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ENVIRONMENTAL RESEARCH CENTER

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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN FRANCISCO

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

12 Plaintiff,

13 v.

14 SUNFOOD CORPORATION and DOES 1-  
15 100,

16 Defendants.

CASE NO. CGC-14-542110

STIPULATED CONSENT JUDGMENT;  
[PROPOSED] ORDER

Health & Safety Code § 25249.5 et seq.

Action Filed: October 8, 2014  
Trial Date: None set

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18  
19 **1. INTRODUCTION**

20 **1.1** On October 8, 2014, Plaintiff Environmental Research Center (“ERC”), a  
21 non-profit corporation, as a private enforcer, and in the public interest, initiated this action by  
22 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)  
23 pursuant to the provisions of California Health and Safety Code section 25249.5 et seq.  
24 (“Proposition 65”), against Sunfood Corporation and Does 1-100 (collectively “Sunfood”). In  
25 this action, ERC alleges that the products listed in ERC’s Proposition 65 60-Day Notice of  
26 Violation dated January 31, 2014 (“Notice”) that are manufactured, distributed or sold by  
27 Sunfood contain lead, a chemical listed under Proposition 65 as a carcinogen and reproductive  
28

1 toxin, and expose consumers at a level requiring a Proposition 65 warning. The products  
2 currently named in ERC's Complaint are:

- 3 1. Sunfood Super Foods Nutrient-Rich Chlorella Tablets
- 4 2. Sunfood Super Foods Green SuperFood Sun Is Shining
- 5 3. Sunfood Single Plantation Maca
- 6 4. Sunfood Super Foods Mangosteen Fruit Powder
- 7 5. Sunfood Super Foods Nutrient-Rich Red Maca Powder
- 8 6. Sunfood Super Foods Nutrient-Rich Maca Powder
- 9 7. Sunfood Super Foods Sacha Jergon
- 10 8. HealthForce Nutritionals HealthForce SuperFoods Spirulina Manna
- 11 9. HealthForce Nutritionals HealthForce SuperFoods Vitamineral Earth v3.2
- 12 10. HealthForce SuperFoods Greener Grasses Alkalizer Version 2.0
- 13 11. SunWarrior Activated Barley
- 14 12. SunWarrior Ormus SuperGreens
- 15 13. HealthForce Nutritionals Nopal Blood Sugar
- 16 14. HealthForce Detox Liver Rescue 4+
- 17 15. HealthForce Nutritionals Fruits Of The Earth Version 2.0
- 18 16. SunWarrior Classic Protein Raw Vegan Vanilla
- 19 17. SunWarrior Protein Raw Vegan Natural
- 20 18. SunWarrior Classic Protein Raw Vegan Chocolate

21 **1.2** The Complaint is based on allegations contained in ERC's Notice of Violation,  
22 dated January 31, 2014, that was served on the California Attorney General, other public  
23 enforcers, and Sunfood ("Notice"). A true and correct copy of the Notice is attached as Exhibit  
24 A and is hereby incorporated by reference. More than 60 days have passed since the Notice  
25 was mailed and uploaded onto the Attorney General's website, and no designated governmental  
26 entity has filed a complaint against Sunfood with regard to the Covered Products or the alleged  
27 violations.

1           **1.3**     On or around October 15, 2014, ERC will issue an additional Proposition 65 60  
2 Day Notice of Violations (“NOVII”) to Sunfood that will be served on the California Attorney  
3 General, other public enforcers, and Sunfood regarding the lead content in the following additional  
4 products: (19) Sunfood Super Foods Pure Spirulina Crunchies (20) Sunfood Super Foods Protein  
5 Rich Sacha Inchi Powder 2.5 lb 21) Sunfood Super Foods Pure Vanilla Powder 22) Sunfood  
6 Super Foods Sweet Mesquite Powder 23) Sunfood Super Foods Himalayan Shilajit Powder 24)  
7 Sunfood Super Foods Rice Bran Solubles Tocotrienols 25) and Sunfood Superfoods Chocolate  
8 Cacao Powder (collectively “Additional Products”). A true and correct copy of the NOV II is  
9 attached as Exhibit B and is hereby incorporated by reference. The parties have stipulated to allow  
10 Plaintiff to amend the Complaint to add the Additional Products upon expiration of the 60 day  
11 notice period after service of the NOVII. All twenty five (25) products listed in Section 1.1 and  
12 1.3 shall be addressed by this Consent Judgment and shall hereinafter be referred to individually as  
13 “Covered Product” or collectively as “Covered Products.”

14           **1.4**     ERC’s Notice and Complaint allege that use of the Covered Products exposes  
15 persons in California to lead without first providing clear and reasonable warnings in violation  
16 of California Health and Safety Code section 25249.6. Sunfood denies all material allegations  
17 contained in the Notice and Complaint.

18           **1.5**     ERC is a California non-profit corporation dedicated to, among other causes,  
19 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
20 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
21 encouraging corporate responsibility.

22           **1.6**     Sunfood is a business entity that, at all relevant times for the purpose of this  
23 Consent Judgment, employed ten or more persons and qualified as a “person in the course of  
24 business” within the meaning of Proposition 65. Sunfood manufactures, distributes and sells the  
25 Covered Products.

26           **1.7**     ERC and Sunfood are referred to individually as “Party” or collectively as the  
27 “Parties.”  
28



1 Level” of more than 0.5 micrograms per day when the maximum suggested dose is taken as  
2 directed on the Covered Product’s label, unless it meets the warning requirements under  
3 Section 3.2.

4           **3.1.1** As used in Consent Judgment, the term “Distributing into the State of  
5 California” shall mean to directly ship a Covered Product into California that Sunfood knows is  
6 for sale in California or to sell a Covered Product to a distributor that Sunfood knows will sell  
7 the Covered Product in California.

8           **3.1.2** For purposes of this Consent Judgment, “Daily Lead Exposure Level”  
9 shall be measured in micrograms, and shall be calculated using the following formula:  
10 micrograms of lead per gram of product, multiplied by grams of product per serving of the  
11 product (using the largest serving size appearing on the product label), multiplied by servings  
12 of the product per day (using the largest number of servings in a recommended dosage  
13 appearing on the product label), which equals micrograms of lead exposure per day.

### 14           **3.2 Clear and Reasonable Warnings**

15           If Sunfood is required to provide a warning pursuant to Section 3.1, the following warning  
16 must be utilized:

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

19 Sunfood shall use the phrase “cancer and” in the warning only if the maximum daily dose  
20 recommended on the label contains more than 15 micrograms of lead as determined pursuant to  
21 the quality control methodology set forth in Section 3.4.

22           Sunfood shall provide the warning on all of the following: 1) on Sunfood’s checkout page  
23 on its website for California consumers identifying each Covered Product. A second warning  
24 shall appear prior to completing checkout on the website when a California delivery address is  
25 indicated. The purchaser shall be required to accept the warning prior to completing checkout for  
26 any of the Covered Products being sold.; 2) on an insert warning contained in each individual box  
27 of product shipped to a California consumer that shall identify the Covered Products and be a  
28 minimum of 5 inches x 7 inches; 3) on Sunfood’s receipt/invoice in boxes of Covered Products

1 shipped to California consumers which shall identify each of the Covered Products and be present  
2 on the front of the receipt/invoice; and 4) on the label of Sunfood's products in retail stores in  
3 California.

4 The warning shall be at least the same size as the largest of any other health or safety  
5 warnings correspondingly appearing on the label, container, receipt, invoice, website, or insert,  
6 and the word "WARNING" shall be in all capital letters and in bold print. No other statements  
7 about Proposition 65 or lead may accompany the warning.

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

### 12 **3.3 Reformulated Covered Products**

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

### 17 **3.4 Testing and Quality Control Methodology**

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

24 **3.4.2** All testing pursuant to this Consent Judgment shall be performed by an  
25 independent third-party laboratory certified by the California Environmental Laboratory  
26 Accreditation Program or an independent third-party laboratory that is registered with the  
27 United States Food & Drug Administration. Nothing in this Consent Judgment shall limit  
28

1 Sunfood's ability to conduct, or require that others conduct, additional testing of the Covered  
2 Products, including the raw materials used in their manufacture.

3 **4. SETTLEMENT PAYMENT**

4 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil  
5 penalties, attorney's fees, and costs, Sunfood shall make a total payment of \$72,000.00  
6 ("Total Settlement Amount") to ERC payable in four (4) consecutive monthly installments with  
7 the first payment to be made within 5 days of the Effective Date. Sunfood shall make these  
8 payments by wire transfer to ERC's escrow account, for which ERC will give Sunfood the  
9 necessary account information.

10 **4.2** As a portion of the Total Settlement Amount, \$17,234.00 shall be considered  
11 a civil penalty pursuant to California Health and Safety Code §25249.7(b)(1). ERC shall remit  
12 75% (\$12,925.50) of the civil penalty to the Office of Environmental Health Hazard  
13 Assessment ("OEHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund  
14 in accordance with California Health and Safety Code §25249.12(c). ERC will retain the  
15 remaining 25% (\$4,308.50) of the civil penalty.

16 **4.3** (A) \$3,564.57 shall be distributed to Environmental Research Center as  
17 reimbursement to ERC for reasonable costs incurred as a result of work in bringing this action;  
18 and (B) \$13,000.68 shall be distributed to Environmental Research Center in lieu of further  
19 civil penalties, for the day-to-day business activities such as (1) continued enforcement of  
20 Proposition 65, which includes work, analyzing, researching and testing consumer products that  
21 may contain Proposition 65 chemicals, focusing on the same or similar type of ingestible  
22 products that are the subject matter of the current action; (2) the continued monitoring of past  
23 consent judgments and settlements to ensure companies are in compliance with Proposition 65;  
24 and (3) giving a donation of \$650.00 to the As You Sow to address reducing toxic chemical  
25 exposures in California.

26 **4.4** \$16,000.00 shall be distributed to Karen Evans as reimbursement of ERC's  
27 attorney's fees, \$540.00 shall be distributed to Michael Freund as reimbursement of ERC's  
28 attorney's fees, and \$4,365.00 shall be distributed to Ryan Hoffman as reimbursement of

1 ERC's attorney's fees, while \$17,295.75 shall be distributed to ERC as reimbursement of its in-  
2 house legal fees.

3 **5. MODIFICATION OF CONSENT JUDGMENT**

4 **5.1** This Consent Judgment may be modified only (i) by written stipulation of  
5 the Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
6 judgment.

7 **5.2** If Sunfood seeks to modify this Consent Judgment under Section 5.1, then  
8 Sunfood must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to  
9 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must  
10 provide written notice to Sunfood within thirty days of receiving the Notice of Intent. If ERC  
11 notifies Sunfood in a timely manner of ERC's intent to meet and confer, then the Parties shall  
12 meet and confer in good faith as required in this Section. The Parties shall meet in person or  
13 via telephone within thirty (30) days of ERC's notification of its intent to meet and confer.  
14 Within thirty days of such meeting, if ERC disputes the proposed modification, ERC shall  
15 provide to Sunfood a written basis for its position. The Parties shall continue to meet and  
16 confer for an additional thirty (30) days in an effort to resolve any remaining disputes. Should  
17 it become necessary, the Parties may agree in writing to different deadlines for the meet-and-  
18 confer period.

19 **5.3** In the event that Sunfood initiates or otherwise requests a modification under  
20 Section 5.1, and the meet and confer process leads to a joint motion or application of the  
21 Consent Judgment, Sunfood shall reimburse ERC its costs and reasonable attorney's fees for  
22 the time spent in the meet-and-confer process and filing and arguing the motion or application.

23 **5.4** Where the meet-and-confer process does not lead to a joint motion or  
24 application in support of a modification of the Consent Judgment, then either Party may seek  
25 judicial relief on its own. In such a situation, the prevailing party may seek to recover costs and  
26 reasonable attorney's fees. As used in the preceding sentence, the term "prevailing party"  
27 means a party who is successful in obtaining relief more favorable to it than the relief that the  
28

1 other party was amenable to providing during the Parties' good faith attempt to resolve the  
2 dispute that is the subject of the modification.

3 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**  
4 **JUDGMENT**

5 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or  
6 terminate this Consent Judgment.

7 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated  
8 Covered Product (for which ERC alleges that no warning has been provided), then ERC shall  
9 inform Sunfood in a reasonably prompt manner of its test results, including information  
10 sufficient to permit Sunfood to identify the Covered Products at issue. Sunfood shall, within  
11 thirty days following such notice, provide ERC with testing information, from an independent  
12 third-party laboratory meeting the requirements of Sections 3.4.1 and 3.4.2, demonstrating  
13 Defendant's compliance with the Consent Judgment, if warranted. The Parties shall first  
14 attempt to resolve the matter prior to ERC taking any further legal action.

15 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

23 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
24 on behalf of itself and in the public interest, and Sunfood, of any alleged violation of  
25 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of  
26 exposure to lead from the handling, use, or consumption of the Covered Products and fully  
27 resolves all claims that have been or could have been asserted in this action up to and including  
28 the Effective Date for failure to provide Proposition 65 warnings for the Covered Products.

1 ERC, on behalf of itself and in the public interest, hereby discharges Sunfood and its respective  
2 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
3 affiliates, suppliers, franchisees, licensees, customers (not including private label customers of  
4 Sunfood), distributors, wholesalers, retailers, and all other upstream and downstream entities in  
5 the distribution chain of any Covered Product, and the predecessors, successors and assigns of  
6 any of them (collectively, "Released Parties"), from any and all claims, actions, causes of  
7 action, suits, demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that  
8 could have been asserted, as to any alleged violation of Proposition 65 arising from the failure  
9 to provide Proposition 65 warnings on the Covered Products regarding lead.

10 **8.2** The Parties further waive and release any and all claims they may have  
11 against each other for all actions or statements made or undertaken in the course of seeking or  
12 opposing enforcement of Proposition 65 in connection with the Notice or Complaint up through  
13 and including the Effective Date, provided, however, that nothing in Section 8 shall affect or  
14 limit any Party's right to seek to enforce the terms of this Consent Judgment.

15 **8.3** It is possible that other claims not known to the Parties arising out of the  
16 facts alleged in the Notice or the Complaint and relating to the Covered Products will develop  
17 or be discovered. The Parties acknowledge that this Consent Judgment is expressly intended to  
18 cover and include all such claims up through the Effective Date, including all rights of action  
19 therefore. The Parties acknowledge that the claims released in Sections 8.1 and 8.2 above may  
20 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any  
21 such unknown claims. California Civil Code section 1542 reads as follows:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
23 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
24 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
25 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
26 OR HER SETTLEMENT WITH THE DEBTOR.

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

1           **8.4**           Compliance with the terms of this Consent Judgment shall be deemed to  
2 constitute compliance with Proposition 65 by any Released Party regarding alleged exposures  
3 to lead in the Covered Products as set forth in the Notice and the Complaint.

4           **8.5**           Nothing in this Consent Judgment is intended to apply to any occupational  
5 or environmental exposures arising under Proposition 65, nor shall it apply to any of Sunfood's  
6 products other than the Covered Products.

7           **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

10          **10. GOVERNING LAW**

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

13          **11. PROVISION OF NOTICE**

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

17  
18          **FOR ENVIRONMENTAL RESEARCH CENTER:**

19 Chris Heptinstall, Executive Director, Environmental Research Center

20 3111 Camino Del Rio North, Suite 400

21 San Diego, CA 92108

22 Tel: (619) 500-3090

23 Email: chris\_erc501c3@yahoo.com

24  
25 With a copy to:

26 Michael Freund

27 Ryan Hoffman

28 Michael Freund & Associates

1 1919 Addison Street, Suite 105  
2 Berkeley, CA 94704  
3 Telephone: (510) 540-1992  
4 Facsimile: (510) 540-5543  
5

6 **FOR SUNFOOD CORPORATION**

7 **Robert DeuPree, President/CEO**

8 **1830 Gillespie Way, Suite 101**

9 **El Cajon, CA 92020**

10 **(619) 596-7979 x 316**  
11

12 **12. COURT APPROVAL**

13 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
14 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
15 Consent Judgment.

16 **12.2** If the California Attorney General object to any term in this Cosnent  
17 Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and  
18 if possible prior to the hearing on the motion.

19 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
20 void and have no force or effect.

21 **13. EXECUTION AND COUNTERPARTS**

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

25 **14. DRAFTING**

26 The terms of this Consent Judgment have been reviewed by the respective counsel for each  
27 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms with  
28 counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent

1 Judgment entered thereon, the terms and provisions shall not be construed against any Party.

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

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

12 **16. ENTIRE AGREEMENT, AUTHORIZATION**

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

19 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully  
20 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
21 explicitly provided herein, each Party shall bear its own fees and costs.

22 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
23 **CONSENT JUDGMENT**

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

27 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
28 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has

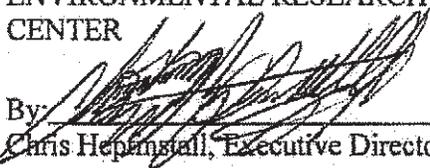
1 been diligently prosecuted, and that the public interest is served by such settlement; and

2 (2) Make the findings pursuant to California Health and Safety Code section  
3 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

4 **IT IS SO STIPULATED:**

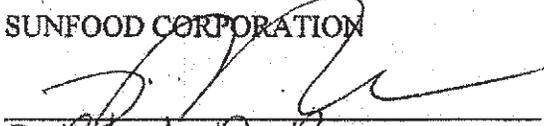
5 Dated: 10/15/, 2014

ENVIRONMENTAL RESEARCH  
CENTER

6 By:   
7 Chris Hepinstall, Executive Director

8 Dated: 10/20, 2014

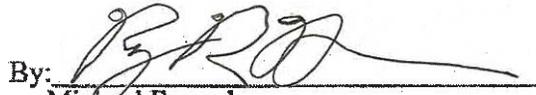
SUNFOOD CORPORATION

9  
10 By:   
Its: President

11 **APPROVED AS TO FORM:**

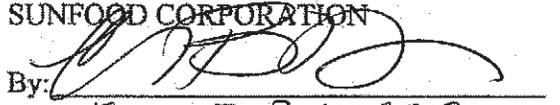
12 Dated: 11/4, 2014

MICHAEL FREUND & ASSOCIATES

13  
14 By:   
15 Michael Freund  
16 Ryan Hoffman  
Attorneys for Plaintiff Environmental  
Research Center

17 Dated: 11/3, 2014

SUNFOOD CORPORATION

18  
19 By:   
20 Erica B Peterson  
Corporate Counsel

21 **ORDER AND 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 **IT IS SO ORDERED, ADJUDGED AND DECREED.**

25  
26 Dated: \_\_\_\_\_, 2014

27 Judge of the Superior Court