

Courtesy
Copy

JUN 08 2018

1 MATTHEW C. MACLEAR (SBN 209228)
2 ANTHONY M. BARNES (SBN 199048)
3 AQUA TERRA AERIS LAW GROUP
4 828 San Pablo Ave, Suite 115B
5 Albany, CA 94706
6 Ph: 415-568-5200
7 Email: mcm@atalawgroup.com

8 Attorneys for Plaintiff
9 ENVIRONMENTAL RESEARCH CENTER, INC.

10 JUDITH M. PRAITIS (SBN 151303)
11 SIDLEY AUSTIN LLP
12 555 West Fifth Street, Suite 4000
13 Los Angeles, California 90013-1010
14 Ph: (213) 896-6000
15 Email: jpraitis@sidley.com

16 Attorney for Defendant
17 LIFESTYLE EVOLUTION, INC., individually
18 and doing business as NUGO NUTRITION

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

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

24 Plaintiff,

25 vs.

26 LIFESTYLE EVOLUTION, INC.,
27 individually and doing business as NUGO
28 NUTRITION, a Pennsylvania corporation;
and DOES 1-25

Defendants.

CASE NO. RG 18904354

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: May 10, 2018

Trial Date: None set

FILED
ALAMEDA COUNTY

JUL 24 2018

CLERK OF THE SUPERIOR COURT

By  Deputy

1. INTRODUCTION

1.1 On May 10, 2018, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Permanent Injunction, Civil Penalties and Other Relief (the "Complaint") pursuant

1 to the provisions of California Health and Safety Code section 25249.5 *et seq.* (“Proposition
2 65”), against LIFESTYLE EVOLUTION, INC., individually and doing business as NUGO
3 NUTRITION (“NUGO NUTRITION”) and Does 1-25.

4 **1.2** In this action, ERC alleges that certain products manufactured, distributed, or sold
5 by NUGO NUTRITION contain lead and/or cadmium, chemicals listed under Proposition 65 as
6 carcinogens and reproductive toxins, and expose consumers to these chemicals at a level
7 requiring a Proposition 65 warning. These products (referred to hereinafter individually as a
8 “Covered Product” or collectively as “Covered Products”) are all sizes and all forms of
9 packaging and labeling of:

- 10 (1) NuGo Slim Chocolate Mint Dipped in Real Dark Chocolate
- 11 (2) NuGo Smarte Carb Sugar Free Peanut Butter Crunch
- 12 (3) NuGo Smarte Carb Sugar Free Chocolate Black Cherry
- 13 (4) NuGo Stronger Whey Protein Bar Peanut Cluster
- 14 (5) NuGo Stronger Whey Protein Bar Caramel Pretzel
- 15 (6) NuGo Dark Mocha Chocolate
- 16 (7) NuGo Dark Chocolate Chocolate Chip
- 17 (8) NuGo Dark Chocolate Pretzel With Sea Salt
- 18 (9) NuGo Dark Mint Chocolate Chip
- 19 (10) NuGo Organic Vegan Dark Chocolate Almond
- 20 (11) NuGo Slim Brownie Crunch
- 21 (12) NuGo Slim Raspberry Truffle
- 22 (13) NuGo Slim Crunchy Peanut Butter
- 23 (14) NuGo Stronger Cookies 'N Cream
- 24 (15) NuGo Fiber d'Lish Peanut Chocolate Chip
- 25 (16) NuGo Stronger Dark Chocolate Caramel with Real Dark Chocolate
- 26 (17) NuGo Slim Toasted Coconut
- 27 (18) NuGo Slim Roasted Peanut Butter

- 1 (19) NuGo Organic Double Dark Chocolate
- 2 (20) NuGo Organic Dark Chocolate Pomegranate
- 3 (21) NuGo Fiber d'Lish Chocolate Brownie
- 4 (22) NuGo Nutrition to Go Coffee
- 5 (23) NuGo Free Gluten Free Dark Chocolate Trail Mix
- 6 (24) NuGo Free Gluten Free Dark Chocolate Crunch
- 7 (25) NuGo Slim Vegan Espresso Dipped In Real Dark Chocolate
- 8 (26) NuGo Slim Roasted Peanut Dipped In Real Dark Chocolate
- 9 (27) NuGo Dark Spicy Chocolate with Chili Peppers
- 10 (28) NuGo Dark Chocolate Coconut.

11 Covered Products shall include those products with minor variations in formulation so
12 long as they have the same internal UPC codes as the Covered Products. NUGO NUTRITION
13 shall not change the internal UPC Codes for the Covered Products during the term of this
14 Agreement, but NUGO NUTRITION may terminate any given UPC Code if it elects to
15 terminate a Covered Product.

16 **1.3** ERC and NUGO NUTRITION are hereinafter referred to individually as a
17 “Party” or collectively as the “Parties.”

18 **1.4** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
19 causes, helping safeguard the public from health hazards by reducing the use and misuse of
20 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
21 and encouraging corporate responsibility.

22 **1.5** For purposes of this Consent Judgment, NUGO NUTRITION represents that it has
23 employed ten or more persons at times relevant to this action and qualifies as a “person in the
24 course of doing business” within the meaning of Proposition 65. NUGO NUTRITION has either
25 manufactured, and/or distributed, and/or sold the Covered Products at times material to this action.

26 **1.6** The Complaint is based on allegations contained in ERC’s 60-Day Notice of
27 Violation dated February 28, 2018 that was served on the California Attorney General, other
28

1 public enforcers, and NUGO NUTRITION (“Notices”). A true and correct copy of the 60-Day
2 Notice dated February 28, 2018 is attached hereto as **Exhibit A** and is incorporated herein by
3 reference. On the date of filing, the Complaint covered allegations against Covered Products
4 numbered 1-20.

5 **1.7** ERC shall file an Amended Complaint on or about June 8, 2018 which extends
6 the allegations in the Complaint to Covered Products numbered 21-28. In addition to applying
7 to Covered Products numbered 1-20, this Consent Judgment shall apply to Covered Products
8 numbered 21-27, effective 60 days after March 15, 2018, provided no public enforcer is
9 diligently pursuing the allegations set forth in ERC’s March 15, 2018 60 Day Notice of
10 Violation, a copy of which is attached as **Exhibit B**. This Consent Judgment also shall apply
11 to Covered Product number 28, once 60 days have run from April 6, 2018, provided no public
12 enforcer is diligently pursuing the allegations set forth in ERC’s April 6, 2018 60 Day Notice
13 of Violation, a copy of which is attached as **Exhibit C**. ERC agrees that, at the time the Motion
14 to Approve this Consent Judgment is heard, more than 60 days will have passed since all of the
15 Notices were served on the Attorney General, public enforcers, and NUGO NUTRITION

16 **1.8** ERC’s Notices, Complaint and Amended Complaint, upon filing, allege that use
17 of the Covered Products exposes persons in California either to lead, or cadmium, or both
18 without first providing clear and reasonable warnings in violation of California Health and
19 Safety Code section 25249.6. NUGO NUTRITION denies all material allegations contained in
20 the Notices, Complaint and, upon filing, the Amended Complaint.

21 **1.9** The Parties have entered into this Consent Judgment in order to settle,
22 compromise, and resolve disputed claims and thus avoid prolonged and costly litigation.

23 Nothing in this Consent Judgment, nor in compliance with this Consent Judgment, shall
24 constitute or be construed as an admission against interest by any of the Parties or by any of their
25 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
26 divisions, franchisees, licensees, customers, suppliers, manufacturers, distributors, wholesalers,
27 or retailers of any fact, issue of law, or violation of law.

1 **1.10** Except as expressly set forth herein, nothing in this Consent Judgment shall
2 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
3 current or future legal proceeding unrelated to these proceedings.

4 **1.11** The Effective Date of this Consent Judgment is the date on which ERC serves
5 notice on NUGO NUTRITION that it has been entered as a Judgment by this Court.

6 **2. JURISDICTION AND VENUE**

7 For purposes of this Consent Judgment and any further court action that may become
8 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
9 jurisdiction over the allegations of violations contained in the Complaint and the Amended
10 Complaint, personal jurisdiction over NUGO NUTRITION as to the acts alleged in Complaint
11 and the Amended Complaint, personal jurisdiction over ERC, that venue is proper in Alameda
12 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
13 resolution of all claims up through and including the Effective Date which were or could have
14 been asserted in this action based on the facts alleged in the Notices, the Complaint and the
15 Amended Complaint.

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

17 **3.1** Beginning on the Effective Date, NUGO NUTRITION shall be permanently
18 enjoined from manufacturing for sale in the State of California, "Distributing into the State of
19 California," or directly selling in the State of California, any Covered Product which exposes a
20 person either to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day or
21 to a "Daily Cadmium Exposure Level" of more than 4.1 micrograms of cadmium per day, or
22 both, unless it meets the warning requirements under Section 3.2. Notwithstanding the
23 foregoing, so long as NUGO NUTRITION can document the date of manufacture of a Covered
24 Product, Covered Products manufactured prior to the Effective Date may be distributed or sold
25 without a Warning (defined below) by any person after the Effective Date without violation of
26 this Consent Judgment. Additionally, NUGO NUTRITION shall be allowed until three (3)
27 months after the Effective Date (the "Compliance Date") to use up chocolate and calcium
28

1 ingredients of the sort listed in **Table 1** below that may contain lead or cadmium, or both, that
2 are used in one or more of the Covered Products and that are on hand as of the Effective Date
3 (the “On-Hand Ingredients”), so long as NUGO NUTRITION provides documentation to ERC
4 within thirty (30) days of the Effective Date of the name, type and amount of such On-Hand
5 Ingredients. Covered Products made with such On-Hand Ingredients may be distributed or sold
6 by any person after the Effective Date without a Warning without violation of this Consent
7 Judgment.

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

12 **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure Level”
13 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 recommended on the Covered Product label), multiplied
16 by servings of the product per day (using the largest number of servings recommended on the
17 Covered Product label for a single day of consumption), *minus* the “Naturally Occurring Lead”
18 (as outlined in Section 3.1.4 below) which equals micrograms of lead exposure per day. If the
19 number of recommended daily servings is not provided on the label, then the number of daily
20 servings shall equal one, as defined by a single serving on the nutrition fact panel or supplement
21 fact panel on the label.

22 **3.1.3** For purposes of this Consent Judgment, the “Daily Cadmium Exposure
23 Level” shall be measured in micrograms, and shall be calculated using the following formula:
24 micrograms of cadmium per gram of product, multiplied by grams of product per serving of the
25 product (using the largest serving size recommended on the Covered Product label), multiplied
26 by servings of the product per day (using the largest number of servings recommended on the
27 Covered Product label for a single day of consumption), which equals micrograms of cadmium
28

1 exposure per day. If the number of recommended daily servings is not provided on the label,
2 then the number of daily servings shall equal one, as defined by a single serving on the nutrition
3 fact panel or supplement fact panel on the label.

4 **3.1.4** In calculating the Daily Lead Exposure Level for a Covered Product,
5 NUGO NUTRITION shall be allowed to deduct the amount of lead which is deemed to be
6 Naturally Occurring Lead in any ingredient listed in **Table 1** (“Lead Ingredient”) that is
7 contained in that Covered Product under the following conditions: (a) NUGO NUTRITION
8 itself or from its Lead Ingredient supplier shall obtain either (i) a valid test result showing lead is
9 present in the Lead Ingredient at a specific concentration or in a range; or (ii) a certificate of
10 analysis or certificate of compliance that shows lead is present in the Lead Ingredient at a
11 specific concentration or in a range; and (b) NUGO NUTRITION shall obtain the documentation
12 in Section 3.1.4(a) (i) or (ii) for at least two delivered lots of a Lead Ingredient listed in **Table 1**,
13 if up to four (4) lots of that Lead Ingredient are delivered within twelve (12) months of the
14 Effective Date, and documentation for at least three (3) lots of a Lead Ingredient if up to eight (8)
15 lots of that Lead Ingredient are delivered within twelve (12) months of the Effective Date, and
16 documentation for at least four (4) lots of a Lead Ingredient if nine (9) or more lots of that Lead
17 Ingredient are delivered within twelve (12) months of the Effective Date; and (c) NUGO
18 NUTRITION shall document the total amount (in grams) of each Lead Ingredient contained in
19 the Covered Product. If the documentation obtained pursuant to Section 3.1.4(a) and (b)
20 documents the presence of lead in any Lead Ingredient in **Table 1**, NUGO NUTRITION shall be
21 entitled to deduct the amount of the Naturally Occurring Lead for that Lead Ingredient, as listed
22 in **Table 1**. If the Covered Product does not contain a Lead Ingredient listed in **Table 1**, NUGO
23 NUTRITION shall not be entitled to a deduction for the Naturally Occurring Lead in **Table 1** for
24 that Covered Product.

25 To deduct the Naturally Occurring Lead in any Covered Product for purposes of
26 determining the Daily Lead Exposure Level under this Consent Judgment, as provided in this
27 Section 3.1.4, NUGO NUTRITION shall provide to ERC, within thirty (30) days after the first
28 anniversary of the Effective Date, the documentation required under Section 3.1.4(a)-(c).

1 Thereafter, for two (2) additional consecutive anniversaries after the Effective Date, if NUGO
2 NUTRITION deducts Naturally Occurring Lead in a Lead Ingredient in calculating the Daily
3 Lead Exposure Level, NUGO NUTRITION shall provide to ERC, within thirty (30) days after
4 each such anniversary date, the documentation for each Lead Ingredient required under Section
5 3.1.4(a)-(c) for each such applicable twelve (12) month period.

6 **TABLE 1**

INGREDIENT	NATURALLY OCCURRING AMOUNTS OF LEAD
Calcium (Elemental)	0.8 micrograms/gram (up to a maximum amount of 1.2 micrograms of lead if there are 1.5 grams or more of elemental calcium in the Covered Product)
Cocoa-powder	1.0 micrograms/gram
Chocolate Liquor	1.0 micrograms/gram
Cocoa Butter	0.1 micrograms/gram

14
15 **3.2 Clear and Reasonable Warnings**

16 If NUGO NUTRITION is required to provide a warning pursuant to Section 3.1, the
17 following warning must be utilized (“Warning”):

18 **WARNING:** Consuming this product can expose you to chemicals including [lead] [and]
19 [cadmium] which is [are] known to the State of California to cause [cancer and] birth
20 defects or other reproductive harm. For more information go to
21 www.P65Warnings.ca.gov/food.

22 NUGO NUTRITION shall use the phrase “cancer and” in the Warning if NUGO
23 NUTRITION has documented or is in possession of representative test results indicating that the
24 “Daily Lead Exposure Level” is greater than fifteen (15) micrograms of lead as determined
25 pursuant to Section 3.1 and Section 3.4 or if NUGO NUTRITION is legally obligated to provide a
26 cancer warning for a Proposition 65 chemical other than lead or cadmium. As identified in the
27 brackets, the warning shall accurately state whether the warning is being provided for lead,
28 cadmium, or both, or for other chemicals in each of the Covered Products. NUGO NUTRITION
shall bear the obligation of providing an accurate form of warning in compliance with this Consent.

1 Judgment for each Covered Product.

2 The Warning shall be securely affixed to or printed upon the container or label of each
3 Covered Product. If the Warning is provided on the label, it must be set off from other
4 surrounding information and enclosed in a box. The Warning on the label shall be at least the
5 same size as other warnings on the Covered Product label so long as it remains clearly visible
6 and readable to the consumer. In addition, for any Covered Product sold over the internet by or
7 through NUGO NUTRITION's own website, the Warning shall either (a) appear on the product
8 display page on which the Covered Product is identified (but may not be provided via a
9 hyperlink on that product display page) or (b) appear to the purchaser, not via a hyperlink, during
10 the checkout process and prior to completion thereof when a California delivery address is
11 indicated for the purchase of any Covered Product. An asterisk or other method of identifying
12 the existence of the Warning must be utilized so the purchaser may readily identify the specific
13 Covered Product(s) subject to the Warning.

14 For Covered Products sold over the internet by or through NUGO NUTRITION's own
15 website, the Warning shall be at least the same size as other health or safety warnings also
16 appearing on the product display page on NUGO NUTRITION's website. For all Warnings, the
17 word "**WARNING**" shall be in all capital letters and in bold print. Statements supplemental to the
18 Warning which are immediately proximate thereto are allowed only to the extent they identify the
19 source of the exposure or provide information on how consumers of the Covered Product may
20 avoid or reduce exposure to the identified chemical or chemicals. Except as set forth in the
21 immediately preceding sentence, no statements shall appear adjacent to the Warning and,
22 specifically, no statements adjacent to the Warning may state that the source of the listed chemical
23 renders the listed chemical non-harmful or healthful.

24 NUGO NUTRITION must display the Warning with such conspicuousness, as compared
25 with other words, statements, or designs on the label or container, or on its website, if applicable,
26 so as to render the Warning likely to be read and understood by an ordinary individual under
27 customary conditions of purchase or use of the Covered Product.

1 **3.3 Reformulated Covered Products**

2 A Reformulated Covered Product is a Covered Product for which the “Daily Lead
3 Exposure Level” is no greater than 0.5 micrograms of lead per day and the “Daily Cadmium
4 Exposure Level” is no more than 4.1 micrograms of cadmium per day as determined pursuant to
5 Section 3.1 and Section 3.4, and for which the Uniform Product Code (UPC) remains the same.

6 **3.4 Testing and Quality Control Methodology**

7 **3.4.1** Beginning within one (1) year of the Effective Date, NUGO
8 NUTRITION shall arrange for lead and cadmium testing of the Covered Products at least once
9 a year for a minimum of two (2) consecutive years by arranging for testing of three (3)
10 randomly selected samples from different lots of each of the Covered Products, in the form
11 intended for sale to the end-user, which NUGO NUTRITION intends to sell or is
12 manufacturing for sale in California, directly selling to a consumer in California or
13 “Distributing into the State of California.” If three (3) or more lots of a given Covered Product
14 are not available at the time of such sampling, then the samples shall be selected from such
15 number of lots as are available. If tests conducted pursuant to this Section demonstrate that no
16 Warning is required for a Covered Product during each of two (2) consecutive years, then the
17 testing requirements of this Section will no longer be required as to that Covered Product;
18 provided, however, that NUGO NUTRITION shall not be required under this Consent
19 Judgment to test any Covered Product for more than three (3) consecutive years from the
20 Effective Date. Nothing in this Section 3.4.1 shall diminish NUGO NUTRITION’S ongoing
21 obligation to provide an accurate Warning when required hereunder.

22 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level” and/or
23 “Daily Cadmium Exposure Level,” the average (arithmetic mean) of the lead and/or cadmium
24 detection results of the three (3) randomly selected samples of the Covered Products will be
25 controlling for all purposes under this Consent Judgment.

26 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
27 laboratory method that complies with the performance and quality control factors appropriate
28

1 for the method used, including limit of detection, qualification, accuracy, and precision that
2 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”)
3 achieving a limit of quantification of less than or equal to 0.010 mg/kg.

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

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

11 **3.4.6** Within thirty (30) days of ERC’s written request, NUGO NUTRITION
12 shall deliver lab reports obtained pursuant to Section 3.4 to ERC. NUGO NUTRITION shall
13 retain all test results and documentation required under this Consent Judgment for a period of
14 three (3) years from the date of each test. ERC shall not request such lab reports more than once
15 annually, absent good cause to do so.

16 **3.4.7** No testing shall be required for a Covered Product which includes a
17 Warning compliant with Section 3.2 on the label, container, or on NUGO NUTRITION’S
18 proprietary website or for a Covered Product that is no longer manufactured, a Covered Product
19 which is not sold in California, or, with respect to internet sales by and through NUGO
20 NUTRITION’s own website, a Covered Product that is not shipped to a California shipping
21 address, or for a Covered Product that is merely transshipped through California (i.e., remains
22 unopened) to a retailer or distributor outside of California that does not sell that particular
23 Covered Product to persons inside of California.

24 **4. SETTLEMENT PAYMENT**

25 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
26 attorney’s fees, and costs, NUGO NUTRITION shall make a total payment of \$265,000.00
27 (“Total Settlement Amount”) to ERC within five (5) business days of the Effective Date (“Due
28

1 Date”). NUGO NUTRITION shall make this payment by wire transfer to ERC’s account, for
2 which ERC will give NUGO NUTRITION the necessary account information and taxpayer
3 information at least five (5) business days prior to the Effective Date. The Total Settlement
4 Amount shall be apportioned as follows:

5 **4.2** \$111,465.42 shall be considered a civil penalty pursuant to California Health
6 and Safety Code section 25249.7(b)(1). Within ten (10) business days, ERC shall remit 75%
7 (\$83,599.06) of the civil penalty to the Office of Environmental Health Hazard Assessment
8 (“OEHHA”) for deposit in the Safe Drinking Water and Toxic Enforcement Fund in
9 accordance with California Health and Safety Code section 25249.12(c). ERC will retain the
10 remaining 25% (\$27,866.36) of the civil penalty.

11 **4.3** \$12,425.09 shall be distributed to ERC as reimbursement to ERC for reasonable
12 costs incurred in bringing this action.

13 **4.4** \$83,598.93 shall be distributed to ERC as an Additional Settlement Payment
14 (“ASP”), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and
15 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
16 caused by Defendant in this matter. These activities are detailed below and support ERC’s
17 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
18 supplement products in California. ERC’s activities have had, and will continue to have, a direct
19 and primary effect within the State of California because California consumers will be benefitted
20 by the reduction and/or elimination of exposure to lead and/or cadmium in dietary supplements
21 and/or by providing clear and reasonable warnings to California consumers prior to ingestion of
22 the products.

23 Based on a review of past years’ actual budgets, ERC is providing the following list of
24 activities ERC engages in to protect California consumers through Proposition 65 citizen
25 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
26 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary
27 supplement products that may contain lead and/or cadmium and are sold to California
28

1 consumers. This work includes continued monitoring and enforcement of past consent judgments
2 and settlements to ensure companies are in compliance with their obligations thereunder, with a
3 specific focus on those judgments and settlements concerning lead and/or cadmium. This work
4 also includes investigation of new companies that ERC does not obtain any recovery through
5 settlement or judgment; (2) VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining
6 ERC's Voluntary Compliance Program by acquiring products from companies, developing and
7 maintaining a case file, testing products from these companies, providing the test results and
8 supporting documentation to the companies, and offering guidance in warning or implementing a
9 self-testing program for lead and/or cadmium in dietary supplement products; and (3) "GOT
10 LEAD" PROGRAM (up to 5%): maintaining ERC's "Got Lead?" Program which reduces the
11 numbers of contaminated products that reach California consumers by providing access to free
12 testing for lead in dietary supplement products (Products submitted to the program are screened
13 for ingredients which are suspected to be contaminated, and then may be purchased by ERC,
14 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer
15 that submitted the product).

16 ERC shall be fully accountable in that it will maintain adequate records to document and
17 will be able to demonstrate how the ASP funds will be spent and can assure that the funds are
18 being spent only for the proper, designated purposes described in this Consent Judgment. ERC
19 shall provide the Attorney General, within thirty (30) days of any request, copies of
20 documentation demonstrating how such funds have been spent.

21 **4.5** \$19,749.00 shall be distributed to Aqua Terra Aeris Law Group as
22 reimbursement of ERC's attorney's fees, while \$37,761.56 shall be distributed to ERC for its
23 in-house legal fees. Except as explicitly provided herein, each Party shall bear its own fees and
24 costs.

25 **4.6** In the event that NUGO NUTRITION fails to remit the Total Settlement
26 Amount owed under Section 4 of this Consent Judgment on or before the Due Date, subject to a
27 two (2) business day grace period during which ERC may provide notice it has not received
28

1 payment, NUGO NUTRITION shall be deemed to be in material breach of its obligations
2 under this Consent Judgment. ERC shall provide written notice of the delinquency to NUGO
3 NUTRITION via electronic mail. If NUGO NUTRITION fails to deliver the Total Settlement
4 Amount within five (5) days from the written notice, the Total Settlement Amount shall accrue
5 interest at the statutory judgment interest rate provided in the California Code of Civil
6 Procedure section 685.010. Additionally, NUGO NUTRITION agrees to pay ERC's
7 reasonable attorney's fees and costs for any efforts to collect the payment due under this
8 Consent Judgment.

9 **5. MODIFICATION OF CONSENT JUDGMENT**

10 **5.1** This Consent Judgment may be modified (except as to the monetary terms)
11 only (i) by written stipulation of the Parties and upon entry by the Court of a modified consent
12 judgment or (ii) by motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the
13 Court of a modified consent judgment.

14 **5.2** If any Party seeks to modify this Consent Judgment under Section 5.1, then that
15 Party must provide written notice to the other Party of its intent ("Notice of Intent"). The
16 Parties shall meet and confer in good faith regarding the proposed modification in the Notice of
17 Intent within thirty (30) days of receiving the Notice of Intent. Within thirty (30) days of such
18 meeting, if there remains a dispute as to the proposed modification, the Party disputing the
19 modification shall provide to the other Party a written basis for its position. The Parties shall
20 continue to meet and confer for an additional thirty (30) days in an effort to resolve any
21 remaining disputes. Should it become necessary, the Parties may agree in writing to different
22 deadlines for the meet-and-confer period.

23 **5.3** In the event that NUGO NUTRITION initiates or otherwise requests a
24 modification under Section 5.1, and the meet and confer process leads to a joint motion or
25 application for a modification of the Consent Judgment, NUGO NUTRITION shall reimburse
26 ERC its costs and reasonable attorney's fees for the time spent in the meet-and-confer process
27 and filing and arguing the motion or application. ERC shall not be reimbursed for costs or
28

1 attorney's fees for an uncontested motion, or for a ministerial motion (such as a change in name
2 or contact information) or if ERC does not expend more than two (2) hours of attorney time on
3 the joint motion.

4 **5.4** Where the meet-and-confer process does not lead to an uncontested motion or to a
5 joint motion or application in support of a modification of the Consent Judgment, then either
6 Party may seek judicial relief on its own.

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

9 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
10 this Consent Judgment. This Consent Judgment may be enforced solely by the Parties hereto,
11 including their respective successors or assigns, provided each Party identifies any such
12 successor or assign in writing to the other Party.

13 **6.2** If ERC alleges that any Covered Product failed or fails to bear a Warning with
14 respect to lead or cadmium and was manufactured for sale in the State of California,
15 "Distributed into the State of California," or directly sold in the State of California in violation
16 of this Consent Judgment, then ERC shall inform NUGO NUTRITION in a reasonably prompt
17 manner of its test results, including information sufficient to permit NUGO NUTRITION to
18 identify the Covered Products at issue, and of ERC's calculation of the Daily Lead Exposure
19 Level or the Daily Cadmium Exposure Level, as applicable. NUGO NUTRITION shall, within
20 thirty (30) days following such notice, provide ERC with testing information, from an
21 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4, and
22 other relevant information it may wish to present to ERC, if any, demonstrating NUGO
23 NUTRITION's compliance with the Consent Judgment, if warranted. The Parties shall first
24 attempt to resolve the matter prior to ERC taking any further legal action.

25 **7. APPLICATION OF CONSENT JUDGMENT**

26 This Consent Judgment applies to, and is binding upon, and benefits the Parties and their
27 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
28

1 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,
2 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no application
3 to any Covered Product which is distributed or sold exclusively outside the State of California and
4 which is not used by California consumers.

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

6 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on
7 behalf of itself and in the public interest, and NUGO NUTRITION and its respective officers,
8 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,
9 manufacturers, franchisees, licensees, customers (not including private label customers of
10 NUGO NUTRITION), distributors, wholesalers, retailers, and all other upstream and
11 downstream entities in the distribution chain of any Covered Product, and the predecessors,
12 successors, and assigns of any of them (collectively, "Released Parties"). ERC, on behalf of
13 itself and in the public interest, hereby fully releases and discharges the Released Parties from
14 any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties,
15 fees, costs, and expenses asserted, or that could have been asserted, from the handling, use, or
16 consumption of the Covered Products manufactured on or prior to the Effective Date, as to any
17 alleged violation of Proposition 65 or its implementing regulations arising from the failure to
18 provide Proposition 65 warnings on the Covered Products regarding lead and/or cadmium up to
19 and including the Effective Date.

20 **8.2** ERC on its own behalf only, and NUGO NUTRITION on its own behalf only,
21 further waive and release any and all claims they may have against each other for all actions or
22 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
23 65 in connection with the Notices and Amended Complaint up through and including the
24 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's
25 right to seek to enforce the terms of this Consent Judgment.

26 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
27 alleged in the Notices and Amended Complaint, and relating to the Covered Products, will
28

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

13 ERC on behalf of itself only, and NUGO NUTRITION on behalf of itself only, acknowledge
14 and understand the significance and consequences of this specific waiver of California Civil
15 Code section 1542.

16 **8.4** Compliance with the terms of this Consent Judgment by NUGO NUTRITION
17 shall be deemed to constitute compliance with Proposition 65 by any Released Party regarding
18 alleged exposures to lead and/or cadmium in the Covered Products as set forth in the Notices,
19 Complaint and the Amended Complaint after the Effective Date.

20 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
21 environmental exposures arising under Proposition 65.

22 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

25 **10. GOVERNING LAW**

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

28 **11. PROVISION OF NOTICE**

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

5 Chris Heptinstall
6 Executive Director
7 3111 Camino Del Rio North, Suite 400
8 San Diego, CA 92108
9 Ph: (619) 500-3090
10 Email: chris_erc501c3@yahoo.com

11 With a copy to:
12 Matthew C. Maclear
13 Anthony M. Barnes
14 AQUA TERRA AERIS LAW GROUP
15 828 San Pablo Ave, Suite 115B
16 Albany, CA 94706
17 Ph: (415) 568-5200
18 Email: mcm@atalawgroup.com.

19
20 **FOR LIFESTYLE EVOLUTION, INC., individually and doing business as NUGO
21 NUTRITION:**

22 David Levine
23 President and Chief Executive Officer
24 520 Second Street
25 Oakmont, PA 15139
26 Ph: (412) 828-4115
27 Email: dlevine@nugonutrition.com

28 With a copy to:
29 Judith Praitis
30 SIDLEY AUSTIN LLP
31 555 West Fifth Street, Suite 4000
32 Los Angeles, California 90013-1010
33 Ph: (213) 896-6000
34 Email: jpraitis@sidley.com.

1 **12. COURT APPROVAL**

2 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
3 Motion for Court Approval to be heard on a date that is at least 60 days after the dates of all of
4 the Notices. NUGO NUTRITION shall not object to judicial approval of the Consent
5 Judgment in the form it was executed and, upon request of ERC, shall file a Statement of Non-
6 Opposition to these Consent Judgment terms.

7 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
8 the Parties shall meet and confer with the Attorney General, or with each other, as applicable,
9 to attempt in good faith to resolve the concern in a timely manner, and, if possible, prior to the
10 hearing on the Motion for Court Approval.

11 **12.3** If this Stipulated Consent Judgment is not approved by the Court in the form it
12 was executed within one (1) year of execution by all Parties, it shall be void and have no force
13 or effect.

14 **13. EXECUTION AND COUNTERPARTS**

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

18 **14. DRAFTING**

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

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

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

6 **16. ENFORCEMENT**

7 This Consent Judgment may be enforced exclusively by the Parties hereto. ERC may, by
8 motion or order to show cause before the Superior Court of Alameda County, enforce the terms
9 and conditions contained in this Consent Judgment. In any action brought by ERC to enforce
10 this Consent Judgment, ERC may seek whatever fines, costs, penalties, or remedies as are
11 provided by law for failure to comply with the Consent Judgment.

12 **17. ENTIRE AGREEMENT, AUTHORIZATION**

13 **17.1** This Consent Judgment contains the sole and entire agreement and
14 understanding of the Parties with respect to the entire subject matter herein, and any and all
15 prior discussions, negotiations, commitments, and understandings related hereto. No
16 representations, oral or otherwise, express or implied, other than those contained herein have
17 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
18 herein, shall be deemed to exist or to bind any Party.

19 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
20 authorized by the Party he or she represents to stipulate to this Consent Judgment.

21 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
22 **CONSENT JUDGMENT**

23 This Consent Judgment has come before the Court upon the request of the Plaintiff. The
24 Plaintiff requests the Court to fully review this Consent Judgment and, being fully informed
25 regarding the matters which are the subject of this action, to:

26 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
27 equitable settlement of all matters raised by the allegations of the Amended Complaint that the
28

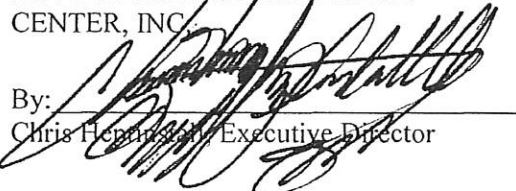
1 matter has been diligently prosecuted, and that the public interest is served by such settlement; and

2 (2) Make the findings pursuant to California Health and Safety Code section
3 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

4
5 **IT IS SO STIPULATED:**

6 Dated: 5/8/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

7
8 By: 
9 Chris Hennrich, Executive Director

10
11 Dated: _____, 2018


LIFESTYLE EVOLUTION, INC.,
individually and doing business as NUGO
NUTRITION

12
13
14 By: _____
15 Its: President and Chief Executive Officer

16 **APPROVED AS TO FORM:**

17 Dated: May 8, 2018

AQUA TERRA AERIS LAW GROUP

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

22 Dated: _____, 2018

SIDLEY AUSTIN LLP

23
24 By: _____
25 Judith M. Praitis
26 Attorneys for Defendant Lifestyle
27 Evolution, Inc., individually and doing
28 business as NuGo Nutrition

1 matter has been diligently prosecuted, and that the public interest is served by such settlement; and

2 (2) Make the findings pursuant to California Health and Safety Code section
3 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

4
5 **IT IS SO STIPULATED:**

6 Dated: _____, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

7
8 By: _____
9 Chris Heptinstall, Executive Director

10
11 Dated: _____, 2018

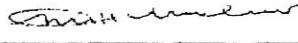
LIFESTYLE EVOLUTION, INC.,
individually and doing business as NUGO
NUTRITION

12
13
14 By: David Levine
15 Its: President and Chief Executive Officer

16 **APPROVED AS TO FORM:**

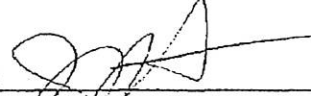
17 Dated: May 8, 2018

AQUA TERRA AERIS LAW GROUP

18 By: 
19 Matthew C. Maclear
20 Anthony M. Barnes
21 Attorneys for Plaintiff Environmental
22 Research Center, Inc.

22 Dated: May 9, 2018

SIDLEY AUSTIN LLP

23
24 By: 
25 Judith M. Praitis
26 Attorneys for Defendant Lifestyle
27 Evolution, Inc., individually and doing
28 business as NuGo Nutrition

1 matter has been diligently prosecuted, and that the public interest is served by such settlement; and
2 (2) Make the findings pursuant to California Health and Safety Code section
3 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.
4

5 **IT IS SO STIPULATED:**


6 Dated: _____, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

8 By: _____
9 Chris Heptinstall, Executive Director

10 Dated: May 9, 2018

LIFESTYLE EVOLUTION, INC.,
11 individually and doing business as NUGO
12 NUTRITION

13 
14 By: David Levine
15 Its: President and Chief Executive Officer

16 **APPROVED AS TO FORM:**

17 Dated: May 8, 2018

AQUA TERRA AERIS LAW GROUP

18 By: _____
19 Matthew C. Maclear
20 Anthony M. Barnes
21 Attorneys for Plaintiff Environmental
Research Center, Inc.

22 Dated: _____, 2018

SIDLEY AUSTIN LLP

24 By: _____
25 Judith M. Praitis
26 Attorneys for Defendant Lifestyle
27 Evolution, Inc., individually and doing
28 business as NuGo Nutrition

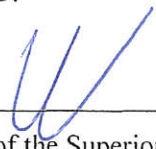
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: 7/27, 2018



Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG18904354

Case name: Environmental Research Center, Inc. v. Lifestyle Evolution, Inc.

CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of this Order was emailed to the addresses shown on at the bottom of this document.

Dated: July 27, 2018

Jhalisa A. Castaneda

Courtroom Clerk, Dept. 23

mcm@atalawgroup.com; jpraitis@sidley.com