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Safe Products for Californians, LLC
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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
10

11 SAFE PRODUCTS FOR CALIFORNIANS,) No. 18CV335862
LLC,)
12) **[PROPOSED] CONSENT JUDGMENT**
Plaintiff,)
13) (Health & Safety Code § 25249.5, *et seq.*)
vs.)
14)
WAL-MART, INC. dba WAL-MART)
15 STORES, INC., et al.;)
16)
Defendants.)
17)
18)
19)

20 **1. INTRODUCTION**

21 **1.1 Parties**

22 This Consent Judgment (“Consent Judgment”) is entered into by and between plaintiff
23 Safe Products for Californians, LLC (“SPFC”) and defendant Fusion Diet Systems, Inc. (“Fusion
24 Diet”). SPFC and Fusion Diet are each referred to individually as a “Party” and collectively as
25 the “Parties.” Defendants Wal-Mart, Inc. dba Wal-mart Stores, Inc. (“Walmart”), Lucky
26 Vitamin, LLC (“Lucky Vitamin”), and Amazon.com, Inc. (“Amazon,” and together with
27 Walmart and Lucky Vitamin, collectively referred to as “Defendants”) are intended third-party
28 beneficiaries of this Consent Judgment.

[PROPOSED] CONSENT JUDGMENT

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1.2 SPFC

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

1.3 Fusion Diet

SPFC alleges, and for the purposes of this Consent Judgment only, Fusion Diet does not dispute, that Fusion Diet employs ten or more employees and are persons in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

1.4 General Allegations

SPFC alleges that powdered dietary supplements that Fusion Diet manufactures, imports, sells and/or distributes for sale in California cause exposure to lead and lead compounds (hereinafter referred to as “lead”) and that it does so without providing the health hazard warning SPFC alleges is required by Proposition 65.

1.5 Product Description

The products that are covered by this Consent Judgment are identified as “Fusion Diet Natural Pea Protein - Strawberry Shortcake,” UPC# 865065003253; “Fusion Diet Natural Pea Protein - Double Chocolate Fudge,” UPC# 865584000309; and “Fusion Diet Natural Meal Replacement Shake - Creamy Chocolate,” UPC# 851295004286, that are manufactured, imported, distributed, sold and/or offered for sale by Fusion Diet and/or its customers in the state of California, hereinafter the “Covered Products.”

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1.6 Notice of Violation

On or about February 2, 2018 and June 1, 2018, SPFC served Defendants, and certain requisite public enforcement agencies, with a 60-Day Notice of Violation (“Notice”), alleging that Defendants violated Proposition 65 when they failed to warn their customers and consumers in California that the Covered Products expose users to lead and lead compounds. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.7 Complaint

On October 4, 2018, SPFC commenced the instant action for the alleged violations of Proposition 65 that are the subject of the Notice. On January 21, 2020, SPFC amended its complaint to name Fusion Diet as a defendant.

1.8 No Admission

Fusion Diet denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it sold or distributed for sale in California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Fusion Diet. This Section shall not, however, diminish or otherwise affect Fusion Diet’s obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

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

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
3 that the Court grants the motion for approval of this Consent Judgment contemplated by Section
4 5.

5 **2. INJUNCTIVE RELIEF**

6 **2.1 Product Removal**

7 Commencing ninety (90) days after the Effective Date and continuing thereafter, Fusion
8 Diet shall only ship, distribute, sell or offer for sale in California, Reformulated Covered
9 Products pursuant to Section 2.2 or Covered Products that are labeled with a clear and reasonable
10 warning pursuant to Section 2.3. Fusion Diet shall have no obligation to label Covered Products
11 that were shipped prior to the Effective Date.

12 **2.1.1** For purposes of this Consent Judgment, the “Daily Lead Exposure Level” shall
13 be measured in micrograms, and shall be calculated using the following formula: micrograms of
14 lead per gram of product, multiplied by grams of product per serving of the product (using the
15 largest serving size appearing on the product label), multiplied by servings of the product per
16 day (using the largest number of recommended daily servings appearing on the product label),
17 which equals micrograms of lead exposure per day. If the label contains no recommended daily
18 servings, then the number of recommended daily servings of the product for purposes of the
19 formula in this Section 2.1.1 shall be calculated as one serving per day.

20 **2.2 Reformulated Covered Products**

21 Reformulated Covered Products are Covered Products manufactured after the Effective
22 date for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per
23 day.

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1 **2.3 Clear and Reasonable Warnings**


2 For any Covered Products manufactured after the Effective Date that do not qualify as
3 Reformulated Covered Products and are directly sold or offered for sale in California by Fusion
4 Diet after the Effective Date, Fusion Diet shall only sell or offer said non-reformulated Covered
5 Products for sale in California when accompanied with one of the following warnings:

6 **OPTION 1:**

7 “  **WARNING:** Consuming this product can expose you to [chemicals including]
8 lead which is [are] known to the State of California to cause [cancer and] birth defects
9 and other reproductive harm. For more information go to:
10 www.P65warnings.CA.gov/food”

11 OR:

12 **OPTION 2:**

13 “  **WARNING:** [Cancer and] Reproductive Harm – www.P65Warnings.ca.gov”

14 In connection with providing a cancer warning for lead and lead compounds, Fusion Diet
15 shall use the phrase “cancer and” in the warning if Fusion Diet has reason to believe that the
16 “Daily Lead Exposure Level” is greater than 15 micrograms of lead as determined pursuant to
17 the quality control methodology set forth in Section 2.4. Fusion Diet also may include the
18 reference to cancer if Fusion Diet has reason to believe that another Proposition 65 chemical is
19 present which may require a cancer warning.

20 The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed
21 on the Covered Product’s packaging or label with such conspicuousness, as compared with other
22 words, statements, or designs as to render it likely to be read and understood by an ordinary
23 individual under customary conditions of purchase or use. If the warning is provided on the label,
24 it must be set off from other surrounding information and enclosed in a box. In addition, for any
25 Covered Product sold over the internet where a California delivery address is indicated, the
26 warning shall be provided either by including the warning on the product display page, by
27 otherwise prominently displaying the warning to the purchaser during the checkout process prior
28 to completing the purchase, or by any other means authorized under Section 25607.1 of Title 27

1 of the California Code of Regulations. An asterisk or other identifying method must be utilized
2 to identify which products on the checkout page are subject to the warning.

3 In the event Fusion Diet provides the warning pursuant to OPTION 2, above, the entire
4 warning must be in a type size no smaller than the largest size used for other consumer
5 information on the product, and in no case shall the warning appear in a type size smaller than
6 6-point type. For all warnings, the word "WARNING" shall be in all capital letters in bold print.
7 Any additional statements in the warning shall comply with Title 27, California Code of
8 Regulations, Section 25601(e).

9 **2.4 Testing and Quality Control Methodology**

10 **2.4.1** Except as provided in Section 2.4.7, beginning within one year of the Effective
11 Date, Fusion Diet shall arrange for lead testing of the Covered Products that are manufactured
12 after the Effective Date which Fusion Diet intends to sell or is manufacturing for sale in
13 California, directly selling to a consumer in California or "Distributing into the State of
14 California," at least once a year for a minimum of three (3) consecutive years by arranging for
15 testing of five (5) randomly selected samples of each of the Covered Products, in the form
16 intended for sale to the end-user. If tests conducted pursuant to this Section demonstrate that no
17 Warning is required for a Covered Product during each of the three (3) consecutive years, then
18 the testing requirements of this Section will no longer be required as to that Covered Product.
19 However, if during or after the three (3)-year testing period, Fusion Diet changes ingredient
20 suppliers for any of the Covered Products and/or reformulates the Covered Products, Fusion Diet
21 shall test that Covered Product annually for at least two (2) consecutive years after such change
22 is made.

23 **2.4.2** For purposes of measuring the "Daily Lead Exposure Level" the highest lead
24 detection result of the five (5) randomly selected samples of the Covered Products will be
25 controlling.

26 **2.4.3** All testing pursuant to this Agreement shall be performed using a laboratory
27 method that complies with the performance and quality control factors appropriate for the
28 method used, including limit of detection, qualification, accuracy, and precision that meets the

1 following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS") achieving a
2 limit of quantification of less than or equal to 0.010 mg/kg.

3 **2.4.4** All testing pursuant to this Agreement shall be performed by an independent
4 third-party laboratory certified by the California Environmental Laboratory Accreditation
5 Program or an independent third-party laboratory that is registered with the United States Food
6 & Drug Administration.

7 **2.4.5** Nothing in this Agreement shall limit Fusion Diet's ability to conduct, or require
8 that others conduct, additional testing of the Covered Products, including the raw materials used
9 in their manufacture.

10 **2.4.6** Within thirty (30) days of SPFC's written request, Fusion Diet shall deliver lab
11 reports obtained pursuant to Section 2.4, and related documentation, to SPFC. Fusion Diet shall
12 retain all such lab reports and related documentation for a period of two years from the date of
13 each test. Any request by SPFC for lab reports and related documentation shall be made prior to
14 the expiration of the two-year time period identified in this section 2.4.6.

15 **2.4.7** If Fusion Diet conducts a test on a batch of a Covered Product pursuant to
16 Sections 2.4.1 to 2.4.4, Fusion Diet shall not be required to re-test the same batch during the
17 three (3) or two (2) year testing periods identified in Section 2.4.1.

18 **3. MONETARY SETTLEMENT TERMS**

19 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

20 Pursuant to Health and Safety Code section 25249.7(b), Fusion Diet shall pay civil
21 penalties in the total amount of \$1,000.00. The penalty payment shall be allocated according to
22 Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to
23 the California Office of Environmental Health Hazard Assessment ("OEHHA") and the
24 remaining 25% of the penalty paid to SPFC. SPFC's counsel shall be responsible for remitting
25 the penalty payment under this Consent Judgment to OEHHA. On or before November 2, 2021,
26 Fusion Diet shall deliver a check payable to "Safe Products for Californians, LLC" in the amount
27 of \$250.00, and a check payable to OEHHA in the amount of \$750.00, to the address listed in
28 Section 3.3 below.

1 **3.2 Reimbursement of Attorneys’ Fees and Costs**

2 For all work performed as a result of investigating, bringing this matter to Defendants’
3 attention and negotiating a settlement in the public interest through the mutual execution of this
4 Consent Judgment and the Court’s approval of the same, but exclusive of fees and costs on
5 appeal, if any, Fusion Diet shall reimburse SPFC and its counsel the total amount of \$21,000.00.
6 The Parties negotiated this resolution of the compensation due to SPFC and its counsel under
7 general contract principles and the private attorney general doctrine codified at California Code
8 of Civil Procedure § 1021.5. This payment shall be on or before November 2, 2021, and
9 delivered to the address in Section 3.3 in the form of a check payable to “Moore Law Firm, P.C.”
10 The reimbursement shall cover all fees and costs incurred by SPFC investigating, bringing this
11 matter to the attention of Fusion Diet, litigating, and negotiating a settlement of the matter in the
12 public interest.

13 **3.3 Payment Procedures**

14 The payments pursuant to Sections 3.1 and 3.2 shall be delivered to the following
15 address:

16 Moore Law Firm, P.C.
17 Attn: Proposition 65 (SPFC)
18 300 South First Street, Suite 342
19 San Jose, California 95113

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

25 **4. CLAIMS COVERED AND RELEASED**

26 **4.1 SPFC’s Public Release of Proposition 65 Claims**

27 This Consent Judgment is a full, final, and binding resolution between SPFC, acting on
28 its own behalf and on behalf of the public interest, and Fusion Diet and its parents, subsidiaries,

1 affiliated entities under common ownership, directors, officers, agents, employees, attorneys,
2 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
3 and licensees, expressly including Wal-Mart Stores, Inc., Amazon.com, Inc., and Lucky
4 Vitamin, LLC (collectively, "Releasees"). SPFC hereby releases the Releasees from all claims
5 for violations of Proposition 65 based on exposures to lead from the Covered Products
6 manufactured, imported, distributed or sold by Fusion Diet as set forth in the Notice of Violation
7 ("Proposition 65 Claims"). The Parties intend that this Consent Judgment will have preclusive
8 effect such that no other person or entity, whether purporting to act in his, her or its interest or
9 the public interest shall be permitted to pursue and/or take any action with respect to any
10 violation of Proposition 65 that was alleged in the Action or that could have been brought
11 pursuant to the Notice against Fusion Diet and the Releasees as to alleged exposure to lead in
12 the Covered Products, as set forth in the Notice and Action. Compliance with the terms of this
13 Consent Judgment constitutes compliance with Proposition 65 by Fusion Diet with respect to
14 exposure to lead from Covered Products as set forth in the Notice of Violation.

15 **4.2 SPFC's Individual Release of Claims**

16 SPFC, in its own capacity only and on its own behalf and on behalf of its past and current
17 agents, representatives, attorneys, successors, and/or assignees and *not* in its representative
18 capacity, also provides a release to Fusion Diet and the Releasees which shall have preclusive
19 effect such that SPFC shall not be permitted to pursue and/or take any action with respect to any
20 other statutory or common law claim to the fullest extent that any such claim was or could have
21 been asserted by SPFC against Fusion Diet and the Releasees, which shall be effective as a full
22 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
23 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of SPFC of any
24 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
25 alleged or actual exposures to lead in Covered Products manufactured, imported, distributed or
26 sold by Fusion Diet and/or the Releasees, or the failure to provide a clear and reasonable warning
27 of exposure as well as any other claim based in whole or in part on the facts alleged in the Action
28

1 and the Notice, based on actions committed before the Effective Date (“Chemical Exposure
2 Claims”).

3 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code**

4 As to SPFC’s individual release of Chemical Exposure Claims set forth in 4.2
5 (“Individual Release”), SPFC, acting on its own behalf only with respect to the Individual
6 Release, waives all rights to institute any and all manner of actions, causes of action, claims,
7 demands, rights, suits, obligations, debts, contracts, agreements, promises liabilities, damages,
8 charges, losses, costs, expenses and attorney’s fees of any nature whatsoever, known or
9 unknown, in law or equity, fixed or contingent now or in the future with respect to the Covered
10 Products manufactured, distributed, or sold by Fusion Diet and the Releasees who may use,
11 maintain, distribute or sell the Covered Products, for the Proposition 65 Claims and the Chemical
12 Exposure Claims (referred to collectively in this Sections as “Claims”). In furtherance of the
13 foregoing, SPFC, acting on its own behalf only and in its individual capacity with respect to the
14 Individual Release, waives any and all rights and benefits which SPFC now has, or in the future
15 may have, conferred upon SPFC with respect to the Claims by virtue of the provisions of § 1542
16 of the California Civil Code, which provides as follows:

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

22 **4.3 Release of SPFC**

23 Fusion Diet, on its own behalf and on behalf of its past and current agents,
24 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
25 SPFC and its attorneys and other representatives, for any and all actions taken or statements
26 made (or those that could have been taken or made) by SPFC and its attorneys and other
27 representatives in the course of investigating claims, seeking to enforce Proposition 65 against
28 it in this matter, or with respect to the Covered Products.

1 **5. COURT APPROVAL**

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

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

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

24 **8. NOTICE**

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

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To Fusion Diet:

To SPFC:

Moore Law Firm, P.C.
Attn: Proposition 65 (SPFC)
300 South First Street, Suite 342
San Jose, California 95113

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

9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

10. COMPLIANCE WITH REPORTING REQUIREMENTS

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

11. MODIFICATION

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

12. OTHER TERMS

12.1 No Other Agreements

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are deemed merged. There are no warranties, representations, or other agreements between the Parties except as expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party. No other agreements not specifically contained or referenced in this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No supplementation, modification, waiver, or termination of this Consent Judgment shall be

1 binding unless executed in writing by the Party to be bound. No waiver of any of the provisions
2 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
3 provisions whether or not similar, nor shall such waiver constitute a continuing waiver. Nothing
4 in this Consent Judgment shall release, or in any way affect any rights that Fusion Diet might
5 have against any other party.

6 **12.2 Construction**

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

16 **13. AUTHORIZATION**

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

20
21 Dated: Oct 21, 2021


KRM/ore (Oct 21, 2021 13:58 PDT)

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

22
23
24 Dated: _____

Fusion Diet Systems, Inc.
By: _____(name), _____(title)

25
26 **IT IS SO ORDERED.**

27 Dated: _____

JUDGE OF THE SUPERIOR COURT

1 binding unless executed in writing by the Party to be bound. No waiver of any of the provisions
2 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
3 provisions whether or not similar, nor shall such waiver constitute a continuing waiver. Nothing
4 in this Consent Judgment shall release, or in any way affect any rights that Fusion Diet might
5 have against any other party.

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

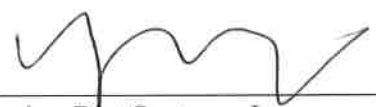
16 **13. AUTHORIZATION**

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

20
21 Dated: _____

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

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24 Dated: 10/21/2021


Fusion Diet Systems, Inc.
By: YINYAN (name), CEO (title)

25
26 **IT IS SO ORDERED.**

27 Dated: _____

28 _____
JUDGE OF THE SUPERIOR COURT