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14

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
16 COUNTY OF ALAMEDA

17 ENVIRONMENTAL RESEARCH  
18 CENTER, a California non-profit  
corporation,

19 Plaintiff,

20 vs.

21 ATLANTIC PRO-NUTRIENTS, INC. dba  
XYMOGEN, a Florida Corporation,  
XYMOGEN, INC.

22 Defendant.  
23  
24  
25  
26  
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Case No. RG14722249

[PROPOSED] STIPULATED  
CONSENT JUDGMENT

ASSIGNED FOR ALL PURPOSES TO:  
JUDGE WYNNE CARVILL  
DEPARTMENT 21

Case Filed: April 27, 2014  
Trial Date: Aug. 31, 2015

1 I. INTRODUCTION

2 1.1 This Action arises out of the alleged violations of California's Safe Drinking Water  
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 *et seq.* (also  
4 known as and herein after referred to as "Proposition 65") regarding the following products  
5 (hereinafter collectively the "Covered Products" or "Covered Product" to refer to a single product):

- 6 1) XYMOGEN Exclusive Professional Formulas i5 Creamy Chocolate
- 7 2) XYMOGEN Exclusive Professional Formulas FitFood Vegan Creamy Chocolate
- 8 3) XYMOGEN Exclusive Professional Formulas FitFood Vegan Vanilla Delight
- 9 4) XYMOGEN Exclusive Professional Formulas TestoPlex
- 10 5) XYMOGEN Exclusive Professional Formulas Viragraphis
- 11 6) XYMOGEN Exclusive Professional Formulas SerenX
- 12 7) XYMOGEN Exclusive Professional Formulas LipotropiX
- 13 8) XYMOGEN Exclusive Professional Formulas MedCaps DPO
- 14 9) XYMOGEN Exclusive Professional Formulas OrganiX Greens
- 15 10) XYMOGEN Exclusive Professional Formulas XYMOGEN EP BrainSustain Creamy  
16 Chocolate
- 17 11) XYMOGEN Exclusive Professional Formulas XYMOGEN EP BrainSustain Vanilla  
18 Delight
- 19 12) XYMOGEN Exclusive Professional Formulas XYMOGEN EP i5 Chai
- 20 13) XYMOGEN Exclusive Professional Formulas OptiCleanse GHI Original
- 21 14) XYMOGEN Exclusive Professional Formulas XYMOGEN EP ImmunoBar Chocolate  
22 Fudge
- 23 15) XYMOGEN Exclusive Professional Formulas DJD Factors
- 24 16) XYMOGEN Exclusive Professional Formulas FitFood Lite Vegan Vanilla Delight
- 25 17) XYMOGEN Exclusive Professional Formulas i5 Energize Vanilla Latte
- 26 18) XYMOGEN Exclusive Professional Formulas i5 Chocolate Mint
- 27 19) XYMOGEN Exclusive Professional Formulas i5 Vanilla Delight
- 28 20) XYMOGEN Exclusive Professional Formulas OptiCleanse GHI Chocolate Mint

1 21) XYMOGEN Exclusive Professional Formulas OptiCleanse GHI Chai

2 1.2 Plaintiff Environmental Research Center, Inc. ("ERC") is a California non-profit  
3 corporation acting as a private enforcer of Proposition 65 that is dedicated to, among other causes,  
4 helping safeguard the public from health hazards by reducing the use and misuse of hazardous and  
5 toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging  
6 corporate responsibility. ERC brings this Action in the public interest pursuant to California Health  
7 and Safety Code Section 25249.7.

8 1.3 Defendants Xymogen, Inc and Atlantic Pro-Nutrients, Inc dba Xymogen are referred  
9 to herein as "XYMOGEN" or "Defendants". XYMOGEN is a California Corporation that is a person  
10 within the meaning of H&S Code §25249.11(a) and has, at all material times, employed ten or more  
11 persons. XYMOGEN designs, distributes and sells the Covered Products.

12 1.4 ERC and XYMOGEN are hereinafter referred to individually as a "Party" or  
13 collectively as the "Parties."

14 1.5 On January 14, 2014, pursuant to California Health and Safety Code  
15 Section 25249.7(d)(1), ERC served a Notice of Violation of Proposition 65 ("NOV I") on the  
16 California Attorney General, other public enforcers, and Atlantic Pro-Nutrients Inc. dba Xymogen. A  
17 true and correct copy of the Notice of Violation is attached hereto as Exhibit A.

18 1.6 On July 1, 2014, a second Notice of Violation of Proposition 65 ("NOV II") was  
19 served on the California Attorney General, other public enforcers, Atlantic Pro-Nutrients, Inc dba  
20 Xymogen and Xymogen, Inc. A true and correct copy of the Notice of Violation is attached hereto as  
21 Exhibit B. NOV I and NOV II shall hereinafter be referred to collectively as the "Notices of  
22 Violation".

23 1.7 After more than sixty (60) days passed since service of the Notices of Violation, and  
24 no designated governmental agency filed a complaint against XYMOGEN with regard to the Covered  
25 Products or the alleged violations, ERC filed its First Amended Complaint in this Action for  
26 injunctive relief and civil penalties. The Complaint is based on the allegations in NOV I and NOV II.

27 1.8 The Complaint and the Notices of Violation each allege that XYMOGEN  
28 manufactured, distributed, and/or sold in California the Covered Products, which contain lead, a

1 chemical listed under Proposition 65 as a carcinogen and reproductive toxin, and expose consumers  
2 at a level requiring a Proposition 65 warning. Further, the Complaint and Notices of Violation allege  
3 that use of the Covered Products exposes persons in California to lead without first providing clear  
4 and reasonable warnings, in violation of California Health and Safety Code Section 25249.6.  
5 XYMOGEN denies all material allegations of the Notices of Violation and the Complaint.

6 1.9 The Parties enter into this Consent Judgment in order to settle, compromise and  
7 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent Judgment,  
8 nor compliance with its terms, shall constitute or be construed as an admission by any of the Parties,  
9 or by any of their respective officers, directors, shareholders, employees, agents, parent companies,  
10 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or  
11 retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability,  
12 including without limitation, any admission concerning any alleged violation of Proposition 65.  
13 Except as expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive, or  
14 impair any right, remedy, argument, or defense the Parties may have in any other or future legal  
15 proceeding unrelated to these proceedings. However, nothing in this Section shall affect the  
16 enforceability of this Consent Judgment.

17 1.10 The "Effective Date" of this Consent Judgment shall be the date this Consent  
18 Judgment is entered as a judgment by the Court.

19 **2. JURISDICTION AND VENUE**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
21 jurisdiction over the subject matter of this Action and personal jurisdiction over the Parties, that  
22 venue is proper in this Court, and that this Court has jurisdiction to enter this Consent Judgment  
23 pursuant to the terms set forth herein.

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

25 **3.1 Clear and Reasonable Warnings**

26 On and after the Effective Date of this Consent Judgment, XYMOGEN shall be permanently  
27 enjoined from Distributing into California, manufacturing for sale in California, and/or directly  
28 selling to a consumer in the State of California any Covered Product for which the maximum dose

1 recommended on the label contains more than 0.5 micrograms (mcg) of lead, as calculated in  
2 accordance with the formula set forth in Section 3.7, unless Defendant complies with the required  
3 warning methods set forth in Section 3.1 through Section 3.6. The term "Distributing into  
4 California" means to ship any of the Covered Products into California for sale in California, or to sell  
5 or provide any of the Covered Products to any person or entity that Defendant knows will sell or  
6 intends to sell any of the Covered Products in California.

7 In all warning methods contained in Section 3.1 through Section 3.6 below, the Warning shall  
8 be provided with such conspicuousness, as compared with other words, statements, designs, or  
9 devices on the container, labeling, webpage, catalog page, invoice, insert, or in the store as to render  
10 it likely to be read and understood by an ordinary individual under customary conditions of purchase  
11 or use. In all warning methods, no other statements about Proposition 65 or lead may accompany the  
12 Warning, except that Defendant may refer consumers to a single website for further information. The  
13 Warning shall be at least the same size as the largest of any other health or safety warnings on the  
14 container, labeling, webpage, catalog page, invoice, or insert, as applicable, and the word  
15 "WARNING" shall be in all capital letters and in bold print. The Warning shall be contained in the  
16 same section of the container, labeling, webpage, catalog page, invoice, or insert, as applicable,  
17 which states other safety warnings concerning the use of the Covered Product.

18 No Warning will be required for Reformulated Covered Products.

19 **3.2 The Warning Language.**

20 The warning language shall be provided as follows:

21 [California Proposition 65] WARNING [(California Proposition 65)] These [This]  
22 product[s] contain[s] [lead,] [a] [and other] chemical[s] known to the State of California to  
23 cause [cancer and] birth defects or other reproductive harm.

24 The text in brackets in the warnings above is optional. The words "cancer and" shall be  
25 included in the warning only if the maximum recommended dose stated on the Covered Product's  
26 label contains more than 15 micrograms (mcg) of lead as calculated in accordance with the formula  
27 set forth in Section 3.6 below. The words "and other" shall be included only if Xymogen has  
28 knowledge that there is another Proposition 65 chemical present in the Covered Products.

1           3.3    Warning Method (Product Container)

2           In all cases, the Warning may be provided in the product label or by a sticker or label affixed  
3 to the cap, shoulder or side of the container of a Covered Product. The Warning shall appear in font  
4 at least as large as the font used to provide any other health or safety warning on the product label,  
5 and if no health or safety warning is provided on the product label, then at least as large as smallest  
6 font used elsewhere on the label.

7           3.4    Warning Method No. 2 (Website Warning)

8           If not provided as set forth in Section 3.3, the Warning stated in Section 3.2 shall be given in  
9 conjunction with all sales of the Covered Products by XYMOGEN via the Internet, and such  
10 Warning shall appear in one of the following ways: (a) on the same web page as the order form for  
11 the Covered Product or as a pop-up warning that appears prior to checkout which requires the  
12 consumer to click on a tab labeled "approved" before purchase; (b) an "Insert Warning" as defined  
13 below; or (c) an "Invoice Warning" as defined below. The Warning stated in Section 3.2 shall be  
14 used and shall appear in any of the above instances adjacent to or immediately following the display,  
15 description, or price of the Covered Product for which it is given, in the same type size or larger than  
16 the text of the Covered Product's description.

17           Insert Warning: Where the Covered Product is being shipped to a consumer in California and  
18 may be returned by the consumer for a full refund with no extra charge or shipping or handling fee,  
19 the warning stated in Section 3.2 may be displayed on the invoice or other package insert that  
20 accompanies each box of Covered Products going to a consumer in California. The insert warning  
21 shall be a minimum of 5 inches x 7 inches and shall be substantially identical to the insert warning  
22 attached as Exhibit C. The Insert Warning shall state the name(s) of the products subject to the  
23 Warning, or a list of all of the Covered Products, unless the shipment contains only products with a  
24 daily exposure level of more than 0.5 micrograms (mcg) of lead. No other statements about  
25 Proposition 65 or lead may accompany the Warning on the package insert, except that Defendant  
26 may refer consumers to a single website for further information.

27           Invoice Warning: Where the Covered Product may be returned by the consumer for a full  
28 refund with no extra charge or shipping or handling fee, the Warning may alternatively be displayed

1 on an invoice that accompanies the shipment of the Covered Product. The Warning shall be  
2 displayed on the front page of the invoice with such conspicuousness, as compared with other words,  
3 statements, designs, or devices on the invoice, as to render it likely to be read and understood by an  
4 ordinary individual prior to use. The word "WARNING" shall be in all capital letters and in bold  
5 print. No other statements about Proposition 65 or lead may accompany the warning. A Warning  
6 printed on an invoice must be in a type size that is 1) at least as tall as the largest letter or numeral in  
7 the name of the Covered Product printed on the invoice, or 2) at least as tall as the largest of any  
8 other health or safety warnings on the invoice, whichever is larger.

9 3.5 Warning Method No. 3 (Printed Catalog)

10 For Covered Products sold to California consumers through a printed catalog, and if the  
11 Warning is not being provided as set forth in Section 3.3, the Warning shall be prominently displayed  
12 on each catalog page that contains a description of the ingredients or attributes of the Covered  
13 Product. Where the Covered Product may be returned by the consumer for a full refund with no extra  
14 charge or shipping or handling fee, the Warning may alternatively be displayed on the invoice or  
15 other package insert as pursuant to Section 3.4 and as attached in Exhibit D. 

16 3.6 Calculation of Lead Levels

17 As used in this Consent Judgment, lead levels are calculated pursuant to the testing protocol  
18 described in Section 3.8. For purposes of measuring the lead, the highest lead detection result of the  
19 three (3) randomly selected samples of the Covered Products will be controlling. For purposes of this  
20 Consent Judgment, daily lead exposure levels shall be measured in micrograms, and shall be  
21 calculated using the following formula: Micrograms of lead per gram of product, multiplied by  
22 grams per serving of the product (using the largest serving size appearing on the Covered Product's  
23 label), multiplied by servings of the product per day (using the largest number of servings in the  
24 recommended dosage appearing on the Covered Product's label), which equals micrograms of lead  
25 exposure per day, excluding, for purposes of this consent judgment only, the amounts of "naturally  
26 occurring" lead in the ingredients listed in the table as well as the Cocoa powder allowance listed in  
27 the table below. If XYMOGEN wishes to exclude the naturally occurring lead set forth in this  
28 section, it must, prior to the Effective Date, provide ERC with a list of all ingredients including the

1 percentage and weight of each ingredient for all Covered Products for which it is requesting that the  
 2 exclusion be applied. In the event that a dispute arises with respect to compliance with the terms of  
 3 this Consent Judgment as to any contribution from naturally occurring lead levels under the Section,  
 4 the Parties shall employ good faith efforts to seek entry of a protective order that governs access to  
 5 and disclosure of the Confidential Information Provided. Should a dispute arise, this Section is  
 6 subject to the meet and confer requirements and attorney's fees provisions set forth in Section 6.2 and  
 7 6.3 below.

INGREDIENT	NATURALLY OCCURRING 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
Magnesium Carbonate	0.332 micrograms/gram
Magnesium Hydroxide	0.4 micrograms/gram
Zinc Gluconate	0.8 micrograms/gram
Potassium Chloride	1.1 micrograms/gram
Cocoa-powder	1.0 microgram/gram

19 **3.7 Reformulated Covered Products**

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

22 **3.8 Testing and Quality Control Methodology**

23 (a) Beginning within one year of the Effective Date, XYMOGEN shall test three (3)  
 24 randomly selected samples of each of the Covered Products (in the form intended for sale to the end-  
 25 user) for lead content. The testing requirement does not apply to any of the Covered Products for  
 26 which XYMOGEN has provided the warning specified in Section 3.2.

1 (b) Testing for lead shall be performed using Inductively Coupled Plasma-Mass  
2 Spectrometry ("ICP-MS") or any other testing method subsequently agreed to in writing by the  
3 Parties.

4 (c) All testing pursuant to this Consent Judgment shall be performed by an independent  
5 third-party laboratory certified by the California Environmental Laboratory Accreditation Program or  
6 a laboratory that is registered with the United States Food & Drug Administration.

7 (d) XYMOGEN shall retain all test results and documentation for a period of three (3)  
8 years from the date of each test. XYMOGEN shall arrange for the laboratory conducting these tests  
9 to send the test results to ERC within 10 days of conducting each test.

10 (e) XYMOGEN shall test each of the Covered Products at least once a year for a  
11 minimum of three (3) consecutive years by testing three (3) randomly selected samples of each  
12 Covered Product which XYMOGEN intends to sell or is manufacturing for sale in California, directly  
13 selling to a consumer in California, or Distributing into California.

14 **4. SETTLEMENT PAYMENT**

15 4.1 XYMOGEN shall remit a total payment of \$170,000.00 (one hundred and seventy  
16 thousand dollars) ("Payment"), which shall be in full and final satisfaction of all civil penalties,  
17 payment in lieu of civil penalties, and attorney's fees and costs. ERC shall allocate payment as  
18 follows:

19 4.2 \$58,100.00 as civil penalties pursuant to California Health and Safety Code  
20 Section 25249.7(b)(1). Of this amount, \$43,575.00 shall be payable to the Office of Environmental  
21 Health Hazard Assessment ("OEHHA"), and \$14,525.00 shall be payable to ERC. (Cal. Health &  
22 Safety Code § 25249.12(c)(1) & (d)). ERC will forward the civil penalty to OEHHA.

23 4.3 \$3,834.95 shall serve as reimbursement to ERC for its actual costs associated with the  
24 enforcement of this Proposition 65 action.

25 4.4 \$43,830.36 shall be payable to ERC in lieu of further civil penalties, for the day-to-  
26 day business activities such as (1) continued enforcement of Proposition 65, which includes work,  
27 analysis and testing of consumer products that may contain Proposition 65 chemicals, focusing on the  
28 same or 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 complying  
2 with Proposition 65; and (3) giving a donation of \$2,191.00 to Natural Resources Defense Council to  
3 address reducing toxic chemical exposures in California.

4 4.5 \$45,420.00 shall serve as reimbursement to Lozeau Drury LLP for ERC's attorney's  
5 fee and costs and \$18,814.69 shall serve as reimbursement to ERC for its in-house legal fees.

6 4.6. Providing that no opposition to a motion to approve this Consent Judgment has been  
7 filed, XYMOGEN shall make the required payments to ERC within ten (10) days of the Effective  
8 Date. In the event that opposition to the Consent Judgment has been filed, then XYMOGEN shall  
9 make the required payment to ERC within ten (10) following the earlier of (1) expiration of the time  
10 within which to appeal, if no appeal is filed, or (2) exhaustion of any appeals, if an appeal is filed.

11 XYMOGEN shall make this payment by wire transfer to ERC's escrow account, for which ERC will  
12 give XYMOGEN the necessary account information. If an appeal challenging approval of this  
13 Consent Judgment is filed, no payment will be owed unless the order approving the Consent  
14 Judgment is affirmed on appeal.

15 4.7. XYMOGEN's failure to remit payment before or on the due date shall be deemed a  
16 material breach of this Agreement.

#### 17 5. MODIFICATION OF CONSENT JUDGMENT

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

#### 20 6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT

21 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate this  
22 Consent Judgment.

23 6.2 Any Party may, by motion or application for an order to show cause filed with this  
24 Court, enforce the terms and conditions contained in this Consent Judgment. The prevailing party in  
25 any such motion or application may request that the Court award its reasonable attorneys' fees and  
26 costs associated with such motion or application.

27 6.3 Prior to filing any motion or application as described in paragraph 6.2, any Party who  
28 contends that any other Party is violating any term(s) or condition(s) of this Consent Judgment shall

1 meet and confer with the other Part(ies) to attempt to informally resolve any dispute. At least 30 days  
2 prior to filing any motion or application with the Court the Party alleging a violation shall provide  
3 written notice to the Party alleged to be in violation, providing a description of the nature of the  
4 alleged violation(s). After providing written notice, the Parties shall make a good faith effort to  
5 resolve any dispute(s). Any motion or application filed with the Court shall describe the good faith  
6 efforts made to resolve the dispute. If any Party fails to engage in the required informal resolution  
7 process described in this paragraph, then that Party shall not be entitled to recover attorneys' fees or  
8 costs, even if successful in any enforcement motion or application.

9 **7. APPLICATION OF CONSENT JUDGMENT**

10 This Consent Judgment shall apply to, be binding upon, and benefit the Parties, and their  
11 respective officers, employees, agents, wholly-owned subsidiaries and subdivisions, and the  
12 successors and assigns of any of them. This Consent Judgment shall have no application to Covered  
13 Products which are distributed or sold exclusively outside the State of California and which are not  
14 used by California consumers

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

16 8.1 ERC on behalf of itself, its agents, officers, representatives, successors, and assigns,  
17 and in the public interest releases (a) XYMOGEN and its past and present parent companies,  
18 subsidiaries, affiliates, and divisions; (b) each of their respective licensors, licensees, franchisors,  
19 franchisees, joint venturers, partners, vendors, manufacturers, packagers, contractors, and finished  
20 product and ingredient suppliers; (c) each of their respective distributors, wholesalers, retailers, users,  
21 packagers and all other entities in the distribution chain of the Covered Products; and (d) each of the  
22 respective officers, directors, shareholders, employees, and agents of the persons and entities  
23 described in (a) through (c) above (the persons and entities identified in (a), (b), (c), and (d), above,  
24 including the predecessors and assigns of any of them, are collectively referred to as "the Released  
25 Parties") from all claims for violations of Proposition 65 up through the Effective Date based on the  
26 Covered Products as set forth in the Notices of Violation and the Complaint. Released Parties do not  
27 include private label customers of XYMOGEN.

28

1           8.2   ERC, on behalf of itself only, and XYMOGEN on behalf of itself only, hereby release  
2 and discharge all known and unknown claims for alleged violations of Proposition 65 arising from or  
3 relating to the Covered Products as set forth in the Notices of Violation and the Complaint. It is  
4 possible that other claims not known to the Parties arising out of the facts alleged in the Notices of  
5 Violation or the Complaint and relating to lead in the Covered Products that were manufactured  
6 before the Effective Date will develop or be discovered. ERC, on behalf of itself only and  
7 XYMOGEN on behalf of itself only, waive California Civil Code Section 1542, which reads as  
8 follows:

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

14           ERC, on behalf of itself only, and XYMOGEN on behalf of itself only acknowledge and understand  
15 the significance and consequences of this specific waiver of California Civil Code section 1542.

16           8.3   Compliance with the terms of this Consent Judgment shall be deemed to constitute  
17 compliance by any releasee with Proposition 65 regarding the Covered Products as set forth in the  
18 Notices of Violation and the Complaint.

19           8.4   ERC, on one hand, and XYMOGEN, on the other hand, each release and waive all  
20 claims they may have against each other for any statements or actions made or undertaken by them in  
21 connection with the Notices of Violation or the Complaint. However, this shall not affect or limit any  
22 Party's right to seek to enforce the terms of this Consent Judgment.

## 23   9.   **CONSTRUCTION AND SEVERABILITY**

24           9.1   The terms and conditions of this Consent Judgment have been reviewed by the  
25 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully  
26 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction of  
27 this Consent Judgment, the terms and conditions shall not be construed against any Party

28           9.2   In the event that any of the provisions of this Consent Judgment is held by a court to  
be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

1           9.3    The terms and conditions of this Consent Judgment shall be governed by and  
2 construed in accordance with the laws of the State of California.

3 **10.   PROVISION OF NOTICE**

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

7 For Environmental Research Center

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

12          With a copy to:

13          Richard Drury  
14          Lozeau | Drury LLP  
15          410 12<sup>th</sup> Street, Suite 250  
16          Oakland, CA 94607

17 For XYMOGEN, Inc.

18          Brian Blackburn  
19          XYMOGEN, Inc.  
20          6900 Kingspointe Parkway  
21          Orlando, FL 32819

22          With a copy to:

23          Edward P. Sangster  
24          K&L Gates LLP  
25          Four Embarcadero Center  
26          Suite 1200  
27          San Francisco, CA 94111

28 **11.   COURT APPROVAL**

11.1    Upon execution of this Consent Judgment by the Parties, ERC shall file a Motion for  
Court Approval. The Parties shall use their best efforts to support entry of this Consent Judgment.

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

1           11.3 If the Court, despite the Parties' best efforts, does not approve this Stipulated Consent  
2 Judgment, it shall be null and void and have no force or effect.

3 **12. EXECUTION AND COUNTERPARTS**

4           This Stipulated Consent Judgment may be executed in counterparts, which taken together  
5 shall be deemed one document. A facsimile or pdf signature shall be construed as valid and as the  
6 original signature.

7 **13. ENTIRE AGREEMENT, AUTHORIZATION**

8           13.1 This Consent Judgment contains the sole and entire agreement and understanding of  
9 the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
10 negotiations, commitments and understandings related hereto. No representations, oral or otherwise,  
11 express or implied, other than those contained herein have been made by any Party. No other  
12 agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist or to  
13 bind any Party.

14           13.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by  
15 the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly provided  
16 herein, each Party shall bear its own fees and costs.

17 **14. REQUEST FOR FINDINGS AND FOR APPROVAL**

18           14.1 This Consent Judgment has come before the Court upon the request of the Parties.  
19 The Parties request the Court to fully review this Consent Judgment and, being fully informed  
20 regarding the matters which are the subject of this action, to:

21           (a) Find that the terms and provisions of this Consent Judgment represent a good faith  
22 settlement of all matters raised by the allegations of the Complaint, that the matter has been diligently  
23 prosecuted, and that the public interest is served by such settlement; and

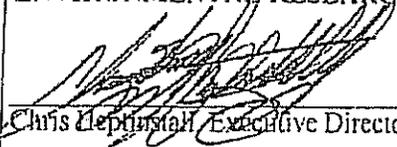
24           (b) Make the findings pursuant to California Health and Safety Code Section  
25 25249.7(f)(4) and approve the Settlement, and this Consent Judgment.

26 **IT IS SO STIPULATED:**

27

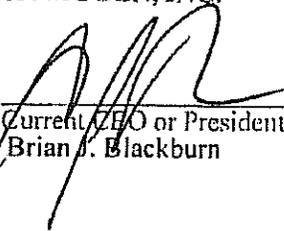
28

1 ENVIRONMENTAL RESEARCH CENTER

2   
3 \_\_\_\_\_  
4 Chris Elephinstah, Executive Director

Dated: 6/2/2015

5 XYMOGEN, INC.

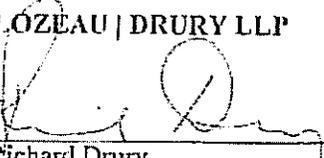
6   
7 \_\_\_\_\_  
8 Current CEO or President  
9 Brian J. Blackburn

Dated: 6/9/2015

10 APPROVED AS TO FORM

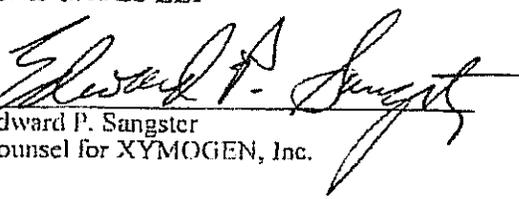
11

12 LOZEAU | DRURY LLP

13   
14 \_\_\_\_\_  
15 Richard Drury  
16 Counsel for Environmental Research Center

Dated: 6/2/2015

17 K&L GATES LLP

18   
19 \_\_\_\_\_  
20 Edward P. Sangster  
21 Counsel for XYMOGEN, Inc.

Dated: 6/4/2015

22 ORDER AND JUDGMENT

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

25 IT IS SO ORDERED, ADJUDGED, AND DECREED.

26 Dated: \_\_\_\_\_

27 \_\_\_\_\_  
28 Judge, Superior Court of the State of California