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5 Environmental Research Center, Inc.

6  
7  
8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10 ENVIRONMENTAL RESEARCH CENTER,  
11 INC., a non-profit California corporation,  
12 Plaintiff,

13 v.

14 NEW WHEY NUTRITION, LLC and DOES  
1-25, Inclusive,  
15 Defendants.

Case No. RG15787566

**NOTICE OF ENTRY OF JUDGMENT**

16  
17 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

18 PLEASE TAKE NOTICE that the Court has entered Judgment in the above-entitled matter. A  
19 true and correct copy of the Judgment is attached hereto as Exhibit 1.

20  
21  
22 Dated: May 4, 2017

WRAITH LAW

23 

24  
25 \_\_\_\_\_  
26 William F. Wraith  
27 Attorney for Plaintiff Environmental  
28 Research Center

# **EXHIBIT 1**



\*14861738\*

Courtesy Copy

MAR 13 2017

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 5 Attorney For Plaintiff,  
 ENVIRONMENTAL RESEARCH CENTER, INC.

6  
 7 JOHN R. EPPERSON, SBN 183347  
 COOPER, WHITE & COOPER LLP  
 201 California Street, 17<sup>th</sup> Floor  
 8 San Francisco, CA 94111  
 Tel: (415) 433-1900  
 9 Fax: (415) 433-5530  
 Email: jepperson@cwclaw.com  
 10

11 Attorney for Defendant  
 NEW WHEY NUTRITION, LLC  
 12

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

15 ENVIRONMENTAL RESEARCH CENTER,  
 16 INC., a non-profit California corporation,

17 Plaintiff,

18 v.

19 NEW WHEY NUTRITION, LLC and DOES  
 20 1-25, Inclusive,

21 Defendants.

CASE NO. RG15787566

**STIPULATED CONSENT  
 JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: September 29, 2015  
 Trial Date: June 9, 2017

**FILED**  
 ALAMEDA COUNTY  
 MAY - 2 2017  
 CLERK OF THE SUPERIOR COURT  
 By Yestrada Deputy

23 **1. INTRODUCTION**

24 **1.1** On September 29, 2015, Plaintiff Environmental Research Center, Inc. ("ERC"),  
 25 a non-profit corporation, as a private enforcer, and in the public interest, initiated this action by  
 26 filing a Complaint for Injunctive Relief and Civil Penalties (the "Complaint") pursuant to the  
 27 provisions of California Health and Safety Code section 25249.5 *et seq.* ("Proposition 65"),  
 28 against New Whey Nutrition, LLC ("NEW WHEY NUTRITION") and Does 1-25. In this

1 action, ERC alleges that a number of products manufactured, distributed or sold by NEW  
2 WHEY NUTRITION contain lead, a chemical listed under Proposition 65 as a carcinogen and  
3 reproductive toxin, and expose consumers to this chemical at a level requiring a Proposition 65  
4 warning. These products (referred to hereinafter individually as a “Covered Product” or  
5 collectively as “Covered Products”) are:

- 6 a) New Whey Nutrition Multi-Pro Whey Isolate Blend Swiss Chocolate
- 7 b) New Whey Nutrition Multi-Pro Whey Isolate Blend Vanilla Cinnamon
- 8 c) New Whey Nutrition Bio Engineered Waximaize Fruit Punch
- 9 d) New Whey Nutrition Bio Engineered Waximaize Grape

10 **1.2** ERC and NEW WHEY NUTRITION are hereinafter referred to individually as  
11 a “Party” or collectively as the “Parties.”

12 **1.3** ERC is a California non-profit corporation dedicated to, among other causes,  
13 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
14 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
15 encouraging corporate responsibility.

16 **1.4** For purposes of this Consent Judgment, the Parties agree that NEW WHEY  
17 NUTRITION is a business entity that has employed ten or more persons at all times relevant to  
18 this action, and qualifies as a “person in the course of business” within the meaning of Proposition  
19 65. NEW WHEY NUTRITION manufactures, distributes and sells the Covered Products.

20 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation  
21 dated June 15, 2015 that was served on the California Attorney General, other public enforcers,  
22 and NEW WHEY NUTRITION (“Notice”). A true and correct copy of the Notice is attached as  
23 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the  
24 Notice was mailed and uploaded to the Attorney General’s website, and no designated  
25 governmental entity has filed a complaint against NEW WHEY NUTRITION with regard to the  
26 Covered Products or the alleged violations.

27 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes  
28 persons in California to lead without first providing clear and reasonable warnings in violation

1 of California Health and Safety Code section 25249.6. NEW WHEY NUTRITION denies all  
2 material allegations contained in the Notice and Complaint.

3       1.7 The Parties have entered into this Consent Judgment in order to settle,  
4 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
5 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
6 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
7 parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers,  
8 distributors, wholesalers, or retailers. Except for the representations made above, nothing in  
9 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of  
10 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
11 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any  
12 purpose.

13       1.8 Except as expressly set forth herein, nothing in this Consent Judgment shall  
14 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
15 other or future legal proceeding unrelated to these proceedings.

16       1.9 The Effective Date of this Consent Judgment is the date on which it is entered as  
17 a Judgment by this Court.

## 18       2.    **JURISDICTION AND VENUE**

19       For purposes of this Consent Judgment and any further court action that may become  
20 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter  
21 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction  
22 over NEW WHEY NUTRITION as to the acts alleged in the Complaint, that venue is proper in  
23 Alameda County, and that this Court has jurisdiction to enter this Consent Judgment as a full and  
24 final resolution of all claims up through and including the Effective Date which were or could  
25 have been asserted in this action based on the facts alleged in the Notice and Complaint.

## 26       3.    **INJUNCTIVE RELIEF, REFORMULATION, TESTING AND WARNINGS**

27       3.1 Beginning six months from the Effective Date (“Compliance Date”), NEW  
28 WHEY NUTRITION shall be permanently enjoined from manufacturing for sale in the State of

1 California, "Distributing into the State of California", or directly selling in the State of  
2 California, any Covered Product which exposes a person to a "Daily Lead Exposure Level" of  
3 more than 0.5 micrograms per day of lead as that term is defined in Section 3.1.2 when the  
4 maximum suggested dose is taken as directed on the Covered Product's label, unless it meets  
5 the warning requirements under Section 3.2.

6 Beginning on the Effective Date, NEW WHEY NUTRITION shall use Good  
7 Manufacturing Practices conforming with National Sanitation Foundation guidelines for  
8 manufacturing of any Covered Products distributed into the State of California.

9 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State  
10 of California" shall mean to directly ship a Covered Product into California for sale in  
11 California or to sell a Covered Product to a distributor that NEW WHEY NUTRITION knows  
12 will sell the Covered Product in California.

13 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure  
14 Level" shall be measured in micrograms, and shall be calculated using the following formula:  
15 micrograms of lead per gram of product, minus the amounts of lead listed in Table 3.1.3 below  
16 (which for purposes of this Consent Judgment shall be treated as naturally occurring)  
17 multiplied by grams of product per serving of the product (using the largest serving size  
18 appearing on the product label), multiplied by servings of the product per day (using the largest  
19 number of servings in a recommended dosage appearing on the product label), which equals  
20 micrograms of lead exposure per day.

21 TABLE 3.1.2

INGREDIENT	NATURALLY OCCURRING AMOUNT OF LEAD
Calcium (Elemental)	0.8 micrograms/gram
Ferrous Fumarate	0.4 micrograms/gram
Zinc Oxide	8.0 micrograms/gram
Magnesium Oxide	0.4 micrograms/gram
Magnesium Carbonate	0.332 micrograms/gram

1	Magnesium Hydroxide	0.4 micrograms/gram
2	Zinc Gluconate	0.8 micrograms/gram
3	Potassium Chloride	1.1 micrograms/gram
4	Cocoa-powder	1.0 microgram/gram

5

6 If NEW WHEY NUTRITION wishes to exclude the naturally occurring lead set forth in  
7 this section, it must, prior to the Effective Date, provide ERC with the percentage and weight of  
8 each ingredient for all Covered Products for which it is requesting that the exclusion be applied.  
9 In the event that a dispute arises with respect to compliance with the terms of this Consent  
10 Judgment as to any contribution from naturally occurring lead levels under the Section, the  
11 Parties shall meet and confer as set forth in Section 15.

12 **3.2 Clear and Reasonable Warnings**

13 If NEW WHEY NUTRITION is required to provide a warning pursuant to Section 3.1, the  
14 following warning must be utilized:

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

17 NEW WHEY NUTRITION shall use the phrase “cancer and” in the warning only if the maximum  
18 daily dose recommended on the label contains more than 15 micrograms of lead as determined  
19 pursuant to the quality control methodology set forth in Section 3.4.

20 The warning shall be securely affixed to or printed upon the container or label of each  
21 Covered Product. In addition, for Covered Products sold over NEW WHEY NUTRITION’s  
22 website, the warning shall appear on NEW WHEY NUTRITION’s checkout page on its website  
23 for California consumers identifying any Covered Product, and also appear prior to completing  
24 checkout on NEW WHEY NUTRITION’s website when a California delivery address is  
25 indicated for any purchase of any Covered Product.

26 The warning shall be at least the same size as the largest of any other health or safety  
27 warnings also appearing on its website or on the label or container of NEW WHEY  
28 NUTRITION’s product packaging and the word “**WARNING**” shall be in all capital letters and in

1 bold print. No other statements about Proposition 65 or lead may accompany the warning.

2 NEW WHEY NUTRITION must display the above warnings with such conspicuousness,  
3 as compared with other words, statements, or design of the label or container, as applicable, to  
4 render the warning likely to be read and understood by an ordinary individual under customary  
5 conditions of purchase or use of the product.

### 6 3.3 Reformulated Covered Products

7 A Reformulated Covered Product is one for which the Daily Lead Exposure Level, taking  
8 in to account the naturally-occurring lead as defined in Section 3.1.2, when the maximum  
9 suggested dose is taken as directed on the Reformulated Covered Product's label, contains no  
10 more than 0.5 micrograms of lead per day as determined by the quality control methodology  
11 described in Section 3.4.

### 12 3.4 Testing and Quality Control Methodology

13 3.4.1 Beginning within one year of the Effective Date, NEW WHEY  
14 NUTRITION shall arrange for lead testing of the Covered Products at least once a year for a  
15 minimum of three consecutive years by arranging for testing of at least five randomly selected  
16 samples of each of the Covered Products, in the form intended for sale to the end-user, which  
17 NEW WHEY NUTRITION intends to sell or is manufacturing for sale in California, directly  
18 selling to a consumer in California or "Distributing into California." The testing requirement  
19 does not apply to any of the Covered Products for which NEW WHEY NUTRITION has  
20 provided the warning specified in Section 3.2 or for Covered Products that are no longer  
21 manufactured.

22 3.4.2 For purposes of measuring the "Daily Lead Exposure Level", the  
23 arithmetic mean lead detection result of the randomly selected samples set forth in section 3.4.1  
24 of the Covered Products will be controlling.

25 3.4.3 All testing pursuant to this Consent Judgment shall be performed using a  
26 laboratory method that complies with the performance and quality control factors appropriate  
27 for the method used, including limit of detection, qualification, accuracy, and precision that  
28 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry ("ICP-MS")



1 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing  
2 method subsequently agreed to in writing by the Parties.

3           **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an  
4 independent third party laboratory certified by the California Environmental Laboratory  
5 Accreditation Program or an independent third-party laboratory that is registered with the  
6 United States Food & Drug Administration.

7           **3.4.5** Nothing in this Consent Judgment shall limit NEW WHEY  
8 NUTRITION's ability to conduct, or require that others conduct, additional testing of the  
9 Covered Products, including the raw materials used in their manufacture.

10           **3.4.6** Beginning on the Effective Date and continuing for a period of five  
11 years, NEW WHEY NUTRITION shall arrange for copies of all laboratory reports with results  
12 of testing for lead content under Section 3.4.1 to be automatically sent by the testing laboratory  
13 directly to ERC within ten days after completion of the testing. NEW WHEY NUTRITION  
14 shall retain all test results and documentation for a period of five years from the date of each  
15 test.

16       **4. SETTLEMENT PAYMENT**

17           **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
18 penalties, attorney's fees, and costs, NEW WHEY NUTRITION shall make a total payment of  
19 \$40,000.00 ("Total Settlement Amount") to ERC within 5 days of the Effective Date. NEW  
20 WHEY NUTRITION shall make this payment by wire transfer to ERC's escrow account, for  
21 which ERC will give NEW WHEY NUTRITION the necessary account information. The  
22 Total Settlement Amount shall be apportioned as follows:

23           **4.2** \$3,000.00 shall be considered a civil penalty pursuant to California Health and  
24 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$2,250.00) of the civil penalty to the  
25 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe  
26 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety  
27 Code §25249.12(c). ERC will retain the remaining 25% (\$750.00) of the civil penalty.

1           **4.3**   \$6,276.44 shall be distributed to ERC as reimbursement to ERC for reasonable  
2 costs incurred in bringing this action.

3           **4.4**   \$15,170.00 shall be distributed to William F. Wraith as reimbursement of ERC's  
4 attorney's fees, while \$15,553.56 shall be distributed to ERC for its in-house legal fees.

5           **5.   MODIFICATION OF CONSENT JUDGMENT**

6           **5.1**   This Consent Judgment may be modified only (i) by written stipulation of the  
7 Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
8 judgment.

9           **5.2**   If NEW WHEY NUTRITION seeks to modify this Consent Judgment under  
10 Section 5.1, then NEW WHEY NUTRITION must provide written notice to ERC of its intent  
11 ("Notice of Intent"). If ERC seeks to meet and confer regarding the proposed modification in  
12 the Notice of Intent, then ERC must provide written notice to NEW WHEY NUTRITION  
13 within thirty days of receiving the Notice of Intent. If ERC notifies NEW WHEY NUTRITION  
14 in a timely manner of ERC's intent to meet and confer, then the Parties shall meet and confer in  
15 good faith as required in this Section. The Parties shall meet in person or via telephone within  
16 thirty (30) days of ERC's notification of its intent to meet and confer. Within thirty days of  
17 such meeting, if ERC disputes the proposed modification, ERC shall provide to NEW WHEY  
18 NUTRITION a written basis for its position. The Parties shall continue to meet and confer for  
19 an additional thirty (30) days in an effort to resolve any remaining disputes. Should it become  
20 necessary, the Parties may agree in writing to different deadlines for the meet-and-confer  
21 period.

22           **5.3**   In the event that NEW WHEY NUTRITION initiates or otherwise requests a  
23 modification under Section 5.1, and the meet and confer process leads to a joint motion or  
24 application of the Consent Judgment, NEW WHEY NUTRITION shall reimburse ERC its  
25 costs and reasonable attorney's fees for the time spent in the meet-and-confer process and filing  
26 and arguing the motion or application.

27           **5.4**   Where the meet-and-confer process does not lead to a joint motion or  
28 application in support of a modification of the Consent Judgment, then either Party may seek

1 judicial relief on its own. In such a situation, the prevailing Party may seek to recover costs  
2 and reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"  
3 means a party who is successful in obtaining relief more favorable to it than the relief that the  
4 other party was amenable to providing during the Parties' good faith attempt to resolve the  
5 dispute that is the subject of the modification.

6 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
7 **JUDGMENT**

8 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate  
9 this Consent Judgment.

10 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated  
11 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall  
12 inform NEW WHEY NUTRITION in a reasonably prompt manner of its test results, including  
13 information sufficient to permit NEW WHEY NUTRITION to identify the Covered Products at  
14 issue. NEW WHEY NUTRITION shall, within thirty days following such notice, provide ERC  
15 with testing information, from an independent third-party laboratory meeting the requirements  
16 of Sections 3.4.1 and 3.4.2, demonstrating NEW WHEY NUTRITION's compliance with the  
17 Consent Judgment, if warranted. The Parties shall first attempt to resolve the matter prior to  
18 ERC taking any further legal action.

19 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

27 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on  
28 behalf of itself and in the public interest, and NEW WHEY NUTRITION and its respective

1 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
2 affiliates, suppliers, franchisees, licensees, customers (not including private label customers of  
3 NEW WHEY NUTRITION), distributors, wholesalers, retailers, and all other upstream and  
4 downstream entities in the distribution chain of any Covered Product, and the predecessors,  
5 successors and assigns of any of them (collectively, "Released Parties"), from any and all  
6 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and  
7 expenses asserted, or that could have been asserted from the handling, use, or consumption of  
8 the Covered Products, as to any alleged violation of Proposition 65 or its implementing  
9 regulations arising from the failure to provide Proposition 65 warnings on the Covered  
10 Products regarding lead up to and including the Effective Date.

11 **8.2** ERC on its own behalf only, on one hand, and NEW WHEY NUTRITION on its  
12 own behalf only, on the other, further waive and release any and all claims they may have  
13 against each other for all actions or statements made or undertaken in the course of seeking or  
14 opposing enforcement of Proposition 65 in connection with the Notice or Complaint up through  
15 and including the Effective Date, provided, however, that nothing in Section 8 shall affect or  
16 limit any Party's right to seek to enforce the terms of this Consent Judgment.

17 **8.3** It is possible that other claims not known to the Parties arising out of the facts  
18 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
19 discovered. ERC on behalf of itself only, on one hand, and NEW WHEY NUTRITION, on the  
20 other hand, acknowledge that this Consent Judgment is expressly intended to cover and include  
21 all such claims up through the Effective Date, including all rights of action therefore. ERC and  
22 NEW WHEY NUTRITION acknowledge that the claims released in Sections 8.1 and 8.2 above  
23 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to  
24 any such unknown claims. California Civil Code section 1542 reads as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
26 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
27 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
28 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
OR HER SETTLEMENT WITH THE DEBTOR.

1 ERC on behalf of itself only, on the one hand, and NEW WHEY NUTRITION, on the other  
2 hand, acknowledge and understand the significance and consequences of this specific waiver of  
3 California Civil Code section 1542.

4 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to  
5 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead  
6 in the Covered Products as set forth in the Notice and the Complaint.

7 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or  
8 environmental exposures arising under Proposition 65, nor shall it apply to any of NEW  
9 WHEY NUTRITION's products other than the Covered Products.

10 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

13 **10. GOVERNING LAW**

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

16 **11. PROVISION OF NOTICE**

17 All notices required to be given to either Party to this Consent Judgment by the other shall  
18 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via  
19 email may also be sent.

20 **FOR ENVIRONMENTAL RESEARCH CENTER, INC.:**

21 Chris Heptinstall, Executive Director, Environmental Research Center  
22 3111 Camino Del Rio North, Suite 400  
23 San Diego, CA 92108  
24 Tel: (619) 500-3090  
25 Email: chris\_erc501c3@yahoo.com

26 With a copy to:

27 WILLIAM F. WRAITH  
28 WRAITH LAW  
24422 Avenida de la Carlota, Suite 400  
Laguna Hills, CA 92653  
Tel: (949) 452-1234

1 Fax: (949) 452-1102

2 **NEW WHEY NUTRITION, LLC**

3 5707 Dot Com Court  
4 Suite 1079  
5 Oviedo, FL 32765

6 With a copy to:

7 JOHN R. EPPERSON  
8 COOPER, WHITE & COOPER LLP  
9 201 California Street, 17<sup>th</sup> Floor  
10 San Francisco, CA 94111  
11 Tel: (415) 433-1900  
12 Fax: (415) 433-5530  
13 Email: jepperson@cwclaw.com

14 **12. COURT APPROVAL**

15 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
16 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
17 Consent Judgment.

18 **12.2** If the California Attorney General objects to any term in this Consent Judgment,  
19 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
20 prior to the hearing on the motion.

21 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
22 void and have no force or effect.

23 **13. EXECUTION AND COUNTERPARTS**

24 This Consent Judgment may be executed in counterparts, which taken together shall be  
25 deemed to constitute one document. A facsimile or .pdf signature shall be construed as valid as  
26 the original signature.

27 **14. DRAFTING**

28 The terms of this Consent Judgment have been reviewed by the respective counsel for each  
Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and  
conditions with legal counsel. The Parties agree that, in any subsequent interpretation and

1 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,  
2 and no provision of this Consent Judgment shall be construed against any Party, based on the fact  
3 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any  
4 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated  
5 equally in the preparation and drafting of this Consent Judgment.

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

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

16 **16. ENTIRE AGREEMENT, AUTHORIZATION**

17 **16.1** This Consent Judgment contains the sole and entire agreement and  
18 understanding of the Parties with respect to the entire subject matter herein, and any and all  
19 prior discussions, negotiations, commitments and understandings related hereto. No  
20 representations, oral or otherwise, express or implied, other than those contained herein have  
21 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
22 herein, shall be deemed to exist or to bind any Party.

23 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully  
24 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
25 explicitly provided herein, each Party shall bear its own fees and costs.

26 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
27 **CONSENT JUDGMENT**

28 This Consent Judgment has come before the Court upon the request of the Parties. The

1 Parties request the Court to fully review this Consent Judgment and, being fully informed  
2 regarding the matters which are the subject of this action, to:

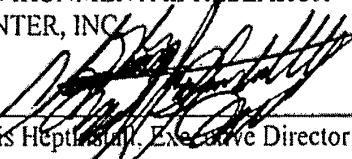
3 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
4 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has  
5 been diligently prosecuted, and that the public interest is served by such settlement; and

6 (2) Make the findings pursuant to California Health and Safety Code section  
7 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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**IT IS SO STIPULATED:**

Dated: 2/8/, 2015

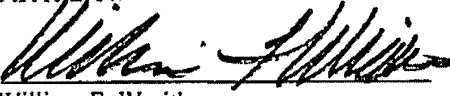
ENVIRONMENTAL RESEARCH  
CENTER, INC.  
By:   
Chris Heptinstall, Executive Director

Dated: \_\_\_\_\_, 2015

NEW WHEY NUTRITION, LLC  
\_\_\_\_\_  
By:  
Its:

**APPROVED AS TO FORM:**

Dated: February 9, 2015

WRAITH LAW  
By:   
William F. Wraith  
Attorney for Plaintiff Environmental  
Research Center, Inc.

Dated: \_\_\_\_\_, 2015

COOPER, WHITE & COOPER LLP  
By: \_\_\_\_\_  
John R. Epperson  
Attorney for Defendant New Whey  
Nutrition, LLC



1 Parties request the Court to fully review this Consent Judgment and, being fully informed  
2 regarding the matters which are the subject of this action, to:

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

6 (2) Make the findings pursuant to California Health and Safety Code section  
7 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

8

9 **IT IS SO STIPULATED:**

10 Dated: \_\_\_\_\_, 2015

ENVIRONMENTAL RESEARCH  
CENTER, INC.


11

By: \_\_\_\_\_  
Chris Heptinstall, Executive Director

12  
13 Dated: February 17, 2015

NEW WHEY NUTRITION, LLC

14

  
By: Chuck Walkley  
Its: CEO

15

16

17 **APPROVED AS TO FORM:**

18 Dated: \_\_\_\_\_, 2015

WRAITH LAW

19

By: \_\_\_\_\_  
William F. Wraith  
Attorney for Plaintiff Environmental  
Research Center, Inc.

20


21

22

23 Dated: February 17, 2015

COOPER, WHITE & COOPER LLP

24

By:   
John R. Epperson  
Attorney for Defendant New Whey  
Nutrition, LLC

25

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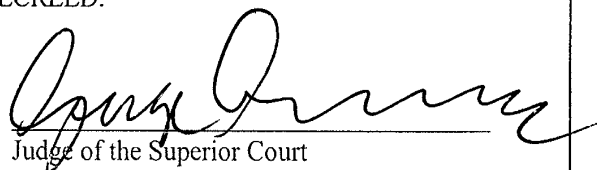
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**ORDER AND JUDGMENT**

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: 5/2, 2017

  
\_\_\_\_\_  
Judge of the Superior Court

GEORGE C. HERNANDEZ, JR.

**EXHIBIT “A”**

## **WRAITH LAW**

24422 AVENIDA DE LA CARLOTA  
SUITE 400  
LAGUNA HILLS, CA 92653  
Tel (949) 452-1234  
Fax (949) 452-1102

June 15, 2015

### **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ. (PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center, Inc. ("ERC"), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC's Executive Director is Chris Heptinstall. 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.

ERC has identified violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

**General Information about Proposition 65.** A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is attached with the copy of this letter served to the alleged Violator identified below.

**Alleged Violator.** The name of the company covered by this notice that violated Proposition 65 (hereinafter the "Violator") is:

**New Whey Nutrition, LLC**

**Consumer Products and Listed Chemical.** The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

**New Whey Nutrition Multi-Pro Whey Isolate Blend Swiss Chocolate - Lead**  
**New Whey Nutrition Multi-Pro Whey Isolate Blend Vanilla Cinnamon - Lead**  
**New Whey Nutrition Bio Engineered Waximaize Fruit Punch – Lead**  
**New Whey Nutrition Bio Engineered Waximaize Grape - 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.

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

June 15, 2015

Page 2

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent notices of violations.

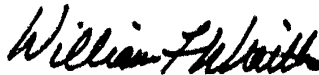
**Route of Exposure.** The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to this chemical has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

**Approximate Time Period of Violations.** Ongoing violations have occurred every day since at least June 15, 2012, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to this chemical.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of these products; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above products in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violations to my attention at the law office address and telephone number indicated on the letterhead.**

Sincerely,



---

William F. Wraith

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to New Whey Nutrition, LLC and its Registered Agents for Service of Process only)

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

**CERTIFICATE OF MERIT**

**Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by New Whey Nutrition, LLC**

I, William F. Wraith, declare:

1. This Certificate of Merit accompanies the attached 60-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.

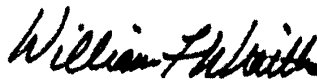
2. I am an attorney for the noticing party.

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: June 15, 2015



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William F. Wraith

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

June 15, 2015

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**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 June 15, 2015, 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current President or CEO  
New Whey Nutrition, LLC  
5707 Dot Com Court, Suite 1079  
Oviedo, FL 32765

Corporation Service Company  
(Registered Agent for New Whey  
Nutrition, LLC)  
2711 Centerville Road, Suite 400  
Wilmington, DE 19808

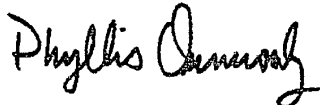
Corporation Service Company  
(Registered Agent for New Whey  
Nutrition, LLC)  
1201 Hays Street  
Tallahassee, FL 32301

On June 15, 2015, I verified 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)** were served on the following party when a true and correct copy thereof was uploaded 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 June 15, 2015, 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on June 15, 2015, in Fort Oglethorpe, Georgia.



Phyllis Dunwoody

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

June 15, 2015

Page 5

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 4<sup>th</sup> 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, 2<sup>nd</sup> 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., 3<sup>rd</sup> 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 12<sup>th</sup> 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 2<sup>nd</sup> 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,  
16<sup>th</sup> Floor  
San Jose, CA 95113



1 I, William F. Wraith, am an active member of the State Bar of California and not a party to  
2 this action. I am a resident or employed in the county where the mailing took place. My business  
3 address is 24422 Avenida de la Carlota, Suite 400, Laguna Hills, CA 92653.

4 On May 4, 2017, I served the foregoing documents described as:

5 **NOTICE OF ENTRY OF JUDGMENT**

6 on the following interested party in this action in the manner identified below:

7 John R. Epperson  
8 Cooper, White & Cooper LLP  
9 201 California Street, 17<sup>th</sup> Floor  
10 San Francisco, CA 94111  
11 Tel: (415) 433-1900  
12 Fax: (415) 433-5530  
13 jepperson@cwclaw.com  
14 Attorney for Defendant New Whey Nutrition, LLC

15 California Dept. of Justice, Office of the Attorney General  
16 Proposition 65 Enforcement Reporting  
17 Attention: Prop 65 Coordinator  
18 1515 Clay Street, Suite 2000  
19 Post Office Box 70550  
20 Oakland, California 94612-0550

21 [X] **BY MAIL – COLLECTION:** I placed the envelope for collection and mailing following  
22 this business's ordinary business practices. I am readily familiar with this business's  
23 practice for collecting and processing correspondence for mailing. On the same day that  
24 correspondence is placed for collection and mailing, it is deposited in the ordinary course  
25 of business with the United States Postal Service in a sealed envelope with postage fully  
26 prepaid.

27 I declare under penalty of perjury under the laws of the State of California that the above is true  
28 and correct. Executed on May 4, 2017 at Laguna Hills, California.



---

William F. Wraith