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Attorneys for Plaintiff
TAMAR KALOUSTIAN

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

TAMAR KALOUSTIAN, in the public interest,

Plaintiff,

v.

SWANSON HEALTH PRODUCTS, INC., a
North Dakota Corporation; and DOES 1 through
100, inclusive,

Defendants.

Case No.: 18STCV01636

**[PROPOSED] CONSENT JUDGMENT AS
TO SWANSON HEALTH PRODUCTS, INC.**

**(Health & Safety Code § 25249.6 et. seq.
and Code Civ. Proc. § 664.6)**

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Tamar Kaloustian (“Plaintiff”) and Swanson Health Products, Inc. (“Defendant”). Plaintiff and Defendant are referred to individually as a “Party” and collectively as the “Parties.”

1.2 Notice

On February 16, 2018, Plaintiff issued a 60-day notice letter (“Notice”) under Cal. Health & Safety Code § 25249.7 (“Proposition 65”) to Defendant in which it asserted a claim under Proposition 65 for alleged exposures to lead in Organic Psyllium Husk Powder manufactured, distributed, or sold by Defendant (“Covered Products”), including but not limited to “Organic Psyllium Husk Powder”; UPC #: 87614 24102.

1.3 Complaint

Plaintiff’s Complaint against Defendant alleges violations of Health and Safety Code section 25249.6 asserted in the Notice. Defendant denies the claims in the Notice and Complaint and denies that Plaintiff is entitled to any relief.

1.4 No Admission

The Parties enter into this Consent Judgment in order to achieve a settlement of the Proposition 65 claims arising from or relating to the allegations asserted in the Notice for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an admission of Plaintiff or Defendant of any fact, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, issue of law or violation of law. Nothing in this Consent Judgment or any document referred to herein, shall be construed as giving rise to any presumption or inference of admission or concession by Defendant as to any fault, wrongdoing or liability whatsoever. Nothing in this Consent Judgment nor compliance with this Consent Judgment shall constitute or be construed as an admission by any of the Parties or by any of their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors,

wholesalers, or retailers of any fact, issue of law, or violation of law. This Consent Judgment is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed with respect to the claims in the Notice and shall not be used for any purpose except to enforce the terms of this Consent Judgment. The Parties agree that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Consent Judgment.

1.5 Effective Date

The Effective Date of this Consent Judgment is the date of entry of the Consent Judgment by the Court.

2. DEFENDANT'S DUTIES

2.1 Any Covered Products that are purchased or manufactured by Defendant on and after the date that is 6 months after the Effective Date ("Compliance Date") that Defendant thereafter sells in California or distributes for sale in California shall either contain no more than 0.5 micrograms of lead per day as calculated based on the provisions of Section 2.3 ("Lead Limit"), or comply with the warning requirements of Section 2.2. As used in this Section 2, "distribute for sale in California" means to directly ship a Covered Product into California or to sell a Covered Product to a distributor that Defendant knows will sell such product in California.

2.2 Warnings

2.2.1 If Defendant provides warnings under Section 2.1, Covered Products may be sold in California with one of the following warning statements:

Option 1:

WARNING: Consuming this product can expose you to chemicals including lead, which is 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/food

Option 2:

WARNING: [Cancer and] Reproductive Harm - <http://www.p65warnings.ca.gov/food>

The warning in Option 2 may be used only if the warning appears on the product container or labeling. The word “**WARNING**” shall be displayed in all capital letters and bold print. The terms in brackets are optional, unless the product contains more than 15 micrograms per day as calculated based on the provisions of Section 2.3 (“Lead Limit”). This warning statement shall be prominently displayed on the Covered Product, on the packaging of the Covered Product, or on a placard, shelf tag, or sign provided that the statement is 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 prior to sale. If the warning statement is displayed on the Covered Product’s label, it must be set off from other surrounding information.

2.2.2 For internet purchases that will be shipped to California addresses, Defendant shall also provide a warning on its website by including either the warning or a clearly marked hyperlink using the word “**WARNING**” on the display page for the Covered Products, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. If a short-form warning is provided on the product label under Option 2 of Section 2.2.1, the warning on the website may use the same content.

2.2.3 For catalog purchases that will be shipped to California addresses, Defendant shall also provide a warning in its catalog in a manner that clearly associates it with the Covered Products. If a short-form warning is provided on the product label under Option 2 of Section 2.2.1, the warning in the catalog may use the same content.

2.2.4 The warning requirements set forth herein are imposed pursuant to the terms of this Consent Judgment and are recognized by the Parties as not being the exclusive manner of providing a warning for the Covered Products. Warnings may be provided as specified in the Proposition 65 regulations for food in effect as of the Effective Date (Title 27, California Code of Regulations, section 25601, *et seq.*) or as such regulations may be amended in the future, or pursuant to a settlement agreement or consent judgment involving lead. In addition, Defendant may follow the notification procedure set out in Title 27, California Code of Regulations, section 25600.2

1 or a similar procedure where Defendant instructs its distributor or retailer customers to provide
2 warnings for the Covered Products consistent with Section 2.2.

3 **2.3** Compliance with the Lead Limit shall be determined using ICP-MS, or any other
4 testing method agreed upon by the Parties. For purposes of determining compliance with the Lead
5 Limit, the average of at least three samples drawn from three different production lots or batches of
6 each type of Product (or from as many lots or batches as are available if there are fewer than three),
7 but no more than ten samples drawn from ten different product lots or batches of each type of
8 Product, shall be controlling. For purposes of this Consent Judgment a “type” of Product includes
9 Products that have materially the same formula and ingredients. The total exposure to lead per day
10 shall be calculated using the highest suggested daily intake of the Covered Product appearing on the
11 product label or packaging.

12 **3. SETTLEMENT PAYMENT**

13 **3.1** In full satisfaction of all potential civil penalties, additional settlement payments,
14 attorney’s fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts,
15 and investigators), Defendant shall pay a total settlement amount \$29,000.00. This includes civil
16 penalties in the amount of \$5,000.00 pursuant to Health and Safety Code section 25249.7(b) and
17 attorney’s fees and costs in the amount of \$24,000.00 pursuant to Code of Civil Procedure section
18 1021.5 and Health and Safety Code section 25249 et seq.

19 **3.2** The portion of the settlement attributable to civil penalties shall be allocated according
20 to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
21 penalty paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and
22 the remaining twenty-five percent (25%) of the penalty paid to Plaintiff.

23 All payments owed to Plaintiff shall be delivered to their attorney of record at the following
24 address:

25 KJT Law Group, LLP
26 Attn: Vache Thomassian
27 230 N. Maryland Ave. Suite 306
28 Glendale, CA 91206

28 All payments owed to OEHHA shall be delivered directly to OEHHA at the following

addresses:

For United States Postal Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

3.3 Attorney's Fees and Costs

In settlement of all of Plaintiff's attorneys' fees and costs shall incurred in this matter, including but not limited to investigating potential violations, bringing this matter to Defendant's attention, as well as litigating and negotiating a settlement in the public interest, Defendant shall pay \$24,000.00 by check payable to KJT Law Group, LLP to the address below.

3.4 Timing

The above -mentioned payments will be issued within fifteen days from the Effective Date.

4. ENFORCEMENT

4.1 Before seeking any judicial enforcement, the Parties shall attempt in good faith to meet and confer to resolve any dispute arising under this Consent Judgment.

4.2 Plaintiff may not bring any 60-day notice or enforcement action if the packaging of the Covered Product is marked or labeled with the statement "Not for sale in California" or equivalent language. If Settling Defendant marks or labels a Covered Product with such a statement, Defendant shall include a letter to each of its retailer or distributor customers receiving that Covered Product notifying the customer that the Covered Product may not be sold in California.

4.3 Prior to bringing any Proposition 65 60-day notice of violation under Cal. Health & Safety Code § 25249.7 as to any Product, or prior to bringing any motion, order to show cause, or other proceeding to enforce the terms of this Consent Judgment, Plaintiff shall provide a Notice of Violation ("NOV") to Defendant and follow the enforcement provisions of this Section 4. The NOV shall include for each of the Products: (a) the name of the Product; (b) specific dates when Plaintiff purchased and tested the samples of the Products; (c) the store or other place at which the Product samples were purchased by Plaintiff; (d) all analytical testing results, from a California certified

laboratory, of samples of the same Product showing an average concentration of lead that exceeds the level set forth in this Consent Judgment; (e) the lot code(s) for the lot(s) at issue in the NOV; (f) evidence establishing the warning required in Section 2.2 was not provided; and (g) any other evidence or support for the allegations in the NOV.

4.3.1 Plaintiff shall take no further action of any kind regarding the alleged violation if, within 60 days of receiving such NOV, Defendant serves a response indicating that it meets one of the three conditions listed below. If Defendant complies with this Section 4.3.1, Plaintiff is not entitled to seek monetary penalties, fees or costs of any kind, or any other non-monetary relief.

(a) A statement that the lot of the Product identified in the NOV ("Product Lot) was manufactured before the Compliance Date; or

(b) A statement that, since receiving the NOV, Defendant has taken corrective action by requesting that its customers in California cease selling Product Lot.

(c) The most recent testing under Section 2.3 demonstrates an average of no more than 17 parts per billion for the Product type at issue in the NOV, provided that the testing is no more than one year prior to the date of the NOV.

4.3.2 If the conditions in Section 4.3.1 do not apply, the Parties shall meet and confer for a period of no less than 60 days before Plaintiff may seek relief through a judicial proceeding. In any such proceeding, Defendant does not waive its right to dispute the applicability of the concentration level in Section 4.3.1(c) based on the statutory warning exemption, regulatory safe harbor level, or other applicable defenses, and the terms of this Consent Judgment shall not constitute or be construed as an admission by Defendant, or give rise to any inference against Defendant, as to the appropriate warning standard in that event.

5. APPLICATION

This Consent Judgment may apply to, be binding upon, and benefit the Parties and their predecessors, successors, and assigns. This Consent Judgment shall have no application to any Covered Product which is distributed or sold outside the State of California.

6. BINDING EFFECT, CLAIMS COVERED AND RELEASED

6.1 Plaintiff's Public Release of Claims

This Consent Judgment is a full, final, and binding resolution between, on the one hand, Plaintiff, on behalf of himself and his attorneys, investigators, agents, heirs, and assigns (collectively referred to as "Plaintiff Releasers") and on behalf of the public in the public interest, and, on the other hand, Defendant and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns ("Defendant Entities"), and each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered Products including but not limited to downstream distributors, wholesalers, customers, retailers, suppliers, franchisees, cooperative members, and licensees, and their owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to as the "Releasees"), of all claims, actions, causes of action (in law or in equity), suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses, and fees (including, but not limited to, investigation fees, expert fees, and attorney's fees), and expenses (collectively, "Claims") that have been or could have been asserted under Proposition 65 for any exposures to lead from the Covered Products manufactured, purchased, distributed, or sold by Defendant prior to the Compliance Date. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to any exposures to lead from Covered Products manufactured, purchased, sold, or distributed by Defendant on and after the Compliance Date.

6.2 Plaintiff's Release of Claims

Plaintiff, in her individual capacity, on behalf of itself and the Plaintiff Releasers, also waives all rights to institute or participate in, directly or indirectly, any form of legal action, and discharges and releases all Claims as to all Releasees under Proposition 65 or any statutory or common law from the alleged failure to provide warnings for any exposures to any Proposition 65 listed chemical in the Covered Products manufactured, purchased, sold, or distributed by Defendant as well as any exposures to lead in psyllium husk manufactured purchased, sold, or distributed by Defendant.

It is possible that other Claims not known to the Parties, arising out of the facts alleged in the Notice, and relating to the Covered Products, will develop or be discovered. Plaintiff, in her individual capacity, and on behalf of herself the Plaintiff Releasors, acknowledges that this Consent Judgment is expressly intended to cover and include all such Claims. Plaintiff, on behalf of itself the Plaintiff Releasors, acknowledges that the claims released in Sections 6.1 and 6.2 above may include unknown claims, and nevertheless waives California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Plaintiff acknowledges and understands the significance and consequences of this specific waiver of California Civil Code section 1542. The release in this Section 6.2 is effective as a full and final accord and satisfaction, as a bar to all Claims of any nature, character or kind, whether known or unknown, or suspected or unsuspected.

6.3 Defendant, on its own behalf, and on behalf of the Defendant Entities, hereby waives any and all claims against Plaintiff and the Plaintiff Releasors, for any and all actions taken or statements made by Plaintiff and its attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it, in this matter or with respect to the Covered Products.

6.4 Nothing in Section 6 affects or limits the right of any Party to enforce the terms of this Consent Judgment.

7. SEVERABILITY OF UNENFORCEABLE PROVISIONS

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

8. GOVERNING LAW

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

9. MODIFICATION

9.1 This Consent Judgment may be modified only as to injunctive terms (i) by written stipulation of the Parties and upon entry by the Court of a modified consent judgment or (ii) by motion by Defendant pursuant to this Section 9 and upon entry by the Court of a modified consent judgment.

9.2 If there is another settlement by Plaintiff or a consent judgment or judgment that establishes a different standard for lead in products similar to the Products than that set in Section 2, Defendant shall be entitled to modify the Consent Judgment accordingly. Plaintiff agrees not to oppose such modification except for good cause shown.

9.3 Where the meet-and-confer process does not lead to a joint motion or application in support of a modification of the Consent Judgment, then either Party may seek judicial relief on its own. In any such contested court proceeding, the prevailing Party shall be entitled to seek recovery of its reasonable attorneys' fees and costs.

10. PROVISION OF NOTICE

All notices required to be given to either Party to this Consent Judgment by the other shall be in writing and sent to the following agents listed below via email and first-class mail.

For Plaintiff:

KJT Law Group, LLP
Attn: Vache Thomassian
230 N. Maryland Ave. Suite 306
Glendale, CA 91206

Email: vache@kjtlawgroup.com

For Defendant:

Tom Evans
ALSTON & BIRD
560 Mission Street, 21st Floor
San Francisco, CA 94105

Telephone: (415) 243-1014

Email: tom.evans@alston.com

11. EXECUTION AND COUNTERPARTS

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

12. DRAFTING

The terms of this Consent Judgment have been reviewed by the respective counsel for each Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn, and no provision of this Consent Judgment shall be construed against any Party, based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated equally in the preparation and drafting of this Consent Judgment.

13. COURT APPROVAL

If this Consent Judgment is not entered by the Court, it shall be of no force or effect.

14. RETENTION OF JURISDICTION

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment. Notwithstanding the provisions of Section 9, nothing in this Consent Judgment limits or affects the Court's authority to modify this Consent Judgment as provided by law

15. AUTHORIZATION

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment.

STIPULATED AND AGREED TO:

Date: _____

Date: _____

By: _____

By: _____

Tamar Kaloustian

Swanson Health Products, Inc.

STIPULATED AND AGREED TO:

Date: _____

Date: _____

By: _____

By: _____

Vache Thomassian
KJT Law Group, LLP

Tom Evans
Alston & Bird

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: _____

Judge of the Superior Court

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