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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**

10
11 SAFE PRODUCTS FOR CALIFORNIANS,) No. 18CV328298
LLC,)
12) **[PROPOSED] CONSENT JUDGMENT**
Plaintiff,)
13) (Health & Safety Code § 25249.5, *et seq.*)
vs.)
14)
EARTH THERAPEUTICS, LTD.; et al.;)
15)
16 Defendants.)
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 defendant Sunny Marketing Systems, Inc. dba Earth
22 Therapeutics, Ltd. (“Earth Therapeutics”) with SPFC and Earth Therapeutics each referred to
23 individually as a “Party” and collectively as the “Parties.”

24 **1.2 Plaintiff**

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

1 **1.3 Defendant**

2 Earth Therapeutics employs ten or more persons and is a person in the course of doing
3 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
4 California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

5 **1.4 General Allegations**

6 SPFC alleges that clear plastic packaging of the Anti-Stress Comfort Wrap that Earth
7 Therapeutics manufactures, imports, sells and/or distributes for sale in California cause
8 exposure to di(2-ethylhexyl)phthalate (“DEHP”) and di-n-butyl phthalate (“DBP”), and that it
9 does so without providing the health hazard warning that SPFC alleges is required by
10 Proposition 65.

11 **1.5 Product Description**

12 The products that are covered by this Settlement Agreement are “Anti-Stress Comfort
13 Wrap” UPC #073377403316, with clear plastic packaging containing DEHP and/or DBP,
14 which are manufactured, imported, distributed, sold and/or offered for sale by Earth
15 Therapeutics and/or its customers in the state of California, hereinafter the “Products.”

16 **1.6 Notice of Violation**

17 On January 4, 2018, SPFC served Earth Therapeutics and the requisite public
18 enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Earth
19 Therapeutics violated Proposition 65 when it failed to warn its customers and consumers in
20 California that the Product exposes users to DEHP and DBP. To the best of the Parties’
21 knowledge, no public enforcer has commenced and is diligently prosecuting an action to
22 enforce the allegations set forth in the Notice.

23 **1.7 Complaint**

24 On May 14, 2018, SPFC commenced the instant action naming Earth Therapeutics as a
25 defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

26 **1.8 No Admission**

27 Earth Therapeutics denies the material, factual, and legal allegations contained in the
28 Notice and Complaint, and maintains that all of the products that it has sold or distributed for

1 sale in California, including the Products, have been, and are, in compliance with all laws.
2 Nothing in this Consent Judgment shall be construed as an admission by Earth Therapeutics of
3 any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance
4 with this Consent Judgment constitute or be construed as an admission by Earth Therapeutics
5 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being
6 specifically denied by Earth Therapeutics. This Section shall not, however, diminish or
7 otherwise affect Earth Therapeutics' obligations, responsibilities, and duties under this Consent
8 Judgment.

9 **1.9 Jurisdiction**

10 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
11 jurisdiction over Earth Therapeutics as to the allegations contained in the Complaint, that
12 venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and
13 enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil
14 Procedure section 664.6.

15 **1.10 Effective Date**

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

19 **2. INJUNCTIVE RELIEF**

20 **2.1 Product Removal**

21 Earth Therapeutics has begun removing the Products from all sales channels. As of the
22 Effective Date, Earth Therapeutics shall not directly sell, or ship for sale in California any
23 Products unless they are Reformulated Products as set forth below.

24 **2.2 Customer Notification for Products No Longer in Earth Therapeutics'**
25 **Control**

26 No later than 30 days after the Effective Date, Earth Therapeutics shall send a letter,
27 electronic or otherwise ("Notification Letter"), to each California retailer to which it supplied
28 the Products for resale in California. The Notification Letter shall advise the recipient that

1 portions of the Products “have been alleged to contain DEHP and DBP, chemicals known to
2 the State of California to cause cancer, birth defects and other reproductive harm,” and request
3 that the recipient either: (a) label the Products remaining in inventory for sale in California, or
4 to California Customers, pursuant to Section 2; or (b) return, at Earth Therapeutics’ sole
5 expense, all units of the Products held by a California customer or for sale in California or to
6 California customers to Earth Therapeutics or a party Earth Therapeutics has otherwise
7 designated. The Notification Letter shall require a response from the recipient within 15 days
8 confirming whether the Products will be labeled or returned. Earth Therapeutics shall maintain
9 records of all correspondence or other communications generated pursuant to this Section for
10 one year after the Effective Date and shall promptly produce copies of such records upon
11 SPFC’s reasonable written request.

12 **2.3 Reformulation**

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

18 **2.4 Clear and Reasonable Warnings**

19 For any Products directly sold or offered for sale in California by Earth Therapeutics
20 after the Effective Date that are not Reformulated Products, Earth Therapeutics shall only sell
21 or offer for sale in California Products accompanied with the following warnings:

22
23 “[new Prop 65 symbol] WARNING: This product can expose you to chemicals
24 including DEHP, which is known to the state of California to cause cancer, birth
25 defects and other reproductive harm. For more information go to:
26 www.P65warnings.CA.gov”
27
28

1 “[new Prop 65 symbol] WARNING: This product can expose you to chemicals
2 including DBP, which is known to the state of California to cause birth defects and
3 other reproductive harm. For more information go to: www.P65warnings.CA.gov”
4

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

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

14 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
15 claims referred to in this Consent Judgment, Earth Therapeutics shall pay \$4,000.00 in civil
16 penalties in accordance with this Section. The penalty payment will be allocated in accordance
17 with California Health & Safety Code § 25249.12(c)(l) & (d), with 75% of the funds remitted
18 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
19 remaining 25% of the penalty remitted to SPFC. SPFC’s counsel shall be responsible for
20 remitting the penalty payment(s) under this Consent Judgment to OEHHA. Within 10 business
21 days of the Effective Date, Earth Therapeutics shall issue a check payable to “Mission Law
22 Firm, A.P.C., Trust Account” in the amount of \$1,000.00, and a check payable to OEHHA in
23 the amount of \$3,000.00. These penalty payments shall be delivered to the address listed in
24 Section 3.3 below.

25 **3.2 Reimbursement of Attorneys’ Fees and Costs**

26 For all work performed as a result of investigating, bringing this matter to Earth
27 Therapeutics’ attention and negotiating a settlement in the public interest through the mutual
28 execution of this agreement and the Court’s approval of the same, but exclusive of fees and

1 costs on appeal, if any, Earth Therapeutics shall reimburse SPFC and its counsel \$28,816.49.
2 The Parties negotiated this resolution of the compensation due to SPFC and its counsel under
3 general contract principles and the private attorney general doctrine codified at California Code
4 of Civil Procedure § 1021.5. Earth Therapeutics' payment shall be due within 10 business days
5 of the Effective Date, and delivered to the address in Section 3.3 in the form of a check payable
6 to "Mission Law Firm, A.P.C." The reimbursement shall cover all fees and costs incurred by
7 SPFC investigating, bringing this matter to Earth Therapeutics' attention, litigating, and
8 negotiating a settlement of the matter in the public interest.

9 **3.3 Payment Procedures**

10 The payments pursuant to Sections 3.1 and 3.2 shall be delivered to the following
11 address:

12 Mission Law Firm, A.P.C.
13 Attn: Proposition 65 (SPFC)
14 332 North Second Street
15 San Jose, California 95112

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

22 **4. CLAIMS COVERED AND RELEASED**

23 **4.1 SPFC's Release of Proposition 65 Claims**

24 SPFC, acting on its own behalf and in the public interest, releases Earth Therapeutics
25 and its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
26 employees, and attorneys and the predecessors, successors, or assigns of each of them
27 ("Releasees") and each entity to whom Earth Therapeutics directly or indirectly distributes or
28 sells the Products including, but not limited to, its downstream distributors, wholesalers,
customers, retailers, franchisers, cooperative members, licensors and licensees ("Downstream

1 Releasees”) for any violations arising under Proposition 65 for unwarned exposures to DEHP
2 or DBP from the Products manufactured, imported, distributed or sold by Earth Therapeutics
3 prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
4 Consent Judgment constitutes compliance with Proposition 65 by Earth Therapeutics with
5 respect to the alleged or actual failure to warn about exposures to DEHP or DBP from Products
6 manufactured, sold or distributed for sale by Earth Therapeutics after the Effective Date.

7 **4.2 SPFC’s Individual Release of Claims**

8 SPFC, in its own capacity only and on its own behalf and on behalf of its past and
9 current agents, representatives, attorneys, successors, and/or assignees and *not* in its
10 representative capacity, also provides a release to Earth Therapeutics, Releasees, and
11 Downstream Releasees, which shall be effective as a full and final accord and satisfaction, as a
12 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages,
13 losses, claims, liabilities and demands of SPFC of any nature, character or kind, whether
14 known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to
15 DEHP or DBP in Products manufactured, imported, distributed or sold by Therapeutics before
16 the Effective Date.

17 **4.3 Earth Therapeutics’ Release of SPFC**

18 Earth Therapeutics, on its own behalf and on behalf of its past and current agents,
19 representatives, attorneys, successors and/or assignees, hereby waives any and all claims
20 against SPFC and its attorneys and other representatives, for any and all actions taken or
21 statements made (or those that could have been taken or made) by SPFC and its attorneys and
22 other representatives in the course of investigating claims, seeking to enforce Proposition 65
23 against it in this matter, or with respect to the Products.

24 **5. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court
26 and shall be null and void if, for any reason, it is not approved and entered by the Court within
27 one year after it has been fully executed by all Parties, unless the Parties mutually agree to
28 extend that time period due to what they mutually agree are reasonably unforeseeable

1 circumstances. SPFC and Earth Therapeutics agree to support the entry of this agreement as a
2 judgment, and to obtain the Court's approval of their settlement in a timely manner. The
3 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
4 noticed motion is required for judicial approval of this Consent Judgment, which motion SPFC
5 shall draft and file and Earth Therapeutics shall support, appearing at the hearing if so
6 requested.

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed,
14 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the
15 Products, then Earth Therapeutics may provide SPFC with written notice of any asserted
16 change in the law, and shall have no further obligations pursuant to this Consent Judgment,
17 with respect to, and to the extent that, the Products are so affected. Nothing in this Consent
18 Judgment shall be interpreted to relieve Earth Therapeutics from its obligation to comply with
19 any pertinent state or federal law or regulation.

20 **8. NOTICE**

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

25 To Earth Therapeutics:

26 Christine M. Wallace, Esq.
27 Law Offices of Anthony S. Cannatella
53 Orchard Street
28 Manhasset, New York 11030

To SPFC:

Mission Law Firm, A.P.C.
Attn: Proposition 65 (SFPC)
332 North Second Street
San Jose, California 95112

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

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

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

7 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

10 **11. MODIFICATION**

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

14 **12. OTHER TERMS**

15 **12.1 No Other Agreements**

16 This Consent Judgment contains the sole and entire agreement and understanding of the
17 Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and
18 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
19 deemed merged. There are no warranties, representations, or other agreements between the
20 Parties except as expressly set forth in this Consent Judgment. No representations, oral or
21 otherwise, express or implied, other than those specifically referred to in this Consent
22 Judgment have been made by any Party. No other agreements not specifically contained or
23 referenced in this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any
24 of the Parties. No supplementation, modification, waiver, or termination of this Consent
25 Judgment shall be binding unless executed in writing by the Party to be bound. No waiver of
26 any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of
27 any of the other provisions whether or not similar, nor shall such waiver constitute a continuing
28

1 waiver. Nothing in this Consent Judgment shall release, or in any way affect any rights that
2 Earth Therapeutics might have against any other party.


3 **12.2 Construction**

4 The Parties, including their counsel, have participated in the preparation of this Consent
5 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
6 Consent Judgment was subject to revision and modification by the Parties and has been
7 accepted and approved as to its final form by all Parties and their Counsel. Accordingly, any
8 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
9 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
10 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are
11 to be resolved against the drafting Party should not be employed in the interpretation of this
12 Consent Judgment and, in this regard the Parties hereby waive California Civil Code section
13 1654.

14 **13. AUTHORIZATION**


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

18
19 Dated: Aug 3, 2018



Kenneth Moore (Aug 3, 2018)
Safe Products for Californians, LLC
By: Randy Moore, Operating Manager

20
21
22 Dated: 8/28/2018



Sunny Marketing Systems, Inc.
dba Earth Therapeutics, Ltd.
Print Name: John Kanc
Print Title: President

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