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14 LUCKYVITAMIN CORPORATION

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

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

21 **Plaintiff,**

22 **vs.**

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

26 **Defendants.**

CASE NO. RG15770506

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: May 15, 2015

Trial Date: None set

27 **1. INTRODUCTION**

28 **1.1** On May 15, 2015, Plaintiff Environmental Research Center, Inc. ("ERC"), a non-profit corporation, as a private enforcer, and in the public interest, initiated this action by

1 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
2 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
3 (“Proposition 65”), against LuckyVitamin Corporation erroneously sued as Lucky Vitamin
4 Corporation (“LuckyVitamin”) and Does 1-100. In this action, ERC alleges that certain
5 products sold by LuckyVitamin contain lead at a level requiring a Proposition 65 warning.
6 These products (referred to hereinafter individually as a “Covered Product” or collectively as
7 “Covered Products”) are: “The Ultimate Life The Ultimate DefenZyme” and “The Ultimate
8 Life The Ultimate Meal Vegan.”

9 1.2 ERC and LuckyVitamin are hereinafter referred to individually as a “Party” or
10 collectively as the “Parties.”

11 1.3 ERC is a California non-profit corporation.

12 1.4 For purposes of this Consent Judgment, the Parties agree that LuckyVitamin is a
13 business entity that has employed ten or more persons at all times relevant to this action, and
14 qualifies as a “person in the course of business” within the meaning of Proposition 65.
15 LuckyVitamin distributes and sells the Covered Products.

16 1.5 The Complaint is based on allegations contained in ERC’s Notice of Violation
17 dated February 13, 2015, that was served on the California Attorney General, other public
18 enforcers, and LuckyVitamin (“Notice”). A true and correct copy of the Notice is attached as
19 **Exhibit A** and is hereby incorporated by reference. More than 60 days have passed since the
20 Notice was mailed and uploaded to the Attorney General’s website, and no designated
21 governmental entity has filed a complaint against LuckyVitamin with regard to the Covered
22 Products or the alleged violations.

23 1.6 ERC’s Notice and Complaint allege that use of the Covered Products
24 exposes persons in California to lead without first providing clear and reasonable warnings in
25 violation of California Health and Safety Code section 25249.6. LuckyVitamin denies all
26 material allegations contained in the Notice and Complaint and specifically denies that it
27 violated Proposition 65 or that the Covered Products require or required a Proposition 65
28 warning or otherwise caused harm to any person. Nothing in the Consent Judgment shall be

1 construed as an admission by LuckyVitamin of any fact, issue of law or violation of law, nor
2 shall compliance with the Consent Judgment constitute or be construed as an admission by
3 LuckyVitamin of any fact, issue of law or violation of law, at any time, for any purpose.
4 Nothing in the Consent Judgment shall prejudice, waive or impair any right, remedy, argument
5 or defense that LuckyVitamin may have in other or further legal proceedings.

6 1.7 The Parties have entered into this Consent Judgment in order to settle,
7 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.
8 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of
9 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,
10 parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers,
11 distributors, wholesalers, or retailers. Except for the representations made above, nothing in
12 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of
13 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
14 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any
15 purpose.

16 1.8 Except as expressly set forth herein, nothing in this Consent Judgment shall
17 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
18 other or future legal proceeding unrelated to these proceedings.

19 1.9 The Effective Date of this Consent Judgment is the date on which it is entered as
20 a Judgment by this Court.

21 2. **JURISDICTION AND VENUE**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
24 over LuckyVitamin as to the acts alleged in the Complaint, that venue is proper in Alameda, and
25 that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
26 claims which were or could have been asserted in his action based on the facts alleged in the
27 Notices and the Complaint.

1 **3. INJUNCTIVE RELIEF**

2 **3.1** Beginning on the Effective Date, LuckyVitamin shall be permanently enjoined
3 from “Distributing into the State of California”, or directly selling in the State of California,
4 any Covered Product which exposes a person to a “Daily Lead Exposure Level” of more than
5 0.5 micrograms per day of lead when the maximum suggested dose is taken as directed on the
6 Covered Product’s label, unless it meets the warning requirements under Section 3.2.

7 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State
8 of California” shall mean to directly ship a Covered Product into California for sale in
9 California or to sell a Covered Product to a distributor that LuckyVitamin knows will sell the
10 Covered Product in California.

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

17 **3.2 Clear and Reasonable Warnings**

18 If LuckyVitamin is required to provide a warning pursuant to Section 3.1, the following
19 warning (“Warning”) must be utilized:

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

22 (a) For sales in retail stores, the Warning may be provided by either of the following
23 methods, (1) Identifying Signs and Designated Symbol in Retail Stores, or (2) Other Clear and
24 Reasonable Warnings in Retail Stores, below:

25 (1) *Identifying Signs and Designated Symbol in Retail Stores.* In retail stores,
26 the Warning may be provided through the use of a system that combines both a designated symbol
27 and an identifying sign that explains the meaning of the designated symbol. The designated
28 symbol (“Symbol”) shall be either:

1 Symbol #1: The Symbol shown on Exhibit B, which shall appear as shown on
2 Exhibit B, with black "Prop 65" and "!" text, black border, and yellow background,
3 whenever it is displayed;

4 -or-

5 Symbol #2: The Symbol shown on Exhibit C, which shall appear as shown on
6 Exhibit C, with the words "Prop 65" placed above the word "Warning!", whenever
7 it is displayed.

8 (A) *Covered Products Displayed in Retail Stores: Signs.*

9 (i) *Form of Sign.* A Sign shall be rectangular and at least 36 square
10 inches in size, with the word "WARNING" centered one-half of an inch from the top of the sign in
11 one-half inch capital letters. For the body of the warning message, left and right margins of at least
12 one-half of an inch, and a bottom margin of at least one-half inch shall be observed. The Symbol
13 must be at least one inch high. Larger signs shall bear substantially the same proportions of type
14 size and spacing to sign dimension as a sign that is 36 square inches in size. Unless modified by
15 agreement of the parties, the sign shall contain the following text (text in brackets is optional,
16 except as described above):

17 WARNING:
18 CALIFORNIA PROPOSITION 65
19 Products with the symbol
 [Shown on Exhibit B or C]
20 Contain lead, a chemical known to the State of California to cause cancer and birth defects or
 other reproductive harm

21 (ii) *Placement of Sign.* Signs shall be placed by the Effective Date
22 in each California establishment of LuckyVitamin in which any of the Covered Products are
23 available for sale to the public. Signs shall not be covered or obscured, and shall be placed and
24 displayed in a manner rendering them likely to be read and understood by an ordinary individual
25 prior to purchase. At least one Sign shall be posted in each aisle or on each shelf or display where
26 the Covered Products for which the warning is being provided are offered or displayed for sale,
27 unless the retail establishment has less than 7,500 square feet of retail space and no more than two
28 chase registers, in which case the Sign may be posted at each cash register. Additional signs shall

1 be posted as are necessary to assure that any potential purchaser of Covered Products would be
2 likely to see a Sign prior to purchase.

3 (B) *Covered Products Sold in Retail Stores: Symbol.* The Symbol shall be
4 prominently displayed by the Effective date and with such conspicuousness, as compared with
5 other words, statements, designs, or devices used at the point the Covered Products are offered for
6 sale, as to render the Symbol likely to be seen by an ordinary individual prior to purchase. The
7 Symbol shall be displayed on or adjacent to the Covered Products in any one or more of the
8 following locations:

9 (i) The Symbol may be permanently affixed to or prominently
10 printed on any placards, signs, or shelf stickers adjacent to the Covered Products that identify the
11 name or price of the Covered Products displayed, in which case the Symbol shall be no less than
12 one-quarter inch (0.25 inch) high; or

13 (ii) The Symbol may be permanently affixed to or printed on
14 (at the point of manufacture, prior to shipment to California, or prior to distribution within
15 California) the outside packaging or container of each unit of the Covered Products, in which case
16 the Symbol must be large enough that the characters in the Symbol are in a type size no smaller
17 than 6 point, and in no case shall the Symbol be less than one-quarter inch (0.25 inch) high.

18 (2) *Other Clear and Reasonable Warnings in Retail Stores.* In
19 stores not using the Identifying Signs and Designated Symbol in Retail Stores system described in
20 Section 3.2(a)(1), the Warning shall be permanently affixed to or printed on (at the point of
21 manufacture, prior to shipment to California, or prior to distribution within California) the outside
22 packaging or container of each unit of the Covered Products. The Warning shall be displayed with
23 such conspicuousness, as compared with other words, statements, designs, or devices on the
24 packaging or labeling, as to render it likely to be read and understood by an ordinary individual
25 prior to purchase. If the Warning is displayed on the product container or labeling, the Warning
26 shall be at least the same size as the largest of any other health or safety warnings on the product
27 container or labeling, and the word "WARNING" shall be in all capital letters and in bold print. If
28 printed on the labeling itself, the Warning shall be contained in the same section of the labeling

1 that states other safety warnings concerning the use of the product.

2 (b) For Covered Products sold by LuckyVitamin to California consumers through the
3 Internet, the Warning shall be prominently displayed on each webpage describing the ingredients
4 or attributes of a Covered Product, or the Warning may be provided at the time the customer enters
5 a California address for the shipping address. In addition, for each shipment of any Covered
6 Product resulting from such a sale, the Warning shall be displayed on the outside packaging or
7 container of each unit of the Covered Product or on the invoice that accompanies the shipment of
8 the Covered Product. In all circumstances, the Warning shall be displayed with such
9 conspicuousness, as compared with other words, statements, designs, or devices on the webpages,
10 product packaging, product container, or invoice, as to render it likely to be read and understood
11 by an ordinary individual prior to purchase. The Warning shall be at least the same size as the
12 largest of any other health or safety warnings on the webpage, invoice, or product packaging, and
13 the word “WARNING” shall be in all capital letters and in bold print. A Warning printed on an
14 invoice must be in a type size at least as tall as the largest letter or numeral in the name or price of
15 the Covered Product printed on the invoice. LuckyVitamin must fully comply with the terms of
16 this section 3.2(b) within 90 of the effective date of this Consent Judgment.

17 (c) For sales and distribution of Covered Products not described in subsections (a) and
18 (b), above, the Warning shall be provided at the point of sale or distribution prior to purchase by
19 the consumer. The Warning Shall be displayed with such conspicuousness, as compared with
20 other words, statements, designs, or devices, as to render it likely to be read and understood by an
21 ordinary individual prior to purchase. The Warning shall be at least the same size as the largest of
22 any other health or safety warnings presented, and the word “WARNING” shall be in all capital
23 letters and in bold print.

24 3.3 No other statements about Proposition 65 may accompany the warnings set forth
25 in Section 3.2

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1 **4. SETTLEMENT PAYMENT**

2 **4.1** In full satisfaction of all potential civil penalties, payment in lieu of civil
3 penalties, attorney’s fees, and costs, LuckyVitamin shall make a total payment of \$32,500.00
4 (“Total Settlement Amount”) to ERC within 10 business of receiving Notice of Entry of
5 Judgment. LuckyVitamin shall make this payment by wire transfer to ERC’s escrow account,
6 for which ERC will give LuckyVitamin the necessary account information. The Total
7 Settlement Amount shall be apportioned as follows:

8 **4.2** \$10,764.00 shall be considered a civil penalty pursuant to California Health and
9 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$8,073.00) of the civil penalty to the
10 Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe
11 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
12 Code §25249.12(c). ERC will retain the remaining 25% (\$2,691.00) of the civil penalty.

13 **4.3** \$1,544.86 shall be distributed to ERC as reimbursement to ERC for reasonable
14 costs incurred in bringing this action.

15 **4.4** \$8,133.91 shall be distributed to ERC in lieu of further civil penalties, for the day-
16 to-day business activities such as (1) continued enforcement of Proposition 65, which includes
17 work, analyzing, researching and testing consumer products that may contain Proposition 65
18 chemicals, focusing on the same or similar type of ingestible products that are the subject
19 matter of the current action; (2) the continued monitoring of past consent judgments and
20 settlements to ensure companies are in compliance with Proposition 65; and (3) giving a
21 donation of \$460.00 to the Global Community Monitor to address reducing toxic chemical
22 exposures in California.

23 **4.5** \$4,000.00 shall be distributed to Ryan Hoffman for reimbursement of ERC’s
24 outside counsel’s legal fees, \$1,440.00 shall be distributed to Michael Freund for
25 reimbursement of ERC’s outside counsel’s legal fees, while \$6,617.23 shall be distributed to
26 ERC for its in-house legal fees.

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1 **5. MODIFICATION OF CONSENT JUDGMENT**

2 **5.1** This Consent Judgment may be modified only (i) by written stipulation of the
3 Parties or pursuant to Sections 5.4 and 5.5 and (ii) upon entry by the Court of a modified
4 Consent Judgment.

5 **5.2** If LuckyVitamin seeks to modify this Consent Judgment under Section 5.1, then
6 LuckyVitamin must provide written notice to ERC of its intent (“Notice of Intent”). If ERC
7 seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC
8 must provide written notice to LuckyVitamin within twenty (20) days of receiving the Notice of
9 Intent. If ERC notifies LuckyVitamin in a timely manner of ERC’s intent to meet and confer,
10 then the Parties shall meet and confer in good faith as required in this Section. The Parties
11 shall meet in person or via telephone within twenty(20) days of ERC’s notification of its intent
12 to meet and confer. Within twenty (20) days of such meeting, if ERC disputes the proposed
13 modification, ERC shall provide to LuckyVitamin a written basis for its position. The Parties
14 shall continue to meet and confer for an additional twenty (20) days in an effort to resolve any
15 remaining disputes. Should it become necessary, the Parties may agree in writing to different
16 deadlines for the meet-and-confer period.

17 **5.3** In the event that LuckyVitamin initiates or otherwise requests a modification
18 under Section 5.1, and the meet and confer process leads to a joint motion or application of the
19 Consent Judgment, LuckyVitamin shall reimburse ERC its costs and reasonable attorney’s fees
20 for the time spent in the meet-and-confer process and filing and arguing the motion or
21 application in support of a modification of the Consent Judgment; provided, however, that
22 these fees and costs shall not exceed \$5,000 total without the prior written consent of
23 LuckyVitamin.

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

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

6 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
7 **JUDGMENT**

8 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate
9 this Consent Judgment.

10 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

1 fees, costs and expenses asserted, or that could have been asserted, as to any alleged violation
2 of Proposition 65 arising from the failure to provide Proposition 65 warnings on the Covered
3 Products regarding lead as set forth in the Notice and the Complaint up to and including the
4 Effective Date.

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

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

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

24 ERC on behalf of itself only, on the one hand, and LuckyVitamin, on the other hand,
25 acknowledge and understand the significance and consequences of this specific waiver of
26 California Civil Code section 1542.

27 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
28 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
in the Covered Products as set forth in the Notice and the Complaint.

1 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
2 environmental exposures arising under Proposition 65, nor shall it apply to any of
3 LuckyVitamin's products other than the Covered Products.

4 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

7 **10. GOVERNING LAW**

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

10 **11. PROVISION OF NOTICE**

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

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

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

20 With a copy to:

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

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

Attorneys for Plaintiff Environmental Research Center, Inc.

1 **FOR LUCKYVITAMIN CORPORATION**

2 James M. Sunder
3 Gary R. Kelly
4 Lucky Vitamin Corporation
5 300 Sixth Avenue
6 Pittsburgh, PA 15222
7 Telephone: (412) 288-4619
8 Facsimile: (412) 288-4621

9 With a copy to:

10 Randall J. Lee
11 WFBM, LLP
12 601 Montgomery Street, Ninth Floor
13 San Francisco, CA 94111-2612
14 Telephone: (415) 781-7072
15 Facsimile: (415) 391-6258

16 Attorneys for Defendant LuckyVitamin Corporation

17 **12. COURT APPROVAL**

18 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
19 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
20 Consent Judgment.

21 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
22 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
23 prior to the hearing on the motion.

24 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
25 void and have no force or effect.

26 **13. EXECUTION AND COUNTERPARTS**

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

14. DRAFTING

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

1 of this Consent Judgment, no inference, assumption, or presumption shall be drawn, and no
2 provision of this Consent Judgment shall be construed against any Party, based on the fact that one
3 of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of
4 the Consent Judgment. It is conclusively presumed that all of the Parties participated equally in
5 the preparation and drafting of this Consent Judgment.

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

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

16 **16. ENTIRE AGREEMENT, AUTHORIZATION**

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

23 **16.2** Each signatory to this Consent Judgment certifies that he or she is fully
24 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as
25 explicitly provided herein, each Party shall bear its own fees and costs.

26 **17. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
27 **CONSENT JUDGMENT**

28 This Consent Judgment has come before the Court upon the request of the Parties. The

1 Parties request the Court to fully review this Consent Judgment and, being fully informed
2 regarding the matters which are the subject of this action, to:

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

6 (2) Make the findings pursuant to California Health and Safety Code section
7 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

8 **IT IS SO STIPULATED:**

9 Dated: _____, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

10

By: _____
Chris Heptinstall, Executive Director

11

12 Dated: June 30, 2016

LUCKYVITAMIN CORPORATION

13

By: [Signature]
Its: SVP

14

15

16 **APPROVED AS TO FORM:**

17 Dated: 6/30, 2016

MICHAEL FREUND & ASSOCIATES

18

By: [Signature]
Ryan Hoffman
Attorney for Plaintiff Environmental
Research Center, Inc.

19

20

21 Dated: June 30, 2016

WFBM, LLP

22

23

By: [Signature]
Randall J. Lee
Attorney for Defendant LuckyVitamin
Corporation

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25

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ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____, 2015

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:

Lucky Vitamin Corporation

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 Lucky Vitamin Corporation 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 Lucky Vitamin Corporation

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 President or CEO
Lucky Vitamin Corporation
18 West Mount Kirk Avenue
Eagleview, PA 19403

Current President or CEO
Lucky Vitamin Corporation
555 E. North Lane, Suite 6050
Conshohocken, PA 19428

Current President or CEO
Lucky Vitamin Corporation
8 Avenue B, Buncher Industrial Park
Leetsdale, PA 15056

Current President or CEO
Lucky Vitamin Corporation
300 6th Avenue
Pittsburgh, PA 15222

National Registered Agents, Inc.
(Lucky Vitamin Corporation’s Registered Agent
for Service of Process)
116 Pine Street, 3rd Floor, Suite 320
Harrisburg, PA 17101

Current President or CEO
Lucky Vitamin Corporation
4 West Mount Kirk Avenue
Norristown, PA 19403

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.

EXHIBIT B

EXHIBIT B: Designated Symbol #1



EXHIBIT C

EXHIBIT C: Designated Symbol #2

**PROP 65
WARNING!**