

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Audrey Kallander (“Kallander”) and Zest Garden Limited (“Zest Garden”), with Kallander and Zest Garden each individually referred to as a “Party” and collectively as the “Parties.” Kallander is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Kallander alleges that Zest Garden is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Kallander alleges that Zest Garden manufactures, sells, and/or distributes for sale in California, plant misters containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Kallander alleges that Zest Garden failed to provide a Proposition 65 warning for exposures to lead.

### 1.3 Product Description

The products covered by this Settlement Agreement are specifically defined as, and limited to, the *Zest Garden Plant Mister, UPC: 1 922340 100488* (hereinafter referred to as the “Products”).

### 1.4 Notices of Violation

On December 13, 2022, Kallander served 1616 Holdings, Inc., Five Below, Inc., and the requisite public enforcement agencies with a 60-Day Notice of Violation, alleging that the notice recipients violated Proposition 65 by failing to warn their customers and consumers in California of the health hazards associated with exposures to

lead from the Products. Zest Garden was subsequently identified as the manufacturer/supplier of the Products.

On March 10, 2023, Kallander served Zest Garden and the requisite public enforcement agencies with a 60-Day Notice of Violation, alleging that the notice recipients violated Proposition 65 by failing to warn their customers and consumers in California of the health hazards associated with exposures to lead from the Products. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

### **1.5 No Admission**

Zest Garden denies the material, factual, and legal allegations contained in the Notices and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Zest Garden of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Zest Garden of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Zest Garden. This Section shall not, however, diminish or otherwise affect Zest Garden's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean May 12, 2023.

## **2. INJUNCTIVE RELIEF: REFORMULATION/WARNINGS**

### **2.1 Reformulation Standards**

"Reformulated Products" are defined as those Products that: (a) contain no more than 90 parts per million ("ppm") lead in any accessible component of the Products when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3050B or equivalent methodologies utilized by federal or state agencies for the purpose


of determining lead content in a solid substance; and (b) yield no more than 1.0 microgram of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol.

## **2.2 Reformulation/Warning Commitment**


As of the Effective Date, Zest Garden shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 or contain appropriate health hazard warnings pursuant to Section 2.3 below. The Parties agree and intend that compliance with the terms of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to exposures to Lead from the Products.

## **2.3 Product Warnings**

As of the Effective Date, all Products Zest Garden sells and/or distributes for sale in California that do not qualify as Reformulated Products, shall bear a clear and reasonable warning pursuant to this Section. Zest Garden further agrees that the warning shall be prominently placed with such conspicuousness when compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed directly to the product or product packaging, label, or tag, for Products sold in California, and contain one of the following statements:

 **WARNING:** [Cancer and] Reproductive Harm-  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

OR

 **WARNING:** This product can expose you to chemicals, including lead, which are known to the State of California to cause [cancer and] birth defects and other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

The above warning statements shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the

label is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING.”

If Office of Environmental Health Hazard Assessment regulations require or permit additional specific safe harbor warning text and/or methods of transmission different than those set forth above, Garden House shall be entitled to use, at its discretion, such other specific safe harbor warning text and/or methods of transmission without being deemed in breach of this Settlement Agreement.

#### **2.4 Internet Warnings**

In the event that Zest Garden sells Products via its own proprietary internet website to customers located in California, the warning requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; (c) on one or more web pages displayed to a California purchaser prior to completion of the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code section 25249.7(b)(2), and as consideration for the releases contained in Sections 4.1 and 4.2 below, Zest Garden agrees to pay \$1,600 in civil penalties within five (5) days of the Effective Date. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the

penalty amount paid to Kallander. Zest Garden shall make its payment in two checks, delivered to the address in section 3.3, as follows: (1) “OEHHA” in the amount of \$1,200; and (2) “Audrey Kallander” in the amount of \$400.

### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Kallander and her counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to her counsel, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been reached, Zest Garden expressed a desire to resolve Kallander’s fees and costs. The Parties reached an accord on the compensation due to Kallander’s counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within five (5) days of the Effective Date, Zest Garden agrees to pay \$15,400, in the form of a check made payable to “Voorhees & Bailey, LLP,” for all fees and costs incurred investigating, bringing this matter to the attention of Zest Garden’s management, and negotiating a settlement in the public interest.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to the following address:

Voorhees & Bailey, LLP  
990 Amarillo Avenue  
Palo Alto, CA 94303

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Kallander’s Release of Proposition 65 Claims**

Kallander acting on her own behalf, and not on behalf of the public, releases Zest Garden, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Zest Garden directly or indirectly distributes or sells the Products, including, but not limited, to downstream distributors,

wholesalers, customers, retailers, franchisees, cooperative members, importers, and licensees (collectively, “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to lead in the Products regardless of the date any other Releasee distributes the Products.. The Parties understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Zest Garden. In this regard, Kallander hereby acknowledges that he is familiar with and hereby waives Section 1542 of the California Civil Code, which provides as follows:

**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR 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.**

#### **4.2 Kallander’s Individual Release of Claims**

Kallander, in her individual capacity only and not in her representative capacity, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, fines, penalties, losses, claims, liabilities, and demands of Kallander of any nature, character, or kind, whether known or unknown, suspected or unsuspected, including but not limited to all failure to warn claims, arising out of alleged or actual exposures to lead in the Products manufactured, imported, distributed, or sold by Zest Garden prior to the Effective Date. The Parties understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to Zest Garden. Nothing in this Section affects

Kallander's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Zest Garden's Products.

#### **4.3 Zest Garden's Release of Kallander**

Zest Garden, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Kallander and her attorneys and other representatives, for any and all actions taken or statements made by Kallander and her attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **4.4 Public Benefit.**

It is the Parties' understanding that the commitments Garden House has agreed to herein, and actions to be taken by Zest Garden under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of the Parties that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Zest Garden's or Releasees' failure to provide a warning concerning exposure to lead prior to use of the Products Zest Garden has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that Zest Garden is in material compliance with this Settlement Agreement.

#### **5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement 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 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Zest Garden may provide written notice to Kallander of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

**For Zest Garden:**

Ryan S. Landis  
Gorden Rees Scully Mansukhani  
5 Park Plaza, Suite 1100  
Irvine, CA 92614

**For Kallander:**

Audrey Kallander  
c/o Voorhees & Bailey, LLP  
Proposition 65 Coordinator  
535 Ramona St.; Suite 5  
Palo Alto, CA 94301

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

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement 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.

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

Kallander and her attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).



**10. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**11. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: May 10, 2023

Date: \_\_\_\_\_

By:  \_\_\_\_\_  
Audrey Kallander

By: \_\_\_\_\_  
Zest Garden Limited

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The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.


**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 5/12/23

By: \_\_\_\_\_  
Audrey Kallander

By:  TIM JUANI  
Zest Garden Limited