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ENVIRONMENTAL RESEARCH CENTER
6
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10 ENVIRONMENTAL RESEARCH
11 CENTER, a California non-profit
12 corporation,

13 Plaintiff,

14 v.

15 FIT FOODS LTD. dba MUTANT MASS and
DOES 1-100,

16
17 Defendants.

CASE NO. CGC-14-541777

STIPULATED CONSENT JUDGMENT;
[PROPOSED] ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: September 23, 2014
Trial Date: None set

18
19
20 **1. INTRODUCTION**

21 **1.1** On September 23, 2014, Plaintiff Environmental Research Center, Inc.
22 (“ERC”), a non-profit corporation, as a private enforcer, and in the public interest, initiated this
23 action by filing a Complaint for Injunctive and Declaratory relief and Civil Penalties (the
24 “Complaint”) pursuant to the provisions of California Health and Safety Code section 25249.5
25 et seq. (“Proposition 65”), against Fit Foods Ltd. dba Mutant Mass and DOES 1-100
26 (collectively “Fit Foods”). In this action, ERC alleges that the following products
27 manufactured, distributed or sold by Fit Foods contain lead, a chemical listed under Proposition
28

1 65 as a carcinogen and reproductive toxin, and expose consumers at a level requiring a
2 Proposition 65 warning:

- 3 1. Fit Foods Distribution Inc. Mutant Pump
- 4 2. Fit Foods Distribution Inc. Mutant Whey Vanilla Infusion Flavor
- 5 3. Fit Foods Distribution Inc. Mutant Whey Triple Chocolate Eruption Flavor

6 **1.2** ERC is a California non-profit corporation dedicated to, among other causes,
7 helping safeguard the public from health hazards by reducing the use and misuse of hazardous
8 and toxic chemicals, facilitating a safe environment for consumers and employees, and
9 encouraging corporate responsibility.

10 **1.3** Fit Foods is a business entity that, at all relevant times for the purpose of this
11 Consent Judgment, employed ten or more persons and qualified as a “person in the course of
12 business” within the meaning of Proposition 65. Fit Foods manufactures, distributes and sells the
13 Covered Products.

14 **1.4** ERC and Fit Foods are referred to individually as “Party” or collectively as the
15 “Parties.”

16 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation,
17 dated September 13, 2013, that was served on the California Attorney General, other public
18 enforcers, and Fit Foods (“Notice”). A true and correct copy of the Notice is attached as
19 Exhibit A and is hereby incorporated by reference. More than 60 days have passed since the
20 Notice was mailed and uploaded onto the Attorney General’s website, and no designated
21 governmental entity has filed a complaint against Fit Foods with regard to the Covered Products
22 or the alleged violations.

23 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes
24 persons in California to lead without first providing clear and reasonable warnings in violation
25 of California Health and Safety Code section 25249.6. Fit Foods denies all material allegations
26 contained in the Notice and Complaint.

27 **1.7** The Parties have entered into this Consent Judgment in order to settle,
28 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.

1 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of
2 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
3 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,
4 distributors, wholesalers, or retailers. Except for the representations made above, nothing in
5 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of
6 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
7 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any
8 purpose.

9 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
10 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
11 other or future legal proceeding unrelated to these proceedings.

12 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as
13 a Judgment by this Court.

14 **2. JURISDICTION AND VENUE**

15 For purposes of this Consent Judgment and for any further court action that may become
16 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
17 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
18 over Fit Foods as to the acts alleged in the Complaint, that venue is proper in Alameda County,
19 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of
20 all claims up through and including the Effective Date which were or could have been asserted in
21 this action based on the facts alleged in the Notice and Complaint.

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

23 **3.1** Beginning six months from the Effective Date (“Compliance Date”), Fit Foods
24 shall be permanently enjoined from manufacturing for sale in the State of California,
25 “Distributing into the State of California”, or directly selling in the State of California, any
26 Covered Product which exposes a person to a “Daily Exposure Level” of more than 0.5
27 micrograms per day when the maximum suggested dose is taken as directed on the Covered
28 Product’s label, unless it meets the warning requirements under Section 3.2.

1 3.1.1 As used in Consent Judgment, the term “Distributing into the State of
2 California” shall mean to directly ship a Covered Product into California for sale in California
3 or to sell a Covered Product to a distributor that Fit Foods knows will sell the Covered Product
4 in California.

5 3.1.2 For purposes of this Consent Judgment, “Daily Lead Exposure Level”
6 shall be measured in micrograms and shall be calculated using the following formula:
7 micrograms of lead per gram of product, multiplied by grams of product per serving of the
8 product (using the largest serving size appearing on the product label), multiplied by servings
9 of the product per day (using the largest number of servings in a recommended dosage
10 appearing on the product label), which equals micrograms of lead exposure per day, excluding
11 amounts of naturally occurring lead in the ingredients listed in the table below in accordance
12 with the Attorney General’s Stipulation Modifying Consent Judgments in *People v Warner*
13 *Lambert, et al* San Fran. Sup. Ct. Case No. 984503 as well as the Cocoa powder allowance
14 listed in the table below.

15 If at any time after the Compliance Date, ERC tests a Covered Product and the test
16 results indicate that the daily exposure level is greater than 0.5 micrograms per gram, Fit Foods
17 Agrees to Confidentially supply to ERC within 30 days a list of ingredients, including the
18 percentage of each ingredient (“Ingredient List”), of that particular Covered Product so that
19 ERC may be able to calculate the daily exposure based on the allowances contained in the table
20 below. If at any time Fit Foods refuses to provide said Ingredient List to ERC following a test
21 result of greater than 0.5 micrograms per gram, then Fit Foods shall not receive the allowances
22 for that particular Covered Product.

| INGREDIENT | NATURALLY OCCURING AMOUNT OF LEAD |
|------------------|-----------------------------------|
| Calcium | 0.8 micrograms/gram |
| Ferrous Fumarate | 0.4 micrograms/gram |
| Zinc Oxide | 8.0 micrograms/gram |
| Magnesium Oxide | 0.4 micrograms/gram |

| | | |
|---|---------------------|-----------------------|
| 1 | Magnesium Carbonate | 0.332 micrograms/gram |
| 2 | Magnesium Hydroxide | 0.4 micrograms/gram |
| 3 | Zinc Gluconate | 0.8 micrograms/gram |
| 4 | Potassium Chloride | 1.1 micrograms/gram |
| 5 | Cocoa-powder | 1.0 micrograms/gram |

6 In the event that a dispute arises with respect to compliance with the terms of this
7 Consent Judgment as to any contribution from naturally occurring lead levels under this
8 Section, the Parties shall employ good faith efforts to seek entry of a protective order that
9 governs access to and disclosure of the Ingredient List provided. Should a dispute arise, this
10 Section is subject to the meet and confer requirements and attorney's fees provisions set forth in
11 Section 15 below.

12 3.2 Clear and Reasonable Warnings

13 If Fit Foods is required to provide a warning pursuant to Section 3.1, then subject to the
14 provisions below, the following warning must be utilized:

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

17 Fit Foods shall use the phrase "cancer and" in the warning only if the maximum daily dose
18 recommended on the label contains more than 15 micrograms of lead as determined pursuant to
19 the quality control methodology set forth in Section 3.4.

20 Fit Foods shall provide the warning on one of the following: 1) for website purchases only,
21 on its website, where the warning conspicuously appears prior to a customer's purchase of a
22 product or 2) for non-website purchases, on the label of Fit Foods' products in California.

23 The warning shall be at least the same size as the largest of any other health or safety
24 warnings correspondingly appearing on the label, container, or website and the word
25 "WARNING" shall be in all capital letters. No other statements about Proposition 65 may
26 visually accompany the warning.

27 In all instances, Fit Foods must display the above warnings with such conspicuousness, as
28 compared with other words, statements, or design of the label or container, as applicable, to render

1 the warning likely to be read and understood by an ordinary individual under customary conditions
2 of purchase or use of the product.

3 Notwithstanding any of the foregoing, Fit Foods may use the following safe-harbor
4 warning language in a warning required by Section 3.1 if such warning was displayed on Fit
5 Foods products already in the stream of commerce on the Effective Date: "For California
6 Residents Only. Required Prop 65 Text: WARNING: This product contains chemicals known to
7 the State of California to cause cancer and birth defects or other reproductive harm."

8 **3.3 Reformulated Covered Products**

9 A Reformulated Covered Product is one for which the Daily Exposure Level when the
10 maximum suggested dose is taken as directed on the Reformulated Covered Product's label,
11 contains no more than 0.5 micrograms of lead per day as determined by the quality control
12 methodology described in Section 3.4.

13 **3.4 Testing and Quality Control Methodology**

14 **3.4.1** All testing pursuant to this Consent Judgment shall be performed using a
15 laboratory method that complies with the performance and quality control factors appropriate
16 for the method used, including limit of detection, qualification, accuracy, and precision that
17 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (ICP-MS)
18 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing
19 method subsequently agreed upon in writing by the Parties.

20 **3.4.2** All testing pursuant to this Consent Judgment shall be performed by an
21 independent third-party laboratory certified by the California Environmental Laboratory
22 Accreditation Program or an independent third-party laboratory that is registered with the
23 United States Food & Drug Administration. Nothing in this Consent Judgment shall limit Fit
24 Foods' ability to conduct, or require that others conduct, additional testing of the Covered
25 Products, including the raw materials used in their manufacture.

26 **3.4.3** Fit Foods shall arrange, for at least three consecutive years and at least
27 once per year, for the lead testing of three randomly selected samples of each Covered Product
28 in the form intended for sale to the end-user to be distributed or sold in California. Fit Foods

1 shall continue testing only so long as the Covered Products are sold in California or sold to a
2 third party for retail sale in California. The testing requirements discussed in Section 3.4 are
3 not applicable to any Covered Product for which Fit Foods has provided the warning as
4 specified in Section 3.2. Fit Foods shall retain all test results and documentation for a period of
5 three years from the date of each test.

6 **3.4.5** The injunctive relief set forth in Section 3 shall not apply to any of the
7 Covered Products that are put into the stream of commerce prior to the Compliance Date. No
8 later than the Compliance Date, Fit Foods shall provide ERC with the last lot number for each of
9 the Covered Products in the stream of commerce as of the Effective Date.

10 **4. SETTLEMENT PAYMENT**

11 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil
12 penalties, attorney's fees, and costs, Fit Foods shall make a total payment of \$45,000.00 ("Total
13 Settlement Amount") to ERC within 15 days of the Effective Date. Fit Foods shall make this
14 payment by wire transfer to ERC's escrow account, for which ERC will give Fit Foods the
15 necessary account information.

16 **4.2** As a portion of the Total Settlement Amount, \$10,000.00 shall be considered
17 a civil penalty pursuant to California Health and Safety Code §25249.7(b)(1). ERC shall remit
18 75% (\$7,500.00) of the civil penalty to the Office of Environmental Health Hazard Assessment
19 ("OEHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in
20 accordance with California Health and Safety Code §25249.12(c). ERC will retain the
21 remaining 25% (\$2,500.00) of the civil penalty.

22 **4.3** As a portion of the Total Settlement Amount, \$1,346.27 shall be distributed
23 to Environmental Research Center as reimbursement to ERC for reasonable costs associated
24 with the enforcement of Proposition 65 and \$5,455.26 shall be distributed to Environmental
25 Research Center in lieu of further civil penalties, for the day-to-day business activities such as
26 (1) continued enforcement of Proposition 65, which includes work, analyzing, researching and
27 testing consumer products that may contain Proposition 65 chemicals, focusing on the same or
28 similar type of ingestible products that are the subject matter of the current action; (2) the

1 continued monitoring of past consent judgments and settlements to ensure companies are in
2 compliance with Proposition 65; and (3) giving a donation of \$165.00 to the Environmental
3 Working Group to address reducing toxic chemical exposures in California.

4 **4.4** \$3,000.00 shall be distributed to Karen Evans as reimbursement of ERC's
5 attorney's fees, \$6,702.50 shall be distributed to Ryan Hoffman as reimbursement of ERC's
6 attorney's fees, \$1,665.00 shall be distributed to Michael Freund as reimbursement of ERC's
7 attorney's fees, and \$16,830.97 shall be distributed to ERC as reimbursement for its in-house
8 legal fees.

9 **5. MODIFICATION OF CONSENT JUDGMENT**

10 **5.1** This Consent Judgment may be modified only (i) by written stipulation of
11 the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent
12 judgment.

13 **5.2** If Fit Foods seeks to modify this Consent Judgment under Section 5.1, then
14 Fit Foods must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to
15 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must
16 provide written notice to Fit Foods within thirty days of receiving the Notice of Intent. If ERC
17 notifies Fit Foods in a timely manner of ERC's intent to meet and confer, then the Parties shall
18 meet and confer in good faith as required in this Section. The Parties shall meet in person or
19 via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.
20 Within thirty days of such meeting, if ERC disputes the proposed modification, ERC shall
21 provide to Fit Foods a written basis for its position. The Parties shall continue to meet and
22 confer for an additional thirty (30) days in an effort to resolve any remaining disputes. Should
23 it become necessary, the Parties may agree in writing to different deadlines for the meet-and-
24 confer period.

25 **5.3** In the event that Fit Foods initiates or otherwise requests a modification
26 under Section 5.1 for its primary benefit, and the meet and confer process leads to a joint
27 motion or application of the Consent Judgment, Fit Foods shall reimburse ERC its costs and
28

1 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and
2 arguing the motion or application, such costs and fees not to exceed \$10,000.

3 **5.4** Where the meet-and-confer process does not lead to a joint motion or
4 application in support of a modification of the Consent Judgment, then either Party may seek
5 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and
6 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"
7 means a party who is successful in obtaining relief more favorable to it than the relief that the
8 other party was amenable to providing during the Parties' good faith attempt to resolve the
9 dispute that is the subject of the modification.

10 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
11 **JUDGMENT**

12 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or
13 terminate this Consent Judgment.

14 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
15 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall
16 inform Fit Foods in a reasonably prompt manner of its test results, including information
17 sufficient to permit Fit Foods to identify the Covered Products at issue. Fit Foods shall, within
18 thirty days following such notice, provide ERC with testing information, from an independent
19 third-party laboratory meeting the requirements of Sections 3.4.1 and 3.4.2, demonstrating Fit
20 Foods' compliance with the Consent Judgment, if warranted. The Parties shall first attempt to
21 resolve the matter prior to ERC taking any further legal action.

22 **7. APPLICATION OF CONSENT JUDGMENT**

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

1 released in Sections 8.1 and 8.2 above may include unknown claims, and nevertheless waive
2 California Civil Code section 1542 as to any such unknown claims. California Civil Code
3 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 and Fit Foods acknowledge and understand the significance and consequences of this
10 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 as set forth in the Notice and Complaint.

14 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational
15 or environmental exposures arising under Proposition 65, nor shall it apply to any of Fit Foods'
16 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

1 San Diego, CA 92108
2 Tel: (619) 500-3090
3 Email: chris_erc501c3@yahoo.com

4 With a copy to:

5 Michael Freund

6 Ryan Hoffman

7 Michael Freund & Associates

8 1919 Addison Street, Suite 105

9 Berkeley, CA 94704

10 Telephone: (510) 540-1992

11 Facsimile: (510) 540-5543

12 **FOR FIT FOODS CORPORATION**

13 Greg Sperla

14 Anthony Cortez

15 Jim Mattesich

16 Greenberg Traurig, LLP

17 1201 K St. Suite 1100,

18 Sacramento, CA 95814

19 **12. COURT APPROVAL**

20 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
21 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
22 Consent Judgment.

23 **12.2** If the California Attorney General objects to any term in this Consent
24 Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and
25 if possible prior to the hearing on the motion.

26 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
27 void and have no force or effect.

28

1 **13. EXECUTION AND COUNTERPARTS**

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

5 **14. DRAFTING**

6 The terms of this Consent Judgment have been reviewed by the respective counsel for each
7 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms with
8 counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent
9 Judgment entered thereon, the terms and provisions shall not be construed against any Party.

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 Complaint, that the matter has
11 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:**

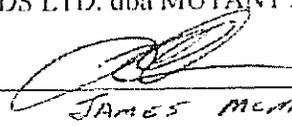
15 Dated: _____, 2015

ENVIRONMENTAL RESEARCH
CENTER

16 By: _____
17 Chris Heptinstall, Executive Director

18 Dated: 1.12.15, 2015

FIT FOODS LTD. dba MUTANT MASS

19 By: 
20 Its: JAMES MCMAHON
CEO

21 **APPROVED AS TO FORM:**

22 Dated: _____, 2015

MICHAEL FREUND & ASSOCIATES

23 By: _____
24 Michael Freund
25 Ryan Hoffman
26 Attorneys for Environmental Research
27 Center
28

1 Dated: 1.12.15, 2015

GREENBURG TRAURIG LLP

2 By: 

3 Greg Sperla
4 James Mattesich
5 Attorneys for Fit Foods Ltd. dba Mutant
6 Mass

7
8 **ORDER AND JUDGMENT**

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

11 IT IS SO ORDERED, ADJUDGED AND DECREED.

12
13 Dated: _____, 2015

14 Judge of the Superior Court

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.

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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 Complaint, that the matter has
11 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: 1/14/, 2015

ENVIRONMENTAL RESEARCH
CENTER

16 By: 
17 Chris Heffinstall, Executive Director

18 Dated: _____, 2015

FIT FOODS LTD. dba MUTANT MASS

19
20 By:
Its:

21 **APPROVED AS TO FORM:**

22 Dated: 1/14, 2015

MICHAEL FREUND & ASSOCIATES

23 By: 
24 Michael Freund
25 Ryan Hoffman
26 Attorneys for Environmental Research
27 Center
28

1 Dated: _____, 2015

GREENBURG TRAUIG, LLP

2 By: _____

3 Greg Sperla
4 James Mattesich
5 Attorneys for Fit Foods Ltd. dba Mutant
6 Mass

7
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10 approved and Judgment is hereby entered according to its terms.

11 IT IS SO ORDERED, ADJUDGED AND DECREED.

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13 Dated: _____, 2015

14 Judge of the Superior Court

Michael Freund & Associates

1919 Addison Street, Suite 105
Berkeley, CA 94704
Voice: 510.540.1992 • Fax: 510.540.5543

Michael Freund, Esq.
Ryan Hoffman, Esq.

OF COUNSEL:
Denise Ferkich Hoffman, Esq.

September 13, 2013

**NOTICE OF VIOLATION OF
CALIFORNIA HEALTH & SAFETY CODE SECTION 25249.5 ET SEQ.
(PROPOSITION 65)**

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I represent Environmental Research Center (“ERC”), 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108; Tel. (619) 500-3090. ERC’s Executive Director is Chris Heptinstall. ERC is a California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by bringing about a reduction in the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

ERC has identified violations of California’s Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), which is codified at California Health & Safety Code §25249.5 *et seq.*, with respect to the products identified below. These violations have occurred and continue to occur because the alleged Violator identified below failed to provide required clear and reasonable warnings with these products. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Health and Safety Code Section 25249.7(d), ERC intends to file a private enforcement action in the public interest 60 days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

General Information about Proposition 65. A copy of a summary of Proposition 65, prepared by the Office of Environmental Health Hazard Assessment, is enclosed with this letter served to the alleged Violator identified below.

Alleged Violator. The name of the company covered by this notice that violated Proposition 65 (hereinafter the “Violator”) is:

Fit Foods Ltd. dba Mutant Mass

Consumer Products and Listed Chemicals. The products that are the subject of this notice and the chemical in those products identified as exceeding allowable levels are:

Fit Foods Distribution Inc. Mutant Pump – Lead

Fit Foods Distribution Inc. Mutant Whey Vanilla Infusion Flavor – Lead

Fit Foods Distribution Inc. Mutant Whey Triple Chocolate Eruption Flavor – Lead

On February 27, 1987, the State of California officially listed lead as a chemical known to cause developmental toxicity, and male and female reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer.

It should be noted that ERC may continue to investigate other products that may reveal further violations and result in subsequent Notices of Violation.

Exhibit A

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of these products. Consequently, the primary route of exposure to these chemicals has been and continues to be through ingestion, but may have also occurred and may continue to occur through inhalation and/or dermal contact.

Approximate Time Period of Violation. Ongoing violations have occurred every day since at least September 13, 2010, as well as every day since the products were introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until these known toxic chemicals are either removed from or reduced to allowable levels in the products. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemicals. The method of warning should be a warning that appears on the product label. The Violator violated Proposition 65 because it failed to provide persons handling and/or using these products with appropriate warnings that they are being exposed to these chemicals.

Consistent with the public interest goals of Proposition 65 and a desire to have these ongoing violations of California law quickly rectified, ERC is interested in seeking a constructive resolution of this matter that includes an enforceable written agreement by the Violator to: (1) reformulate the identified products so as to eliminate further exposures to the identified chemicals, or provide appropriate warnings on the labels of these products; and (2) pay an appropriate civil penalty. Such a resolution will prevent further unwarned consumer exposures to the identified chemicals, as well as an expensive and time consuming litigation.

ERC has retained me as legal counsel in connection with this matter. **Please direct all communications regarding this Notice of Violation to my attention at the law office address and telephone number indicated on the letterhead or at rrhoffma@gmail.com.**

Sincerely,



Ryan Hoffman

Attachments

Certificate of Merit

Certificate of Service

OEHHA Summary (to Fit Foods Ltd. dba Mutant Mass and its Legal Correspondent 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 Violation by Fit Foods Ltd. dba Mutant Mass

I, Ryan Hoffman, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged that 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 chemicals that are 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: September 13, 2013



Ryan Hoffman

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. I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Fort Oglethorpe, Georgia.

On September 13, 2013, I served the following documents: **NOTICE OF VIOLATION 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Registered Mail:

Current President or CEO
Fit Foods Ltd. dba Mutant Mass
PO Box 43
Station Main
Port Coquitlam, BC V3C 3V5
Canada

Current President or CEO
Fit Foods Ltd. dba Mutant Mass
1551 Broadway Street
Unit 101
Port Coquitlam, BC V3C 6N9
Canada

Dean A. Palmer
Legal Correspondent for Fit Foods Ltd. dba Mutant Mass
Dean Palmer IP Law & IPR
Box 32, Suite 950-609 West Hastings Street
Vancouver, BC V6B 4W4
Canada

On September 13, 2013, I electronically 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 party by uploading a true and correct copy thereof on the California Attorney General's website, which can be accessed at <https://oag.ca.gov/prop65/add-60-day-notice> :

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

On September 13, 2013, 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 at a U.S. Postal Service Office with the postage fully prepaid for delivery by Priority Mail.

Executed on September 13, 2013, in Fort Oglethorpe, Georgia.



Tiffany Capehart

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

September 13 2013

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Service List

| | | | |
|--|--|---|---|
| District Attorney, Alameda County 1225 Fallon Street, Suite 900 Oakland, CA 94612 | District Attorney, Los Angeles County 210 West Temple Street, Suite 18000 Los Angeles, CA 90012 | District Attorney, San Diego County 330 West Broadway, Suite 1300 San Diego, CA 92101 | District Attorney, Tuolumne County 423 N. Washington Street Sonora, CA 95370 |
| District Attorney, Alpine County P.O. Box 248 Markleeville, CA 96120 | District Attorney, Madera County 209 West Yosemite Avenue Madera, CA 93637 | District Attorney, San Francisco County 850 Bryant Street, Suite 322 San Francisco, CA 94103 | District Attorney, Ventura County 800 South Victoria Ave, Suite 314 Ventura, CA 93009 |
| District Attorney, Amador County 708 Court Street Jackson, CA 95642 | District Attorney, Marin County 3501 Civic Center Drive, Room 130 San Rafael, CA 94903 | District Attorney, San Joaquin County 222 E. Weber Ave. Rm. 202 Stockton, CA 95202 | District Attorney, Yolo County 215 2 nd Street Woodland, CA 95695 |
| District Attorney, Butte County 25 County Center Drive, Suite 245 Oroville, CA 95965 | District Attorney, Mariposa County Post Office Box 730 Mariposa, CA 95338 | District Attorney, San Luis Obispo County 1035 Palm St, Room 450 San Luis Obispo, CA 93408 | District Attorney, Yuba County 215 Fifth Street, Suite 152 Marysville, CA 95901 |
| District Attorney, Calaveras County 891 Mountain Ranch Road San Andreas, CA 95249 | District Attorney, Mendocino County Post Office Box 1000 Ukiah, CA 95482 | District Attorney, San Mateo County 400 County Ctr., 3 rd Floor Redwood City, CA 94063 | Los Angeles City Attorney's Office City Hall East 200 N. Main Street, Suite 800 Los Angeles, CA 90012 |
| District Attorney, Colusa County 346 Fifth Street Suite 101 Colusa, CA 95932 | District Attorney, Merced County 550 W. Main Street Merced, CA 95340 | District Attorney, Santa Barbara County 1112 Santa Barbara Street Santa Barbara, CA 93101 | San Diego City Attorney's Office 1200 3 rd Avenue, Ste 1620 San Diego, CA 92101 |
| District Attorney, Contra Costa County 900 Ward Street Martinez, CA 94553 | District Attorney, Modoc County 204 S Court Street, Room 202 Alturas, CA 96101-4020 | District Attorney, Santa Clara County 70 West Hedding Street San Jose, CA 95110 | San Francisco, City Attorney City Hall, Room 234 1 Dr Carlton B Goodlett PL San Francisco, CA 94102 |
| District Attorney, Del Norte County 450 H Street, Room 171 Crescent City, CA 95531 | District Attorney, Mono County Post Office Box 617 Bridgeport, CA 93517 | District Attorney, Santa Cruz County 701 Ocean Street, Room 200 Santa Cruz, CA 95060 | San Jose City Attorney's Office 200 East Santa Clara Street, 16 th Floor San Jose, CA 95113 |
| District Attorney, El Dorado County 515 Main Street Placerville, CA 95667 | District Attorney, Monterey County Post Office Box 1131 Salinas, CA 93902 | District Attorney, Shasta County 1355 West Street Redding, CA 96001 | |
| District Attorney, Fresno County 2220 Tulare Street, Suite 1000 Fresno, CA 93721 | District Attorney, Napa County 931 Parkway Mall Napa, CA 94559 | District Attorney, Sierra County PO Box 457 Downieville, CA 95936 | |
| District Attorney, Glenn County Post Office Box 430 Willows, CA 95988 | District Attorney, Nevada County 110 Union Street Nevada City, CA 95959 | District Attorney, Siskiyou County Post Office Box 986 Yreka, CA 96097 | |
| District Attorney, Humboldt County 825 5th Street 4 th Floor Eureka, CA 95501 | District Attorney, Orange County 401 West Civic Center Drive Santa Ana, CA 92701 | District Attorney, Solano County 675 Texas Street, Ste 4500 Fairfield, CA 94533 | |
| District Attorney, Imperial County 940 West Main Street, Ste 102 El Centro, CA 92243 | District Attorney, Placer County 10810 Justice Center Drive, Ste 240 Roseville, CA 95678 | District Attorney, Sonoma County 600 Administration Drive, Room 212J Santa Rosa, CA 95403 | |
| District Attorney, Inyo County 230 W. Line Street Bishop, CA 93514 | District Attorney, Plumas County 520 Main Street, Room 404 Quincy, CA 95971 | District Attorney, Stanislaus County 832 12 th Street, Ste 300 Modesto, CA 95354 | |
| District Attorney, Kern County 1215 Truxtun Avenue Bakersfield, CA 93301 | District Attorney, Riverside County 3960 Orange Street Riverside, CA 92501 | District Attorney, Sutter County 446 Second Street Yuba City, CA 95991 | |
| District Attorney, Kings County 1400 West Lacey Boulevard Hanford, CA 93230 | District Attorney, Sacramento County 901 "G" Street Sacramento, CA 95814 | District Attorney, Tehama County Post Office Box 519 Red Bluff, CA 96080 | |
| District Attorney, Lake County 255 N. Forbes Street Lakeport, CA 95453 | District Attorney, San Benito County 419 Fourth Street, 2 nd Floor Hollister, CA 95023 | District Attorney, Trinity County Post Office Box 310 Weaverville, CA 96093 | |
| District Attorney, Lassen County 220 South Lassen Street, Ste. 8 Susanville, CA 96130 | District Attorney, San Bernardino County 316 N. Mountain View Avenue San Bernardino, CA 92415-0004 | District Attorney, Tulare County 221 S. Mooney Blvd., Room 224 Visalia, CA 93291 | |

APPENDIX A

OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

THE SAFE DRINKING WATER AND TOXIC ENFORCEMENT ACT OF 1986 (PROPOSITION 65): A SUMMARY

The following summary has been prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), the lead agency for the implementation of the Safe Drinking Water and Toxic Enforcement Act of 1986 (commonly known as "Proposition 65"). A copy of this summary must be included as an attachment to any notice of violation served upon an alleged violator of the Act. The summary provides basic information about the provisions of the law, and is intended to serve only as a convenient source of general information. It is not intended to provide authoritative guidance on the meaning or application of the law. The reader is directed to the statute and OEHHA's implementing regulations (see citations below) for further information.

FOR INFORMATION CONCERNING THE BASIS FOR THE ALLEGATIONS IN THE NOTICE RELATED TO YOUR BUSINESS, CONTACT THE PERSON IDENTIFIED ON THE NOTICE.

Proposition 65 appears in California law as Health and Safety Code Sections 25249.5 through 25249.13. The statute is available online at: <http://oehha.ca.gov/prop65/law/P65law72003.html>. Regulations that provide more specific guidance on compliance, and that specify procedures to be followed by the State in carrying out certain aspects of the law, are found in Title 27 of the California Code of Regulations, sections 25102 through 27001.¹ These implementing regulations are available online at: <http://oehha.ca.gov/prop65/law/P65Regs.html>.

WHAT DOES PROPOSITION 65 REQUIRE?

The "Governor's List." Proposition 65 requires the Governor to publish a list of chemicals that are known to the State of California to cause cancer and/or reproductive toxicity. This means that chemicals are placed on the Proposition 65 list if they are known to cause cancer and/or birth defects or other reproductive harm, such as

¹ All further regulatory references are to sections of Title 27 of the California Code of Regulations unless otherwise indicated. The statute, regulations and relevant case law are available on the OEHHA website at: <http://www.oehha.ca.gov/prop65/law/index.html>.

damage to female or male reproductive systems or to the developing fetus. This list must be updated at least once a year. The current Proposition 65 list of chemicals is available on the OEHHA website at:

http://www.oehha.ca.gov/prop65/prop65_list/Newlist.html.

Only those chemicals that are on the list are regulated under this law. Businesses that produce, use, release or otherwise engage in activities involving listed chemicals must comply with the following:

Clear and reasonable warnings. A business is required to warn a person before "knowingly and intentionally" exposing that person to a listed chemical unless an exemption applies; for example, when exposures are sufficiently low (see below). The warning given must be "clear and reasonable." This means that the warning must: (1) clearly make known that the chemical involved is known to cause cancer, or birth defects or other reproductive harm and (2) be given in such a way that it will effectively reach the person before he or she is exposed. Some exposures are exempt from the warning requirement under certain circumstances discussed below.

Prohibition from discharges into drinking water. A business must not knowingly discharge or release a listed chemical into water or onto land where it passes or probably will pass into a source of drinking water. Some discharges are exempt from this requirement under certain circumstances discussed below.

DOES PROPOSITION 65 PROVIDE ANY EXEMPTIONS?

Yes. You should consult the current version of the statute and regulations (<http://www.oehha.ca.gov/prop65/law/index.html>) to determine all applicable exemptions, the most common of which are the following:

Grace Period. Proposition 65 warning requirements do not apply until 12 months after the chemical has been listed. The Proposition 65 discharge prohibition does not apply to a discharge or release of a chemical that takes place less than 20 months after the listing of the chemical.

Governmental agencies and public water utilities. All agencies of the federal, state or local government, as well as entities operating public water systems, are exempt.

Businesses with nine or fewer employees. Neither the warning requirement nor the discharge prohibition applies to a business that employs a total of nine or fewer employees. This includes all employees, not just those present in California.

Exposures that pose no significant risk of cancer. For chemicals that are listed as known to the State to cause cancer ("carcinogens"), a warning is not required if the business can demonstrate that the exposure occurs at a level that poses "no significant risk." This means that the exposure is calculated to result in not more than one excess case of cancer in 100,000 individuals exposed over a 70-year lifetime. The Proposition 65 regulations identify specific "No Significant Risk Levels" (NSRLs) for many listed carcinogens. Exposures below these levels are exempt from the warning requirement. See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of NSRLs, and Section 25701 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures that will produce no observable reproductive effect at 1,000 times the level in question. For chemicals known to the State to cause reproductive toxicity, a warning is not required if the business can demonstrate that the exposure will produce no observable effect, even at 1,000 times the level in question. In other words, the level of exposure must be below the "no observable effect level" divided by a 1,000. This number is known as the Maximum Allowable Dose Level (MADL). See OEHHA's website at: <http://www.oehha.ca.gov/prop65/getNSRLs.html> for a list of MADLs, and Section 25801 *et seq.* of the regulations for information concerning how these levels are calculated.

Exposures to Naturally Occurring Chemicals in a Food. Certain exposures to chemicals that occur in foods naturally (i.e., that do not result from any known human activity, including activity by someone other than the person causing the exposure) are exempt from the warning requirements of the law. If the chemical is a contaminant² it must be reduced to the lowest level feasible. Regulations explaining this exemption can be found in Section 25501.

Discharges that do not result in a "significant amount" of the listed chemical entering into any source of drinking water. The prohibition from discharges into drinking water does not apply if the discharger is able to demonstrate that a "significant amount" of the listed chemical has not, does not, or will not pass into or probably pass into a source of drinking water, and that the discharge complies with all other applicable laws, regulations, permits, requirements, or orders. A "significant amount" means any detectable amount, except an amount that would meet the "no significant risk" level for chemicals that cause cancer or that is 1,000 times below the "no observable effect" level for chemicals that cause reproductive toxicity, if an individual were exposed to that amount in drinking water.

² See Section 25501(a)(4)

HOW IS PROPOSITION 65 ENFORCED?

Enforcement is carried out through civil lawsuits. These lawsuits may be brought by the Attorney General, any district attorney, or certain city attorneys. Lawsuits may also be brought by private parties acting in the public interest, but only after providing notice of the alleged violation to the Attorney General, the appropriate district attorney and city attorney, and the business accused of the violation. The notice must provide adequate information to allow the recipient to assess the nature of the alleged violation. The notice must comply with the information and procedural requirements specified in Section 25903 of the regulations and in Title 11, sections 3100-3103. A private party may not pursue an independent enforcement action under Proposition 65 if one of the governmental officials noted above initiates an action within sixty days of the notice.

A business found to be in violation of Proposition 65 is subject to civil penalties of up to \$2,500 per day for each violation. In addition, the business may be ordered by a court to stop committing the violation.

FOR FURTHER INFORMATION ABOUT THE LAW OR REGULATIONS...

Contact the Office of Environmental Health Hazard Assessment's Proposition 65 Implementation Office at (916) 445-6900 or via e-mail at P65Public.Comments@oehha.ca.gov.

Revised: July, 2012

NOTE: Authority cited: Section 25249.12, Health and Safety Code. Reference: Sections 25249.5, 25249.6, 25249.9, 25249.10 and 25249.11, Health and Safety Code.