

ENDORSED
FILED
ALAMEDA COUNTY

FEB 11 2015

K. McCoy, Exec. Off./Clerk

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11 Attorney for Defendant
12 TRIVITA, INC.

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF ALAMEDA

16 ENVIRONMENTAL RESEARCH
17 CENTER, a California non-profit
corporation,

18 Plaintiff,

19 v.

20 TRIVITA, INC., an Arizona Corporation

21 Defendant.
22
23

CASE NO. RG14746573

STIPULATED CONSENT JUDGMENT;

~~PROPOSED~~ ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: October 31, 2014

Trial Date: None set

24
25 **1. INTRODUCTION**

26 1.1 On October 31, 2014, Plaintiff Environmental Research Center ("ERC"), a
27 non-profit corporation, as a private enforcer, and in the public interest, initiated this action by
28 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the "Complaint")

STIPULATED CONSENT JUDGMENT; ~~PROPOSED~~ ORDER

CASE NO. RG14746573

1

1 pursuant to the provisions of California Health and Safety Code section 25249.5 et seq.
2 ("Proposition 65"), against Trivita, Inc. ("Trivita"). In this action, ERC alleges that the
3 following products referred to hereinafter individually as "Covered Product" or collectively as
4 "Covered Products", manufactured, distributed or sold by Trivita contain lead, a chemical
5 listed under Proposition 65 as a carcinogen and reproductive toxin, and expose consumers at a
6 level requiring a Proposition 65 warning:

- 7 a. **TriVita Inc. Garcinia Cambogia**
- 8 b. **TriVita Inc. Bone Growth Factor**
- 9 c. **TriVita Inc. Amazon Herb Perform Shake**
- 10 d. **TriVita Inc. Leanology Nutritional Shake Creamy Vanilla**
- 11 e. **TriVita Inc. GlucoManage Formula**
- 12 f. **TriVita Inc. Leanology**
- 13 g. **TriVita Inc. Leanology Appetite Control Soft Chews Chocolate Mocha 60**
14 **Soft Chews**
- 15 h. **TriVita Inc. Nopalea Daily Cleanse**

16 1.2 ERC is a California non-profit corporation dedicated to, among other causes,
17 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
18 and toxic chemicals, facilitating a safe environment for consumers and employees, and
19 encouraging corporate responsibility.

20 1.3 Trivita is an Arizona Corporation that, at all relevant times for the purpose of this
21 Consent Judgment, employed ten or more persons and qualified as a "person in the course of
22 business" within the meaning of Proposition 65. Trivita manufactures, distributes and sells the
23 Covered Products.

24 1.4 ERC and Trivita are referred to individually as "Party" or collectively as the
25 "Parties."

26 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation,
27 dated May 23, 2014, that was served on the California Attorney General, other public
28 enforcers, and Trivita ("Notice"). A true and correct copy of the Notice is attached as Exhibit

1 A and is hereby incorporated by reference. More than 60 days have passed since the Notice
2 was mailed and uploaded onto the Attorney General's website, and no designated governmental
3 entity has filed a complaint against Trivita with regard to the Covered Products or the alleged
4 violations.

5 1.6 ERC's Notice and Complaint allege that use of the Covered Products exposes
6 persons in California to lead without first providing clear and reasonable warnings in violation
7 of California Health and Safety Code section 25249.6. Trivita denies all material allegations
8 contained in the Notice and Complaint.

9 1.7 The Parties have entered into this Consent Judgment in order to settle,
10 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.
11 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of
12 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
13 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,
14 distributors, wholesalers, or retailers. Except for the representations made above, nothing in
15 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of
16 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
17 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any
18 purpose.

19 1.8 Except as expressly set forth herein, nothing in this Consent Judgment shall
20 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
21 other or future legal proceeding unrelated to these proceedings.

22 1.9 The Effective Date of this Consent Judgment is the date on which it is entered as
23 a Judgment by this Court.

24 **2. JURISDICTION AND VENUE**

25 For purposes of this Consent Judgment and for any further court action that may become
26 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
27 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
28 over Trivita as to the acts alleged in the Complaint, that venue is proper in Alameda County, and

1 that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
2 claims up through and including the Effective Date which were or could have been asserted in this
3 action based on the facts alleged in the Notice and Complaint.

4 **3. INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

5 **3.1** Beginning on the Effective Date, Trivita shall be permanently enjoined from
6 manufacturing for sale in the State of California, "Distributing into the State of California", or
7 directly selling in the State of California, any Covered Product which exposes a person to a
8 "Daily Exposure Level" of more than 0.5 micrograms per day when the maximum suggested
9 dose is taken as directed on the Covered Product's label, unless it contains the warning set forth
10 in Section 3.2 below.

11 **3.1.1** As used in Consent Judgment, the term "Distributing into the State of
12 California" shall mean to directly ship a Covered Product into California for sale in California
13 or to sell a Covered Product to a distributor that Trivita knows will sell the Covered Product in
14 California.

15 **3.1.2** For purposes of this Consent Judgment, "Daily Lead Exposure Level"
16 shall be measured in micrograms, and shall be calculated using the following formula:
17 micrograms of lead per gram of product, multiplied by grams of product per serving of the
18 product (using the largest serving size appearing on the product label), multiplied by servings
19 of the product per day (using the largest number of servings in a recommended dosage
20 appearing on the product label), which equals micrograms of lead exposure per day.

21 **3.2 Clear and Reasonable Warnings**

22 If Trivita is required to provide a warning pursuant to Section 3.1, the following warning
23 must be utilized:

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

26 Trivita shall use the phrase "cancer and" in the warning only if the maximum daily dose
27 recommended on the label contains more than 15 micrograms of lead as determined pursuant to
28 the quality control methodology set forth in Section 3.4.

1 Trivita shall provide the warning on one of the following: 1) for website purchases only,
2 on Trivita's checkout page for California consumers identifying each Covered Product. A second
3 warning shall appear prior to completing checkout on the website when a California delivery
4 address is indicated. The purchaser shall be required to accept the warning prior to completing
5 checkout for any of the Covered Products being sold or 2) on Trivita's product packaging. The
6 warning appearing on the label or container shall be at least the same size as the largest of any
7 other health or safety warnings correspondingly appearing on the label or container, as applicable,
8 or such product, and the word "WARNING" shall be in all capital letters. No other statements
9 about Proposition 65 or lead may accompany the warning.

10 Trivita must display the above warnings with such conspicuousness, as compared with
11 other words, statements, or design of the label or container, as applicable, to render the warning
12 likely to be read and understood by an ordinary individual under customary conditions of purchase
13 or use of the product.

14 3.3 Reformulated Covered Products

15 A Reformulated Covered Product is one for which the Daily Exposure Level when the
16 maximum suggested dose is taken as directed on the Reformulated Covered Product's label,
17 contains no more than 0.5 micrograms of lead per day as determined by the quality control
18 methodology described in Section 3.4 below.

19 3.4 Testing and Quality Control Methodology

20 3.4.1 All testing pursuant to this Consent Judgment shall be performed using a
21 laboratory method that complies with the performance and quality control factors appropriate
22 for the method used, including limit of detection, qualification, accuracy, and precision that
23 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (ICP-MS)
24 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing
25 method subsequently agreed upon in writing by the Parties.

26 3.4.2 All testing pursuant to this Consent Judgment shall be performed by an
27 independent third-party laboratory certified by the California Environmental Laboratory
28 Accreditation Program or an independent third-party laboratory that is registered with the

1 United States Food & Drug Administration. Nothing in this Consent Judgment shall limit
2 Trivita's ability to conduct, or require that others conduct, additional testing of the Covered
3 Products, including the raw materials used in their manufacture.

4 3.4.3 Trivita shall arrange, for at least three consecutive years and at least once
5 per year, for the lead testing of three randomly selected samples of each Covered Product in the
6 form intended for sale to the end-user to be distributed or sold to California. If tests conducted
7 pursuant to this Section demonstrate that no warning is required for a Covered Product during
8 each of three consecutive years, then the testing requirements of this Section will no longer be
9 required as to that Covered Product. However, if after the three-year period, Trivita changes
10 ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered
11 Products, Trivita shall test that Covered Product at least once after such change is made, and
12 send those test results to ERC within ten (10) working days of receiving the test results. The
13 testing requirements discussed in Section 3.4 are not applicable to any Covered Product for
14 which Trivita has provided the warning as specified in Section 3.2.

15 3.4.4 Beginning on the Effective Date and continuing for a period of three
16 years thereafter, upon ERC's written request, Trivita shall provide ERC with copies of all
17 laboratory reports with results of testing for lead content within ten (10) working days of
18 Trivita's receipt of said request. These reports shall be deemed and treated by ERC as
19 confidential information under the terms of the confidentiality agreement entered into by the
20 Parties. Trivita shall retain all test results and documentation for a period of three years from
21 the date of each test.

22 4. SETTLEMENT PAYMENT

23 4.1 In full satisfaction of all potential civil penalties, payment in lieu of civil
24 penalties, attorney's fees, and costs, Trivita shall make a total payment of \$98,000.00
25 ("Total Settlement Amount") in settlement payments to ERC on the following schedule: An
26 initial payment of \$19,600.00 shall be made to ERC on the later of the following: five (5) days
27 after the Effective Date, or February 15, 2015, followed by four (4) consecutive monthly
28 payments in the amount of \$19,600.00 due and owing no later than the 15th of each month after

1 the month the first payment is made. Trivita shall make these payments by wire transfer to
2 ERC's escrow account, for which ERC will give Trivita the necessary account information.

3 The Total Settlement Amount shall be apportioned as follows:

4 4.2 \$34,152.00 shall be considered a civil penalty pursuant to California Health
5 and Safety Code §25249.7(b)(1). ERC shall remit 75% (\$25,614.00) of the civil penalty to the
6 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
7 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
8 Code §25249.12(c). ERC will retain the remaining 25% (\$8,538.00) of the civil penalty.

9 4.3 \$2,341.38 shall be distributed to Environmental Research Center as
10 reimbursement to ERC for reasonable costs incurred in bringing this action; and \$25,765.44
11 shall be distributed to Environmental Research Center in lieu of further civil penalties, for the
12 day-to-day business activities such as (1) continued enforcement of Proposition 65, which
13 includes work, analyzing, researching and testing consumer products that may contain
14 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are
15 the subject matter of the current action; (2) the continued monitoring of past consent judgments
16 and settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
17 donation of \$1,285.00 to the Environmental Working Group to address reducing toxic chemical
18 exposures in California.

19 4.4 \$18,000.00 shall be distributed to Lozeau Drury LLP as reimbursement of
20 ERC's attorney's fees while \$17,741.18 shall be distributed to ERC for its in-house legal fees.

21 5. MODIFICATION OF CONSENT JUDGMENT

22 5.1 This Consent Judgment may be modified only (i) by written stipulation of
23 the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent
24 judgment.

25 5.2 If Trivita seeks to modify this Consent Judgment under Section 5.1, then
26 Trivita must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to
27 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must
28 provide written notice to Trivita within thirty days of receiving the Notice of Intent. If ERC

1 notifies Trivita in a timely manner of ERC's intent to meet and confer, then the Parties shall
2 meet and confer in good faith as required in this Section. The Parties shall meet in person or
3 via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.
4 Within thirty days of such meeting, if ERC disputes the proposed modification, ERC shall
5 provide to Trivita a written basis for its position. The Parties shall continue to meet and confer
6 for an additional thirty (30) days in an effort to resolve any remaining disputes. Should it
7 become necessary, the Parties may agree in writing to different deadlines for the meet-and-
8 confer period.

9 **5.3** In the event that Trivita initiates or otherwise requests a modification under
10 Section 5.1, and the meet and confer process leads to a joint motion or application of the
11 Consent Judgment, Trivita shall reimburse ERC its costs and reasonable attorney's fees for the
12 time spent in the meet-and-confer process and filing and arguing the motion or application.

13 **5.4** Where the meet-and-confer process does not lead to a joint motion or
14 application in support of a modification of the Consent Judgment, then either Party may seek
15 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and
16 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"
17 means a party who is successful in obtaining relief more favorable to it than the relief that the
18 other party was amenable to providing during the Parties' good faith attempt to resolve the
19 dispute that is the subject of the modification.

20 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
21 **JUDGMENT**

22 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or
23 terminate this Consent Judgment.

24 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
25 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall
26 inform Trivita in a reasonably prompt manner of its test results, including information sufficient
27 to permit Trivita to identify the Covered Products at issue. Trivita shall, within thirty days
28 following such notice, provide ERC with testing information, from an independent third-party

1 laboratory meeting the requirements of Sections 3.4.1 and 3.4.2, demonstrating Defendant's
2 compliance with the Consent Judgment, if warranted. The Parties shall first attempt to resolve
3 the matter prior to ERC taking any further legal action.

4 **7. APPLICATION OF CONSENT JUDGMENT**

5 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
6 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
7 divisions, affiliates, franchisees, licensees, customers (excluding private labelers), distributors,
8 wholesalers, retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
9 application to Covered Products which are distributed or sold exclusively outside the State of
10 California and which are not used by California consumers.

11 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

12 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
13 on behalf of itself and in the public interest, and Trivita, of any alleged violation of Proposition
14 65 or its implementing regulations for failure to provide Proposition 65 warnings of exposure to
15 lead from the handling, use, or consumption of the Covered Products and fully resolves all
16 claims that have been or could have been asserted in this action up to and including the
17 Effective Date for failure to provide Proposition 65 warnings for the Covered Products. ERC,
18 on behalf of itself and in the public interest, hereby discharges Trivita and its respective
19 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
20 affiliates, suppliers, franchisees, licensees, customers (not including private label customers of
21 Trivita), distributors, wholesalers, retailers, and all other upstream and downstream entities in
22 the distribution chain of any Covered Product, and the predecessors, successors and assigns of
23 any of them (collectively, "Released Parties"), from any and all claims, actions, causes of
24 action, suits, demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that
25 could have been asserted, as to any alleged violation of Proposition 65 arising from the failure
26 to provide Proposition 65 warnings on the Covered Products regarding lead.

27 **8.2** ERC on its own behalf only, on one hand, and Trivita on its own behalf only,
28 on the other, further waive and release any and all claims they may have against each other for

1 all actions or statements made or undertaken in the course of seeking or opposing enforcement
2 of Proposition 65 in connection with the Notice or Complaint up through and including the
3 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's
4 right to seek to enforce the terms of this Consent Judgment.

5 **8.3** It is possible that other claims not known to the Parties arising out of the
6 facts alleged in the Notice or the Complaint and relating to the Covered Products will develop
7 or be discovered. ERC on behalf of itself only, on one hand, and Trivita, on the other hand,
8 acknowledge that this Consent Judgment is expressly intended to cover and include all such
9 claims up through the Effective Date, including all rights of action therefore. ERC and Trivita
10 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
11 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
12 claims. California Civil Code section 1542 reads as follows:

13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
14 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
15 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
16 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
17 OR HER SETTLEMENT WITH THE DEBTOR,

18 ERC on behalf of itself only, on the one hand, and Trivita, on the other hand, acknowledge and
19 understand the significance and consequences of this specific waiver of California Civil Code
20 section 1542.

21 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
22 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
23 in the Covered Products as set forth in the Notice and the Complaint.

24 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational
25 or environmental exposures arising under Proposition 65, nor shall it apply to any of Trivita's
26 products other than the Covered Products.

27 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

28 In the event that any of the provisions of this Consent Judgment are held by a court to be
unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

1 **10. GOVERNING LAW**

2 The terms and conditions of this Consent Judgment shall be governed by and construed in
3 accordance with the laws of the State of California.

4 **11. PROVISION OF NOTICE**

5 All notices required to be given to either Party to this Consent Judgment by the other shall
6 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified
7 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.

8

9 **FOR ENVIRONMENTAL RESEARCH CENTER:**

10 Chris Heptinstall, Executive Director, Environmental Research Center

11 3111 Camino Del Rio North, Suite 400

12 San Diego, CA 92108

13 Tel: (619) 500-3090

14 Email: chris_erc501c3@yahoo.com

15

16 With a copy to:

17 MICHAEL R. LOZEAU

18 RICHARD DRURY

19 LOZEAU | DRURY LLP

20 410 12th Street, Suite 250

21 Oakland, CA 94607

22 Ph: 510-836-4200

23 Fax: 510-836-4205

24 Email: michael@lozeaudrury.com

25 Email: richard@lozeaudrury.com

26

27

28

1 **FOR TRIVITA, INC.**

2 Gene Henderson, Executive Vice President Legal Affairs

3 Trivita, Inc.

4 16100 North Greenway Hayden Loop, Suite 950

5 Scottsdale, AZ 85260

6 Ph: (480) 337-4124

7 Email: Gene.Henderson@Trivita.com

8
9 With a copy to:

10 DANIEL S. SILVERMAN

11 VENABLE LLP

12 2049 Century Park East, Suite 2100

13 Los Angeles, CA 90067

14 Ph: (310) 229-0373

15 Fax: (310) 229-9901

16 Email: DSilverman@Venable.com

17
18 **12. COURT APPROVAL**

19 12.1 Upon execution of this Consent Judgment by the Parties, ERC shall notice a
20 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
21 Consent Judgment.

22 12.2 If the California Attorney General objects to any term in this Consent
23 Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and
24 if possible prior to the hearing on the motion.

25 12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be
26 void and have no force or effect.

27 **13. EXECUTION AND COUNTERPARTS**

28 This Consent Judgment may be executed in counterparts, which taken together shall be

1 deemed to constitute one document. A facsimile or .pdf signature shall be construed as valid as
2 the original signature.

3 **14. DRAFTING**

4 The terms of this Consent Judgment have been reviewed by the respective counsel for each
5 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms with
6 counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent
7 Judgment entered thereon, the terms and provisions shall not be construed against any Party.

8 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

9 If a dispute arises with respect to either Party's compliance with the terms of this Consent
10 Judgment entered by the Court, the Parties shall meet in person or by telephone and endeavor to
11 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of
12 such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is
13 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As
14 used in the preceding sentence, the term "prevailing party" means a party who is successful in
15 obtaining relief more favorable to it than the relief that the other party was amenable to providing
16 during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement
17 action.

18 **16. ENTIRE AGREEMENT, AUTHORIZATION**

19 **16.1** This Consent Judgment contains the sole and entire agreement and
20 understanding of the Parties with respect to the entire subject matter herein, and any and all
21 prior discussions, negotiations, commitments and understandings related hereto. No
22 representations, oral or otherwise, express or implied, other than those contained herein have
23 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
24 herein, shall be deemed to exist or to bind any Party.

25 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully
26 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as
27 explicitly provided herein, each Party shall bear its own fees and costs.

1 17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF
2 CONSENT JUDGMENT

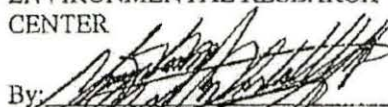
3 This Consent Judgment has come before the Court upon the request of the Parties. The
4 Parties request the Court to fully review this Consent Judgment and, being fully informed
5 regarding the matters which are the subject of this action, to:

6 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
7 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has
8 been diligently prosecuted, and that the public interest is served by such settlement; and

9 (2) Make the findings pursuant to California Health and Safety Code section
10 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

11 IT IS SO STIPULATED:

12 Dated: 12/21, 2014

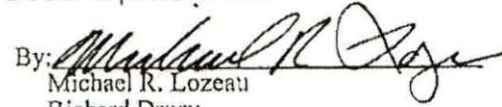
ENVIRONMENTAL RESEARCH
CENTER
By: 
Chris Hepburn, Executive Director

15 Dated: 12/21, 2014

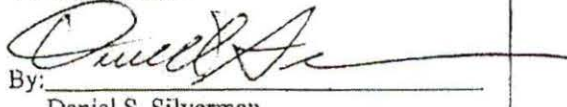
TRIVITA, INC.
By: 
Gene Henderson, Executive Vice
President Legal Affairs

18 APPROVED AS TO FORM:

19 Dated: 12/2, 2014

LOZEAU | DRURY LLP
By: 
Michael R. Lozeau
Richard Drury
Attorneys for Plaintiff Environmental
Research Center

24 Dated: 12/2, 2014

VENABLE LLP
By: 
Daniel S. Silverman
Attorney for Defendant Trivita, Inc.

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ORDER AND JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is approved and Judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: Feb. 11, 2014



Judge of the Superior Court

EXHIBIT A



T 510.836.4200
F 510.836.4205

410 12th Street, Suite 250
Oakland, Ca 94607

www.lozeaudrury.com
michael@lozeaudrury.com

VIA CERTIFIED MAIL

Current CEO or President
TriVita, Inc.
16100 N. Greenway Hayden Loop
Suite 950
Scottsdale, AZ 85260

Current CEO or President
TriVita, Inc.
PO Box 15700
Scottsdale, AZ 85267

Mark Allen
(TriVita, Inc.'s Registered Agent for
Service of Process)
393 East Palm Lane
Phoenix, AZ 85004

VIA PRIORITY MAIL

District Attorneys of All California Counties
and Select City Attorneys
(See Attached Certificate of Service)

VIA ONLINE SUBMISSION

Office of the California Attorney General

Re: Notice of Violations of California Health & Safety Code Section 25249.5 *et seq.*

Dear Addressees:

I represent the Environmental Research Center ("ERC") in connection with this Notice of Violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986, which is codified at California Health & Safety Code Section 25249.5 *et seq.* and also referred to as Proposition 65.

ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

The name of the Company covered by this notice that violated Proposition 65 (hereinafter the "Violator") is:

TriVita, Inc.

The products that are the subject of this notice and the chemicals in those products identified as exceeding allowable levels are:

- **TriVita Inc. Garcinia Cambogia - Lead**
- **TriVita Inc. Bone Growth Factor - Lead**
- **TriVita Inc. Amazon Herb Perform Shake - Lead**
- **TriVita Inc. Leanology Nutritional Shake Creamy Vanilla - Lead**
- **TriVita Inc. GlucoManage Formula - Lead**
- **TriVita Inc. Leanology - Lead**
- **TriVita Inc. Leanology Appetite Control Soft Chews Chocolate Mocha 60 Soft Chews- Lead**
- **TriVita Inc. Nopalea Daily Cleanse - Lead**

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

This letter is a notice to the Violator and the appropriate governmental authorities of the Proposition 65 violations concerning the listed products. This notice covers all violations of Proposition 65 involving the Violator currently known to ERC from the information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with the copy of this letter to the Violator.

The Violator has manufactured, marketed, distributed, and/or sold the listed products, which have exposed and continue to expose numerous individuals within California to the identified chemical, lead. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and/or recommended use of these products by consumers. The primary route of exposure to lead has been through ingestion, but may have also occurred through inhalation and/or dermal contact. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to lead. The method of warning should be a warning that appears on the product's label. The Violator violated Proposition 65 because it failed to provide an appropriate warning to persons using and/or handling these products that they are being exposed to lead. Each of these ongoing violations has occurred on every day since May 23, 2011, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users.

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 23, 2014

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Pursuant to Section 25249.7(d) of the statute, ERC intends to file a citizen enforcement action sixty days after effective service of this notice unless the Violator agrees in an enforceable written instrument to: (1) reformulate the listed products so as to eliminate further exposures to the identified chemicals; (2) pay an appropriate civil penalty; and 3) provide clear and reasonable warnings compliant with Proposition 65 to all persons who purchased the above products in the last four years. Consistent with the public interest goals of Proposition 65 and my client's objectives in pursuing this notice, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time consuming litigation.

ERC's Executive Director is Chris Heptinstall, and is located at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. 619-500-3090. ERC has retained me in connection with this matter. We suggest that communications regarding this Notice of Violations should be directed to my attention at the above listed law office address and telephone number.

Sincerely,



Michael Lozeau

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to TriVita, Inc. and its Registered Agent for Service of Process only)

Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

**Re: Environmental Research Center's Notice of Proposition 65 Violations by
TriVita, Inc.**

I, Michael Lozeau, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged the party identified in the notice violated California Health & Safety Code Section 25249.6 by failing to provide clear and reasonable warnings.
2. I am an attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who have reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the notice.
4. Based on the information obtained through those consultants, and on other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiff's case can be established and that the information did not prove that the alleged Violator will be able to establish any of the affirmative defenses set forth in the statute.
5. Along with the copy of this Certificate of Merit served on the Attorney General is attached additional factual information sufficient to establish the basis for this certificate, including the information identified in California Health & Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

Dated: May 23, 2014


Michael Lozeau

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On May 23, 2014, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President
TriVita, Inc.
16100 N. Greenway Hayden Loop
Suite 950
Scottsdale, AZ 85260

Mark Allen
(TriVita, Inc.'s Registered Agent for
Service of Process)
393 East Palm Lane
Phoenix, AZ 85004

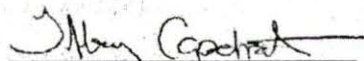
Current CEO or President
TriVita, Inc.
PO Box 15700
Scottsdale, AZ 85267

On May 23, 2014, I electronically served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following party by uploading a true and correct copy thereof on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice>:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Oakland, CA 94612-0550

On May 23, 2014, I served the following documents: **NOTICE OF VIOLATIONS, CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service with the postage fully prepaid for delivery by Priority Mail.

Executed on May 23, 2014, in Fort Oglethorpe, Georgia.



Tiffany Capehart

Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

May 23, 2014

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Service List

District Attorney, Alameda County
1225 Fallon Street, Suite 900
Oakland, CA 94612

District Attorney, Alpine County
P.O. Box 248
Markleeville, CA 96120

District Attorney, Amador County
708 Court Street
Jackson, CA 95642

District Attorney, Butte County
25 County Center Drive, Suite 245
Oroville, CA 95965

District Attorney, Calaveras County
891 Mountain Ranch Road
San Andreas, CA 95249

District Attorney, Colusa County
346 Fifth Street Suite 101
Colusa, CA 95932

District Attorney, Contra Costa County
900 Ward Street
Martinez, CA 94553

District Attorney, Del Norte County
450 H Street, Room 171
Crescent City, CA 95531

District Attorney, El Dorado County
515 Main Street
Placerville, CA 95667

District Attorney, Fresno County
2220 Tulare Street, Suite 1000
Fresno, CA 93721

District Attorney, Glenn County
Post Office Box 430
Willows, CA 95988

District Attorney, Humboldt County
825 5th Street 4th Floor
Eureka, CA 95501

District Attorney, Imperial County
940 West Main Street, Ste 102
El Centro, CA 92243

District Attorney, Inyo County
230 W. Line Street
Bishop, CA 93514

District Attorney, Kern County
1215 Truxtun Avenue
Bakersfield, CA 93301

District Attorney, Kings County
1400 West Lacey Boulevard
Hanford, CA 93230

District Attorney, Lake County
255 N. Forbes Street
Lakeport, CA 95453

District Attorney, Lassen County
220 South Lassen Street, Ste. 8
Susanville, CA 96130

District Attorney, Los Angeles County
210 West Temple Street, Suite 18000
Los Angeles, CA 90012

District Attorney, Madera County
209 West Yosemite Avenue
Madera, CA 93637

District Attorney, Marin County
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

District Attorney, Mariposa County
Post Office Box 730
Mariposa, CA 95338

District Attorney, Mendocino County
Post Office Box 1000
Ukiah, CA 95482

District Attorney, Merced County
550 W. Main Street
Merced, CA 95340

District Attorney, Modoc County
204 S Court Street, Room 202
Alturas, CA 96101-4020

District Attorney, Mono County
Post Office Box 617
Bridgeport, CA 93517

District Attorney, Monterey County
Post Office Box 1131
Salinas, CA 93902

District Attorney, Napa County
931 Parkway Mall
Napa, CA 94559

District Attorney, Nevada County
201 Commercial Street
Nevada City, CA 95959

District Attorney, Orange County
401 West Civic Center Drive
Santa Ana, CA 92701

District Attorney, Placer County
10810 Justice Center Drive, Ste 240
Roseville, CA 95678

District Attorney, Plumas County
520 Main Street, Room 404
Quincy, CA 95971

District Attorney, Riverside County
3960 Orange Street
Riverside, CA 92501

District Attorney, Sacramento County
901 "G" Street
Sacramento, CA 95814

District Attorney, San Benito County
419 Fourth Street, 2nd Floor
Hollister, CA 95023

District Attorney, San Bernardino County
316 N. Mountain View Avenue
San Bernardino, CA 92415-0004

District Attorney, San Diego County
330 West Broadway, Suite 1300
San Diego, CA 92101

District Attorney, San Francisco County
850 Bryant Street, Suite 322
San Francisco, CA 94103

District Attorney, San Joaquin County
222 E. Weber Ave. Rm. 202
Stockton, CA 95202

District Attorney, San Luis Obispo County
1035 Palm St, Room 450
San Luis Obispo, CA 93408

District Attorney, San Mateo County
400 County Ctr., 3rd Floor
Redwood City, CA 94063

District Attorney, Santa Barbara County
1112 Santa Barbara Street
Santa Barbara, CA 93101

District Attorney, Santa Clara County
70 West Hedding Street
San Jose, CA 95110

District Attorney, Santa Cruz County
701 Ocean Street, Room 200
Santa Cruz, CA 95060

District Attorney, Shasta County
1355 West Street
Redding, CA 96001

District Attorney, Sierra County
PO Box 457
Downieville, CA 95936

District Attorney, Siskiyou County
Post Office Box 986
Yreka, CA 96097

District Attorney, Solano County
675 Texas Street, Ste 4500
Fairfield, CA 94533

District Attorney, Sonoma County
600 Administration Drive,
Room 212J
Santa Rosa, CA 95403

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95354

District Attorney, Sutter County
446 Second Street
Yuba City, CA 95991

District Attorney, Tehama County
Post Office Box 519
Red Bluff, CA 96080

District Attorney, Trinity County
Post Office Box 310
Weaverville, CA 96093

District Attorney, Tulare County
221 S. Mooney Blvd., Room 224
Visalia, CA 93291

District Attorney, Tuolumne County
423 N. Washington Street
Sonora, CA 95370

District Attorney, Ventura County
800 South Victoria Ave, Suite 314
Ventura, CA 93009

District Attorney, Yolo County
301 2nd Street
Woodland, CA 95695

District Attorney, Yuba County
215 Fifth Street, Suite 152
Marysville, CA 95901

Los Angeles City Attorney's Office
City Hall East
200 N. Main Street, Suite 800
Los Angeles, CA 90012

San Diego City Attorney's Office
1200 3rd Avenue, Ste 1620
San Diego, CA 92101

San Francisco, City Attorney
City Hall, Room 234
1 Dr Carlton B Goodlett Pl
San Francisco, CA 94102

San Jose City Attorney's Office
200 East Santa Clara Street,
16th Floor
San Jose, CA 95113

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA's implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. This means that chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as

¹ All further regulatory references are to sections of Title 27 of the California Code of Regulations unless otherwise indicated. The statute, regulations and relevant case law are available on the OEHHA website at: <http://www.oehha.ca.gov/prop65/law/index.html>.

damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at:

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies; for example, when exposures are sufficiently low (see below). The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

Grace Period. Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

Governmental agencies and public water utilities. All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

Businesses with nine or fewer employees. Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by a 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures to Naturally Occurring Chemicals in a Food. Certain exposures to chemicals that occur in foods naturally (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant² it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for chemicals that cause cancer or that is 1,000 times below the "no observable effect" level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

² See Section 25501(a)(4)

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at P65Public.Comments@oehha.ca.gov.

Revised: July, 2012

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.