

1 **SETTLEMENT AGREEMENT**

2 **1. INTRODUCTION**

3 1.1 This Settlement Agreement (this "Agreement") is entered into by and between
4 Environmental Research Center ("ERC") as a private enforcer and Earthlab, Inc. dba Wise
5 Woman Herbals ("EARTHLAB"). ERC and EARTHLAB are hereinafter sometimes referred
6 to individually as a "Party" or collectively as the "Parties."

7 1.2 ERC is a California non-profit corporation dedicated to, among other causes,
8 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
9 and toxic chemicals, facilitating a safe environment for consumers and employees, and
10 encouraging corporate responsibility.

11 1.3 EARTHLAB is an Oregon corporation, qualified to do business in the State of
12 California. At all times relevant to this action, EARTHLAB has employed ten or more persons
13 and is a "person in the course of doing business" within the meaning of Proposition 65.

14 1.4 On January 6, 2012, pursuant to California Health and Safety Code
15 § 25249.7(d)(1), ERC served a Notice of Violations of Proposition 65 ("Notice of Violations")
16 on the California Attorney General, other public enforcers, and EARTHLAB. The Notice of
17 Violations contains allegations that EARTHLAB, without giving a required clear and
18 reasonable warning, has exposed and continues to expose individuals in California to lead, a
19 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, by manufacturing,
20 marketing, distributing and/or selling the following seven (7) products:

- 21 1) Wise Woman Herbals Gymnema Capsules,
- 22 2) Wise Woman Herbals PSA Capsules,
- 23 3) Wise Woman Herbals Fiber Flow Capsules,
- 24 4) Wise Woman Herbals GI Capsules,
- 25 5) Wise Woman Herbals RA* OA Capsules,
- 26 6) Wise Woman Herbals Hepacaps, and
- 27 7) Wise Woman Herbals Licorice Solid Extract.

1 These seven (7) products are hereinafter referred to collectively as the "Covered Products." No
2 public enforcer has prosecuted the allegation set forth in the Notice.

3 1.5 The Parties enter into this Agreement in order to settle disputed claims between
4 them and to avoid prolonged and costly litigation.

5 1.6 Nothing in this Agreement, nor compliance with this Agreement, shall constitute
6 or be construed as an admission by the Parties of any fact, issue of law, or violation of law, at
7 any time, for any purpose. Nothing in this Agreement shall be construed as giving rise to any
8 presumption or inference of admission or concession or waiver of a defense by EARTHLAB as
9 to any fault, wrongdoing or liability whatsoever, including, but not limited to, any alleged
10 violation of Proposition 65.

11 1.7 Except as expressly provided herein, nothing in this Agreement shall prejudice,
12 waive or impair any right, remedy or defense that the Parties may have in any legal proceeding.
13 This paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties
14 of any Party to this Agreement.

15 1.8 The "Effective Date" of this Agreement shall be the date on which this
16 Agreement is fully executed.

17 1.9 The only products covered by this Agreement are the Covered Products, and the
18 only chemical covered by this Agreement is the chemical lead as related to the Covered
19 Products.

20 **2. INJUNCTIVE RELIEF**

21 **2.1 Reformulation of Covered Product**

22 On and after the Effective Date, EARTHLAB shall not manufacture for sale in
23 California, distribute into California, sell to any consumer located in California, or supply to
24 distributors or retailers in California, any Covered Product for which the maximum dose
25 recommended on the label contains more than 0.5 micrograms (mcg) of lead, unless each
26 individual product (in the form intended for sale to the end user) bears one of the warning
27 statements specified in section 2.2 below on its individual unit label or unit packaging.
28 The term "distributing into California" means to ship any of the Covered Products into

1 California for sale in California or to sell or provide any of the Covered Products to any person
2 or entity, wherever located, that EARTHLAB knows intends to or will ship any of the Covered
3 Products into or sell any of the Covered Products in California.

4 2.2 **Clear and Reasonable Warnings**

5 (a) If the daily lead exposure level is greater than 0.5 micrograms (mcg) for any lot
6 of the Covered Products, the following warning shall be provided:

7 **WARNING: This product contains lead, a chemical known to the State of**
8 **California to cause birth defects and other reproductive harm.**

9 (b) If the maximum dose recommended on the label contains a daily lead exposure
10 level greater than 15 micrograms (mcg) for any lot of the Covered Products, the following
11 warning shall be provided:

12 **WARNING: This product contains lead, a chemical known to the State of**
13 **California to cause cancer, birth defects, and other reproductive harm.**

14 (c) The warning shall be prominently and securely affixed to or printed upon the
15 label, cap, or packaging of the Covered Product. The warning shall be displayed with such
16 conspicuousness, as compared with other words, statements, or designs on the label, cap, or
17 package, so as to render it likely to be read and understood by an ordinary individual under
18 customary conditions of purchase or use. If the warning is displayed on the product label, the
19 warning shall be at least the same size as the largest of any other health or safety warnings on
20 the product and the word "WARNING" shall be in all capital letters and in bold print. If the
21 warning is to be affixed to the product with a sticker, EARTHLAB must use a permanent
22 adhesive. No other statements relating to Proposition 65 may accompany the warning.

23 (d) EARTHLAB represents that as of the Effective Date, EARTHLAB has warning
24 labels in use for the Covered Products that state as follows:

25 **WARNING: This product contains lead, a chemical known to the State of**
26 **California to cause birth defects or other reproductive harm. Lead is found**
27 **naturally occurring in soil. Plant material in this product is either organic,**
28 **cultivated, wildcrafted, or of best quality available.**

1 (e) EARTHLAB agrees that it will, as of the Effective Date, cease the
2 manufacturing of, or the ordering of labels incorporating into the warning the words "Lead is
3 found naturally occurring in soil." However, EARTHLAB may continue to utilize its existing
4 inventory of labels on the Covered Products for a period of twelve (12) months from the
5 Effective Date.

6 (f) EARTHLAB represents that its prior use of the words "Plant material in this
7 product is either organic, cultivated, wildcrafted, or of best quality available." incorporated into
8 the warning is not exclusive to the Covered Products requiring a Proposition 65 warning, but
9 has been used on the labels of all products, without discrimination.

10 2.3 Testing

11 (a) On and after the Effective Date, and annually for three (3) consecutive years,
12 EARTHLAB shall have one (1) randomly selected sample of two separate lots of each of the
13 Covered Products (in the form intended for distribution or sale to an end-user in California)
14 tested for lead to determine if a warning is required. Additionally, if the formula of any of the
15 Covered Products is altered by either the inclusion of a new ingredient, an increase in the
16 percentage of an existing ingredient, or if any ingredient in the Covered Products is sourced
17 from a different supplier, EARTHLAB shall conduct lead testing according to the testing
18 requirements of this Section.

19 For purposes of determining which warning, if any, is required under Section
20 2.2, the highest lead detection result of the randomly selected samples of the Covered Products
21 will be controlling.

22 (b) All testing is to be performed by a laboratory certified by the American
23 Proficiency Institute for the analysis of heavy metals or a laboratory that is approved by,
24 accredited by, or registered with the United States Food & Drug Administration for the analysis
25 of heavy metals. Testing under this section shall be performed using Inductively Coupled
26 Plasma-Mass Spectrometry (ICP-MS) or other testing methods recommended at the time of the
27 testing by the California Attorney General's Office, or any other testing method agreed upon in
28 writing by the Parties.

1 (c) If testing is required pursuant to Section 2.3(a) and the result requires a change in
2 the warning presently in use and approved by both Parties at the time of this writing for a
3 product, EARTHLAB shall forward to ERC the copies of all test results and laboratory report
4 documentation relating to the testing for lead content of each of the lots of Covered Products
5 within twenty (20) working days after receipt by EARTHLAB of the test results.

6 (d) For purposes of this Agreement, daily lead exposure levels shall be measured in
7 micrograms, and shall be calculated using the following formula: micrograms of lead per gram
8 of product (lead content found using the above described testing), multiplied by grams of
9 product per serving of the product (using the maximum serving size appearing on the product
10 label), multiplied by servings of the product per day (using the largest number of servings in a
11 recommended dosage appearing on the product label), equals micrograms of lead exposure per
12 day.

13 (e) Nothing in this Agreement shall limit EARTHLAB's ability to conduct, or
14 require that others conduct, additional testing of the Covered Products including the raw
15 materials used in their manufacture.

16 (f) The testing and sampling methodology set forth above is a result of negotiation
17 and compromise, and is accepted by the Parties for the purposes of settling, compromising, and
18 resolving the issues in this matter, including future compliance with this Agreement, and shall
19 not be used for any purpose or in any other matter, except for the purposes of determining future
20 compliance with this Agreement.

21 2.4 Additional Compliance Measures

22 (a) EARTHLAB shall incorporate Proposition 65 compliance requirements into the
23 company's Distribution and Retailer Agreements.

24 (b) For distributors and retailers ordering from EARTHLAB's website, EARTHLAB
25 will expand the Terms & Conditions section to include information specific to Proposition 65.
26 In the website warning, EARTHLAB shall identify each Covered Product that requires a
27 Proposition 65 warning for sales in California.

28

1 (c) If a warning is required for any of the Covered Products sold by EARTHLAB to
2 its distributors and retailers without a warning, EARTHLAB shall provide Proposition 65
3 warning stickers to EARTHLAB's distributors and retailers, upon such request made by a
4 distributor or retailer.

5 **2.5 Products in the Stream of Commerce**

6 The injunctive relief set forth in Section 2 shall not apply to any of the Covered Products
7 that EARTHLAB put into the stream of commerce before the Effective Date. EARTHLAB shall
8 provide ERC with the last lot number and expiration date for each of the Covered Products in
9 the stream of commerce on the Effective Date.

10 **3. SETTLEMENT PAYMENT**

11 **3.1 Total Payment**

12 In full and final satisfaction of civil penalties, payment in lieu of further civil penalties,
13 ERC's expenses and costs of litigation, and ERC's attorney fees, EARTHLAB shall, within 5
14 business days after the Effective Date, issue a single check in the amount of \$35,000.00 ("Total
15 Settlement Amount"), made payable to "Environmental Research Center – ERC Escrow
16 Account", and send the check by first-class registered or certified mail, or overnight delivery,
17 directly to ERC at the following address:

18 Environmental Research Center
19 3111 Camino Del Rio North, Suite 400
20 San Diego, CA 92108

21 Sections 3.2-3.5 below describe the agreed partition of the Total Settlement Amount.

22 **3.2 Civil Penalty**

23 As a portion of the Total Settlement Amount, \$2,750.00 shall be considered a civil
24 penalty pursuant to California Health and Safety Code § 25249.7(b)(1). ERC shall remit 75%
25 (\$2,062.50) of the civil penalties to the Office of Environmental Health Hazard Assessment
26 ("OEHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance
27 with California Health and Safety Code § 25249.12(c), and a copy of the transmittal letter will
28 be sent to EARTHLAB's counsel. ERC will retain the remaining 25% (\$687.50) of the civil
penalty.

1 **3.3 Payment in Lieu of Further Civil Penalties**

2 As a portion of the Total Settlement Amount, \$8,250.00 shall be considered a payment
3 to ERC in lieu of further civil penalties for activities such as (1) funding the researching and
4 testing of consumer products that may contain Proposition 65 listed chemicals; (2) funding a
5 grant or donation to California non-profit foundations/entities dedicated to eliminating public
6 exposure to toxic chemicals and substances; and (3) funding the continued day-to-day business
7 of enforcement of Proposition 65 matters which address contaminated ingestible products
8 similar to the subject matter of this Action.

9 **3.4 Reimbursement of Expenses and Costs**

10 As a portion of the Total Settlement Amount, \$15,000.00 shall be considered a
11 reimbursement to ERC for its reasonable expenditures associated with the enforcement of
12 Proposition 65 and other expenses and costs incurred as a result of investigating, bringing this
13 matter to EARTHLAB’s attention and negotiating a settlement in the public interest.

14 **3.5 Attorney Fees**

15 As a portion of the Total Settlement Amount, \$9,000.00 shall be considered a
16 reimbursement to ERC for its attorney fees.

17 **4. COSTS AND FEES**

18 Except as expressly set forth herein in Section 3, each Party shall bear its own attorneys’
19 fees, costs and expenses in this action.

20 **5. RELEASE**

21 5.1 ERC, acting on its own behalf and in the public interest, releases EARTHLAB,
22 and its respective officers, directors, shareholders, employees, agents, representatives, parents,
23 subsidiaries, divisions, subdivisions, affiliates, franchisees, licensees, successors, assigns and
24 attorneys, and distributors, wholesalers, retailers and all other entities (not including private
25 label customers of EARTHLAB) in the downstream distribution chain of the Covered Products
26 (“Released Parties”), from all claims for violations of Proposition 65 up through the Effective
27 Date based on exposure to lead from the Covered Products as set forth in the Notice of
28 Violations.

1 5.2 Compliance with the terms of this Agreement constitutes compliance with
2 Proposition 65 with respect to exposures to lead from the Covered Products.

3 5.3 ERC on behalf of itself only, on the one hand, and EARTHLAB, on the other
4 hand, release and waive all claims they may have against each other and their respective
5 officers, directors, employees, agents, representatives and attorneys for any statements or
6 actions made or undertaken by them or their respective officers, directors, employees, agents,
7 representatives and attorneys in connection with the Notice of Violations.

8 5.4 Nothing in this release is intended to apply to any occupational or environmental
9 exposures arising under Proposition 65, nor shall it apply to any of EARTHLAB's products
10 other than the Covered Products.

11 5.5 Nothing herein shall be construed as diminishing EARTHLAB's continuing
12 obligations to comply with Proposition 65.

13 **6. COMPLIANCE WITH *HEALTH & SAFETY CODE* § 25249.7(f)**

14 After execution of this Agreement, ERC will submit a Report of Settlement to the
15 California Attorney General. In addition, ERC will provide to the California Attorney General
16 the fully signed copy of this Agreement. The Parties acknowledge and agree that the Parties
17 shall provide as much information as is requested by the California Attorney General, or any
18 other governmental agency, regarding this matter, its settlement, and this Agreement.

19 **7. MODIFICATION OF AGREEMENT**

20 This Agreement may be modified only upon written agreement of the Parties.

21 **8. ENFORCEMENT OF AGREEMENT; GOOD FAITH ATTEMPT TO**
22 **RESOLVE DISPUTES**

23 In the event a dispute arises with respect to any Party's compliance with the terms and/or
24 conditions of this Agreement, the Party seeking compliance of another Party shall make a good
25 faith attempt to resolve the dispute by conferring with the other Party in person, by telephone or
26 by written communication before seeking relief from a Court. If the dispute is not resolved after
27 such an attempt, this Agreement may be enforced pursuant to Code of Civil Procedure § 664.4
28 or any other valid provision of the law. The prevailing party in any such dispute brought to this

1 Court for resolution shall be awarded all reasonable costs and attorney's fees. As used in the
2 preceding sentence, the term "prevailing party" means a party who is successful in obtaining
3 relief more favorable to it than the relief the other party was agreeable to providing during the
4 Parties' good faith attempt to resolve the dispute that is the subject of such an enforcement
5 proceeding.

6 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

7 In the event that any of the provisions hereof are subsequently held by a court to be
8 unenforceable, the validity of the enforceable provisions shall not be adversely affected.

9 **10. GOVERNING LAW**

10 The terms of this Agreement shall be governed by the laws of the State of California and
11 apply within the State of California.

12 **11. DRAFTING**

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

21 **12. ENTIRE AGREEMENT**

22 This Agreement contains the sole and entire agreement and understanding of the Parties
23 with respect to the entire subject matter hereof, and supersedes and replaces any and all prior
24 agreements or understandings, written or oral, with regard to the matters set forth herein. No
25 other agreements or understandings not specifically referred to herein, oral or otherwise, shall
26 be deemed to exist or to bind any of the Parties.

27 ///

28 ///

1 **13. EXECUTION IN COUNTERPARTS**

2 This Agreement may be executed in counterparts, which taken together shall be deemed
3 to constitute one document. A facsimile or pdf signature shall be construed as valid as the
4 original signature.

5 **14. NOTICES**

6 All notices required by this Agreement to be given to any Party shall be sent by first-
7 class registered or certified mail, or overnight delivery, to the following:

8 **FOR ERC:**

9 Chris Heptinstall, Executive Director
10 Environmental Research Center
11 3111 Camino Del Rio North, Suite 400
12 San Diego, CA 92108

12 Karen A. Evans
13 Law Office of Karen A. Evans
14 4218 Biona Place
15 San Diego, CA 92116

16 **FOR EARTHLAB:**

17 Dr. Ken Koenig
18 President
19 EarthLab, Inc.
20 P.O. Box 279
21 Creswell, OR 97426

22 Melissa A. Jones
23 Stoel Rives LLP
24 500 Capitol Mall, Suite 1600
25 Sacramento, CA 95814

26 **15. AUTHORITY TO STIPULATE TO THIS AGREEMENT**

27 Each person signing this Agreement on behalf of a Party certifies that he or she is fully
28 authorized by that Party to stipulate to the terms and conditions of this Agreement on behalf of
that Party, to enter into and execute this Agreement on behalf of that Party, and to legally bind
that Party to this Agreement. Each person signing this Agreement on behalf of a Party

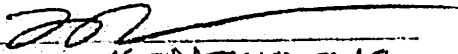
1 represents and warrants that he or she has read and understands this Agreement, and agrees to
2 all of the terms and conditions of this Agreement on behalf of that Party.

3 **IT IS SO STIPULATED:**

4 Dated: _____ ENVIRONMENTAL RESEARCH CENTER

5
6 By: _____
7 Chris Heptinstall
8 Executive Director

9 Dated: 3/14/13 EARTHLAB, INC. dba WISE WOMAN
10 HERBALS

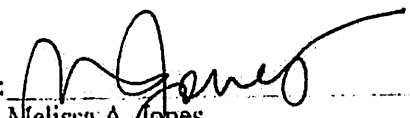
11 By: 
12 Name: KENNETH KOENIG
13 Title: PRES.

14 **APPROVED AS TO FORM:**

15 Dated: _____ LAW OFFICE OF KAREN A. EVANS

16
17 By: _____
18 Karen A. Evans
19 Attorney for
20 ENVIRONMENTAL RESEARCH CENTER

21 Dated: 3/14/2013

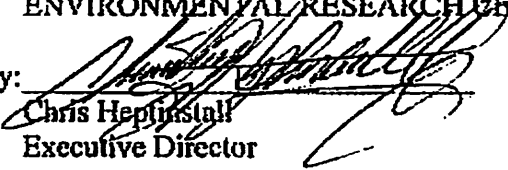
22 By: 
23 Melissa A. Jones
24 Attorney for
25 EARTHLAB, INC. dba WISE WOMAN
26 HERBALS

27
28

1 represents and warrants that he or she has read and understands this Agreement, and agrees to
2 all of the terms and conditions of this Agreement on behalf of that Party.

3 **IT IS SO STIPULATED:**

4 Dated: 3/14/2013

ENVIRONMENTAL RESEARCH CENTER
By: 
Chris Hepinstall
Executive Director

8 Dated: _____

EARTHLAB, INC. dba WISE WOMAN
HERBALS
By: _____
Name:
Title:

13 **APPROVED AS TO FORM:**

15 Dated: _____

LAW OFFICE OF KAREN A. EVANS
By: _____
Karen A. Evans
Attorney for
ENVIRONMENTAL RESEARCH CENTER

20 Dated: _____

By: _____
Melissa A. Jones
Attorney for
EARTHLAB, INC. dba WISE WOMAN
HERBALS

28

1 represents and warrants that he or she has read and understands this Agreement, and agrees to
2 all of the terms and conditions of this Agreement on behalf of that Party.

3 **IT IS SO STIPULATED:**

4 Dated: _____ ENVIRONMENTAL RESEARCH CENTER

5
6 By: _____
7 Chris Heptinstall
8 Executive Director

8 Dated: _____ EARTHLAB, INC. dba WISE WOMAN
9 HERBALS

10
11 By: _____
12 Name:
13 Title:

13 **APPROVED AS TO FORM:**

14
15 Dated: 3-14-13 LAW OFFICE OF KAREN A. EVANS

16
17 By: Karen A. Evans
18 Karen A. Evans
19 Attorney for
20 ENVIRONMENTAL RESEARCH CENTER

21 Dated: _____

22 By: _____
23 Melissa A. Jones
24 Attorney for
25 EARTHLAB, INC. dba WISE WOMAN
26 HERBALS

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