

ENTORNO LAW, LLP

Noam Glick (SBN 251582)

Jake W. Schulte (SBN 293777)

Craig M. Nicholas (SBN 178444)

Janani Natarajan (SBN 346770)

225 Broadway, Suite 1900

San Diego, California 92101

Tel: (619) 629-0527

Email: noam@entornolaw.com

Email: jake@entornolaw.com

Email: craig@entornolaw.com

Email: janani@entornolaw.com

Attorneys for Plaintiff

Environmental Health Advocates, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ENVIRONMENTAL HEALTH
ADVOCATES, INC.,

Plaintiff,

v.

PATAGONIA PROVISIONS, INC., a
California corporation, and DOES 1 through
100, inclusive,

Defendants.

Case No.: 23CV028844

**[PROPOSED] AMENDED CONSENT
JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Environmental Health Advocates, Inc.,
4 (“EHA” or “Plaintiff”) and Patagonia Provisions, Inc. (“Defendant” or “Patagonia”), with EHA and
5 Patagonia each individually referred to as a “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 EHA is a corporation organized in the state of California, acting in the interest of the general
8 public. It seeks to promote awareness of exposures to toxic chemicals and to improve human health by
9 reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Patagonia employs ten or more individuals and is a “person in the course of doing business” for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 section 25249.6 et seq. (“Proposition 65”).

14 **1.4 General Allegations**

15 EHA alleges that Patagonia manufactures, imports, sells, and distributes for sale anchovies that
16 contains lead and cadmium. EHA further alleges that Patagonia does so without providing a sufficient
17 health hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition
18 65, lead and cadmium are listed as a chemicals known to cause cancer, birth defects and other
19 reproductive harm.

20 **1.5 Notices of Violation**

21 On or around October 21, 2022, EHA served Defendant Patagonia Provisions, Inc., nonparty
22 myPanier Inc, the California Attorney General, and all other required public enforcement agencies with
23 a 60-Day Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that Patagonia had
24 violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards
25 associated with exposures to lead and cadmium contained in anchovies, including but not limited to
26 Lemon Olive Spanish White Anchovies.

27 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
28 violations alleged in the Notice.

1 **1.6 Product Description**

2 The products covered by this Consent Judgment are anchovies, including but not limited to
3 Lemon Olive Spanish White Anchovies and all other anchovy products manufactured or processed by
4 Patagonia, that allegedly contain lead and cadmium and are imported, sold, shipped, delivered, or
5 distributed for sale to consumers in California by Releasees (as defined in section 4.1) (“Covered
6 Products”).

7 **1.7 No Admission**

8 Patagonia denies the material factual and legal allegations of the Notice and Complaint and
9 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
10 California, including Covered Products, have been, and are, in compliance with all laws. Nothing in
11 this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue
12 of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect Patagonia’s obligations, responsibilities, and duties under
15 this Consent Judgment.

16 **1.8 Jurisdiction**

17 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
18 Court has jurisdiction over Patagonia as to the allegations in the Complaint, that venue is proper in the
19 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1..09 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
23 Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

24 **1.10 Compliance Date**

25 For purposes of this Consent Judgment, “Compliance Date” refers to the date that is sixty (60)
26 days after the Effective Date.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Covered Products**

3 Beginning on the Compliance Date, Patagonia shall be permanently enjoined from
4 manufacturing, distributing, or directly selling in the State of California, any Covered Product that
5 expose a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead based on a
6 single serving per day unless such Covered Products comply with the warning requirements of Section
7 2.2. The “Daily Lead Exposure Level” shall be calculated by multiplying the recommended serving
8 size in Covered Product by the concentration of lead in Covered Products. As used in this Section 2,
9 “distributing for sale in the State of California” means to directly ship Covered Products into California
10 or to sell Covered Products to a distributor Patagonia knows will sell Covered Products in California.

11 Also on the Compliance Date, Patagonia shall be permanently enjoined from manufacturing,
12 distributing, or directly selling in the State of California, any Covered Product that exposes a person to
13 a “Daily Cadmium Exposure Level” of more than 4.1 micrograms of cadmium based on a single serving
14 per day unless such Covered Products comply with the warning requirements of Section 2.2. The
15 “Daily Cadmium Exposure Level” shall be calculated by multiplying the recommended serving size in
16 Covered Product by the concentration of cadmium in Covered Products. As used in this Section 2,
17 “distributing for sale in the State of California” means to directly ship Covered Products into California
18 or to sell Covered Products to a distributor Patagonia knows will sell Covered Products in California

19 **2.2 Clear and Reasonable Warnings**

20 As of the Compliance Date, and continuing thereafter, if the Daily Lead Exposure Level in the
21 Product is more than 0.5 micrograms of lead, and/or the Daily Cadmium Exposure Level in the Product
22 is more than 4.1 micrograms of cadmium, a clear and reasonable Proposition 65 warning as set forth
23 below must be provided for the Product that Patagonia sells in California.

24 If required, Patagonia shall provide one of the following warning statements:

- 25 1) **WARNING:** Consuming this product can expose you to
26 chemicals including lead, which are known to the State of
27 California to cause cancer and birth defects or other
28 reproductive harm. For more information go to
 www.P65Warnings.ca.gov/food.

2) **WARNING:** Cancer and Reproductive Harm –
www.P65Warnings.ca.gov/food.

This warning statement shall be prominently displayed on the Covered Products, on the packing of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is 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 prior to sale. If the warning statement is displayed on the Covered Products' packaging, it must be in a type size no smaller than the largest type size used for other consumer information on the product. In no case shall a warning statement displayed on the Covered Products' packaging appear in a type size smaller than 6-point type. The same warning shall be posted on any websites under the exclusive control of Patagonia where Covered Products are sold into California. Patagonia shall instruct any third-party website to which it sells its Covered Products to include the same warning as a condition of selling the Covered Products.

The warning shall be provided to California consumers in a manner that complies with 27 C.C.R. § 25607.1(b). Specifically, for internet purchases, a warning must also be provided by including either the warning or a clearly marked hyperlink using the word "**WARNING**" on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase.

2.3 Sell-Through Period

Notwithstanding anything else in this Consent Judgment, the Covered Products that are manufactured on or prior to the Compliance Date shall be subject to release of liability pursuant to this Consent Judgment, without regard to when such Covered Products were, or are in the future, distributed or sold to customers. As a result, the obligation of Patagonia, or any Releasees (if applicable), do not apply to these Covered Products manufactured on or prior to the Compliance Date.

3. MONETARY SETTLEMENT TERMS

3.1 Settlement Amount

Patagonia shall pay fifty thousand dollars (\$50,000) in settlement and total satisfaction of all the claims referred to in the Notice, and this Consent Judgment. This includes civil penalties in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety Code section 25249.7(b) and

attorneys' fees and costs in the amount forty-five thousand dollars (\$45,000) pursuant to Code of Civil Procedure section 1021.5.

3.2 Civil Penalty

The portion of the settlement attributable to civil penalties shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty paid to EHA individually.

All payments owed to EHA shall be delivered to the following address:

Environmental Health Advocates
225 Broadway, Suite 2100
San Diego, CA 92101

All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Federal Express 2-Day Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

Patagonia agrees to provide EHA's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to EHA.

Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required. Relevant information is set out below:

- "Environmental Health Advocates, Inc." (EIN: 84-2322975) at the address provided above.
- "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

The foregoing payments shall be made within 14 days of the Effective Date.

3.3 Attorney's Fees and Costs

The portion of the settlement attributable to attorneys' fees and costs shall be paid to EHA's counsel, who are entitled to attorneys' fees and costs incurred by it in this action, including but not limited to investigating potential violations, bringing this matter to Patagonia's attention, as well as litigating and negotiating a settlement in the public interest.

Patagonia's payment shall be delivered in the form of one check for forty-five thousand dollars (\$45,000.00) payable to "Entorno Law, LLP" within fourteen (14) days of the Effective Date.

All payments will be sent to the following address:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 2100
San Diego, CA 92101

4. CLAIMS COVERED AND RELEASED

4.1 EHA's Public Release of Proposition 65 Claims

Plaintiff acting on its own behalf and in the public interest releases Patagonia, and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns, each entity to whom Defendant directly or indirectly distributes, ships, or sells the Covered Products including but not limited to downstream distributors, wholesalers, customers, and retailers (including but not limited to myPanier Inc.), franchisees, franchisors, cooperative members, suppliers, licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to as the "Releasees") from all claims for violations of Proposition 65 up through the Compliance Date based on alleged exposures to lead and cadmium from Covered Products as set forth in the Notice(s). Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to lead and cadmium from Covered Products as set forth in the Notice(s). This Consent Judgment is a full, final, and binding resolution of all claims under Proposition 65 that were or could have been asserted against Patagonia and/or Releasees for failure to provide warnings required under Proposition 65 for alleged exposure to lead and cadmium through reasonably foreseeable use of

1 the Covered Products. This release does not extend to any third-party retailers selling the product on a
2 website who, after receiving instruction from Patagonia to include a warning as set forth above in
3 section 2.2, do not include such a warning.

4 **4.2 EHA's Individual Release of Claims**

5 EHA, in its individual capacity, also provides a release to Patagonia and/or Releasees, which
6 shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action,
7 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every
8 nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of
9 alleged or actual exposures to lead and cadmium in Covered Products manufactured, imported, sold,
10 or distributed by Patagonia before the Compliance Date.

11 **4.3 Patagonia's Release of EHA**

12 Patagonia on its own behalf, and on behalf of Releasees as well as its past and current agents,
13 representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA
14 and its attorneys and other representatives, for any and all actions taken or statements made by EHA
15 and its attorneys and other representatives, whether in the course of investigating claims, otherwise
16 seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered Products.

17 **4.4 California Civil Code Section 1542**

18 It is possible that other claims not known to the Parties arising out of the facts alleged in the
19 Notice and Complaint and relating to the Covered Products will develop or be discovered. EHA on
20 behalf of itself only, on one hand, and Patagonia on behalf of itself only, on the other hand,
21 acknowledge that this Settlement Agreement is expressly intended to cover and include all such
22 claims up through and including the Compliance Date, including all rights of action therefore. EHA
23 and Patagonia acknowledge that the claims released in Sections 4.1 through 4.3 may include unknown
24 claims, and nevertheless waive California Civil Code section 1542 and any federal or state law of
25 similar effect as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

1 EHA, on behalf of itself only, and Patagonia, on behalf of itself only, acknowledge and
2 understand the significance and consequences of this specific waiver of California Civil Code Section
3 1542.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved by the Court and shall be null and
6 void if it is not approved by the Court within one year after it has been fully executed by the Parties, or
7 by such additional time as the Parties may agree to in writing.

8 **6. SEVERABILITY**

9 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held
10 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the state of California as
13 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
14 rendered inapplicable for reasons, including but not limited to changes in the law, then Patagonia may
15 provide written notice to EHA of any asserted change, and shall have no further injunctive obligations
16 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so
17 affected.

18 In the event the California Office of Health Hazard Assessment adopts a regulation or safe use
19 determination, or issues an interpretive guideline that exempts Covered Products from meeting the
20 requirements of Proposition 65; or if lead or cadmium cases are permanently enjoined by a court of
21 competent jurisdiction; or if Proposition 65 is determined by a court of competent jurisdiction to be
22 preempted by federal law or a burden on First Amendment rights with respect to lead and cadmium in
23 Covered Products or Covered Products substantially similar to Covered Products, then Patagonia shall
24 be relieved of its obligation to comply with Section 2 herein.

25 **8. ENFORCEMENT**

26 In any action to enforce the terms of this Consent Judgment, the prevailing party shall be entitled
27 to its reasonable attorneys' fees and costs.
28

9. NOTICE

Unless otherwise 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 the following addresses:

If to Patagonia:

David Barnes
Arnold & Porter
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024

Patagonia Legal Department
259 W. Santa Clara Street
Ventura, CA 93001

If to EHA:

Noam Glick
Entorno Law, LLP
225 Broadway, Suite 2100
San Diego, CA 92101

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

10. COUNTERPARTS; DIGITAL SIGNATURES

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

11. POST EXECUTION ACTIVITIES

EHA agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, including those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval, responding to any objection that any third-party may make, and appearing at the hearing before the Court if so requested.

12. MODIFICATION

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

13. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

If a dispute arises with respect to either Party's compliance with the terms of this Consent Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute beforehand.

15. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter herein, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any Party. No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

AGREED TO:**AGREED TO:**Date: 2/16/2023Date: 2/17/2023By: ENVIRONMENTAL HEALTH
ADVOCATES, INC.By: 

PATAGONIA PROVISIONS, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT