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20 VITACOST.COM, INC.

21 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
22 **COUNTY OF ALAMEDA**

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

25 Plaintiff,

26 v.

27 VITACOST.COM, INC., a Delaware
28 corporation, and DOES 1 – 25,

Defendants.

CASE NO. RG17867086

**[PROPOSED] STIPULATED
CONSENT JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Dept. 21
Hon. Winifred Y. Smith

Action Filed: July 11, 2017
Trial Date: None set

1. INTRODUCTION

1.1 On July 11, 2017, Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Permanent Injunction, Civil Penalties, and Other Relief (the “Complaint”)

1 pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.*
2 (“Proposition 65”), against VITACOST.COM, INC. (“VITACOST”) and Does 1-25. In this
3 action, ERC alleges that a number of Harmonic Innerprizes products, distributed or sold by
4 VITACOST, contain lead, a chemical listed under Proposition 65 as a carcinogen and
5 reproductive toxin, and expose consumers to this chemical at a level requiring a Proposition 65
6 warning. These products (referred to hereinafter individually as a “Covered Product” or
7 collectively as “Covered Products”) are:

- 8 • Harmonic Innerprizes Inc. HeartLight
- 9 • Harmonic Innerprizes Inc. Toxin Therapy
- 10 • Harmonic Innerprizes Etherium Black Re-Action Neutralizer
- 11 • Harmonic Innerprizes Inc. Aulterra
- 12 • Harmonic Innerprizes Inc. Etherium Pink (28.3g)
- 13 • Harmonic Innerprizes Inc. Aulterra Nutrient Optimizer
- 14 • Harmonic Innerprizes Etherium Gold Focused Brain
- 15 • Harmonic Innerprizes SuperSilica Plus!

16 **1.2** ERC and VITACOST are hereinafter referred to individually as a “Party” or
17 collectively as the “Parties.”

18 **1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
19 causes, helping safeguard the public from health hazards by reducing the use and misuse of
20 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
21 and encouraging corporate responsibility.

22 **1.4** For purposes of this Consent Judgment, the Parties agree that VITACOST is a
23 business entity that has employed ten or more persons at all times relevant to this action, and
24 qualifies as a “person in the course of business” within the meaning of Proposition 65.
25 VITACOST distributes and sells the Covered Products.

26 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
27 dated April 28, 2017 that was served on the California Attorney General, other public
28 enforcers, and VITACOST (“Notice”). A true and correct copy of the 60-Day Notice dated

1 April 28, 2017 is attached as **Exhibit A** and is hereby incorporated by reference. More than 60
2 days have passed since the Notice was served on the Attorney General, public enforcers, and
3 VITACOST and no designated governmental entity has filed a complaint against VITACOST
4 with regard to the Covered Products or the alleged violations.

5 **1.6** ERC's Notice and Complaint allege that use of the Covered Products exposes
6 persons in California to lead without first providing clear and reasonable warnings in violation
7 of California Health and Safety Code section 25249.6. VITACOST denies all material
8 allegations contained in the Notice and Complaint. Nothing in the Consent Judgment shall be
9 construed as an admission by Vitacost of any fact, issue of law or violation of law, nor shall
10 compliance with the Consent Judgment constitute or be construed as an admission by Vitacost
11 of any fact, issue of law or violation of law, at any time, for any purpose.

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

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

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

24 **2. JURISDICTION AND VENUE**

25 For purposes of this Consent Judgment and any further court action that may become
26 ~~necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter~~
27 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
28 over VITACOST as to the acts alleged in the Complaint, that venue is proper in Alameda County,

1 and that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of
2 all claims up through and including the Effective Date which were or could have been asserted in
3 this action based on the facts alleged in the Notice and Complaint.

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

5 **3.1** Beginning 10 business days after the Effective Date, VITACOST shall be
6 permanently enjoined from “Distributing into the State of California”, or directly selling in the
7 State of California, any Covered Products which expose a person to a “Daily Lead Exposure
8 Level” of more than 0.5 micrograms of lead per day unless it meets the warning requirements
9 under Section 3.2.

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

14 **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure
15 Level” shall be measured in micrograms, and shall be calculated using the following formula:
16 micrograms of lead per gram of product, multiplied by grams of product per serving of the
17 product (using the largest serving size appearing on the product label), multiplied by servings
18 of the product per day (using the largest number of servings in a recommended dosage
19 appearing on the product label), which equals micrograms of lead exposure per day. If no
20 recommended daily serving size is provided on the label, then the daily serving size shall equal
21 one unit.

22 **3.2 Clear and Reasonable Warnings**

23 If VITACOST is required to provide a warning pursuant to Section 3.1, the following
24 warning must be utilized (“Warning”):

25 **WARNING:** Consuming this product can expose you to chemicals including lead [and any
26 additional chemicals], which is [are] known to the State of California to cause [cancer and]
27 birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov/food.

28 VITACOST shall use the phrase “cancer and” in the Warning if VITACOST has reason to believe

1 that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead or if VITACOST has
2 reason to believe that another Proposition 65 chemical is present which may require a cancer
3 warning.

4 The Warning shall appear on VITACOST’s checkout page on its website for California
5 consumers identifying any Covered Product, or a link to the Warning, using the word
6 “WARNING” shall appear prior to completing checkout on VITACOST’s website when a
7 California delivery address is indicated for any purchase of any Covered Product. An asterisk or
8 other identifying method, such as text accompanying the product, must be utilized to identify
9 which product(s) on the checkout page are subject to the Warning. The Warning may be used in
10 conjunction with a more general warning in the checkout procedures indicating that item(s) in
11 the customer’s order are subject to a California Proposition 65 warning.

12 The Warning shall be at least the same size as the largest of any other health or safety
13 warnings also appearing on its website or on the label or container of the Covered Product’s
14 packaging and the word “**WARNING**” shall be in all capital letters and in bold print. No
15 statements intended to or likely to have the effect of diminishing the impact of, or reducing the
16 clarity of, the Warning on the average lay person shall accompany the Warning unless required by
17 Proposition 65 implementing regulations. Further, no statements may accompany the Warning
18 that state or imply that the source of the listed chemical has an impact on or results in a less
19 harmful effect of the listed chemical.

20 VITACOST must display the above Warning with such conspicuousness, as compared
21 with other words, statements, or design of the website, to render the Warning likely to be read and
22 understood by an ordinary individual under customary conditions of purchase or use of the
23 product.

24 3.3 If subsequently enacted changes to Proposition 65 or its implementing regulations
25 require the use of additional or different information on any warning, the Parties agree to meet and
26 confer on good faith pursuant to the procedures set out in 5.2 below, to reach an agreement as to
27 any revisions to the warning provisions set out here. Any changes agreed to will be subject to the
28 procedures set out in section 5.1 for revisions to this agreement.

1 **4. SETTLEMENT PAYMENT**

2 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
3 attorney’s fees, and costs, VITACOST shall make or have made a total payment of \$33,000.00
4 (“Total Settlement Amount”) to ERC, with an initial payment of \$3,664.00 to be paid within
5 10 business days of the Effective Date with each subsequent payment of \$3,667.00 due within
6 30 days after the prior payment (“Due Date”). VITACOST shall make or have made these
7 payments by wire transfer to ERC’s escrow account, for which ERC will give VITACOST the
8 necessary account information. The Total Settlement Amount shall be apportioned as follows:

9 **4.2** \$3,500.00 shall be considered a civil penalty pursuant to California Health and
10 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$2,625.00) of the civil penalty to the
11 Office of Environmental Health Hazard Assessment (“OEHHA”) for deposit in the Safe
12 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
13 Code section 25249.12(c). ERC will retain the remaining 25% (\$875.00) of the civil penalty.

14 **4.3** \$5,055.98 shall be distributed to ERC as reimbursement to ERC for reasonable
15 costs incurred in bringing this action.

16 **4.4** \$10,030.00 shall be distributed to Aqua Terra Aeris Law Group, while
17 \$14,414.02 shall be distributed to ERC for its in-house legal fees. Except as explicitly provided
18 herein, each Party shall bear its own fees and costs.

19 **4.6** In the event that VITACOST fails to remit the Settlement Amount owed under
20 Section 4 of this Consent Judgment on or before the Due Date, VITACOST shall be deemed to
21 be in material breach of its obligations under this Consent Judgment. ERC shall provide
22 written notice of the delinquency to VITACOST via electronic mail. If VITACOST fails to
23 deliver the Settlement Amount within ten (10) business days from receipt of the written notice,
24 the Settlement Amount shall become immediately due and owing and shall accrue interest at
25 the statutory judgment interest rate provided in the California Code of Civil Procedure section
26 ~~685.010. Additionally, VITACOST agrees to pay ERC’s reasonable attorney’s fees and costs~~
27 for any efforts to collect the payment due under this Consent Judgment.

1 **5. MODIFICATION OF CONSENT JUDGMENT**

2 **5.1** This Consent Judgment may be modified only (i) by written stipulation of the
3 Parties and upon entry by the Court of a modified consent judgment or (ii) by motion of either
4 Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a modified consent
5 judgment.

6 **5.2** If VITACOST seeks to modify this Consent Judgment under Section 5.1, then
7 VITACOST must provide written notice to ERC of its intent (“Notice of Intent”). If ERC seeks
8 to meet and confer regarding the proposed modification in the Notice of Intent, then ERC must
9 provide written notice to VITACOST within thirty (30) days of receiving the Notice of Intent.
10 If ERC notifies VITACOST in a timely manner of ERC’s intent to meet and confer, then the
11 Parties shall meet and confer in good faith as required in this Section. The Parties shall meet in
12 person or via telephone within thirty (30) days of ERC’s notification of its intent to meet and
13 confer. Within thirty (30) days of such meeting, if ERC disputes the proposed modification,
14 ERC shall provide to VITACOST a written basis for its position. The Parties shall continue to
15 meet and confer for an additional thirty (30) days in an effort to resolve any remaining disputes.
16 Should it become necessary, the Parties may agree in writing to different deadlines for the
17 meet-and-confer period.

18 **5.3** Where the meet-and-confer process does not lead to a joint motion or
19 application in support of a modification of the Consent Judgment, then either Party may seek
20 judicial relief on its own.

21 **5.4** In the event that Proposition 65 is repealed or preempted, then VITACOST shall
22 have no further obligation pursuant to this Consent Judgment with respect to, and to the extent
23 that the Covered Products are so affected.

24 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
25 **JUDGMENT**

26 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
27 this Consent Judgment.
28

1 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

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

23 **8.2** ERC on its own behalf only, and VITACOST on its own behalf only, further
24 waive and release any and all claims they may have against each other and their respective
25 officers, directors, shareholders, owners, employees, agents, parents, subsidiaries, divisions,
26 ~~affiliated entities under common (full or partial) ownership, and attorneys for all actions or~~
27 ~~statements made or undertaken in the course of seeking or opposing enforcement of Proposition~~
28 ~~65 in connection with the Notice and Complaint up through and including the Effective Date,~~

1 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
2 enforce the terms of this Consent Judgment.

3 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
4 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
5 discovered. ERC on behalf of itself only, and VITACOST on behalf of itself only,
6 acknowledge that this Consent Judgment is expressly intended to cover and include all such
7 claims up through and including the Effective Date, including all rights of action therefore.
8 ERC and VITACOST acknowledge that the claims released in Sections 8.1 and 8.2 above may
9 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any
10 such unknown claims. California Civil Code section 1542 reads as follows:

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

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

19 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
20 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
21 in the Covered Products as set forth in the Notice and Complaint.

22 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
23 environmental exposures arising under Proposition 65, nor shall it apply to any of VITACOST'
24 products other than the Covered Products.

25 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

28 **10. GOVERNING LAW**

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

1 **11. PROVISION OF NOTICE**

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

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

6 Chris Heptinstall, Executive Director, Environmental Research Center
7 3111 Camino Del Rio North, Suite 400
8 San Diego, CA 92108
9 Tel: (619) 500-3090
10 Email: chris_erc501c3@yahoo.com

11 With a copy to:

12 MATTHEW C. MACLEAR
13 ANTHONY M. BARNES
14 AQUA TERRA AERIS LAW GROUP
15 828 San Pablo Ave, Suite 115B
16 Albany, CA 94706
17 Ph: 415-568-5200
18 Email: mcm@atalawgroup.com

19 **VITACOST.COM, INC.**

20 Steven J. Prough
21 Vice President, Legal Services
22 The Kroger Co.
23 PO Box 54143
24 Los Angeles, CA 90054
25 310-884-6016
26 steve.prough@ralphs.com

27 With a copy to:

28 Gregory P. O'Hara
Lauren M. Michals
NIXON PEABODY LLP
One Embarcadero Center
Suite 1800
San Francisco, CA 94111
gohara@nixonpeabody.com
lmichals@nixonpeabody.com
Ph 415-984-8200

1 **12. COURT APPROVAL**

2 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
3 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
4 Consent Judgment.

5 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
6 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
7 prior to the hearing on the motion.

8 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
9 void and have no force or effect.

10 **13. EXECUTION AND COUNTERPARTS**

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

14 **14. DRAFTING**

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

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

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

1 **16. ENFORCEMENT**

2 ERC may, by motion or order to show cause before the Superior Court of Alameda
3 County, enforce the terms and conditions contained in this Consent Judgment. In any action
4 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,
5 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.
6 To the extent the failure to comply with the Consent Judgment constitutes a violation of
7 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,
8 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by
9 law for failure to comply with Proposition 65 or other laws.

10 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

17 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
18 authorized by the Party he or she represents to stipulate to this Consent Judgment.

19 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
20 **CONSENT JUDGMENT**

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

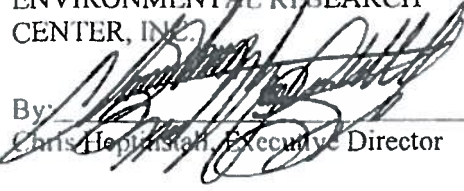
24 (1) Find that the terms and provisions of this Consent Judgment represent a fair and
25 equitable settlement of all matters raised by the allegations of the Complaint that the matter has
26 ~~been diligently prosecuted, and that the public interest is served by such settlement; and~~

27 (2) Make the findings pursuant to California Health and Safety Code section
28 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

1 **IT IS SO STIPULATED:**

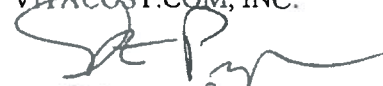
2 Dated: 11/22/, 2017

ENVIRONMENTAL RESEARCH
CENTER, INC.

By: 
Chris Hopmisten, Executive Director

6 Dated: 12/4/, 2017


VITACOST.COM, INC.

By: 
Steve Proulx
Its: Assistant Secretary

10 **APPROVED AS TO FORM:**

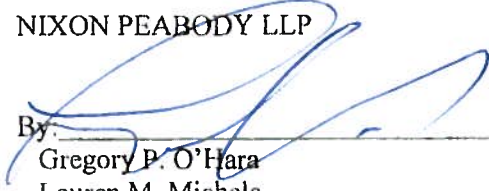
11 Dated: 11/22/, 2017

AQUA TERRA AERIS LAW GROUP

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

15 Dated: 12/15/, 2017

NIXON PEABODY LLP

By: 
Gregory P. O'Hara
Lauren M. Michals
Attorneys for Defendant Vitacost.com, Inc.

21 **ORDER AND JUDGMENT**

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

24 **IT IS SO ORDERED, ADJUDGED AND DECREED.**

25 Dated: _____, 2017

Judge of the Superior Court