

## **SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (this “Agreement”) is made effective on the date on which it is fully executed (the “Effective Date”) by and between Environmental Research Center Inc. (“ERC”) and Growing Naturals, LLC (“Growing Naturals” or “Defendant”). ERC and Defendant are referred to individually as a “Party” and collectively as the “Parties.” The Parties agree as follows:

### **1. INTRODUCTION**

**1.1** This Agreement is limited to this Matter, which is defined as all claims and allegations related to the Notice of Violation of California Health & Safety Sections 25249.5 *et seq.* (“Proposition 65”), against Defendant dated December 22, 2016 that was served on the California Attorney General, other public enforcers, and Defendant (“Notice”). A true and correct copy of the 60-Day Notice dated December 22, 2016 is attached hereto as **Exhibit A** and incorporated herein by reference. In this Notice, ERC alleges that a number of products manufactured, distributed, or sold by Defendant contain lead and/or cadmium, chemicals listed under Proposition 65 as carcinogens and reproductive toxins, and expose consumers to these chemicals at a level requiring a Proposition 65 warning. These products (referred to hereinafter individually as a “Covered Product” or collectively as “Covered Products”) are:

- 1) Growing Naturals LLC Yellow Pea Protein Original – Lead
- 2) Growing Naturals LLC Organic Rice Protein Original - Lead, Cadmium
- 3) Growing Naturals LLC Organic Rice Protein Vanilla Blast – Lead, Cadmium
- 4) Growing Naturals LLC Organic Rice Protein Strawberry Burst – Lead, Cadmium
- 5) Growing Naturals LLC Organic Rice Protein Chocolate Power – Lead, Cadmium

More than 60 days have passed since the Notice was served on the Attorney General, public enforcers, and Defendant and no designated governmental entity has filed a complaint against Defendant with regard to the Covered Products or the alleged violations.

**1.2** The Parties enter into this Agreement in order to achieve a settlement of the claims as stated in Section 1.1 for the purpose of avoiding prolonged litigation. Nothing in this Agreement shall be construed as an admission of ERC or Defendant of any fact, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Defendant of any fact, issue of law or violation of law. Defendant contends that the settlement in this matter has been agreed to based on economic considerations. Nothing in this Agreement or any document referred to herein, shall be construed as giving rise to any presumption or inference of admission or concession by

Defendant as to any fault, wrongdoing or liability whatsoever. Nothing in this Agreement nor compliance with this Agreement shall constitute or be construed as an admission by any of the Parties or by any of their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers, suppliers, distributors, wholesalers, or retailers of any fact, issue of law, or violation of law. The Parties agree that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Agreement.

**1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other causes, helping safeguard the public from health hazards by reducing the use and misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and employees, and encouraging corporate responsibility.

**1.4** Defendant Growing Naturals manufactures, distributes, and/or sells the Covered Products.

**1.5** For purposes of this Agreement, the Parties agree that Defendant is a business entity that has employed ten or more persons at all times relevant to this action, and qualifies as a “person in the course of business” within the meaning of Proposition 65.

**1.6** ERC’s Notice alleges that use of the Covered Products exposes persons in California to lead and/or cadmium without first providing clear and reasonable warnings in violation of California Health and Safety Code Section 25249.6. Defendant denies all material allegations contained in the Notice.

**1.7** Except as expressly set forth herein, nothing in this Agreement shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any current or future legal proceeding unrelated to these proceedings.

**1.8** The Effective Date of this Agreement is the date on which it is fully executed by all Parties. The Compliance Date is sixty (60) days after the Effective Date.

## **2. INJUNCTIVE RELIEF AND WARNINGS**

**2.1** Beginning on the Compliance Date, Defendant shall be permanently enjoined from selling or distributing Covered Products in the State of California, “Distributing into the State of California”, or directly selling in the State of California, any Covered Products unless it meets the warning requirements under Section 2.2.

**2.1.1** As used in this Agreement, the term “Distributing into the State of California” shall mean to directly ship a Covered Product into California for sale in California or to sell a Covered Product to a distributor that Defendants know or have reason to know will sell the Covered Product in California.

### **2.2 Clear and Reasonable Warnings**

The following warning must be used (“Warning”) on all Covered Products sold or distributed into the State of California:

**WARNING:** Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov/food](http://www.P65Warnings.ca.gov/food).

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

Defendants must display the above Warning with such conspicuousness, as compared with other words, statements, design of the label, container, or on its website, as applicable, to render the Warning likely to be read and understood by an ordinary individual under customary conditions of purchase or use of the product. The Warning shall be at least 6 pt., or the same size as the largest of any other health or safety warnings also appearing on the label or container of Defendants' product packaging and the word "**WARNING**" shall be in all capital letters and in bold print.

### **3. SETTLEMENT PAYMENT**

**3.1** In full satisfaction of all potential civil penalties, additional settlement payments, attorney's fees, and costs, Defendant shall make a total payment of \$50,000.00 ("Total Settlement Amount") to ERC by wire transfer to ERC's escrow account, for which ERC will give Defendant the necessary account information. The Total Settlement Amount shall be made pursuant to the following payment schedule ("Due Dates").

\$10,000 due within 5 business days of the Effective Date

\$10,000 due within 35 days of the Effective Date

\$10,000 due within 65 days of the Effective Date

\$10,000 due within 95 days of the Effective Date

\$10,000 due within 125 days of the Effective Date

The Total Settlement Amount shall be apportioned as follows:

**3.2** \$5,000.00 shall be considered a civil penalty pursuant to California Health and Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$3,750.00) of the civil penalty to the Office of Environmental Health Hazard Assessment ("OEHHHA") for deposit in the Safe Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety Code section 25249.12(c). ERC will retain the remaining 25% (\$1,250.00) of the civil penalty.

**3.3** \$1,976.63 shall be distributed to ERC as reimbursement to ERC for reasonable costs incurred in bringing this action.

**3.4** \$23,850.00 shall be distributed to Lozeau Drury LLP as reimbursement of ERC's attorney's fees, while \$19,173.37 shall be distributed to ERC for its in-house legal fees. Except as explicitly provided herein, each Party shall bear its own fees and costs.

**3.5** In the event that Defendant fails to remit any payment owed under Section 3 of this Agreement on or before its respective Due Date, Defendant shall be deemed to be in material breach of its obligations under this Agreement. ERC shall provide written notice of the delinquency to Defendant via electronic mail. If Defendant fails to deliver the delinquent payment within five (5) days from the written notice, the Total Settlement Amount shall become due and owing and shall accrue interest at the statutory judgment interest rate provided in the California Code of Civil Procedure section 685.010.

#### **4. CHANGE OF LAW**

**4.1** In the future, if the Proposition 65 statute or regulations are revised, modified, repealed, or preempted, such that for Covered Products Proposition 65 warnings are no longer required or the nature of the safe harbor warning is revised by regulation, Defendant shall comply with the new requirements as if fully set forth herein.

**4.2** If either Party contends that a change of law as defined within section 4.1 has occurred which affects the injunctive terms of this Agreement, that Party will provide written notice to the other Party that the Change of Law has occurred.

#### **5. ENFORCEMENT**

**5.1** Any legal action to enforce this Agreement shall be brought in any county of the State of California, any of which is deemed to be the proper venue for such legal action.

**5.2** If ERC alleges that any Covered Product is sold in California without a Proposition 65 warning), then ERC shall inform Defendant in a reasonably prompt manner of its test results, including information sufficient to permit Defendant to identify the Covered Products at issue. Defendant shall, within thirty (30) days following such notice, provide ERC with documentation that warnings are being provided or other information to demonstrate that Defendant did not violate the terms of this agreement. The Parties shall first attempt to resolve the matter prior to ERC taking any further legal action.

**5.3** Any Party that fails to meet and confer or otherwise attempt in good faith to resolve any dispute arising under this Agreement prior to seeking judicial enforcement, shall forfeit any attorney's fees and cost to which that Party may otherwise be entitled.

**5.4** This Agreement shall not be enforceable if either of the following applies: (1) five years after the Compliance date; or (2) if a Covered Product is discontinued, then the Agreement may not be enforced as to that Covered Product after one year following the last date of distribution of said Covered Product by Defendant.

#### **6. APPLICATION**

This Agreement may apply to, be binding upon, and benefit the Parties and their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,

franchisees, licensees, customers (excluding private labelers), distributors, wholesalers, retailers, predecessors, successors, and assigns. This Agreement shall have no application to any Covered Product which is distributed or sold outside the State of California.

## **7. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

**7.1** This Agreement is a full, final, and binding resolution between ERC, on behalf of itself and in the public interest, and Defendant and its respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers, including Axiom Foods, Inc., franchisees, licensees, customers, distributors, wholesalers, retailers, and all other upstream and downstream entities in the distribution chain of any Covered Product, and the predecessors, successors, and assigns of any of them (collectively, "Released Parties"). ERC hereby fully releases and discharges the Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted from the handling, use, or consumption of the Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings on the Covered Products regarding lead and/or cadmium for products manufactured up to and including the Effective Date.

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

**7.3** It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice, and relating to the Covered Products, will develop or be discovered. ERC on behalf of itself only, and Defendant each on their behalf of themselves only, acknowledge that this Agreement is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefore. ERC and Defendant acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

ERC on behalf of itself only, and Defendant on behalf of itself only, acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

**7.4** Compliance with the terms of this Agreement shall be deemed to constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead and/or cadmium in the Covered Products as set forth in the Notice.

Nothing in this Agreement is intended to apply to any occupational or environmental exposures arising under Proposition 65, nor shall it apply to any of Defendant's products other than the Covered Products.

#### **8. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

#### **9. GOVERNING LAW**

The terms and conditions of this Agreement shall be governed by and construed in accordance with the laws of the State of California.

#### **10. PROVISION OF NOTICE**

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

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

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

With a copy to:

RICHARD T. DRURY  
DOUGLAS J. CHERMAK  
LOZEAU | DRURY LLP  
410 12th Street, Suite 250  
Oakland, CA 94607  
Ph: 510-836-4200  
Fax: 510-836-4205  
Email: richard@lozeaudrury.com

#### **Growing Naturals, LLC**

David Janow, President, Growing Naturals, LLC.  
13428 Maxella Ave., Suite 471  
Marina Del Rey, CA 90292

With a copy to:

CAROL BROPHY  
SEDGWICK LLP  
333 Bush Street, 30th Floor

San Francisco, CA 94104-2834  
Telephone: (415) 781-7900  
Facsimile: (415) 781-2635  
Email: carol.brophy@sedgwicklaw.com

## **11. EXECUTION AND COUNTERPARTS**

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

## **12. DRAFTING**

The terms of this Agreement 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 legal counsel. The Parties agree that, in any subsequent interpretation and construction of this Agreement, no inference, assumption, or presumption shall be drawn, and no provision of this Agreement shall be construed against any Party, based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any portion of the Agreement. It is conclusively presumed that all of the Parties participated equally in the preparation and drafting of this Agreement.

## **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

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

## **14. ENTIRE AGREEMENT, AUTHORIZATION**

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

**14.2** Each signatory to this Agreement certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Agreement.

IT IS SO STIPULATED:

Dated: 11/16/, 2017

ENVIRONMENTAL RESEARCH  
CENTER, INC.

By:   
Chris Hopfman, Executive Director

Dated: 11/16, 2017

GROWING NATURALS, LLC

By: ASRAF SHAMZA  
Its: Equity partner