

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 The Parties**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Safe Products for Californians LLC (“SPFC”) and Giant Sports International Limited Liability Company (“Giant Sports”) with SPFC and Giant Sports International Limited Liability Company collectively referred to as the “Parties.” SPFC is a limited liability California company with its principal place of business within the State of California, County of Santa Clara, who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. SPFC alleges, and, for purposes of this settlement only, Giant Sports International Limited Liability Company does not dispute, that Giant Sports International Limited Liability Company employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code sections 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

SPFC alleges that Giant Sports International Limited Liability Company manufactures, imports, sells and/or distributes for sale in California products containing cadmium and/or lead and lead compounds, and that it does so without providing the health hazard warning that SPFC alleges is required by Proposition 65. Cadmium, lead and lead compounds are listed pursuant to Proposition 65 as chemicals known to the state of California to cause reproductive toxicity and cancer.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are identified in SPFC’s Notice of Violation as Powdered Cocoa Dietary Supplements, consisting of: “Keto Cocoa - Natural MCT Hot Cocoa,” UPC# 0-711583-543074, ASIN B075FW7RH2; that are manufactured,

imported, distributed, sold and/or offered for sale by Giant Sports International Limited Liability Company and/or its customers in the state of California, hereinafter the “Covered Products.”

#### **1.4 Notice of Violation**

On or about November 15, 2018, SPFC served Giant Sports International Limited Liability Company, and certain requisite public enforcement agencies, with a 60-Day Notice of Violation (“Notice”), alleging that Giant Sports International Limited Liability Company violated Proposition 65 when it failed to warn its customers and consumers in California that the Covered Products expose users to cadmium and lead and lead compounds. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

#### **1.5 No Admission**

Giant Sports International Limited Liability Company denies the material, factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that it has manufactured, imported, sold and/or distributed for sale in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Giant Sports International Limited Liability Company of any fact, finding, and issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Giant Sports International Limited Liability Company of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Giant Sports International Limited Liability Company. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean one year from the date on which this document has been signed by all Parties.

## **2. INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

### **2.1 Product Removal**

As of the Effective Date, Giant Sports International Limited Liability Company shall be permanently enjoined from manufacturing for sale in the State of California, “Distributing into the State of California,” or directly selling in the State of California, any Covered Products manufactured after the Effective Date which expose a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day and/or “Daily Cadmium Exposure Level” of more than 4.1 micrograms per day, unless it meets the warning requirements under section 2.3.

**2.1.1** As used in this Settlement Agreement, the term “Distributing into the State of California” shall mean to directly ship a Covered Product into California for sale in California or to sell a Covered Product to a distributor Giant Sports International Limited Liability Company knows or has reason to know will sell the Covered Products in California.

**2.1.2** For purposes of this Settlement Agreement, the “Daily Lead Exposure Level” shall be measured in micrograms, and shall be calculated using the following formula: micrograms of lead per gram of product, multiplied by grams of product per serving of the product (using the largest serving size appearing on the product label), multiplied by servings of the product per day (using the largest number of recommended daily servings appearing on the label), which equals micrograms of lead exposure per day. If the label contains no recommended daily servings, then the number of recommended daily shall be one.

**2.1.3** For purposes of this Settlement Agreement, the “Daily Cadmium Exposure Level” shall be measured in micrograms, and shall be calculated using the following formula: micrograms of cadmium per gram of product, multiplied by grams of product per serving of the product (using the largest serving size appearing on the product label), multiplied by servings of the product per day (using the largest number of recommended daily servings appearing on the label), which equals micrograms of cadmium exposure per day. If the label contains no recommended daily servings, then the number of recommended daily shall be one.

## **2.2 Reformulated Covered Products**

Reformulated Covered Products are Covered Products manufactured after the Effective date for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per day and/or “Daily Cadmium Exposure Level” is no more than 4.1 micrograms of cadmium per day.

## **2.3 Clear and Reasonable Warnings**

For any Covered Products manufactured after the Effective Date that do not qualify as Reformulated Covered Products and are directly sold or offered for sale in California by Giant Sports International Limited Liability Company after the Effective Date, Giant Sports International Limited Liability Company shall only sell or offer said non-reformulated Covered Products for sale in California when accompanied with one of the following warnings:

### **OPTION 1:**

**WARNING:** Consuming this product can expose you to chemicals including [lead] [and] [cadmium] which is [are] known to the State of California [cancer and] birth defects and other reproductive harm. For more information go to: [www.P65warnings.CA.gov/food](http://www.P65warnings.CA.gov/food)

OR:

### **OPTION 2:**

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

Giant Sports International Limited Liability Company shall use the phrase “cancer and” in the warning if Giant Sports International Limited Liability Company has reason to believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead or if Giant Sports International Limited Liability Company has reason to believe that another Proposition 65 chemical is present which may require a cancer warning. As identified in the brackets, the warning shall appropriately reflect whether there is lead or cadmium present in each of the Covered Products. The words “chemicals including” may be deleted from the warning content if the warning is being provided for an exposure to a single chemical.

The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed on the Covered Product's packaging or label 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. If the warning is provided on the label, it must be set off from other surrounding information and enclosed in a box. In addition, for any Covered Product sold over the internet where a California delivery address is indicated, the warning shall be provided either by including the warning on the product display page, by otherwise prominently displaying the warning to the purchaser during the checkout process prior to completing the purchase, or by any other means authorized under Section 25607.1 of Title 27 of the California Code of Regulations. An asterisk or other identifying method must be utilized to identify which products on the checkout page are subject to the warning.

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

### **3. MONETARY PAYMENTS**

#### **3.1 Civil Penalty**

Pursuant to Health and Safety Code section 25249.7(b), Giant Sports International Limited Liability Company shall pay civil penalties in the amount of \$1,000.00. The penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty paid to SPFC. SPFC's counsel shall be responsible for remitting Giant Sports International Limited Liability Company's penalty payment under this Settlement Agreement to OEHHA. Within five (5) business days of this Agreement

being signed by the Parties, Giant Sports International Limited Liability Company shall issue a check payable to “Safe Products for Californians, LLC” in the amount of \$250.00, and a check payable to OEHHA in the amount of \$750.00. These penalty payments shall be delivered to the address listed in Section 3.3 below.

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

The Parties acknowledge that SPFC and its counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, 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 finalized, Giant Sports International Limited Liability Company expressed a desire to resolve SPFC’s fees and costs. The Parties then negotiated a resolution of the compensation due to SPFC and its counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5. For all work performed through the mutual execution of this agreement, Giant Sports International Limited Liability Company shall reimburse SPFC and their counsel \$14,000.00 within five (5) business days of this Agreement being signed by the Parties. Giant Sports International Limited Liability Company’s payment shall be delivered to the address in Section 3.3 in the form of a check payable to “Moore Law Firm, P.C.” The reimbursement shall cover all fees and costs incurred by SPFC investigating, bringing this matter to Giant Sports International Limited Liability Company’s attention and negotiating a settlement of the matter in the public interest.

### **3.3 Payment Address**

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

Safe Products for Californians, LLC  
c/o Moore Law Firm, P.C.  
332 North Second Street  
San Jose, California 95112

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

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

This Settlement Agreement is a full, final and binding resolution between SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, and Giant Sports International Limited Liability Company, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Giant Sports International Limited Liability Company directly or indirectly distributes or sells Covered Products, including, but not limited to, Amazon.com, Inc., downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims for any violation of Proposition 65 through the Effective Date that were or could have been asserted by SPFC relating to the Covered Products. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to cadmium and/or lead and lead compounds from the Covered Products, as set forth in the Notice. The Parties further 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 Giant Sports International Limited Liability Company.

##### **4.2 SPFC's Individual Releases of Claims**

SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, 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, losses, claims, liabilities, and demands of SPFC of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to cadmium and/or lead and lead compounds in the Covered Products manufactured, imported, distributed, or sold by Giant Sports International Limited Liability Company prior to the Effective Date. The Parties further 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 Giant Sports International Limited Liability Company. Nothing in this section affects SPFC's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Giant Sports International Limited Liability Company's Covered Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that it may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the allegations made in the Notice.

#### **4.3 Giant Sports International Limited Liability Company's Release of SPFC**

Giant Sports International Limited Liability Company, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against SPFC and its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by SPFC and their attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Covered Products.

#### **5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Covered Products, then Giant Sports International Limited Liability Company shall provide written notice to SPFC 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 Covered Products are so affected. If the Office of Environmental Health Hazard Assessment promulgates one or more regulations governing the provision of Proposition 65 warnings for foods, Giant Sports International Limited Liability Company may comply with such regulations as to the Covered Products without being deemed in breach of this Settlement Agreement. Nothing in this Settlement Agreement shall be interpreted to relieve Giant Sports International Limited Liability Company from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

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

For Giant Sports International Limited Liability Company:

Philip Nash  
Collins Gann McCloskey & Barry, PLLC  
138 Mineola Blvd.  
Mineola, NY 11501  
Pnash@supplementcounsel.com

For SPFC:

Proposition 65 Coordinator  
Moore Law Firm, P.C.  
332 N 2<sup>nd</sup> Street  
San Jose, CA 95112

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

**8. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, 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 hereto. No other agreements addressing compliance with Proposition 65 as to the Covered Products not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

**9. COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or .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 HEALTH & SAFETY CODE SECTION 25249.7(f)**

SPFC agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

**11. MODIFICATION**

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

**12. AUTHORIZATION**

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

**AGREED TO:**

Dated: \_\_\_\_\_

5/21/2019

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Giant Sports International Limited Liability  
Company  
By: \_\_\_\_\_ (name), \_\_\_\_\_ (title)

**AGREED TO:**

Dated: 5/21/19

Dated: 5/21/19

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

Giant Sports International Limited Liability  
Company  
By: PETER J. JENSEN (name), MARK M. JENSEN (title)