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10
11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SANTA CLARA**

13 SAFE PRODUCTS FOR CALIFORNIANS,)
14 LLC,)

15 Plaintiff,

16 vs.

17 OUTDOOR CREATIVE MINDS dba)
18 DYNAMIC LURES; PRODUCT)
19 MOVEMENT TECHNOLOGIES, LLC;)
20 AMAZON.COM, INC.; DOES 1 THROUGH)
21 150)

22 Defendants.

No. 18CV329024

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5, *et seq.*)

23 **1. INTRODUCTION**

24 **1.1 Parties**

25 This Consent Judgment is entered into by and between plaintiff Safe Products for
26 Californians, LLC ("SPFC") and defendants Outdoor Creative Minds dba Dynamic Lures
27 ("Dynamic Lures") and Product Movement Technologies, LLC ("Product Movement," and
28 together with Dynamic Lures, collectively referred to as "Defendants"). SPFC, Dynamic Lures,
and Product Movement, are each referred to individually as a "Party" and collectively as the
"Parties."

[PROPOSED] CONSENT JUDGMENT

1 **1.2 Plaintiff**

2 SPFC is a limited liability California company with its principal place of business within
3 the State of California, County of Santa Clara, who seeks to promote awareness of exposures to
4 toxic chemicals, and to improve human health by reducing or eliminating harmful substances
5 contained in consumer and commercial products.

6 **1.3 Defendants**

7 SPFC alleges, and for the purposes of this Consent Judgment only, the Parties stipulate,
8 that Defendants employ ten or more persons and are persons in the course of doing business for
9 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
10 Safety Code section 25249.5 *et seq.* ("Proposition 65").

11 **1.4 General Allegations**

12 SPFC alleges that soft plastic fishing lures that Defendants manufacture, import, sell
13 and/or distributes for sale in California cause exposure to di(2-ethylhexyl) phthalate ("DEHP")
14 and that they do so without providing the health hazard warning that SPFC alleges is required
15 by Proposition 65.

16 **1.5 Product Description**

17 The products that are covered by this Settlement Agreement are "Dynamic Lures Ten
18 Craw Soft Plastic Fishing Lures, 3.50 Inch Crawfish Profile," ASIN# B010EAS5UM, containing
19 DEHP, which are manufactured, imported, distributed, sold and/or offered for sale by
20 Defendants and/or their customers in the state of California, hereinafter the "Products."

21 **1.6 Notice of Violation**

22 On August 30, 2017, SPFC served Defendants and the requisite public enforcement
23 agencies with a 60-Day Notice of Violation ("Notice"), alleging that Defendants violated
24 Proposition 65 when they failed to warn their customers and consumers in California that the
25 Product exposes users to DEHP. To the best of the Parties' knowledge, no public enforcer has
26 commenced and is diligently prosecuting an action to enforce the allegations set forth in the
27 Notice.

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1 **1.7 Complaint**

2 On May 29, 2018, SPFC commenced the instant action against Defendants¹ for the
3 alleged violations of Proposition 65 that are the subject of the Notice.

4 **1.8 No Admission**

5 Defendants deny the material, factual, and legal allegations contained in the Notice and
6 Complaint, and maintain that all of the products that they have sold or distributed for sale in
7 California, including the Products, have been, and are, in compliance with all laws. Nothing in
8 this Consent Judgment shall be construed as an admission by Defendants of any fact, finding,
9 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
10 Judgment constitute or be construed as an admission by Defendants of any fact, finding,
11 conclusion of law, issue of law, or violation of law, the same being specifically denied by
12 Defendants. This Section shall not, however, diminish or otherwise affect Defendants'
13 obligations, responsibilities, and duties under this Consent Judgment.

14 **1.9 Jurisdiction**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper
17 in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
18 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
19 section 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date
22 that the Court grants the motion for approval of this Consent Judgment contemplated by Section
23 5.

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¹ Dynamic Lures and Product Movement were dismissed from the Action without prejudice on June 28, 2018.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Product Removal**

3 Defendants have begun removing the Products from all sales channels. As of the
4 Effective Date, Defendants shall not directly sell, or ship for sale in California any Products
5 unless they are Reformulated Products as set forth below.

6 **2.2 Customer Notification for Products No Longer in Dynamic Lures' Control**

7 No later than thirty (30) days after the Effective Date, Dynamic Lures shall send a letter,
8 electronic or otherwise ("Notification Letter"), to each California retailer to which it supplied
9 the Products for resale in California, except for Amazon and Product Movement. The
10 Notification Letter shall advise the recipient that portions of the Products "have been alleged to
11 contain DEHP, a chemical known to the State of California to cause cancer, birth defects and
12 other reproductive harm," and request that the recipient either: (a) label the Products remaining
13 in inventory for sale in California, or to California Customers, pursuant to Section 2; or (b) return,
14 at Dynamic Lures' sole expense, all units of the Products held by a California customer or for
15 sale in California or to California customers to Dynamic Lures or a party Dynamic Lures has
16 otherwise designated. The Notification Letter shall require a response from the recipient within
17 fifteen (15) days confirming whether the Products will be labeled or returned. Dynamic Lures
18 shall maintain records of all correspondence or other communications generated pursuant to this
19 Section for one year after the Effective Date and shall promptly produce copies of such records
20 upon SPFC's reasonable written request.

21 **2.3 Reformulation**

22 For the purposes of this Consent Judgment, "Reformulated Products" are defined as
23 Products that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%)
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or equivalent methodologies utilized by state or federal agencies for the purpose of
26 determining DEHP content in a solid substance.

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1 **2.4 Clear and Reasonable Warnings**

2 For any Products directly sold or offered for sale in California by Defendants after the
3 Effective Date that are not Reformulated Products, Defendants shall only sell or offer for sale in
4 California Products accompanied with the following warnings:

5
6 “[new Prop 65 symbol] WARNING: This product can expose you to chemicals including
7 DEHP, which is known to the state of California to cause cancer, birth defects and other
8 reproductive harm. For more information go to: www.P65warnings.CA.gov”
9

10 The warning provided pursuant to Section 2.4 shall be prominently affixed to or printed
11 on the non-Reformulated Products’ packaging, labeling, website, or instruction booklet and
12 displayed with such conspicuousness, as compared with other words, statements, or designs as
13 to render it likely to be read and understood by an ordinary individual under customary
14 conditions of purchase or use. A warning may be contained in the same section of the packaging,
15 labeling, website, or instruction booklet that states other safety warnings, if any, concerning the
16 use of the product and shall be at least the same size as those other safety warnings.

17 **3. MONETARY SETTLEMENT TERMS**

18 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

19 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
20 claims referred to in this Consent Judgment, Defendants shall pay \$1,000.00 in civil penalties in
21 accordance with this Section. The penalty payment will be allocated in accordance with
22 California Health & Safety Code § 25249.12(c)(l) & (d), with 75% of the funds remitted to the
23 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
24 25% of the penalty remitted to SPFC. SPFC’s counsel shall be responsible for remitting the
25 penalty payment(s) under this Consent Judgment to OEHHA. Within 10 business days of the
26 date this Consent Judgment is signed by all Parties, Defendants shall issue a check payable to
27 “Safe Products for Californians, LLC” in the amount of \$250.00, and a check payable to OEHHA
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1 in the amount of \$750.00. These penalty payments shall be delivered to the address listed in
2 Section 3.3 below.

3 **3.2 Reimbursement of Attorneys' Fees and Costs**

4 For all work performed as a result of investigating, bringing this matter to Defendants'
5 attention and negotiating a settlement in the public interest through the mutual execution of this
6 agreement and the Court's approval of the same, but exclusive of fees and costs on appeal, if
7 any, Defendants shall reimburse SPFC and its counsel \$12,197.84. The Parties negotiated this
8 resolution of the compensation due to SPFC and its counsel under general contract principles
9 and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5.
10 Defendants' payment shall be due within 10 business days of the date this Consent Judgment is
11 signed by all Parties, and delivered to the address in Section 3.3 in the form of a check payable
12 to "Safe Products for Californians, LLC." The reimbursement shall cover all fees and costs
13 incurred by SPFC investigating, bringing this matter to Defendants' attention, litigating, and
14 negotiating a settlement of the matter in the public interest.

15 **3.3 Payment Procedures**

16 The payments pursuant to Sections 3.1 and 3.2 shall be delivered to the following
17 address:

18 Moore Law Firm, P.C.
19 Attn: Proposition 65 (SPFC)
20 332 North Second Street
San Jose, California 95112

21 If for any reason this Consent Judgment is not entered by the Court within one year of
22 the date the Consent Judgment is executed by all parties, SPFC shall meet and confer with
23 Defendants about mutually agreeable steps the parties can take to ensure entry of the Consent
24 Judgment. If such steps cannot be agreed between the Parties, SPFC shall promptly return to
25 Defendants any and all monies paid by Defendants herein under Sections 3.1 and 3.2 upon
26 Defendants' written request.

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 SPFC's Release of Proposition 65 Claims**

3 SPFC, acting on its own behalf and in the public interest, releases Defendants and their
4 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
5 and attorneys and the predecessors, successors, or assigns of each of them, and Amazon.com,
6 Inc. (along with its parents, subsidiaries, affiliated entities under common ownership, directors,
7 officers, agents, employees, and attorneys) (collectively, "Releasees") and each entity to whom
8 Defendants directly or indirectly distribute or sell the Products including, but not limited to, their
9 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
10 licensors and licensees ("Downstream Releasees") for any violations arising under Proposition
11 65 for unwarned exposures to DEHP from the Products manufactured, imported, distributed or
12 sold by Defendants prior to the Effective Date, as set forth in the Notice. Compliance with the
13 terms of this Consent Judgment constitutes compliance with Proposition 65 by Defendants with
14 respect to the alleged or actual failure to warn about exposures to DEHP from Products
15 manufactured, sold or distributed for sale by Defendants after the Effective Date.

16 **4.2 SPFC's Individual Release of Claims**

17 SPFC, in its own capacity only and on its own behalf and on behalf of its past and current
18 agents, representatives, attorneys, successors, and/or assignees and *not* in its representative
19 capacity, also provides a release to Defendants, Releasees, and Downstream Releasees, which
20 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
21 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and
22 demands of SPFC of any nature, character or kind, whether known or unknown, suspected or
23 unsuspected, arising out of alleged or actual exposures to DEHP in Products manufactured,
24 imported, distributed or sold by Defendants before the Effective Date.

25 **4.3 Defendants' Release of SPFC**

26 Defendants, on their own behalf and on behalf of their past and current agents,
27 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
28 SPFC and its attorneys and other representatives, for any and all actions taken or statements

made (or those that could have been taken or made) by SPFC and its attorneys and other representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.4 SPFC's Voluntary Dismissal of Amazon

Contemporaneous with the execution of this Agreement, SPFC will deliver to counsel for Amazon.com, Inc. a signed request for dismissal of Amazon.com, Inc. with prejudice, in the instant action (Case No. 18CV329024), which counsel for SPFC shall file immediately thereafter.

5. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by all Parties, unless the Parties mutually agree to extend that time period due to what they mutually agree are reasonably unforeseeable circumstances. SPFC and Defendants agree to support the entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which motion SPFC shall draft and file and Defendants shall support, appearing at the hearing if so requested.

6. SEVERABILITY

If, subsequent to the execution of this Consent Judgment as a judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

7. GOVERNING LAW

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, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendants may provide SPFC with written notice of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment, with respect to,

1 and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be
2 interpreted to relieve Defendants from their obligation to comply with any pertinent state or
3 federal law or regulation.

4 **8. NOTICE**

5 Unless specified herein, all correspondence and notice required by this Consent
6 Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or
7 certified mail, return receipt requested; or (iii) a recognized overnight courier to any Party by the
8 other at the following addresses:

9 To Dynamic Lures:

To Product Movement:

12 To SPFC:

14 Moore Law Firm, P.C.
15 Attn: Proposition 65 (SPFC)
16 332 North Second Street
San Jose, California 95112

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

19 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

20 This Consent Judgment may be executed in counterparts and by facsimile or portable
21 document format (pdf) signature, each of which shall be deemed an original and, all of which,
22 when taken together, shall constitute one and the same document.

23 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

24 SPFC and its counsel agree to comply with the reporting form requirements referenced
25 in California Health and Safety Code section 25249.7(f).

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1 **11. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
3 and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful
4 motion of any Party and the entry of a modified Consent Judgment by the Court thereon.

5 **12. OTHER TERMS**

6 **12.1 No Other Agreements**

7 This Consent Judgment contains the sole and entire agreement and understanding of the
8 Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and
9 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
10 deemed merged. There are no warranties, representations, or other agreements between the
11 Parties except as expressly set forth in this Consent Judgment. No representations, oral or
12 otherwise, express or implied, other than those specifically referred to in this Consent Judgment
13 have been made by any Party. No other agreements not specifically contained or referenced in
14 this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties.
15 No supplementation, modification, waiver, or termination of this Consent Judgment shall be
16 binding unless executed in writing by the Party to be bound. No waiver of any of the provisions
17 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
18 provisions whether or not similar, nor shall such waiver constitute a continuing waiver. Nothing
19 in this Consent Judgment shall release, or in any way affect any rights that Earth Therapeutics
20 might have against any other party.

21 **12.2 Construction**


22 The Parties, including their counsel, have participated in the preparation of this Consent
23 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent
24 Judgment was subject to revision and modification by the Parties and has been accepted and
25 approved as to its final form by all Parties and their Counsel. Accordingly, any uncertainty or
26 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
27 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
28 agrees that any statute or rule of construction providing that ambiguities are to be resolved

1 against the drafting Party should not be employed in the interpretation of this Consent Judgment
2 and, in this regard the Parties hereby waive California Civil Code section 1654.

3 **13. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective Parties and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

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8 Dated: Feb 6, 2019


K R Moore (Feb 6, 2019)

Safe Products for Californians, LLC
By: Randy Moore, Operating Manager

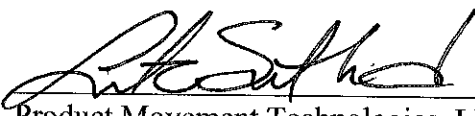
9
10
11 Dated: 2/11/2019


Outdoor Creative Minds dba Dynamic Lures

Print Name: BRIAN ALANO

Print Title: President

12
13
14
15
16 Dated: 2/11/2019


Product Movement Technologies, LLC

Print Name: Luke Sutherland

Print Title: Owner