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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12

13
14 **THE PEOPLE OF THE STATE OF CALIFORNIA,**
15
16 Plaintiff,
17
18 **v.**
19 **21ST CENTURY HEALTHCARE, INC., et**
20 **al.**
21
22 Defendants.

Case No.: RG08426937

ASSIGNED FOR ALL PURPOSES TO:
JUDGE ROBERT B. FREEDMAN
DEPARTMENT 20

**CONSENT JUDGMENT AS TO
DEFENDANT KIRKMAN GROUP, INC.
(SUED AS "KIRKMAN")**

Trial Date: None set
Action Filed: December 23, 2008

~~ENDORSED~~
FILED
ALAMEDA COUNTY

NOV 05 2010

CLERK OF THE SUPERIOR COURT

By *Pardyn Bir* Deputy

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1 **1. INTRODUCTION**

2 **1.1 Introduction**

3 This Consent Judgment is entered pursuant to a stipulation by and between Plaintiff
4 People of the State of California and Defendant Kirkman Group, Inc., sued as Kirkman
5 ("Kirkman," or "Defendant"). Plaintiff and Defendant are collectively referred to as the
6 "parties," and individually as a "party," in this Consent Judgment.

7 **1.2 Plaintiff**

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

16 **1.3 Defendant**

17 The settling defendant is Kirkman Group, Inc., an Oregon corporation, with its principal
18 place of business at Lake Oswego, Oregon. Kirkman Group, Inc. is settling on behalf of the party
19 named in the Complaint as "Kirkman." The Complaint is hereby amended by this Consent
20 Judgment to substitute Kirkman Group, Inc. in place of "Kirkman." For purposes of this Consent
21 Judgment, Defendant acknowledges that it is a corporation with ten or more employees, and that
22 it therefore is a "person in the course of doing business" within the meaning of Proposition 65.

23 **1.4 General Allegation**

24 The People's Complaint alleges that, through the manufacture, distribution, and/or sale of
25 vitamin supplements to consumers in California, Defendant violated the provisions of Proposition
26 65 and Business and Professions Code section 17200 et seq. by knowingly exposing persons to
27 lead, a chemical known to cause cancer and reproductive toxicity, without providing a clear and
28 reasonable warning to such individuals.

1 **1.5 Covered Products**

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

23 **1.6 Released Products**

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

25 **1.7 Complaint**

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

1 section 17200 based on the alleged exposures to lead contained in the vitamin supplements. On
2 March 27, 2009, the People filed a First Amended Complaint ("Complaint" or "Action").
3 Defendant filed an answer to the Complaint on July 14, 2009.

4 **1.8 Complaint Deemed Amended**

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

8 **1.9 No Admissions or Findings**

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

3 **1.10 Consent to Jurisdiction**

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

10 **1.11 Effective Date**

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

13 **2. INJUNCTIVE RELIEF/ PERMANENT INJUNCTION**

14 **2.1.** On and after the Effective Date of this Consent Judgment, Defendant shall not
15 manufacture for sale in California, distribute into California, or directly sell in California any
16 Covered Product for which the maximum dose recommended on the label contains more than 0.5
17 micrograms of lead, unless (a) such Covered Product complies with the warning requirement set
18 forth in Section 2.2 below, or (b) such Covered Product was in the stream of commerce prior to
19 the date that is ninety (90) days after the Effective Date. "In the stream of commerce" means the
20 Covered Product was either manufactured and put into final packaging for consumer sale,
21 distributed, or sold by Defendant. "Distribute into California" means to directly ship a Covered
22 Product into California for sale in California or to sell a Covered Product to a distributor that
23 Defendant knows will sell the Covered Product in California. Defendant shall not reduce the
24 recommended dose (by size, number of tablets, volume, weight, or frequency) of a Covered
25 Product solely to bring a Covered Product into compliance with this Consent Judgment. Nothing
26 in this Consent Judgment shall impair or limit the ability of Defendant to reformulate any
27 Covered Product for other reasons.
28

1 2.2. For Covered Products that contain more than 0.5 micrograms of lead per suggested
2 daily dose, except those in the stream of commerce as defined above, Defendant shall provide the
3 following warning as specified below (the text in brackets in the warning below is optional):

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

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

- 7 (1) affixing the warning to or printing the warning on the Covered Product container, cap,
8 label, or unit package at the point of manufacture, prior to shipment to California, or prior
9 to distribution within California,
10 (2) including the warning on a “hang tag” attached to the Covered Product, or
11 (3) displaying the warning at the point of sale (including Internet or catalog sales) of the
12 Covered Products.

13 2.3 The warning required by paragraph 2.2 above shall be prominently affixed to,
14 printed on, or displayed proximately to the point of sale of each Covered Product with such
15 conspicuousness, as compared with other words, statements, designs, or devices on the labeling as
16 to render it likely to be read and understood by an ordinary individual under customary conditions
17 of purchase or use. If the warning is displayed on the product container or labeling, the warning
18 shall be at least the same size as the largest of any other health or safety warnings on the product
19 container or labeling, and the word “warning” shall be in all capital letters and in bold print. If
20 printed on the labeling itself, the warning shall be contained in the same section of the labeling
21 that states other safety warnings concerning the use of the product. The requirement for product
22 labeling set forth herein is imposed pursuant to the terms of this Consent Judgment and is
23 recognized by the parties as not being the exclusive method of providing a warning for the
24 Covered Products under Proposition 65 and its implementing regulations.

25 2.4. Testing.

26 (a) Once a year, on or before the anniversary of the entry of the Consent Judgment (or, in
27 the case of a New Product deemed to be a Covered Products pursuant to Section 9, prior to the
28 time it is distributed into or directly sold in California), Defendant shall test, or require its

1 supplier to test, randomly-selected samples of each Covered Product (in the form intended for
2 sale to the end-user) for lead content. The method of selecting samples for testing must comply
3 with the regulations of the Food and Drug Administration as set forth in Title 21, Part 111,
4 Subpart E of the Code of Federal Regulations, including section 111.80(c).

5 (b) Testing for lead shall be performed using Inductively Coupled Plasma-Mass
6 Spectrometry (ICP-MS) and closed-vessel, microwave-assisted digestion employing high-purity
7 reagents¹ or any other testing method agreed upon in writing by the parties.

8 (c) Defendant shall provide any test results and documentation within ten working days
9 of any written request from the People, and shall retain all test results and documentation for a
10 period of four years from the date of the test. All test results for lead content, once provided to
11 the Attorney General, shall be public documents, but Defendant may redact any test reports to
12 remove results of tests for chemicals other than (1) lead and (2) substances listed on the
13 Supplement Facts portion of the product's label.

14 (d) Nothing in this Consent Judgment shall limit Defendant's ability to conduct, or
15 require that others conduct, additional testing of the Covered Products, including the raw
16 materials used in their manufacture.

17 (e) This Consent Judgment, including the testing and sampling methodology set forth in
18 this Section, is the product of negotiation and compromise, and is accepted by the parties for
19 purposes of settling, compromising, and resolving issues disputed in this action, including future
20 compliance by Defendant with Section 2 of this Consent Judgment, and shall not be used for any
21 other purpose, or in any other matter and, except for the purpose of determining future
22 compliance with this Consent Judgment, shall not constitute an adoption or employment of a
23 method of analysis for a listed chemical in a specific medium as set forth in California Code of
24 Regulations, title 27, section 25900, subdivision (g).

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26
27 ¹ See Mindak, W.R., Cheng, J., Canas, B.J., & Bolger, P.M. Lead in Women's and
28 Children's Vitamins, *J. Agric. Food Chem.* 2008, 56, 6892-96.

1 **3. SETTLEMENT PAYMENTS**

2 Based on test results of the Released Product and sales information provided by Defendant
3 and the other relief provided in this Consent Judgment, Defendant will pay no civil penalty or
4 other payment. Each settling party shall bear its own costs and attorney fees.

5 **4. ENFORCEMENT OF CONSENT JUDGMENT**

6 In the event that the People believe that Defendant is in violation of any provision of this
7 Consent Judgment, the People shall provide written notice of such alleged violation to Defendant.
8 The Parties must meet and confer regarding the alleged violation within twenty (20) business
9 days of Defendant's receipt of the notice. After sending such a notice of alleged violation, and
10 notwithstanding the meet-and-confer obligation in the preceding sentence, the People may, by
11 motion or order to show cause before the Superior Court of Alameda County, enforce the terms
12 and conditions contained in this Consent Judgment. In any action brought by the People to
13 enforce this Consent Judgment, the People may seek whatever fines, costs, penalties, or remedies
14 as provided by law for failure to comply with the Consent Judgment. Where said failure to
15 comply constitutes future violations of Proposition 65, Business and Professions Code section
16 17200, or other laws, the People are not limited to enforcement of this Consent Judgment, but
17 may seek in another action whatever fines, costs, penalties, or remedies are provided by law for
18 failure to comply with Proposition 65, Business and Professions Code section 17200 et seq., or
19 other laws. The rights of Defendant to defend itself and its actions in law or equity shall not be
20 abrogated or reduced in any fashion by the terms of this paragraph.

21 **5. COVERED CLAIMS**

22 This Consent Judgment is a full, final, and binding resolution between the People and
23 Defendant, its parents, shareholders, divisions, subdivision, subsidiaries, sister companies,
24 affiliates, cooperative members, licensors, licensees, retailers, distributors, wholesalers, agents
25 and representatives, and the officers, directors, employees, attorneys, agents, representatives,
26 predecessors, successors, and assigns of any of them, of any violation of Proposition 65 or its
27 implementing regulations, Business and Professions Code sections 17200 et seq., or any other
28 statutory or common law claims that have been or could have been asserted in the Action for

1 failure to provide clear and reasonable warnings required by Proposition 65 of exposure to lead
2 from use of the Released Products, or any other claim based on the facts or conduct alleged in the
3 Complaint as to such Released Products. Defendant waives any claims against the People based
4 on the filing or prosecution of the Action. Compliance with all of the requirements of paragraphs
5 2.1, 2.2, and 2.3 constitutes compliance with Proposition 65 and Business and Professions Code
6 sections 17200 et seq. with respect to any obligation of Defendant to provide a warning as to the
7 lead content of any Covered Product.

8 **6. COURT APPROVAL**

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

11 **7. RETENTION OF JURISDICTION**

12 This Court shall retain jurisdiction of this matter to implement the Consent Judgment, and
13 to enable plaintiff to apply to the Court upon noticed motion for additional civil penalties, within
14 three years after entry of judgment, in the event there are any material misrepresentations in the
15 Declaration in Support of Consent Judgment as to Defendant Kirkman, signed by James Hall,
16 Chief Financial Officer of Kirkman, dated September 8, 2010, submitted to the People and on
17 which the People relied in executing this Consent Judgment.

18 **8. MODIFICATION**

19 **8.1** This Consent Judgment may be modified from time to time by express written
20 agreement of the parties, with the approval of the Court, or by an order of this Court. Before
21 filing an application with the Court for a modification to this Consent Judgment, the Parties shall
22 meet and confer with each other to determine whether each will consent to the proposed
23 modification. If a proposed modification is agreed upon, then the Parties will present the
24 modification to the Court by means of a stipulated modification to the Consent Judgment.
25 Grounds for considering modification shall include any that are permitted by law, including but
26 not limited to the grounds set forth below.

27 **8.2** If the Attorney General subsequently agrees in a settlement or judicially-entered
28 injunction or consent judgment that vitamin supplements do not require a warning under

1 Proposition 65, or that a modified warning for vitamin supplements is appropriate that differs
2 from that imposed in this Consent Judgment, or establishes allowances for naturally-occurring
3 lead; or a court of competent jurisdiction renders a final judgment in a case brought by the
4 Attorney General that eliminates the warning requirement for vitamin supplements or that
5 modifies the warning requirement for vitamin supplements, either by establishing allowances for
6 naturally-occurring lead or otherwise, then Defendant shall be entitled to seek to modify the terms
7 of this Consent Judgment to make it consistent with the Attorney General agreement or Court
8 judgment described herein.

9 **9. NEW PRODUCTS**

10 A "New Product" is a product that is intended to substantially replace or be substantially
11 duplicative of a Covered Product identified on Exhibit A hereto. Each New Product is deemed
12 also to be a Covered Product. Defendant shall not manufacture for sale in California, distribute
13 into California, or directly sell in California any New Product unless the New Product adheres to
14 the requirements of this Consent Judgment with respect to Covered Products. On or prior to
15 April 1st of each year Defendant shall send written notice to the Office of the Attorney General
16 listing any New Products it manufactured for sale in California, distributed into California, or
17 directly sold in California during the previous calendar year for which such notice has not
18 previously been provided. (The notice requirement in the preceding sentence terminates ten years
19 from the effective date of this Consent Judgment.) Defendant may seek the People's agreement to
20 add a New Product to the list of Released Products in Exhibit B. If the People do not object
21 within 45 days of receiving the request, such New Product shall be deemed a Released Product.
22 If the People do not agree, the parties will meet and confer for a period of 45 days to determine if
23 an agreement can be reached. If no agreement is reached after the 45-day meet-and-confer
24 period, Defendant may file a motion pursuant to Section 8 seeking to modify the Consent
25 Judgment to add the New Product to the list of Released Products in Exhibit B on the ground that
26 the New Product substantially replaces or is substantially duplicative of a Covered Product
27 identified on Exhibit A.

1 **10. SEVERABILITY**

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

5 **11. ENTIRE AGREEMENT**

6 This Consent Judgment contains the sole and entire agreement and understanding of the
7 parties with respect to the entire subject matter hereof, and any and all prior discussions,
8 negotiations, commitments, and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any party
10 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
11 deemed to exist or to bind any of the parties.

12 **12. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the State of
14 California and apply within the State of California.

15 **13. NOTICES**

16 Unless specified herein, all correspondence and notices required to be provided pursuant
17 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
18 registered or certified mail, return receipt requested; or (ii) overnight courier on any party at the
19 following addresses:

20 To Kirkman:

21 Larry Newman
22 Chief Operating Officer
23 Technical and Regulatory Affairs
24 Kirkman Group, Inc.
25 6400 SW Rosewood Street
26 Lake Oswego, OR 97035

27 Stephen D. Lucas, Esq.
28 Lucas & Haverkam Law Firm
4350 Executive Drive, Suite 260
San Diego, CA 92121


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To the Office of the Attorney General:

Laura J. Zuckerman, Esq.
Timothy E. Sullivan, Esq.
California Department of Justice
P.O. Box 70550
1515 Clay Street, Suite 2000
Oakland, CA 94612

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

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: Nov 5, 2010  JUDGE OF THE SUPERIOR COURT

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EXHIBIT A: Covered Products

<u>Product Name</u>	<u>Kirkman Product #</u>
Advanced Mineral Support	325
Calcium Capsules 200 mg.	130
Calcium Capsules 200 mg. w/ Vitamin D	372
Calcium Magnesium Liquid	253
Calcium Chewable Wafers	320
Calcium with Vitamin D Powder Flavored	405
Calcium with Vitamin D Powder Unflavored	036
Chromium Capsules 100 mcg.	298
Iron Capsules 5 mg.	280
Iron Liquid 18 mg.	306
Buffered Magnesium Glycinate Capsules	258
Buffered Magnesium Glycinate Powder	459
Buffered Magnesium Oxide Capsules	257
Magnesium Citrate Soluble Powder	239
Magnesium Glycinate Capsules	096
Magnesium Malate Capsules	373
Molybdenum 100 mcg. Capsules	244
Multiple Mineral Pro-Support Capsules	063
Selenium 100 mcg. Capsules	071
Vanadium 100 mcg. Capsules	246
Zinc 20 mg. Capsules	023
Zinc Liquid	487
Zinc with Vitamin C and Slippery Elm Lozenges	358
Advanced Adult Multi-Vitamin Capsules	394
Children's Chewable Vitamin/Mineral Wafers	288

1	Children's Chew Vitamin/Mineral Wafers w/ Xylitol	379
2	Children's Vitamin/Mineral Capsules	299
3	EveryDay Multiple Vitamin/Mineral Capsules	054
4	Multiple Vitamins Pro Support	067
5	Nu-Thera Capsules w/P-5-P	322
6	Nu-Thera Capsules w/ P-5-P w/o A and D	227
7	Nu-Thera Everyday Companion Capsules	340
8	Nu-Thera Everyday Companion Powder	218
9	Perry Prenatal Capsules	388
10	Spectrum Complete Powder Flavored	451
11	Spectrum Complete Powder Hypoallergenic	252
12	Spectrum Complete Capsules Flavored	451
13	Super Nu-Thera Capsules	337
14	Super Nu-Thera Capsules w/o A and D	338
15	Super Nu-Thera Caplets	312
16	Super Nu-Thera Caplets w/P-5-P	313
17	Super Nu-Thera Powder Hypoallergenic	307
18	Super Nu-Thera Powder Flavored	470
19	Super Nu-Thera Powder w/o A and 0	457
20	Super Nu-Thera w/P-5-P Powder	411
21	Thera Response Capsules	300
22	Super I'ju-Thera Liquid Tropical Fruit	397
23	Super Nu-Thera Liquid w/o A and 0	419
24	Super Nu-Thera Liquid Raspberry	455
25	Super Nu-Thera w/P-5-P Green Apple	174
26	Super Nu-Thera Lemon -Lime	417
27	Super Nu-Thera Lemon -Lime w/ P-5-P	474
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1	B-Complex Powder Pro-Support	499
2	B-Complex Powder Capsules	095
3	d-Biotin 1000 mcg. Capsules	382
4	Folic Acid 400 mcg. Capsules	425
5	Folic Acid 400 mcg. Chewable Tablets	016
6	Folinic Acid 800 mcg. Capsules	293
7	Folinic Acid with B-12 Capsules	275
8	Methyleobalamin Powder	292
9	Myeellized Vitamin A Liquid	366
10	Vitamin B-6 50 mg. Capsules	268
11	Vitamin B-6/Magnesium Chewable Tablets	291
12	Vitamin C 250 mg. Capsules	024
13	Vitamin C 250 mg. Chewable Tablets	479
14	Vitamin C Powder Flavored	393
15	Vitamin C Powder Hypoallergenic	438
16	Vitamin D-3 Capsules 400 IU	378
17	Vitamin D-3 Capsules 1000 IU	380
18	Vitamin D-3 Capsules 2000 IU	422
19	Vitamin D-3 Chewable Tablets	428
20	Vitamin E 100 IU Capsules	030
21	Zinc Picolinate 25 mg. Capsules	423

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EXHIBIT B: Released Products

Perry Prenatal Capsules

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