts.** This Consent Judgment may be executed in counterparts and has the
27 same force and effect as if all the signatures were obtained in one document.

28 ///

1 **17. Notices.**

2 **17.1** All correspondence and notices required by this Consent Judgment to Plaintiff
3 shall be sent to Ms. Buckland as follows:

4 Katherine Lee Buckland, Esq.
5 Executive Director
6 California Women's Law Center
7 6300 Wilshire Boulevard, Suite 980
8 Los Angeles, CA 90048
9 Tel: (323) 951-1041
10 Fax: (323) 951-9870
11 E-mail: katie.buckland@cwlc.org

With a copy to:
12 Roger Lane Carrick, Esq.
13 The Carrick Law Group, P.C.
14 350 S. Grand Avenue, Suite 2930
15 Los Angeles, CA 90071-3406
16 Tel: (213) 346-7930
17 Fax: (213) 346-7931
18 E-mail: roger@carricklawgroup.com

9 **17.2** All correspondence and notices required by this Consent Judgment to Defendant
10 shall be sent to Defendant as follows:

11 Carl Sell
12 Botanical Laboratories/Zand Herbal
13 Formulas
14 1441 West Smith Road
15 Ferndale, Washington 98240

With a copy to:
16 Judith M. Praitis, Esq.
17 Sidley Austin Brown & Wood LLP
18 555 West Fifth Street, Suite 4000
19 Los Angeles, CA 90013
20 Tel: (213) 896-6000
21 Fax: (213) 896-6600
22 E-mail: jpraitis@sidley.com

16 **18. Entry of Stipulation For Entry of Consent Judgment Required.** This Consent
17 Judgment shall be null and void, and without any force or effect, unless fully approved as
18 required by law and entered by the Court. If the Court does not enter this Consent Judgment, the
19 execution thereof by Defendant or Ms. Buckland shall not be construed as an admission by
20 Defendant or Ms. Buckland of any fact, issue of law or violation of law.

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **19. Jurisdiction.** This Court shall retain jurisdiction of this matter to implement this Consent
2 Judgment.

4 **IT IS SO STIPULATED.**

5 Date: December 9, 2005

KATHERINE LEE BUCKLAND

6 By: Katherine L Buckland
7 Katherine Lee Buckland

8 Date: December 9, 2005

BOTANICAL LABORATORIES, INC.

10 By: _____
11 Carl Sell
12 President

13 **IT IS SO ORDERED, ADJUDGED, AND DECREED.**

15 DATED: _____

17 _____
18 ROBERT L. HESS
19 JUDGE OF THE SUPERIOR COURT

28

1 **19. Jurisdiction.** This Court shall retain jurisdiction of this matter to implement this Consent
2 Judgment.

3
4 **IT IS SO STIPULATED.**

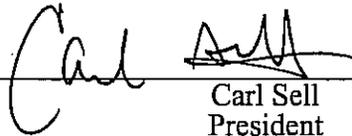
5 Date: December 9, 2005

KATHERINE LEE BUCKLAND

6
7 By: _____
Katherine Lee Buckland

8 Date: December 9, 2005

BOTANICAL LABORATORIES, INC.

9
10 By:  _____
11 Carl Sell
12 President

13
14 **IT IS SO ORDERED, ADJUDGED, AND DECREED.**

15 DATED: _____

16
17 _____
18 ROBERT L. HESS
19 JUDGE OF THE SUPERIOR COURT

