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BPI SPORTS, LLC

11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF ALAMEDA

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

16 Plaintiff,

17 v.

18 BPI SPORTS, LLC and DOES 1-100

19  
20 Defendants.

CASE NO. RG14728381

[PROPOSED] STIPULATED  
CONSENT JUDGMENT; [PROPOSED]  
ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: June 9, 2014  
Trial Date: None set

21  
22 **1. INTRODUCTION**

23 **1.1** On June 9, 2014, Plaintiff Environmental Research Center (“ERC”), a non-profit  
24 corporation, as a private enforcer, and in the public interest, initiated this action by filing a  
25 Complaint for Injunctive and Declaratory relief and Civil Penalties (the “Complaint”) pursuant  
26 to the provisions of California Health and Safety Code section 25249.5 et seq. (“Proposition  
27 65”), against BPI Sports, LLC and DOES 1-100 (collectively “BPI”). In this action, ERC  
28 alleges that the products listed in ERC’s Proposition 65 60-Day Notice of Violation dated

1 January 31, 2014 (“Notice”) that are manufactured, distributed or sold by BPI, as more fully  
2 described below, contain lead, a chemical listed under Proposition 65 as a carcinogen and  
3 reproductive toxin, and that such products expose consumers at a level requiring a Proposition  
4 65 warning. The products currently named in ERC’s complaint are: (1) “Image Sports Vein  
5 Watermelon”; (2) “Image Sports Racing Fruit Punch”; (3) “BPI Sports A-HD Fruit Punch”; (4)  
6 “BPI Sports Stim-Elite Blue Raspberry”; (5) “BPI Sports 1.MR Lemon Lime”; (6) “Image  
7 Sports 4D Pump Red Lemonade”; (7) “Image Sports 4D Pump Arctic Ice”; (8) “BPI Sports  
8 1.M.R Orange”; (9) “Image Sports Racing Raspberry Lemonade”; (10) “BPI Sports A-HD  
9 Blue Raspberry”; (11) “BPI Sports A-HD Watermelon”; and (12) “BPI Sports Stim-Elite  
10 Watermelon.”

11 **1.2** The Complaint is based on allegations contained in ERC’s Notice that was  
12 served on the California Attorney General, other public enforcers, and BPI. A true and correct  
13 copy of the Notice is attached as Exhibit A and is hereby incorporated by reference. Prior to  
14 filing the Complaint, more than 60 days have passed since the Notice was mailed and uploaded  
15 onto the Attorney General’s website, and no designated governmental entity has filed a  
16 complaint against BPI with regard to the Covered Products or the alleged violations.

17 **1.3** On August 29, 2014 ERC issued an additional Proposition 65 60-Day Notice of  
18 Violation (“NOVII”) to BPI that was served on the California Attorney General, other public  
19 enforcers, and BPI regarding the following additional products: (13) Image Sports Pro Grade  
20 Weight Loss Whey Vanilla Graham Cracker (14) BPI Sports Pump-H Blue Ice Lemonade (15)  
21 BPI Sports Pump-HD Orange Twist (collectively “Additional Products”). A true and correct  
22 copy of the NOVII is attached as Exhibit B and is hereby incorporated by reference. The  
23 parties have stipulated to allow Plaintiff to amend the Complaint to add the Additional Products  
24 upon expiration of the 60 day notice period after service of NOVII. All fifteen (15) products  
25 listed in Section 1.1 and Section 1.3 shall be addressed by this Consent Judgment and shall  
26 hereinafter be referred to as “Covered Products”.

27 **1.4** ERC is a California non-profit corporation dedicated to, among other causes,  
28 helping safeguard the public from health hazards by reducing the use and misuse of hazardous

1 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
2 encouraging corporate responsibility.

3 **1.5** BPI is a business entity that employed ten or more persons. BPI arranges the  
4 manufacture, distribution and sale of the Covered Products.

5 **1.6** ERC and BPI are referred to individually as a “Party” or collectively as the  
6 “Parties.”

7 **1.7** ERC’s Notice and Complaint allege that use of the Covered Products exposes  
8 persons in California to lead without first providing clear and reasonable warnings in violation  
9 of California Health and Safety Code section 25249.6. BPI denies all material allegations  
10 contained in the Notice and Complaint.

11 **1.8** The Parties have entered into this Consent Judgment in order to settle,  
12 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
13 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
14 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
15 parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers,  
16 distributors, wholesalers, or retailers. Except for the representations made above, nothing in  
17 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of  
18 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
19 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any  
20 purpose.

21 **1.9** Except as expressly set forth herein, nothing in this Consent Judgment shall  
22 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
23 other or future legal proceeding unrelated to these proceedings.

24 **1.10** The Effective Date of this Consent Judgment is the date on which it is entered as  
25 a Judgment by this Court.

26 **1.11** BPI represents that as of June 2014 the company stopped manufacturing the  
27 Covered Products.

1       **2.        JURISDICTION AND VENUE**

2           For purposes of this Consent Judgment and for any further court action that may become  
3 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter  
4 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction  
5 over BPI as to the acts alleged in the Complaint, that venue is proper in Alameda County, and that  
6 this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims  
7 up through and including the Effective Date which were or could have been asserted in this action  
8 based on the facts alleged in the Notice and Complaint.

9       **3.        INJUNCTIVE RELIEF**

10          Except as expressly set forth herein, commencing on the Effective Date, BPI shall be  
11 permanently enjoined from manufacturing for sale in the State of California, marketing or  
12 “Distributing into the State of California”, and directly selling any of the Covered Products in the  
13 State of California. “Distributing into the State of California” shall mean to directly ship a  
14 Covered Product into California for sale in California or to sell a Covered Product to a distributor  
15 that BPI knows intends to or will sell the Covered Product in California. Covered  
16 Products manufactured before the Effective Date are not subject to the obligations imposed by  
17 section 3 irrespective of when they are sold. The final lot numbers of Covered Products  
18 manufactured before the Effective Date will be provided to ERC no more than (20) twenty days  
19 after the Effective Date and such Covered Products will not be covered by this permanent  
20 injunction.

21       **4.        SETTLEMENT PAYMENT**

22           **4.1**    In full satisfaction of all potential civil penalties, payment in lieu of civil  
23 penalties, attorney’s fees, and costs, BPI shall make a total payment of \$72,000.00 to ERC  
24 within 5 days of the Effective Date. BPI shall make this payment by wire transfer to ERC’s  
25 escrow account, for which ERC will give BPI the necessary account information. Said payment  
26 shall be for the following:

27           **4.2**    As a portion of the Total Settlement Amount, \$17,242.00 shall be considered a  
28 civil penalty pursuant to California Health and Safety Code §25249.7(b)(1). ERC shall remit

1 75% (\$12,931.50) of the civil penalty to the Office of Environmental Health Hazard  
2 Assessment (“OEHHA”) for deposit in the Safe Drinking Water and Toxic Enforcement Fund  
3 in accordance with California Health and Safety Code §25249.12(c). ERC will retain the  
4 remaining 25% (\$4,310.50) of the civil penalty.

5 **4.3** \$24,307.56 shall be distributed to Environmental Research Center as  
6 reimbursement to ERC for (A) reasonable costs associated with the enforcement of Proposition  
7 65 and other costs incurred as a result of work in bringing this action; and (B) \$16,792.94 shall  
8 be distributed to Environmental Research Center in lieu of further civil penalties, for the day-  
9 to-day business activities such as (1) continued enforcement of Proposition 65, which includes  
10 work, analyzing, researching and testing consumer products that may contain Proposition 65  
11 chemicals, focusing on the same or similar type of ingestible products that are the subject  
12 matter of the current action; (2) the continued monitoring of past consent judgments and  
13 settlements to ensure companies are in compliance with Proposition 65; and (3) giving a  
14 donation of \$862.00 to the As You Sow to address reducing toxic chemical exposures in  
15 California. Since 1992, As You Sow has been working to bring hundreds of manufacturers and  
16 whole industries into compliance with Proposition 65. As You Sow encourages innovative  
17 settlements that reduce hazardous emissions, eliminate consumer exposures to toxics, and  
18 provide funds for employee training to lower occupational exposure to toxic chemicals.

19 **4.4** \$9,405.00 shall be distributed to Michael Freund as reimbursement of ERC’s  
20 attorney’s fees and \$4,252.50 shall be distributed to Ryan Hoffman as reimbursement of ERC’s  
21 attorney’s fees.

## 22 **5. MODIFICATION OF CONSENT JUDGMENT**

23 **5.1** This Consent Judgment may be modified only (i) by written stipulation of the  
24 Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
25 judgment.

26 **5.2** If BPI seeks to modify this Consent Judgment under Section 5.1, then BPI must  
27 provide written notice to ERC of its intent (“Notice of Intent”). If ERC seeks to meet and  
28 confer regarding the proposed modification in the Notice of Intent, then ERC must provide



1 written notice to BPI within thirty days of receiving the Notice of Intent. If ERC notifies BPI in  
2 a timely manner of ERC's intent to meet and confer, then the Parties shall meet and confer in  
3 good faith as required in this Section. The Parties shall meet in person or via telephone within  
4 thirty (30) days of ERC's notification of its intent to meet and confer. Within thirty days of  
5 such meeting, if ERC disputes the proposed modification, ERC shall provide to BPI a written  
6 basis for its position. The Parties shall continue to meet and confer for an additional thirty (30)  
7 days in an effort to resolve any remaining disputes. Should it become necessary, the Parties  
8 may agree in writing to different deadlines for the meet-and-confer period.

9 **5.3** In the event that BPI initiates or otherwise requests a modification under Section  
10 5.1, and the meet and confer process leads to a joint motion or application of the Consent  
11 Judgment, BPI shall reimburse ERC its costs and reasonable attorney's fees for the time spent  
12 in the meet-and-confer process and filing and arguing the motion or application.

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

20 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
21 **JUDGMENT**

22 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate  
23 this Consent Judgment.

24 **6.2** Only after it complies with Section 15 below may any Party, by motion or  
25 application for an order to show cause filed with this Court, enforce the terms and conditions  
26 contained in this Consent Judgment.

27 **6.3** If ERC alleges that any Covered Product fails to qualify as a Reformulated  
28 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall

1 inform BPI in a reasonably prompt manner of its test results, including information sufficient to  
2 permit BPI to identify the Covered Products at issue. BPI shall, within thirty days following  
3 such notice, provide ERC with testing information, from an independent third-party laboratory  
4 meeting the requirements of Sections 3.4.2 and 3.4.3, demonstrating Defendant's compliance  
5 with the Consent Judgment, if warranted. The Parties shall first attempt to resolve the matter  
6 prior to ERC taking any further legal action.

7 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

15 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC, on  
16 behalf of itself and in the public interest, and BPI, of any alleged violation of Proposition 65 or  
17 its implementing regulations for failure to provide Proposition 65 warnings of exposure to lead  
18 from the handling, use, or consumption of the Covered Products and fully resolves all claims  
19 that have been or could have been asserted in this action up to and including the Effective Date  
20 for failure to provide Proposition 65 warnings for the Covered Products. ERC, on behalf of  
21 itself and in the public interest, hereby discharges BPI and its respective officers, directors,  
22 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,  
23 franchisees, licensees, customers (not including private label customers of BPI), distributors,  
24 wholesalers, retailers, and all other upstream and downstream entities in the distribution chain  
25 of any Covered Product, and the predecessors, successors and assigns of any of them  
26 (collectively, "Released Parties"), from any and all claims, actions, causes of action, suits,  
27 demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that could have  
28

1 been asserted, as to any alleged violation of Proposition 65 arising from the failure to provide  
2 Proposition 65 warnings on the Covered Products regarding lead.

3 **8.2** The Parties further waive and release any and all claims they may have against  
4 each other for all actions or statements made or undertaken in the course of seeking or opposing  
5 enforcement of Proposition 65 in connection with the Notice or Complaint up through  
6 and including the Effective Date, provided, however, that nothing in Section 8 shall affect or  
7 limit any Party's right to seek to enforce the terms of this Consent Judgment.

8 **8.3** It is possible that other claims not known to the Parties arising out of the facts  
9 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
10 discovered. The Parties acknowledge that this Consent Judgment is expressly intended to cover  
11 and include all such claims up through the Effective Date, including all rights of action  
12 therefore. The Parties acknowledge that the claims released in Sections 8.1 and 8.2 above may  
13 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any  
14 such unknown claims. California Civil Code section 1542 reads as follows:

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

18 The Parties acknowledge and understand the significance and consequences of this specific  
19 waiver of California Civil Code section 1542.

20 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to  
21 constitute compliance with Proposition 65 by any Released Party regarding alleged exposures  
22 to lead in the Covered Products as set forth in the Notice and the Complaint.

23 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or  
24 environmental exposures arising under Proposition 65, nor shall it apply to any of BPI's  
25 products other than the Covered Products.

26 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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



1     **10. GOVERNING LAW**

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

4     **11. PROVISION OF NOTICE**

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

8  
9     **FOR ENVIRONMENTAL RESEARCH CENTER:**

10 Chris Heptinstall, Executive Director, Environmental Research Center

11 3111 Camino Del Rio North, Suite 400

12 San Diego, CA 92108

13 Tel: (619) 500-3090

14 Email: chris\_erc501c3@yahoo.com

15  
16 With a copy to:

17 Michael Freund SBN 99687

18 Ryan Hoffman SBN 283297

19 Michael Freund & Associates

20 1919 Addison Street, Suite 105

21 Berkeley, CA 94704

22 Telephone: (510) 540-1992

23 Facsimile: (510) 540-5543

24  
25     **FOR BPI SPORTS, LLC**

26 Derek Ettinger, Chief Executive Officer, BPI Sports, LLC

27 3149 S.W. 42nd Street, Suite 200

28 Hollywood, FL 33312

1 Tel: (954) 926-0900  
2 Email: derek@bpisports.net  
3 With a copy to:  
4 Daniel S. Silverman  
5 Venable LLP  
6 2049 Century Park East, Suite 2100  
7 Los Angeles, CA 90067

8 Tel: (310) 229-0373  
9 Fax: (310) 229-9901

10

11

12 **12. COURT APPROVAL**

13 **12.1** If this Stipulated Consent Judgment is not approved by the Court, it shall be void  
14 and have no force or effect.

15 **12.2** Following Court Approval of the Consent Judgment, ERC shall comply with  
16 California Health and Safety Code section 25249.7(f) and with Title II of the California Code  
17 Regulations, Section 3003.

18 **13. EXECUTION AND COUNTERPARTS**

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

22 **14. DRAFTING**

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

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

28 If a dispute arises with respect to either Party's compliance with the terms of this Consent

1 Judgment entered by the Court, the Parties shall meet in person or by telephone and endeavor to  
2 resolve the dispute in an amicable manner. No action or motion may be filed in the absence of  
3 such a good faith attempt to resolve the dispute beforehand. In the event an action or motion is  
4 filed, however, the prevailing party may seek to recover costs and reasonable attorney's fees. As  
5 used in the preceding sentence, the term "prevailing party" means a party who is successful in  
6 obtaining relief more favorable to it than the relief that the other party was amenable to providing  
7 during the Parties' good faith attempt to resolve the dispute that is the subject of such enforcement  
8 action.

9 **16. ENTIRE AGREEMENT, AUTHORIZATION**

10 **16.1** This Consent Judgment contains the sole and entire agreement and understanding  
11 of the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
12 negotiations, commitments and understandings related hereto. No representations, oral or  
13 otherwise, express or implied, other than those contained herein have been made by any Party.  
14 No other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to  
15 exist or to bind any Party.

16 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully  
17 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
18 explicitly provided herein, each Party shall bear its own fees and costs.

19 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
20 **CONSENT JUDGMENT**

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

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

27 (2) Make the findings pursuant to California Health and Safety Code section  
28 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

1 **IT IS SO STIPULATED:**

2 Dated: Sept 23, 2014

ENVIRONMENTAL RESEARCH  
CENTER

3  
4 By: [Signature]  
Anne Barker, Environmental Compliance  
Coordinator

5  
6 Dated: Sept 23, 2014

7 BPI SPORTS, LLC  
By: [Signature]  
Derek Etfinger, Chief Executive Officer

8 **APPROVED AS TO FORM:**

9  
10 Dated: 9/23, 2014

11 ENVIRONMENTAL RESEARCH  
CENTER  
12 By: [Signature]  
13 Michael Freund SBN 99687  
14 Ryan Hoffman SBN 283297  
Michael Freund & Associates

15 Dated: 9/23, 2014

16 VENABLE LLP  
17 By: [Signature]  
18 Daniel S. Silverman SBN 137864  
19 Attorneys for BPI Sports, LLC

20  
21 **JUDGMENT**

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

24  
25 Dated: \_\_\_\_\_, 2014 \_\_\_\_\_

26 Judge of the Superior Court