

1 MATTHEW C. MACLEAR (SBN 2092228)  
2 ANTHONY M. BARNES (SBN 199048)  
3 AQUA TERRA AERIS LAW GROUP  
4 7425 Fairmount Ave.  
5 El Cerrito, CA 94530  
6 Ph: 415-568-5200  
7 Email: [mcmm@atalawgroup.com](mailto:mcmm@atalawgroup.com)

8 Attorneys for Plaintiff  
9 ENVIRONMENTAL RESEARCH CENTER, INC.

10 FREDERICK W. KOSMO JR. (SBN 36014)  
11 WILSON TURNER KOSMO LLP  
12 550 West C Street, Suite 1050  
13 San Diego, CA 92101-3532  
14 Telephone: 619-236-9600  
15 Facsimile: 619-236-9669  
16 Email: [fkosmo@wilsonturnerkosmo.com](mailto:fkosmo@wilsonturnerkosmo.com)

17 Attorney for Defendant  
18 VITACOST.COM, INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
20 COUNTY OF ALAMEDA

21 ENVIRONMENTAL RESEARCH  
22 CENTER, INC., a non-profit California  
23 corporation,  
24 Plaintiff,

25 v.

26 6S, INC. dba ALL STAR HEALTH, a  
27 California corporation, VITACOST.COM,  
28 INC., a Delaware corporation, and DOES 1-  
29 25,  
30 Defendants.

CASE NO. RG16802586

**STIPULATED CONSENT  
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: February 3, 2016

Trial Date: None set

**1. INTRODUCTION**

1.1 On February 3, 2016, 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 Permanent Injunction, Civil Penalties and Other Relief (the  
2 “Complaint”) pursuant to the provisions of California Health and Safety Code section 25249.5  
3 *et seq.* (“Proposition 65”), against Vitacost.com, Inc. (“Vitacost”), 6S, Inc. dba All Star Health  
4 (“All Star Health”), and Does 1-25. In this action, ERC alleges that a number of Myogenix  
5 products, distributed or sold by Vitacost contain lead, a chemical listed under Proposition 65 as  
6 a carcinogen and reproductive toxin, and expose consumers to this chemical at a level requiring  
7 a Proposition 65 warning. These products (referred to hereinafter individually as a “Covered  
8 Product” or collectively as “Covered Products”) are: Myogenix Inc. Pro Enzyme + Fiber and  
9 Myogenix Inc. Liver Support Extra Strength.

10 **1.2** ERC and Vitacost are hereinafter referred to individually as a “Party” or  
11 collectively as the “Parties.”

12 **1.3** ERC is a California non-profit corporation dedicated to, among other causes,  
13 helping safeguard the public from health hazards by reducing the use and misuse of hazardous  
14 and toxic chemicals, facilitating a safe environment for consumers and employees, and  
15 encouraging corporate responsibility.

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

20 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation  
21 dated August 28, 2015, that was served on the California Attorney General, other public  
22 enforcers, and Vitacost (“Notice”). A true and correct copy of the Notice is attached as Exhibit  
23 A and is hereby incorporated by reference. More than 60 days have passed since the Notice  
24 was mailed and uploaded to the Attorney General’s website, and no designated governmental  
25 entity has filed a complaint against Vitacost with regard to the Covered Products or the alleged  
26 violations.

27 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes  
28 persons in California to lead without first providing clear and reasonable warnings in violation

1 of California Health and Safety Code section 25249.6. Vitacost denies all material allegations  
2 contained in the Notice and Complaint.

3           **1.7** The Parties have entered into this Consent Judgment in order to settle,  
4 compromise and resolve disputed claims and thus avoid prolonged and costly litigation.  
5 Nothing in this Consent Judgment shall constitute or be construed as an admission by any of  
6 the Parties, or by any of their respective officers, directors, shareholders, employees, agents,  
7 parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, suppliers,  
8 distributors, wholesalers, or retailers. Except for the representations made above, nothing in  
9 this Consent Judgment shall be construed as an admission by the Parties of any fact, issue of  
10 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an  
11 admission by the Parties of any fact, issue of law, or violation of law, at any time, for any  
12 purpose.

13           **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall  
14 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any  
15 other or future legal proceeding unrelated to these proceedings.

16           **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as  
17 a Judgment by this Court.

## 18           **2. JURISDICTION AND VENUE**

19           For purposes of this Consent Judgment and any further court action that may become  
20 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter  
21 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction  
22 over Vitacost as to the acts alleged in the Complaint, that venue is proper in Alameda County,  
23 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of  
24 all claims up through and including the Effective Date which were or could have been asserted in  
25 this action based on the facts alleged in the Notice and Complaint.

## 26           **3. INJUNCTIVE RELIEF AND WARNINGS**

27           **3.1** Beginning on the Effective Date, Vitacost has elected to voluntarily discontinue  
28 the Covered Products for sale into California.



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 regarding ERC's claim against Vitacost and the Released  
4 Parties herein only, Vitacost shall make a total payment of \$20,500.00 ("Total Settlement  
5 Amount") to ERC within five (5) business days of the Effective Date. Vitacost shall make this  
6 payment by wire transfer to ERC's escrow account, for which ERC will give Vitacost the  
7 necessary account information. The Total Settlement Amount shall be apportioned as follows:

8           **4.2** \$1,092.00 shall be considered a civil penalty pursuant to California Health and  
9 Safety Code §25249.7(b)(1). ERC shall remit 75% (\$819.00) of the civil penalty to the Office  
10 of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe Drinking  
11 Water and Toxic Enforcement Fund in accordance with California Health and Safety Code  
12 §25249.12(c). ERC will retain the remaining 25% (\$273.00) of the civil penalty.

13           **4.3** \$1,190.07 shall be distributed to ERC as reimbursement to ERC for reasonable  
14 costs incurred in bringing this action.

15           **4.4** \$1,092.56 shall be distributed to ERC in lieu of further civil penalties, for the  
16 day-to-day business activities such as (1) continued enforcement of Proposition 65, which  
17 includes work, analyzing, researching and testing consumer products that may contain  
18 Proposition 65 chemicals, focusing on the same or similar type of ingestible products that are  
19 the subject matter of the current action; (2) the continued monitoring of past consent judgments  
20 and settlements to ensure companies are in compliance with Proposition 65; and (3) giving a  
21 donation of \$55.00 to the As You Sow to address reducing toxic chemical exposures in  
22 California.

23           **4.5** \$8,189.55 shall be distributed to Agua Terra Aeris Law Group as reimbursement  
24 of ERC's attorney's fees, while \$8,935.82 shall be distributed to ERC for its in-house legal  
25 fees.

26           **4.6** In the event that Vitacost fails to remit the Total Settlement Payment owed  
27 under Section 4 of this Consent Judgment on or before the Due Date, Vitacost shall be deemed  
28 to be in material breach of its obligations under this Consent Judgment. ERC shall provide

1 written notice of the delinquency to Vitacost via electronic mail. If Vitacost fails to deliver the  
2 Total Settlement Payment within five (5) business days from the written notice, the Total  
3 Settlement Payment shall become immediately due and payable and shall accrue interest at the  
4 statutory judgment interest rate provided in the Code of Civil Procedure section 685.010.  
5 Additionally, Vitacost agrees to pay ERC's reasonable attorney's fees and costs for any efforts  
6 to collect the payment due under this Consent Judgment.

7 **5. MODIFICATION OF CONSENT JUDGMENT**

8 **5.1** This Consent Judgment may be modified only (i) by written stipulation of the  
9 Parties or pursuant to Section 5.4 and (ii) upon entry by the Court of a modified consent  
10 judgment.

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

23 **5.3** Where the meet-and-confer process does not lead to a joint motion or  
24 application in support of a modification of the Consent Judgment, then either Party may seek  
25 judicial relief on its own.

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

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

13           **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,  
14 on behalf of itself and in the public interest, and Vitacost and its respective officers, directors,  
15 shareholders, employees, agents, parent companies, subsidiaries, and divisions(collectively,  
16 "Released Parties"). ERC hereby fully releases and discharges the Released Parties from any  
17 and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees,  
18 costs and expenses asserted, or that could have been asserted from the handling, use, or  
19 consumption of the Covered Products, as to any alleged violation of Proposition 65 or its  
20 implementing regulations arising from the failure to provide Proposition 65 warnings on the  
21 Covered Products regarding lead up to and including the Effective Date.

22           **8.2** ERC on its own behalf only, on one hand, and Vitacost on its own behalf  
23 only, on the other, further waive and release any and all claims they may have against each  
24 other for all actions or statements made or undertaken in the course of seeking or opposing  
25 enforcement of Proposition 65 in connection with the Notice or Complaint up through and  
26 including the Effective Date, provided, however, that nothing in Section 8 shall affect or limit  
27 any Party's right to seek to enforce the terms of this Consent Judgment.

28           **8.3** It is possible that other claims not known to the Parties arising out of the facts

1 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
2 discovered. ERC on behalf of itself only, on one hand, and Vitacost, on the other hand,  
3 acknowledge that this Consent Judgment is expressly intended to cover and include all such  
4 claims up through the Effective Date, including all rights of action therefore. ERC and Vitacost  
5 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown  
6 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown  
7 claims. California Civil Code section 1542 reads as follows:

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

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

14 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to  
15 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead  
16 in the Covered Products as set forth in the Notice and the Complaint.

17 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or  
18 environmental exposures arising under Proposition 65, nor shall it apply to any of Vitacost's  
19 products other than the Covered Products.

20 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**  
21 In the event that any of the provisions of this Consent Judgment are held by a court to be  
22 unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

23 **10. GOVERNING LAW**  
24 The terms and conditions of this Consent Judgment shall be governed by and construed in  
25 accordance with the laws of the State of California.

26 **11. PROVISION OF NOTICE**  
27 All notices required to be given to either Party to this Consent Judgment by the other shall  
28 be in writing and sent to the following agents listed below via first-class mail. Courtesy copies via

1 email may also be sent.

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

3 Chris Hepinstall, Executive Director, Environmental Research Center  
4 3111 Camino Del Rio North, Suite 400  
5 San Diego, CA 92108  
6 Tel: (619) 500-3090  
7 Email: chris\_erc501c3@yahoo.com

7 With a copy to:

8 MATTHEW C. MACLEAR  
9 ANTHONY M. BARNES  
10 AQUA TERRA AERIS LAW GROUP  
11 7425 Fairmount Ave.  
12 EI Cerrito, CA 94530  
13 Ph: 415-568-5200  
14 Email: mcm@atalawgroup.com

15 **VITACOST.COM, INC.**

16 Steven Prough, Senior Counsel  
17 Vitacost  
18 P.O. Box 54143  
19 Los Angeles, CA 90054

17 With a copy to:

18 FREDERICK W. KOSMO JR.  
19 WILSON TURNER KOSMO LLP  
20 550 West C Street, Suite 1050  
21 San Diego, CA 92101-3532  
22 Telephone: 619-236-9600  
23 Facsimile: 619-236-9669  
24 Email: fkosmo@wilsonturnerkosmo.com

25 **12. COURT APPROVAL**

26 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a  
27 Motion for Court Approval. The Parties shall use their best efforts to support entry of this  
28 Consent Judgment.

1           **12.2** If the California Attorney General objects to any term in this Consent Judgment,  
2 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible  
3 prior to the hearing on the motion.

4           **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be  
5 void and have no force or effect.

6           **13. EXECUTION AND COUNTERPARTS**

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

10          **14. DRAFTING**

11          The terms of this Consent Judgment have been reviewed by the respective counsel for each  
12 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and  
13 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and  
14 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,  
15 and no provision of this Consent Judgment shall be construed against any Party, based on the fact  
16 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any  
17 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated  
18 equally in the preparation and drafting of this Consent Judgment.

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

20          If a dispute arises with respect to either Party's compliance with the terms of this Consent  
21 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in  
22 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be  
23 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

24          **16. ENFORCEMENT**

25          ERC may, by motion or order to show cause before the Superior Court of Alameda  
26 County, enforce the terms and conditions contained in this Consent Judgment. In any action  
27 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,  
28 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.

1 To the extent the failure to comply with the Consent Judgment constitutes a violation of  
2 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,  
3 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by  
4 law for failure to comply with Proposition 65 or other laws.

5 **17. ENTIRE AGREEMENT, AUTHORIZATION**

6 **17.1** This Consent Judgment contains the sole and entire agreement and  
7 understanding of the Parties with respect to the entire subject matter herein, and any and all  
8 prior discussions, negotiations, commitments and understandings related hereto. No  
9 representations, oral or otherwise, express or implied, other than those contained herein have  
10 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to  
11 herein, shall be deemed to exist or to bind any Party.

12 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully  
13 authorized by the Party he or she represents to stipulate to this Consent Judgment. Except as  
14 explicitly provided herein, each Party shall bear its own fees and costs.

15 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
16 **CONSENT JUDGMENT**

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

- 20 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
21 equitable settlement of all matters raised by the allegations of the Complaint, that the matter has  
22 been diligently prosecuted, and that the public interest is served by such settlement; and  
23 (2) Make the findings pursuant to California Health and Safety Code section  
24 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

25 **IT IS SO STIPULATED:**

26  
27  
28

1 Dated: 8/31, 2016

ENVIRONMENTAL RESEARCH  
CENTER, INC.

By:   
Chris Heppner, Director

4 Dated: 8/4, 2016

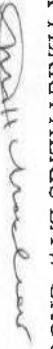
VITACOST.COM, INC.

By:   
Steve Fong, Secretary  
Is: 

8 APPROVED AS TO FORM:

9 Dated: August 3, 2016

AQUA TERRA AERIS LAW GROUP

By:   
Matthew C. Maclear  
Attorneys for Plaintiff Environmental  
Research Center, Inc.

14 Dated: 8/8, 2016

WILSON TURNER KOSMO LLP

By:   
Frederick W. Kosmo, Jr.  
Attorney for Defendant Vitacost.com,  
Inc.

20 ORDER AND JUDGMENT

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

23 IT IS SO ORDERED, ADJUDGED AND DECREED.

24 Dated: \_\_\_\_\_, 2016  
25 \_\_\_\_\_  
26 Judge of the Superior Court  
27  
28