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Safe Products for Californians, LLC  
6

7 SUPERIOR COURT OF CALIFORNIA  
8 COUNTY OF SANTA CLARA

9 SAFE PRODUCTS FOR CALIFORNIANS,  
10 LLC,

11 Plaintiff,

12 vs.

13 CLAY AND CO, LLC; WAL-MART, INC.,  
d/b/a, WAL-MART STORES, INC., BASS  
14 PRO OUTDOOR WORLD, LLC;  
AMAZON.COM, INC., DOES 1 THROUGH  
15 150;

16 Defendants.

Case No.: 18CV335059

[PROPOSED] CONSENT JUDGMENT

17  
18 **1. INTRODUCTION**

19 **1.1. Parties**

20 This Consent Judgment is entered into by and between plaintiff Safe Products for  
21 Californians, LLC (“SPFC”) and ACK, LLC (“ACK”) as indemnitor for defendant Walmart Inc.,  
22 erroneously named “Wal-Mart, Inc.” and/or “Wal-Mart Stores, Inc.” (“Walmart”), with SPFC  
23 and ACK and Walmart each referred to individually as a “Party” and collectively as the “Parties.”  
24

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. Defendant**

7           Walmart employs ten or more persons and is a person in the course of doing business for  
8 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and  
9 Safety Code section 25249.5, *et seq.* ("Proposition 65").

10          **1.4. Indemnitor**

11          ACK employs ten or more persons and is a person in the course of doing business for  
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and  
13 Safety Code section 25249.5, *et seq.* ("Proposition 65"). Pursuant to an Indemnification  
14 Agreement between ACK and Walmart, ACK is resolving all SPFC claims alleged against  
15 Walmart.

16          **1.5. General Allegations**

17          SPFC alleges that the products ACK manufactures, imports, sells and/or distributes for  
18 sale in California cause exposure to di(2-ethylhexyl) phthalate ("DEHP"), and that it does so  
19 without providing the health hazard warning that SPFC alleges is required by Proposition 65.

20          **1.6. Product Description**

21          The products that are covered by this Settlement Agreement are identified in the 60-Day  
22 Notice of Violation as "Tiny Paca Craw Soft Plastic Lures," UPC #665685421313, which are  
23 manufactured, imported, distributed, sold and/or offered for sale by ACK and/or its customers  
24

1 in the state of California, hereinafter the "Covered Products."

2 **1.7. Notice of Violation**

3 On October 5, 2017 and May 24, 2018, SPFC served Walmart and the requisite public  
4 enforcement agencies with a 60-Day Notice of Violation ("Notice"), alleging that Walmart  
5 violated Proposition 65 when it failed to warn customers in California that the Covered Products  
6 expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has either  
7 commenced or is diligently prosecuting an action to enforce the allegations set forth in the Notice.

8 **1.8. Complaint**

9 On September 18, 2018, SPFC commenced the instant action naming Walmart as a  
10 defendant.

11 **1.9. No Admission**

12 Walmart and ACK deny all material, factual, and/or legal allegations contained in the  
13 Notice and Complaint, and maintain that all of the products sold or distributed for sale in  
14 California, including the Covered Products, have been, and are, in compliance with all laws.  
15 Nothing in this Consent Judgment shall be construed as an admission by Walmart or ACK of  
16 any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with  
17 this Consent Judgment constitute or be construed as an admission by Walmart or ACK of any  
18 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,  
19 diminish or otherwise affect ACK's obligations, responsibilities, and duties under this Consent  
20 Judgment.

21 **1.10. Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
23 jurisdiction over Walmart as to the allegations contained in the Complaint, that venue is proper  
24

1 in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the  
2 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure  
3 section 664.6.

4 **1.11. Effective Date**

5 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date  
6 that the Court enters an order approving the terms of this Consent Judgment.

7 **2. INJUNCTIVE RELIEF**

8 **2.1. Reformulation Standard.** Commencing on the Effective Date, and continuing  
9 thereafter, to the extent that ACK continues to import, manufacture, ship to be sold or offer for  
10 sale or purchase the Covered Products in California, it shall be deemed to comply with  
11 Proposition 65, and be exempt from any Proposition 65 warning requirements with respect to  
12 DEHP if the Products meet the standard of "Reformulated Products." "Reformulated Products"  
13 shall mean Covered Products containing less than or equal to 1,000 parts per million (0.1%)  
14 DEHP in each accessible component when analyzed pursuant to Environmental Protection  
15 Agency testing methodologies 3580A and 8270C, CPSC-CH-C1001-09.3 or equivalent  
16 methodologies utilized by federal or state agencies for the purpose of determining DEHP content  
17 in a solid substance ("Reformulation Standard"). With respect to existing Covered Products,  
18 meaning those that are currently in the channels of distribution, with distributors, and retailers,  
19 ACK may continue to sell-through those items for a period of six months following the Effective  
20 Date. However, as of the Effective Date, no new Covered Products may be distributed or sold  
21 in California that are not Reformulated Products or do not contain the warnings set forth in  
22 Paragraph 2.3

1           **2.2. Warning Option.** Covered Products that do not meet the Reformulation  
2 Standard set forth in Section 2.1 above shall be accompanied by a warning as described in  
3 Section 2.3 below. This warning shall only be required as to Covered Products that are sold or  
4 shipped out to consumers, retailers, or distributors after the Effective Date. No Proposition 65  
5 warning for DEHP shall be required as to any Covered Products that are already in the stream of  
6 commerce as of the Effective Date.

7           **2.3. Warning Language.** Commencing on the Effective Date, ACK shall ensure that  
8 any unreformulated Covered Products that it ships to California retailers or for sale in California  
9 includes a clear and reasonable warning. The warning shall be affixed to the packaging or  
10 labeling using language similar to the warnings below:

11           ⚠ **WARNING:** This product can expose you to chemicals including Di-(2-ethylhexyl) phthalate,  
12 which are known to the State of California to cause cancer and birth defects or other reproductive  
13 harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

13           or

14           ⚠ **[California Proposition 65] WARNING:** Cancer and Reproductive Harm -  
15 [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

16           The warning shall be prominently displayed with such conspicuousness as compared  
17 with other words, statements, designs, or devices as to render it likely to be read and understood  
18 by an ordinary individual under customary conditions before purchase or use. Each warning  
19 shall be provided in a manner such that the consumer or user is reasonably likely to understand  
20 to which the specific Product the warning applies, so as to minimize the risk of consumer  
21 confusion. In the event that the Office of Environmental Health Hazard Assessment promulgates  
22 one or more regulations requiring or permitting warning text and/or methods of transmission  
23 different than those set forth above, ACK shall be entitled to use, at its discretion, such other  
~ warning text and/or methods of transmission without being deemed in breach of this Agreement

1           **2.4. Accessible Component.** The term “Accessible Component” shall mean any  
2 component of the Covered Product that could be touched by a person during reasonably  
3 foreseeable use.

4           **3. MONETARY SETTLEMENT TERMS**

5           **3.1. Civil Penalty**

6           Pursuant to Health and Safety Code section 25249.7(b), ACK shall pay civil penalties in  
7 the amount of \$1,000.00. The penalty payment shall be allocated according to Health and Safety  
8 Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California  
9 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the  
10 penalty paid to SPFC. SPFC’s counsel shall be responsible for remitting ACK’S penalty  
11 payment under this Settlement Agreement to OEHHA. Within ten (10) business days of this  
12 Agreement being signed by the Parties, ACK shall issue a check payable to “Moore Law Firm,  
13 P.C., Trust Account” in the amount of \$250.00, and a check payable to OEHHA in the amount  
14 of \$750.00. These penalty payments shall be delivered to the address listed in Section 3.3 below.

15           **3.2. Reimbursement of Attorneys’ Fees and Costs**

16           The Parties acknowledge that SPFC and its counsel offered to resolve this dispute without  
17 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the  
18 issue to be resolved after the material terms of the agreement had been settled. Shortly after the  
19 other settlement terms had been finalized, ACK expressed a desire to resolve SPFC’s fees and  
20 costs. The Parties then negotiated a resolution of the compensation due to SPFC and its counsel  
21 under general contract principles and the private attorney general doctrine codified at California  
22 Code of Civil Procedure section 1021.5. For all work performed through the mutual execution  
23 of this agreement, ACK shall reimburse SPFC and their counsel \$10,000.00 within ten (10)

1 business days of this Agreement being signed by the Parties, as a check made payable to “Moore  
2 Law Firm, P.C.”

3 **3.3. Payment Address**

4 All payments required by this Settlement Agreement shall be delivered to the following  
5 address:

6 Moore Law Firm, P.C.  
7 Attn: Proposition 65 (SPFC)  
8 332 North Second Street  
9 San Jose, California 95112

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1. SPFC’s Release of Proposition 65 Claims**

12 SPFC, on behalf of itself, its past and current agents, representatives, attorneys,  
13 successors, and assignees, releases Walmart and ACK, their parents, subsidiaries, affiliated  
14 entities under common ownership, directors, officers, agents employees, attorneys, and each  
15 entity to whom ACK directly or indirectly distributes or sells products, including, but not limited,  
16 to downstream distributors, wholesalers, customers, retailers (including Walmart and its  
17 affiliates and subsidiaries), franchisees, cooperative members, and licensees (collectively,  
18 “Releasees”), from all claims for violations of Proposition 65 through the Effective Date that  
19 were or could have been asserted by SPFC relating to the Products. Compliance with the terms  
20 of this Settlement Agreement constitutes compliance with Proposition 65 with respect to  
21 exposures to DEHP from the Products, as set forth in the Notice. The Parties further understand  
22 and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured  
23 the Products or any component parts thereof, or any distributors or suppliers who sold the  
24 Products or any component parts thereof to ACK. Nothing herein shall release any claims  
25 brought by plaintiff against any of the other named defendants in this action.

1           **4.2. SPFC's Individual Releases of Claims**

2           SPFC, on behalf of itself, its past and current agents, representatives, attorneys,  
3 successors, and assignees, provides a release herein which shall be effective as a full and final  
4 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,  
5 attorneys' fees, damages, losses, claims, liabilities, and demands of SPFC of any nature,  
6 character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising  
7 out of alleged or actual exposures to DEHP in the Products manufactured, imported, distributed,  
8 or sold by Walmart or ACK prior to the Effective Date. The Parties further understand and agree  
9 that this Section 4.2 release shall not extend upstream to any entities that manufactured the  
10 Products, or any component parts thereof, or any distributors or suppliers who sold the Products,  
11 or any component parts thereof to ACK. Nothing in this section affects SPFC's right to  
12 commence or prosecute an action under Proposition 65 against a Releasee that does not involve  
13 ACK's Products.

14           In further consideration of the promises and agreements herein contained, and for the  
15 payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current agents,  
16 representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives  
17 any right to institute, participate in, directly or indirectly, any form of legal action and releases  
18 all claims that it may have, including without limitation, all actions and causes of action in law  
19 and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert  
20 fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of  
21 the Releasees of any nature, character, or kind, whether known or unknown, suspected or  
22 unsuspected, limited to and arising out of the allegations made in the Notice. Nothing herein  
23 shall release any claims brought by plaintiff against any of the other named defendants in this



1 action.

2 **4.3. Walmart and ACK's Release of SPFC**

3 Walmart and ACK, on behalf of themselves, their past and current agents, representatives,  
4 attorneys, successors, and assignees, hereby waive any and all claims against SPFC and its  
5 attorneys and other representatives, for any and all actions taken or statements made by SPFC  
6 and its attorneys and other representatives, whether in the course of investigating claims or  
7 otherwise seeking to enforce Proposition 65 in this matter.

8 **5. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and  
10 shall be null and void if, for any reason, it is not approved and entered by the Court within one  
11 year after it has been fully executed by all Parties. SPFC, Walmart and ACK agree to support  
12 the entry of this agreement as a judgment, and to obtain the Court's approval of their settlement  
13 in a timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code  
14 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,  
15 which motion SPFC shall draft and file and Walmart shall support, appearing at the hearing if so  
16 requested. SPFC agrees to file a Notice of Motion and Motion for Entry of Consent Judgment  
17 within fifteen (15) calendar days after this proposed Consent Judgment is fully executed by the  
18 Parties.

19 **6. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any of the provisions of this  
21 Consent Judgment are deemed by a court to be unenforceable, the validity of the enforceable  
22 provisions remaining shall not be adversely affected.

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of  
3 California and apply within the state of California. In the event that Proposition 65 is repealed  
4 or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of  
5 this Consent Judgment are rendered inapplicable or no longer required as a result of any such  
6 repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then  
7 ACK shall provide written notice to SPFC of any asserted change in the law and shall have no  
8 further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent  
9 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to  
10 relieve ACK from any obligation to comply with any pertinent state or federal toxics control law.

11 **8. NOTICE**

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

16 For Walmart Inc.:

17 Thomas L. Van Wyngarden, Esq.  
18 Katten Muchin Rosenman LLP  
2029 Century Park East, Suite 2600  
19 Los Angeles, CA 90067

20 For ACK:

21 Guy Bennett Rubin, Esq.  
22 Rubin & Rubin  
PO Box 395  
23 Stuart, FL 34995

1 For SPFC:

2 Proposition 65 Coordinator  
3 Moore Law Firm, P.C.  
4 332 N 2nd Street  
5 San Jose, CA 95112

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

8 **9. ENTIRE AGREEMENT**

9 This Consent Judgment contains the sole and entire agreement and understanding of the  
10 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
11 negotiations, commitments and understandings related hereto. No representations, oral or  
12 otherwise, express or implied, other than those contained herein have been made by any party  
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
14 deemed to exist or to bind any of the Parties.

15 **10. COUNTERPARTS; FACSIMILE AND SIGNATURES**

16 This Consent Judgment may be executed in counterparts and by facsimile or .pdf  
17 signature, each of which shall be deemed an original, and all of which, when taken together, shall  
18 constitute one and the same document.

19 **11. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

20 SPFC agrees to comply with the reporting requirements referenced in Health & Safety  
21 Code section 25249.7(f).


22 **12. AUTHORIZATION**

23 The undersigned are authorized to execute this Consent Judgment and have read,  
24 understood and agree to all of the terms and conditions contained herein.

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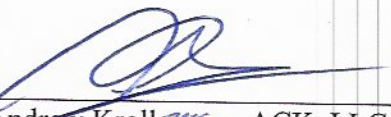
**AGREED TO:**

Date: August 23, 2019

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

**AGREED TO:**

Date: August 30, 2019

By:   
\_\_\_\_\_  
Andrew Kroll, ~~2015~~, ACK, LLC