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11 ENVIRONMENTAL RESEARCH CENTER, INC.

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21 Attorney for Defendant
22 SECOND WIND VITAMINS, INC.
23 dba CELEBRATE VITAMINS

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,

vs.

SECOND WIND VITAMINS, INC. dba
CELEBRATE VITAMINS and DOES 1
through 100

Defendants.

CASE NO. RG18899337

**STIPULATED CONSENT
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Complaint Filed: April 2, 2018
Trial Date: None set

1 **1. INTRODUCTION**

2 **1.1** On April 2, 2018, Plaintiff Environmental Research Center, Inc. ("ERC"), a
3 non-profit corporation, as a private enforcer and in the public interest, initiated this action by
4 filing a Complaint for Permanent Injunction, Civil Penalties and Other Relief (the
5 "Complaint") pursuant to the provisions of California Health and Safety Code section 25249.5
6 *et seq.* ("Proposition 65"), against SECOND WIND VITAMINS, INC. dba CELEBRATE
7 VITAMINS ("CELEBRATE") and DOES 1-100. In this action, ERC alleges that a number of
8 products manufactured, distributed, or sold by CELEBRATE contain lead, a chemical listed
9 under Proposition 65 as a carcinogen and reproductive toxin, and expose consumers to this
10 chemical at a level requiring a Proposition 65 warning. These products (referred to hereinafter
11 individually as a "Covered Product" or collectively as "Covered Products") are:

- 12 • Celebrate Nutritional Supplements Essential Multi 3 in 1 Celebrate ENS
13 Multivitamin and Calcium Drink Mix (Wild Cherry)
- 14 • Celebrate Nutritional Supplements Essential Multi 3 in 1 Celebrate ENS
15 Multivitamin and Calcium Drink Mix (Citrus Splash)
- 16 • Celebrate Nutritional Supplements Essential Multi 3 in 1 Celebrate ENS
17 Multi, Calcium and Fiber Powder (Raspberry-Lemonade)
- 18 • Celebrate Nutritional Supplements Essential Multi 2 in 1 Chewable
19 (Multivitamin & Calcium) (Mango)
- 20 • Celebrate Nutritional Supplements Essential Multi 2 in 1 Chewable
21 (Multivitamin & Calcium) Orange-Pineapple

22 **1.2** ERC and CELEBRATE are hereinafter referred to individually as a "Party" or
23 collectively as the "Parties."

24 **1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
25 causes, helping safeguard the public from health hazards by reducing the use and misuse of
26 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
27 and encouraging corporate responsibility.

28 **1.4** For purposes of this Consent Judgment, the Parties agree that CELEBRATE is a
business entity that employs ten or more persons and qualifies as a "person in the course of doing

1 business” within the meaning of Proposition 65. CELEBRATE manufactures, distributes, and/or
2 sells the Covered Products.

3 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
4 dated December 20, 2017 that was served on the California Attorney General, other public
5 enforcers, and CELEBRATE (“Notice”). A true and correct copy of the 60-Day Notice dated
6 December 20, 2017 is attached hereto as **Exhibit A** and is incorporated herein by reference.
7 More than 60 days have passed since the Notice was served on the Attorney General, public
8 enforcers, and CELEBRATE and no designated governmental entity has filed a complaint
9 against CELEBRATE with regard to the Covered Products or the alleged violations.

10 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes
11 persons in California to lead without first providing clear and reasonable warnings in violation
12 of California Health and Safety Code section 25249.6. CELEBRATE denies all material
13 allegations contained in the Notice and Complaint.

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

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

24 **1.9** The Effective Date of this Consent Judgment is the date on which it is entered as
25 a Judgment by this Court.

26 **2. JURISDICTION AND VENUE**

27 For purposes of this Consent Judgment and any further court action that may become
28

1 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
2 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
3 over CELEBRATE as to the acts alleged in the Complaint, that venue is proper in Alameda
4 County, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
5 resolution of all claims up through and including the Effective Date which were or could have
6 been asserted in this action based on the facts alleged in the Notice and Complaint.

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

8 **3.1** Beginning on the Effective Date, CELEBRATE shall be permanently enjoined
9 from manufacturing for sale in the State of California, "Distributing into the State of
10 California," or directly selling in the State of California, any Covered Products which expose a
11 person to a "Daily Lead Exposure Level" of more than 0.5 micrograms of lead per day unless it
12 meets the warning requirements under Section 3.2.

13 **3.1.1** As used in this Consent Judgment, the term "Distributing into the State
14 of California" shall mean to directly ship a Covered Product into California for sale in
15 California or to sell a Covered Product to a distributor that CELEBRATE knows or has reason
16 to know will sell the Covered Product in California.

17 **3.1.2** For purposes of this Consent Judgment, the "Daily Lead Exposure
18 Level" shall be measured in micrograms, and shall be calculated using the following formula:
19 micrograms of lead per gram of product, multiplied by grams of product per serving of the
20 product (using the largest serving size appearing on the product label), multiplied by servings
21 of the product per day (using the largest number of recommended daily servings appearing on
22 the label), which equals micrograms of lead exposure per day. If the label contains no
23 recommended daily servings, then the number of recommended daily servings shall be one.

24 **3.2 Clear and Reasonable Warnings**

25 If CELEBRATE is required to provide a warning pursuant to Section 3.1, the following
26 warning must be utilized ("Warning"):

27 **WARNING:** Consuming this product can expose you to chemicals including lead, which is
28 [are] known to the State of California to cause [cancer and] birth defects or other

1 reproductive harm. For more information go to www.P65Warnings.ca.gov/food.

2 CELEBRATE shall use the phrases "are" and/or "cancer and" in the Warning if CELEBRATE
3 has reason to believe that the "Daily Lead Exposure Level" is greater than 15 micrograms of lead
4 as determined pursuant to the quality control methodology set forth in Section 3.4 or if
5 CELEBRATE has reason to believe that another Proposition 65 chemical is present which may
6 require a cancer warning.

7 The Warning shall be provided to California consumers prior to the purchase of each
8 Covered Product, whether it be online or on label. If the Warning is provided on the label, it
9 must be set off from other surrounding information and enclosed in a box. If the Warning is
10 provided online, for any Covered Product sold over the internet where a California delivery
11 address is indicated, the Warning shall be provided either by including the Warning on the
12 product display page, by otherwise prominently displaying the Warning to the purchaser on the
13 checkout page prior to completing the purchase, or by any other means authorized under Section
14 25602 of Title 27 of the California Code of Regulations. An asterisk or other identifying method
15 must be utilized to identify which products on the checkout page are subject to the Warning.

16 The Warning shall be at least the same size as the largest of any other health or safety
17 warnings also appearing on the page where the Warning appears online or on the label or container
18 of CELEBRATE'S product packaging, and the word "**WARNING**" shall be in all capital letters
19 and in bold print. No statements intended to or likely to have the effect of diminishing the impact
20 of, or reducing the clarity of, the Warning on the average lay person shall accompany the Warning.
21 Further, no statements may accompany the Warning that state or imply that the source of the listed
22 chemical has an impact on or results in a less harmful effect of the listed chemical.

23 CELEBRATE must display the above Warning with such conspicuousness, as compared
24 with other words, statements or designs on the label or container, or on its website, if applicable, to
25 render the Warning likely to be read and understood by an ordinary individual under customary
26 conditions of purchase or use of the product.

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Accreditation Program or an independent third-party laboratory that is registered with the United States Food & Drug Administration.

3.4.5 Nothing in this Consent Judgment shall limit CELEBRATE'S ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw materials used in their manufacture.

3.4.6 Within thirty (30) days of ERC's written request, CELEBRATE shall deliver lab reports obtained pursuant to Section 3.4 to ERC. CELEBRATE shall retain all test results and documentation for a period of three (3) years from the date of each test. ERC shall treat all documents provided by CELEBRATE pursuant to this Section as confidential.

3.4.7 The requirements of Section 3.4 of this Consent Judgment shall not apply to any Covered Products for which a Warning is provided, continuously and without interruption, pursuant to Section 3.

4. SETTLEMENT PAYMENT

4.1 In full satisfaction of all potential civil penalties, additional settlement payments, attorney's fees, and costs, CELEBRATE shall make a total payment of \$37,500.00 ("Total Settlement Amount") to ERC within 5 days of the Effective Date ("Due Date"). CELEBRATE shall make this payment by wire transfer to ERC's account, for which ERC will give CELEBRATE the necessary account information. The Total Settlement Amount shall be apportioned as follows:

4.2 \$2,000.00 shall be considered a civil penalty pursuant to California Health and Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$1,500.00) of the civil penalty to the Office of Environmental Health Hazard Assessment ("OEHHA") 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% (\$500.00) of the civil penalty.

4.3 \$3,384.00 shall be distributed to ERC as reimbursement to ERC for reasonable costs incurred in bringing this action.

4.4 \$4,966.45 shall be distributed to Michael Freund as reimbursement of ERC's attorney's fees, \$8,296.35 shall be distributed to Ryan Hoffman as reimbursement of ERC's attorney's fees, while \$18,853.20 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.

4.6 In the event that CELEBRATE fails to remit the Total Settlement Amount owed under Section 4 of this Consent Judgment on or before the Due Date, CELEBRATE shall be deemed to be in material breach of its obligations under this Consent Judgment. ERC shall provide written notice of the delinquency to CELEBRATE via electronic mail. If CELEBRATE fails to deliver the Total Settlement Amount within five (5) days from the written notice, the Total Settlement Amount shall accrue interest at the statutory judgment interest rate provided in the California Code of Civil Procedure section 685.010. Additionally, CELEBRATE agrees to pay ERC's reasonable attorney's fees and costs for any efforts to collect the payment due under this Consent Judgment.

5. MODIFICATION OF CONSENT JUDGMENT

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

5.2 If CELEBRATE seeks to modify this Consent Judgment under Section 5.1, then CELEBRATE must provide written notice to ERC of its intent ("Notice of Intent"). If ERC seeks to meet and confer regarding the proposed modification in the Notice of Intent, then ERC must provide written notice to CELEBRATE within thirty (30) days of receiving the Notice of Intent. If ERC notifies CELEBRATE in a timely manner of ERC's intent to meet and confer, then the Parties shall meet and confer in good faith as required in this Section. The Parties shall meet in person or via telephone within thirty (30) days of ERC's notification of its intent to meet and confer. Within thirty (30) days of such meeting, if ERC disputes the proposed modification, ERC shall provide to CELEBRATE a written basis for its position. The Parties

1 shall continue to meet and confer for an additional thirty (30) days in an effort to resolve any
2 remaining disputes. Should it become necessary, the Parties may agree in writing to different
3 deadlines for the meet-and-confer period.

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

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

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

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

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

1 retailers, predecessors, successors, and assigns. This Consent Judgment shall have no
2 application to any Covered Product 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 CELEBRATE and its respective officers,
7 directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers,
8 franchisees, licensees, customers (not including private label customers of CELEBRATE),
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, on behalf of itself and in the public interest,
12 hereby fully releases and discharges the Released Parties from any and all claims, actions,
13 causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses
14 asserted, or that could have been asserted from the handling, use, or consumption of the
15 Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations
16 arising from the failure to provide Proposition 65 warnings on the Covered Products regarding
17 lead up to and including the Effective Date.

18 **8.2** ERC on its own behalf only, and CELEBRATE 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 CELEBRATE 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 CELEBRATE 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 CELEBRATE 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 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
16 CELEBRATE'S 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 ///

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

2 Chris Heptinstall, Executive Director
3 Environmental Research Center
4 3111 Camino Del Rio North, Suite 400
5 San Diego, CA 92108
6 Email: chris_crc501c3@yahoo.com

7 With a copy to:
8 Michael Freund
9 Ryan Hoffman
10 Michael Freund & Associates
11 1919 Addison Street, Suite 105
12 Berkeley, CA 94704
13 Telephone: 510-540-1992
14 Facsimile: 510-540-5543
15 Email: freund1@aol.com
16 Email: rrhoffma@gmail.com

17 **FOR SECOND WIND VITAMINS, INC. DBA CELEBRATE VITAMINS**

18 Vic Giaconia, President
19 Second Wind Vitamins, Inc.
20 516 Corporate Parkway
21 Wadsworth, OH 44281

22 With a copy to:
23 Anthony J. Cortez
24 Sean Newland
25 Greenberg Traurig, LLP
26 1201 K Street, Suite 1100
27 Sacramento, CA 95814-3938
28 Telephone: 916-442-1111
Facsimile: 916-448-1709
Email: cortezan@gtlaw.com
Email: newlands@gtlaw.com

12. **COURT APPROVAL**

12.1 Upon execution of this Consent Judgment by the Parties, ERC shall notice a
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.

13. EXECUTION AND COUNTERPARTS

This Consent Judgment 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.

14. DRAFTING

The terms of this Consent Judgment have been reviewed by the respective counsel for each Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation and construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn, and no provision of this Consent Judgment 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 Consent Judgment. It is conclusively presumed that all of the Parties participated equally in the preparation and drafting of this Consent Judgment.

15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES

If a dispute arises with respect to either Party's compliance with the terms of this Consent Judgment entered by the Court, 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.

16. ENFORCEMENT

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

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

4 **17. ENTIRE AGREEMENT, AUTHORIZATION**

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

11 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
12 authorized by the Party he or she represents to stipulate to this Consent Judgment.

13 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
14 **CONSENT JUDGMENT**

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

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

21 (2) Make the findings pursuant to California Health and Safety Code section
22 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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1 **IT IS SO STIPULATED:**

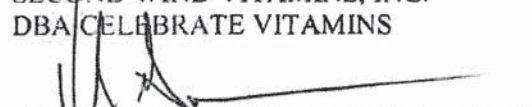
2 Dated: 11/28/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

By: 
Chris Heppington, Executive Director

6 Dated: Nov. 26, 2018

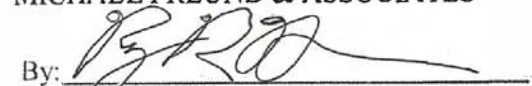
SECOND WIND VITAMINS, INC.
DBA CELEBRATE VITAMINS

By: 
Vic Giaconia
Its: President

11 **APPROVED AS TO FORM:**

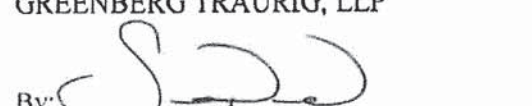
12 Dated: 11/28, 2018

MICHAEL FREUND & ASSOCIATES

By: 
Michael Freund
Ryan Hoffinan
Attorneys for Plaintiff Environmental
Research Center, Inc.

18 Dated: Nov. 27, 2018

GREENBERG TRAURIG, LLP

By: 
Anthony Cortez
Sean Newland
Attorney for Second Wind Vitamins, Inc.
dba Celebrate Vitamins

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ORDER AND JUDGMENT

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

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: _____, 2018 _____
Judge of the Superior Court