

State of California - Department of Justice - Attorney General's Office - Proposition 65 Enforcement Reporting

Attention: Prop 65 Coordinator, 1515 Clay Street, Suite 2000, Oakland, CA 94612

FORM JUS 1501
(03-01)

PRIVATE ENFORCEMENT FILING - Health and Safety Code section 25249.7(e) and (f)

REPORT OF SETTLEMENT

Please print or type required information

☒ Original Filing ☐ Supplemental Filing ☐ Corrected Filing

PARTIES TO THE ACTION	PLAINTIFF(S) Jennifer Fishman			
	DEFENDANT(S) INVOLVED IN SETTLEMENT Swisher International, Inc.			
CASE INFO	COURT DOCKET NUMBER 37-2019-00044381-CU-MC-CTL		COURT NAME San Diego Superior Court	
	SHORT CASE NAME Fishman v. Swisher International, Inc.			
REPORT INFO	INJUNCTIVE RELIEF Proposition 65 exposure warnings on rolling papers			
	PAYMENT: CIVIL PENALTY \$2,000		PAYMENT: ATTORNEYS FEES \$18,000	
	PAYMENT: OTHER 		For Internal Use Only	
	WILL SETTLEMENT BE SUBMITTED TO COURT? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No			
DATE SETTLEMENT SIGNED 10 / 02 / 2019		For Internal Use Only		
COPY OF SETTLEMENT MUST BE ATTACHED				
FILER INFO	NAME OF CONTACT Jack Fitzgerald			
	ORGANIZATION The Law Office of Jack Fitzgerald		TELEPHONE NUMBER ((619)) 692-3840	
	ADDRESS 3636 4th Ave., Ste. 202		FAX NUMBER ((619)) 362-9555	
	CITY San Diego		STATE ZIP E-MAIL ADDRESS CA 92103 jack@jackfitzgeraldlaw.com	

FILING INSTRUCTIONS: This form can be completed online and printed. If electronic filing is not available, mail the completed form with a copy of the settlement to the attention of the Prop 65 Coordinator at the address shown above. If you need additional space to complete this form please use an attachment.

1 **THE LAW OFFICE OF JACK FITZGERALD, PC**

2 JACK FITZGERALD (SBN 257370)

3 *jack@jackfitzgeraldlaw.com*

4 TREVOR M. FLYNN (SBN 253362)

5 *trevor@jackfitzgeraldlaw.com*

6 MELANIE PERSINGER (SBN 275423)

7 *melanie@jackfitzgeraldlaw.com*

8 Hillcrest Professional Building

9 3636 Fourth Avenue, Suite 202

10 San Diego, California 92103

11 Phone: (619) 692-3840

12 Fax: (619) 362-9555

13 ***Counsel for Plaintiff***

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

JENNIFER FISHMAN,

Plaintiff,

v.

SWISHER INTERNATIONAL, INC.

Defendant.

Case No.: 37-2019-00002496-CU-MC-CTL

CONSENT JUDGMENT

Cal. Health & Safety Code §§ 25249.5, *et seq.*

1 **1. INTRODUCTION & FACTUAL ALLEGATIONS**

2 1.1. This Consent Judgment is entered into by Plaintiff Jennifer Fishman
3 (“Plaintiff”), acting on behalf of the public interest, and Swisher International Inc.
4 (“Defendant”) to settle claims asserted by Fishman against Defendant as set forth in the
5 operative Complaint in the matter of *Jennifer Fishman v. Swisher International Inc.*, 37-2019-
6 00002496-CU-MC-CTL (the “Action”). Plaintiff and Defendant are referred to collectively
7 as the “Parties.”.

8 1.2. On April 30, 2019, Plaintiff served a 60-Day Notice of Violation (the “Notice”)
9 relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986, California
10 Health & Safety Code § 25249.5, et seq. (“Proposition 65”) on Defendant, the California
11 Attorney General, the District Attorneys of every County in the State of California, and the
12 City Attorneys for every City in State of California with a population greater than 750,000.
13 The Notice alleges violations of Proposition 65 with respect to the presence of carbon
14 monoxide and soot in smoke resulting from the combustion of rolling papers manufactured,
15 distributed, and/or sold by Defendant, designed for use with tobacco and other legal smoking
16 herbs.

17 1.3. Defendant is a corporation that employs ten (10) or more persons and that
18 manufactures, distributes, and/or sells Covered Products (as defined herein) in the State of
19 California, or has done so in the past.

20 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
21 Court has jurisdiction over the allegations of violations contained in the Notices and
22 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint;
23 (ii) venue is proper in the County of San Diego; and (iii) this Court has jurisdiction to enter
24 this Consent Judgment as a full and final resolution of all claims which were or could have
25 been raised in the Complaint based on the facts alleged in the Notices and Complaint with
26 respect to Covered Products manufactured, distributed, and/or sold by Defendant.

27 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all
28 claims which were or could have been raised in the Complaint arising out of the facts or

conduct related to Defendant alleged therein. By execution of this Consent Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law, or violation of law. Defendant denies the material, factual, and legal allegations in the Notices and Complaint and expressly denies any wrongdoing whatsoever. Except as specifically provided herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any of the Parties may have in this or any other pending or future legal proceedings. 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 in this Action.

2. DEFINITIONS

2.1. “Covered Products” means rolling paper products that were or are manufactured, distributed and/or offered for sale by Defendant, and specifically rolling papers branded “Hempire.”

2.2. “Effective Date” means the date on the Court enters this Consent Judgment.

3. INJUNCTIVE RELIEF

3.1. As of one year following the Effective Date, no Covered Product may be distributed or sold in California by Defendant unless such Covered Product has a clear and reasonable warning on the product. The warning shall include one of the following statements:

3.2.1 A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word “warning” in bold, all capital letters, followed by the statement “The combustion of this product can expose you to carbon monoxide, which is known to the State of California to cause birth defects or other reproductive harm and soot, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.” Where the sign, label

1 or shelf tag for the product is not printed using the color yellow, the symbol may be
2 printed in black and white.

3 3.2.2 A symbol consisting of a black exclamation point in a yellow equilateral
4 triangle with a bold black outline to the left of the word “warning” in bold all capital
5 letters, followed by the statement “Cancer and Reproductive harm -
6 www.P65Warnings.ca.gov.” Where the sign, label or shelf tag for the product is not
7 printed using the color yellow, the symbol may be printed in black and white.

8 3.2. The warning provided pursuant to Section 3.1 shall be provided in a manner
9 consistent with the warnings regulations published by the State of California at Title 27
10 California Code of Regulations Section 25600 et seq. All Covered Products that have been
11 or will have been distributed, shipped, sold, or otherwise placed in the stream of commerce
12 through and including the date one year following the Effective Date of this Consent
13 Judgement are exempt from the provisions of Section 3.1 and are included in the release in
14 Section 5. Defendant may manufacture or package and sell Covered Products without
15 providing a Proposition 65 compliant warning so long as such products are only for sale to
16 consumers located outside of California and Defendant does not distribute them in California.

17 **4. MONETARY PAYMENTS**

18 4.1. Within ten (10) days of the Effective Date, Defendant shall pay the total sum of
19 \$20,000, which shall be allocated as set forth in this Section.

20 4.2. \$2,000 as a civil penalty pursuant to California Health & Safety Code §
21 25249.7(b), such money to be apportioned in accordance with California Health & Safety
22 Code § 25249.12 (25% to Plaintiff and 75% to the State of California’s Office of
23 Environmental Health Hazard Assessment (“OEHHA”)).

24 4.2.1 Within ten (10) days of the Effective Date, Defendant shall issue two
25 separate checks for the Civil Penalty to (a) “OEHHA” in the amount of \$1,500; and to
26 (b) “The Law Office of Jack Fitzgerald in Trust for Jennifer Fishman” in the amount
27 of \$500.
28

1 4.3. \$18,000 as a reimbursement of a portion of Plaintiff’s reasonable attorneys’ fees
2 and costs. This amount shall be issued in a check made payable to The Law Office of Jack
3 Fitzgerald within ten (10) days of the Effective Date.

4 4.4. All checks shall be sent to counsel for Plaintiff, Jack Fitzgerald, 3636 Fourth
5 Ave #202, San Diego, California 92103. Plaintiff’s counsel shall promptly forward all checks
6 or amounts due to the payees indicated.

7 **5. RELEASE OF ALL CLAIMS**

8 5.1. This Consent Judgment is a full, final, and binding resolution between Plaintiff,
9 acting in the public interest, and Defendant, as well as Defendant’s parents, officers, directors,
10 shareholders, divisions, subdivisions, subsidiaries, and their respective successors and assigns
11 (“Released Parties”), and all entities who distribute or sell or have distributed or sold Covered
12 Products including, but not limited to, distributors, wholesalers, customers, retailers,
13 franchisees, cooperative members, and licensees (“Downstream Released Parties”), of all
14 claims alleged in the Complaint in this Action arising from any violation of Proposition 65
15 that have been or could have been asserted in the public interest against Defendant and
16 Downstream Released Parties, regarding the failure to warn about exposure to carbon
17 monoxide in the Covered Products manufactured, distributed, or sold by Defendant prior to
18 the Effective Date.

19 5.2. Plaintiff on her own behalf releases, waives, and forever discharges any and all
20 claims alleged in the Complaint against Defendant and Downstream Released Parties arising
21 from any violation of Proposition 65 that has been or could have been asserted regarding the
22 failure to warn about exposure to carbon monoxide or soot in connection with Covered
23 Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

24 5.3. Compliance with the terms of this Consent Judgment by Defendant and the
25 Downstream Released Parties shall constitute compliance with Proposition 65 by Defendant
26 and Downstream Released Parties with respect to any alleged failure to provide Proposition
27 65 warnings in Covered Products after the Effective Date.

1 5.4. Upon the Effective Date, the Released Parties and Downstream Released Parties,
2 on behalf of themselves and their officers, directors, owners, partners, servants, agents,
3 attorneys, employees, affiliates, and other representatives hereby release and forever
4 discharge Plaintiff, and Plaintiff's attorneys, family members, predecessors, successors, heirs,
5 assigns, related persons and other representatives, from any and all claims or causes of action
6 that were alleged or could have been alleged in the Action, or arising out of the Action.

7 **6. OVERSIGHT AND ENFORCEMENT OF TERMS**

8 6.1. The Court shall retain jurisdiction to oversee, enforce and/or modify the terms
9 of this Consent Judgment.

10 6.2. Any Party may, by means of filing an application for an order to show cause,
11 enforce the terms and conditions contained in this Consent Judgment. The prevailing party in
12 any such action or application may request that the Court award its reasonable attorneys' fees
13 and costs associated with such action or application.

14 **7. APPLICATION OF CONSENT JUDGMENT**

15 7.1. This Consent Judgment shall apply to and be binding upon the Parties and their
16 respective privies, successors, and assigns, and it shall be deemed to inure the benefit of the
17 Parties and their respective privies, successors, and assigns.

18 **8. MODIFICATION OF CONSENT JUDGMENT**

19 8.1. This Consent Judgment may only be modified by written agreement of Plaintiff
20 and Defendant, or upon noticed motion of Plaintiff or Defendant as provided by law.

21 **9. PROVISION OF NOTICE**

22 9.1. All notices required to be given to either Party to this Consent Judgment by the
23 other shall be in writing and sent to the following agents listed below by (a) first-class,
24 registered, (b) certified mail, (c) overnight courier, or (d) personal delivery to the following:

25 For Plaintiff Jennifer Fishman
26 The Law Office of Jack Fitzgerald, PC
27 Jack Fitzgerald
28 3636 Fourth Ave #202
 San Diego, CA 92103

1 For Defendant Swisher International Inc.

2 Christopher L. Casey
3 Senior VP & General Counsel
4 Swisher International, Inc.
5 459 E. 16th Street
6 Jacksonville, FL 32206

7 With a copy to:

8 Michael J. Steel
9 Morrison & Foerster LLP
10 425 Market St., 31st Floor
11 San Francisco, CA 94105

12 9.2. Any Party may modify the person and address to whom the notice is to be sent
13 by sending the other Parties notice by first class and electronic mail.

14 **10. CONSTRUCTION AND SEVERABILITY**

15 10.1. The terms and conditions of this Consent Judgment have been reviewed by the
16 respective counsel for the parties prior to its signing, and each party has had an opportunity
17 to fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
18 construction of this Consent Judgment, the terms and conditions shall not be construed against
19 any Party.

20 10.2. In the event that any of the provisions of this Consent Judgment is held by a
21 court to be unenforceable, the validity of the remaining enforceable provisions shall not be
22 adversely affected.

23 **11. GOVERNING LAW**

24 11.1. The terms and conditions of this Consent Judgment shall be governed by and
25 construed in accordance with the laws of the State of California.

26 **12. COURT APPROVAL**

27 12.1. The Parties shall use their reasonable best efforts to support the Court's approval
28 of the Consent Judgment and entry of the Consent Judgment.

1 12.2. If the California Attorney General objects to any term in this Consent Judgment,
2 the Parties shall use their best efforts to resolve the concern in a timely manner, and, if
3 possible, prior to the hearing on the Motion for Court Approval.

4 12.3. This Consent Judgment shall not be effective until it is approved by the Court.
5 If, despite the Parties' best efforts, the Court does not approve this Settlement and enter a
6 Consent Judgment thereon, the parties shall have the option of (a) proceeding to try and
7 resolve the matter amicably, or (b) determining that the Settlement is null and void and of no
8 force or effect, in which event, all payment-related obligations set forth in Section 4 shall be
9 deemed never to have existed and the Parties may thereafter proceed of their own accord.

10 **13. ENTIRE AGREEMENT**

11 13.1. This Consent Judgment contains the sole and entire agreement and
12 understanding of Plaintiff and Defendant with respect to the entire subject matter herein, and
13 any and all prior discussions, negotiations, commitments, or understandings related hereto, if
14 any, and are hereby merged herein. No representations, express or implied, other than those
15 contained herein have been made by any party.

16 13.2. No other agreements not specifically contained or referenced herein shall be
17 deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained
18 or referenced herein shall be deemed to exist or to bind any of the Parties hereto only to the
19 extent that they are expressly incorporated herein.

20 13.3. No supplementation, modification, waiver, or termination of this Consent
21 Judgment shall be binding unless executed in writing by the Party to be bound thereby.

22 13.4. No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
24 such waiver constitute a continuing waiver.

25 **14. RETENTION OF JURISDICTION**

26 14.1. This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

1 **15. AUTHORIZATION**

2 15.1. Each signatory to this Consent Judgment certifies that he or she is fully
3 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter
4 into and execute the Consent Judgment on behalf of the Party represented and to legally bind
5 that Party.

6 **16. EXECUTION IN COUNTERPARTS**

7 16.1. This Consent Judgment may be executed in counterparts and by facsimile, each
8 of which shall be deemed an original, and all of which, when taken together, shall constitute
9 one and the same document.

10 **IT IS AGREED:**

11 Plaintiff, Jennifer Fishman

12
13 By: 

Dated: 9/6/2019

14 Jennifer Fishman

15
16 Defendant, Swisher International Inc.

17
18 By: 

Dated: 8/15/19

19 Name: CHARLOTTE L. CASEY

20 Position: SENIOR V.P. AND GENERAL COUNSEL

21 **APPROVED AS TO FORM**

22
23 By: 

Dated: 10.2.19

24 Defendant's Counsel, Michael J. Steel

25
26 By: 

Dated: 9/6/19

27 Plaintiff's Counsel, Jack Fitzgerald