

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 The Parties**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Safe Products for Californians LLC (“SPFC”) and The Nue Co USA, Inc. (“Nue Co”) with SPFC and Nue Co collectively referred to as the “Parties.” 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 hazardous substances contained in consumer products. SPFC alleges, and, for purposes of this settlement only, Nue Co does not dispute, that Nue Co employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code sections 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

SPFC alleges that Nue Co manufactures, imports, sells and/or distributes for sale in California certain products containing lead and/or lead compounds at levels requiring a Proposition 65 warning, and that it does so without providing the health hazard warning that SPFC alleges is required by Proposition 65. Lead and lead compounds are listed pursuant to Proposition 65 as chemicals known to the state of California to cause reproductive toxicity at the levels alleged by SPFC to be present in the products.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are identified in SPFC’s Notice of Violation as Plant Protein + Gut Food, consisting of: “Plant Protein + Gut Food,” UPC# 5-060506-360041, that are manufactured, imported, distributed, sold and/or offered for sale by Nue Co and/or its customers in the state of California, hereinafter the “Covered Products.”

#### **1.4 Notice of Violation**

On or about May 20, 2019, SPFC served Nue Co, and certain requisite public enforcement agencies, with a 60-Day Notice of Violation (“Notice”), alleging that Nue Co violated Proposition 65 when it failed to warn its 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.

#### **1.5 No Admission**

Nue Co denies the material, factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are being or have been manufactured, imported, sold and/or distributed for sale in California, including the Covered Products, have been and are in compliance with Proposition 65 or any other statutory, regulatory, common law or equitable doctrine. Nothing in this Settlement Agreement shall be construed as an admission by Nue Co of any fact, finding, conclusion, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Nue Co of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Nue Co. Nothing in this Settlement Agreement, nor compliance with its terms, shall constitute or be construed, considered, offered, or admitted as evidence of an admission against interest or evidence of fault, wrongdoing, or liability by Nue Co., its officers, directors, employees, or parents, subsidiaries, or affiliated corporations, or any person acting for Nue Co., or any direct or indirect customer of Nue Co. who sold or sells the Covered Products, in any administrative or judicial proceeding or litigation in any court, agency, or forum. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Nue Co. maintains that it has not knowingly manufactured, or caused to be manufactured, the Covered Products for sale in California in violation of Proposition 65. The Parties have entered into this Settlement Agreement in order to settle, compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.

## **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean one year from the date on which this document has been signed by all Parties.

## **2. INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

### **2.1 Product Removal**

As of the Effective Date, Nue Co shall be permanently enjoined from manufacturing for sale in the State of California, “Distributing into the State of California,” or directly selling in the State of California, any Covered Products manufactured after the Effective Date which expose a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day, unless it meets the warning requirements under section 2.3.

**2.1.1** As used in this Settlement Agreement, the term “Distributing into the State of California” shall mean to directly ship a Covered Product into California for sale in California or to sell a Covered Product to a distributor that Nue Co knows or has reason to know will sell the Covered Products in California.

**2.1.2** For purposes of this Settlement Agreement, the “Daily Lead Exposure Level” shall be measured in micrograms, and shall be calculated using the following formula: micrograms of lead per gram of product, multiplied by grams of product per serving of the product (using the largest serving size appearing on the product label), multiplied by servings of the product per day (using the largest number of recommended daily servings appearing on the product label), which equals micrograms of lead exposure per day. If the label contains no recommended daily servings, then the number of recommended daily servings of the product for purposes of the formula in this Section 2.1.2 shall be calculated as one serving per day.

**2.1.3** For purposes of this Settlement Agreement, “Reformulated Covered Products” are Covered Products manufactured after the Effective date for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per day. “Conforming Covered Products” are Covered Products for which the “Daily Lead Exposure Level” is no greater than 0.5

micrograms of lead per day as determined by the quality control methodology described in Section 2.3.

## **2.2 Clear and Reasonable Warnings**

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

### **OPTION 1:**

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

OR:

### **OPTION 2:**

**WARNING:** [Cancer and] Reproductive Harm – [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food)”

Nue Co shall use the phrase “cancer and” in the warning if Nue Co has reason to believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead or if Nue Co has reason to believe that another Proposition 65 chemical is present which may require a cancer warning. The words “chemicals including” may be omitted from the warning content if the warning is being provided for an exposure to lead only.

The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed on the Covered Product’s packaging or label 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 under customary conditions of purchase or use. If the warning is provided on the label, it must be set off from other surrounding information and enclosed in a box. In addition, for any Covered Product sold over the internet on Nue Co.’s website where a California delivery address

is indicated, the warning shall be provided either by including the warning on the product display page, by otherwise prominently displaying the warning to the purchaser during the checkout process prior to completing the purchase, or by any other means authorized under Section 25607.1 of Title 27 of the California Code of Regulations. An asterisk or other identifying method must be utilized to identify which products on the checkout page are subject to the warning.

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

### **2.3 Testing and Quality Control Methodology**

**2.3.1** Except as provided in Section 3.4.7, beginning within one year of the Effective Date, Nue Co shall arrange for lead testing of the Covered Products that are manufactured after the Effective Date at least once a year for a minimum of three (3) consecutive years by arranging for testing of five (5) randomly selected samples of each of the Covered Products, in the form intended for sale to the end-user, which Nue Co intends to sell or is manufacturing for sale in California, directly selling to a consumer in California or "Distributing into the State of California." If tests conducted pursuant to this Section demonstrate that no Warning is required for a Covered Product during each of the three (3) consecutive years, then the testing requirements of this Section will no longer be required as to that Covered Product. However, if during or after the three (3)-year testing period, Nue Co changes ingredient suppliers for any of the Covered Products and/or reformulates the Covered Products, Nue Co shall test that Covered Product annually for at least two (2) consecutive years after such change is made.

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

**2.3.3** All testing pursuant to this Agreement shall be performed using a laboratory method that complies with the performance and quality control factors appropriate for the method used, including limit of detection, qualification, accuracy, and precision that meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS") achieving a limit of quantification of less than or equal to 0.010 mg/kg.

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

**2.3.5** Nothing in this Agreement shall limit Nue Co's ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw materials used in their manufacture.

**2.3.6** Within thirty (30) days of SPFC's written request, Nue Co shall deliver lab reports obtained pursuant to Section 2.3, and related documentation, to SPFC. Nue Co shall retain all such lab reports and related documentation for a period of two years from the date of each test. Any request by SPFC for lab reports and related documentation shall be made prior to the expiration of the two-year time period identified in this section 2.3.6.

**2.3.7** If Nue Co conducts a test on a batch of a Covered Product pursuant to Sections 2.3.1 to 2.3.4, Nue Co shall not be required to re-test the same batch during the three (3) or two (2) year testing periods identified in Section 2.3.1.

### **3. MONETARY PAYMENTS**

#### **3.1 Civil Penalty**

Pursuant to Health and Safety Code section 25249.7(b), Nue Co shall pay civil penalties in the amount of \$3,000.00. The penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid to SPFC. SPFC’s counsel shall be responsible for remitting Nue Co’s penalty payment under this Settlement Agreement to OEHHA. Within five (5) business days of this Agreement being signed by the Parties, Nue Co shall issue a check payable to “Safe Products for Californians, LLC” in the amount of \$750.00, and a check payable to OEHHA in the amount of \$2,250.00. These penalty payments shall be delivered to the address listed in Section 3.3 below.

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

The Parties acknowledge that SPFC and its counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, Nue Co expressed a desire to resolve SPFC’s fees and costs. The Parties then negotiated a resolution of the compensation due to SPFC and its counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5. For all work performed through the mutual execution of this agreement, Nue Co shall reimburse SPFC and their counsel \$10,000.00 within five (5) business days of this Agreement being signed by the Parties. Nue Co’s payment shall be delivered to the address in Section 3.3 in the form of a check payable to “Moore Law Firm, P.C.” The reimbursement shall cover all fees and costs incurred by SPFC investigating, bringing this matter to Nue Co’s attention and negotiating a settlement of the matter in the public interest.

### **3.3 Payment Address**

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

Safe Products for Californians, LLC  
c/o Moore Law Firm, P.C.  
332 North Second Street  
San Jose, California 95112

## **4. CLAIMS COVERED AND RELEASED**

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

This Settlement Agreement is a full, final and binding resolution between SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees (collectively, "Releasor"), and (a) Nue Co, and its owners, parents, subsidiaries, affiliated entities under common ownership, sister and related companies, shareholders, members, directors, officers, agents employees, attorneys, insurers, predecessors, successors, and assigns (collectively, "Releasees"), and (b) each entity to whom Releasees directly or indirectly distribute, provide or sell Covered Products, including, but not limited to, Goop Inc, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, "Downstream Releasees"), from all claims for any violation of Proposition 65 through the Effective Date that were or could have been asserted by SPFC relating to the Covered Products. Compliance with the terms of this Settlement Agreement by Releasees and Downstream Releasees constitutes compliance with Proposition 65 with respect to exposures to lead and lead compounds from the Covered Products manufactured, distributed or sold by Nue Co after the Effective Date. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Nue Co.

### **4.2 SPFC's Individual Releases of Claims**

SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, provides a release herein which shall be effective as a full and final accord and



satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of SPFC of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to lead and lead compounds in the Covered Products manufactured, imported, distributed, or sold by Nue Co and Downstream Releasees prior to the Effective Date. The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to Nue Co. Nothing in this section affects SPFC's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Nue Co's Covered Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that it may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees or Downstream Releasees (including each of Releasees' and Downstream Releasees' parent companies, corporate affiliates, subsidiaries, sister entities, officers, directors, attorneys, representatives, shareholders, agents, and employees, as well as each of their downstream distributors, wholesalers, vendors, licensors, licensees, auctioneers, retailers, franchisees, dealers, cooperative members, customers, owners, purchasers, and users) of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the allegations made in the Notice.

#### **4.3 Nue Co's Release of SPFC**

Nue Co, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against SPFC and its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by SPFC and their attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Covered Products.

#### **4.4 Waiver of Civil Code Section 1542**

With respect to the foregoing waivers and releases in this Settlement Agreement, SPFC hereby specifically waives any and all rights and benefits which it now has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides 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.

#### **5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

#### **6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the state of California and apply within the state of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Covered Products, then Nue Co shall provide written notice to SPFC of any asserted change in the law and shall have no

further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Products are so affected. If the Office of Environmental Health Hazard Assessment promulgates one or more regulations governing the provision of Proposition 65 warnings for foods, Nue Co may comply with such regulations as to the Covered Products without being deemed in breach of this Settlement Agreement. Nothing in this Settlement Agreement shall be interpreted to relieve Nue Co from any obligation to comply with any pertinent state or federal toxics control law.

7. **NOTICE**

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

For Nue Co:

108 E 16<sup>th</sup> STREET  
FLOOR 6 WORKSHOPS  
NEW YORK  
NY 10003

For SPFC:

Proposition 65 Coordinator  
Moore Law Firm, P.C.  
332 N 2<sup>nd</sup> Street  
San Jose, CA 95112

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

8. **ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party

hereto. No other agreements addressing compliance with Proposition 65 as to the Covered Products not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

**9. COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or .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 HEALTH & SAFETY CODE SECTION 25249.7(f)**

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

**11. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.


**AGREED TO:**

Dated: Oct 23, 2019

  
KR Moore (Oct 23, 2019)

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

Dated: OCT 29 2019

  
The Nue Co USA, Inc.  
By: CHARLIE GOWER COO, DIRECTOR