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8 Attorneys for Plaintiff,
9 Brad Van Patten

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN DIEGO**

13 BRAD VAN PATTEN, an individual

14 Plaintiff,

15 v.

16 AMAZON.COM, Inc., a Delaware
17 corporation; CAMERONS PRODUCTS,
18 L.L.C., a Connecticut limited liability
19 company; SCS DIRECT, INC., a Connecticut
20 corporation; NEPCO, a business organization,
21 form unknown; DOES 1-10

22 Defendants.

Case No. 37-2020-00026593-CU-MC-CTL

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This settlement and prospective consent judgment (“Settlement”) is
3 entered into by and between Brad Van Patten (“Van Patten”) and Nepco Inc. (“Nepco”). Together,
4 Van Patten and Nepco are collectively referred to as the “Parties.” Van Patten is an individual that
5 resides in the State of California and seeks to promote awareness of exposures to toxic chemicals
6 and to improve human health by reducing or eliminating hazardous substances contained in
7 consumer products. Nepco is a company which employs ten or more persons and distributes
8 products in the United States, including to California.

9 **1.2 General Allegations.** Van Patten alleges that Nepco is a person in the course of
10 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
11 & Safety Code Sections 25249.6 et seq. (“Proposition 65”) and that Wood Dust is listed pursuant to
12 Proposition 65 as a substance known to the State of California to cause cancer. Van Patten alleges
13 that Nepco has therefore exposed individuals to Wood Dust from its sales of Premium Wood
14 Smoking Chips (“Product”) without first providing users and consumers of the product with a clear
15 and reasonable cancer warning as required pursuant to Proposition 65. Nepco denies Van Patten’s
16 allegations and claims and, for a variety of reasons, avers that it is not required to provide such
17 Proposition 65 warnings for the Product they distribute for sale in California.

18 **1.3 Product Description.** The products covered by this Settlement are all Premium
19 Wood Smoking Chips, including, without limitation, all varieties (the “Products”) that have been
20 manufactured, imported, distributed, offered for sale and/or sold in California by Nepco or any of
21 its downstream distributors to whom it sells its products.

22 **1.4 Notice of Violation, Complaint, and Jurisdiction.** On March 25, 2021 Van Patten
23 served Nepco and various public enforcement agencies with a document entitled “Notice of
24 Violation of California Health & Safety Code § 25249.6 et seq.” (the “Notice”). The Notice
25 provided Nepco and such others, including public enforcers, with notice that alleged that Nepco was
26 in violation of California Health & Safety Code § 25249.6 for failing to warn California consumers
27 and customers that use of the Products will expose them to Wood Dust. No public enforcer has
28 ~~diligently prosecuted the allegations set forth in the Notice. On July 16, 2021, based on the Notice~~

1 and the absence of any authorized public prosecutor of Proposition 65 having filed a suit based on
2 the allegations contained therein, Van Patten filed an amended complaint (“Complaint”) in the
3 Superior Court of and for San Diego County (the “Court”) , Case No. 37-2020-00026593-CU-MC-
4 CTL. For purposes of this Settlement, the parties stipulate that this Court has jurisdiction over the
5 allegations of violations contained in the Complaint and personal jurisdiction over Nepco, that venue
6 is proper in the County of San Diego, and that this Court has jurisdiction to enter this Settlement as
7 a consent judgment as a full and final resolution of the claims and allegations contained in the
8 Complaint.

9 **1.5 No Admission.** This Settlement resolves claims that are denied and disputed. The
10 Parties enter into this Settlement as a full and final settlement of any and all claims between the
11 Parties for the purpose of avoiding prolonged litigation. Nothing in this Settlement shall be
12 construed as an admission by Nepco of any fact, finding, issue of law, or violation of law; nor shall
13 compliance with this Settlement constitute or be construed as an admission by Nepco of any fact,
14 finding, conclusion, issue of law or violation of law, such being specifically denied by Nepco.
15 However, this Section 1.5 shall not diminish or otherwise affect Nepco’s obligations,
16 responsibilities and duties under this Settlement.

17 **1.6 Effective Date.** For purposes of this Settlement, the term “Effective Date” shall
18 mean the date this Settlement has been approved by the Court and Van Patten has provided notice
19 to Nepco that it has been entered in the Court’s records as a consent judgment.

20 **2. INJUNCTIVE RELIEF**

21 **2.1 Compliance with Proposition 65 Warning Regulations.** As of the Effective Date, and
22 continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.1 and 2.2
23 must be provided for the Products at issue in this lawsuit that Nepco manufacturers, imports,
24 distributes, sells, or offers for sale in California. There shall be no obligation for such an exposure
25 warning to be provided for Products that entered the stream of commerce prior to the Effective
26 Date. The warning shall consist of either the Warning or Alternative Warning described in §§
27 2.1(a) or (b), respectively:

28 ~~(a) Warning. The “Warning” shall consist of the statement:~~

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⚠WARNING: This product can expose you to Wood Dust, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov;

(b) **Alternative Warning:** Nepco may, but are not required to, use the alternative short-form warning as set forth in this § 2.3(b) (“Alternative Warning”) as follows:

⚠WARNING: Cancer - www.P65Warnings.ca.gov.

2.2 A **Warning or Alternative Warning** provided pursuant to § 2.1 must have the term “**WARNING:**” printed in all capital letters and in bold font. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the label for the Products does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the Products’ packaging or labeling and displayed 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.

2.3 **Compliance with Warning Regulations.** Nepco shall be deemed to be in compliance with this Settlement Agreement by either adhering to §§ 2.1 and 2.2 of this Settlement Agreement or by complying with warning requirements adopted by the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) that are applicable to this product.

2.4. **Alternative to Warning.** For Product not packaged by Nepco but sold in bulk, Nepco may as the manufacturer of the Product, **provide a written notice directly to the authorized agent for a distributor or retail seller** who is subject to Section 25249.6 of the Act, which: (1) States that the product may result in an exposure to one or more listed chemicals; (2) Includes the exact name or description of the product or specific identifying information for the product such as a Universal Product Code or other identifying designation; (3) Includes all necessary warning materials such as labels, labeling, shelf signs or tags, and warning language for products sold on the Internet, that satisfies Section 25249.6 of the Act; (4) Has been sent to the retail seller, and the manufacturer, producer, packager, importer, supplier, or distributor has obtained confirmation—

1 electronically or in writing of receipt of the notice. If the manufacturer, producer, packager,
2 importer, supplier, or distributor of a product is complying with this section by providing a written
3 notice directly to the authorized agent: (1) The notice must be renewed, and receipt of the renewed
4 notice confirmed electronically or in writing by the retail seller's authorized agent within six
5 months during the first year after the effective date of this section, then annually thereafter during
6 the period in which the Product is sold in California by the retail seller.

7 **3. SETTLEMENT PAYMENTS**

8 **3.1 Civil Penalties**

9 In settlement of all the claims referred to in this Settlement, Nepco shall pay \$2,000 as a civil
10 penalty, allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d),
11 with 75% of the penalty to be remitted to the California Office of Environmental Health Hazard
12 Assessment ("OEHHA") and the remaining 25% of the Penalty remitted to Van Patten no later than
13 ten (10) business days following the Effective Date. More specifically, Nepcos shall issue two
14 separate checks for the civil penalty payment to (a) "Office of Environmental Health Hazard
15 Assessment" in the amount of \$1,500 (75%); and to (b) "Law Offices of George Rikos in Trust for
16 Brad Van Patten" in the amount of \$500 (25%). These Payments shall be delivered as follows:

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18 (i) The penalty payment owed to Van Patten shall be delivered to the following
19 address:

20
21 George Rikos
22 Law Offices of George Rikos
23 555 West Beech, Suite 500
24 San Diego, CA 92101

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26 (ii) The penalty payment owed to OEHHA (EIN: 68-0284486) shall be delivered
27 directly to OEHHA (Memo Line "Prop 65 Penalties") at the following address:

28 Mike Gyurics
Fiscal Operations Branch Chief

1 Office of Environmental Health Hazard Assessment
2 Attn. Prop 65 Penalties – Van Patten v. Nepco Settlement
3 1001 I Street
4 Sacramento, CA 95814

5 Nepco shall provide Van Patten’s counsel with a copy of the check it sends to OEHHA with its
6 penalty payment to Van Patten. Late payments by Nepco shall be subject to additional penalties of
7 \$100/day to be allocated between OEHHA and Van Patten in the same ratio as set forth above. Van
8 Patten’s counsel shall provide Nepco with an IRS W-9 form for its firm and trust account for Van
9 Patten within three (3) days of the Effective Date and Nepco’s payment deadlines under this
10 Agreement shall be tolled pending its receipt of the W-9 form. In association with the issuance of
11 the payments under this Settlement, Nepco will issue IRS 1099 forms as appropriate given the
12 payees.

13 **3.2 Attorneys’ Fees and Litigation Costs**

14 Nepco shall reimburse Van Patten’s counsel \$28,000 for fees and costs incurred as a result
15 of investigating and bringing this matter to Nepcos’ attention, negotiating a settlement in the
16 public interest, and obtaining the Court’s approval of the Settlement and its entry as a consent
17 judgment. Nepco has agreed to pay the \$28,000 for fees and costs in three installments. All three
18 installment payments shall be made payable to “Law Offices of George Rikos” and deliver it to
19 the address identified in Section 3.1. The first installment payment shall be issued by Nepco for
20 \$10,000 within 10 days of the Court approving this Consent Judgment. Nepco shall issue a
21 second payment of \$10,000 within 30 days of the Court approving this Consent Judgment.
22 Nepco shall issue a third and final payment of \$8,000 within 45 days of the Court approving this
23 Consent Judgment.

24 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

25 **4.1 Release of Nepco and Downstream Customers and Entities Except for SCS Direct, Inc., 26 Camerons Products, LLC, and Amazon.com, Inc.**

27 . This Settlement is a full, final and binding resolution between Van Patten, acting on her
28 own behalf and in the public interest, and Nepco, of any violation of Proposition 65 that was or
could have been asserted by Van Patten or on behalf of his past and current agents, representatives,
attorneys, successors, and/or assigns (“Releasers”) for failure to provide warnings for alleged

1 exposures to Wood Dust contained in the Products, and Releasors hereby release any such claims
2 against Nepco and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors,
3 officers, agents, employees, attorneys, successors and assignees, and each entity to whom Nepco
4 directly or indirectly distributes or sells the Products, including but not limited to, downstream
5 distributors, wholesalers, customers, retailers, and its respective subsidiaries, affiliates and parents,
6 franchisees, cooperative members and licensees (collectively, the “Releasees”), from all claims for
7 violations of Proposition 65 through the Effective Date based on their failure to warn of alleged
8 exposure to the substance Wood Dust from use of the Products.

9 In further consideration of the promises and agreements herein contained, and for the
10 payments to be made pursuant to Section 3 above, Van Patten, on behalf of himself, his past and
11 current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue
12 and waives any right to institute, participate in, directly or indirectly, any form of legal action and
13 releases all claims that he may have, including without limitation, all actions and causes of action
14 in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert
15 fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the
16 Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
17 limited to and arising out of the alleged or actual exposure to substances contained in Nepco’s
18 Products. **This release explicitly does not release any of the other named defendants in this**
19 **case, including but not limited to, SCS Direct, Inc., Camerons Products, LLC, and**
20 **Amazon.com, Inc. Nothing contained herein shall be construed as a release of any other**
21 **Defendant named in the Complaint, including, but not limited to, SCS Direct, Inc., Camerons**
22 **Products, LLC, and Amazon.com, Inc.**

23 **4.2 Nepco’s Release of Van Patten.** Nepco, on behalf of themselves, their past and
24 current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all
25 claims against Van Patten, his attorneys and other representatives, for any and all actions taken or
26 statements made by Van Patten and/or his attorneys and other representatives, whether in the course
27 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter.

28 ~~**4.3 California Civil Code Section 1542.** It is possible that other claims not known to~~

1 the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or
2 be discovered. Van Patten on behalf of himself only, on one hand, and Nepcos, on the other hand,
3 acknowledge that this Agreement is expressly intended to cover and include all such claims up
4 through the Effective Date, including all rights of action therefor. The Parties acknowledge that the
5 claims released in Sections 4.1 and 4.2, above, may include unknown claims, and nevertheless waive
6 California Civil Code Section 1542 as to any such unknown claims. California Civil Code Section
7 1542 reads as follows:

8 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE**
9 **CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT**
10 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING**
11 **THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD**
12 **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
13 **THE DEBTOR OR RELEASED PARTY.**

14 Van Patten and Nepco each acknowledge and understand the significance and consequences of this
15 specific waiver of California Civil Code Section 1542. **Nothing contained herein shall be**
16 **construed as a release of any other Defendant named in the Complaint, including, but not**
17 **limited to, SCS Direct, Inc., Camerons Products, LLC, and Amazon.com, Inc.**

18 **4.4 Deemed Compliance with Proposition 65.** Compliance by Nepco with this
19 Settlement following the Effective Date constitutes compliance with Proposition 65 with respect to
20 exposure to WOOD DUST from the Products. Products distributed by Nepco prior to the Effective
21 Date may be sold through as previously manufactured and labeled.

22 **5. ENTRY OF CONSENT JUDGMENT**

23 The Parties hereby request that the Court promptly enter this Settlement as a
24 consent judgment based on the motion for its approval Van Patten will be making pursuant
25 to Section 10 below. Upon entry of the Settlement as consent judgment, Van Patten and
26 Nepcos waive their respective rights to a hearing or trial on the allegations contained in the
27 Complaint.

28

1 **6. SEVERABILITY**

2 If, subsequent to the execution of this Settlement, any of the provisions of this Settlement
3 are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall
4 not be adversely affected but only to the extent the deletion of the provision deemed unenforceable
5 does not materially affect, or otherwise result in the effect of the Settlement being contrary to the
6 intent of the Parties in entering into this Settlement.

7 **7. GOVERNING LAW/ENFORCEMENT**

8 The terms of this Settlement shall be governed by the law of the State of California and apply
9 within the State of California. The rights to enforce the terms of this Settlement are exclusively
10 conferred on the Parties hereto and this Court shall retain jurisdiction over any enforcement actions
11 , including but not limited to, any failure by Nepco to make the payments identified above. Any
12 Party may, after providing sixty (60) days written notice and meeting and conferring within a
13 reasonable time thereafter to attempt to resolve any issues, by motion or application for an order to
14 show cause before this Court, enforce the terms and conditions contained in this Settlement. In the
15 event that Proposition 65 is repealed or is otherwise rendered inapplicable or limited by reason of
16 law generally, due to federal preemption or the First Amendment commercial speech rights of the
17 U.S. Constitution, or as to the Products, Nepcos shall provide written notice to Van Patten of any
18 asserted change in the law, and shall have no further obligations pursuant to this Settlement
19 Agreement with respect to, and to the extent that, a Product is so affected.

20 **8. NOTICES**

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

25
26
27 For Nepco:

28 Jeffrey F. Allen, Esq.
Bond, Schoeneck & King

1 350 Linden Oaks, Third Floor
2 Rochester New York, 14625
3 Attorneys for Nepco

4 For Van Patten:

5 George Rikos, Esq.
6 Law Offices of George Rikos
7 555 West Beech Street, Suite 500
8 San Diego, CA 92101

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

11 **9. COUNTERPARTS: SIGNATURES**

12 This Settlement may be executed in counterparts and by facsimile or .pdf signature, each of
13 which shall be deemed an original, and all of which, when taken together, shall constitute one and
14 the same document.

15 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

16 Van Patten agrees to comply with the reporting requirements referenced in Health & Safety
17 Code Section 25249.7(f) and to seek, by formal and properly noticed motion (including with service
18 to the Office of the California Attorney General being fully effectuated at least 45 days prior to a
19 requested hearing thereon), approval of this Settlement's terms pursuant to Proposition 65 and its
20 associated entry as a consent judgment by the Court.

21 **11. MODIFICATION**

22 This Settlement may be modified only by a written agreement of the Parties and the approval
23 of the Court or upon a duly noticed motion of either Party for good cause shown. A showing of
24 technical infeasibility or commercial unreasonableness in meeting the requirements of Section 2
25 with respect to the Products shall be deemed to constitute good cause for a modification to substitute
26 an alternative no significant risk level on the basis of 27 Cal. Code Regs. § 25703(b) in place of the
27 cancer risk level and presumptive part per billion average concentration threshold set forth in
28 Sections 2.1 and 2.2, and such a modification shall not be opposed by Van Patten. Any proposed
modification shall be sent to the Office of the California Attorney General in advance of its

1 submission to the Court such that the Attorney General has a reasonable opportunity to review and
2 comment thereon.

3 **12. ENTIRE AGREEMENT**

4 This Settlement contains the sole and entire agreement of the Parties and any and all prior
5 negotiations and understandings related hereto shall be deemed to have been merged within it. No
6 representations or terms of agreement other than those contained herein exist or have been made by
7 any Party with respect to the other Party or the subject matter hereof. This Settlement shall have no
8 effect if it is not approved by the Court and entered as a consent judgment.

9 **13. AUTHORIZATION**

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

12
13 **AGREED TO:**
6/27/2022
Date: _____
DocuSigned by:
14 Brad Van Patten
By: _____
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15 Brad Van Patten

AGREED TO:
Date: 6/27/2022
By: [Signature]
Nepco

17 **IT IS SO ORDERED, ADJUDGED AND DECREED THAT THE SETTLEMENT SET**
18 **FORTH ABOVE SHALL PROMPTLY BE ENTERED AS A CONSENT JUDGMENT BY**
19 **THIS COURT:**

20 DATED: _____

JUDGE OF THE SUPERIOR COURT