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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 UST Brands., et al.

14 Defendants,

Case No.

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT UST BRANDS**

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Evelyn
3 Wimberley acting on behalf of the public interest (hereinafter “Wimberley”), and UST Brands
4 (hereinafter “UST”), with Wimberley and UST collectively referred to as the “Parties” and each
5 of them as a “Party.” Wimberley is an individual residing in California who seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. UST employs ten or more persons and is
8 a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Wimberley alleges that UST has offered for
11 sale in the State of California and has sold in California, Wetfire Fire Starter Tinder that exposes
12 individuals to carbon monoxide and soot, and that such sales have not been accompanied by
13 Proposition 65 warnings. Carbon monoxide and soot are listed under Proposition 65 as chemicals
14 known to the State of California to cause birth defects or other reproductive harm.

15 **1.3 Notices of Violation/Complaint.** On or about May 8, 2017, Wimberley served
16 UST, Walmart Stores, Inc and various public enforcement agencies with a document entitled "60-
17 Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging
18 that UST was in violation of Proposition 65 for failing to warn consumers and customers that the
19 Wetfire Fire Starter Tinder exposed users in California to carbon monoxide and soot. No public
20 enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service
21 time relative to the provision of the Notice to them by Wimberley.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
23 has jurisdiction over UST as to the allegations contained in the complaint filed in this matter, that
24 venue is proper in the County of San Diego, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notices.

1 1.5 UST denies the material allegations contained in Wimberley's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
3 Judgment shall be construed as an admission by UST of any fact, finding, issue of law, or
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
5 an admission by UST of any fact, finding, conclusion, issue of law, or violation of law, such
6 being specifically denied by UST. However, this section shall not diminish or otherwise affect
7 the obligations, responsibilities, and duties of UST under this Consent Judgment.
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9 **2. DEFINITIONS**

10 2.1 **Complaint.** The term "Complaint" shall have the meaning given in Section 1.3.

11 2.2 **Covered Product.** The term "Covered Product" means Wetfire Fire Starter
12 Tinder.

13 2.3 **Effective Date.** The term "Effective Date" shall mean the date this Consent
14 Judgment is entered as a Judgment of the Court.

15 2.4 **Listed Chemicals:** The term "Listed Chemicals" shall mean carbon monoxide and
16 soot.

17 2.5 **Notice.** The term "Notice" shall have the meaning given in Section 1.3.

18 2.6 **Releasees.** The terms "Defendant Releasees" and "Downstream Releasees" shall
19 have the meanings given in Section 5.1.

20 2.7 **Execution Date.** The term "Execution Date" shall mean the date this Consent
21 Judgment is signed by both parties

22 **3. INJUNCTIVE RELIEF: WARNINGS**

23 3.1 Commencing 30 days after the Effective Date, UST shall not sell, offer for sale, or
24 ship for sale in California any Covered Product, unless the Covered Product is accompanied by
25 one of the following warnings:



26 **WARNING: Cancer and Reproductive Harm.**

27 www.P65Warnings.ca.gov.

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

or



WARNING: The combustion of wood, charcoal, and other fuels can expose you to chemicals, including soot and carbon monoxide, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to, www.P65Warnings.ca.gov.

or



WARNING: Combustion byproducts, such as carbon monoxide and soot, produced when using this product, contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the Covered Product's packaging, labeling, or instruction booklet. The warning shall be prominently affixed to or printed on the packaging, labeling, or package insert and displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or package insert that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

1 **4. MONETARY TERMS**

2 4.1 **Civil Penalty.** UST shall pay a civil penalty of \$1000.00 pursuant to Health and
3 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
4 Code § 25192, with 75% of these funds remitted to the State of California's Office of
5 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
6 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

7 4.2 **Attorney Fees.** UST agrees to pay and will not oppose an application made by
8 Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs incurred as
9 a result of investigating, bringing this matter to UST's attention, litigating and negotiating and
10 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
11 Procedure section 1021.5, in an amount of \$25,000.00 Other than the payment required
12 hereunder, each side is to bear its own attorneys' fees and costs.

13 4.3 Within seven days of the execution of this Consent Judgment by the parties, UST
14 shall deposit in the Beveridge & Diamond PC Client Escrow Account the total sum of \$26,000.00
15 representing the civil penalty and attorney fees in Sections 4.1 and 4.2. Within seven days
16 following entry of this Consent Judgment, and receipt of W-9 forms from Wimberley's counsel
17 for all payees, Beveridge & Diamond PC will issue a check for the funds deposited by UST and
18 mail the check to Wimberley's counsel. If the Court declines to enter this Consent Judgment,
19 Beveridge & Diamond PC will return the funds to UST.

20 **5. RELEASE OF ALL CLAIMS**

21 5.1 This consent judgment is a full, final, and binding resolution between Wimberley
22 acting in the public interest, and UST, its parents, shareholders, divisions, subdivisions,
23 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
24 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
25 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
26 suppliers, distributors, marketplace hosts, wholesalers, customers, licensors, licensees, retailers
27 (including but not limited to Wal-Mart Stores, Inc. and its affiliated and subsidiaries, franchisees,
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1 and cooperative members, ("Downstream Releasees"), of all claims for violations of Proposition
2 65 based on exposure to Listed Chemicals from Covered Products as set forth in the Notice, with
3 respect to any Covered Products manufactured, distributed, or sold by UST prior to 30 days after
4 the Effective Date. Compliance with the terms of this consent judgment constitutes compliance
5 with Proposition 65 with regard to the Covered Products.

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

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20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
21 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
22 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
23 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
24 THE DEBTOR.

25 5.3 UST waives any and all claims against Wimberley, her attorneys and other
26 representatives, for any and all actions taken or statements made (or those that could have been
27 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
28 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
matter, and/or with respect to Covered Products.

1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
3 any and all prior negotiations and understandings related hereto shall be deemed to have been
4 merged within it. No representations or terms of agreement other than those contained herein
5 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. In the event that Proposition 65 is repealed or
9 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
10 UST shall provide written notice to Wimberley of any asserted change in the law, and shall have
11 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
12 Covered Products are so affected.

13 **8. NOTICES**

14 8.1 Unless specified herein, all correspondence and notices required to be provided
15 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
16 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
17 party by the other party at the following addresses:

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20 For UST:

21 Gary J. Smith
22 Beveridge & Diamond, P.C.
23 456 Montgomery Street, Suite 1800
24 San Francisco, CA 94104

25 and

26 For Wimberley:

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

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and
6 the same document.

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

9 10.1 Wimberley agrees to comply with the requirements set forth in California Health
10 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
11 Judgment and UST agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by
13 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
14 within twelve months after it has been fully executed by the Parties.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
17 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
18 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
19 trial court, and the case shall proceed on its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either
23 Party.

24 **12. ATTORNEY'S FEES**

25 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
26 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
27 unless the unsuccessful party has acted with substantial justification. For purposes of this
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Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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


13. RETENTION OF JURISDICTION

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


14. AUTHORIZATION

14.1 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 certify that they are fully authorized by the Parties they represent 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.

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2 **APPROVED AS TO FORM:**

3 4 5 6 7	AGREED TO: Date: <u>January 17</u> , 2018 By: <u></u> On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2018 By: _____ On Behalf of UST Gary J. Smith Beveridge & Diamond, PC
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10 **IT IS HEREBY SO STIPULATED:**

11	AGREED TO:	AGREED TO:
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13	Date: <u>1/16/18</u>	Date: _____
14	By: <u></u>	By: _____
15	EVELYN WIMBERLEY	UST Brands

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APPROVED AS TO FORM:

AGREED TO: Date : _____, 2018 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: <u>1/17/</u> _____, 2018 By: <u>[Signature]</u> On Behalf of UST Gary J. Smith Beveridge & Diamond, PC
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IT IS HEREBY SO STIPULATED:

AGREED TO:	AGREED TO:
Date: _____	Date: <u>[Signature]</u> _____
By: _____ EVELYN WIMBERLEY	By: <u>[Signature]</u> _____ UST Brands