ENTORSED FILED EDMUND G. BROWN JR. 1 ALAMEDA COUNTY Attorney General of California Laura J. Zuckerman 2 NOV 0.5 2010 Deputy Attorney General MILCOURT State Bar No. 161896 3 TIMOTHY E. SULLIVAN Deputy Attorney General 4 Deputy State Bar No. 197054 1515 Clay Street, 20th Floor 5 Oakland, CA 94612-0550 Telephone: (510) 622-2174 6 Fax: (510) 622-2270 E-mail: Laura.Zuckerman@doj.ca.gov 7 Attorneys for the People of the State of California 8 (Additional counsel for plaintiff on following page) 9 10 SUPERIOR COURT OF THE STATE OF CALIFORNIA 11 COUNTY OF ALAMEDA 12 13 THE PEOPLE OF THE STATE OF Case No.: RG08426937 · 14 CALIFORNIA, ASSIGNED FOR ALL PURPOSES TO: 15 JUDGE ROBERT B. FREEDMAN Plaintiff, **DEPARTMENT 20** 16 CONSENT JUDGMENT AS TO 17 DEFENDANT FAIRHAVEN HEALTH, LLC 21ST CENTURY HEALTHCARE, INC., et 18 al. 19 Trial Date: Defendants. None set Action Filed: December 23; 2008 20 21 22 23 24 25 26 27 28 CONSENT JUDGMENT AS TO DEFENDANT FAIRHAVEN HEALTH, LLC (RG08426937)

1		
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1. INTRODUCTION

1.1 Introduction

This Consent Judgment is entered pursuant to a stipulation by and between Plaintiff People of the State of California and Defendant Fairhaven Health, LLC ("Fairhaven," or "Defendant"). Plaintiff and Defendant are collectively referred to as the "parties," and individually as a "party," in this Consent Judgment.

1.2 Plaintiff

Plaintiff is the People of the State of California. The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.5 et seq. ("Proposition 65"), at section 25249.7, subdivision (c), provides that actions to enforce Proposition 65 may be brought by the Attorney General in the name of the People of the State of California or by any district attorney. California Business and Professions Code sections 17200 et seq. also provide that actions to prohibit unfair and unlawful business practices may be brought in the name of the People of the State of California by the Attorney General or by any district attorney.

1.3 Defendant

The settling defendant is Fairhaven Health, LLC, a Washington limited liability company, with its principal place of business at 1200 Harris Ave, Suite 403, Bellingham, WA 98225. For purposes of this Consent Judgment, Defendant acknowledges that it is currently a business with 11 employees, with four part-time employees, and that it currently therefore is a "person in the course of doing business" within the meaning of Proposition 65.

1.4 General Allegation

The People's Complaint alleges that, through the manufacture, distribution, and/or sale of vitamin supplements to consumers in California, Defendant violated the provisions of Proposition 65 and Business and Professions Code section 17200 et seq. by knowingly exposing persons to lead, a chemical known to cause cancer and reproductive toxicity, without providing a clear and reasonable warning to such individuals.

1.5 Covered Products

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The term "Covered Products" means products manufactured, distributed, and/or sold by Defendant for human ingestion for the primary purpose of supplementing the intake of essential vitamins and minerals that are available for purchase by California consumers and that are (1) are identified on the label as "vitamin," "vitamin-mineral," "multivitamin," or "multivitamin-multimineral," or (2) contain as an intended constituent or additive, and for which the presence of the ingredient(s) is stated on the "Supplement Facts" portion of the label, one or more of the following: calcium, copper, chlorine, chloride, iodine, iodide, iodate, iron, magnesium, manganese, molybdenum, phosphorus, potassium, selenium, zinc, Vitamin A, beta carotene, retinol, Vitamin D, Vitamin E, Vitamin K, Vitamin B-1, thiamin, Vitamin B-2, riboflavin, Vitamin B-6, pyridoxine, Vitamin B-12, cyanocobalamin, Vitamin C, ascorbic acid, biotin, choline, folic acid, folate (Vitamin B9), niacin, Vitamin B-3, and/or pantothenic acid (Vitamin B-5). Covered Products do not include (1) "fortified foods," i.e., foods to which additional vitamins and minerals have been added, including but not limited to cereal or pasta with vitamins and minerals added, or iodized salt; (2) beverages that otherwise would fall within the definition; or (3) meal replacement products, i.e., products that are intended to provide calories sufficient to replace a meal. The presence of substances such as herbs, herbal extracts, or amino acids does not preclude a product from falling within the definition of Covered Products if it otherwise falls within the terms set forth. A list of the Covered Products manufactured, distributed, and/or sold by Defendant is set forth in Exhibit A. Any product manufactured, distributed, and/or sold by Defendant that is not set forth in Exhibit A is not covered by the injunctive relief provisions of Section 2, except as specifically provided in Section 9 below.

1.6 Released Products

The term "Released Products" means the Covered Products set forth in Exhibit B.

1.7 Complaint

On December 23, 2008, the People filed a complaint in the Superior Court in and for the County of Alameda against Defendant and certain other vitamin supplement manufacturers, distributors, and sellers, alleging violations of Proposition 65 and Business and Professions Code

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section 17200 based on the alleged exposures to lead contained in the vitamin supplements. On March 27, 2009, the People filed a First Amended Complaint ("Complaint" or "Action").

Defendant filed an answer to the Complaint on July 21, 2009.

1.8 Complaint Deemed Amended

The Complaint is hereby amended by this Consent Judgment so that all allegations in the Complaint regarding "vitamin supplements" sold, manufactured, and/or distributed by Defendant are replaced by allegations regarding the Released Products.

1.9 No Admissions or Findings

Defendant denies the material, factual and legal allegations contained in Plaintiff's Complaint and maintains that all Covered Products that it sold and distributed in California have been and are in compliance with all laws, including Proposition 65. The parties enter into this Consent Judgment pursuant to a settlement of certain disputed claims between the parties as alleged in the Complaint for the purpose of avoiding prolonged and costly litigation between the parties hereto. By execution of this Consent Judgment, Defendant does not admit any facts or conclusions of law suggesting or demonstrating any violations of Proposition 65, the Unfair Competition Act, or any other statutory, common law or equitable requirements relating to the Covered Products. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, issue of law, or violation of law. Except as expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or defense Defendant may have in this or any other or future legal proceedings. However, this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment. By execution of this Consent Judgment, the People do not admit any facts or conclusions of law concerning any violations of Proposition 65, the Unfair Competition Act, or any other statutory, common law or equitable requirements relating to the Covered Products. Nothing in this Consent Judgment shall be construed as an admission by the People of any fact or issue of law, nor shall entering into the Consent Judgment constitute or be construed as an admission by the People of any fact or issue of law. Except as expressly set forth

herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or argument the People may have in this or any other or future legal proceedings.

1.10 Consent to Jurisdiction

For purposes of this Consent Judgment only, the parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment. This Consent Judgment shall have no application or effect on Defendant for Covered Products or other products manufactured, distributed or sold by or on behalf of Defendant to consumers outside of the state of California.

1.11 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this Consent Judgment is entered by the Court.

2. INJUNCTIVE RELIEF/ PERMANENT INJUNCTION

2.1. On and after the Effective Date of this Consent Judgment, Defendant shall not manufacture for sale in California, distribute into California, or directly sell in California any Covered Product for which the maximum dose recommended on the label contains more than 0.5 micrograms of lead, unless (a) such Covered Product complies with the warning requirement set forth in Section 2.2 below, or (b) such Covered Product was in the stream of commerce prior to the date that is ninety (90) days after the Effective Date. "In the stream of commerce" means the Covered Product was either manufactured and put into final packaging for consumer sale, distributed, or sold by Defendant. "Distribute into California" means to directly ship a Covered Product into California for sale in California or to sell a Covered Product to a distributor that Defendant knows will sell the Covered Product in California. Defendant shall not reduce the recommended dose (by size, number of tablets, volume, weight, or frequency) of a Covered Product solely to bring a Covered Product into compliance with this Consent Judgment. Nothing in this Consent Judgment shall impair or limit the ability of Defendant to reformulate any Covered Product for other reasons.

2.2. For Covered Products that contain more than 0.5 micrograms of lead per suggested daily dose, except those in the stream of commerce as defined above, Defendant shall provide the following warning as specified below (the text in brackets in the warning below is optional, except that the term "cancer" must be included only if the maximum dose recommended on the label contains more than 15 micrograms of lead):

WARNING: This product contains [lead,] a chemical known [to the State of California] to cause [cancer and] birth defects or other reproductive harm.

The above warning may be provided by any of the following methods:

- (1) affixing the warning to or printing the warning on the Covered Product container, cap, label, or unit package at the point of manufacture, prior to shipment to California, or prior to distribution within California,
- (2) including the warning on a "hang tag" attached to the Covered Product, or
- (3) displaying the warning at the point of sale (including Internet or catalog sales) of the Covered Products.
- 2.3 The warning required by paragraph 2.2 above shall be prominently affixed to, printed on, or displayed proximately to the point of sale of each Covered Product with such conspicuousness, as compared with other words, statements, designs, or devices on the labeling 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 displayed on the product container or labeling, the warning shall be at least the same size as the largest of any other health or safety warnings on the product container or labeling, and the word "warning" shall be in all capital letters and in bold print. If printed on the labeling itself, the warning shall be contained in the same section of the labeling that states other safety warnings concerning the use of the product. The requirement for product labeling set forth herein is imposed pursuant to the terms of this Consent Judgment and is recognized by the parties as not being the exclusive method of providing a warning for the Covered Products under Proposition 65 and its implementing regulations.

2.4. Testing.

- (a) Once a year, on or before the anniversary of the entry of the Consent Judgment (or, in the case of a New Product deemed to be a Covered Products pursuant to Section 9, prior to the time it is distributed into or directly sold in California), Defendant shall test, or require its supplier to test, randomly-selected samples of each Covered Product (in the form intended for sale to the end-user) for lead content. The method of selecting samples for testing must comply with the regulations of the Food and Drug Administration as set forth in Title 21, Part 111, Subpart E of the Code of Federal Regulations, including section 111.80(c).
- (b) Testing for lead shall be performed using Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) and closed-vessel, microwave-assisted digestion employing high-purity reagents¹ or any other testing method previously agreed upon in writing by the parties.
- (c) Defendant shall provide any test results and documentation within ten working days of any written request from the People, and shall retain all test results and documentation for a period of four years from the date of the test. All test results for lead content, once provided to the Attorney General, shall be public documents, but Defendant may redact any test reports to remove results of tests for chemicals other than (1) lead and (2) substances listed on the Supplement Facts portion of the product's label.
- (d) Nothing in this Consent Judgment shall limit Defendant's ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw materials used in their manufacture.
- (e) This Consent Judgment, including the testing and sampling methodology set forth in this Section, is the product of negotiation and compromise, and is accepted by the parties for purposes of settling, compromising, and resolving issues disputed in this action, including future compliance by Defendant with Section 2 of this Consent Judgment, and shall not be used for any other purpose, or in any other matter and, except for the purpose of determining future compliance with this Consent Judgment, shall not constitute an adoption or employment of a

¹ See Mindak, W.R., Cheng, J., Canas, B.J., & Bolger, P.M. Lead in Women's and Children's Vitamins, J. Agric. Food Chem. 2008, 56, 6892-96.

method of analysis for a listed chemical in a specific medium as set forth in California Code of Regulations, title 27, section 25900, subdivision (g).

3. SETTLEMENT PAYMENTS

3.1 Settlement Amount and Allocation

The total settlement amount to be paid by Defendant shall be \$1,500.00, allocated more specifically as follows:

- (1) Defendant is hereby ordered to pay, at the time of the filing of this judgment, pursuant to California Health & Safety Code section 25249.12, a civil penalty of Five Hundred Thirteen Dollars (\$513.00);
- (2) Defendant is hereby ordered to pay, at the time of the filing of this judgment, pursuant to Business & Professions Code §17206, a civil penalty of Two Hundred Fifty-Seven Dollars (\$257.00) to the Marin County District Attorney's Office, which office shall distribute this amount pursuant to a written agreement of the District Attorney offices in this action;
- (3) Defendant is hereby ordered to pay, at the time of the filing of this judgment, pursuant to Business and Professions Code §17203, investigative costs in the amount of Three Hundred Sixty-Five Dollars (\$365.00), to the Marin County District Attorney's Office, which office shall distribute this amount pursuant to a written agreement of the District Attorney offices in this action; the portion provided to the Napa County District Attorney's Office shall be deposited into the Napa District Attorney's Environmental Protection Trust Fund;
- (4) Defendant is hereby ordered to pay, at the time of the filing of this judgment, Two Hundred Thirty-Seven Dollars (\$237.00), to the California Department of Justice as reimbursement for the costs and expenses incurred in investigating, bringing, and resolving this action, which will be applied by the Attorney General to the enforcement of Proposition 65 ("Enforcement Fund Payment");
- (5) Defendant is hereby ordered to pay, at the time of the filing of this judgment, One Hundred Twenty-Eight Dollars (\$128.00), to the California Department of Justice for the enforcement of Proposition 65 ("Enforcement Fund Payment").

3.2 Enforcement Fund Payment

Money designated above in paragraphs 3.1(4) and 3.1(5) as "Enforcement Fund Payment" shall be placed in an interest-bearing Special Deposit Fund established by the Attorney General. These funds, including any interest, shall be used by the Attorney General, until all funds are exhausted, for the costs and expenses associated with the enforcement and implementation of Proposition 65, including investigations, enforcement actions, other litigation or activities as determined by the Attorney General to be reasonably necessary to carry out his duties and authority under Proposition 65. Such funding may be used for the costs of the Attorney General's investigation, filing fees and other court costs, payment to expert witnesses and technical consultants, purchase of equipment, travel, purchase of written materials, laboratory testing, sample collection, or any other cost associated with the Attorney General's duties or authority under Proposition 65. Funding placed in the Special Deposit Fund pursuant to this paragraph, and any interest derived therefrom, shall solely and exclusively augment the budget of the Attorney General's Office and in no manner shall supplant or cause any reduction of any portion of the Attorney General's budget.

3.3 Payment Instructions

Defendant shall pay the entire settlement amount within thirty (30) days following the Effective Date. The payments required by this Consent Judgment shall be made through the delivery of a two separate checks as follows:

(a) A single check in the amount of Eight Hundred Seventy-Eight Dollars (\$878.00), comprising the amounts described above in paragraphs 3.1(1), 3.1(4), and 3.1(5), shall be made payable to "California Department of Justice" and sent by certified or express mail to the attention of:

Laura J. Zuckerman
Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550

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A copy of the check shall be sent to:

Robert Thomas Legal Analyst California Department of Justice 1515 Clay St., 20th Floor P.O. Box 70550 Oakland, California 94612-0550

(b) A single check in the amount of Six Hundred Twenty-Two Dollars (\$622.00), comprising the amounts described above in paragraphs 3.1(2) and 3.1(3), shall be made payable to "Marin District Attorney Consumer Trust Account" and sent by certified or express mail to the attention of:

Robert Nichols
Deputy District Attorney
Marin County District Attorney's Office
3501 Civic Center Dr.
San Rafael CA 94903

4. ENFORCEMENT OF CONSENT JUDGMENT

In the event that the People believe that Defendant is in violation of any provision of this Consent Judgment, the People shall provide written notice of such alleged violation to Defendant. The Parties must meet and confer regarding the alleged violation within twenty (20) business days of Defendant's receipt of the notice. After sending such a notice of alleged violation, and notwithstanding the meet-and-confer obligation in the preceding sentence, the People may, by motion or order to show cause before the Superior Court of Alameda County, enforce the terms and conditions contained in this Consent Judgment. In any action brought by the People to enforce this Consent Judgment, the People may seek whatever fines, costs, penalties, or remedies as provided by law for failure to comply with the Consent Judgment. Where said failure to comply constitutes future violations of Proposition 65, Business and Professions Code section 17200, or other laws, the People are not limited to enforcement of this Consent Judgment, but may seek in another action whatever fines, costs, penalties, or remedies are provided by law for failure to comply with Proposition 65, Business and Professions Code section 17200 et seq., or

other laws. The rights of Defendant to defend itself and its actions in law or equity shall not be abrogated or reduced in any fashion by the terms of this paragraph.

5. COVERED CLAIMS

This Consent Judgment is a full, final, and binding resolution between the People and Defendant, its parents, shareholders, divisions, subdivision, subsidiaries, sister companies, affiliates, cooperative members, licensors, licensees, retailers, distributors, wholesalers, agents and representatives, and the officers, directors, employees, attorneys, agents, representatives, predecessors, successors, and assigns of any of them, of any violation of Proposition 65 or its implementing regulations, Business and Professions Code sections 17200 et seq., or any other statutory or common law claims that have been or could have been asserted in the Action for failure to provide clear and reasonable warnings required by Proposition 65 of exposure to lead from use of the Released Products, or any other claim based on the facts or conduct alleged in the Complaint as to such Released Products. Defendant waives any claims against the People based on the filing or prosecution of the Action. Compliance with all of the requirements of Section 2 constitutes compliance with Proposition 65 and Business and Professions Code sections 17200 et seq. with respect to any obligation of Defendant to provide a warning as to the lead content of any Covered Product.

6. COURT APPROVAL

The People shall submit this Consent Judgment to the Court for its approval and entry in the Action.

7. RETENTION OF JURISDICTION

This Court shall retain jurisdiction of this matter to implement the Consent Judgment, and to enable plaintiff to apply to the Court upon noticed motion for additional civil penalties, within three years after entry of judgment, in the event there are any material misrepresentations in Defendant's Amended Response to Plaintiff's First Set of Special Interrogatories to Defendant Fairhaven Health, LLC, dated March 24, 2010, Defendant's Amended Response to Plaintiff's First Set of Requests for Production to Defendant Fairhaven Health, LLC, dated April 22, 2010,

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9. NEW PRODUCTS

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the requirements of this Consent Judgment with respect to Covered Products. On or prior to March 1 of each year Defendant shall send written notice to the Office of the Attorney General

duplicative of a Covered Product identified on Exhibit A hereto. Each New Product is deemed

also to be a Covered Product. Defendant shall not manufacture for sale in California, distribute

into California, or directly sell in California any New Product unless the New Product adheres to

A "New Product" is a product that is intended to substantially replace or be substantially

and in documents produced by Defendant labeled FH-000001 through FH-000003, submitted to the People and on which the People relied in executing this Consent Judgment.

MODIFICATION 8.

- This Consent Judgment may be modified from time to time by express written 8.1 agreement of the parties, with the approval of the Court, or by an order of this Court. Before filing an application with the Court for a modification to this Consent Judgment, the Parties shall meet and confer with each other to determine whether each will consent to the proposed modification. If a proposed modification is agreed upon, then the Parties will present the modification to the Court by means of a stipulated modification to the Consent Judgment. Grounds for considering modification shall include any that are permitted by law, including but not limited to the grounds set forth below.
- If the Attorney General subsequently agrees in a settlement or judicially-entered 8.2 injunction or consent judgment that vitamin supplements do not require a warning under Proposition 65, or that a modified warning for vitamin supplements is appropriate that differs from that imposed in this Consent Judgment, or establishes allowances for naturally-occurring lead; or a court of competent jurisdiction renders a final judgment in a case brought by the Attorney General that eliminates the warning requirement for vitamin supplements or that modifies the warning requirement for vitamin supplements, either by establishing allowances for naturally-occurring lead or otherwise, then Defendant shall be entitled to seek to modify the terms of this Consent Judgment to make it consistent with the Attorney General agreement or Court judgment described herein.

listing any New Products it manufactured for sale in California, distributed into California, or directly sold in California during the previous calendar year for which such notice has not previously been provided. (The notice requirement in the preceding sentence terminates ten years from the effective date of this Consent Judgment.) Defendant may seek the People's agreement to add a New Product to the list of Released Products in Exhibit B. If the People do not object within 45 days of receiving the request, such New Product shall be deemed a Released Product. If the People do not agree, the parties will meet and confer for a period of 45 days to determine if an agreement can be reached. If no agreement is reached after the 45-day meet-and-confer period, Defendant may file a motion pursuant to Section 8 seeking to modify the Consent Judgment to add the New Product to the list of Released Products in Exhibit B.

10. SEVERABILITY

If, subsequent to the execution of this Consent Judgment, any of the provisions of this Consent Judgment are held by a Court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

11. ENTIRE AGREEMENT

This Consent Judgment 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 not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

12. 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.

13. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,

1	registered or certified mail, return receipt requested; or (ii) overnight courier to any party at the
2	following addresses:
3	To Fairhaven Health, LLC:
4	Trenton H. Norris, Esq.
5	Arnold & Porter LLP 275 Battery Street, Suite 2700 San Expressions CA 041111
6	San Francisco, CA 941111 trent.norris@aporter.com
7	Ethan Lynette Fairhaven Health
8	1200 Harris Ave, Ste 403 Bellingham, WA 98225
9	To the Office of the Attorney General:
10	Laura J. Zuckerman, Esq.
11	Timothy E. Sullivan, Esq. California Department of Justice
12	P.O. Box 70550 1515 Clay Street, Suite 2000
13	Oakland, CA 94612
14	Any party, from time to time, may specify in writing to the other a change of address to which all
15	notices and other communications shall be sent.
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17	IT IS SO ORDERED, ADJUDGED, AND DECREED:
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CONSENT JUDGMENT AS TO DEFENDANT FAIRHAVEN HEALTH, LLC (RG08426937)

1	EXHIBIT A: Covered Products
2	FertilAid for Men
3	FertilAid for Women
4	FertileCM
5	Nursing Blend
6	Pregnancy Plus Prenatal Vitamin
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1	EXHIBIT B: Released Products		
2	FertilAid for Men		
4	FertilAid for Women		
5	FertileCM		
6	Nursing Blend		
7	Pregnancy Plus Prenatal Vitamin		
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CONSENT JUDGMENT AS TO DEFENDANT FAIRHAVEN HEALTH, LLC (RG08426937)