

1 Robert B. Hancock, Esq. (Bar No. 179438)
PACIFIC JUSTICE CENTER
2 50 California Street, Suite 1500
San Francisco, CA 94111
3 Telephone: (415) 310-1940
Email: rbh@lawyer.com

4 Attorneys for Plaintiff
5 Amy Chamberlin

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

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11 AMY CHAMBERLIN, in the public interest,

12 Plaintiff,

13 vs.

14 PENNINGTON SEED, INC., a Delaware
15 corporation; and DOES 1 through 500,
inclusive,

16 Defendant.
17

Case No. RG16829495

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

**[Cal. Health and Safety
Code § 25249.6, et seq.]**

Action Filed: August 31, 2016

1 **1. INTRODUCTION**

2 **1.1** This Action arises out of the alleged violations of California’s Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.5, *et seq.*
4 (also known as and hereinafter referred to as “Proposition 65”) regarding the Defendant’s
5 “Nature’s Heat Wood Pellets” (the “Covered Product”).

6 **1.2** Plaintiff AMY CHAMBERLIN (“Chamberlin”) is a California resident acting as a
7 private enforcer of Proposition 65. Chamberlin alleges that she brings this Action in the public
8 interest pursuant to California Health and Safety Code section 25249.5, *et seq.*, asserts that she is
9 dedicated to, among other causes, helping safeguard the public from health hazards by reducing
10 the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for
11 consumers and employees, and encouraging corporate responsibility.

12 **1.3** Defendant Pennington Seed, Inc., is a Delaware corporation, hereinafter referred to
13 as “Defendant” or “Pennington.”

14 **1.4** Chamberlin and Pennington are hereinafter sometimes referred to individually as a
15 “Party” or collectively as the “Parties.”

16 **1.5** Pennington acquires, distributes and/or sells the Covered Product.

17 **1.6** On or about June 24, 2016, pursuant to California Health and Safety Code section
18 25249.7(d)(1), Chamberlin served a 60-Day Notice of Violation of Proposition 65 on the
19 California Attorney General, other public enforcers and Pennington alleging that Pennington
20 violated Proposition 65 by exposing persons in California to wood dust in connection with the use
21 of the Covered Product without first providing a Proposition 65 warning.

22 **1.7** After more than sixty (60) days passed since service of the Notices of Violation,
23 and no designated governmental agency having filed a complaint against Pennington with regard
24 to the Covered Product or the alleged violations, Chamberlin filed a complaint (the “Complaint”)
25 for injunctive relief and civil penalties. The Complaint, dated August 31, 2016, is based on the
26 allegations in the Notice of Violation.

27 **1.8** The Complaint alleges that Pennington manufactured, distributed, and/or sold in
28 California the Covered Product, which allegedly contain wood dust, a substance listed under

1 Proposition 65 as being known by the State of California to cause cancer, requiring a Proposition
2 65 warning. Further, the Complaint alleges that use of the Covered Product expose persons in
3 California to wood dust without first providing clear an reasonable warnings, in violation of
4 California Health and Safety Code section 25249.6. Pennington generally denies all material and
5 factual allegations of the Notice of Violations and the Complaint, and specifically denies that the
6 Plaintiff or California consumers have been harmed or damaged by its conduct. Pennington and
7 Chamberlin each reserve all rights to allege additional facts, claims, and affirmative defenses if the
8 Court does not approve this Consent Judgment.

9 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
10 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
11 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any
12 of the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
13 parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
14 wholesalers, customers, or retailers ("Party Affiliates"), of any fact, conclusion of law, issue of
15 law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission
16 concerning any alleged violation of Proposition 65. Except as expressly set forth herein, nothing
17 in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense
18 the Parties or Party Affiliates may have in any other or future legal proceeding. Provided,
19 however, nothing in this Section shall affect the enforceability of this Consent Judgment.

20 **1.10** The "Effective Date" of this Consent Judgment shall be the date this Consent
21 Judgment is entered as a Judgment.

22 **2. JURISDICTION AND VENUE**

23 **2.1** The Parties stipulate that this Court has jurisdiction over the subject matter of this
24 Action and personal jurisdiction over the Parties, that venue is proper in this Court, and that this
25 Court has jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

26 **3. INJUNCTIVE RELIEF AND WARNINGS**

27 **3.1** Beginning on the Effective Date, and except as provided in Section 3.2 below,
28 Pennington shall be permanently enjoined from offering for sale to a consumer in California,

1 directly selling to a consumer in California, or "Distributing into California" any of the Covered
2 Product, unless the label of the Covered Product contains a Proposition 65 compliant warning,
3 consistent with Section 3.3, below. "Distribution into California" means to ship any of the
4 Covered Product to California for sale by others. Provided, however, that Pennington may
5 manufacture or package and sell Covered Product without providing a Proposition 65 compliant
6 warning so long as such products are only for sale to distributors located outside of California or
7 Pennington does not Distribute them into California.

8 **3.2** All Covered Product that have been or will have been produced, distributed,
9 shipped, or sold, or otherwise placed in the stream of commerce through and including 60 days
10 after the Effective Date of this Consent Judgment are exempt from the provisions of Sections 3.1
11 and 3.3 and are included within the release in Sections 8.1 through 8.4.

12 **3.3 Clear and Reasonable Warnings**

13 (A) For the Covered Product that is subject to the warning requirement of Section 3.1.:

WARNING. Drilling, sawing, sanding or machining wood products
can expose you to wood dust, a substance known to the State of
California to cause cancer. This product contains wood dust. Avoid
inhaling wood dust or use a dust mask or other safeguards for personal
protection. Carbon monoxide, which is a by-product of combustion of
this product, is known by the State of California to cause birth defects or
other reproductive harm.

For more information go to www.P65Warnings.ca.gov/wood.

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21 Pennington shall provide a Compliant Warning. The Parties agree the foregoing
22 constitutes a clear and reasonable warning:

23 (B) The Warning shall be permanently affixed to or printed on (at the point of
24 manufacture, or distribution, but prior to shipment into California, or prior to distribution within
25 California) the outside packaging or container of each bag of the Covered Product. The Warning
26 shall be displayed with such conspicuousness, as compared with other words, statements, designs
27 or devices on the outside packaging or labeling, as to render it likely be to read and understood by
28 an ordinary individual prior to use. If the Warning is displayed on the product packaging or

1 labeling, the Warning shall be at least the same size as the largest of any other health or safety
2 warnings on the product packaging or labeling, and the word "WARNING" shall be in all capital
3 letters. If printed on the label itself, the Warning shall be contained in the same section of the
4 labeling that states other safety warnings concerning the use of Covered Product, if any. The
5 Parties acknowledge that Pennington is currently utilizing a safe harbor warning as specified in
6 Cal. Code Reg. section 25603.2 in connection with the Covered Product. That warning is set from
7 in Section 3.3(A) and is agreed to satisfy the warning obligation.

8 (C) Notwithstanding paragraphs (A) and (B) above, if modifications or amendments to
9 Proposition 65 of its regulations adopted after the Effective Date are inconsistent with, or provide
10 warnings specifications or options different from, the specifications in this Agreement, Pennington
11 may modify the content and delivery methods of its warnings to conform to the clear and
12 reasonable warning provisions of Proposition 65 or its regulations as modified or amended, and
13 such warnings shall constitute Compliant Warnings under this Agreement.

14 4. SETTLEMENT PAYMENT

15 4.1 Pennington shall make a total payments of \$64,500.00. The payments shall be
16 within ten days of the Effective Date. The payments shall be in full and final satisfaction of any
17 and all civil penalties, payment in lieu of civil penalties, and attorneys' fees and costs.

18 4.2 The payment shall be in the form of three separate checks sent to counsel for
19 Plaintiff, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
20 California 94111. The checks shall be payable to the following parties and the payment shall be
21 apportioned as follows:

22 4.3 An aggregate of \$22,500.00 (Twenty-Two Thousand and Five Hundred Dollars) as
23 civil penalties pursuant to California Health and Safety Code section 25249.7(b)(1). Of this
24 amount, one check shall be payable to the Office of Environmental Health Hazard Assessment
25 ("OEHHA"), in the sum of \$16,875.00 and a second check shall be payable to Chamberlin in the
26 sum of \$5,625.00. (Cal. Health & Safety Code section 25249.12(c)(1) and (d)). Chamberlin
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1 waives any statutory right to share in the penalties awarded to any further extent. Chamberlin's
2 counsel will forward the civil penalty to OEHHA.

3 **4.4** The third check shall be for \$42,000.00 (Forty-Two Thousand Dollars) payable to
4 Robert B. Hancock as reimbursement of Chamberlin's attorneys' fees, costs, investigation and
5 litigation expenses ("Attorneys' Fees and Costs").

6 **4.5** Any failure by Pennington to remit payments on or before its due date shall be
7 deemed a material breach of this Agreement, entitling Plaintiff to rescind. In such event, the
8 Parties agree to cooperate in taking any and all steps necessary to vacate and/or set aside any
9 Judgment or dismissal entered, and this Agreement and the Consent Judgment shall be deemed
10 null, void and not admissible at trial in this proceeding.

11 **5. MODIFICATION OF CONSENT JUDGMENT**

12 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
13 stipulation of the Parties and upon having such stipulation entered as a modified Consent
14 Judgment by the Court; or (ii) upon entry of a modified Judgment by the Court pursuant to a
15 motion by one of the Parties after exhausting the meet and confer process set forth as follows. If
16 either Party requests or initiates a modification, then it shall meet and confer with the other Party
17 in good faith before filing a motion with the Court seeking to modify it. Chamberlin is entitled to
18 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
19 efforts for any modification requested or initiated by Pennington. Similarly, Pennington is entitled
20 to reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
21 efforts for any modification requested or initiated by Chamberlin. If, despite their meet and confer
22 efforts, the Parties are unable to reach agreement on any proposed modification the party seeking
23 the modification may file the appropriate motion and the prevailing party on such motion shall be
24 entitled to recover its reasonable fees and costs associated with such motion. One basis, but not
25 the exclusive basis, for Pennington to seek a modification of this Consent Judgment is if
26 Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in whole or in
27 part to the Covered Product or wood dust due to legislative change, a change in the implementing
28 regulations, court decisions or other legal basis.

1 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

2 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
3 this Consent Judgment, if the Agreement is not rescinded.

4 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to
5 show cause filed with this Court, enforce the terms and conditions contained in this Consent
6 Judgment. The prevailing party in any such motion or application may request that the Court
7 award its reasonable attorneys' fees and costs associated with such motion or application.

8 **6.3** Before filing a motion or application for an order to show cause, Chamberlin shall
9 provide Pennington with 30 (thirty days' written notice of any alleged violations of the terms and
10 conditions contained in this Consent Judgment. As long as Pennington cures any such alleged
11 violations within the 30-day period (or if any such violation cannot practicably be cured within 30
12 days, it expeditiously initiates a cure within 30 days and completes it as soon as practicable) and
13 Pennington provides proof to Chamberlin that the alleged violation(s) were the result of good faith
14 mistake or accident, then Pennington shall not be in violation of the Consent Judgment.
15 Pennington shall have the ability to avail itself of the benefits of this Section two (2) times
16 following the Effective Date.

17 **7. APPLICATION OF CONSENT JUDGMENT**

18 **7.1** This Consent Judgment shall apply to and be binding upon and benefit the Parties
19 and their respective officers, directors, successors, and assigns, and it shall benefit the Parties and
20 their respective officers, directors, shareholders, employees, agents, parent companies,
21 subsidiaries, divisions, affiliates, suppliers, franchisees, licenses, customers, distributors,
22 wholesalers, retailers, predecessors, successors, and assigns.

23 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

24 **8.1** This Consent Judgment is a full, final, and binding resolution between Chamberlin,
25 on behalf of herself and in the public interest, and Pennington, of any and all direct or derivative
26 violations (or claimed violations) of Proposition 65 or its implementing regulations for failure to
27 provide Proposition 65 warnings of exposure from the handling, use, or consumption of the
28 Covered Product and fully resolves all claims that have been or could have been asserted in this

1 Action by any person up to and including the Effective Date for failure to provide Proposition 65
2 warnings for the Covered Product. Chamberlin, on behalf of herself and in the public interest,
3 hereby forever releases and discharges Pennington and its past and present officers, directors,
4 owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries, divisions,
5 affiliates, suppliers, franchisees, licensees, customers, distributors, wholesalers, retailers, and all
6 other upstream and downstream entities and persons in the distribution chain of any Covered
7 Product, including but not limited to Walmart, Inc., and Blue Mountain Lumber, and the
8 predecessors, successors and assigns of any of them (collectively, "Released Parties"), from any
9 and all claims and causes of action and obligations to pay damages, restitution, fines, civil
10 penalties, payment in lieu of civil penalties and expenses (including but not limited to expert
11 analysis fees, expert fees, attorneys' fees and costs) (collectively, "Claims") arising under, based
12 on, or derivative of Proposition 65 or its implementing regulations up through the Effective Date
13 relating to actual or potential exposure to chemicals known by the State of California to cause
14 cancer, birth defects or other reproductive harm, from the Covered Product and/or failure to warn
15 about wood dust, as set forth in the Notices of Violation and the Complaint.

16 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute
17 compliance by any Released Party with Proposition 65 regarding alleged exposures from the
18 Covered Product as described above or set forth in the Notice of Violations and the Complaint.

19 **8.3** It is possible that other Claims not known to Chamberlin arising out of the facts
20 alleged in the Notice of Violations or the Complaint and relating to the Covered Product that were
21 manufactured, sold or distributed into California before the Effective Date will develop or be
22 discovered. Chamberlin, on behalf of herself only, acknowledges that the Claims released herein
23 include all known and unknown Claims and waives California Civil Code section 1542 as to any
24 such unknown Claims. California Civil Code section 1542 reads as follows:

25 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
26 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
27 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
28 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR."**

1 Chamberlin, on behalf of herself only, acknowledges and understands the significance and
2 consequences of this specific waiver of California Civil Code section 1542.

3 **8.4** Chamberlin, on one hand, and Pennington, on the other hand, each release and
4 waive all Claims they may have against each other for any statements or actions made or
5 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
6 shall not affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

7 **9. CONSTRUCTION AND SEVERABILITY**

8 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
9 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
10 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
11 construction of this Consent Judgment, the terms and conditions shall not be construed against any
12 Party.

13 **9.2** In the event that any of the provisions of this Consent Judgment are held by a court
14 to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
15 affected.

16 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
17 construed in accordance with the laws of the State of California.

18 **10. PROVISION OF NOTICE**

19 All notices required to be given to either Party to this Consent Judgment by the other shall
20 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b)
21 certified mail, (c) overnight courier, or (d) personal delivery to the following:

22 **For Chamberlin:**

23 Melvin B. Pearlston
24 Robert B. Hancock
25 PACIFIC JUSTICE CENTER
26 50 California Street, Suite 1500
27 San Francisco, California 94111

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1 **For Pennington Seed:**

2 Daniel Rapaport
3 WENDEL, ROSEN, BLACK & DEAN LLP
4 1111 Broadway, 24th Floor
5 Oakland, California 94607

6 **11. COURT APPROVAL**

7 **11.1** Upon execution of this Consent Judgment by the Parties, Chamberlin shall notice a
8 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
9 Consent Judgment.

10 **11.2** If the California Attorney General objects to any term in this Consent Judgment,
11 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
12 prior to the hearing on the motion.

13 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
14 Consent Judgment, it shall be null and void and have no force or effect.

15 **12. EXECUTION AND COUNTERPARTS**

16 This Stipulated Consent Judgment may be executed in counterparts, which taken together
17 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid as the
18 original signature.

19 **13. ENTIRE AGREEMENT, AUTHORIZATION**

20 **13.1** This Consent Judgment contains the sole and entire agreement and understanding
21 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,
22 negotiations, commitments and understandings related hereto. No representations, oral or
23 otherwise, express or implied, other than those contained herein have been made by any Party. No
24 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
25 or to bind any Party.

26 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
28 provided herein, each Party shall bear its own fees and costs.

1 **14. REQUEST FOR FINDINGS AND FOR APPROVAL**

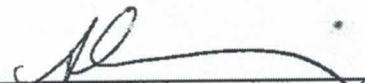
2 14.1 This Consent Judgment has come before the Court upon the request of the Parties.
3 The Parties request the Court to fully review this Consent Judgment and, being fully informed
4 regarding the matters which are the subject of this action, to:

5 (a) Find that the terms and provisions of this Consent Judgment represent a good faith
6 settlement of all matters raised by the allegations of the Complaint, that the matter has been
7 diligently prosecuted, and that the public interest is served by such settlement; and

8 (b) Make the findings pursuant to California Health and Safety Code section
9 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

10 **IT IS SO STIPULATED.**

11 Dated: 3/9/2017

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15 Amy Chamberlin

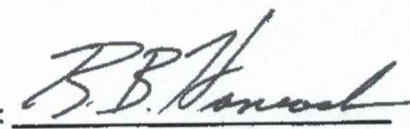
15 Dated: _____

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17 _____
18 Pennington Seed, Inc.
19 By: Dan Pennington

19 APPROVED AS TO FORM:

20 Dated: 3/14/17

21 PACIFIC JUSTICE CENTER

22 By: 
23 _____
24 Robert B. Hancock
25 Attorneys for Plaintiff
26 AMY CHAMBERLIN
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4 regarding the matters which are the subject of this action, to:

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6 settlement of all matters raised by the allegations of the Complaint, that the matter has been
7 diligently prosecuted, and that the public interest is served by such settlement; and

8 (b) Make the findings pursuant to California Health and Safety Code section
9 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

10 **IT IS SO STIPULATED.**

11 Dated: _____

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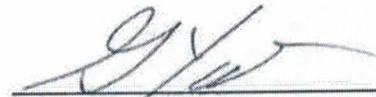
Amy Chamberlin

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15 Dated: 3/14/17

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Pennington Seed, Inc.
By: George A. Yuhas
Secretary of Pennington Seed, Inc.

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APPROVED AS TO FORM:

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21 Dated: _____

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By: _____
Robert B. Hancock
Attorneys for Plaintiff
AMY CHAMBERLIN

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Dated: March 14, 2017

WENDEL, ROSEN, BLACK & DEAN LLP

By: 
Daniel Rapaport
Attorneys for Defendant
Pennington Seed, Inc.

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JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____, 2017

Judge of the Superior Court