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ENVIRONMENTAL RESEARCH CENTER, INC.

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16 Attorneys for Defendant
VITACOST.COM, INC.

17
18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

19 **COUNTY OF ALAMEDA**

20 **ENVIRONMENTAL RESEARCH**
21 **CENTER, INC., a California non-profit**
corporation

22 **Plaintiff,**

23 **vs.**

24 **VITACOST.COM, INC., LUCKY**
25 **VITAMIN CORPORATION, and DOES 1-**
100

26 **Defendants.**

CASE NO. RG15770506

[PROPOSED] STIPULATED
CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: May 15, 2015

Trial Date: None set

1
2 **1. INTRODUCTION**

3 **1.1** On May 15, 2015, Plaintiff Environmental Research Center, Inc. (“ERC”), a
4 non-profit corporation, as a private enforcer, and in the public interest, initiated this action by
5 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
6 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
7 (“Proposition 65”), against Vitacost.com, Inc. (“Vitacost”). In this action, ERC alleges that
8 certain products sold by Vitacost contain lead at a level requiring a Proposition 65 warning.
9 These products (referred to hereinafter individually as a “Covered Product” or collectively as
10 “Covered Products”) are: “The Ultimate Life The Ultimate DefenZyme” and “The Ultimate
11 Life The Ultimate Meal Vegan.”

12 **1.2** ERC and Vitacost are hereinafter referred to individually as a “Party” or
13 collectively as the “Parties.”

14 **1.3** ERC is a California non-profit corporation.

15 **1.4** For purposes of this Consent Judgment only, the Parties agree that Vitacost is a
16 business entity that has employed ten or more persons at all times relevant to this action; qualifies
17 as a “person in the course of business” within the meaning of Proposition 65; and that Vitacost
18 distributed and/or sold the Covered Products.

19 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
20 dated February 13, 2015, that was served on the California Attorney General, other public
21 enforcers, and Vitacost (“Notice”). A true and correct copy of the Notice is attached as **Exhibit**
22 **A** and is hereby incorporated by reference. More than 60 days have passed since the Notice
23 was mailed and uploaded to the Attorney General’s website, and no designated governmental
24 entity has filed a complaint against Vitacost with regard to the Covered Products or the alleged
25 violations.

26 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products
27 exposes persons in California to lead without first providing clear and reasonable warnings in
28 violation of California Health and Safety Code section 25249.6. Vitacost denies all material

1 allegations contained in the Notice and Complaint and specifically denies that it violated
2 Proposition 65 or that the Covered Products require or required a Proposition 65 warning or
3 otherwise caused harm to any person. Nothing in the Consent Judgment shall be construed as
4 an admission by Vitacost of any fact, issue of law or violation of law, nor shall compliance
5 with the Consent Judgment constitute or be construed as an admission by Vitacost of any fact,
6 issue of law or violation of law, at any time, for any purpose. Nothing in the Consent Judgment
7 shall prejudice, waive or impair any right, remedy, argument or defense that Vitacost may have
8 in other or further legal proceedings.

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

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

22 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as
23 a Judgment by this Court.

24 **2. JURISDICTION AND VENUE**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
27 over Vitacost as to the acts alleged in the Complaint, that venue is proper in Alameda, and that this
28 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims

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

3 **3. INJUNCTIVE RELIEF**

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

9 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State
10 of California” shall mean to directly ship a Covered Product into California for sale in
11 California or to sell a Covered Product to a distributor that Vitacost knows will sell the Covered
12 Product in California.

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

19 **3.2 Clear and Reasonable Warnings**

20 If Vitacost is required to provide a warning pursuant to Section 3.1, the following warning
21 (“Warning”) must be utilized:

22 **WARNING California Proposition 65:** This product contains lead, a chemical known to
23 the state of California to cause cancer and birth defects or other reproductive harm.

24 (a) For Covered Products sold by Vitacost to California consumers through the
25 Internet, the Warning shall be prominently displayed on each webpage describing the ingredients
26 or attributes of a Covered Product, or the Warning may be provided at the time the customer enters
27 a California address for the shipping address. In all circumstances, the Warning shall be displayed
28 with such conspicuousness, as compared with other words, statements, designs, or devices on the

1 webpages, product packaging, product container, or invoice, as to render it likely to be read and
2 understood by an ordinary individual prior to purchase. The Warning shall be at least the same
3 size as the largest of any other health or safety warnings on the webpage, invoice, or product
4 packaging, and the word “**WARNING**” shall be in all capital letters and in bold print. The
5 requirements of this paragraph may be modified by written agreement between Vitacost and ERC
6 and subsequent approval by the Court. Vitacost must fully comply with the terms of this section
7 3.2(b) within 90 of the Effective Date of this Consent Judgment.

8 (b) For sales and distribution of Covered Products not described in subsections (a),
9 above, the Warning shall be provided at the point of sale or distribution prior to purchase by the
10 consumer or directly on the product. For Warnings affixed directly on the product, the Warning
11 shall be permanently affixed to the outside packaging or container of each unit of the Covered
12 Products. In each case, the Warning shall be displayed with such conspicuousness, as compared
13 with other words, statements, designs, or devices, as to render it likely to be read and understood
14 by an ordinary individual prior to purchase. The Warning shall be at least the same size as the
15 largest of any other health or safety warnings presented, and the word “**WARNING**” shall be in
16 all capital letters and in bold print.

17 **3.3** No other statements about Proposition 65 may accompany the warnings set forth
18 in Section 3.2 unless required by Proposition 65 implementing regulations. If subsequently
19 enacted changes to Proposition 65 or its implementing regulations require the use of additional
20 information on any warning, the Parties agree to meet and confer in good faith pursuant to the
21 procedures set out in Section 5.2, below, to reach an agreement at to any revisions to the
22 warning provisions set out here. Any changes agreed to will be subject to the procedures set
23 out in Section 5.1 for revisions to this agreement. Each party to bear its own costs and
24 attorney’s fees.

25 **4. SETTLEMENT PAYMENT**

26 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil
27 penalties, attorney’s fees, and costs, Vitacost shall make a total payment of \$24,500.00 (“Total
28 Settlement Amount”) to ERC within 10 business days of receiving Notice of Entry of

1 Judgment. Vitacost shall make this payment by wire transfer to ERC's escrow account, for
2 which ERC will give Vitacost the necessary account information. The Total Settlement
3 Amount shall be apportioned as follows:

4 **4.2** \$4,368.00 shall be considered a civil penalty pursuant to California Health and
5 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$3,276.00) of the civil penalty to the
6 Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
7 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
8 Code §25249.12(c). ERC will retain the remaining 25% (\$1,092.00) of the civil penalty.

9 **4.3** \$1,353.82 shall be distributed to ERC as reimbursement to ERC for reasonable costs
10 incurred in bringing this action.

11 **4.4** \$ 3,297.39 shall be distributed to ERC in lieu of further civil penalties, for the day-
12 to-day business activities such as (1) continued enforcement of Proposition 65, which includes
13 work, analyzing, researching and testing consumer products that may contain Proposition 65
14 chemicals, focusing on the same or similar type of ingestible products that are the subject
15 matter of the current action; (2) the continued monitoring of past consent judgments and
16 settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
17 donation of \$165.00 to the Community Science Institute to address reducing toxic chemical
18 exposures in California.

19 **4.5** \$1,525.00 shall be distributed to Ryan Hoffman for reimbursement of ERC's
20 outside counsel's legal fees, \$450.00 shall be distributed to Michael Freund for reimbursement
21 of ERC's outside counsel's legal fees, while \$ 13,505.79 shall be distributed to ERC for its in-
22 house legal fees.

23 **5. MODIFICATION OF CONSENT JUDGMENT**

24 **5.1** This Consent Judgment may be modified only (i) by written stipulation of the
25 Parties or pursuant to Sections 5.4 and 5.5 and (ii) upon entry by the Court of a modified
26 Consent Judgment.

27 **5.2** If Vitacost seeks to modify this Consent Judgment under Section 5.1, then
28 Vitacost must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to

1 meet and confer regarding the proposed modification in the Notice of Intent, then ERC must
2 provide written notice to Vitacost within twenty (20) days of receiving the Notice of Intent. If
3 ERC notifies Vitacost in a timely manner of ERC's intent to meet and confer, then the Parties
4 shall meet and confer in good faith as required in this Section. The Parties shall meet in person
5 or via telephone within twenty(20) days of ERC's notification of its intent to meet and confer.
6 Within twenty (20) days of such meeting, if ERC disputes the proposed modification, ERC
7 shall provide to Vitacost a written basis for its position. The Parties shall continue to meet and
8 confer for an additional twenty (20) days in an effort to resolve any remaining disputes.
9 Should it become necessary, the Parties may agree in writing to different deadlines for the
10 meet-and-confer period.

11 **5.3** In the event that Vitacost initiates or otherwise requests a modification under
12 Section 5.1 for modification beyond bringing this Consent Judgment into compliance with any
13 revisions to Proposition 65 and its regulations, and the meet and confer process leads to a joint
14 motion or application of the Consent Judgment, Vitacost shall reimburse ERC its costs and
15 reasonable attorney's fees for the time spent in the meet-and-confer process and filing and
16 arguing the motion or application in support of a modification of the Consent Judgment;
17 provided, however, that these fees and costs shall not exceed \$5,000 total without the prior
18 written consent of Vitacost.

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

26 **5.5** In the event that Proposition 65 is repealed or preempted, then Vitacost shall
27 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
28 the Covered Products are so affected.

1 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
2 **JUDGMENT**

3 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
4 this Consent Judgment.

5 **7. APPLICATION OF CONSENT JUDGMENT**

6 This Consent Judgment shall have no application to Covered Products which are
7 distributed or sold exclusively outside the State of California and which are not used by California
8 consumers.

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

10 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
11 on behalf of itself and in the public interest, and Vitacost, of any alleged violation of
12 Proposition 65 or its implementing regulations for failure to provide Proposition 65 warnings of
13 exposure to lead from the handling, use, or consumption of the Covered Products and fully
14 resolves all claims that have been or could have been asserted in this Action, including all
15 claims from the handling, use, or consumption of the Covered Products, as to any alleged
16 violation of Proposition 65 or its implementing regulations , up to and including the Effective
17 Date. ERC, on behalf of itself and in the public interest, hereby discharges and releases
18 Vitacost, its parents, subsidiaries, affiliated entities under common (full or partial) ownership,
19 directors, officers, agents, employees, shareholders, attorneys, and each entity to or from whom
20 Vitacost directly or indirectly acquires, distributes or sells the Covered Products, including but
21 not limited to, distributors, wholesalers, customers, retailers, franchises, cooperative members
22 and licensees, (collectively, “Released Parties”) and the predecessors, successors and assigns of
23 each from any and all claims, actions, causes of action, suits, demands, liabilities, damages,
24 penalties, fees, costs and expenses asserted, or that could have been asserted, as to any alleged
25 violation of Proposition 65 arising from the failure to provide Proposition 65 warnings on the
26 Covered Products regarding lead as set forth in the Notice and the Complaint up to and
27 including the Effective Date.

28 **8.2** ERC on its own behalf only, on one hand, and Vitacost on its own behalf only,

1 on the other, further waive and release any and all claims they may have against each other and
2 their respective parents, subsidiaries, affiliated entities under common (full or partial)
3 ownership, directors, officers, agents, employees, shareholders, attorneys, for all actions or
4 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
5 65 in connection with the Notice or Complaint up through and including the Effective Date,
6 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
7 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. ERC on behalf of itself only, on one hand, and Vitacost, on the other hand,
11 acknowledge that this Consent Judgment is expressly intended to cover and include all such
12 claims up through the Effective Date, including all rights of action therefore. ERC and Vitacost
13 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
14 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
15 claims. California Civil Code section 1542 reads as follows:

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

21 ERC on behalf of itself only, on the one hand, and Vitacost, on the other hand, acknowledge
22 and understand the significance and consequences of this specific waiver of California Civil
23 Code section 1542.

24 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
25 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
26 in the Covered Products as set forth in the Notice and the Complaint.

27 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
28 environmental exposures arising under Proposition 65, nor shall it apply to any of Vitacost's
products other than the Covered Products.

1 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

4 **10. GOVERNING LAW**

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

7 **11. PROVISION OF NOTICE**

8 All notices required to be given to either Party to this Consent Judgment by the other shall
9 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via
10 email may also be sent.

11 **FOR ENVIRONMENTAL RESEARCH CENTER, INC.:**

12 Chris Heptinstall, Executive Director, Environmental Research Center
13 3111 Camino Del Rio North, Suite 400
14 San Diego, CA 92108
15 Tel: (619) 500-3090
16 Email: chris_erc501c3@yahoo.com
17 With a copy to:

18 Anne Barker
19 Environmental Research Center, Inc.
20 3111 Camino Del Rio North, Suite 400
21 San Diego, CA 92108
22 Telephone: (619) 500-3090
23 Facsimile: (706) 858-0326

24 Michael Freund
25 Ryan Hoffman
26 Michael Freund & Associates
27 1919 Addison Street, Suite 105
28 Berkeley, CA 94704
Telephone: (510) 540-1992
Facsimile: (510) 540-5543

Attorneys for Plaintiff Environmental Research Center, Inc.

FOR VITACOST.COM, INC.

Steven J. Prough
Vice President, Legal Services
The Kroger Co.
PO Box 54143
Los Angeles, CA 90054
310-884-6016

1 steve.prough@ralphs.com

2 With a copy to:

3 Gregory P. O'Hara
4 Lauren M. Michals
5 NIXON PEABODY, LLP
6 2 Palo Alto Square
7 3000 El Camino Real, Suite 500
8 Palo Alto, CA 94306-2106
9 Ph: 650-320-7700
10 Fax: 650-320-7701

11 Attorneys for Defendant Vitacost.com, Inc.

12 **12. COURT APPROVAL**

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

16 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
17 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
18 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 and
28 conditions with counsel. The Parties agree that, in any subsequent interpretation and construction
of this Consent Judgment, no inference, assumption, or presumption shall be drawn, and no
provision of this Consent Judgment shall be construed against any Party, based on the fact that one
of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of

1 the Consent Judgment. It is conclusively presumed that all of the Parties participated equally in
2 the preparation and drafting of this Consent Judgment.

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

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

13 **16. ENTIRE AGREEMENT, AUTHORIZATION**

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

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

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

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

28 (1) Find that the terms and provisions of this Consent Judgment represent a fair and

1 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has
2 been diligently prosecuted, and that the public interest is served by such settlement; and

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

5 **IT IS SO STIPULATED:**

6 Dated: 6/9/, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

7
8 By: 
Chris Heppe, Executive Director

9 Dated: _____, 2016


VITACOST.COM, INC.

10 By: _____
11 Its: _____

12 **APPROVED AS TO FORM:**

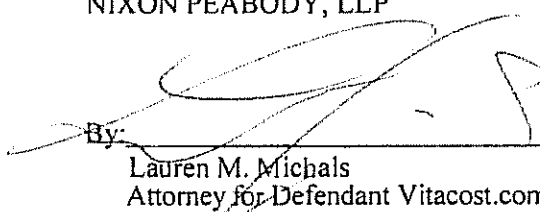
13 Dated: June 9, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

14
15
16 By: 
Anne Barker
17 Attorney for Plaintiff Environmental
Research Center, Inc.

18 Dated: June 9, 2016

NIXON PEABODY, LLP

19
20
21 By: 
Lauren M. Michals
22 Attorney for Defendant Vitacost.com, Inc.

23 **ORDER AND JUDGMENT**

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

26 IT IS SO ORDERED, ADJUDGED AND DECREED.

27 Dated: _____, 2016

28 _____
Judge of the Superior Court

1 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has
2 been diligently prosecuted, and that the public interest is served by such settlement; and

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

5 **IT IS SO STIPULATED:**

6 Dated: _____, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

7 By: _____
8 Chris Heptinstall, Executive Director

9 Dated: June 7, 2016

VITACOST.COM, INC.

10 By: Steve J. Prough
11 Its: Steve Prough
Assistant Secretary

12 **APPROVED AS TO FORM:**

13 Dated: _____, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

14 By: _____
15 Anne Barker
16 Attorney for Plaintiff Environmental
17 Research Center, Inc.

18 Dated: _____, 2016

NIXON PEABODY, LLP

19 By: _____
20 Lauren M. Michals
21 Attorney for Defendant Vitacost.com, Inc.

22 **ORDER AND JUDGMENT**

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

25 IT IS SO ORDERED, ADJUDGED AND DECREED.

26 Dated: _____, 2016

27 _____
28 Judge of the Superior Court

1 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has
2 been diligently prosecuted, and that the public interest is served by such settlement; and

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

5 **IT IS SO STIPULATED:**

6 Dated: _____, 2016 ENVIRONMENTAL RESEARCH
7 CENTER, INC.

8 By: _____
9 Chris Heptinstall, Executive Director

10 Dated: _____, 2016 VITACOST.COM, INC.

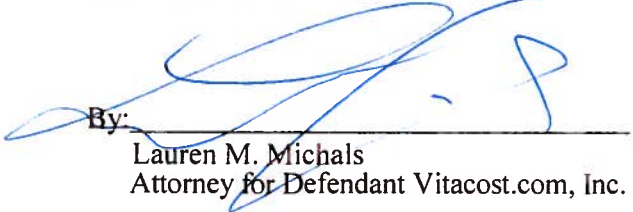
11 By: _____
12 Its:

13 **APPROVED AS TO FORM:**

14 Dated: _____, 2016 ENVIRONMENTAL RESEARCH
15 CENTER, INC.

16 By: _____
17 Anne Barker
18 Attorney for Plaintiff Environmental
19 Research Center, Inc.

20 Dated: June 7, 2016 NIXON PEABODY, LLP

21 By: 
22 Lauren M. Michals
23 Attorney for Defendant Vitacost.com, Inc.

24 **ORDER AND JUDGMENT**

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

27 IT IS SO ORDERED, ADJUDGED AND DECREED.

28 Dated: _____, 2016 _____
Judge of the Superior Court

EXHIBIT A



Environmental Research Center

3111 Camino Del Rio North, Suite 400
San Diego, CA 92108
619-500-3090

February 13, 2015

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

Dear Alleged Violator and the Appropriate Public Enforcement Agencies:

I am the Executive Director of Environmental Research Center, Inc. (“ERC”). 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 product 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 this product. This letter serves as a notice of these violations to the alleged Violator and the appropriate public enforcement agencies. Pursuant to Section 25249.7(d) of the statute, 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 attached with the copy of 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:

Vitacost.com, Inc.

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

**The Ultimate Life The Ultimate DefenZyme - Lead
The Ultimate Life The Ultimate Meal Vegan – 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 violations.

Route of Exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and recommended use of this product. Consequently, the primary route of exposure to this chemical 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 Violations. Ongoing violations have occurred every day since at least February 13, 2012, as well as every day since the product was introduced into the California marketplace, and will continue every day until clear and reasonable warnings are provided to product purchasers and users or until this known toxic chemical is either removed from or reduced to allowable levels in the product. Proposition 65 requires that a clear and reasonable warning be provided prior to exposure to the identified chemical. 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 this product with appropriate warnings that they are being exposed to this chemical.

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 product so as to eliminate further exposures to the identified chemical, or provide appropriate warnings on the labels of this product; (2) pay an appropriate civil penalty; and (3) provide clear and reasonable warnings compliant with Proposition 65 to all persons located in California who purchased the above product in the last three years. Such a resolution will prevent further unwarned consumer exposures to the identified chemical, as well as an expensive and time consuming litigation.

Please direct all questions concerning this notice to ERC at the above listed address and telephone number.

Sincerely,



Chris Heptinstall
Executive Director
Environmental Research Center

Attachments

- Certificate of Merit
- Certificate of Service
- OEHHA Summary (to Vitacost.com, Inc. and its Registered Agent for Service of Process only)
- Additional Supporting Information for Certificate of Merit (to AG only)

CERTIFICATE OF MERIT

Re: Environmental Research Center, Inc.'s Notice of Proposition 65 Violations by Vitacost.com, Inc.

I, Chris Heptinstall, declare:

1. This Certificate of Merit accompanies the attached 60-day notice in which it is alleged 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 the Executive Director 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: February 13, 2015

Chris Heptinstall

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 February 13, 2015, I served the following documents: **NOTICE OF VIOLATIONS 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 in a U.S. Postal Service Office with the postage fully prepaid for delivery by Certified Mail:

Current CEO or President
Vitacost.com, Inc.
5400 Broken Sound Parkway NW,
Suite 500
Boca Raton, FL 33487

Corporation Service Company
(Vitacost.com, Inc.’s Registered
Agent for Service of Process)
1201 Hays Street
Tallahassee, FL 32301

Corporation Service Company
(Vitacost.com, Inc.’s Registered
Agent for Service of Process)
2711 Centerville Road, Suite 400
Wilmington, DE 19808

On February 13, 2015, I electronically served the following documents: **NOTICE OF VIOLATIONS, 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
Post Office Box 70550
Oakland, CA 94612-0550

On February 13, 2015, I served the following documents: **NOTICE OF VIOLATIONS, 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 with the U.S. Postal Service with the postage fully prepaid for delivery by Priority Mail.

Executed on February 13, 2015, in Fort Oglethorpe, Georgia.



Tiffany Capehart

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

February 13, 2015

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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 301 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 3rd 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 Post Office Box 720 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 201 Commercial 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.