

1 GIDEON KRACOV (SBN 179815)
801 S. Grand Avenue, Ste. 1100
2 Los Angeles, CA 90017
213.629.2071
3 FAX 213.623.7755
gk@gideonlaw.net

4 Attorney for Plaintiff
5 Environmental Research Center, Inc.

6 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
7 **COUNTY OF LOS ANGELES**

9 ENVIRONMENTAL RESEARCH CENTER,)
10 INC., a non-profit California corporation,)

11 Plaintiff,)

12 v.)

13 MUSCLE PHARM, LLC, et al)

14 Defendant(s).)

Case No. BC 454453

Assigned to Hon. Richard L. Fruin Jr.

**DECLARATION OF GIDEON KRACOV
IN SUPPORT OF AMENDED
[PROPOSED] STIPULATED
PROPOSITION 65 CONSENT
JUDGMENT**

[Amended (Proposed) Stipulated Consent
Judgment Attached Hereto]

Date: 11/8/12

Time: 8:30 a.m.

Dept.: 15

1 **DECLARATION OF GIDEON KRACOV**

2 I, Gideon Kracov, hereby declare:

3
4 1. I have personal knowledge of the following and could competently testify
5 thereto if called as a witness.

6
7
8 2. I am lead counsel for Plaintiff Environmental Research Center, Inc.
9 (“ERC”) in the above-entitled action and am an attorney in good standing with the
10 California State Bar.

11
12 3. I respectfully submit this Declaration in support of the Motion to
13 Approve the Amended [Proposed] Stipulated Consent Judgment with Defendant
14 MusclePharm Corp. ERC appreciates this opportunity to provide the following
15 information to this Honorable Court.

16
17
18 4. At the October 16, 2012 hearing on the [Proposed] Stipulated Consent
19 Judgment, the Court expressed concerns about future monitoring to ensure compliance
20 with the terms of the Judgment, and continued the hearing on the Motion to Approve to
21 November 8, 2012 so that the parties could resolve the Court’s concerns.

22
23
24 5. In response to the Court’s concerns, the parties have executed a new
25 Amended [Proposed] Stipulated Consent Judgment, agreed to by the parties and attached
26 hereto as Exhibit A.

1 6. The Amended [Proposed] Stipulated Consent Judgment contains
2 revisions in Sections 3.3.2, 4.1.2 and 9.1 to address the Court's concerns. A redline of
3 the Amended [Proposed] Stipulated Consent Judgment depicting the revisions is
4 attached hereto as Exhibit B. Otherwise, the Consent Judgment is identical in all
5 material respects.
6

7
8 7. The California Attorney General, the primary enforcer of Proposition 65,
9 has been served with and is aware of the new terms in the Amended [Proposed]
10 Stipulated Consent Judgment. I personally telephoned and e-mailed Deputy Attorney
11 General Harrison Pollak, the lawyer responsible for reviewing Proposition 65 settlements,
12 to alert him to the revisions. Should the California Attorney General's Office express
13 any concerns or objections, I will inform this Honorable Court before or at the hearing.
14

15 I declare under penalty of perjury under the laws of the State of California, that the
16 foregoing is true and correct.
17

18 Executed at Los Angeles, California, on 11/11, 2012.

19 
20 _____
21 GIDEON KRACOV
22
23
24
25
26

EXHIBIT A

1 GIDEON KRACOV (SBN 179815)
801 S. Grand Avenue, Ste. 1100
2 Los Angeles, CA 90017
Telephone: (213) 629.2071
3 Facsimile: (213) 623.7755
Email: gk@gideonlaw.net

4 Attorneys for Plaintiff
5 ENVIRONMENTAL RESEARCH CENTER

6 Arnold & Porter LLP
Trenton Norris (SBN 164781)
7 Sarah Esmaili (SBN 206053)
Three Embarcadero Center, 7th Floor
8 San Francisco, CA 94111
Telephone: (415) 471-3283
9 Facsimile: (415) 471-3400
trent.norris@aporter.com
10 sarah.esmaili@aporter.com

11 Attorneys for Defendant
MUSCLEPHARM CORP.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF LOS ANGELES

15
16 ENVIRONMENTAL RESEARCH CENTER,)
a non-profit California corporation,)
17)
Plaintiff,)
18)
v.)
19)
MUSCLE PHARM, LLC, et al.,)
20)
Defendants.)
21)
22)

Case No. BC454453

Hon. Richard L. Fruin Jr.

**AMENDED [PROPOSED]
STIPULATED CONSENT JUDGMENT**

23 **1. INTRODUCTION**

24 **1.1** Plaintiff ENVIRONMENTAL RESEARCH CENTER (“ERC” or “Plaintiff”) is a
25 citizen enforcer of California Health and Safety Code §§ 25249.6 *et seq.* (“Proposition 65”) and is
26 a non-profit corporation organized under California’s Non-Profit Public Benefit Corporation Law.

27 **1.2** Defendant MUSCLEPHARM CORP. (“MusclePharm” or “Defendant”) is a person
28 doing business within the meaning of California Health and Safety Code § 25249.11. ERC and

1 MusclePharm are referred to collectively herein as the “Parties” and each as a “Party.” The names
2 of the Products covered under this Consent Judgment are: MusclePharm Shred Matrix,
3 MusclePharm Battle Fuel, MusclePharm Recon, and MusclePharm Battle Fuel Performance Pack.
4 The products listed in this Section 1.2 are referred to herein as the “Covered Products.”
5 MusclePharm has manufactured, distributed and/or sold the Covered Products.

6 **1.3** On February 27, 1987, the State of California officially listed the chemical lead as a
7 chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code §
8 25249.8. On October 1, 1992, the State of California officially listed the chemicals lead and lead
9 compounds as chemicals known to cause cancer, pursuant to California Health and Safety Code §
10 25249.8.

11 **1.4** On October 8, 2010, ERC served MusclePharm and each of the appropriate public
12 enforcement agencies with a document entitled “60-Day Notice” that provided notice that
13 MusclePharm was allegedly in violation of Proposition 65 for failing to warn purchasers and
14 individuals that the use of the Covered Products exposes them to lead, a chemical known to the
15 State of California to cause cancer and/or reproductive toxicity (“Notice”), a copy of which is
16 attached as Exhibit A.

17 **1.5** At least sixty (60) days after ERC provided the Notice to MusclePharm and the
18 appropriate public enforcement agencies, ERC filed a complaint in the above-titled lawsuit (the
19 “Action” or “Complaint”) pursuant to Cal. Health & Safety Code § 25249.7(d) in the public
20 interest. When ERC filed the Action, no public enforcement agencies had commenced and begun
21 diligently prosecuting an action against MusclePharm with regard to the Covered Products or the
22 alleged violations. On June 22, 2011, ERC dismissed the Action in its entirety as to defendant
23 Muscle Pharm, LLC.

24 **1.6** For purposes of this Proposed Stipulated Consent Judgment (“Consent Judgment”)
25 only, the Parties stipulate that this Court has jurisdiction over the subject matter of this action and
26 personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
27 jurisdiction to enter the Consent Judgment pursuant to the terms set forth herein.

28 ///

1 **1.7** MusclePharm denies and disputes the claims asserted in the Notice and the Action.
2 Furthermore, MusclePharm contends that any lead present in the Covered Products is the result of
3 naturally occurring levels, as provided for in California Code of Regulations, Title 27, Section
4 25501(a). Furthermore, MusclePharm maintains that all of its products satisfy applicable federal
5 standards and requirements.

6 **1.8** The Parties have entered into this Consent Judgment in order to settle, compromise
7 and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing in this
8 Consent Judgment shall constitute or be construed as an admission by any of the Parties, or by any
9 of their respective officers, directors, shareholders, employees, agents, parent companies,
10 subsidiaries, divisions, affiliates, franchisors, franchisees, licensors, licensees, customers
11 (excluding private label customers), distributors, wholesalers, or retailers, of any fact, conclusion
12 of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation,
13 any admission concerning any alleged violation of Proposition 65, nor shall this Consent Judgment
14 be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any
15 court, agency, or forum, except with respect to an action seeking to enforce the terms of this
16 Consent Judgment. This paragraph shall not diminish or otherwise affect the obligations,
17 responsibilities, and duties of any Party to this Consent Judgment.

18 **1.9** The “Effective Date” of this Consent Judgment shall be the date upon which this
19 Consent Judgment is entered by the Court. The “Compliance Date” is the date that is six months
20 after the Effective Date.

21 **2. JURISDICTION AND VENUE**

22 **2.1** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
24 over MusclePharm as to the acts alleged in the Complaint, that venue is proper in Los Angeles
25 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
26 resolution of all claims which were or could have been asserted in this action based on the facts
27 alleged in the Notice or the Complaint.

28 ///

1 **3. INJUNCTIVE RELIEF**

2 **3.1** Any Covered Products manufactured after the Compliance Date that MusclePharm
3 thereafter sells in California, distributes for sale in California, or manufactures for sale in
4 California must (1) meet the warning requirements set out in Section 3.2 or (2) meet the
5 reformulation requirements in Section 3.3. Any Covered Products that have been manufactured
6 before the Compliance Date shall additionally be subject to the release of claims in Section 5 of
7 this Consent Judgment, without regard to when such Covered Products were, or are in the future,
8 put into the stream of commerce. The obligations of this Section 3 do not apply to any Covered
9 Products manufactured before the Compliance Date. Prior to the Compliance Date, MusclePharm
10 shall provide ERC with the range of lot numbers and expiration dates of each Covered Product
11 covered by Paragraph 3.1.

12 **3.2 Warnings**

13 **3.2.1** If MusclePharm provides a warning pursuant to Section 3.1, the warning
14 shall state as follows:

15 WARNING: This product contains lead, a substance known to the
16 State of California to cause birth defects or other reproductive harm.

17 The term “cancer” shall be included in the warning only if the maximum daily dose recommended
18 on the label contains more than 15 micrograms (“mcg”) of lead as determined by the quality control
19 methodology set forth in Section 3.3.4.

20 The warning statement shall be prominently and securely displayed on, or affixed to, the
21 container or label of the Covered Products with such conspicuousness, as compared with other
22 words, statements, or designs so as to render it likely to be read and understood by an ordinary
23 individual purchasing or using the Covered Products.

24 **3.3 Reformulation**

25 **3.3.1** In complying with Section 3.1, MusclePharm shall not be required to provide
26 the warning specified in Section 3.2 for any Covered Product if the daily dose or serving
27 recommended on the Covered Product’s label contains no more than 0.5 mcg of lead per day as
28 defined in Section 3.3.3, and with regard to the Recon product only, excluding the amounts of

naturally occurring lead in the ingredients listed below in Table 1A in accordance with the Attorney General's Stipulation Modifying Consent Judgments in *People v. Warner Lambert, et al.* (San. Fran. Sup. Ct. Case No. 984503). For Covered Products manufactured after the Compliance Date that cause exposures in excess of that permitted by this Section, Defendant shall, at the point of manufacture, prior to shipment to California, or prior to distribution within California, affix to or prominently display on the container or label of the Covered Products the warning as specified in Section 3.2.1.

3.3.1.a. Should Defendant seek to exclude naturally occurring lead in its calculation of overall lead content for the Recon product, Defendant will provide a separate document to ERC to include a complete list of ingredients and the corresponding percentages of each ingredient within the Recon product to be held in confidence and kept confidential by ERC.

TABLE 1A

<u>INGREDIENT</u>	<u>NATURALLY OCCURRING AMOUNT OF LEAD</u>
<u>Calcium (elemental)</u>	<u>0.8 mcg /1000 milligrams</u>
<u>Ferrous Fumarate</u>	<u>0.4 mcg/g</u>
<u>Zinc Oxide</u>	<u>8.0 mcg/g</u>
<u>Magnesium Oxide</u>	<u>0.4 mcg/g</u>
<u>Magnesium Carbonate</u>	<u>.332 mcg/g</u>
<u>Magnesium Hydroxide</u>	<u>0.4 mcg/g</u>
<u>Zinc Gluconate</u>	<u>0.8 mcg/g</u>
<u>Potassium Chloride</u>	<u>1.1 mcg/g</u>

3.3.2 By no later than fifteen (15) days before the Compliance Date, MusclePharm shall notify ERC pursuant to the notice requirements of Section 11.1 as to whether MusclePharm intends to warn as specified under Section 3.2 for any Covered Products or whether MusclePharm intends to sell any of the Covered Products without the warning specified under Section 3.2, and, if

1 so, MusclePharm shall provide ERC the test results for such Covered Products within fifteen (15)
2 working days thereafter, along with information indicating when Covered Products meeting the lead
3 standard in Section 3.3.1 are first expected to be sold by MusclePharm in California. MusclePharm
4 shall retain all such test results and related documentation for a period of at least two years after
5 reintroduction into California. If MusclePharm intends to warn under Section 3.2, no later than
6 fifteen (15) days before the Compliance Date, MusclePharm shall provide to ERC a copy of the
7 warning labels for the Covered Products, along with information indicating when Covered Products
8 with the warning labels are first expected to begin to be sold by MusclePharm in California.

9 **3.3.3** As used in this Consent Judgment, “no more than 0.5 mcg of lead per day”
10 means that the samples tested by MusclePharm pursuant to this Consent Judgment each result in a
11 daily exposure of no more than 0.5 mcg per day based on the maximum daily dose or serving
12 recommended on a Covered Product’s label after excluding any naturally occurring levels of lead as
13 provided in Section 3.3.1, after the two samples that each represent the highest and lowest lead
14 results are excluded. Five (5) randomly selected samples of such Covered Product (in the form
15 intended for sale to the end-user) shall be tested. Before MusclePharm’s first distribution or sale of
16 a Covered Product manufactured after the Compliance Date, and continuing for at least four (4)
17 years thereafter, at least once every year, MusclePharm shall test the Covered Products for lead
18 content in the manner provided for in this Consent Judgment.

19 **3.3.4** All testing pursuant to this Consent Judgment shall be performed by a
20 laboratory that is approved by, accredited by, or registered with the United States Food & Drug
21 Administration for the analysis of heavy metals. All testing pursuant to this Consent Judgment shall
22 be performed using a laboratory method that complies with the performance and quality control
23 factors appropriate for the method used (including limit of detection, limit of quantification,
24 accuracy, and precision) and that meets the following criteria: Closed-vessel, microwave-assisted
25 acid digestion employing high-purity reagents, followed by Inductively Coupled Plasma-Mass
26 Spectrometry (ICP-MS), or any other testing method agreed upon in writing by the Parties. Nothing
27 in this Consent Judgment shall limit MusclePharm’s ability to conduct, or require that others
28 conduct, additional testing of the Covered Products, including the raw materials used in their

1 manufacture. This Consent Judgment, including the testing and sampling methodology set forth in
2 this paragraph, is the product of negotiation and compromise, and is accepted by the Parties for
3 purposes of settling, compromising, and resolving issues disputed in this action, including future
4 compliance by MusclePharm with this Consent Judgment, and shall not be used for any other
5 purpose, or in any other matter and, except for the purpose of determining future compliance with
6 this Consent Judgment, shall not constitute an adoption or employment of a method of analysis for a
7 listed chemical in a specific medium as set forth in 27 California Code of Regulations § 25900(g).

8 **4. SETTLEMENT PAYMENT**

9 **4.1** In full satisfaction of all potential civil penalties, payments in lieu of penalties,
10 attorneys' fees and costs (which include, but are not limited to, fees and the costs of attorneys,
11 experts, and investigators), MusclePharm shall make a total payment of \$59,950 to be allocated
12 and paid as set forth in Sections 4.1.1 through 4.1.3.

13 **4.1.1 Civil Penalty Assessment.** MusclePharm agrees to pay a civil penalty in the
14 amount of \$4,860.00 pursuant to Health & Safety Code §25249.7(b). Plaintiff ERC shall remit 75%
15 of this amount to the State of California pursuant to Health & Safety Code §25192. This payment
16 shall be made payable to ERC.

17 **4.1.2 Payment In Lieu of Further Civil Penalties.** MusclePharm agrees to make
18 an additional payment in lieu of further civil penalties in the amount of \$14,583.00 to ERC for
19 projects to reduce exposures to toxic chemicals, and to increase consumer, worker and community
20 awareness of the health hazards posed by toxic chemicals, and to monitor compliance by
21 MusclePharm with the terms of this Consent Judgment. This payment shall be made payable to
22 ERC.

23 **4.1.3 Reimbursement of Plaintiff's Fees and Costs.** MusclePharm agrees to
24 reimburse Plaintiff's reasonable investigative, expert and attorneys' fees and costs incurred as a
25 result of investigating and bringing this matter to the attention of MusclePharm, of bringing and
26 pursuing this action, and of negotiating a settlement in the public interest, in the total amount of
27 \$40,507.00. This payment shall be made payable to Gideon Kracov.

28 ///

1 **4.1.4 Payment Schedule.** MusclePharm shall remit the payments required in
2 Section 4.1 to the Law Office of Gideon Kracov at the law firm’s address noted in the notice
3 provision in Section 11.1, below. All such payments shall be delivered on or before fifteen (15)
4 days following entry and approval of this Consent Judgment.

5 **5. RELEASE OF CLAIMS**

6 **5.1 Plaintiff’s Release of Defendant**

7 This Consent Judgment is a full, final, and binding resolution between ERC, on behalf of
8 itself, and in the public interest, and MusclePharm, of any alleged violation of Proposition 65 or its
9 implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from
10 the handling, use or consumption of the Covered Products. ERC, on behalf of itself, its agents,
11 officers, representatives, attorneys, successors and/or assignees, and in the public interest, hereby
12 releases and discharges: (a) MusclePharm and its parent companies, subsidiaries, affiliates, and
13 divisions, as well as Muscle Pharm LLC; (b) their respective licensors, licensees, franchisors,
14 franchisees, joint venturers, partners, vendors, manufacturers, packagers, contractors, and finished
15 product and ingredient suppliers; (c) each of the distributors, wholesalers, retailers, users,
16 packagers, retail customers (but not including private label customers) and all other entities in the
17 distribution chain down to the consumer of any Covered Product of the persons and entities
18 described in (a) and (b) above; and (d) each of the respective officers, directors, shareholders,
19 employees, and agents of the persons and entities described in (a) through (c), above (the persons
20 and entities identified in (a), (b), (c), and (d), above, including the predecessors, successors and
21 assigns of any of them are collectively referred to as the “Released Parties”), from any and all
22 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but
23 not limited to investigation fees, attorney’s fees and expert fees), costs and expenses (collectively,
24 “Claims”) as to any alleged violation of Proposition 65 arising from or related to the failure to
25 provide Proposition 65 warnings regarding lead for Covered Products manufactured up through the
26 Compliance Date.

27 **5.2** ERC, on behalf of itself, its agents, representatives, attorneys, successors and/or
28 assignees, and not on behalf of the general public, hereby releases and discharges the Released

1 Parties from any and all known and unknown Claims for alleged violations of Proposition 65, or
2 for any other statutory or common law, arising from or relating to alleged exposures to lead or lead
3 compounds in the Covered Products. It is possible that other Claims not known to the Parties
4 arising out of the facts alleged in the Notice or the Complaint and relating to the Covered Products
5 will develop or be discovered. ERC, on behalf of itself only, acknowledges that this Consent
6 Judgment is expressly intended to cover and include all such Claims, including all rights of action
7 therefor. ERC has full knowledge of the contents of California Civil Code section 1542. ERC, on
8 behalf of itself only, acknowledges that the Claims released in Sections 5.1 and 5.2 may include
9 unknown Claims, and nevertheless waives California Civil Code section 1542 as to any such
10 unknown Claims. California Civil Code section 1542 reads as follows:

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

17 ERC, on behalf of itself only, acknowledges and understands the significance and consequences of
18 this specific waiver of California Civil Code section 1542.

19 **5.3 Release of Environmental Research Center**

20 ERC, on one hand, and MusclePharm, on the other hand, release and waive all claims they
21 may have against each other for any statements of actions made or undertaken by them in
22 connection with the Notice or the Action.

23 **5.4** Compliance with the terms of this Consent Judgment shall be deemed to constitute
24 compliance by any Released Party with Proposition 65 regarding alleged exposures to lead in the
25 Covered Products.

26 **5.5** Nothing in this Section 5 shall affect or limit any Party's right to seek to enforce the
27 terms of this Consent Judgment in accordance with its terms.

28 **6. MOTION FOR APPROVAL OF CONSENT JUDGMENT/NOTICE TO THE CALIFORNIA ATTORNEY GENERAL'S OFFICE**

6.1 Upon execution of this Consent Judgment by the Parties, Plaintiff shall notice a

1 Motion for Approval & Entry of Consent Judgment in the Los Angeles Superior Court pursuant to
2 11 California Code of Regulations §3000, *et seq.* This motion shall be served upon all of the
3 Parties to the Action and upon the California Attorney General’s Office. In the event that the
4 Court fails to approve and order entry of the judgment, this Consent Judgment shall become null
5 and void upon the election of any Party as to them and upon written notice to all of the Parties to
6 the Action pursuant to the notice provisions herein. MusclePharm and ERC shall use good faith,
7 reasonable efforts to support entry of this Consent Judgment in the form submitted to the Office of
8 the Attorney General. If the Attorney General objects in writing to any term in this Consent
9 Judgment, the Parties shall use good faith, reasonable efforts to attempt to resolve the concern in a
10 timely manner and prior to the hearing on the motion to approve this Consent Judgment.

11 **7. SEVERABILITY**

12 7.1 In the event that any of the provisions of this Consent Judgment are held by a court
13 to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

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

15 8.1 In the event a dispute arises with respect to either Party’s compliance with the terms
16 of this Consent Judgment entered by the Court, the Parties shall meet either in person or by
17 telephone and endeavor to resolve the dispute in a good faith manner. No action or motion may be
18 filed in the absence of such a good faith attempt to resolve the dispute beforehand. In the event an
19 action or motion is filed, however, the prevailing Party may seek to recover costs and reasonable
20 attorneys’ fees. As used in the preceding sentence, the term “prevailing Party” means a Party who
21 is successful in obtaining relief more favorable to it than the relief that the other Party was
22 amenable to providing during the Parties’ good faith attempt to resolve the dispute that is the
23 subject of such enforcement action

24 **9. ENFORCEMENT**

25 9.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate
26 this Consent Judgment. Any Party may, by motion or application for an order to show cause filed
27 with this Court, enforce the terms and conditions contained in this Consent Judgment provided that
28 it first undertakes a good faith effort to resolve the dispute informally as required under Section 8.

1 In accordance with Section 8, the prevailing Party may request that the Court award its reasonable
2 attorney's fees and costs associated with such motion or application. As part of its monitoring
3 efforts, ERC shall report to the Court any alleged lack of compliance by MusclePharm with
4 Section 3 of this Consent Judgment, subject to the meet and confer procedures of Section 8.

5 **10. GOVERNING LAW**

6 **10.1** The terms of this Consent Judgment shall be governed by the laws of the State of
7 California.

8 **11. NOTICES**

9 **11.1** All correspondence and notices required to be provided under this Consent
10 Judgment shall be in writing and shall be sent by first class registered or certified mail addressed as
11 follows. All correspondence to ERC shall be mailed to:

12 Environmental Research Center
13 3111 Camino Del Rio North, Suite 400
14 San Diego, CA 92108

15 And to:

16 Gideon Kracov
17 801 S. Grand Ave., 11th Fl.
18 Los Angeles, CA 90017

19 All correspondence to Defendant, shall be mailed to:

20 Mark Campanini
21 MusclePharm
22 401 N. Tryon Street
23 10th Floor
24 Charlotte, NC
25 28202

26 With a copy to:

27 Trenton H. Norris
28 Sarah Esmaili
Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

1 **12. INTEGRATION**

2 **12.1** This Consent Judgment, together with the Exhibit attached hereto, which is
3 specifically incorporated herein by this reference, constitutes the entire agreement between the
4 Parties relating to the rights and obligations herein granted and assumed, and supersede all prior
5 agreements and understandings between the Parties.

6 **13. MODIFICATION**

7 **13.1** This Consent Judgment may be modified only upon written agreement or stipulation
8 between the Parties and upon entry of a modified Consent Judgment by the Court thereon. ERC is
9 entitled to reasonable attorney's fees and costs for any modification of the Consent Judgment
10 initiated or requested by MusclePharm.

11 **14. COUNTERPARTS**

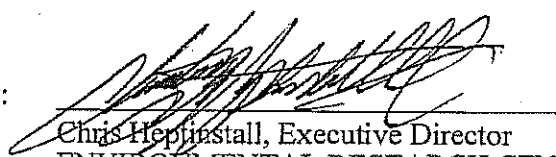
12 **14.1** This Consent Judgment may be executed in counterparts, each of which shall be
13 deemed an original, and all of which, when taken together, shall constitute one and the same
14 document.

15 **15. AUTHORIZATION**

16 **15.1** The undersigned are authorized to execute this Consent Judgment on behalf of their
17 respective Parties and have read, understood, and agree to all of the terms and conditions of this
18 Consent Judgment.

19 DATED: 11/1/2012

By:



Chris Heppinstall, Executive Director
ENVIRONMENTAL RESEARCH CENTER

22 DATED: _____

By:

Mark Campanini
MUSCLEPHARM CORP.

25 IT IS SO ORDERED.

26 DATED: _____

27 _____
28 JUDGE OF THE SUPERIOR COURT

1 **12. INTEGRATION**

2 12.1 This Consent Judgment, together with the Exhibit attached hereto, which is
3 specifically incorporated herein by this reference, constitutes the entire agreement between the
4 Parties relating to the rights and obligations herein granted and assumed, and supersede all prior
5 agreements and understandings between the Parties.

6 **13. MODIFICATION**

7 13.1 This Consent Judgment may be modified only upon written agreement or stipulation
8 between the Parties and upon entry of a modified Consent Judgment by the Court thereon. ERC is
9 entitled to reasonable attorney's fees and costs for any modification of the Consent Judgment
10 initiated or requested by MusclePharm.

11 **14. COUNTERPARTS**

12 14.1 This Consent Judgment may be executed in counterparts, each of which shall be
13 deemed an original, and all of which, when taken together, shall constitute one and the same
14 document.

15 **15. AUTHORIZATION**

16 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
17 respective Parties and have read, understood, and agree to all of the terms and conditions of this
18 Consent Judgment.

19 DATED: _____

By: _____

Chris Heptinstall, Executive Director
ENVIRONMENTAL RESEARCH CENTER

22 DATED: 31 Oct 2012

By:  _____

Mark Campanini
MUSCLEPHARM CORP.

25 IT IS SO ORDERED.

26 DATED: _____

27 _____
28 JUDGE OF THE SUPERIOR COURT



Environmental Research Center

5694 Mission Center Road #199

San Diego, CA 92108

619.309.4194

October 8, 2010

VIA CERTIFIED MAIL

Current CEO or President
Muscle Pharm, LLC
10145 W Wesley Dr
Lakewood, CO 80227

Current CEO or President
MusclePharm Corporation
3390 Peoria Street #307
Aurora, CO 80010

Brad Pyatt
(MusclePharm Corporation's Registered
Agent of Service of Process)
3390 Peoria Street #307
Aurora, CO 80010

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
P.O. Box 70550
Oakland, CA 94612-0550

Re: Notice of Violation against Muscle Pharm, LLC, and MusclePharm Corporation for Violation of California Health & Safety Code Section 25249.6

Dear Prosecutors:

The Environmental Research Center ("ERC"), the noticing entity is a California corporation whose mission is to safeguard the public from health hazards that impact families, workers and the environment. ERC is dedicated to reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and encouraging corporate responsibility. ERC is located at 5694 Mission Center Road, # 199, San Diego, CA 92108. Tel. (619) 309-4194, Executive Director: Chris Heptinstall. Through this Notice of Violation, ERC seeks to reduce exposure to the public from lead that is contained in the named products manufactured and distributed by Muscle Pharm, LLC and MusclePharm Corporation.

This letter constitutes notification that Muscle Pharm, LLC located at 10145 W. Wesley Drive, Lakewood, CO 80227 and MusclePharm Corporation located at 3390 Peoria Street #307, Aurora, CO 80010 have violated the warning requirement of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with section 25249.5 of the Health and Safety Code).

In particular, these Companies has manufactured and distributed products that have exposed and continue to expose numerous individuals within California to lead. Lead was listed pursuant to Proposition 65 as a chemical known to cause developmental toxicity, and male and female reproductive toxicity on February 27, 1987. Lead was listed pursuant to Proposition 65 as a carcinogen on October 1, 1992. The time period of these violations commenced one year after the listed dates above, at least since October 8, 2007, as well as every day since the products were introduced in the California marketplace, and will continue every day until clear and reasonable warnings are provided to purchasers and users.

The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products by consumers. Accordingly, the primary route of exposure for consumers has been oral through ingestion, but may also occur through the inhalation and/or dermal contact route of exposure.

Muscle Pharm, LLC, and MusclePharm Corporation are exposing people to lead from the following products:

MusclePharm Shred Matrix
MusclePharm Battle Fuel
MusclePharm Recon
MusclePharm Battle Fuel Performance Pack

Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to certain listed chemicals. Muscle Pharm, LLC and MusclePharm Corporation are in violation of Proposition 65 because the Company failed to provide a warning to persons using their products that they are being exposed to lead. (22 C.C.R. section 12601.) While in the course of doing business, the company is knowingly and intentionally exposing people to lead without first providing clear and reasonable warning. (Health and Safety Code section 25249.6.) The method of warning should be a warning that appears on the product's label. 22 C.C.R. section 12601 (b)(1) (A).

Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the suit is filed. With this letter, ERC gives notice of the alleged violation to the noticed party and the appropriate governmental authorities. This notice covers all violations of Proposition 65 that are currently known to ERC from information now available. ERC may continue to investigate other products that may reveal further violations. A summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, and referenced as Appendix A, has been provided to the noticed party.

Based on the allegations set forth in this Notice, ERC intends to file a citizen enforcement action against Muscle Pharm, LLC and MusclePharm Corporation unless they agree in an enforceable written instrument to: instrument to: (1) recall or reformulate the listed products so as to eliminate further unwarned exposures to the identified chemicals; and (2) pay an appropriate civil penalty. Consistent with the public interest goals of Proposition 65, ERC is interested in seeking a constructive resolution to this matter. Such resolution will avoid both further unwarned consumer exposures to the identified chemicals and expensive and time consuming litigation.

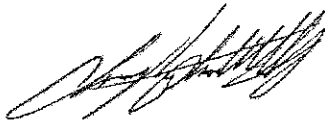
Notice of Violations of California Health & Safety Code §25249.5 *et seq.*

October 8, 2010

Page 3

Please direct all questions concerning this notice to ERC's attorney, Gideon Kracov, 801 S. Grand Ave., 11th Fl., Los Angeles, CA 90017, 213-629-2071, gk@gideonlaw.net.

Sincerely,



Chris Heptinstall
Executive Director, Environmental Research Center

cc: Karen A. Evans

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Muscle Pharm, LLC, MusclePharm Corporation and its Registered Agent for Service of Process Only)

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

CERTIFICATE OF MERIT

Re: Environmental Research Center's Notice of Proposition 65 Violations by Muscle Pharm, LLC and MusclePharm Corporation

I, Gideon Kracov, declare:

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



Dated: October 8, 2010

Gideon Kracov, Attorney At Law

CERTIFICATE OF SERVICE

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

I am a citizen of the United States, over the age of 18 years of age, and am not a party to the within entitled action. My business address is 306 Joy Street, Fort Oglethorpe, Georgia 30742

On October 8, 2010, I served the following documents: **NOTICE OF VIOLATIONS OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT; "THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY"**

On the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Current CEO or President
Muscle Pharm, LLC
10145 W Wesley Dr
Lakewood, CO 80227

Current CEO or President
MusclePharm Corporation
3390 Peoria Street #307
Aurora, CO 80010

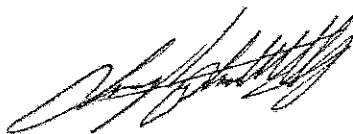
Brad Pyatt
(MusclePharm Corporation's Registered
Agent of Service of Process)
3390 Peoria Street #307
Aurora, CO 80010

On October 8, 2010, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT; ADDITIONAL SUPPORTING INFORMATION FOR CERTIFICATE OF MERIT AS REQUIRED BY CALIFORNIA HEALTH & SAFETY CODE §25249.7(d)(1)** on the following parties by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below and depositing it in a US Postal Service Office for delivery by Certified Mail:

Office of the California Attorney General
Prop 65 Enforcement Reporting
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, CA 94612-0550

On October 8, 2010, I served the following documents: **NOTICE OF VIOLATION, CALIFORNIA HEALTH & SAFETY CODE §25249.5 *ET SEQ.*; CERTIFICATE OF MERIT** on each of the parties on the Service List attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties **on the Service List attached hereto**, and depositing it with the U.S. Postal Service for delivery by Priority Mail.

Executed on October 8, 2010, in Fort Oglethorpe, Georgia.



Chris Heptinstall

Service List

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

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

District Attorney, Amador County
708 Court Street, #202
Jackson, CA 95642

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

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

District Attorney, Colusa County
547 Market Street
Colusa, CA 95932

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

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

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

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

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

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

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

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

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

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

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

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

District Attorney, Los Angeles County
210 West Temple Street, Rm 345
Los Angeles, CA 90012

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

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

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

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

District Attorney, Merced County
2222 M Street
Merced, CA 95340

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

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

District Attorney, Monterey County
230 Church Street, Bldg 2
Salinas, CA 93901

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

District Attorney, Nevada County
110 Union Street
Nevada City, CA 95959

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

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

October 8, 2010

Page 7

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

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

District Attorney, Riverside County
4075 Main Street, 1st Floor
Riverside, CA 92501

District Attorney, Sacramento County
901 "G" Street
Sacramento, CA 9581

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

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

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

District Attorney, San Francisco County
850 Bryant Street, Room 325
San Francisco, CA 94103

District Attorney, San Joaquin County
Post Office Box 990
Stockton, CA 95201

District Attorney, San Luis Obispo County
1050 Monterey Street, Room 450
San Luis Obispo, CA 93408

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

District Attorney, Santa Barbara County
1105 Santa Barbara Street
Santa Barbara, CA 93101

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

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

District Attorney, Shasta County
1525 Court Street, Third Floor
Redding, CA 96001-1632

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

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

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

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

District Attorney, Stanislaus County
832 12th Street, Ste 300
Modesto, CA 95353

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

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

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

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

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

District Attorney, Ventura County
800 South Victoria Avenue
Ventura, CA 93009

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

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

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

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

San Francisco City Attorney's Office
City Hall, Room 234
1 Drive Carlton B Goodlett Place
San Francisco, CA 94102

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

EXHIBIT B

1 GIDEON KRACOV (SBN 179815)
801 S. Grand Avenue, Ste. 1100
2 Los Angeles, CA 90017
Telephone: (213) 629.2071
3 Facsimile: (213) 623.7755
Email: gk@gideonlaw.net

4 Attorneys for Plaintiff
5 ENVIRONMENTAL RESEARCH CENTER

6 Arnold & Porter LLP
Trenton Norris (SBN 164781)
7 Sarah Esmaili (SBN 206053)
Three Embarcadero Center, 7th Floor
8 San Francisco, CA 94111
Telephone: (415) 471-3283
9 Facsimile: (415) 471-3400
trent.norris@aporter.com
10 sarah.esmaili@aporter.com

11 Attorneys for Defendant
MUSCLEPHARM CORP.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF LOS ANGELES

15
16 ENVIRONMENTAL RESEARCH CENTER,)
a non-profit California corporation,)
17)
Plaintiff,)

18 v.)

19)
20 MUSCLE PHARM, LLC, et al.,)
21)
Defendants.)

Case No. BC454453

Hon. Richard L. Fruin Jr.

AMENDED [PROPOSED]
STIPULATED CONSENT JUDGMENT

22
23 **1. INTRODUCTION**

24 **1.1** Plaintiff ENVIRONMENTAL RESEARCH CENTER (“ERC” or “Plaintiff”) is a
25 citizen enforcer of California Health and Safety Code §§ 25249.6 *et seq.* (“Proposition 65”) and is
26 a non-profit corporation organized under California’s Non-Profit Public Benefit Corporation Law.

27 **1.2** Defendant MUSCLEPHARM CORP. (“MusclePharm” or “Defendant”) is a person
28 doing business within the meaning of California Health and Safety Code § 25249.11. ERC and

1 MusclePharm are referred to collectively herein as the “Parties” and each as a “Party.” The names
2 of the Products covered under this Consent Judgment are: MusclePharm Shred Matrix,
3 MusclePharm Battle Fuel, MusclePharm Recon, and MusclePharm Battle Fuel Performance Pack.
4 The products listed in this Section 1.2 are referred to herein as the “Covered Products.”
5 MusclePharm has manufactured, distributed and/or sold the Covered Products.

6 **1.3** On February 27, 1987, the State of California officially listed the chemical lead as a
7 chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code §
8 25249.8. On October 1, 1992, the State of California officially listed the chemicals lead and lead
9 compounds as chemicals known to cause cancer, pursuant to California Health and Safety Code §
10 25249.8.

11 **1.4** On October 8, 2010, ERC served MusclePharm and each of the appropriate public
12 enforcement agencies with a document entitled “60-Day Notice” that provided notice that
13 MusclePharm was allegedly in violation of Proposition 65 for failing to warn purchasers and
14 individuals that the use of the Covered Products exposes them to lead, a chemical known to the
15 State of California to cause cancer and/or reproductive toxicity (“Notice”), a copy of which is
16 attached as Exhibit A.

17 **1.5** At least sixty (60) days after ERC provided the Notice to MusclePharm and the
18 appropriate public enforcement agencies, ERC filed a complaint in the above-titled lawsuit (the
19 “Action” or “Complaint”) pursuant to Cal. Health & Safety Code § 25249.7(d) in the public
20 interest. When ERC filed the Action, no public enforcement agencies had commenced and begun
21 diligently prosecuting an action against MusclePharm with regard to the Covered Products or the
22 alleged violations. On June 22, 2011, ERC dismissed the Action in its entirety as to defendant
23 Muscle Pharm, LLC.

24 **1.6** For purposes of this Proposed Stipulated Consent Judgment (“Consent Judgment”)
25 only, the Parties stipulate that this Court has jurisdiction over the subject matter of this action and
26 personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has
27 jurisdiction to enter the Consent Judgment pursuant to the terms set forth herein.

28 ///

1 1.7 MusclePharm denies and disputes the claims asserted in the Notice and the Action.
2 Furthermore, MusclePharm contends that any lead present in the Covered Products is the result of
3 naturally occurring levels, as provided for in California Code of Regulations, Title 27, Section
4 25501(a). Furthermore, MusclePharm maintains that all of its products satisfy applicable federal
5 standards and requirements.

6 1.8 The Parties have entered into this Consent Judgment in order to settle, compromise
7 and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing in this
8 Consent Judgment shall constitute or be construed as an admission by any of the Parties, or by any
9 of their respective officers, directors, shareholders, employees, agents, parent companies,
10 subsidiaries, divisions, affiliates, franchisors, franchisees, licensors, licensees, customers
11 (excluding private label customers), distributors, wholesalers, or retailers, of any fact, conclusion
12 of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation,
13 any admission concerning any alleged violation of Proposition 65, nor shall this Consent Judgment
14 be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any
15 court, agency, or forum, except with respect to an action seeking to enforce the terms of this
16 Consent Judgment. This paragraph shall not diminish or otherwise affect the obligations,
17 responsibilities, and duties of any Party to this Consent Judgment.

18 1.9 The “Effective Date” of this Consent Judgment shall be the date upon which this
19 Consent Judgment is entered by the Court. The “Compliance Date” is the date that is six months
20 after the Effective Date.

21 **2. JURISDICTION AND VENUE**

22 2.1 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
24 over MusclePharm as to the acts alleged in the Complaint, that venue is proper in Los Angeles
25 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
26 resolution of all claims which were or could have been asserted in this action based on the facts
27 alleged in the Notice or the Complaint.

28 ///

1 **3. INJUNCTIVE RELIEF**

2 **3.1** Any Covered Products manufactured after the Compliance Date that MusclePharm
3 thereafter sells in California, distributes for sale in California, or manufactures for sale in
4 California must (1) meet the warning requirements set out in Section 3.2 or (2) meet the
5 reformulation requirements in Section 3.3. Any Covered Products that have been manufactured
6 before the Compliance Date shall additionally be subject to the release of claims in Section 5 of
7 this Consent Judgment, without regard to when such Covered Products were, or are in the future,
8 put into the stream of commerce. The obligations of this Section 3 do not apply to any Covered
9 Products manufactured before the Compliance Date. Prior to the Compliance Date, MusclePharm
10 shall provide ERC with the range of lot numbers and expiration dates of each Covered Product
11 covered by Paragraph 3.1.

12 **3.2 Warnings**

13 **3.2.1** If MusclePharm provides a warning pursuant to Section 3.1, the warning
14 shall state as follows:

15 WARNING: This product contains lead, a substance known to the
16 State of California to cause birth defects or other reproductive harm.

17 The term “cancer” shall be included in the warning only if the maximum daily dose recommended
18 on the label contains more than 15 micrograms (“mcg”) of lead as determined by the quality control
19 methodology set forth in Section 3.3.4.

20 The warning statement shall be prominently and securely displayed on, or affixed to, the
21 container or label of the Covered Products with such conspicuousness, as compared with other
22 words, statements, or designs so as to render it likely to be read and understood by an ordinary
23 individual purchasing or using the Covered Products.

24 **3.3 Reformulation**

25 **3.3.1** In complying with Section 3.1, MusclePharm shall not be required to provide
26 the warning specified in Section 3.2 for any Covered Product if the daily dose or serving
27 recommended on the Covered Product’s label contains no more than 0.5 mcg of lead per day as
28 defined in Section 3.3.3, and with regard to the Recon product only, excluding the amounts of

naturally occurring lead in the ingredients listed below in Table 1A in accordance with the Attorney General's Stipulation Modifying Consent Judgments in *People v. Warner Lambert, et al.* (San. Fran. Sup. Ct. Case No. 984503). For Covered Products manufactured after the Compliance Date that cause exposures in excess of that permitted by this Section, Defendant shall, at the point of manufacture, prior to shipment to California, or prior to distribution within California, affix to or prominently display on the container or label of the Covered Products the warning as specified in Section 3.2.1.

3.3.1.a. Should Defendant seek to exclude naturally occurring lead in its calculation of overall lead content for the Recon product, Defendant will provide a separate document to ERC to include a complete list of ingredients and the corresponding percentages of each ingredient within the Recon product to be held in confidence and kept confidential by ERC.

TABLE 1A

<u>INGREDIENT</u>	<u>NATURALLY OCCURRING AMOUNT OF LEAD</u>
<u>Calcium (elemental)</u>	<u>0.8 mcg /1000 milligrams</u>
<u>Ferrous Fumarate</u>	<u>0.4 mcg/g</u>
<u>Zinc Oxide</u>	<u>8.0 mcg/g</u>
<u>Magnesium Oxide</u>	<u>0.4 mcg/g</u>
<u>Magnesium Carbonate</u>	<u>.332 mcg/g</u>
<u>Magnesium Hydroxide</u>	<u>0.4 mcg/g</u>
<u>Zinc Gluconate</u>	<u>0.8 mcg/g</u>
<u>Potassium Chloride</u>	<u>1.1 mcg/g</u>

3.3.2 By no later than fifteen (15) days before the Compliance Date, MusclePharm shall notify ERC pursuant to the notice requirements of Section 11.1 as to whether MusclePharm intends to warn as specified under Section 3.2 for any Covered Products or whether MusclePharm intends to sell any of the Covered Products without the warning specified under

1 Section 3.2, ~~on a one-time basis and, if so,~~ MusclePharm shall notify ERC of its intent and, upon
2 request from ERC pursuant to the notice requirements of Section 11.1, provide ERC the test results
3 for such Covered Products ~~showing compliance with~~ within fifteen (15) working days thereafter,
4 along with information indicating when Covered Products meeting the lead standard in Section
5 3.3.1 to ERC within fifteen (15) working days are first expected to be sold by MusclePharm in
6 California. MusclePharm shall retain all such test results and related documentation for a period of
7 at least two years after reintroduction into California. If MusclePharm intends to warn under
8 Section 3.2, no later than fifteen (15) days before the Compliance Date, MusclePharm shall provide
9 to ERC a copy of the warning labels for the Covered Products, along with information indicating
10 when Covered Products with the warning labels are first expected to begin to be sold by
11 MusclePharm in California.

12 **3.3.3** As used in this Consent Judgment, “no more than 0.5 mcg of lead per day”
13 means that the samples tested by MusclePharm pursuant to this Consent Judgment each result in a
14 daily exposure of no more than 0.5 mcg per day based on the maximum daily dose or serving
15 recommended on a Covered Product’s label after excluding any naturally occurring levels of lead as
16 provided in Section 3.3.1, after the two samples that each represent the highest and lowest lead
17 results are excluded. Five (5) randomly selected samples of such Covered Product (in the form
18 intended for sale to the end-user) shall be tested. Before MusclePharm’s first distribution or sale of
19 a Covered Product manufactured after the Compliance Date, and continuing for at least four (4)
20 years thereafter, at least once every year, MusclePharm shall test the Covered Products for lead
21 content in the manner provided for in this Consent Judgment.

22 **3.3.4** All testing pursuant to this Consent Judgment shall be performed by a
23 laboratory that is approved by, accredited by, or registered with the United States Food & Drug
24 Administration for the analysis of heavy metals. All testing pursuant to this Consent Judgment shall
25 be performed using a laboratory method that complies with the performance and quality control
26 factors appropriate for the method used (including limit of detection, limit of quantification,
27 accuracy, and precision) and that meets the following criteria: Closed-vessel, microwave-assisted
28 acid digestion employing high-purity reagents, followed by Inductively Coupled Plasma-Mass

1 Spectrometry (ICP-MS), or any other testing method agreed upon in writing by the Parties. Nothing
2 in this Consent Judgment shall limit MusclePharm's ability to conduct, or require that others
3 conduct, additional testing of the Covered Products, including the raw materials used in their
4 manufacture. This Consent Judgment, including the testing and sampling methodology set forth in
5 this paragraph, is the product of negotiation and compromise, and is accepted by the Parties for
6 purposes of settling, compromising, and resolving issues disputed in this action, including future
7 compliance by MusclePharm with this Consent Judgment, and shall not be used for any other
8 purpose, or in any other matter and, except for the purpose of determining future compliance with
9 this Consent Judgment, shall not constitute an adoption or employment of a method of analysis for a
10 listed chemical in a specific medium as set forth in 27 California Code of Regulations § 25900(g).

11 **4. SETTLEMENT PAYMENT**

12 **4.1** In full satisfaction of all potential civil penalties, payments in lieu of penalties,
13 attorneys' fees and costs (which include, but are not limited to, fees and the costs of attorneys,
14 experts, and investigators), MusclePharm shall make a total payment of \$59,950 to be allocated
15 and paid as set forth in Sections 4.1.1 through 4.1.3.

16 **4.1.1 Civil Penalty Assessment.** MusclePharm agrees to pay a civil penalty in the
17 amount of \$4,860.00 pursuant to Health & Safety Code §25249.7(b). Plaintiff ERC shall remit 75%
18 of this amount to the State of California pursuant to Health & Safety Code §25192. This payment
19 shall be made payable to ERC.

20 **4.1.2 Payment In Lieu of Further Civil Penalties.** MusclePharm agrees to make
21 an additional payment in lieu of further civil penalties in the amount of \$14,583.00 to ERC for
22 projects to reduce exposures to toxic chemicals, and to increase consumer, worker and community
23 awareness of the health hazards posed by toxic chemicals, and to monitor compliance by
24 MusclePharm with the terms of this Consent Judgment. This payment shall be made payable to
25 ERC.

26 **4.1.3 Reimbursement of Plaintiff's Fees and Costs.** MusclePharm agrees to
27 reimburse Plaintiff's reasonable investigative, expert and attorneys' fees and costs incurred as a
28 result of investigating and bringing this matter to the attention of MusclePharm, of bringing and

1 pursuing this action, and of negotiating a settlement in the public interest, in the total amount of
2 \$40,507.00. This payment shall be made payable to Gideon Kracov.

3 ///

4 **4.1.4 Payment Schedule.** MusclePharm shall remit the payments required in
5 Section 4.1 to the Law Office of Gideon Kracov at the law firm's address noted in the notice
6 provision in Section 11.1, below. All such payments shall be delivered on or before fifteen (15)
7 days following entry and approval of this Consent Judgment.

8 ///

9 ///

10 ///

11 **5. RELEASE OF CLAIMS**

12 **5.1 Plaintiff's Release of Defendant**

13 This Consent Judgment is a full, final, and binding resolution between ERC, on behalf of
14 itself, and in the public interest, and MusclePharm, of any alleged violation of Proposition 65 or its
15 implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from
16 the handling, use or consumption of the Covered Products. ERC, on behalf of itself, its agents,
17 officers, representatives, attorneys, successors and/or assignees, and in the public interest, hereby
18 releases and discharges: (a) MusclePharm and its parent companies, subsidiaries, affiliates, and
19 divisions, as well as Muscle Pharm LLC; (b) their respective licensors, licensees, franchisors,
20 franchisees, joint venturers, partners, vendors, manufacturers, packagers, contractors, and finished
21 product and ingredient suppliers; (c) each of the distributors, wholesalers, retailers, users,
22 packagers, retail customers (but not including private label customers) and all other entities in the
23 distribution chain down to the consumer of any Covered Product of the persons and entities
24 described in (a) and (b) above; and (d) each of the respective officers, directors, shareholders,
25 employees, and agents of the persons and entities described in (a) through (c), above (the persons
26 and entities identified in (a), (b), (c), and (d), above, including the predecessors, successors and
27 assigns of any of them are collectively referred to as the "Released Parties"), from any and all
28 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but

1 not limited to investigation fees, attorney's fees and expert fees), costs and expenses (collectively,
2 "Claims") as to any alleged violation of Proposition 65 arising from or related to the failure to
3 provide Proposition 65 warnings regarding lead for Covered Products manufactured up through the
4 Compliance Date.

5 **5.2** ERC, on behalf of itself, its agents, representatives, attorneys, successors and/or
6 assignees, and not on behalf of the general public, hereby releases and discharges the Released
7 Parties from any and all known and unknown Claims for alleged violations of Proposition 65, or
8 for any other statutory or common law, arising from or relating to alleged exposures to lead or lead
9 compounds in the Covered Products. It is possible that other Claims not known to the Parties
10 arising out of the facts alleged in the Notice or the Complaint and relating to the Covered Products
11 will develop or be discovered. ERC, on behalf of itself only, acknowledges that this Consent
12 Judgment is expressly intended to cover and include all such Claims, including all rights of action
13 therefor. ERC has full knowledge of the contents of California Civil Code section 1542. ERC, on
14 behalf of itself only, acknowledges that the Claims released in Sections 5.1 and 5.2 may include
15 unknown Claims, and nevertheless waives California Civil Code section 1542 as to any such
16 unknown Claims. California Civil Code section 1542 reads as follows:

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

21 ERC, on behalf of itself only, acknowledges and understands the significance and consequences of
22 this specific waiver of California Civil Code section 1542.

23 **5.3 Release of Environmental Research Center**

24 ERC, on one hand, and MusclePharm, on the other hand, release and waive all claims they
25 may have against each other for any statements of actions made or undertaken by them in
26 connection with the Notice or the Action.

1 **5.4** Compliance with the terms of this Consent Judgment shall be deemed to constitute
2 compliance by any Released Party with Proposition 65 regarding alleged exposures to lead in the
3 Covered Products.

4 **5.5** Nothing in this Section 5 shall affect or limit any Party's right to seek to enforce the
5 terms of this Consent Judgment in accordance with its terms.

6 **6. MOTION FOR APPROVAL OF CONSENT JUDGMENT/NOTICE TO THE**
7 **CALIFORNIA ATTORNEY GENERAL'S OFFICE**

8 **6.1** Upon execution of this Consent Judgment by the Parties, Plaintiff shall notice a
9 Motion for Approval & Entry of Consent Judgment in the Los Angeles Superior Court pursuant to
10 11 California Code of Regulations §3000, *et seq.* This motion shall be served upon all of the
11 Parties to the Action and upon the California Attorney General's Office. In the event that the
12 Court fails to approve and order entry of the judgment, this Consent Judgment shall become null
13 and void upon the election of any Party as to them and upon written notice to all of the Parties to
14 the Action pursuant to the notice provisions herein. MusclePharm and ERC shall use good faith,
15 reasonable efforts to support entry of this Consent Judgment in the form submitted to the Office of
16 the Attorney General. If the Attorney General objects in writing to any term in this Consent
17 Judgment, the Parties shall use good faith, reasonable efforts to attempt to resolve the concern in a
18 timely manner and prior to the hearing on the motion to approve this Consent Judgment.

19 **7. SEVERABILITY**

20 **7.1** In the event that any of the provisions of this Consent Judgment are held by a court
21 to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

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

23 **8.1** In the event a dispute arises with respect to either Party's compliance with the terms
24 of this Consent Judgment entered by the Court, the Parties shall meet either in person or by
25 telephone and endeavor to resolve the dispute in a good faith manner. No action or motion may be
26 filed in the absence of such a good faith attempt to resolve the dispute beforehand. In the event an
27 action or motion is filed, however, the prevailing Party may seek to recover costs and reasonable
28 attorneys' fees. As used in the preceding sentence, the term "prevailing Party" means a Party who

1 is successful in obtaining relief more favorable to it than the relief that the other Party was
2 amenable to providing during the Parties' good faith attempt to resolve the dispute that is the
3 subject of such enforcement action

4 **9. ENFORCEMENT**

5 **9.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
6 this Consent Judgment. Any Party may, by motion or application for an order to show cause filed
7 with this Court, enforce the terms and conditions contained in this Consent Judgment provided that
8 it first undertakes a good faith effort to resolve the dispute informally as required under Section 8.
9 In accordance with Section 8, the prevailing Party may request that the Court award its reasonable
10 attorney's fees and costs associated with such motion or application.

11 ~~///~~

12 ~~///As part of its monitoring efforts, ERC shall report to the Court any alleged lack of compliance~~
13 ~~by MusclePharm with Section 3 of this Consent Judgment, subject to the meet and confer~~
14 ~~procedures of Section 8.~~

15 **10. GOVERNING LAW**

16 **10.1** The terms of this Consent Judgment shall be governed by the laws of the State of
17 California.

18 **11. NOTICES**

19 **11.1** All correspondence and notices required to be provided under this Consent
20 Judgment shall be in writing and shall be sent by first class registered or certified mail addressed as
21 follows. All correspondence to ERC shall be mailed to:

22 Environmental Research Center
23 3111 Camino Del Rio North, Suite 400
24 San Diego, CA 92108

25 And to:

26 Gideon Kracov
27 801 S. Grand Ave., 11th Fl.
28 Los Angeles, CA 90017

All correspondence to Defendant, shall be mailed to:

1 Mark Campanini
2 MusclePharm
3 401 N. Tryon Street
4 10th Floor
5 Charlotte, NC
6 28202

7 With a copy to:

8 Trenton H. Norris
9 Sarah Esmail
10 Arnold & Porter LLP
11 Three Embarcadero Center, 7th Floor
12 San Francisco, CA 94111

13
14
15
16
17 **12. INTEGRATION**

18 **12.1** This Consent Judgment, together with the Exhibit attached hereto, which is
19 specifically incorporated herein by this reference, constitutes the entire agreement between the
20 Parties relating to the rights and obligations herein granted and assumed, and supersede all prior
21 agreements and understandings between the Parties.

22 **13. MODIFICATION**

23 **13.1** This Consent Judgment may be modified only upon written agreement or stipulation
24 between the Parties and upon entry of a modified Consent Judgment by the Court thereon. ERC is
25 entitled to reasonable attorney's fees and costs for any modification of the Consent Judgment
26 initiated or requested by MusclePharm.

27 **14. COUNTERPARTS**

28 **14.1** This Consent Judgment may be executed in counterparts, each of which shall be
deemed an original, and all of which, when taken together, shall constitute one and the same
document.

15. AUTHORIZATION

15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
respective Parties and have read, understood, and agree to all of the terms and conditions of this

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

Consent Judgment.

DATED: _____

By: _____

Chris Heptinstall, Executive Director
ENVIRONMENTAL RESEARCH CENTER

DATED: _____

By: _____

Mark Campanini
MUSCLEPHARM CORP.

IT IS SO ORDERED.

DATED: _____

JUDGE OF THE SUPERIOR COURT

PROOF OF SERVICE

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

I, Gideon Kracov, being duly sworn, deposes and says:

I am a citizen of the United States and work in Los Angeles County, California. I am over the age of eighteen years and am not a party to the within entitled action. My business address is: 801 S. Grand Ave., 11th Fl., LA, CA 90017. On 11/1, 2012, I served this list of persons with the following documents: **Kracov Decl. in Support of Amended Consent Judgment, Amended Consent Judgment, Proposed Order Approving Amended Consent Judgment**

The documents were served on:

Trent Norris
Sarah Esmaili
Arnold & Porter LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111

Sarah.Esmaili@aporter.com

Harrison Pollak
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612

Harrison.Pollak@doj.ca.gov

✓
✓

via email

by placing a true copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at 801 S. Grand Ave., Los Angeles, California, addressed as set forth above. I am readily familiar with my firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on the same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date of postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury, according to the laws of the State of California, that the foregoing is true and correct.

Executed this 11/1, 2012 at Los Angeles, California.



Gideon Kracov