



FILED
ALAMEDA COUNTY

SEP 27 2016

CLERK OF THE SUPERIOR COURT

By [Signature]
Deputy

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17 Attorney for Defendant
18 VITACOST.COM, INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF ALAMEDA

21 ENVIRONMENTAL RESEARCH
22 CENTER, INC., a non-profit California
23 corporation,

24 Plaintiff,

25 v.

26 6S, INC. dba ALL STAR HEALTH, a
27 California corporation, VITACOST.COM,
28 INC., a Delaware corporation, and DOES 1-
29 25,

30 Defendants.

CASE NO. RG16802586

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: February 3, 2016

Trial Date: None set

31 1. INTRODUCTION

32 1.1 On February 3, 2016, Plaintiff Environmental Research Center, Inc. ("ERC"), a
33 non-profit corporation, as a private enforcer, and in the public interest, initiated this action by

1 filing a Complaint for Permanent Injunction, Civil Penalties and Other Relief (the
2 "Complaint") pursuant to the provisions of California Health and Safety Code section 25249.5
3 *et seq.* ("Proposition 65"), against Vitacost.com, Inc. ("Vitacost"), 6S, Inc. dba All Star Health
4 ("All Star Health"), and Does 1-25. In this action, ERC alleges that a number of Myogenix
5 products, distributed or sold by Vitacost contain lead, a chemical listed under Proposition 65 as
6 a carcinogen and reproductive toxin, and expose consumers to this chemical at a level requiring
7 a Proposition 65 warning. These products (referred to hereinafter individually as a "Covered
8 Product" or collectively as "Covered Products") are: Myogenix Inc. Pro Enzyme + Fiber and
9 Myogenix Inc. Liver Support Extra Strength.

10 1.2 ERC and Vitacost are hereinafter referred to individually as a "Party" or
11 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 Vitacost is a business
17 entity that has employed ten or more persons at all times relevant to this action, and qualifies as a
18 "person in the course of business" within the meaning of Proposition 65. Vitacost distributes and
19 sells the Covered Products.

20 1.5 The Complaint is based on allegations contained in ERC's Notice of Violation
21 dated August 28, 2015, that was served on the California Attorney General, other public
22 enforcers, and Vitacost ("Notice"). A true and correct copy of the Notice is attached as Exhibit
23 A and is hereby incorporated by reference. More than 60 days have passed since the Notice
24 was mailed and uploaded to the Attorney General's website, and no designated governmental
25 entity has filed a complaint against Vitacost with regard to the Covered Products or the alleged
26 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. Vitacost denies all material allegations
2 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 Vitacost as to the acts alleged in the Complaint, that venue is proper in Alameda County,
23 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of
24 all claims up through and including the Effective Date which were or could have been asserted in
25 this action based on the facts alleged in the Notice and Complaint.

26 3. INJUNCTIVE RELIEF AND WARNINGS

27 3.1 Beginning on the Effective Date, Vitacost has elected to voluntarily discontinue
28 the Covered Products for sale into California.

1 3.2 In the event that at any time Vitacost chooses to re-introduce the Covered
2 Products into the California marketplace, Vitacost shall be permanently enjoined from
3 "Distributing into the State of California", or directly selling in the State of California, any
4 Covered Product which exposes a person to a "Daily Lead Exposure Level" of more than 0.5
5 micrograms per day of lead when the maximum suggested dose is taken as directed on the
6 Covered Product's label, unless it meets the warning requirements under Section 3.3.

7 3.2.1 As used in this Consent Judgment, the term "Distributing into the State
8 of California" shall mean to directly ship a Covered Product into California for sale in
9 California or to sell a Covered Product to a distributor that Vitacost knows will sell the Covered
10 Product in California.

11 3.2.2 For purposes of this Consent Judgment, the "Daily Lead Exposure
12 Level" shall be measured in micrograms, and shall be calculated using the following formula:
13 micrograms of lead per gram of product, multiplied by grams of product per serving of the
14 product (using the largest serving size appearing on the product label), multiplied by servings
15 of the product per day (using the largest number of servings in a recommended dosage
16 appearing on the product label), which equals micrograms of lead exposure per day.

17 **3.3 Clear and Reasonable Warnings**

18 If Vitacost is required to provide a warning pursuant to Sections 3.2, 3.2.1 and 3.2.2, the
19 warning shall appear on Vitacost's checkout page on its website for California consumers
20 identifying any Covered Product, prior to completing checkout on Vitacost's website when a
21 California delivery address is indicated for the purchase of any Covered Product. The warning
22 shall comply with the Clear and Reasonable Warning standard pursuant to 27 California Code of
23 Regulations section 25601 and utilize the safe harbor warning language set forth in 27 California
24 Code of Regulations section 25603.2.

25 In the event there is an amendment to Proposition 65 or its implementing regulations
26 regarding the clear and reasonable warning standard or the safeharbor warning language, this
27 agreement shall be deemed modified on the date the amendment becomes final or the regulations
28 become effective to incorporate the new standard into this Section.

1 **4. SETTLEMENT PAYMENT**

2 4.1 In full satisfaction of all potential civil penalties, payment in lieu of civil
3 penalties, attorney's fees, and costs regarding ERC's claim against Vitacost and the Released
4 Parties herein only, Vitacost shall make a total payment of \$20,500.00 ("Total Settlement
5 Amount") to ERC within five (5) business days of the Effective Date. Vitacost shall make this
6 payment by wire transfer to ERC's escrow account, for which ERC will give Vitacost the
7 necessary account information. The Total Settlement Amount shall be apportioned as follows:

8 4.2 \$1,092.00 shall be considered a civil penalty pursuant to California Health and
9 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$819.00) of the civil penalty to the Office
10 of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe Drinking
11 Water and Toxic Enforcement Fund in accordance with California Health and Safety Code
12 §25249.12(c). ERC will retain the remaining 25% (\$273.00) of the civil penalty.

13 4.3 \$1,190.07 shall be distributed to ERC as reimbursement to ERC for reasonable
14 costs incurred in bringing this action.

15 4.4 \$1,092.56 shall be distributed to ERC in lieu of further civil penalties, for the
16 day-to-day business activities such as (1) continued enforcement of Proposition 65, which
17 includes work, analyzing, researching and testing consumer products that may contain
18 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are
19 the subject matter of the current action; (2) the continued monitoring of past consent judgments
20 and settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
21 donation of \$55.00 to the As You Sow to address reducing toxic chemical exposures in
22 California.

23 4.5 \$8,189.55 shall be distributed to Aqua Terra Aeris Law Group as reimbursement
24 of ERC's attorney's fees, while \$8,935.82 shall be distributed to ERC for its in-house legal
25 fees.

26 4.6 In the event that Vitacost fails to remit the Total Settlement Payment owed
27 under Section 4 of this Consent Judgment on or before the Due Date, Vitacost shall be deemed
28 to be in material breach of its obligations under this Consent Judgment. ERC shall provide

1 written notice of the delinquency to Vitacost via electronic mail. If Vitacost fails to deliver the
2 Total Settlement Payment within five (5) business days from the written notice, the Total
3 Settlement Payment shall become immediately due and payable and shall accrue interest at the
4 statutory judgment interest rate provided in the Code of Civil Procedure section 685.010.
5 Additionally, Vitacost agrees to pay ERC's reasonable attorney's fees and costs for any efforts
6 to collect the payment due under this Consent Judgment.

7 **5. MODIFICATION OF CONSENT JUDGMENT**

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

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

23 **5.3** Where the meet-and-confer process does not lead to a joint motion or
24 application in support of a modification of the Consent Judgment, then either Party may seek
25 judicial relief on its own.
26
27
28

1 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
2 **JUDGMENT**

3 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate
4 this Consent Judgment.

5 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

13 8.1 This Consent Judgment is a full, final, and binding resolution between ERC,
14 on behalf of itself and in the public interest, and Vitacost and its respective officers, directors,
15 shareholders, employees, agents, parent companies, subsidiaries, and divisions (collectively,
16 "Released Parties"). ERC hereby fully releases and discharges the Released Parties from any
17 and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees,
18 costs and expenses asserted, or that could have been asserted from the handling, use, or
19 consumption of the Covered Products, as to any alleged violation of Proposition 65 or its
20 implementing regulations arising from the failure to provide Proposition 65 warnings on the
21 Covered Products regarding lead up to and including the Effective Date.

22 8.2 ERC on its own behalf only, on one hand, and Vitacost on its own behalf
23 only, on the other, further waive and release any and all claims they may have against each
24 other for all actions or statements made or undertaken in the course of seeking or opposing
25 enforcement of Proposition 65 in connection with the Notice or Complaint up through and
26 including the Effective Date, provided, however, that nothing in Section 8 shall affect or limit
27 any Party's right to seek to enforce the terms of this Consent Judgment.

28 8.3 It is possible that other claims not known to the Parties arising out of the facts

1 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be
2 discovered. ERC on behalf of itself only, on one hand, and Vitacost, on the other hand,
3 acknowledge that this Consent Judgment is expressly intended to cover and include all such
4 claims up through the Effective Date, including all rights of action therefore. ERC and Vitacost
5 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
6 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
7 claims. California Civil Code section 1542 reads as follows:

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

11 ERC on behalf of itself only, on the one hand, and Vitacost, on the other hand, acknowledge
12 and understand the significance and consequences of this specific waiver of California Civil
13 Code section 1542.

14 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
15 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
16 in the Covered Products as set forth in the Notice and the Complaint.

17 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or
18 environmental exposures arising under Proposition 65, nor shall it apply to any of Vitacost's
19 products other than the Covered Products.

20 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

23 **10. GOVERNING LAW**

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

26 **11. PROVISION OF NOTICE**

27 All notices required to be given to either Party to this Consent Judgment by the other shall
28 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via

1 email may also be sent.

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

3 Chris Heptinstall, Executive Director, Environmental Research Center
4 3111 Camino Del Rio North, Suite 400
5 San Diego, CA 92108
6 Tel: (619) 500-3090
7 Email: chris_crc501c3@yahoo.com

8 With a copy to:

9 MATTHEW C. MACLEAR
10 ANTHONY M. BARNES
11 AQUA TERRA AERIS LAW GROUP
12 7425 Fairmount Ave.
13 El Cerrito, CA 94530
14 Ph: 415-568-5200
15 Email: mcm@atalawgroup.com

16 **VITACOST.COM, INC.**

17 Steven Prough, Senior Counsel
18 Vitacost
19 P.O. Box 54143
20 Los Angeles, CA 90054

21 With a copy to:

22 FREDERICK W. KOSMO JR.
23 WILSON TURNER KOSMO LLP
24 550 West C Street, Suite 1050
25 San Diego, CA 92101-3532
26 Telephone: 619-236-9600
27 Facsimile: 619-236-9669
28 Email: fkosmo@wilsonturnerkosmo.com

12. COURT APPROVAL

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

1 12.2 If the California Attorney General objects to any term in this Consent Judgment,
2 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
3 prior to the hearing on the motion.

4 12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be
5 void and have no force or effect.

6 **13. EXECUTION AND COUNTERPARTS**

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

10 **14. DRAFTING**

11 The terms of this Consent Judgment have been reviewed by the respective counsel for each
12 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
13 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and
14 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,
15 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
16 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
17 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
18 equally in the preparation and drafting of this Consent Judgment.

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

20 If a dispute arises with respect to either Party's compliance with the terms of this Consent
21 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in
22 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be
23 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

24 **16. ENFORCEMENT**

25 ERC may, by motion or order to show cause before the Superior Court of Alameda
26 County, enforce the terms and conditions contained in this Consent Judgment. In any action
27 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,
28 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.

1 To the extent the failure to comply with the Consent Judgment constitutes a violation of
2 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,
3 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by
4 law for failure to comply with Proposition 65 or other laws.

5 **17. ENTIRE AGREEMENT, AUTHORIZATION**

6 17.1 This Consent Judgment contains the sole and entire agreement and
7 understanding of the Parties with respect to the entire subject matter herein, and any and all
8 prior discussions, negotiations, commitments and understandings related hereto. No
9 representations, oral or otherwise, express or implied, other than those contained herein have
10 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
11 herein, shall be deemed to exist or to bind any Party.

12 17.2 Each signatory to this Consent Judgment certifies that he or she is fully
13 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as
14 explicitly provided herein, each Party shall bear its own fees and costs.

15 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
16 **CONSENT JUDGMENT**

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

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

23 (2) Make the findings pursuant to California Health and Safety Code section
24 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

25 **IT IS SO STIPULATED:**

