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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11 **CONSUMER ADVOCACY GROUP, INC.,**
12
13 Plaintiff,
14
15 v.
16 **SAWYER PRODUCTS, INC.,**
17
18 Defendants.

CASE No. CGC-09-494169
[PROPOSED] CONSENT JUDGMENT
(Health and Safety Code § 25249 et seq.)

19 **1. INTRODUCTION**

20 **1.1 Plaintiff:** The Plaintiff is Consumer Advocacy Group, Inc. ("CAG" or
21 "Plaintiff"), a non-profit foundation organized under California's Non-Profit Public Benefit
22 Corporation Law. CAG is dedicated to, among other causes, protecting the environment,
23 improving human health, and supporting environmentally sound practices.

24 **1.2 Defendant:** The Defendant is Sawyer Products, Inc., ("Sawyer").

25 **1.3 The Parties:** Plaintiff and Defendant are sometimes referred to herein in the
26 singular as a "Party" and collectively as the "Parties."
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1 **1.4 The Action:** This action (“Action”) is brought under Proposition 65, the popular
2 name for California’s Safe Drinking Water and Toxic Enforcement Act of 1986, *Cal. Health and*
3 *Safety Code* Section 25249.5 *et seq.* (sometimes referred to as “the Act”). Plaintiff proceeds
4 under Section 25249.7(d) as a “person in the public interest.” Solely for purposes of this Consent
5 Judgment, the Parties stipulate that Plaintiff’s Notices of Intent to Sue, listed at **Exhibit A** to this
6 Consent Judgment and attached at Tabs 1-2 thereto (“Plaintiff’s Notices”) were served upon the
7 Defendant and upon public prosecutors, including the Attorney General and all district attorneys
8 and city attorneys authorized to prosecute an action to enforce the Act, accompanied by
9 certificates of merit, in compliance with Section 25249.7(d)(1) of the Act. Plaintiff is allowed to
10 proceed pursuant to Section 25249.7(d)(2), because none of those public prosecutors commenced
11 an action pursuant to Plaintiff’s Notices.

12 **1.5 The Complaint:** On April 9, 2010, Plaintiff filed a complaint against Defendant
13 in the Superior Court for the City and County of San Francisco (“Complaint”) alleging that
14 Defendant violated Proposition 65 by exposing individuals in California to the chemical known as
15 di-*n*-propyl isocinchomeronate (the “Covered Chemical”),, which has been designated under the
16 Act as “known to the State of California to cause cancer” within the meaning of Section
17 25249.8(b), without providing Proposition 65 warnings to such individuals as alleged to be
18 required under Section 25249.6. According to the Complaint, the alleged exposure to the
19 Covered Chemical occurs when individuals in California use or apply certain insect repellent
20 products that are manufactured, packaged, distributed, marketed and/or sold by Defendant for use
21 in California. These products are identified with specificity in Plaintiff’s Notices and the
22 Complaint, and such products, as identified in Plaintiff’s Notices, are referred to collectively
23 herein as the “Covered Products.”

24 **1.6 Jurisdiction:** Solely for purposes of this Consent Judgment, the Parties stipulate
25 that the Court has personal jurisdiction over Defendant as to the acts alleged in the Action; that
26 venue is proper in the City and County of San Francisco; that the claims in the Action present a
27 live controversy as to the application of Proposition 65 to the Covered Products and the Covered
28 Chemical therein; that this Court has jurisdiction to enter this Consent Judgment as a resolution of

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1 all claims alleged in the Action; and that the Court shall retain jurisdiction to implement the
2 Consent Judgment.

3 **1.7 The Standard for Determining Whether Proposition 65 Warnings Are**
4 **Required:** Section 25249.6 of Proposition 65 provides that “[n]o person in the course of
5 business shall knowingly and intentionally expose any individual to a chemical known to the state
6 to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
7 individual, except as provided in Section 25429.10.” Section 25249.10(c), under the heading
8 “Exemptions from Warning Requirement,” provides that Section 25249.6 “shall not apply” to an
9 “exposure for which the person responsible can show that the exposure poses no significant risk
10 assuming lifetime exposure at the level in question for substances known to the state to cause
11 cancer, and that the exposure will have no observable effect assuming exposure at one thousand
12 (1000) times the level in question for substances known to the state to cause reproductive toxicity,
13 based on evidence and standards of comparable scientific validity to the evidence and standards
14 which form the scientific basis for the listing of such chemical In any action brought to
15 enforce Section 25249.6, the burden of showing that an exposure meets the criteria of this
16 subdivision shall be on the defendant.” Proposition 65 thus makes it unlawful for a person
17 subject to the Act to expose an individual in California to a Proposition 65-listed chemical
18 without first providing a Proposition 65 warning unless an exemption to this requirement applies.
19 Where the defendant asserts an exemption because the alleged exposure is beneath the level that
20 would require a warning, the burden of proof is on the defendant to establish that the exemption
21 applies.

22 **1.8 Settlement:** The first of Plaintiff’s Notices to Sawyer was issued in July 3, 2008;
23 the second was issued in July 1, 2009. The Parties began engaging in informal discovery shortly
24 thereafter, and have been engaged in settlement negotiations since that time. As a result of this
25 exchange of information, the Parties agree on some aspects of the allegations, but disagree as to
26 several other aspects, and thus disagree as to whether Defendant has violated Proposition 65.
27 Specifically, the Parties agree that each of the Covered Products contains the Covered Chemical,
28 and that Defendant has not distributed Proposition 65 warnings with respect to the Covered

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1 Products. Defendant disputes, however, that the manufacture, packaging, distribution, marketing,
2 sale or use of the Covered Products results in the exposure of individuals in California (or
3 elsewhere) to the Covered Chemical in amounts, if any, that would require a warning under
4 Proposition 65. Defendant also asserts other affirmative defenses. In support of its assertions,
5 Defendant, through its counsel, has presented scientific evidence to demonstrate that any
6 exposure to the Covered Chemical that results from any reasonably anticipated use of the
7 Covered Products, in the words of Section 25249.10(c), “poses no significant risk assuming
8 lifetime exposure at the level in question for substances known to the state to cause cancer ...
9 based on evidence and standards of comparable scientific validity to the evidence and standards
10 which form the scientific basis for the listing of such chemical” Plaintiff disputes
11 Defendant’s assertions. In support of its position, Plaintiff has presented evidence to dispute
12 Defendant’s evidence with respect to the use of the Covered Chemical in products similar to the
13 Covered Products, and asserts that this evidence also demonstrates that Defendant’s evidence
14 with respect to the Covered Chemical and Covered Products does not satisfy Defendant’s burden
15 under Section 25249.6. Therefore, in order to avoid prolonged litigation and the waste of private
16 and judicial resources that would arise from prosecuting, defending, and adjudicating the issues
17 on which the Plaintiff and Defendant disagree, the Parties have agreed, subject to the approval of
18 the Court, to compromise their disputed claims and defenses, and have entered into a settlement
19 agreement, the terms of which are embodied in this Consent Judgment.

20 **1.9 No Admissions:** Neither the Consent Judgment nor any of its provisions shall be
21 construed as an admission by any Party of any fact, finding, issue of law, or violation of law,
22 including Proposition 65 or any other statute, regulation, or common law requirement related to
23 exposure to the Covered Chemical or other chemicals listed under Proposition 65 from the
24 Covered Products. By executing this Consent Judgment, and agreeing to provide the relief and
25 remedies specified herein, Defendant does not admit that this Action is not pre-empted by Federal
26 law, or that Defendant has committed any violations of Proposition 65, or any other law or legal
27 duty, and, further, specifically deny that they have committed any such violations. Rather,
28 Defendant maintains that all Covered Products distributed, marketed and/or sold by Defendant in

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1 California have at all times been in compliance with Proposition 65. Nothing in this Consent
2 Judgment shall prejudice, waive, or impair any right, remedy, or defense that Plaintiff and
3 Defendant may have in any other or in future legal proceedings unrelated to these proceedings.
4 Defendant reserves all of its rights and defenses with regard to any claim by any person under
5 Proposition 65 or otherwise. Nevertheless, this paragraph shall not diminish or otherwise affect
6 the obligations, responsibilities, waivers, releases, and/or duties provided for under this Consent
7 Judgment.

8

9 **2. INJUNCTIVE RELIEF**

10 In the spirit of settlement and compromise, Sawyer has agreed to (a) change the precautionary
11 statements on the label for this product to include the following statement: *“Wash thoroughly*
12 *with soap and water after handling, and before eating, drinking, chewing gum, using tobacco,*
13 *or using the toilet,”* and (b) add the following statement to the use instructions: *“Wash hands*
14 *with soap and water promptly after use,”* and (c) enhance the use instruction at subparagraph (b)
15 by use of bold print and/or a pictogram, at Defendant’s option. The Parties acknowledge that no
16 changes to the label or labeling for any Covered Products that are the subject of this Consent
17 Judgment can be made except as permitted by certain federal and California agencies in their
18 implementation of state and federal laws, other than Proposition 65, that regulate the
19 manufacture, sale, labeling, distribution and use of these Covered Products, and further that
20 Defendant’s obligations to make changes to the labels for any Covered Products under this
21 Consent Judgment are as follows: (1) within 60 days following notice that this Consent Judgment
22 has been approved and has become a final order of the Court, notifying the applicable federal and
23 California agencies of the proposed change to the use instructions on the label; and (2) within 120
24 days following the delivery of such notification to the applicable federal and California agencies,
25 include such changed use instructions on the first production run of the label of such Covered
26 Product after the notification of such changed use instructions has been submitted to the
27 applicable federal and California agencies, provided that Defendant shall not be required to re-
28 label or recall any Covered Product in the stream of commerce at the time this Consent Judgment

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1 is approved and that Defendant shall not be required to change the use instructions on the label
2 from those approved previously by such federal and California agencies prior to the approval of
3 such change by such agencies, and further provided that Defendant is not required by federal or
4 California state agencies to generate testing data or submit data or reformulate its Covered
5 Product(s) to support its changed use instructions. Under no circumstances shall this Consent
6 Judgment be interpreted to require Defendant to make any other applications or secure any other
7 approvals from federal or state agencies regarding the labeling (including specifically the use
8 instructions or warnings thereon) for the Covered Product(s), on any other aspect of its (their)
9 manufacture, distribution, sale or use or to distribute any Covered Product in violation of federal
10 and California labeling requirements as such labeling requirements are interpreted by the
11 applicable federal or California agency.

12
13 **3. MONETARY PAYMENTS**

14 **3.1 Total of Payments:** In settlement of this matter, Defendant has agreed to make
15 monetary payments totaling \$25,000 (Twenty-Five Thousand Dollars), as described in paragraphs
16 3.2 and 3.3 below.

17 **3.2 Payment In Lieu of Civil Penalties:** Within thirty (30) days following notice of
18 approval and entry of this Consent Judgment by the Court, Defendant shall pay \$5000 in the form
19 of a check made payable to "Consumer Advocacy Group, Inc." CAG will use the payment for
20 such projects and purposes related to environmental protection, worker health and safety, or
21 reduction of human exposure to hazardous substances (including administrative and litigation
22 costs arising from such projects), as CAG may choose. The check shall be delivered to: Reuben
23 Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills,
24 California 90212.

25 **3.3 Reimbursement of Attorneys Fees and Costs:** Within thirty (30) days following
26 notice of approval and entry of this Consent Judgment, Defendant shall pay \$20,000 in the form
27 of a check made payable to "YEROUSHALMI & ASSOCIATES" as reimbursement for the
28 investigation fees and costs, testing costs, expert witness fees, attorneys fees, and other litigation

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1 costs and expenses. The check shall be delivered by overnight delivery to: Reuben Yeroushalmi,
2 Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills, California
3 90212.

4
5 **4. WAIVER AND RELEASE OF ALL CLAIMS**

6 **4.1 Waiver And Release of Claims Against Defendant:** As to those matters raised
7 in this Action, the Complaint, or in Plaintiff's Notices (whether as to Covered Products or as to
8 Covered Chemical, and without regard to any potential disputes about the adequacy of such
9 Notices), and any related actions, Plaintiff, on behalf of the general public, hereby releases
10 Defendant and waives any claims against Defendant for injunctive relief or damages, penalties,
11 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses
12 or any other sum incurred or claimed, for any claims under Proposition 65 or any related actions
13 arising from the sale, distribution or use in California of any Covered Products or Covered
14 Chemical, including all claims that may arise from the acts alleged in the Plaintiff's Notices or the
15 Complaint.

16 **4.2 Defendant's Waiver And Release Of Plaintiff:** Defendant hereby releases
17 Plaintiff from and waive any claims against Plaintiff for injunctive relief or damages, penalties,
18 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs,
19 expenses, or any other sum incurred or claimed or which could have been claimed for matters
20 related to the Action.

21 **4.3 Matters Covered By This Consent Judgment/Release of Future Claims:** This
22 Consent Judgment is a full, final, and binding resolution between the Plaintiff, acting on behalf of
23 itself and on behalf of the general public in the public interest pursuant to *Health and Safety Code*
24 Section 25249.7(d), and Defendant, as to all claims arising from Defendant's alleged failure to
25 provide clear, reasonable, and lawful warnings of exposure to the Covered Chemical.
26 Compliance with the terms of this Consent Judgment resolves any issue, now and in the future,
27 concerning compliance by Defendant with existing requirements of Proposition 65 to provide
28 clear and reasonable warnings about exposure to the Covered Products only.

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1 **4.4. Waiver Of Civil Code Section 1542:** This Consent Judgment is intended as a full
2 settlement and compromise of all claims arising out of or relating to Plaintiffs' Notices and/or the
3 Action regarding the Covered Products, except as set forth herein. No claim is reserved as
4 between the Parties hereto, and each Party expressly waives any and all rights which it may have
5 under the provisions of Section 1542 of the *Civil Code* of the State of California, which provides:

6 " A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
7 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
8 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
9 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
10 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
11 DEBTOR."

12 **4.5.** For purposes of this paragraph 4., the terms "Plaintiff" and "Defendant" are
13 defined as follows. The term "Plaintiff" includes the Plaintiff as defined at paragraph 1.1 above,
14 and also includes its members, subsidiaries, successors, and assigns and its directors, officers,
15 agents, attorneys, representatives, and employees. The term "Defendant" includes the Defendant,
16 as that term is defined in paragraph 1.2 above, and also includes its corporate affiliates, including
17 any and all corporate parents and subsidiaries and their directors, officers, agents, attorneys,
18 representatives, employees, licensors, heirs, predecessors, successors, and assigns, their suppliers,
19 distributors and customers of any Covered Products that contain the Covered Chemical, and any
20 other customers of such suppliers of the Covered Chemical, provided that such customers identify
21 themselves to Plaintiff within sixty (60) days following the approval of this Agreement, and agree
22 to include on the label(s) for the Covered Products the use instructions described at paragraph 2.

23 **5. MODIFICATION OF CONSENT JUDGMENT**

24 This Consent Judgment may be modified from time to time by express written agreement
25 of the Parties, with the approval of the Court, or by an order of this Court in accordance with law.

26 **5.1** The Parties recognize in particular that a Defendant or any other person engaged in
27 the manufacture, distribution or sale of a Covered Product may apply to the Office of Health
28 Hazard Assessment for a Safe Use Determination ("SUD") indicating that a Proposition 65
warning is not required for any of the Covered Products or a substantially similar product that

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1 contains a Covered Chemical. If such a person should obtain such an SUD, then the Defendant
2 shall be entitled to submit evidence to CAG demonstrating that the Covered Product, or for any
3 other substantially similar product used, manufactured and/or sold by Defendant comes within the
4 scope of the SUD does not require a Proposition 65 warning, or that different injunctive relief
5 under Proposition 65 is appropriate.

6 **5.2** CAG and the Defendant shall have ninety (90) days from the date on which the
7 Defendant submits such evidence to CAG in which to confer and decide concerning whether
8 modify the injunctive relief provisions of this Consent Judgment. If the Parties agree that the
9 Covered Products, or for any other additional products used, manufactured and/or sold by the
10 Defendant come within the scope of the SUD, then they shall jointly move the Court for such
11 modification.

12 **5.3** If the Parties are unable to agree, then the Defendant may file a motion with the
13 Court seeking the elimination or modification of the injunctive relief provisions of this Consent
14 Judgment, based on the SUD.

15 **5.4** Subsections 5.1 through 5.3 of this paragraph shall not apply to the monetary relief
16 sections of this Consent Judgment.

17 **5.5** The Attorney General shall be served with notice of any proposed modification to
18 this Consent Judgment at least fifteen (15) days in advance of its consideration by the Court.
19

20 **6. ENFORCEMENT OF CONSENT JUDGMENT**

21 **6.1** The Parties may, by motion or other application before this Court, and upon notice
22 having been given to all Parties in accordance with paragraph 10 below, unless waived, enforce
23 the terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or
24 remedies are provided by law. The prevailing party on any such motion or application shall be
25 entitled to recover reasonable attorneys' fees and costs.

26 **6.2** The Parties may enforce the terms and conditions of this Consent Judgment
27 pursuant to paragraph 6.1 only after the complaining party has first given thirty (30) days notice
28 to the Party allegedly failing to comply with the terms and conditions of the Consent Judgment

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1 and has attempted, in an open and good faith manner, to resolve such Party's alleged failure to
2 comply.

3
4 **7. GOVERNING LAW**

5 **7.1** The terms of this Consent Judgment shall be governed by, and construed in
6 accordance with, the laws of the State of California.

7 **7.2** The Parties have participated jointly in the preparation of this Consent Judgment
8 and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment
9 was subject to revision and modification by the Parties and has been accepted and approved as to
10 its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing
11 in this Consent Judgment shall not be interpreted against any Party as a result of the manner in
12 which this Consent Judgment was prepared. Each Party to this Consent Judgment agrees that any
13 statute or rule of construction providing that ambiguities are to be resolved against the drafting
14 party should not be employed in the interpretation of this Consent Judgment and, in this regard,
15 the Parties hereby waive the applications of California *Civil Code* Section 1654.

16
17 **8. ENTIRE AGREEMENT**

18 This Consent Judgment constitutes the sole and entire agreement and understanding
19 between the Parties with respect to the subject matter hereof, and any prior discussions,
20 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
21 and therein. There are no warranties, representations, or other agreements between the Parties,
22 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
23 other than those specifically referred to herein, shall be deemed to exist or bind any of the Parties
24 hereto. No supplementation, modification, waiver, or termination of this Consent Judgment shall
25 be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the
26 provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
27 other provisions hereof, whether or not similar, nor shall such waiver constitute a continuing
28 waiver.

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1 **9. NOTICES**

2 All notices or correspondence to be given pursuant to this Consent Judgment shall be in
3 writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight
4 courier, and/or via facsimile transmission (with presentation of facsimile transmission
5 confirmation) addressed to the Parties as follows:

6 **For Plaintiff:** **Yeroushalmi & Associates**
7 Attn: Reuben Yeroushalmi
8 9100 Wilshire Boulevard, Suite 610E
9 Beverly Hills, California 90212

9 **For Defendant::** **McKenna Long & Aldridge LLP**
10 Attn: Stanley W. Landfair
11 101 California Street, 41st Floor
12 San Francisco, California 94111

13 The contacts and/or addresses above may be amended by giving notice to all Parties to this
14 Consent Judgment.

15 **10. COURT APPROVAL**

16 The Court shall either approve or disapprove of this Consent Judgment in its entirety,
17 without alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their
18 counsel. If the Court approves of this Consent Judgment, then the terms of this Consent
19 Judgment are incorporated into the terms of the Court's Order.

20 Plaintiff will prepare and file a motion to approve this Consent Judgment in full, and shall
21 take all reasonable measures to ensure that it is entered without delay. In the event that the Court
22 declines to approve and order entry of the Consent Judgment without any change whatsoever, this
23 Consent Judgment shall become null and void upon the election of either Party and upon written
24 notice to all of the Parties to the Action pursuant to the notice provisions herein (unless the Parties
25 stipulate otherwise, in writing).

26 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days
27 thereafter, electronically provide or otherwise serve a copy of it and the report required pursuant
28 to 11 *Cal. Code Regs.* § 3004 to/on the California Attorney General's Office.

1 **11. AUTHORIZATION**

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

5
6 **12. COUNTERPARTS/FACSIMILE SIGNING**

7 This Consent Judgment may be executed in one or more counterparts, each of which shall
8 be deemed an original, and all of which, when taken together, shall constitute one and the same
9 document. All signatures need not appear on the same page of the document and signatures of
10 the Parties transmitted by facsimile shall be deemed binding.

11 **IT IS SO STIPULATED:**

12
13 Dated: 8/3/10

CONSUMER ADVOCACY GROUP, INC.

14 *Lyn H. Marcus*
15 (Signature)

16 Lyn H. Marcus
17 (Name)

18 President
19 (Title)

20
21 Dated: July 28, 2010

SAWYER PRODUCTS, INC.

22 *Kurt Avery*
23 (Signature)

24 KURT AVERY
25 (Name)

26 PRESIDENT
27 (Title)

28

1 APPROVED AS TO FORM:

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3 Dated: 8/3/10

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6 Dated: July 30, 2010

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IT IS SO ORDERED:

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Dated: _____

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JUDGE OF THE SUPERIOR COURT

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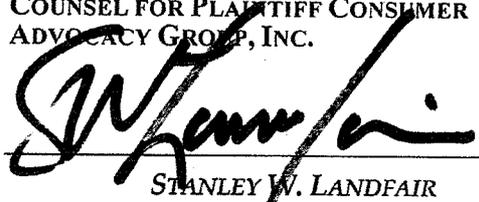
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ADVOCACY GROUP, INC.

STANLEY W. LANDFAIR
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