

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

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8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SANTA CLARA**
10

11 SAFE PRODUCTS FOR CALIFORNIANS,) No. 19CV343825
12 LLC,)

13 Plaintiff,)

14 vs.)

15 TNT PRO SERIES LLC.; AMAZON.COM,)
16 INC;)

17 Defendants.)
18)

[PROPOSED] CONSENT JUDGMENT

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

19 **1. INTRODUCTION**

20 **1.1 Parties**

21 This Consent Judgment (“Consent Judgment”) is entered into by and between plaintiff
22 Safe Products for Californians, LLC (“SPFC”) and defendant TNT Pro Series LLC (“TNT”).
23 SPFC and TNT are each referred to individually as a “Party” and collectively as the “Parties.”
24 Defendant Amazon.com, Inc. (“Amazon,” and together with TNT, collectively “Defendants”) is
25 an intended third-party beneficiary of this Consent Judgment.

26 **1.2 SPFC**

27 SPFC is a limited liability California company with its principal place of business within
28 the State of California, County of Santa Clara, who seeks to promote awareness of exposures to

[PROPOSED] CONSENT JUDGMENT

1 toxic chemicals, and to improve human health by reducing or eliminating harmful substances
2 contained in consumer and commercial products.

3 **1.3 TNT Pro**

4 TNT Pro employs ten or more employees and is a person in the course of doing business
5 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
6 and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

7 **1.4 General Allegations**

8 SPFC alleges that powdered dietary supplements that Defendants manufacture, import,
9 sell and/or distribute for sale in California cause exposure to lead and lead compounds
10 (hereinafter referred to as “lead”) and that it does so without providing the health hazard warning
11 that SPFC alleges is required by Proposition 65.

12 **1.5 Product Description**

13 The product that is covered by this Consent Judgment is identified as “Mommy Knows
14 Best Lactation Cookie Mix – Oatmeal Chocolate Chip,” UPC# 7-39615-32908-3, that was
15 manufactured, imported, distributed, sold and/or offered for sale by TNT Pro, and/or their
16 customers in the state of California, hereinafter the “Product.”

17 **1.6 Notice of Violation**

18 On or about October 19, 2018, SPFC served Defendants, and certain requisite public
19 enforcement agencies, with a 60-Day Notice of Violation (“Notice”), alleging that Defendants
20 violated Proposition 65 when they failed to warn their customers and consumers in California
21 that the Product exposes users to lead and lead compounds.¹ To the best of the Parties’
22 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set
23 forth in the Notice.

24 **1.7 Complaint**

25 On February 14, 2019, SPFC commenced the instant action against Defendants for the
26 alleged violations of Proposition 65 that are the subject of the Notice.

27
28 ¹ The October 19, 2019 Notice also included an additional product identified as “Mommy Knows Best Lactation
Fruit Drink Mix Blueberry Pomegranate”, UPC#7-39615-32975-5. This product is no longer produced by TNT
and therefore, is not covered by this Consent Judgment.

1 **1.8 No Admission**

2 TNT Pro denies the material, factual, and legal allegations contained in the Notice and
3 Complaint, and maintains that all of the products that it sold or distributed for sale in California,
4 including the Product, have been, and are, in compliance with all laws. Nothing in this Consent
5 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
6 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
7 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
8 law, the same being specifically denied by TNT Pro. This Section shall not, however, diminish
9 or otherwise affect TNT Pro's obligations, responsibilities, and duties under this Consent
10 Judgment.

11 **1.9 Jurisdiction**

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

17 **1.10 Effective Date**

18 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date
19 that the Court grants the motion for approval of this Consent Judgment contemplated by Section

20 **2. INJUNCTIVE RELIEF**

21 **2.1 Product Removal**

22 Commencing ninety (90) days after the Effective Date and continuing thereafter, TNT
23 Pro shall only ship, distribute, sell or offer for sale in California, Reformulated Products pursuant
24 to Section 2.2 or Products that are labeled with a clear and reasonable warning pursuant to
25 Section 2.3. TNT Pro shall have no obligation to label Products that were shipped prior to the
26 Effective Date.

1 **2.1.1** For purposes of this Consent Judgment, the “Daily Lead Exposure Level” shall
2 be measured in micrograms, and shall be calculated using the following formula: micrograms of
3 lead per gram of product, multiplied by grams of product per serving of the product (using the
4 largest serving size appearing on the product label), multiplied by servings of the product per
5 day (using the largest number of recommended daily servings appearing on the product label),
6 which equals micrograms of lead exposure per day. If the label contains no recommended daily
7 servings, then the number of recommended daily servings of the product for purposes of the
8 formula in this Section 2.1.1 shall be calculated as one serving per day.


9 **2.2 Reformulated Products**

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

12 **2.3 Clear and Reasonable Warnings**

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

17 **OPTION 1:**

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

22 OR:

23 **OPTION 2:**

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

25 In connection with providing a cancer warning for lead and lead compounds, TNT Pro
26 shall use the phrase “cancer and” in the warning if TNT Pro has reason to believe that the “Daily
27 Lead Exposure Level” is greater than 15 micrograms of lead as determined pursuant to the
28 quality control methodology set forth in Section 2.4. TNT Pro also may include the reference to

1 cancer if TNT Pro has reason to believe that another Proposition 65 chemical is present which
2 may require a cancer warning.

3 The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed
4 on the Product's packaging or label with such conspicuousness, as compared with other words,
5 statements, or designs as to render it likely to be read and understood by an ordinary individual
6 under customary conditions of purchase or use. If the warning is provided on the label, it must
7 be set off from other surrounding information and enclosed in a box. In addition, for any Product
8 sold over the internet where a California delivery address is indicated, the warning shall be
9 provided either by including the warning on the product display page, by otherwise prominently
10 displaying the warning to the purchaser during the checkout process prior to completing the
11 purchase, or by any other means authorized under Section 25607.1 of Title 27 of the California
12 Code of Regulations. An asterisk or other identifying method must be utilized to identify which
13 products on the checkout page are subject to the warning.

14 In the event TNT Pro provides the warning pursuant to OPTION 2, above, the entire
15 warning must be in a type size no smaller than the largest size used for other consumer
16 information on the product, and in no case shall the warning appear in a type size smaller than
17 6-point type. For all warnings, the word "WARNING" shall be in all capital letters in bold print.
18 Any additional statements in the warning shall comply with Title 27, California Code of
19 Regulations, Section 25601(e).

20 **2.4 Testing and Quality Control Methodology**

21 **2.4.1** Except as provided in Section 2.4.7, beginning within one year of the Effective
22 Date, TNT Pro shall arrange for lead testing of the Product that is manufactured after the
23 Effective Date at least once a year for a minimum of three (3) consecutive years by arranging
24 for testing of randomly selected samples of each Lot of the Product, in the form intended for
25 sale to the end-user, which TNT Pro intends to sell or is manufacturing for sale in California,
26 directly selling to a consumer in California or "Distributing into the State of California." If tests
27 conducted pursuant to this Section demonstrate that no Warning is required for a Product during
28 each of the three (3) consecutive years, then the testing requirements of this Section will no

1 longer be required as to that Product. However, if during or after the three (3)-year testing period,
2 TNT Pro changes ingredient suppliers for any of the Products and/or reformulates the Products,
3 TNT Pro shall test that Product annually for at least two (2) consecutive years after such change
4 is made.

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

7 **2.4.3** All testing pursuant to this Agreement shall be performed using a laboratory
8 method that complies with the performance and quality control factors appropriate for the
9 method used, including limit of detection, qualification, accuracy, and precision that meets the
10 following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS") achieving a
11 limit of quantification of less than or equal to 0.010 mg/kg.

12 **2.4.4** All testing pursuant to this Agreement shall be performed by an independent
13 third-party laboratory certified by the California Environmental Laboratory Accreditation
14 Program or an independent third-party laboratory that is registered with the United States Food
15 & Drug Administration.

16 **2.4.5** Nothing in this Agreement shall limit TNT Pro's ability to conduct, or require
17 that others conduct, additional testing of the Product, including the raw materials used in its
18 manufacture.

19 **2.4.6** Within thirty (30) days of SPFC's written request, TNT Pro shall deliver lab
20 reports obtained pursuant to Section 2.4, and related documentation, to SPFC. TNT Pro shall
21 retain all such lab reports and related documentation for a period of two years from the date of
22 each test. Any request by SPFC for lab reports and related documentation shall be made prior to
23 the expiration of the two-year time period identified in this section 2.4.6.

24 **2.4.7** If TNT Pro conducts a test on a batch of a Product pursuant to Sections 2.4.1 to
25 2.4.4, TNT Pro shall not be required to re-test the same batch during the three (3) or two (2) year
26 testing periods identified in Section 2.4.1.

1 **3. MONETARY SETTLEMENT TERMS**

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

3 Pursuant to Health and Safety Code section 25249.7(b), TNT Pro shall pay civil penalties
4 in the total amount of \$10,000.00. The penalty payment shall be allocated according to Health
5 and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the
6 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
7 25% of the penalty paid to SPFC. SPFC’s counsel shall be responsible for remitting the penalty
8 payment under this Consent Judgment to OEHHA. Within five (5) business days of this Consent
9 Judgment being signed by all Parties, TNT Pro shall deliver a check payable to “Safe Products
10 for Californians, LLC” in the amount of \$2,500.00, and a check payable to OEHHA in the
11 amount of \$7,500.00, to the address listed in Section 3.3 below.

12 **3.2 Reimbursement of Attorneys’ Fees and Costs**

13 For all work performed as a result of investigating, bringing this matter to TNT Pro’s
14 attention and negotiating a settlement in the public interest through the mutual execution of this
15 Consent Judgment and the Court’s approval of the same, but exclusive of fees and costs on
16 appeal, if any, TNT Pro shall reimburse SPFC and its counsel the total amount of \$37,500.00.
17 The Parties negotiated this resolution of the compensation due to SPFC and its counsel under
18 general contract principles and the private attorney general doctrine codified at California Code
19 of Civil Procedure § 1021.5. This payment shall be due within five (5) business days of the date
20 this Consent Judgment is signed by all Parties, and delivered to the address in Section 3.3 in the
21 form of a check payable to “Moore Law Firm, P.C.” The reimbursement shall cover all fees and
22 costs by SPFC investigating, litigating, and negotiating a settlement of the matter in the public
23 interest.

24 **3.3 Payment Procedures**

25 The payments pursuant to Sections 3.1 and 3.2 shall be delivered to the following
26 address:

27 Safe Products for Californians, LLC
28 C/O Moore Law Firm, P.C.
300 South First Street, Suite 342
San Jose, California 95113

1 **4. CLAIMS COVERED AND RELEASED**

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

3 SPFC, acting on its own behalf and in the public interest, releases TNT Pro, and their
4 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
5 and attorneys and the predecessors, successors, or assigns of each of them ("Releasees") and
6 each entity to whom TNT Pro directly or indirectly distributed or sold the Products including,
7 but not limited to, their downstream distributors, Amazon.com, Inc., wholesalers, customers,
8 retailers, franchisers, cooperative members, licensors and licensees ("Downstream Releasees")
9 for any violations arising under Proposition 65 for unwarned exposures TNT Pro prior to the
10 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
11 constitutes compliance with Proposition 65 by TNT Pro with respect to the alleged or actual
12 failure to warn about exposures to lead from Products manufactured, sold or distributed for sale
13 by TNT Pro after the Effective Date.

14 **4.2 SPFC's Individual Release of Claims**

15 SPFC, in its own capacity only and on its own behalf and on behalf of its past and current
16 agents, representatives, attorneys, successors, and/or assignees and *not* in its representative
17 capacity, also provides a release to TNT Pro, Amazon.com, Inc., Releasees, and Downstream
18 Releasees, which shall be effective as a full and final accord and satisfaction, as a bar to all
19 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
20 liabilities and demands of SPFC of any nature, character or kind, whether known or unknown,
21 suspected or unsuspected, arising out of alleged or actual exposures to lead in Products
22 manufactured, imported, distributed or sold by TNT Pro.

23 **4.3 Release of SPFC**

24 TNT Pro, on their own behalf and on behalf of their past and current agents,
25 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
26 SPFC and its attorneys and other representatives, for any and all actions taken or statements
27 made (or those that could have been taken or made) by SPFC and its attorneys and other
28

representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

5. COURT APPROVAL

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

6. SEVERABILITY

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

7. GOVERNING LAW

The terms of this Consent Judgment 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, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then TNT Pro may provide SPFC with written notice of any asserted change in the law, and the Party that provides such notice shall have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve TNT Pro from their obligation to comply with any pertinent state or federal law or regulation.

8. NOTICE

Unless specified herein, all correspondence and notice required by this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or

certified mail, return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the following addresses:

To TNT Pro:

To SPFC:

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

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

9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

10. COMPLIANCE WITH REPORTING REQUIREMENTS

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

11. MODIFICATION

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

12. OTHER TERMS

12.1 No Other Agreements

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

1 this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties.
2 No supplementation, modification, waiver, or termination of this Consent Judgment shall be
3 binding unless executed in writing by the Party to be bound. No waiver of any of the provisions
4 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
5 provisions whether or not similar, nor shall such waiver constitute a continuing waiver. Nothing
6 in this Consent Judgment shall release, or in any way affect any rights that TNT Pro might have
7 against any other party.

8 **12.2 Construction**

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

18 **13. AUTHORIZATION**

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

22 Dated: Nov 23, 2020


KR Moore (Nov 23, 2020 19:07 PST)

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

24 Dated: _____

TNT Pro Series LLC
By: _____(name), _____(title)

27 **IT IS SO ORDERED.**

28 Dated: _____

Judge of the Superior Court

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22 Dated: Nov 23, 2020

23
24 Dated: 12/8/20


KR Moore (Nov 23, 2020 19:07 PST)

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


TNT Pro Series LLC

By: Tn Terry (name), CEO (title)

27 **IT IS SO ORDERED.**

28 Dated: _____

Judge of the Superior Court