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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.

1 individual under customary conditions of purchase or use. A warning may be contained in the
2 same section of the packaging or labeling that states other safety warnings, if any, concerning the
3 use of the product and shall be at least the same size as those other safety warnings, but no less
4 than 6 point font.

5 3.3 For warnings that are not on-product warnings, including but not limited to
6 warnings printed in an instruction booklet for any Covered Product, the following warning shall
7 be used:



8 **WARNING:** Combustion (burning) of this product, like other cooking
9 methods, can expose you to carbon monoxide and other substances which are
10 known to the State of California to cause cancer, birth defects or reproductive
11 harm. Do not use this product indoors or in an enclosed area as this product is
12 intended for outdoor use only. For more information go to
www.P65Warnings.ca.gov

13 4. MONETARY TERMS

14 4.1 **Civil Penalty.** Salco shall pay a civil penalty of \$1,000.00 pursuant to Health and
15 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
16 Code § 25192, with 75% of these funds remitted to the State of California's Office of
17 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
18 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

19 4.2 **Attorney Fees.** Salco agrees to pay and will not oppose an application made by
20 Wimberley's counsel for an award of reasonable attorney fees, inclusive of all expenses and costs
21 incurred as a result of investigating, bringing this matter to Salco's attention, litigating and
22 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
23 of Civil Procedure section 1021.5, in an amount of \$31,000.00. Salco shall wire Wimberley's
24 counsel the total sum of \$32,000.00 representing the civil penalty and attorney fees in Sections 0
25 and 0 within 10 days following receipt of a fully-executed copy of this Consent Judgment, and
26 wire instruction information from Wimberley's counsel. Payment shall be wired on the following
27 days: August 25, 2017 - \$15,000.00; September 29, 2017 - \$8,500.00; and, October 31, 2017 -
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1 \$8,500.00. If payments are not made in accordance with this section (4.2) the entire agreement
2 will be void.

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

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

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11 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES
12 NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
13 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
14 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
15 THE DEBTOR.

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17 5.3 Salco waives any and all claims against Wimberley, her attorneys and other
18 representatives, for any and all actions taken or statements made (or those that could have been
19 taken or made) by Wimberley and her attorneys and other representatives, whether in the course of
20 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
21 and/or with respect to Covered Products.

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23 **6. INTEGRATION**

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25 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and any
26 and all prior negotiations and understandings related hereto shall be deemed to have been merged
27 within it. No representations or terms of agreement other than those contained herein exist or
28 have been made by any Party with respect to the other Party or the subject matter hereof.

7. GOVERNING LAW

7.1 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 as to Covered Products, then

1 Salco shall provide written notice to Wimberley of any asserted change in the law, and shall have
2 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
3 Covered Products are so affected.

4 **8. ENFORCEMENT**

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

14 **9. NOTICES**

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

19 For Salco:

20
21 Paul H. Burleigh
22 Chad M. Mandell
23 Attorney at Law
24 LECLAIRRYAN
25 725 S. Figueroa Street, Suite 350
26 Los Angeles, California 90017

27 and

28 For Wimberley:

1 Stephen Ure
2 Law Offices of Stephen Ure, PC.
3 11622 El Camino Real, Suite 100
4 San Diego, California 92130

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

7 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

8 10.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
9 which shall be deemed an original, and all of which, when taken together, shall constitute one and
10 the same document.

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

13 11.1 Wimberley agrees to comply with the requirements set forth in California Health &
14 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
15 and Salco agrees it shall support approval of such Motion.

16 11.2 This Consent Judgment shall not be effective until it is approved and entered by the
17 Court and shall be null and void if, for any reason, it is not approved and entered by the Court
18 within twelve months after it has been fully executed by the Parties. In such case, the Parties agree
19 to meet and confer on how to proceed and if such agreement is not reached within 30-days, any
20 monies that have been paid pursuant to Section 0 shall be refunded and the case shall proceed on
21 its normal course.

22 11.3 If the Court approves this Consent Judgment and is reversed or vacated by an
23 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
24 Judgment. If the Parties do not jointly agree on a course of action to take, any monies that have
25 been paid pursuant to Section 0 shall be refunded within 15 days after remittitur to the trial court,
26 and the case shall proceed on its normal course on the trial court's calendar.
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1 **12. MODIFICATION**

2 12.1 This Consent Judgment may be modified only by express written agreement of the
3 Parties and the approval of the Court or upon the granting of a motion brought to the Court by
4 either Party.

5 12.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and
6 confer with the other Party prior to filing a motion to modify the Consent Judgment.

7 **13. ATTORNEY'S FEES**

8 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
9 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
10 the unsuccessful party has acted with substantial justification. For purposes of this Consent
11 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
12 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

13 13.2 Except as otherwise provided in this Consent Judgment, each Party shall bear its
14 own attorneys' fees and costs.

15 13.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions
16 pursuant to law.

17 **14. RETENTION OF JURISDICTION**



18 14.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
19 Judgment.

20 **15. AUTHORIZATION**


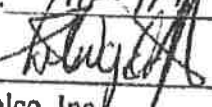
21 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
22 respective Parties and have read, understood and agree to all of the terms and conditions of this
23 document and certifies that he or she is fully authorized by the Party he or she represents to
24 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
25 Except as explicitly provided herein each Party is to bear its own fees and costs.
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27 **APPROVED AS TO FORM:**

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AGREED TO: Date: <u>October 12</u> , 2017 By:  On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: <u>January 4</u> , 2018 By:  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: <u>10/12/2017</u> By:  EVELYN WIMBERLEY	AGREED TO: Date: <u>10/17/17</u> By:  Salco, Inc.
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