

ENDORSED  
FILED  
ALAMEDA COUNTY

NOV - 8 2016

CLERK OF THE SUPERIOR COURT  
By M. Salcido

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18 6S, INC. dba ALL STAR HEALTH

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-  
25,

Defendants.

CASE NO. RG16802586

STIPULATED CONSENT  
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: February 3, 2016

Trial Date: None set

1. INTRODUCTION

1.1 On February 3, 2016, Plaintiff Environmental Research Center, Inc. ("ERC"), a 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 6S, Inc. dba All Star Health ("All Star Health"). In this  
4 action, ERC alleges that a number of products manufactured, distributed or sold by All Star  
5 Health contain lead, a chemical listed under Proposition 65 as a carcinogen and reproductive  
6 toxin, and expose consumers to this chemical at a level requiring a Proposition 65 warning.  
7 These products (referred to hereinafter individually as a "Covered Product" or collectively as  
8 "Covered Products") are: Myogenix Inc. After Shock Critical Mass Chocolate Milk Shake,  
9 Myogenix Inc. After Shock Critical Mass Cookies N' Cream Milk Shake, Myogenix Inc. Pro  
10 Enzyme + Fiber, Myogenix Inc. Liver Support Extra Strength and Myogenix Inc. AdiPro Max  
11 Appetite Control +.

12       **1.2** ERC and All Star Health are hereinafter referred to individually as a "Party" or  
13 collectively as the "Parties."

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

18       **1.4** For purposes of this Consent Judgment, the Parties agree that All Star Health is a  
19 business entity that has employed ten or more persons at all times relevant to this action, and  
20 qualifies as a "person in the course of business" within the meaning of Proposition 65. All Star  
21 Health distributes and sells the Covered Products.

22       **1.5** The Complaint is based on allegations contained in ERC's Notice of Violation  
23 dated August 28, 2015, that was served on the California Attorney General, other public  
24 enforcers, and All Star Health ("Notice"). A true and correct copy of the Notice is attached as  
25 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the  
26 Notice was mailed and uploaded to the Attorney General's website, and no designated  
27 governmental entity has filed a complaint against All Star Health with regard to the Covered  
28 Products or the alleged violations.

1           1.6     ERC's Notice and Complaint allege that use of the Covered Products exposes  
2 persons in California to lead without first providing clear and reasonable warnings in violation  
3 of California Health and Safety Code section 25249.6. All Star Health denies all material  
4 allegations contained in the Notice and Complaint.

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

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

18           1.9     The Effective Date of this Consent Judgment is the date on which it is entered as  
19 a Judgment by this Court.

## 20     2.     **JURISDICTION AND VENUE**

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

28     ///

1     **3. INJUNCTIVE RELIEF AND WARNINGS**

2           **3.1** Beginning on the Effective Date, All Star Health shall be permanently enjoined  
3 from manufacturing for sale in the State of California, "Distributing into the State of  
4 California", or directly selling in the State of California, any Covered Product which exposes a  
5 person to a "Daily Lead Exposure Level" of more than 0.5 micrograms per day of lead when  
6 the maximum suggested dose is taken as directed on the Covered Product's label, unless it  
7 meets the warning requirements under Section 3.2.

8           **3.1.1** As used in this Consent Judgment, the term "Distributing into the State  
9 of California" shall mean to directly ship a Covered Product into California for sale in  
10 California or to sell a Covered Product to a distributor that All Star Health knows will sell the  
11 Covered Product in California.

12           **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure  
13 Level" shall be measured in micrograms, and shall be calculated using the following formula:  
14 micrograms of lead per gram of product, multiplied by grams of product per serving of the  
15 product (using the largest serving size appearing on the product label), multiplied by servings  
16 of the product per day (using the largest number of servings in a recommended dosage  
17 appearing on the product label), which equals micrograms of lead exposure per day.

18           **3.2 Clear and Reasonable Warnings**

19           If All Star Health is required to provide a warning pursuant to Section 3.1, the following  
20 warning must be utilized:

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

23 All Star Health shall use the phrase "cancer and" in the warning only if the maximum daily dose  
24 recommended on the label contains more than 15 micrograms of lead.

25           The warning shall appear prior to completing checkout on All Star Health's website  
26 when a California delivery address is indicated for any purchase of any Covered Product.

27           The warning shall be at least the same size as the largest of any other health or safety  
28 warnings also appearing on its website and the word "WARNING" shall be in all capital letters

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

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

6 **4. SETTLEMENT PAYMENT**

7 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
8 penalties, attorney's fees, and costs regarding ERC's claim against All Star Health and the  
9 Released Parties herein only, All Star Health shall make a total payment of \$13,500.00 ("Total  
10 Settlement Amount") to ERC within ten (10) days of the Effective Date. All Star Health shall  
11 make this payment by wire transfer to ERC's escrow account, for which ERC will give All Star  
12 Health the necessary account information. The Total Settlement Amount shall be apportioned  
13 as follows:

14 **4.2** \$500.00 shall be considered a civil penalty pursuant to California Health and  
15 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$375.00) of the civil penalty to the Office  
16 of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe Drinking  
17 Water and Toxic Enforcement Fund in accordance with California Health and Safety Code  
18 §25249.12(c). ERC will retain the remaining 25% (\$125.00) of the civil penalty.

19 **4.3** \$1,779.38 shall be distributed to ERC as reimbursement to ERC for reasonable  
20 costs incurred in bringing this action.

21 **4.4** \$6,277.50 shall be distributed to Aqua Terra Aeris Law Group as reimbursement  
22 of ERC's attorney's fees, while \$4,943.12 shall be distributed to ERC for its in-house legal  
23 fees.

24 **4.6** In the event that All Star Health fails to remit the Total Settlement Payment  
25 owed under Section 4 of this Consent Judgment on or before the Due Date, All Star Health  
26 shall be deemed to be in material breach of its obligations under this Consent Judgment. ERC  
27 shall provide written notice of the delinquency to All Star Health via electronic mail. If All  
28 Star Health fails to deliver the Total Settlement Payment within five (5) days from the written

1 notice, the Total Settlement Payment shall become immediately due and payable and shall  
2 accrue interest at the statutory judgment interest rate provided in the Code of Civil Procedure  
3 section 685.010. Additionally, All Star Health agrees to pay ERC's reasonable attorney's fees  
4 and costs for any efforts to collect the payment due under this Consent Judgment.

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

21 **5.3** In the event that All Star Health initiates or otherwise requests a modification  
22 under Section 5.1, and the meet and confer process leads to a joint motion or application of the  
23 Consent Judgment, All Star Health shall reimburse ERC its costs and reasonable attorney's fees  
24 for the time spent in the meet-and-confer process and filing and arguing the motion or  
25 application.

26 **5.4** Where the meet-and-confer process does not lead to a joint motion or  
27 application in support of a modification of the Consent Judgment, then either Party may seek  
28 judicial relief on its own.

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 All Star Health and its respective officers,  
15 directors, shareholders, employees, agents, parent companies, subsidiaries, and divisions  
16 (collectively, "Released Parties"). ERC hereby fully releases and discharges the Released  
17 Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages,  
18 penalties, fees, costs and expenses asserted, or that could have been asserted from the handling,  
19 use, or consumption of the Covered Products, as to any alleged violation of Proposition 65 or  
20 its 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 All Star Health on its own  
23 behalf only, on the other, further waive and release any and all claims they may have against  
24 each other up through and including the Effective Date, provided, however, that nothing in  
25 Section 8 shall affect or limit any Party's right to seek to enforce the terms of this Consent  
26 Judgment.

27     **8.3**     It is possible that other claims not known to the Parties arising out of the facts  
28 alleged in the Notice or the Complaint will develop or be discovered. ERC on behalf of itself

1 only, on one hand, and All Star Health, on the other hand, acknowledge that this Consent  
2 Judgment is expressly intended to cover and include all such claims up through the Effective  
3 Date, including all rights of action therefore. ERC and All Star Health acknowledge that the  
4 claims released in Sections 8.1 and 8.2 above may include unknown claims, and nevertheless  
5 waive California Civil Code section 1542 as to any such unknown claims. California Civil  
6 Code section 1542 reads as follows:

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

10 ERC on behalf of itself only, on the one hand, and All Star Health, on the other hand,  
11 acknowledge and understand the significance and consequences of this specific waiver of  
12 California Civil Code section 1542. Excluding the present action, ERC represents, warrants,  
13 and covenants that it will not prosecute any Proposition 65 Notice of Violation that it has issued  
14 to All Star Health prior to the Effective Date.

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

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

## 21       **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

## 24       **10. GOVERNING LAW**

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

## 27       **11. PROVISION OF NOTICE**

28       All notices required to be given to either Party to this Consent Judgment by the other shall



1 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via  
2 email may also be sent.

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

4 Chris Heptinstall, Executive Director, Environmental Research Center  
5 3111 Camino Del Rio North, Suite 400  
6 San Diego, CA 92108  
7 Tel: (619) 500-3090  
8 Email: chris\_erc501c3@yahoo.com

9 With a copy to:

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

17 **6S, INC. dba ALL STAR HEALTH**

18 Fernando Scalini  
19 6S, Inc. dba All Star Health  
20 5951 Skylab Road  
21 Huntington Beach, CA 92647  
22 Email: fscalini@allstarhealth.com

23 With a copy to:

24 PEG CAREW TOLEDO  
25 PEG CAREW TOLEDO, LAW CORPORATION  
26 3001 Douglas Blvd., Suite 340  
27 Roseville, CA 95661-3853  
28 Ph: 916-462-8950  
Fax: 916-791-0175  
Email: peg@toledolawcorp.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 make the findings pursuant to  
20 California Health and Safety Code section 25249.7(f)(4), approve the Settlement, and approve this  
21 Consent Judgment.

22 **IT IS SO STIPULATED:**

23 Dated: 8/30/, 2016

24 ENVIRONMENTAL RESEARCH  
25 CENTER, INC.

26 By:   
27 Chris Hepinstall, Executive Director  
28

1 Dated: 9/7/, 2016

6S, INC. dba ALL STAR HEALTH

By: Fernando Scalini  
Its: COO

5 APPROVED AS TO FORM:

7 Dated: 9/8/, 2016

AQUA TERRA AERIS LAW GROUP

By: Matthew C. Maclear  
Matthew C. Maclear  
Anthony M. Barnes  
Attorneys for Plaintiff Environmental  
Research Center, Inc.

13 Dated: 9-7, 2016

PEG CAREW TOLEDO, LAW CORPORATION

By: Peg Carey Toledo  
Peg Carey Toledo  
Attorney for Defendant 6S, Inc. dba All  
Star Health

20 ORDER AND JUDGMENT

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

23 IT IS SO ORDERED, ADJUDGED AND DECREED.

24 Dated: NOV - 8 2016, 2016

BRAD SELIGMAN

Judge of the Superior Court