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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 Salco, Inc. et al.
14 Defendants,

Case No. 37-2017-00004684-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT SALCO, INC.**

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18 **1. INTRODUCTION**

19 1.1 **The Parties.** This Consent Judgment is entered into by and between Plaintiff
20 Evelyn Wimberley acting on behalf of the public interest (hereinafter “Wimberley”), and
21 Defendant Salco Inc., dba Two Trees Products (erroneously sued as separate entities) (hereinafter
22 “Salco”), with Wimberley and Salco collectively referred to as the “Parties” and each of them as a
23 “Party.” Wimberley is an individual residing in California who seeks to promote awareness of
24 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
25 substances contained in consumer products. Salco 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 Salco has offered for
28 sale in the State of California and has sold in California, charcoal that exposes individuals to

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

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5 1.3 **Notices of Violation/Complaint.** On or about April 22, 2016, Wimberley served
6 Salco, Smart & Final Stores, LLC, The Kroger Company, Two Trees Products, and various public
7 enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health
8 & Safety Code §25249.7(d) (the "Notice"), alleging that Salco, Smart & Final Stores, LLC., The
9 Kroger Company, and Two Trees Products were in violation of Proposition 65 for failing to warn
10 consumers and customers that the Best of the West Mesquite Charcoal exposed users in
11 California to carbon monoxide and soot. No public enforcer diligently prosecuted the claims
12 threatened in the Notice within sixty days plus service time relative to the provision of the Notice
13 to them by Wimberley, such that Wimberley filed a complaint in the matter as captioned above on
14 or about February 7, 2017.

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

21 1.5 Salco denies the material allegations contained in Wimberley's Notice and
22 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
23 Judgment shall be construed as an admission by Salco of any fact, finding, issue of law, or
24 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
25 an admission by Salco of any fact, finding, conclusion, issue of law, or violation of law, such
26 being specifically denied by Salco. However, this section shall not diminish or otherwise affect
27 the obligations, responsibilities, and duties of Salco under this Consent Judgment.
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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 Best of the West Mesquite
4 Charcoal.

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 the parties

14 **3. INJUNCTIVE RELIEF; WARNINGS**

15 **3.1** Commencing on the Effective Date, Salco shall not sell, offer for sale, or ship for
16 sale in California any Covered Product, unless the Covered Product is accompanied by the
17 following on-product warning:



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

20 **3.2** The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
21 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
22 on the packaging or labeling, and displayed with such conspicuousness, as compared with other
23 words, statements, or designs as to render it likely to be read and understood by an ordinary
24 individual under customary conditions of purchase or use. A warning may be contained in the
25 same section of the packaging or labeling that states other safety warnings, if any, concerning the
26 use of the product and shall be at least the same size as those other safety warnings, but no less
27 than 6 point font.
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1 3.3 For warnings that are not on-product warnings, including but not limited to
2 warnings printed in an instruction booklet for any Covered Product, the following warning shall
3 be used:
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5 **WARNING:** This product can expose you to carbon monoxide and soot, which are
6 known to the State of California to cause cancer and birth defects or other reproductive
7 harm. For more information go to www.P65Warnings.ca.gov.

8 **4. MONETARY TERMS**

9 4.1 **Civil Penalty.** Salco shall pay a civil penalty of \$1,000.00 pursuant to Health and
10 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
11 Code § 25192, with 75% of these funds remitted to the State of California's Office of
12 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
13 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

14 4.2 **Attorney Fees.** Salco agrees to pay and will not oppose an application made by
15 Wimberley's counsel for an award of reasonable attorney fees, inclusive of all expenses and costs
16 incurred as a result of investigating, bringing this matter to Salco's attention, litigating and
17 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
18 of Civil Procedure section 1021.5, in an amount of \$31,000.00. Salco shall wire Wimberley's
19 counsel the total sum of \$32,000.00 representing the civil penalty and attorney fees in Sections
20 4.1 and 4.2 within 10 days following receipt of a fully-executed copy of this Consent Judgment,
21 and wire instruction information from Wimberley's counsel. Payment shall be wired on the
22 following days: August 25, 2017 - \$15,000.00; September 29, 2017 - \$8,500.00; and, October
23 31, 2017 - \$8,500.00. If payments are not made in accordance with this section (4.2) the entire
24 agreement will be void.

25 **5. RELEASE OF ALL CLAIMS**

26 5.1 This consent judgment is a full, final, and binding resolution between Wimberley
27 acting in the public interest, and Salco, its owners, investors employees, directors, officers,
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1 managers, attorneys, parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister
2 companies, and affiliates, and their successors and assigns (“Defendant Releasees”), and all
3 entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered
4 Products, including but not limited to manufacturers, suppliers, distributors, wholesalers,
5 customers, licensors, licensees retailers, franchisees, and cooperative members, including but not
6 limited to Salco, Defendant The Kroger Company, and Defendant Smart & Final Stores, and their
7 respective subsidiaries, affiliates, owners, investors employees, directors, officers, managers,
8 attorneys, parents, shareholders, divisions, subdivisions, partners, sister companies, and their
9 successors and assigns (“Downstream Defendant Releasees”). Upon full execution of this
10 Consent Judgement, and subject to payment by Salco of the full settlement amount and
11 compliance with the terms of this Consent Judgment, Wimberley, on behalf of herself, her agents,
12 successors, heirs, and assigns, hereby fully and irrevocably releases and discharges Salco, the
13 Defendant Releasees, and the Downstream Defendant Releasees from all claims for violations of
14 Proposition 65 that were, or which could have been, asserted in the Complaint based on exposure
15 to and/or failure to warn about Listed Chemicals from Covered Products as set forth in the Notice,
16 with respect to any Covered Products manufactured, distributed, or sold by Salco, the Defendant
17 Releasees, and/or the Downstream Defendant Releasees prior to the Effective Date. Compliance
18 with the terms of this consent judgment constitutes compliance with Proposition 65 with regard to
19 the Covered Products.

20 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
21 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
22 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
23 legal action and releases any Salco, Defendant Releasees, and Downstream Defendant Releasees
24 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
25 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
26 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or
27 contingent, now or in the future, with respect to any alleged violations of Proposition 65 related to
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1 or arising from Covered Products manufactured distributed or sold by Salco or Defendant
2 Releasees. With respect to the foregoing waivers and releases in this paragraph, Wimberley
3 hereby specifically waives any and all rights and benefits which she now has, or in the future may
4 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
5 provides as follows:
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7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
9 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
10 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
11 THE DEBTOR.

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

17 **6. INTEGRATION**

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

22 **7. GOVERNING LAW**

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

1 **8. ENFORCEMENT**

2 8.1 Wimberley may, by motion or application for an order to show cause before the
3 Superior Court of San Diego County, enforce the terms and conditions contained in this Consent
4 Judgment. Prior to bringing any motion or application to enforce the requirements of this
5 Consent Judgment, Wimberley shall provide Salco with a proposed Notice of Violation, and a
6 copy of any documentary evidence which purportedly supports Wimberley's Notice of Violation.
7 The Parties shall then meet and confer in good faith for a period of at least sixty (60) days
8 regarding the basis for Wimberley's anticipated motion or application in an attempt to resolve it
9 informally. Should such attempts at informal resolution fail, Wimberley may file her
10 enforcement motion or application. This Consent Judgment may only be enforced by the Parties.

11 **9. NOTICES**

12 9.1 Unless specified herein, all correspondence and notices required to be provided
13 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
14 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
15 party by the other party at the following addresses:

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17 For Salco:

18 Paul H. Burleigh
19 Chad M. Mandell
20 Attorney at Law
21 LECLAIRRYAN
22 725 S. Figueroa Street, Suite 350
23 Los Angeles, California 90017

24 and

25 For Wimberley:

26 Stephen Ure
27 Law Offices of Stephen Ure, PC.
28 11622 El Camino Real, Suite 100
 San Diego, California 92130

Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

3 10.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 11.1 Wimberley agrees to comply with the requirements set forth in California Health
9 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
10 Judgment and Salco agrees it shall support approval of such Motion.

11 11.2 This Consent Judgment shall not be effective until it is approved and entered by
12 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
13 within twelve months after it has been fully executed by the Parties. In such case, the Parties
14 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
15 any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed
16 on its normal course.

17 11.3 If the Court approves this Consent Judgment and is reversed or vacated by an
18 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
19 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
20 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
21 trial court, and the case shall proceed on its normal course on the trial court's calendar.

22 **12. MODIFICATION**

23 12.1 This Consent Judgment may be modified only by express written agreement of the
24 Parties and the approval of the Court or upon the granting of a motion brought to the Court by
25 either Party.

26 12.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
27 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.
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1 **13. ATTORNEY'S FEES**

2 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
4 unless the unsuccessful party has acted with substantial justification. For purposes of this
5 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
6 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

7 13.2 Except as otherwise provided in this Consent Judgment, each Party shall bear its
8 own attorneys' fees and costs.

9 13.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions
10 pursuant to law.

11 **14. RETENTION OF JURISDICTION**

12 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 **15. AUTHORIZATION**

15 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of
16 their respective Parties and have read, understood and agree to all of the terms and conditions of
17 this document and certifies that he or she is fully authorized by the Party he or she represents to
18 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
19 Except as explicitly provided herein each Party is to bear its own fees and costs.
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21 **APPROVED AS TO FORM:**
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AGREED TO: Date : _____, 2017 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: <u>8/25/2017</u> By: <u>Chad M. Mandell</u> On Behalf of Salco, Inc. Paul H. Burleigh Chad M. Mandell Attorneys at Law
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IT IS HEREBY SO STIPULATED:

AGREED TO: Date: _____ By: _____ EVELYN WIMBERLEY	AGREED TO: Date: <u>8/25/17</u> By: <u>[Signature]</u> Salco, Inc.
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<p>1 AGREED TO:</p> <p>2 Date: <u>August 25</u>, 2017</p> <p>3</p> <p>4 By: </p> <p>5 On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC</p>	<p>AGREED TO:</p> <p>Date: _____, 2017</p> <p>By: _____</p> <p>On Behalf of Salco, Inc. Paul H. Burleigh Chad M. Mandell Attorneys at Law</p>
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9 **IT IS HEREBY SO STIPULATED:**

<p>10 AGREED TO:</p> <p>11 Date: <u>8/23/17</u></p> <p>12</p> <p>13 By: </p> <p>14 <u>EVELYN WIMBERLEY</u></p>	<p>AGREED TO:</p> <p>Date: _____</p> <p>By: _____</p> <p><u>Salco, Inc.</u></p>
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