

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (this "Agreement") is made effective on the date last executed herein ("Effective Date") by and between **Environmental Research Center, Inc.** ("ERC") and **Western Botanicals, Inc.** ("Western Botanicals"). ERC and Western Botanicals are referred to collectively as the "Parties" and individually as a "Party." The Parties agree as follows:

### 1. INTRODUCTION

1.1 This Agreement is limited to this Matter, which is defined as all claims and allegations related to the Notice of Violations of California Health & Safety Code §25249.5, *et seq.* (also known as "Proposition 65") that ERC served on Western Botanicals on December 19, 2011 (the "Notice"), and which identified the following twenty-five (25) Western Botanicals products:

- Western Botanicals Inc. Allergy Capsules
- Western Botanicals Inc. Colon Cleanse
- Western Botanicals Inc. Anti-Plague
- Western Botanicals Inc. Blood Detox
- Western Botanicals Inc. Anti-Parasite Formula
- Western Botanicals Inc. Brain Circulation
- Western Botanicals Inc. Attention Calm
- Western Botanicals Inc. Digestion Aid
- Western Botanicals Inc. Colon Detox Caps
- Western Botanicals Inc. Bountiful Blend
- Western Botanicals Inc. Earth's Nutrition
- Western Botanicals Inc. Liver/Gallbladder
- Western Botanicals Inc. Kidney/Bladder
- Western Botanicals Inc. Sweet Dreams
- Western Botanicals Inc. Weightloss Formula
- Western Botanicals Inc. Essiac Formula
- Western Botanicals Inc. Headache Formula
- Western Botanicals Inc. Pancreas Support
- Western Botanicals Inc. Heart Formula
- Western Botanicals Inc. Nerve Repair
- Western Botanicals Inc. Pain Relief
- Western Botanicals Inc. Sensual Enhancement
- Western Botanicals Inc. Ginseng Plus Formula
- Western Botanicals Inc. Female Balance
- Western Botanicals Inc. Nerve Calm

The products listed in Section 1.1 shall be referred to collectively as the "Covered Products", with each of them a "Covered Product."

1.2 Western Botanicals denies and disputes the claims asserted in the Notice. Furthermore, Western Botanicals maintains that promptly after receiving the Notice, it began a

clear and reasonable warning program to address ERC's allegations in an effort to resolve the claims informally, despite disputing ERC's claims. Furthermore, Western Botanicals contends that any lead present in the Covered Products is the result of naturally occurring levels, as provided for in California Code of Regulations, Title 27, Section 25501(a). Furthermore, Western Botanicals maintains that all of its products satisfy applicable federal standards and requirements.

1.3 For purposes of this Agreement, Western Botanicals acknowledges that it is a "person in the course of doing business" within the meaning of Proposition 65.

1.4 The Parties enter into this Agreement in order to achieve a settlement of disputed claims in the Matter for the purpose of avoiding prolonged litigation. Nothing in this Agreement shall constitute or be construed as an admission of Western Botanicals of any fact, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged violation of Proposition 65, nor shall this Agreement be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum, except with respect to an action seeking to enforce the terms of this Agreement. The Parties agree that this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Agreement.

## 2. INJUNCTIVE RELIEF, WARNINGS AND TESTING

2.1 After the Effective Date, any Covered Products that Western Botanicals distributes into the State of California, distributes for sale in California, or offers for sale to a third party for retail sale to California must either (1) qualify as a "Reformulated Covered Product" under Section 2.3 or (2) meet the warning requirements set out in Section 2.2. Covered Products that were already put into the stream of commerce by Western Botanicals prior to the Effective Date are not subject to the obligations of Section 2 but are covered under the release in Section 4.

### 2.2 Warnings

If Western Botanicals provides a warning pursuant to Section 2.1, Western Botanicals shall provide the following warning:

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

Terms in brackets are optional, provided however, the term "cancer," must be included in the warning if the maximum daily serving recommended on the label contains more than 15 micrograms of lead as determined pursuant to Section 2.3.

The warning shall be affixed to or printed upon the product label, cap, or packaging of the Covered Product. The warning shall be displayed with such conspicuousness, as compared with other words, statements, or design of the label, cap, or package, as applicable, to render the warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use. If the warning is displayed on the product label, the warning shall be at least

the same size as the largest of any other health or safety warnings on the product and the word **“WARNING”** shall be in all capital letters and in bold print. If the Warning is to be affixed to the product label, cap, or packaging with a sticker, a permanent adhesive shall be used.

Western Botanicals shall use best efforts to ensure that any written materials accompanying the Warning provided to consumers of the Covered Products do not negate or dilute the meaning or impact of the Warning in a manner that makes the Warning no longer clear and reasonable.

### **2.3 Reformulated Covered Products**

**2.3.1** A Reformulated Covered Product is one for which the maximum recommended daily serving on the label contains no more than 0.5 micrograms of lead.

**2.3.2** For purposes of this Agreement, daily lead exposure levels shall be measured in micrograms, and shall be calculated using the following formula: micrograms of lead per gram of product multiplied by grams of product per serving of the product (using the maximum serving size appearing on the product label), multiplied by servings of the product per day (using the maximum number of servings in a recommended serving appearing on the product label), which equals micrograms of lead exposure per day.

### **2.4 Testing**

**2.4.1** Once a year, on or before the anniversary of the Effective Date of the Agreement, Western Botanicals shall test, or cause to be tested, at least three (3) randomly selected samples of each Covered Product (in the form intended for distribution or sale to California) for lead content. Provided however that the testing requirements of Section 2.4 do not apply to a Covered Product for which Western Botanicals has provided the Warning specified in Section 2.2 since the Effective Date or during the preceding year unless the formula of any of the Covered Products is altered by either the inclusion of a new ingredient, an increase in the percentage of an existing ingredient, or if any ingredient in the Covered Products is sourced from a different supplier such that Western Botanicals has reason to believe that a Covered Product no longer requires a Warning under the terms of this Agreement. Western Botanicals agrees to conduct Lead testing according to the testing requirements of Section 2.4 if Western Botanicals seeks to meet the requirements of Section 2.3, including those Covered Products for which Western Botanicals has provided the Warning specified in Section 2.2 since the Effective Date or during the preceding year.

**2.4.2** All testing done under Section 2.4 is to be performed by a laboratory certified by the California Environmental Laboratory Accreditation Program for the analysis of heavy metals or a laboratory that is approved by, accredited by, or registered with the United States Food & Drug Administration for the analysis of heavy metals. Testing under Section 2.4 shall be performed using Inductively Coupled Plasma-Mass Spectrometry (ICP-MS) and closed-vessel, microwave-assisted digestion employing high-purity reagents, or other testing methods recommended at the time by the California Attorney General’s Office, or any other testing method agreed upon in writing by the Parties.

**2.4.3** Upon written request by ERC, Western Botanicals shall provide to ERC any test results and documentation of testing undertaken by Western Botanicals pursuant to Section 2.4 within ten working days of receipt by Western Botanicals of ERC's request. Western Botanicals shall include the lot identification numbers of the lots tested.

**2.4.4** For purposes of determining which Warning, if any, is required pursuant to Section 2.2, the highest lead detection result of the three (3) randomly selected samples of the Covered Products will be controlling.

**2.4.5** Nothing in this Agreement shall limit Western Botanicals' ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw materials used in their manufacture.

### **3. SETTLEMENT PAYMENT**

**3.1** In full and final satisfaction of civil penalties, payment in lieu of further civil penalties, ERC's expenses and costs of analysis, and ERC's attorney fees, Western Botanicals shall make a total payment of \$45,000 ("Total Settlement Amount"). Sections 3.1.1 through 3.1.5 describe the agreed partition and timing of payments of the Total Settlement Amount.

**3.1.1** As a portion of the Total Settlement Amount, \$4,690.00 shall be considered a civil penalty pursuant to California Health and Safety Code §25249.7(b)(1). ERC shall remit 75% (\$3,517.50) of the civil penalties to the Office of Environmental Health Hazard Assessment ("OEHHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety Code §25249.12(c). ERC will retain the remaining 25% (\$1,172.50) of the civil penalty.

**3.1.2** As a portion of the Total Settlement Amount, \$14,047.50 shall be considered a payment to ERC in lieu of further civil penalties for activities such as (1) funding the analysis, researching and testing of consumer products that may contain Proposition 65 listed chemicals; (2) funding grants to California non-profit foundations/entities dedicated to public health; (3) funding ERC's Voluntary Compliance Program to work with companies not subject to Proposition 65 to reformulate their products to reduce potential consumer exposures to Proposition 65 listed chemicals; (4) funding ERC's RxY Program to assist various medical personnel to provide testing assistance to independent distributors of various products; (5) funding ERC's Got Lead? Program to assist consumers in testing products for lead content; (6) funding post-settlement monitoring of past consent judgments; (7) funding to maintain ERC's database of lead-free products, Proposition 65-compliant products and contaminated products; (8) funding to track and catalog Proposition 65-compliant, contamination-free sources of ingredients used in the products ERC tests; and (9) funding the continued day to day enforcement of Proposition 65 matters which address contaminated ingestible products, similar to the subject matter of this Action.

**3.1.3** As a portion of the Total Settlement Amount, \$15,500.00 shall be considered a reimbursement to ERC for its reasonable work and analysis costs associated with the enforcement of Proposition 65 and other expenses and costs incurred as a result of bringing this matter to Western Botanicals' attention, and negotiating a settlement in the public interest.

**3.1.4** As a portion of the Total Settlement Amount, \$10,762.50 shall be considered a reimbursement to ERC for its attorney fees.

**3.1.5** On April 30, 2013, or within 5 business days after the Effective Date, whichever comes sooner, Western Botanicals shall pay ERC the sum of \$5,000; and for the next 8 months, beginning with May 2013 and ending in December 2013, due by the 30<sup>th</sup> day of each of those 8 months, Western Botanicals shall pay ERC the sum of \$5,000 for each of those 8 months by checks made payable to "Environmental Research Center" and sent by first-class registered or certified mail, or overnight delivery, to ERC at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108. In the event that any payment owed under this Agreement is not remitted on or before its due date, Western Botanicals shall be deemed to be in default of its obligations under this Agreement and all future payments shall become immediately due and payable, and the California statutory interest rate applying to all interest accruing on unpaid balances due hereunder, will be added to the Total Settlement Amount beginning on the due date of the funds in default.

**3.2** Except as otherwise provided herein, each Party shall bear its own costs and fees in this Matter.

#### **4. BINDING EFFECT; CLAIMS COVERED AND RELEASED**

**4.1** This Agreement is a full, final, and binding resolution between ERC, on behalf of itself, and Western Botanicals, of any alleged violation of Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of exposure to lead from the handling, use or consumption of the Covered Products. ERC, on behalf of itself, its agents, officers, representatives, attorneys, successors and/or assignees, hereby releases and discharges: (a) Western Botanicals and its parent companies, subsidiaries, affiliates, and divisions, but excluding private label customers of Western Botanicals; (b) each of their respective licensors, licensees, franchisors, franchisees, joint venturers, partners, vendors, manufacturers, packagers, contractors, and finished product and ingredient suppliers; (c) each of the distributors, wholesalers, retailers, users, packagers, and all other entities in the distribution chain down to the consumer of any Covered Product of the persons and entities described in (a) and (b) above; and (d) each of the respective officers, directors, shareholders, employees, and agents of the persons and entities described in (a) through (c), above (the persons and entities identified in (a), (b), (c), and (d), above, including the predecessors, successors and assigns of any of them, are collectively referred to as the "Released Parties"), from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees (including but not limited to investigation fees, attorney's fees and expert fees), costs and expenses (collectively, "Claims") as to any alleged violation of Proposition 65 arising from or related to the failure to provide Proposition 65 warnings regarding lead for Covered Products that are distributed or sold by Western Botanicals prior to the Effective Date.

**4.2** ERC also, on behalf of itself, its agents, representatives, attorneys, successors and/or assignees, and in its individual capacity only (and not on behalf of the public), hereby releases and discharges the Released Parties from any and all known and unknown Claims for alleged violations of Proposition 65, or for any other statutory or common law Claims, arising from or relating to alleged exposures to lead in the Covered Products as set forth in the Notice. It

is possible that other Claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. ERC, on behalf of itself only, acknowledges that this Agreement is expressly intended to cover and include all such Claims, including all rights of action therefore. ERC has full knowledge of the contents of California Civil Code section 1542. ERC, on behalf of itself only, acknowledges that the Claims released in Sections 4.1 and 4.2 may include unknown Claims, and nevertheless waives California Civil Code section 1542 as to any such unknown Claims. California Civil Code section 1542 reads as follows:

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

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

**4.3** Compliance with the terms of this Agreement shall be deemed to constitute compliance by any Released Party with Proposition 65 regarding alleged exposures to lead in the Covered Products.

**4.4** ERC, on its own behalf, on one hand, and Western Botanicals, on the other hand, release and waive any claims they may have against each other, and their officers, directors, employees, agents, representatives, and attorneys for all actions or statements made or undertaken by them in the course of seeking or opposing enforcement of Proposition 65 in connection with the Notice.

**4.5** Nothing herein shall be construed as diminishing Western Botanicals' continuing obligations to comply with Proposition 65, nor shall it affect or limit any Party's right to seek to enforce the terms of this Agreement.

## **5. POST-EXECUTION ACTIVITIES**

**5.1** After execution of the Agreement, ERC will submit to the California Attorney General a Report of Settlement on Form JUS 1501, or as currently required by the California Attorney General. In addition, ERC will provide to the California Attorney General a fully signed copy of this Agreement.

## **6. ENTIRE AGREEMENT; MODIFICATION**

**6.1** This Agreement contains the entire agreement between the Parties with regard to settlement of this Matter, and supersedes and replaces any and all prior or contemporaneous agreements or understandings, written or oral, with regard to the matters set forth in this Agreement. This Agreement may be amended or modified in whole or in part at any time only by an agreement in writing executed by all Parties to this Agreement.

**7. APPLICATION OF AGREEMENT**

7.1 This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective owners, principals, shareholders, officers, directors, employees, agents, servants, heirs, executors, successors, and assigns.

**8. DRAFTING**

8.1 No inference, assumption or presumption shall be drawn, and no provision of this Agreement shall be construed against any of the Parties, based upon the fact that one of the Parties and/or one of the Parties' attorneys prepared and/or drafted all or any portion this Agreement. It is conclusively presumed all of the Parties participated equally in the preparation and drafting of this Agreement.

**9. PROVISION OF NOTICES**

9.1 All notices required to be given to either Party to this Agreement by the other shall be in writing and sent to the following agents listed below by (a) first-class mail, (b) overnight courier, or (c) personal delivery:

**FOR ENVIRONMENTAL RESEARCH CENTER:**

Chris Heptinstall, Executive Director  
Environmental Research Center  
3111 Camino Del Rio North, Suite 400  
San Diego, CA 92108

Law Office of Karen A. Evans  
Karen Evans  
4218 Biona Place  
San Diego, CA 92116  
Telephone: (619) 640-8100  
Email: karen.erc@cox.net

**FOR Western Botanicals:**

Randy Giboney  
President  
Western Botanicals Inc.  
768 E. 1950 N.  
Spanish Fork, UT 84660

With a copy to:

Arnold & Porter LLP  
Trenton Norris  
Sarah Esmaili  
Three Embarcadero Center 7th Floor  
San Francisco, CA 94111  
Telephone: (415) 471-3100  
Facsimile: (415) 471-3400

## **10. SEVERABILITY**

**10.1** If any provision, term or section of this Agreement is found to be invalid, illegal or unenforceable, all remaining provisions, terms or sections shall continue in full force and effect and remain binding on the Parties. If any provision, term or section of this Agreement is determined to be unenforceable, such provision, term or section may be modified so that the unenforceable provision, term or section is enforceable to the greatest extent possible.

## **11. GOVERNING LAW**

**11.1** This Agreement shall be deemed to have been entered into in the State of California, and governed and interpreted by the laws of the State of California, regardless of the physical locations of the individuals executing this Agreement at the time of execution.

## **12. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

**12.1** In the event a dispute arises with respect to either Party's compliance with the terms of this Agreement, the Parties shall meet in person or by telephone and endeavor to resolve the dispute amicably. No action or motion may be filed in the absence of such a good faith attempt to resolve the dispute. If an action or motion is filed, however, such action or motion shall be brought in a court of the State of California, any county of which is deemed to be the proper venue for such action. The prevailing Party in any such action may seek to recover its reasonable attorney fees in addition to any other legally recoverable costs. As used in this Section 12, the term "prevailing Party" means a Party who is successful in obtaining relief more favorable to it than the relief that the other Party was amenable to providing during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement action.

## **13. COUNTERPARTS; AUTHORIZATION**

**13.1** This Agreement may be signed in counterparts, and each counterpart, as well as any facsimile, e-mail or other copies of this Agreement or any counterparts, shall be deemed to be an original.

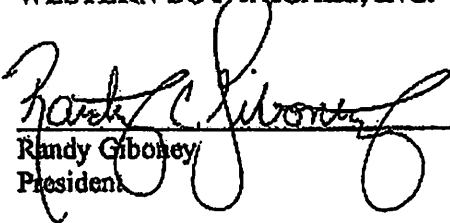


13.2 Each of the individuals who execute this Agreement represents and warrants they have the authority to execute this document and bind the party for whom they execute to the terms and conditions of this Agreement.

AGREED:

DATED: 22 April 2013

WESTERN BOTANICALS, INC.

By:   
Randy Giboney  
President

DATED: \_\_\_\_\_


ENVIRONMENTAL RESEARCH CENTER

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

APPROVED AS TO FORM:

DATED: 4/22/13

ARNOLD & PORTER LLP

By:   
Sarah Esmaili  
Attorney for Western Botanicals, Inc.

DATED: \_\_\_\_\_

LAW OFFICES OF KAREN A. EVANS

By: \_\_\_\_\_  
Karen Evans  
Attorney for Environmental Research Center

13.2 Each of the individuals who execute this Agreement represents and warrants they have the authority to execute this document and bind the party for whom they execute to the terms and conditions of this Agreement.

**AGREED:**

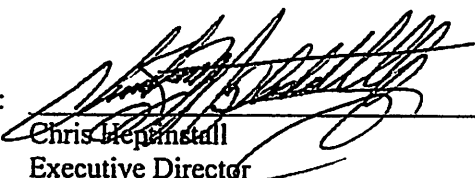
DATED: \_\_\_\_\_

**WESTERN BOTANICALS, INC.**

By: \_\_\_\_\_  
Randy Giboney  
President

DATED: 4/23/2013

**ENVIRONMENTAL RESEARCH CENTER**

By:   
Chris Hepinstall  
Executive Director

**APPROVED AS TO FORM:**


DATED: \_\_\_\_\_

**ARNOLD & PORTER LLP**

By: \_\_\_\_\_  
Sarah Esmaili  
Attorney for Western Botanicals, Inc.

DATED: 4-23-13

**LAW OFFICES OF KAREN A. EVANS**

By:   
Karen Evans  
Attorney for Environmental Research Center