

1 JAMES KAWAHITO (SBN 234851)
KAWAHITO LAW GROUP APC
2 222 N. Pacific Coast Hwy. Suite 2222
El Segundo, CA 90245
3 Telephone: (310) 746-5300
Facsimile: (310) 593-2520
4 Email: jkawahito@kawahitolaw.com

5 Attorneys for Plaintiff EnviroProtect, LLC

6 CHRISTOPHER J. BARRETT (SBN 330024)
BAKER DONELSON, P.C.
7 211 Commerce Street, Suite 800
8 Nashville, TN 37201
T: 615.726.5600
9 F: 615.726.0464
Email: cbarrett@bakerdonelson.com

10 Attorneys for Nutritional Medicinals, LLC

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**

14 ENVIROPROTECT, LLC, in the public
15 interest,

16 Plaintiff,

17 vs.

18 NURTITIONAL MEDICINALS, LLC, a
Delaware Corporation; and DOES 1 through
19 50, inclusive,

20 Defendants.

Case Number: CGC-20-587042

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

HEALTH AND SAFETY CODE § 25249.6

1
2
3 **1. INTRODUCTION**

4 **1.1. EnviroProtect, LLC and Nutritional Medicinals, LLC**

5 This Consent Judgment is entered into by and between plaintiff EnviroProtect, LLC ("EP"
6 or "Plaintiff") and defendant Nutritional Medicinals, LLC ("Nutritional Medicinals" or
7 "Defendant") with Nutritional Medicinals and EP each individually referred to as a "Party" and
8 collectively as the "Parties."

9 **1.2. Plaintiff**

10 EP is a limited liability company duly organized and existing in the State of California,
11 which seeks to promote awareness of exposures to toxic chemicals and to improve human health
12 by reducing or eliminating hazardous substances used in consumer products.

13 **1.3. Defendant**

14 Nutritional Medicinals employs ten or more persons and is a person in the course of doing
15 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
16 Health and Safety Code section 25249.6 *et seq.* ("Proposition 65").

17 **1.4. General Allegations**

18 EP alleges that Nutritional Medicinals has manufactured, sold, and/or distributed for sale
19 in California, certain products described more specifically below containing lead, a chemical listed
20 by the State of California under Proposition 65, without providing a required Proposition 65
21 warning. Lead shall be referred to hereinafter as the "Listed Chemical."

22 **1.5. Product Description**

23 The Nutritional Medicinal products sold under the "Functional Formularies" name that are
24 the subject of this Consent Judgment are: Liquid Hope (Original and Peptide Formula), Nourish
25 (Original and Peptide Formula), and Keto, which were sold and/or distributed for sale in
26 California by Nutritional Medicinals ("Covered Products").

1
2
3 **1.6. Notice of Violation**

4 On February 21, 2020, EP served Nutritional Medicinals and the requisite public
5 enforcement agencies with a 60-Day Notice of Violation ("Notice") alleging that Nutritional
6 Medicinals violated Proposition 65. The Notice alleged that Nutritional Medicinals failed to warn
7 its customers and consumers in California that the Covered Products contain lead.

8 **1.7. Complaint**

9 On October 8, 2020, Plaintiff, who was and is acting in the interest of the general public in
10 California, filed a complaint ("Complaint" or "Action") in the Superior Court in and for the
11 County of San Francisco against Nutritional Medicinals and Does 1 through 50, alleging
12 violations of Health & Safety Code §25249.6 based on the alleged exposures to lead contained in
13 the Covered Products sold by Nutritional Medicinals.

14 **1.8. No Admission**

15 The Parties enter into this Consent Judgment as a full and final settlement of all claims that
16 were raised or that could have been raised in the Notice, arising out of the facts and/or conduct
17 alleged therein. Nutritional Medicinals denies the material, factual and legal allegations
18 contained in EP's Notice and the Complaint, and maintains that all products, including but not
19 limited to the Covered Products, that it has sold and distributed in California have been and are in
20 compliance with all applicable laws, and are completely safe for their intended use. Nothing in
21 this Consent Judgment shall be construed as an admission by Nutritional Medicinals of any fact,
22 finding, conclusion, issue of law, or violation of law, nor shall compliance with this Consent
23 Judgment constitute or be construed as an admission by Nutritional Medicinals of any fact,
24 finding, conclusion, issue of law, or violation of law, such being specifically denied by
25 Nutritional Medicinals. However, this section shall not diminish or otherwise affect Nutritional
26 Medicinal's obligations, responsibilities, and duties hereunder.
27
28

1
2
3 **1.9. Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that: (1) this Court has
5 jurisdiction over Nutritional Medicinals as to the allegations contained in the Complaint; 2) that
6 venue is proper in the County of San Francisco; and 3) that this Court has jurisdiction to enter and
7 enforce the provisions of this Consent Judgment.

8 **1.10. Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
10 which the Court approves this Consent Judgment, including any unopposed tentative ruling
11 granting approval of this Consent Judgment.

12 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

13 **2.1. Reformulation Standard and Schedule**

14 Commencing 90 days after the Effective Date, Nutritional Medicinals shall not
15 manufacture for consumer sale into the State of California any Covered Product that subsequently
16 exposes a person to a Daily Serving of more than 0.5 micrograms, as calculated in Section 2.3,
17 without providing a warning as set forth in Sections 2.4 and 2.5. A reformulated Covered Product
18 ("Reformulated Product") is one for which the Daily Serving contains no more than 0.5
19 micrograms of lead ("Reformulation Standard").

20 Covered Products that comply with the Reformulation Standard shall not require any
21 warnings. For any Covered Products manufactured 90 days after the Effective Date or later that
22 do not meet the Reformulation Standard, based on the testing requirements set forth in Section 2.2,
23 Nutritional Medicinals shall provide the warning set forth in Section 2.5.

24 As long as Nutritional Medicinals complies and remains in compliance with the
25 requirements of Section 2.1 – 2.5 for each of the Covered Products, the Parties agree that such
26 Reformulated Products shall be deemed to comply with Proposition 65 with respect to lead, and
27 that compliance with this Consent Judgment shall fully and completely satisfy Nutritional
28

1
2
3 Medicinals' obligations under Proposition 65 to provide warnings for such Covered Products with
4 respect to the presence of lead, regardless of when manufactured, distributed or sold. To the
5 extent that Nutritional Medicinals manufactures other similar products in the future, aside from the
6 Covered Products, its compliance with the obligations set forth herein, Sections 2.1-2.5, shall be
7 deemed to comply with Proposition 65 with respect to lead.

8 Covered Products manufactured within 90 days of the Effective Date and/or currently in
9 the channels of distribution may continue to be sold through by Nutritional Medicinals and
10 Releasees. However, as of 90 days from the Effective Date, Nutritional Medicinals and the
11 Releasees, as defined in Section 5.1, may not sell into California newly manufactured Covered
12 Products that are not Reformulated Products or do not contain the warnings set forth in Paragraph
13 2.5.

14 **2.2. Testing and Quality Control Methodology**

15 Nutritional Medicinals shall perform lead testing for at least five (5) consecutive years and
16 at least once per year, on five (5) randomly selected samples of each Covered Product in the form
17 intended for sale to the end user to be distributed into California. Nutritional Medicinals shall
18 maintain the results of such lead testing for at least five (5) consecutive years but is not required to
19 publish such test results. Nutritional Medicinals shall continue testing the raw materials in the
20 Covered Products so long as the Covered Products are distributed into California. All testing
21 pursuant to this Consent Judgment shall be performed using a laboratory method that complies
22 with the performance and quality control factors appropriate for the method used, including limit
23 of detection, qualification, accuracy, and precision that meets the following criteria: Inductively
24 Coupled Plasma-Mass Spectrometry (ICP-MS) utilizing scientifically appropriate adherence to the
25 protocols set forth in the EPA Methods 6020 and 6020a. The laboratory must digest at least 0.5
26 grams of each sample with a level of detection of at least 4 parts per billion. The sample
27 preparation method must use a microwave or heat-assisted acid digestion method.

1
2
3 For purposes of determining whether a warning is required as set forth above, the second
4 highest lead detection result of the five (5) randomly selected samples of the Covered Product will
5 be controlling.

6 **2.3. Daily Serving**

7 A Daily Serving (for purposes of determining Proposition 65 compliance for chemicals
8 present in the Covered Products) shall be defined as one of the following, as applicable: (a) if the
9 Covered Product label includes a recommended number of servings, then the recommended
10 serving size, so long as the recommended serving size is equal to or larger than the serving size set
11 forth on the "Nutritional Facts" or "Supplemental Facts" portion of the label: (b) if the Covered
12 Product label includes a smaller serving size, or no recommended number of servings, then the
13 serving size set forth on the "Nutritional Facts" or "Supplemental Facts" portion of the label; or (c)
14 if the Covered Product label recommends a range of servings in one day, then the amount that is
15 the higher recommended total daily serving.

16 **2.4. Warning Option**

17 Covered Products that do not meet the standard of Reformulated Products set forth in
18 Section 2.1 above shall be accompanied by a warning as described in Section 2.5 below. This
19 warning shall only be required as to Covered Products that Defendant manufactures, sells or ships
20 to consumers, retailers, or distributors located in California after the Effective Date, and not to
21 Covered Products currently in the channels of distribution with distributors and retailers. No
22 Proposition 65 warning for lead shall be required as to any Covered Products that are already in
23 the stream of commerce as of the Effective Date.

24 **2.5. Warning Language**

25 Covered Products manufactured after the Effective Date for sale in California that do not
26 qualify as Reformulated Products shall contain a Proposition 65 warning affixed to the packaging,
27 labeling, or directly on each Covered Product. The warning shall state either:
28

1
2
3 **[California Proposition 65] WARNING:** Consuming this product can
4 expose you to chemicals including lead, which are known to the State
5 of California to cause cancer, and birth defects and other reproductive
6 harm. www.P65Warnings.ca.gov.

7
8 **[California Proposition 65] WARNING:** Cancer and Reproductive
9 Harm - www.P65Warnings.ca.gov.

10 The warning shall be prominently displayed with such conspicuousness as compared with
11 other words, statements, designs, or devices as to render it likely to be read and understood by an
12 ordinary individual under customary conditions before purchase or use. Each warning shall be
13 provided in a manner such that the consumer or user is reasonably likely to understand the
14 Covered Products the warning applies to, so as to minimize the risk of consumer confusion. In the
15 event that the Office of Environmental Health Hazard Assessment promulgates one or more
16 regulations requiring or permitting warning text and/or methods of transmission different than
17 those set forth above, Nutritional Medicinals shall be entitled to use, at its discretion, such other
18 warning text and/or methods of transmission without being deemed in breach of this Consent
19 Judgment, as long as such warning text and methods of transmission comply with OEHHA
20 regulations.

21 **2.6. Internet Sales**

22 For any Covered Products sold by Nutritional Medicinals through the internet, the relevant
23 warnings shall comply with the requirements of 27 Cal. Code Regs. § 25602(b), effective August
24 30, 2018.

25 **3. MONETARY PAYMENTS**

26 **3.1. Payments Pursuant to Health & Safety Code § 25249.7(b)**

27 Nutritional Medicinals shall pay a total civil penalty of \$12,000, to be apportioned in
28 accordance with California Health & Safety Code §§25249.12(c) & (d), with 75% of these funds
remitted to the State of California's Office of Environmental Health Hazard Assessment
("OEHHA") and the remaining 25% of the penalty remitted to EP. Nutritional Medicinals shall

1
2
3 issue two separate checks for the penalty payment: (a) one check made payable to the Kawahito
4 Law Group in Trust for the State of California's Office of Environmental Health Hazard
5 Assessment ("in Trust for OEHHA") in the amount of \$9,000, representing 75% of the total civil
6 penalty; and (b) one check to "Kawahito Law Group in Trust for Center for Advanced Public
7 Awareness, Inc.," in the amount of \$3,000, representing 25% of the total civil penalty. Two
8 separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA,
9 P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to
10 Kawahito Law Group APC, who shall furnish a W2 at least five calendar days before payment is
11 due.

12 The payments shall be delivered to EP's counsel at the following address within ten days
13 of the Effective Date of this Consent Judgment:

14 James Kawahito, Esq.
15 Kawahito Law Group APC
16 222 N. Pacific Coast Hwy., Suite 2222
El Segundo, CA 90245

17 **4. REIMBURSEMENT OF ATTORNEYS' FEES AND COSTS**

18 The Parties acknowledge that EP and its counsel offered to resolve this dispute without
19 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving any fee
20 reimbursement issue to be resolved after the material terms of the Consent Judgment had been
21 settled. The Parties reached an accord on the compensation due to EP and its counsel under
22 general contract principles and the private attorney general doctrine codified at California Code of
23 Civil Procedure (CCP) § 1021.5, for all work performed through the mutual execution of this
24 Consent Judgment. Nutritional Medicinals shall reimburse EP and its counsel in the total amount
25 of \$50,000 for all attorney's fees, investigative and consulting costs, and all other expenses of any
26 kind incurred by EP as a result of investigating, bringing this matter to the attention of Nutritional
27 Medicinals, negotiating this Consent Judgment, drafting the Complaint, and preparing the
28 necessary briefing to obtain Court approval of the Consent Judgment. Nutritional Medicinals shall

1
2
3 make the check payable to "Kawahito Law Group APC" and shall deliver payment within ten days
4 of the Effective Date to:

5 James Kawahito, Esq.
6 Kawahito Law Group APC
7 Attn. EP v. Nutritional Medicinals
222 N. Pacific Coast Hwy., Suite 2222
El Segundo, CA 90245

8 To allow for the issuance of a timely payment pursuant to the above, EP shall provide
9 Nutritional Medicinals with a completed IRS Form W-9 for the Kawahito Law Group APC upon
10 request.

11 **5. RELEASE OF CLAIMS**

12 **5.1. Release of Nutritional Medicinals**

13 This Consent Judgment is a full, final and binding resolution between EP, on behalf of
14 itself and the public interest, and its past and current agents, representatives, attorneys, successors
15 and/or assignees (the "Releasers"), on the one hand, and Nutritional Medicinals, its respective
16 parents, subsidiaries, affiliated entities that are under common ownership, directors, officers,
17 employees, licensors, licensees, and each entity to whom Nutritional Medicinals directly or
18 indirectly distributes or sells the Covered Products, including but not limited to downstream
19 retailers, distributors, wholesalers, customers, marketplace hosts, franchisers, cooperative
20 members, licensors, licensees, and the successors and assigns of any of them ("Releasees"), on the
21 other hand, of any violation of Proposition 65 that was or could have been asserted by EP against
22 Nutritional Medicinals or the Releasees based on the alleged failure to warn about alleged
23 Proposition 65 exposures caused by the Covered Products that were manufactured by Nutritional
24 Medicinals (either directly or through any of the Releasees) as of 90 days after the Effective Date.
25 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
26 by Defendant with respect to the alleged or actual failure to warn about exposures to lead from
27 Covered Products.

1
2
3 **5.2 Nutritional Medicinals Release of EP**

4 Nutritional Medicinals on behalf of itself, its past and current agents, representatives,
5 attorneys, successors, and/or assignees, hereby waives any and all claims against EP, its attorneys
6 and other representatives, for any and all actions taken or statements made (or those that could
7 have been taken or made) by EP and its attorneys and other representatives, whether in the course
8 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
9 respect to the Covered Products.

10 **6. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and
12 shall be null and void if, for any reason, it is not approved and entered by the Court.

13 **7. SEVERABILITY**

14 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
15 Judgment is deemed by a court to be unenforceable, the validity of the remaining provisions shall
16 not be adversely affected.

17 **8. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California and apply within the State of California. In the event that Proposition 65 is repealed,
20 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
21 then Nutritional Medicinals may provide Plaintiff with written notice of any asserted change in the
22 law, and shall have no further obligations pursuant to this Consent Judgment, with respect to, and
23 to the extent that, the Covered Products are so affected.

24 **9. JOINT PREPARATION**

25 The Parties have jointly participated in the preparation of this Consent Judgment and this
26 Consent Judgment is the result of the joint efforts of the Parties. Accordingly, any uncertainty or
27 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
28

1
2
3 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
4 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
5 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
6 this regard, the Parties hereby waive California Civil Code § 1654.

7 **10. ENTIRE AGREEMENT**

8 This Consent Judgment contains the sole and entire agreement and understanding of the
9 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
10 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein.
11 No supplementation, modification, waiver, or termination of this Consent Judgment shall be
12 binding unless executed in writing by the Party to be bound thereby. No waiver of any of the
13 provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
14 other provisions hereof whether or not similar, nor shall such waiver constitute a continuing
15 waiver unless set forth in writing between the Parties.

16 **11. NOTICES**

17 Unless specified herein, all correspondence and notice required to be provided pursuant to
18 this Consent Judgment shall be in writing and, with courtesy copies to counsel delivered by email,
19 sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested;
20 or (c) a recognized overnight courier on any Party by the other at the following addresses:

21 For Nutritional Medicinals: Christopher J. Barrett, Esq.
22 Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
23 211 Commerce Street, Suite 800
24 Nashville, TN 37201
25 T: 615.726.5600
F: 615.726.0464
cbarrett@bakerdonelson.com

26 For EP: EnviroProtect, LLC.
27 3142 W. 59th Pl.
28 Los Angeles, CA 90043

1
2
3 with a copy to:

James K. Kawahito
Kawahito Law Group APC
Attn. EP v. Nutritional Medicinals
222 N. Pacific Coast Hwy., Suite 2222
El Segundo, CA 90245
jkawahito@kawahitolaw.com

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

8 **12. COUNTERPARTS; FACSIMILE SIGNATURES**

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

12 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7**

13 EP and his attorneys agree to comply with the reporting form requirements referenced in
14 California Health and Safety Code Section 25249.7(f).

15 **14. ADDITIONAL POST EXECUTION ACTIVITIES**

16 The Parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
17 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
18 obtaining such approval, EP shall be responsible for preparing the motion to approve the Consent
19 Judgment. Nutritional Medicinals and their respective counsel agree to mutually employ their best
20 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
21 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts
22 shall include at a minimum, cooperating in Plaintiff's drafting and filing of any papers in support
23 of the required motion for judicial approval.

24 **15. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the parties and
26 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion
27 of any party and entry of a modified consent judgment by the Court. The Attorney General shall
28

1
2
3 be served with notice of any proposed modification to this Consent Judgment at least fifteen days
4 in advance of its consideration by the Court. To the extent either party alleges a breach of this
5 Consent Judgment, written notice shall be provided to the party in alleged breach and the Parties
6 shall thereafter meet and confer for at least 30 days to try to informally resolve the dispute before
7 either Party files a motion to enforce.

8 **16. AUTHORIZATION**

9 The undersigned are authorized to stipulate to, enter into, and execute this Consent
10 Judgment on behalf of their respective parties, and have read, understood, and agree to all of the
11 terms and conditions of this Consent Judgment.

12 **AGREED TO:**

AGREED TO:

13 Date: 10/19/20

Date: _____

14
15 By: 
16 EnviroProtect, LLC.

By: _____
Nutritional Medicinals, LLC.

17
18
19
20 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety
21 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered.

22
23 Dated: _____

JUDGE OF THE SUPERIOR COURT

1
2
3 be served with notice of any proposed modification to this Consent Judgment at least fifteen days
4 in advance of its consideration by the Court. To the extent either party alleges a breach of this
5 Consent Judgment, written notice shall be provided to the party in alleged breach and the Parties
6 shall thereafter meet and confer for at least 30 days to try to informally resolve the dispute before
7 either Party files a motion to enforce.

8 **16. AUTHORIZATION**

9 The undersigned are authorized to stipulate to, enter into, and execute this Consent
10 Judgment on behalf of their respective parties, and have read, understood, and agree to all of the
11 terms and conditions of this Consent Judgment.

12 **AGREED TO:**

AGREED TO:

13
14 Date: _____

Date: 10/15/2020

15
16 By: _____
EnviroProtect, LLC.

By: Marc M. Gelsky
Nutritional Medicinals, LLC.
CEO

17
18
19
20 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety
21 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered.
22

23 Dated: _____

24 _____
JUDGE OF THE SUPERIOR COURT
25
26
27
28