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9 ENVIRONMENTAL RESEARCH CENTER, INC.

10
11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF ALAMEDA**

14 **ENVIRONMENTAL RESEARCH**
15 **CENTER, INC., a California non-profit**
16 **corporation**

17 **Plaintiff,**

18 **vs.**

19 **ROCKIN' WELLNESS INC. and DOES 1-**
20 **100**

21 **Defendants.**

CASE NO. RG16837855

STIPULATED CONSENT
JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Action Filed: November 3, 2016

Trial Date: None set

22
23 **1. INTRODUCTION**

24 **1.1** On November 3, 2016, Plaintiff Environmental Research Center, Inc. (“ERC”),
25 a non-profit corporation, as a private enforcer and in the public interest, initiated this action by
26 filing a Complaint for Injunctive and Declaratory Relief and Civil Penalties (the “Complaint”)
27 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*

1 (“Proposition 65”), against Rockin' Wellness Inc. (“Rockin' Wellness”) and Does 1-100. In this
2 action, ERC alleges that a number of products manufactured, distributed, or sold by Rockin'
3 Wellness contain lead and/or cadmium (as identified next to the product name below),
4 chemicals listed under Proposition 65 as carcinogens and reproductive toxins, and expose
5 consumers to these chemicals at a level requiring a Proposition 65 warning. These products
6 (referred to hereinafter individually as a “Covered Product” or collectively as “Covered
7 Products”) are: (1) Rockin' Wellness Inc. Whole Body Nutritional Shake Cacao Chocolate (Lead,
8 Cadmium) and (2) Rockin' Wellness Inc. Total Body Nutritional Shake Vanilla Mocha Swirl
9 (Lead).

10 **1.2** ERC and Rockin' Wellness are hereinafter referred to individually as a “Party”
11 or 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** Rockin' Wellness qualifies as a “person in the course of business” within the
17 meaning of Proposition 65. Rockin' Wellness manufactures, distributes, and/or sells the Covered
18 Products.

19 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
20 dated March 30, 2016 that was served on the California Attorney General, other public
21 enforcers, and Rockin' Wellness (“Notice”). A true and correct copy of the 60-Day Notice dated
22 March 30, 2016 is attached hereto as **Exhibit A** and incorporated herein by reference. More
23 than 60 days have passed since the Notice was served on the Attorney General, public
24 enforcers, and Rockin' Wellness and no designated governmental entity has filed a complaint
25 against Rockin' Wellness with regard to the Covered Products or the alleged violations.

26 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes
27 persons in California to lead and/or cadmium without first providing clear and reasonable
28

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

2 **3.1** Beginning on the Effective Date, Rockin' Wellness shall be permanently
3 enjoined from manufacturing for sale in the State of California, “Distributing into the State of
4 California”, or directly selling in the State of California, any Covered Products which exposes a
5 person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day and/or
6 “Daily Cadmium Exposure Level” of more than 4.10 micrograms of cadmium per day,
7 excluding allowances pursuant to Section 3.3, unless it meets the warning requirements under
8 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 Rockin' Wellness knows or has
12 reason to know will sell the Covered Product in California.

13 **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure
14 Level” and “Daily Cadmium Exposure Level” shall be measured in micrograms, and shall be
15 calculated using the following formula: micrograms of lead or cadmium per gram of product
16 minus any naturally occurring allowances pursuant to section 3.3, multiplied by grams of
17 product per serving of the product (using the largest serving size appearing on the product
18 label), multiplied by servings of the product per day (using the largest number of servings in a
19 recommended dosage appearing on the product label), which equals micrograms of lead or
20 cadmium exposure per day.

21 **3.2 Clear and Reasonable Warnings**

22 If Rockin' Wellness is required to provide a warning pursuant to Section 3.1, the following
23 warning must be utilized (“Warning”):

24 **WARNING:** This product can expose you to chemicals including [lead] [and] [cadmium]
25 which is [are] known to the State of California to cause [cancer and] birth defects or other
26 reproductive harm. For more information go to www.P65Warnings.ca.gov.

27 Rockin' Wellness shall use the phrase “cancer and” in the Warning only if the “Daily Lead
28

1 Exposure Level” is greater than 15 micrograms of lead as determined pursuant to the quality
2 control methodology set forth in Section 3.4 or if Rockin Wellness has reason to believe there is
3 another Proposition 65 chemical at levels requiring a cancer warning. As identified in the brackets,
4 the warning shall appropriately reflect whether there is lead, cadmium, or both chemicals present
5 in each of the Covered Products.

6 The Warning shall be securely affixed to or printed upon the container or label of each
7 Covered Product. Alternatively, for any Covered Product sold over the internet, the Warning
8 shall appear on the checkout page when a California delivery address is indicated for any
9 purchase of any Covered Product. An asterisk or other identifying method must be utilized to
10 identify which products on the checkout page are subject to the Warning.

11 The Warning shall be at least the same size as the largest of any other health or safety
12 warnings also appearing on its website or on the label or container of Rockin' Wellness' product
13 packaging and the word “**WARNING**” shall be in all capital letters and in bold print. No
14 statements contradicting or conflicting with the Warning shall accompany the Warning.

15 Rockin' Wellness must display the above Warning with such conspicuousness, as compared
16 with other words, statements, design of the label, container, or on its website, as applicable, to
17 render the Warning likely to be read and understood by an ordinary individual under customary
18 conditions of purchase or use of the product.

19 **3.3 Reformulated Covered Products**

20 A Reformulated Covered Product is one for which the “Daily Lead Exposure Level” is no
21 greater than 0.5 micrograms of lead per day and the “Daily Cadmium Exposure Level” is no more
22 than 4.10 micrograms of cadmium per day as determined by the quality control methodology
23 described in Section 3.4, excluding amounts of naturally occurring lead in the ingredients listed in
24 the table below.

INGREDIENT	NATURALLY OCCURING AMOUNT OF LEAD
Elemental Calcium	0.8 micrograms/gram

1	Ferrous Fumarate	0.4 micrograms/gram
2	Zinc Oxide	8.0 micrograms/gram
3	Magnesium Oxide	0.4 micrograms/gram
4	Magnesium Carbonate	0.332 micrograms/gram
5	Magnesium Hydroxide	0.4 micrograms/gram
6	Zinc Gluconate	0.8 micrograms/gram
7	Potassium Chloride	1.1 micrograms/gram
8	Cocoa Powder	1.0 micrograms/gram
9		
10		

11 If at any time after the Effective Date, ERC tests a Reformulated Covered Product and
12 the test results indicate that the Daily Lead Exposure Level is greater than 0.5 micrograms per
13 day and/or the Daily Cadmium Exposure Level is greater than 4.1 micrograms per day,
14 Rockin' Wellness agrees to confidentially supply to ERC, within 30 days of a request from
15 ERC, a list of ingredients, including the percentage of each ingredient of that particular covered
16 product so that ERC may be able to calculate the daily exposure based on allowances contained
17 in the above table. Should a dispute arise, the Parties shall first meet and confer in an effort to
18 fully resolve any dispute.

19 **3.4 Testing and Quality Control Methodology**

20 **3.4.1** Beginning within one year of the Effective Date, Rockin' Wellness shall
21 arrange for lead and/or cadmium testing of the Covered Products at least once a year for a
22 minimum of five consecutive years by arranging for testing of five randomly selected samples
23 of each of the Covered Products, in the form intended for sale to the end-user, which Rockin'
24 Wellness intends to sell or is manufacturing for sale in California, directly selling to a
25 consumer in California or "Distributing into the State of California." If tests conducted
26 pursuant to this Section demonstrate that no Warning is required for a Covered Product during
27 each of five consecutive years, then the testing requirements of this Section will no longer be

1 required as to that Covered Product.

2 **3.4.2** For purposes of measuring the “Daily Lead Exposure Level” and/or
3 “Daily Cadmium Exposure Level,” the highest lead and/or cadmium detection result of the five
4 (5) randomly selected samples of the Covered Products will be controlling.

5 **3.4.3** All testing pursuant to this Consent Judgment shall be performed using a
6 laboratory method that complies with the performance and quality control factors appropriate
7 for the method used, including limit of detection, qualification, accuracy, and precision that
8 meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”)
9 achieving a limit of quantification of less than or equal to 0.010 mg/kg or any other testing
10 method subsequently agreed to in writing by the Parties and approved by the Court through
11 entry of a modified consent judgment.

12 **3.4.4** All testing pursuant to this Consent Judgment shall be performed by an
13 independent third party laboratory certified by the California Environmental Laboratory
14 Accreditation Program or an independent third-party laboratory that is registered with the
15 United States Food & Drug Administration.

16 **3.4.5** Nothing in this Consent Judgment shall limit Rockin' Wellness' ability to
17 conduct, or require that others conduct, additional testing of the Covered Products, including
18 the raw materials used in their manufacture.

19 **3.4.6** Within thirty (30) days of ERC's written request, Rockin' Wellness shall
20 deliver lab reports obtained pursuant to Section 3.4 to ERC. Rockin' Wellness shall retain all
21 test results and documentation for a period of five years from the date of each test.

22 **4. SETTLEMENT PAYMENT**

23 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
24 attorney's fees, and costs, Rockin' Wellness shall wire a total of \$50,000.00 (“Total Settlement
25 Amount”) to ERC's escrow account, for which ERC will give Rockin' Wellness the necessary
26 account information. The Total Settlement Payment shall be paid in six consecutive monthly
27 payments with the first settlement payment of \$8,333.35. due within 5 days of the Effective
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1 Date followed by five equal consecutive monthly payments of \$8,333.33 due in increments of
2 30 days from the first payment (“Due Dates”). The Total Settlement Amount shall be
3 apportioned as follows:

4 **4.2** \$13,857.00 shall be considered a civil penalty pursuant to California Health and
5 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$10,392.75) of the civil penalty to
6 the 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 section 25249.12(c). ERC will retain the remaining 25% (\$3,464.25) of the civil penalty.

9 **4.3** \$558.70 shall be distributed to ERC as reimbursement to ERC for reasonable
10 costs incurred in bringing this action.

11 **4.4** \$10,392.20 shall be distributed to ERC as an Additional Settlement Payment
12 (“ASP”), pursuant to California Code of Regulations, title 27, sections 3203, subdivision (d) and
13 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
14 caused by Defendant in this matter. These activities are detailed below and support ERC’s
15 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
16 supplement products in California. ERC’s activities have had, and will continue to have, a direct
17 and primary effect within the State of California because California consumers will be benefitted
18 by the reduction and/or elimination of exposure to lead and cadmium in dietary supplements
19 and/or by providing clear and reasonable warnings to California consumers prior to ingestion of
20 the products.

21 Based on a review of past years’ actual budgets, ERC is providing the following list of
22 activities ERC engages in to protect California consumers through Proposition 65 citizen
23 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
24 activities: (1) ENFORCEMENT (55-70%): obtaining, shipping, analyzing, and testing dietary
25 supplement products that may contain lead and cadmium and are sold to California consumers;
26 continued monitoring and enforcement of past consent judgments and settlements to ensure
27 companies are in compliance with their obligations thereunder, with a specific focus on those

1 judgments and settlements concerning lead and cadmium (which necessarily includes additional
2 work purchasing, processing, analyzing and testing consumer products; litigating matters that
3 result in defaults, bankruptcies, or dismissals; (2) VOLUNTARY COMPLIANCE PROGRAM
4 (10-20%): maintaining ERC's Voluntary Compliance Program by acquiring products from
5 companies, developing and maintaining a case file, testing products from these companies,
6 providing the test results and supporting documentation to the companies, and offering guidance
7 in implementing a self-testing program for lead and cadmium in dietary supplement products; (3)
8 "GOT LEAD" PROGRAM (up to 5%): maintaining ERC's "Got Lead?" Program which reduces
9 the numbers of contaminated products that reach California consumers by providing access to
10 free testing for lead in dietary supplement products (Products submitted to the program are
11 screened for ingredients which are suspected to be contaminated, and then may be purchased by
12 ERC, catalogued, sent to a qualified laboratory for testing, and the results shared with the
13 consumer that submitted the product); (4) DONATION: from this settlement, a donation of
14 \$520.00 to Center for Environmental Health will be provided to address reducing toxic chemical
15 exposures in California and following up with the recipient to ensure the funds are utilized in a
16 manner that is consistent with ERC's mission and stated purpose of the Donation; (5) PUBLIC
17 OUTREACH (up to 5%): public outreach programs including maintaining ERC's blog, website,
18 and social media accounts; (6) SPECIAL PROJECTS (10-20%): projects including obtaining
19 expert and legal opinions not specific to any one case that are necessary to the continued private
20 enforcement of Proposition 65 (7) SCHOLARSHIPS (up to 5%): scholarships for college
21 students in California who have been or are currently diagnosed with cancer or who are pursuing
22 an environmental health science major; and (8) PRODUCT DATABASE (up to 5%):
23 maintaining a database with all products sold to California consumers that ERC has tested for
24 lead, cadmium, or arsenic.

25 ERC will maintain adequate records to document that the funds paid as an ASP are spent
26 on the activities described herein. ERC shall provide the Attorney General, within thirty days of
27 any request, copies of documentation demonstrating how such funds have been spent.

1 resolve any remaining disputes. Should it become necessary, the Parties may agree in writing
2 to different deadlines for the meet-and-confer period.

3 **5.3** In the event that Rockin' Wellness initiates or otherwise requests a modification
4 under Section 5.1, and the meet and confer process leads to a joint motion or application of the
5 Consent Judgment, Rockin' Wellness shall reimburse ERC its costs and reasonable attorney's
6 fees for the time spent in the meet-and-confer process and filing and arguing the motion or
7 application.

8 **5.4** Where the meet-and-confer process does not lead to a joint motion or
9 application in support of a modification of the Consent Judgment, then either Party may seek
10 judicial relief on its own.

11 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
12 **JUDGMENT**

13 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
14 this Consent Judgment.

15 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
16 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
17 inform Rockin' Wellness in a reasonably prompt manner of its test results, including
18 information sufficient to permit Rockin' Wellness to identify the Covered Products at issue.
19 Rockin' Wellness shall, within thirty (30) days following such notice, provide ERC with testing
20 information, from an independent third-party laboratory meeting the requirements of Sections
21 3.4.3 and 3.4.4, demonstrating Rockin' Wellness' compliance with the Consent Judgment, if
22 warranted. The Parties shall first attempt to resolve the matter prior to ERC taking any further
23 legal action.

24 **7. APPLICATION OF CONSENT JUDGMENT**

25 This Consent Judgment may apply to, be binding upon, and benefit the Parties and their
26 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
27 divisions, franchisees, licensees, customers (excluding private labelers), distributors, wholesalers,
28

1 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
2 application to Covered Products which is distributed or sold exclusively outside the State of
3 California and which is not used by California consumers.

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

5 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
6 on behalf of itself and in the public interest, and Rockin' Wellness and its respective officers,
7 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,
8 franchisees, licensees, customers (not including private label customers of Rockin' Wellness),
9 distributors, wholesalers, retailers, and all other upstream and downstream entities in the
10 distribution chain of any Covered Product, and the predecessors, successors, and assigns of any
11 of them (collectively, "Released Parties"). ERC hereby fully releases and discharges the
12 Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities,
13 damages, penalties, fees, costs, and expenses asserted, or that could have been asserted from
14 the handling, use, or consumption of the Covered Products, as to any alleged violation of
15 Proposition 65 or its implementing regulations arising from the failure to provide Proposition
16 65 warnings on the Covered Products regarding lead and/or cadmium up to and including the
17 Effective Date.

18 **8.2** ERC on its own behalf only, and Rockin' Wellness on its own behalf only,
19 further waive and release any and all claims they may have against each other for all actions or
20 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
21 65 in connection with the Notice and Complaint up through and including the Effective Date,
22 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
23 enforce the terms of this Consent Judgment.

24 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
25 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
26 discovered. ERC on behalf of itself only, and Rockin' Wellness on behalf of itself only,
27 acknowledge that this Consent Judgment is expressly intended to cover and include all such

1 claims up through and including the Effective Date, including all rights of action therefore.
2 ERC and Rockin' Wellness acknowledge that the claims released in Sections 8.1 and 8.2 above
3 may include unknown claims, and nevertheless waive California Civil Code section 1542 as to
4 any such unknown claims. California Civil Code section 1542 reads as follows:

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

8 ERC on behalf of itself only, and Rockin' Wellness on behalf of itself only, acknowledge and
9 understand the significance and consequences of this specific waiver of California Civil Code
10 section 1542.

11 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
12 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
13 and/or cadmium in the Covered Products as set forth in the Notice and Complaint.

14 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
15 environmental exposures arising under Proposition 65, nor shall it apply to any of Rockin'
16 Wellness' products other than the Covered Products.

17 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

20 **10. GOVERNING LAW**

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

23 **11. PROVISION OF NOTICE**

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

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

1 Chris Heptinstall, Executive Director, Environmental Research Center
2 3111 Camino Del Rio North, Suite 400
3 San Diego, CA 92108
4 Tel: (619) 500-3090
5 Email: chris_erc501c3@yahoo.com

6 With a copy to:
7 Michael Freund
8 Ryan Hoffman
9 Michael Freund & Associates
10 1919 Addison Street, Suite 105
11 Berkeley, CA 94704
12 Telephone: (510) 540-1992
13 Facsimile: (510) 540-5543

14 Rockin' Wellness Inc.
15 c/o Richard Finkelstein
16 94 Aspen Drive East
17 Woodbury, NY
18 11797

19 With a copy to:
20 Russell H. Stern
21 Ruskin, Moscou, Faltischeck, P.C.
22 1425 RXR Plaza
23 East Tower, 15th Floor
24 Uniondale, NY
25 11556-1425

26 **12. COURT APPROVAL**

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

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

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

1 **17. ENTIRE AGREEMENT, AUTHORIZATION**

2 **17.1** This Consent Judgment contains the sole and entire agreement and
3 understanding of the Parties with respect to the entire subject matter herein, and any and all
4 prior discussions, negotiations, commitments, and understandings related hereto. No
5 representations, oral or otherwise, express or implied, other than those contained herein have
6 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
7 herein, shall be deemed to exist or to bind any Party.

8 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
9 authorized by the Party he or she represents to stipulate to this Consent Judgment.

10 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
11 **CONSENT JUDGMENT**

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

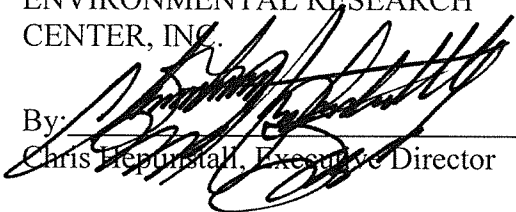
15 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
16 equitable settlement of all matters raised by the allegations of the Complaint that the matter has
17 been diligently prosecuted, and that the public interest is served by such settlement; and

18 (2) Make the findings pursuant to California Health and Safety Code section
19 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

20 **IT IS SO STIPULATED:**

21 Dated: 11/10/, 2016

ENVIRONMENTAL RESEARCH
CENTER, INC.

22
23 By: 
Chris Depunstall, Executive Director

1
2 Dated: November 10, 2016

ROCKIN' WELLNESS INC.

3 Seth Luker
4 By: Seth Luker
5 Its: President - Rockin' Wellness Inc

6 **APPROVED AS TO FORM:**

7 Dated: 11/15, 2016

MICHAEL FREUND & ASSOCIATES

8 By: [Signature]
9 Michael Freund
10 Ryan Hoffman
11 Attorneys for Plaintiff Environmental
12 Research Center, Inc.

13 Dated: November 10, 2016

RUSKIN MOSCOU FALTISCHECK P.C.

14 By: [Signature]
15 Russell H. Stern
16 Attorney for Defendant Rockin' Wellness
17 Inc.

18 **ORDER AND JUDGMENT**

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

21 IT IS SO ORDERED, ADJUDGED AND DECREED.

22
23 Dated: _____, 2016

24 Judge of the Superior Court