

1 Michael Freund SBN 99687
Ryan Hoffman SBN 283297
2 Michael Freund & Associates
1919 Addison Street, Suite 105
3 Berkeley, CA 94704
Telephone: (510) 540-1992
4 Facsimile: (510) 540-5543

5 Attorneys for Plaintiff
ENVIRONMENTAL RESEARCH CENTER

6 Duane M. Linstrom SBN 206294
7 11750 Sorrento Valley Rd., Suite 250
San Diego, CA 92121
8 Telephone: (619) 436-1000
Facsimile: (619) 436-1001

9 Attorney for Defendant
10 TAXUS CARDIUM PHARMACEUTICALS
GROUP, INC.

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO

14 ENVIRONMENTAL RESEARCH
15 CENTER, a California non-profit
corporation,

16 Plaintiff,

17 v.

18 TAXUS CARDIUM PHARMACEUTICALS
19 GROUP, INC. dba MEDPODIUM; CELL-
20 NIQUE CORPORATION dba HEALTHY
BRANDS COLLECTIVE; and DOES 1-100,

21 Defendants.
22
23

CASE NO. CGC-14-539326

STIPULATED CONSENT JUDGMENT;
[PROPOSED] ORDER

Health & Safety Code § 25249.5 *et seq.*

Action Filed: May 15, 2014

Trial Date: None set

24 1. INTRODUCTION

25 1.1 On May 15, 2014, Plaintiff Environmental Research Center (“ERC”), a non-
26 profit corporation, as a private enforcer, and in the public interest, initiated this action by filing
27 a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
28 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*

1 (“Proposition 65”), against To Go Brands, Inc., Taxus Cardium Pharmaceuticals Group, Inc.
2 dba Medpodium (“Taxus Cardium”), Cell-nique Corporation dba Healthy Brands Collective
3 and Does 1-100. Subsequently, on December 10, 2014 an Amended Complaint was filed (the
4 “Amended Complaint”) removing To Go Brands, Inc. as a Defendant. Cell-nique Corporation
5 dba Healthy Brands Collective was also later dismissed from the action. In this action, ERC
6 alleges that a number of products manufactured, distributed or sold by Taxus Cardium contain
7 lead, a chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose
8 consumers to this chemical at a level requiring a Proposition 65 warning. These products
9 (referred to hereinafter individually as a “Covered Product” or collectively as “Covered
10 Products”) are: (1) To Go Brands Inc. Greens To Go Delicious Apple Melon Flavor, (2) To Go
11 Brands Inc. Smoothie Complete Vanilla Berry, and (3) To Go Brands Inc. Go Greens Powder Mix
12 Green Apple Flavor.

13 1.2 ERC and Taxus Cardium are hereinafter referred to individually as a “Party” or
14 collectively as the “Parties.”

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

19 1.4 ERC contends that Taxus Cardium is a business entity that has employed ten or
20 more persons at all times relevant to this action, and qualifies as a “person in the course of
21 business” within the meaning of Proposition 65. Taxus Cardium disputes this contention for at
22 least part of the time period relevant to this action. Taxus Cardium previously had an ownership
23 interest in the company that manufactured, distributed, and sold the Covered Products.

24 1.5 The Amended Complaint is based on allegations contained in ERC’s Notices of
25 Violation dated May 17, 2013 and July 29, 2014, that were served on the California Attorney
26 General, other public enforcers, and Taxus Cardium (“Notices”). True and correct copies of the
27 Notices are attached as Exhibit A and are hereby incorporated by reference. More than 60 days
28 have passed since the Notices were mailed and uploaded to the Attorney General’s website, and

1 no designated governmental entity has filed a complaint against Taxus Cardium with regard to
2 the Covered Products or the alleged violations.

3 1.6 ERC's Notices and Amended Complaint allege that use of the Covered Products
4 exposes persons in California to lead without first providing clear and reasonable warnings in
5 violation of California Health and Safety Code section 25249.6. Taxus Cardium denies all
6 material allegations contained in the Notices and Amended Complaint.

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

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

20 1.9 The Effective Date of this Consent Judgment is the date on which it is entered as
21 a Judgment by this Court.

22 **2. JURISDICTION AND VENUE**

23 For purposes of this Consent Judgment and any further court action that may become
24 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
25 jurisdiction over the allegations of violations contained in the Amended Complaint, personal
26 jurisdiction over Taxus Cardium as to the acts alleged in the Amended Complaint, that venue is
27 proper in San Francisco County, and that this Court has jurisdiction to enter this Consent
28 Judgment as a full and final resolution of all claims up through and including the Effective Date

1 which were or could have been asserted in this action based on the facts alleged in the Notices and
2 Amended Complaint.

3 **3. INJUNCTIVE RELIEF**

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

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

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

20 **3.2 Clear and Reasonable Warnings**

21 If Taxus Cardium is required to provide a warning pursuant to Section 3.1, the following
22 warning must be utilized:

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

25 Taxus Cardium shall use the phrase "cancer and" in the warning only if the maximum daily dose
26 recommended on the label contains more than 15 micrograms of lead as determined pursuant to
27 the quality control methodology set forth in Section 3.4.

1 The warning shall be securely affixed to or printed upon the container or label of each
2 Covered Product. In addition, for Covered Products sold over Taxus Cardium's website, the
3 warning shall appear on Taxus Cardium's checkout page on its website for California consumers
4 identifying any Covered Product, and also appear prior to completing checkout on Taxus
5 Cardium's website when a California delivery address is indicated for any purchase of any
6 Covered Product.

7 The warning shall be at least the same size as the largest of any other health or safety
8 warnings also appearing on its website or on the label or container of Taxus Cardium's product
9 packaging and the word "WARNING" shall be in all capital letters and in bold print. No other
10 statements about Proposition 65 or lead may accompany the warning.

11 Taxus Cardium must display the above warnings with such conspicuousness, as compared
12 with other words, statements, or design of the label or container, as applicable, to render the
13 warning likely to be read and understood by an ordinary individual under customary conditions of
14 purchase or use of the product.

15 4. SETTLEMENT PAYMENT

16 4.1 In full satisfaction of all potential civil penalties, payment in lieu of civil
17 penalties, attorney's fees, and costs, Taxus Cardium shall make a total payment of \$55,000.00
18 ("Total Settlement Amount") to ERC. Within ^{written notice of} 25 days of the Effective Date, Taxus Cardium
19 shall make a lump sum payment of \$10,000.00. Thereafter, Taxus Cardium shall pay the
20 remaining \$45,000.00 in eleven monthly consecutive payments due and owing on the same day
21 of the month as the Effective Date. Payments two through ten shall be in the amount of
22 \$4,090.91, while the last payment shall be in the amount of \$4,090.90. Taxus Cardium shall
23 make these payments by wire transfer to ERC's escrow account, for which ERC will give
24 Taxus Cardium the necessary account information. The Total Settlement Amount shall be
25 apportioned as follows:

26 4.2 \$13,564.00 shall be considered a civil penalty pursuant to California Health and
27 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$10,173.00) of the civil penalty to the
28 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe

1 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
2 Code §25249.12(c). ERC will retain the remaining 25% (\$3,391.00) of the civil penalty.

3 4.3 \$1,728.23 shall be distributed to ERC as reimbursement to ERC for reasonable
4 costs incurred in bringing this action.

5 4.4 \$10,232.28 shall be distributed to ERC in lieu of further civil penalties, for the
6 day-to-day business activities such as (1) continued enforcement of Proposition 65, which
7 includes work, analyzing, researching and testing consumer products that may contain
8 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are
9 the subject matter of the current action; (2) the continued monitoring of past consent judgments
10 and settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
11 donation of \$512.00 to the Global Community Monitor to address reducing toxic chemical
12 exposures in California.

13 4.5 \$2,385.00 shall be distributed to Michael Freund as reimbursement of ERC's
14 attorney's fees, \$10,305.00 shall be distributed to Ryan Hoffman as reimbursement of ERC's
15 attorney's fees, while \$16,785.49 shall be distributed to ERC for its in-house legal fees.

16 **5. MODIFICATION OF CONSENT JUDGMENT**

17 5.1 This Consent Judgment may be modified only (i) by written stipulation of the
18 Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent
19 judgment.

20 5.2 If Taxus Cardium seeks to modify this Consent Judgment under Section 5.1, then
21 Taxus Cardium must provide written notice to ERC of its intent ("Notice of Intent"). If ERC
22 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC
23 must provide written notice to Taxus Cardium within thirty days of receiving the Notice of
24 Intent. If ERC notifies Taxus Cardium in a timely manner of ERC's intent to meet and confer,
25 then the Parties shall meet and confer in good faith as required in this Section. The Parties
26 shall meet in person or via telephone within thirty (30) days of ERC's notification of its intent
27 to meet and confer. Within thirty days of such meeting, if ERC disputes the proposed
28 modification, ERC shall provide to Taxus Cardium a written basis for its position. The Parties

1 shall continue to meet and confer for an additional thirty (30) days in an effort to resolve any
2 remaining disputes. Should it become necessary, the Parties may agree in writing to different
3 deadlines for the meet-and-confer period.

4 **5.3** In the event that Taxus Cardium initiates or otherwise requests a modification
5 under Section 5.1, and the meet and confer process leads to a joint motion or application of the
6 Consent Judgment, Taxus Cardium shall reimburse ERC its costs and reasonable attorney's
7 fees for the time spent in the meet-and-confer process and filing and arguing the motion or
8 application.

9 **5.4** Where the meet-and-confer process does not lead to a joint motion or
10 application in support of a modification of the Consent Judgment, then either Party may seek
11 judicial relief on its own. In such a situation, the prevailing Party may seek to recover costs
12 and reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"
13 means a party who is successful in obtaining relief more favorable to it than the relief that the
14 other party was amenable to providing during the Parties' good faith attempt to resolve the
15 dispute that is the subject of the modification.

16 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
17 **JUDGMENT**

18 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
19 this Consent Judgment.

20 **7. APPLICATION OF CONSENT JUDGMENT**

21 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
22 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
23 divisions, affiliates, franchisees, licensees, customers (excluding private labelers), distributors,
24 wholesalers, retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
25 application to Covered Products which are distributed or sold exclusively outside the State of
26 California and which are not used by California consumers.

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

2 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on
3 behalf of itself and in the public interest, and Taxus Cardium, of any alleged violation of
4 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of
5 exposure to lead from the handling, use, or consumption of the Covered Products and fully
6 resolves all claims that have been or could have been asserted in this action up to and including
7 the Effective Date for failure to provide Proposition 65 warnings for the Covered Products.
8 ERC, on behalf of itself and in the public interest, hereby discharges Taxus Cardium and its
9 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
10 divisions, affiliates, suppliers, franchisees, licensees, customers (not including private label
11 customers of Taxus Cardium), distributors, wholesalers, retailers, and all other upstream and
12 downstream entities in the distribution chain of any Covered Product, and the predecessors,
13 successors and assigns of any of them (collectively, "Released Parties"), from any and all
14 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and
15 expenses asserted, or that could have been asserted, as to any alleged violation of Proposition
16 65 arising from the failure to provide Proposition 65 warnings on the Covered Products
17 regarding lead.

18 **8.2** ERC on its own behalf only, and Taxus Cardium on its own behalf only, further
19 waive and release any and all claims they may have against each other for all actions or
20 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
21 65 in connection with the Notices or Amended Complaint up through and including the
22 Effective Date, provided, however, that nothing in Section 8 shall affect or limit any Party's
23 right to seek to enforce the terms of this Consent Judgment.

24 **8.3** It is possible that other claims not known to the Parties arising out of the facts
25 alleged in the Notices or the Amended Complaint and relating to the Covered Products will
26 develop or be discovered. ERC on behalf of itself only, and Taxus Cardium, acknowledge that
27 this Consent Judgment is expressly intended to cover and include all such claims up through
28 the Effective Date, including all rights of action therefore. ERC and Taxus Cardium

1 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
2 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
3 claims. California Civil Code section 1542 reads as follows:

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

9 ERC on behalf of itself only and Taxus Cardium, acknowledge and understand the significance
10 and consequences of this specific waiver of California Civil Code section 1542.

11 8.4 Compliance with the terms of this Consent Judgment shall be deemed to
12 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
13 in the Covered Products as set forth in the Notices and the Amended Complaint.

14 8.5 Nothing in this Consent Judgment is intended to apply to any occupational or
15 environmental exposures arising under Proposition 65, nor shall it apply to any of Taxus
16 Cardium's products other than the Covered Products.

17 9. SEVERABILITY OF UNENFORCEABLE PROVISIONS

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

20 10. GOVERNING LAW

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

23 11. PROVISION OF NOTICE

24 All notices required to be given to either Party to this Consent Judgment by the other shall
25 be in writing and sent to the following agents listed below by: (a) first-class, registered, or certified
26 mail; (b) overnight courier; or (c) personal delivery. Courtesy copies via email may also be sent.

27 FOR ENVIRONMENTAL RESEARCH CENTER:

28 Chris Heptinstall, Executive Director, Environmental Research Center
3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
Tel: (619) 500-3090
Email: chris_erc501c3@yahoo.com

1 With a copy to:
2 Michael Freund
3 Ryan Hoffman
4 Michael Freund & Associates
5 1919 Addison Street, Suite 105
6 Berkeley, CA 94704
7 Telephone: (510) 540-1992
8 Facsimile: (510) 540-5543

9 **TAXUS CARDIUM PHARMACEUTICALS GROUP, INC.;**
10 **CELL-NIQUE CORPORATION dba HEALTHY BRANDS COLLECTIVE**

11 *11750 Sorrento Valley Road*
12 *Suite 250*
13 *San Diego, CA. 92121*
14 *Telephone: (858) 436-1000*
15 *Facsimile: (858)436-1001*

16 With a copy to:
17 Duane M. Linstrom
18 11750 Sorrento Valley Rd., Suite 250
19 San Diego, CA 92121
20 Telephone: (619) 436-1000
21 Facsimile: (619) 436-1001

22 **12. COURT APPROVAL**

23 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
24 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
25 Consent Judgment.

26 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
27 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
28 prior to the hearing on the motion.

12.3 If this Stipulated Consent Judgment is not approved by the Court, it shall be
void and have no force or effect.

13. EXECUTION AND COUNTERPARTS

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

1 **14. DRAFTING**

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

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

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

20 **16. ENTIRE AGREEMENT, AUTHORIZATION**

21 **16.1** This Consent Judgment contains the sole and entire agreement and
22 understanding of the Parties with respect to the entire subject matter herein, and any and all
23 prior discussions, negotiations, commitments and understandings related hereto. No
24 representations, oral or otherwise, express or implied, other than those contained herein have
25 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
26 herein, shall be deemed to exist or to bind any Party.

1 16.2 Each signatory to this Consent Judgment certifies that he or she is fully
2 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as
3 explicitly provided herein, each Party shall bear its own fees and costs.

4 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
5 **CONSENT JUDGMENT**

6 This Consent Judgment has come before the Court upon the request of the Parties. The
7 Parties request the Court to fully review this Consent Judgment and, being fully informed
8 regarding the matters which are the subject of this action, to:

9 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
10 equitable settlement of all matters raised by the allegations of the Amended Complaint, that the
11 matter has been diligently prosecuted, and that the public interest is served by such settlement; and

12 (2) Make the findings pursuant to California Health and Safety Code section
13 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

14 **IT IS SO STIPULATED:**


15 Dated: 6/26/, 2015

ENVIRONMENTAL RESEARCH
CENTER

16
17 By: 
Chris Heptinstall, Executive Director

18 Dated: 6/26, 2015

TAXUS CARDIUM
PHARMACEUTICALS GROUP, INC.

19
20 
21 By: Duane Libstrom
22 Its: Secretary, General Counsel

1 **APPROVED AS TO FORM:**

2 Dated: 6/29, 2015

MICHAEL FREUND & ASSOCIATES

3
4 By: 

Michael Freund
Ryan Hoffman
Attorneys for Plaintiff Environmental
Research Center

5
6
7 Dated: Jun 26, 2015

DUANE M. LINSTROM, ATTORNEY AT
LAW

8
9 By: 

Duane M. Linstrom
Attorney for Defendant
Taxis Cardium Pharmaceuticals Group,
Inc.

10
11
12
13
14
15
16
17 **ORDER AND JUDGMENT**

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

20 IT IS SO ORDERED, ADJUDGED AND DECREED.

21 Dated: _____, 2015

Judge of the Superior Court