

1 Tanya E. Moore, SBN 206683
MOORE LAW FIRM, P.C.
2 300 South First Street, Suite 342
San Jose, California 95113
3 Telephone (408) 298-2000
Facsimile (408) 298-6046
4 E-mail: service@moorelawfirm.com

5 Attorneys for Plaintiff
Safe Products for Californians, LLC
6

7 Jennifer M. Adams (SBN 319347)
8 Amin Talati Wasserman LLP
100 S. Wacker Drive, Suite 2000
9 Chicago, IL 60606
10 Telephone (312) 327-3383
Facsimile (312) 884-7352
11 E-mail: jennifer@amintalati.com

12 Attorneys for Defendant
Perfect Keto, LLC
13

14 **SUPERIOR COURT OF CALIFORNIA**
15 **COUNTY OF SANTA CLARA**

16
17 SAFE PRODUCTS FOR CALIFORNIANS,)
LLC,)

18 Plaintiff,)

19 vs.)

20 PERFECT KETO LLC, et al.;)

21 Defendants.)
22)
23)

No. 20CV371148

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5, *et seq.*)

24 **1. INTRODUCTION**

25 **1.1 Parties**

26 This Consent Judgment (“Consent Judgment”) is entered into by and between plaintiff
27 Safe Products for Californians, LLC (“SPFC”) and defendant Perfect Keto LLC (“Perfect
28 Keto”). SPFC and Perfect Keto are each referred to individually as a “Party” and collectively
as the “Parties.”

[PROPOSED] CONSENT JUDGMENT

1 **1.2 SPFC**

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

6 **1.3 Perfect Keto**

7 For the purposes of this Consent Judgment, SPFC alleges, and Perfect Keto does not
8 dispute, that Perfect Keto employs ten or more persons and is a person in the course of doing
9 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
10 California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

11 **1.4 General Allegations**

12 SPFC alleges that the Perfect Keto Dietary Supplements and Keto Bars that Perfect
13 Keto manufactures, imports, sells and/or distributes for sale in California cause exposure to
14 lead and that Perfect Keto does so without providing the health hazard warning that SPFC
15 alleges is required by Proposition 65.

16 **1.5 Product Description**

17 The products that are covered by this Consent Judgment are identified as “Base –
18 Coffee Betahydroxybutyrate (BHB) Ketone Supplement,”; “Base – Salted Caramel
19 Betahydroxybutyrate (BHB) Ketone Supplement,”; “Medium Chain Triglyceride (MCT) Oil
20 Powder,”; “Lemon Keto Greens Powder with MCTs,”; “Keto Nootropic Exogenous Ketone
21 and Herbal Supplement,”; “Matcha MCT Oil Powder Medium Chain Triglyceride
22 Supplement,”; “Instant Keto Coffee – Original,”; “Instant Keto Coffee - French Vanilla,”;
23 “Instant Keto Coffee – Mocha,”; “Almond Butter Brownie Keto Bar,”; and “Salted Caramel
24 Keto Bar,”, that are manufactured, imported, distributed, sold and/or offered for sale by Perfect
25 Keto and/or its customers in the state of California, hereinafter the “Covered Products.”

26 **1.6 Notices of Violation**

27 On or about May 21, 2019 and October 24, 2019, SPFC served Perfect Keto, and
28 certain requisite public enforcement agencies, with 60-Day Notices of Violation (“Notices”),

1 alleging that Perfect Keto violated Proposition 65 when it failed to warn its customers and
2 consumers in California that the Covered Products expose users to lead. A true and correct
3 copy of the 60-Day Notices dated May 21, 2019 and October 24, 2019 are attached hereto as
4 **Exhibit A.** To the best of the Parties' knowledge, no public enforcer has commenced and is
5 diligently prosecuting the allegations set forth in the Notices.

6 **1.7 Complaint**

7 On September 24, 2020, SPFC commenced the instant action (the "Action") for the
8 alleged violations of Proposition 65 that are the subject of the Notice.

9 **1.8 No Admission**

10 The Parties enter into this Consent Judgment pursuant to a full settlement of disputed
11 claims between the Parties as alleged in the Action for the purpose of avoiding prolonged
12 litigation. By execution of this Consent Judgment, Perfect Keto does not admit any material,
13 factual, and legal allegations contained in the Notice and Action, and maintains that all of the
14 products that it has sold or distributed for sale in California, including the Covered Products,
15 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
16 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
17 law, nor shall compliance with this Consent Judgment constitute or be construed as an
18 admission of any fact, finding, conclusion of law, issue of law, or violation of law, the same
19 being specifically denied by Perfect Keto. Nothing in this Consent Judgment shall prejudice,
20 waive, or impair any right, remedy or defense that Perfect Keto may have in any other further
21 legal proceedings unrelated to this Action. This Section shall not, however, diminish or
22 otherwise affect Perfect Keto's obligations, responsibilities, and duties under this Consent
23 Judgment.

24 **1.9 Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Perfect Keto as to the allegations contained in the Action, that venue is proper
27 in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
28 provisions as a full and final binding resolution of all claims which were or could have been

1 raised in the Action based on the facts alleged therein and/or notice of this Consent Judgment
2 pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 //

4 //

5 **1.10 Effective Date**

6 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
7 that this Consent Judgment is signed by all Parties.

8 **2. INJUNCTIVE RELIEF**

9 **2.1 Product Removal**

10 Commencing ninety (90) days after the Effective Date and continuing thereafter,
11 Perfect Keto shall only ship, distribute, sell or offer for sale in California, Reformulated
12 Product pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning
13 pursuant to Section 2.3. Perfect Keto shall have no obligation to label Covered Products that
14 were shipped prior to the Effective Date.

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

23 **2.2 Reformulated Covered Products**

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

27 **2.3 Clear and Reasonable Warnings**

28

For any Covered Products manufactured after the Effective Date that do not qualify as Reformulated Covered Products and are directly sold or offered for sale in California by Perfect Keto after the Effective Date, Perfect Keto 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

OR:

OPTION 2:

WARNING: [Cancer and] Reproductive Harm – www.P65Warnings.ca.gov/food

In connection with providing a cancer warning for lead, Perfect Keto shall use the phrase “cancer and” in the warning if Perfect Keto has reason to believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead. Perfect Keto also may include the reference to cancer if Perfect Keto has reason to believe that another Proposition 65 chemical is present which may require a cancer warning. The words “chemicals including” may be deleted from the warning content if the warning is being provided for an exposure to a single chemical.

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 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 may be utilized to identify which products on the checkout page are subject to the warning.

In the event Perfect Keto 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). If subsequently enacted changes to Proposition 65 or its implementing regulations require the use of additional or different information on any warning, the Parties agree that the new safe harbor warning may be utilized in place of the warnings set forth in this Section.

3. MONETARY SETTLEMENT TERMS

3.1 In full satisfaction of all potential civil penalties, additional settlement payments, attorney’s fees, and costs, Perfect Keto shall make a total payment of \$62,500.00 (“Total Settlement Amount”) to SPFC, with an initial payment of \$32,500.00 to be paid within 5 days of the Effective Date, and a final payment of \$30,000.00 to be paid within 35 days of the Effective Date. The Total Settlement Amount shall be apportioned as follows:

3.2 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)

Pursuant to Health and Safety Code section 25249.7(b), Perfect Keto shall pay civil penalties in the amount of \$27,500.00. 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 Perfect Keto’s penalty payment under this Consent Judgment to OEHHA. Within five business days of all Parties signing this Consent Judgment, Perfect Keto shall issue a check payable to “Safe Products for Californians, LLC” in the amount of \$6,875.00, and a check payable to

1 OEHHA in the amount of \$20,625.00. These penalty payments shall be delivered to the
2 address listed in Section 3.3 below.

3 **3.3 Reimbursement of Attorneys' Fees and Costs**

4 For all work performed as a result of investigating, bringing this matter to Perfect
5 Keto's attention and negotiating a settlement in the public interest through the mutual
6 execution of this Consent Judgment and the Court's approval of the same, but exclusive of fees
7 and costs on appeal, if any, Perfect Keto shall reimburse SPFC and its counsel \$35,000.00. The
8 Parties negotiated this resolution of the compensation due to SPFC and its counsel under
9 general contract principles and the private attorney general doctrine codified at California Code
10 of Civil Procedure § 1021.5. Perfect Keto's payment shall be delivered to the address in
11 Section 3.3 in the form of a check payable to "Moore Law Firm, P.C." within five business
12 days of all Parties signing this Consent Judgment. The reimbursement shall cover all fees and
13 costs incurred by SPFC investigating, bringing this matter to Perfect Keto's attention,
14 litigating, and negotiating a settlement of the matter in the public interest.

15 //

16 //

17 **3.4 Payment Procedures**

18 The payments pursuant to Sections 3.2 and 3.3 shall be delivered to the following
19 address:

20 Moore Law Firm, P.C.
21 Attn: Proposition 65 (SPFC)
22 300 South First Street, Suite 342
San Jose, California 95113

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 SPFC's Public Release of Proposition 65 Claims**

3 This Consent Judgment is a full, final, and binding resolution between SPFC, acting on
4 its own behalf and on behalf of the public interest, and Perfect Keto and its parents,
5 subsidiaries, affiliated entities under common ownership, directors, shareholders, officers,
6 employees, and attorneys and the predecessors, agents, suppliers, distributors, retailers,
7 successors, or assigns of each of them (the "Releasees"), for any claims with respect to any
8 Covered Products manufactured, imported, distributed or sold by Perfect Keto and on or prior
9 to the date of entry of this Consent Judgment, including but not limited to any violations
10 arising under Proposition 65 that was or could have been asserted in the Action against Perfect
11 Keto and the Releasees for unwarned exposures to lead from the Covered Products
12 manufactured, imported, distributed or sold by Perfect Keto prior to the Effective Date
13 ("Proposition 65 Claims"). This Consent Judgment shall have preclusive effect such that no
14 other person or entity, whether purporting to act in his, her or its interest or the public interest
15 shall be permitted to pursue and/or take any action with respect to any violation of Proposition
16 65 that was alleged in the Action or that could have been brought pursuant to the Notice
17 against Perfect Keto and the Releasees as to alleged exposure to lead in the Covered Products,
18 as set forth in the Notice and Action. Compliance with the terms of this Consent Judgment
19 constitutes compliance with Proposition 65 by Perfect Keto and it is deemed sufficient to
20 satisfy all obligations concerning compliance by the Releasees with respect to the alleged or
21 actual failure to warn about exposures to lead from Products manufactured, sold or distributed
22 for sale and any and all other requirement of Proposition 65 with respect to the products by
23 Perfect Keto after the Effective Date.

24 **4.2 SPFC's Individual Release of Claims**

25 SPFC, in its own capacity only and on its own behalf and on behalf of its past and
26 current agents, representatives, attorneys, successors, and/or assignees and *not* in its
27 representative capacity, also provides a release to Perfect Keto and the Releasees which shall
28 have preclusive effect such that SPFC shall not be permitted to pursue and/or take any action

1 with respect to any other statutory or common law claim to the fullest extent that any such
2 claim was or could have been asserted by SPFC against Perfect Keto and the Releasees, which
3 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
4 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and
5 demands of SPFC of any nature, character or kind, whether known or unknown, suspected or
6 unsuspected, arising out of alleged or actual exposures to lead in Covered Products
7 manufactured, imported, distributed or sold by Perfect Keto and/or the Releasees, or the failure
8 to provide a clear and reasonable warning of exposure as well as any other claim based in
9 whole or in part on the facts alleged in the Action and the Notice, based on actions committed
10 before the Effective Date ("Chemical Exposure Claims").

11 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code**

12 As to SPFC's public release of Proposition 65 Claims set forth in Section 4.1 ("Public
13 Release") and its individual release of Chemical Exposure Claims set forth in 4.2 ("Individual
14 Release"), SPFC, acting on its own behalf and on behalf of the public with respect to the
15 Public Release and acting in its individual capacity with respect to the Individual Release,
16 waives all rights to institute any and all manner of actions, causes of action, claims, demands,
17 rights, suits, obligations, debts, contracts, agreements, promises liabilities, damages, charges,
18 losses, costs, expenses and attorney's fees of any nature whatsoever, known or unknown, in
19 law or equity, fixed or contingent now or in the future with respect to the Covered Products
20 manufactured, distributed, or sold by Perfect Keto and the Releasees who may use, maintain,
21 distribute or sell the Covered Products, for the Proposition 65 Claims and the Chemical
22 Exposure Claims (referred to collectively in this Sections as "Claims"). In furtherance of the
23 foregoing, SPFC, acting on its own behalf and on behalf of the public with respect to the
24 Public Release and acting in its individual capacity with respect to the Individual Release,
25 waives any and all rights and benefits which SPFC now has, or in the future may have,
26 conferred upon SPFC with respect to the Claims by virtue of the provisions of § 1542 of the
27 California Civil Code, which provides as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR

1 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
2 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER,
3 WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
4 WITH THE DEBTOR OR RELEASED PARTY.

5 **4.4 Perfect Keto's Release of SPFC**

6 Perfect Keto, on its own behalf and on behalf of its past and current agents,
7 representatives, attorneys, successors and/or assignees, hereby waives any and all claims
8 against SPFC and its attorneys and other representatives, for any and all actions taken or
9 statements made (or those that could have been taken or made) by SPFC and its attorneys and
10 other representatives in the course of investigating claims, seeking to enforce Proposition 65
11 against it in this matter.

12 **5. ENTRY OF CONSENT JUDGMENT**

13 The Parties hereby request that the Court promptly enter this Consent Judgment. Upon
14 entry of this Consent Judgment, SPFC and Perfect Keto waive their respective rights to a
15 hearing or trial on the allegations of the Action and Notice.

16 //

17 //

18 **5.1 COURT APPROVAL**

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

28 **6. SEVERABILITY**

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

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and apply within the State of California. In the event that Proposition 65 is repealed,
7 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the
8 Covered Products, then Perfect Keto may provide SPFC with written notice of any asserted
9 change in the law, and shall have no further obligations pursuant to this Consent Judgment,
10 with respect to, and to the extent that, the Covered Products are so affected. Nothing in this
11 Consent Judgment shall be interpreted to relieve Perfect Keto from its obligation to comply
12 with any pertinent state or federal law or regulation.

13 **8. NOTICE**

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

18 To Perfect Keto:

19 Abhishek K. Gurnani
20 Amin Talati Wasserman, LLP
21 100 S. Wacker Dr. Suite 2000
Chicago, IL 60606

To SPFC:

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

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

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

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

28 **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. In the event that Proposition 65 is repealed or preempted, then Perfect Keto shall have no further obligation as to injunctive terms pursuant to this Consent Judgment with respect to, and to the extent that the Covered Products are so affected.

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

12.2 Construction

The Parties have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. Each Party has had the

1 opportunity to consult counsel with regard to the preparation of this Consent Judgment. This
2 Consent Judgment was subject to revision and modification by the Parties and has been
3 accepted and approved as to its final form by all Parties. Accordingly, any uncertainty or
4 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
5 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
6 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
7 resolved against the drafting Party should not be employed in the interpretation of this Consent
8 Judgment and, in this regard the Parties hereby waive California Civil Code section 1654.

9 **13. AUTHORIZATION**

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

13 Dated: Dec 15, 2020


KR Moore (Dec 15, 2020 10:41 PST)

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

14
15
16 Dated: _____

Perfect Keto LLC
By: _____

17
18 **IT IS SO ORDERED.**

19 Dated: _____

JUDGE OF THE SUPERIOR COURT

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2 Consent Judgment was subject to revision and modification by the Parties and has been
3 accepted and approved as to its final form by all Parties. Accordingly, any uncertainty or
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12 this Consent Judgment.

13 Dated: _____

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

14
15
16 Dated: 12/15/20

Justin Marces
Perfect Keto LLC
By: Justin Marces, Co-Founder

17
18 **IT IS SO ORDERED.**

19 Dated: _____

JUDGE OF THE SUPERIOR COURT