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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,

11 Plaintiff,

12 v.

13 ALBERTSON'S, LLC., et al.

14 Defendants,

Case No. 37-2017-00003980-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT KINGSFORD
PRODUCTS COMPANY, LLC**

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18 **1. INTRODUCTION**

19 1.1 **The Parties.** This Consent Judgment is entered into by and between Evelyn
20 Wimberley acting on behalf of the public interest (hereinafter "Wimberley"), and Kingsford
21 Products Company, LLC (hereinafter "Kingsford"), with Wimberley and Kingsford collectively
22 referred to as the "Parties" and each of them as a "Party." Wimberley is an individual residing in
23 California who seeks to promote awareness of exposures to toxic chemicals and improve human
24 health by reducing or eliminating hazardous substances contained in consumer products.
25 Kingsford employs ten or more persons and is a person in the course of doing business for
26 purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

27 1.2 **Allegations and Representations.** Wimberley alleges that Kingsford has offered
28 for sale in the State of California and has sold in California, charcoal lighter fluids that expose

1 individuals to carbon monoxide and soot, and that such sales have not been accompanied by
2 Proposition 65 warnings. Carbon monoxide and soot are listed under Proposition 65 as chemicals
3 known to the State of California to cause birth defects or other reproductive harm.

4 **1.3 Notices of Violation/Complaint.** On or about April 11, 2016, Wimberley served
5 Kingsford, Albertson's LLC ("Albertson's") and various public enforcement agencies with a
6 document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d)
7 (the "Notice"), alleging that Kingsford was in violation of Proposition 65 for failing to warn
8 consumers and customers that the charcoal fire starters exposed users in California to carbon
9 monoxide and soot. No public enforcer diligently prosecuted the claims threatened in the Notice
10 within sixty days plus service time relative to the provision of the Notice to them by Wimberley.
11 Wimberley accordingly filed the complaint in the above-captioned action ("Complaint") on
12 February 1, 2017.

13 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
14 has jurisdiction over Kingsford as to the allegations contained in the Complaint, that venue is
15 proper in the County of San Diego, and that this Court has jurisdiction to approve, enter, and
16 oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
17 claims which were or could have been raised in the Complaint based on the facts alleged therein
18 and/or in the Notice.

19 **1.5** On both its own and Albertson's behalves, Kingsford denies the material
20 allegations contained in Wimberley's Notice and Complaint and maintains that they have not
21 violated Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
22 Kingsford or Albertson's of any fact, finding, issue of law, or violation of law; nor shall
23 compliance with this Consent Judgment constitute or be construed as an admission by Kingsford
24 or Albertson's of any fact, finding, conclusion, issue of law, or violation of law, such being
25 specifically denied by Kingsford on its own and Albertson's behalves. However, this section
26 shall not diminish or otherwise affect the obligations, responsibilities, and duties of Kingsford
27 under this Consent Judgment.

1 **2. DEFINITIONS**

2 2.1 **Complaint.** The term “Complaint” shall have the meaning given in Section 1.3.

3 2.2 **Covered Product.** The term “Covered Product” means all stock keeping units
4 (“SKUs”) of charcoal lighter fluid sold or offered for sale by Kingsford in California.

5 2.3 **Effective Date.** The term “Effective Date” shall mean the date this Consent
6 Judgment is entered as a Judgment of the Court.

7 2.4 **Listed Chemicals:** The term “Listed Chemicals” shall mean carbon monoxide and
8 soot.

9 2.5 **Notice.** The term “Notice” shall have the meaning given in Section 1.3.

10 2.6 **Releasees.** The terms “Defendant Releasees” and “Downstream Defendant
11 Releasees” shall have the meanings given in Section 5.1.

12 2.7 **Execution Date.** The term “Execution Date” shall mean the date this Consent
13 Judgment is signed by both of the Parties

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing on the Effective Date, Kingsford shall not sell, offer for sale, or ship
16 for sale in California any Covered Product, unless the Covered Product is accompanied by one of
17 the following clear and reasonable Proposition 65 warnings:



19 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

20 or



22 **WARNING:** This product can expose you to carbon monoxide and soot, which are
23 known to the State of California to cause cancer and birth defects or other reproductive
24 harm. For more information go to www.P65Warnings.ca.gov.

25 or



27 **WARNING:** Combustion of this product can expose you to chemicals, including
28 soot, which are known to the State of California to cause cancer, and carbon monoxide,

1 which are known to the State of California to cause birth defects or other reproductive
2 harm. For more information go to www.P65Warnings.ca.gov.

3 or
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5 Combustion byproducts, such as carbon monoxide and soot, produced when using this
6 product contain chemicals known to the State of California to cause cancer and birth
7 defects or other reproductive harm.

8 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
9 Covered Product's packaging or labeling and displayed with such conspicuousness, as compared
10 with other words, statements, or designs as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use. A warning may be contained
12 in the same section of the packaging or labeling that states other safety warnings, if any,
13 concerning the use of the product and shall be displayed using no less than 6 point font size.

14 **4. MONETARY TERMS**

15 4.1 **Civil Penalty.** Kingsford shall pay a civil penalty of \$2,000.00 pursuant to Health
16 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
17 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
18 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
19 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

20 4.2 **Attorney Fees.** Kingsford agrees to pay and will not oppose an application made
21 by Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs
22 incurred as a result of investigating, bringing this matter to Kingsford's attention, litigating and
23 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
24 of Civil Procedure section 1021.5, in an amount of \$40,000.00 Other than the payment required
25 hereunder, each side is to bear its own attorneys' fees and costs.

26 4.3 Kingsford shall wire Wimberley's counsel the total sum of \$42,000.00
27 representing the civil penalty and attorney fees in Sections 4.1 and 4.2 within ten business days
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1 following receipt of a fully-executed copy of this Consent Judgment, all applicable IRS Form W-
2 9s, and wire instruction information from Wimberley's counsel.

3 **5. RELEASE OF ALL CLAIMS**

4 5.1 This Consent Judgment is a full, final, and binding resolution between Wimberley
5 acting in the public interest, and Kingsford, it's parents, shareholders, divisions, subdivisions,
6 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
7 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
8 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
9 suppliers, distributors, wholesalers, customers, licensors, licensees retailers (including but not
10 limited to Albertson's), franchisees, and cooperative members, including but not limited to each
11 of their subsidiaries and affiliates ("Downstream Defendant Releasees"), of all claims for
12 violations of Proposition 65 based on exposure to Listed Chemicals from Covered Products as set
13 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
14 Kingsford prior to the Effective Date. Compliance with the terms of this Consent Judgment
15 following the Effective Date shall be deemed to constitute compliance with Proposition 65 with
16 regard to the Covered Products.

17 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
18 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
19 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
20 legal action and releases any Kingsford, Defendant Releasees, and Downstream Defendant
21 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
22 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
23 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
24 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
25 related to or arising from Covered Products manufactured distributed or sold by Kingsford or
26 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
27 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
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1 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
2 Code, which provides as follows:

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

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10 5.3 Kingsford waives any and all claims against Wimberley, her attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
13 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
14 matter, and/or with respect to Covered Products.

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16 **6. INTEGRATION**

17 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
18 any and all prior negotiations and understandings related hereto shall be deemed to have been
19 merged within it. No representations or terms of agreement other than those contained herein
20 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

21 **7. GOVERNING LAW**

22 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California and apply within the State of California. In the event that Proposition 65 is repealed or
24 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
25 Kingsford shall provide written notice to Wimberley of any asserted change in the law, and shall
26 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
27 that, Covered Products are so affected.

28 **8. ENFORCEMENT**

8.1 Wimberley may, by motion or application for an order to show cause before the
Superior Court of San Diego County, enforce the terms and conditions contained in this Consent
Judgment. Prior to bringing any motion or application to enforce the requirements of this
Consent Judgment, Wimberley shall provide Kingsford with a proposed Notice of Violation, and

1 a copy of any documentary evidence which purportedly supports Wimberley's Notice of
2 Violation. The Parties shall then meet and confer in good faith for a period of at least sixty (60)
3 days regarding the basis for Wimberley's anticipated motion or application in an attempt to
4 resolve it informally. Should such attempts at informal resolution fail, Wimberley may file her
5 enforcement motion or application. This Consent Judgment may only be enforced by the Parties.

6 **9. NOTICES**

7 9.1 Unless specified herein, all correspondence and notices required to be provided
8 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
9 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
10 party by the other party at the following addresses:

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12 For Kingsford:

13 Kingsford Products Company
14 Attn: General Counsel
15 1221 Broadway
Oakland, CA 94612

16 and

17 For Wimberley:

18 Stephen Ure
19 Law Offices of Stephen Ure, PC.
20 11622 El Camino Real, Suite 100
San Diego, California 92130

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

23 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

24 10.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
25 which shall be deemed an original, and all of which, when taken together, shall constitute one and
26 the same document.

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1 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
2 **APPROVAL**

3 11.1 Wimberley agrees to comply with the requirements set forth in California Health
4 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
5 Judgment and Kingsford agrees it shall support approval of such Motion.

6 11.2 This Consent Judgment shall not be effective until it is approved and entered by
7 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
8 within 12 months after a motion to approve this settlement has been filed with the court. In such
9 case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached
10 within 30-days, any monies that have been paid pursuant to Section 4 shall be refunded and the
11 case shall proceed on its normal course.

12 11.3 If the Court approves this Consent Judgment and is reversed or vacated by an
13 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
14 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
15 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
16 trial court, and the case shall proceed on its normal course on the trial court's calendar.

17 **12. MODIFICATION**

18 12.1 This Consent Judgment may be modified only by further stipulation of the Parties
19 and the approval of the Court or upon the granting of a motion brought to the Court by either
20 Party.

21 **13. ATTORNEY'S FEES**

22 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
23 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
24 unless the unsuccessful party has acted with substantial justification. For purposes of this
25 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
26 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

27 13.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
28 pursuant to law.

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14. RETENTION OF JURISDICTION

14.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

15. AUTHORIZATION

15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

1 **APPROVED AS TO FORM:**


2 AGREED TO:	AGREED TO:
3 Date : _____, 2017	Date: <u>3-27</u> , 2017
4	
5 By: _____	By: <u>Robert L. Falk</u>
6 On Behalf of Evelyn Wimberley	On Behalf of Kingsford
7 Stephen Ure,	Robert L. Falk
8 Law Offices of Stephen Ure, PC	Morrison & Foerster, LLP

9 **IT IS HEREBY SO STIPULATED:**


10 AGREED TO:	AGREED TO:
11	
12 Date: _____	Date: <u>March 28, 2017</u>
13 By: _____	By: <u>Matthew R. Gregory</u> Matthew R. Gregory
14 EVELYN WIMBERLEY	Kingsford Products Company, LLC
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APPROVED AS TO FORM:

<p>AGREED TO: Date: <u>MARCH 28</u>, 2017</p> <p>By: </p> <p>On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC</p>	<p>AGREED TO: Date: _____, 2017</p> <p>By: _____</p> <p>On Behalf of Kingsford Robert L. Falk Morrison & Foerster, LLP</p>
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IT IS HEREBY SO STIPULATED:

<p>AGREED TO:</p> <p>Date: <u>3/28/17</u></p> <p>By:  EVELYN WIMBERLEY</p>	<p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____ Kingsford Products Company, LLC</p>
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