

## **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 Community Science Institute (“CSI”) and Metagenics, Inc. (“Metagenics”). CSI and Metagenics 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 Metagenics dated January 18, 2018 that was served on Metagenics, the California Attorney General, and other public enforcers (“Notice”). A true and correct copy of the 60-Day Notice dated January 18, 2018 is attached hereto as **Exhibit A** and incorporated herein by reference. In the Notice, CSI alleges that a product, UltraGI Replenish Vanilla (the “Product”) was manufactured, distributed, or sold by Metagenics and contains lead, a chemical listed under Proposition 65 as a carcinogen, and that the Product exposes consumers to lead at a level requiring a Proposition 65 warning.

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

**1.3** 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 CSI or Metagenics of any fact, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Metagenics of any fact, issue of law or violation of law. 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 Metagenics 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. This Agreement is the product of negotiation and compromise and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues disputed in this matter and shall not be used for any purpose except to enforce the terms of this Agreement. The Parties agree that this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties under this Agreement.

**1.4** Community Science Institute represents that it is an unincorporated association whose mission is to unite consumers and industrial neighbors to reform government and industry practices for a toxic free future.

**1.5** Defendant Metagenics, Inc. allegedly manufactures, distributes, and/or sells the Product.

**1.6** For purposes of this Agreement, the Parties agree that Metagenics, Inc. 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.

**1.7** CSI’s Notice alleges that use of the Product exposes persons in California to lead without first providing clear and reasonable warnings in violation of California Health and Safety Code Section 25249.6. Metagenics denies all material allegations contained in the Notice.

**1.8** 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 the Notice.

**1.9** The Effective Date of this Agreement is the date on which it is fully executed by all Parties. The Compliance Date is ninety (90) days after the Effective Date.

## **2. METAGENICS’ DUTIES**

**2.1** Beginning on the Effective Date, Metagenics shall be permanently enjoined from manufacturing or causing the Product to be manufactured for sale in the State of California, “Distributing the Product into the State of California,” or directly selling the Product in the State of California if doing so exposes a person to a “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day when the maximum suggested dose is taken as directed on the Product’s label unless it meets the warning requirements of Section 2.2.

**2.1.1** As used in this Consent Judgment, the term “Distributing the Product into the State of California” shall mean to knowingly and intentionally directly ship the Product into California for sale in California or to sell a Product to a distributor that Metagenics knows will sell the Product in California.

**2.1.2** For purposes of this Agreement, the “Daily Lead Exposure Level” shall be measured in micrograms, and shall be calculated using the following formula: micrograms of lead per gram of product, multiplied by grams of product per serving of the product (using the largest serving size appearing on the product label), multiplied by servings of the product per day (using the largest number of servings in a recommended dosage appearing on the product label), which equals micrograms of lead exposure per day.

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

If Metagenics is required to provide a warning pursuant to Section 2.1, the following warning must be utilized (the “Warning”):

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

Or

Any other warning that complies with Title 27, Cal. Code Regs., § 25607.2

Metagenics shall use the phrase “cancer and” in the Warning if Metagenics has reason to believe that the “Daily Lead Exposure Level” is greater than 15 micrograms of lead as determined pursuant to the quality control methodology set forth in Section 2.4 or if Metagenics has reason to believe that another Proposition 65 chemical is present which may require a cancer warning.

The method of transmission for the warning shall comply with Tit. 27, Cal. Code Regs. §25607.1. In addition, for any Product sold over the internet to consumers by Metagenics, the Warning shall appear on the checkout page, primary display page or a pop-up window when a California delivery address is indicated for any purchase of the Product. An asterisk or other identifying method must be utilized to identify which products on the checkout page are subject to the Warning. Nothing in this paragraph relieves Metagenics from complying with section 27 CCR 25600.2 when selling the product to a retailer. The Warning shall be at least the same size as the largest of any other health or safety warnings also appearing on the checkout page, primary display page or pop-up window from its website or on the label or container of Metagenics’ product packaging and the word “**WARNING**” shall be in all capital letters and in bold print. No statements may accompany the Warning that state or imply that the source of the listed chemical has an impact on or results in a less harmful effect of the listed chemical. The warning content may contain information that is supplemental to the content required by this agreement only to the extent that it identifies the source of the exposure or provides information on how to avoid or reduce exposure to the identified chemical or chemicals. Such supplemental information is not a substitute for the warning content required by this agreement.

Metagenics 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.

## **2.3 Reformulated Product**

A Reformulated Product is a Product for which the “Daily Lead Exposure Level” is no greater than 0.5 micrograms of lead per day as determined by the quality control methodology described in Section 2.4.

## **2.4 Testing and Quality Control Methodology**

**2.4.1** Beginning within one year of the Effective Date, Metagenics shall arrange for lead testing of the Product for which a warning is not being provided pursuant to Section 2.1 at least once a year for a minimum of three consecutive years by arranging for testing

of five randomly selected samples of the Product, in the form intended for sale to the end-user, which Metagenics intends to sell or is manufacturing for sale in California, directly selling to a consumer in California or “Distributing into the State of California.” If tests conducted pursuant to this Section demonstrate that no Warning is required for the Product during each of three consecutive years, then the testing requirements of this Section will no longer be required. However, if during or after the three-year testing period, Metagenics changes ingredient suppliers for the Product and/or reformulates the Product, Metagenics shall test the Product annually for at least two (2) consecutive years after such change is made.

**2.4.2** For purposes of measuring the “Daily Lead Exposure Level,” the average lead detection result of the five (5) randomly selected samples of the Product will be controlling.

**2.4.3** All testing pursuant to this Agreement shall be performed using a laboratory method that complies with the performance and quality control factors appropriate for the method used, including limit of detection, qualification, accuracy, and precision that meets the following criteria: Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”) achieving a limit of quantification of less than or equal to 0.010 mg/kg.

**2.4.4** All testing pursuant to this Agreement shall be performed by an independent third party laboratory certified by the California Environmental Laboratory Accreditation Program or an independent third-party laboratory that is registered with the United States Food & Drug Administration.

**2.4.5** Nothing in this Agreement shall limit Metagenics’ ability to conduct, or require that others conduct, additional testing of the Product, including the raw materials used in their manufacture.

**2.4.6** Within thirty (30) days of CSI’s written request (which shall not be made more than once per year), Metagenics shall deliver lab reports obtained pursuant to Section 2.4 to CSI. Metagenics shall retain all test results and documentation for a period of three years from the date of each test. This section will sunset eight (8) years after the Effective Date.

### **3. SETTLEMENT PAYMENT**

**3.1** In full satisfaction of all potential civil penalties, additional settlement payments, attorney’s fees and costs (including, but not limited to, fees and costs incurred by attorneys, experts, and investigators), Metagenics shall make a total payment of \$37,500.00 (“Total Settlement Amount”) to CSI within fifteen (15) calendar days of the Effective Date (“Due Date”). Metagenics shall make this payment by a check made payable to Lozeau Drury LLP and delivered to Lozeau Drury LLP, 410 12th Street, Suite 250, Oakland, California 94607. The Total Settlement Amount shall be apportioned as follows:

**3.2** \$16,135.00 shall be considered a civil penalty pursuant to California Health and Safety Code section 25249.7(b)(1). CSI shall remit 75% (\$12,101.25) 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). CSI will retain the remaining 25% (\$4,033.75) of the civil penalty.

**3.3** \$21,365.00 shall be distributed to Lozeau Drury LLP as reimbursement of CSI's attorney's fees and reasonable costs incurred in bringing this action. Except as explicitly provided herein, each Party shall bear its own fees and costs.

**3.4** In the event that Metagenics fails to remit the Total Settlement Amount owed under Section 3 of this Agreement on or before the Due Date, Metagenics shall be deemed to be in material breach of its obligations under this Agreement. CSI shall provide written notice of the delinquency to Metagenics via electronic mail. If Metagenics 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.

#### **4. ENFORCEMENT**

**4.1** The Parties agree that any legal action to enforce this Agreement shall be brought in Alameda County Superior Court. The Parties agree that Alameda County Superior Court has subject matter jurisdiction over the enforcement of this Agreement and personal jurisdiction over Metagenics, and that venue is proper in Alameda County.

**4.2** If CSI alleges that the Product for which a warning is not being provided pursuant to Section 2.1 fails to qualify as a Reformulated Product (for which CSI alleges that no Warning has been provided), then CSI shall inform Metagenics in a reasonably prompt manner of its test results. Metagenics shall, within thirty (30) days following such notice, provide CSI with testing information, from an independent third-party laboratory meeting the requirements of Sections 2.4.3 and 2.4.4, demonstrating Metagenics' compliance with this Agreement, if warranted. The Parties shall attempt to resolve the matter by meeting and conferring prior to taking any further legal action.

**4.3** If CSI alleges that the Product for which a Warning is being provided does not comply with the terms of Section 2.2, then CSI shall inform Metagenics in a reasonably prompt manner of the alleged deficiency. The Parties shall attempt to resolve the matter by meeting and conferring prior to taking any further legal action.

**4.4** 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. APPLICATION**

This Agreement shall apply to, be binding upon, and benefit the Parties and their respective officers, directors, attorneys, shareholders, employees, agents, parent companies, subsidiaries, divisions, franchisees, licensees, customers, distributors, wholesalers, retailers,

predecessors, successors, and assigns. This Agreement shall have no application to any Product which is distributed or sold outside the State of California.

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

**6.1** This Agreement is a full, final, and binding resolution between CSI and Metagenics and its officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, suppliers, franchisees, licensees, customers, manufacturers, distributors, wholesalers, retailers, and all other upstream and downstream entities in the distribution chain of the Product, and the predecessors, successors, and assigns of any of them (collectively, “Released Parties”). CSI 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 Product, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings on the Product regarding lead for Product manufactured, distributed, or sold prior to the Compliance Date.

**6.2** CSI and Metagenics each 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 claims in the Notice with respect to Product manufactured, distributed, or sold prior to the Compliance Date, provided, however, that nothing in Section 6 shall affect or limit any Party’s right to seek to enforce the terms of this Agreement.

**6.3** It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice, and relating to the Product, will develop or be discovered. CSI and Metagenics 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. CSI and Metagenics acknowledge that the claims released in Sections 6.1 and 6.2 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.

CSI and Metagenics acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

**6.4** Compliance with the terms of this Agreement shall be deemed to constitute compliance with Proposition 65 by any Released Party regarding alleged exposures to lead in the Product manufactured, distributed, or sold on or after the Compliance Date. 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 Metagenics’ products other than the Product.

## **7. SEVERABILITY AND 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.

## **8. 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.

## **9. 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 email and first-class mail.

### **For Community Science Institute:**

Rebecca L. Davis  
LOZEAU | DRURY LLP  
410 12th Street, Suite 250  
Oakland, CA 94607  
Ph: 510-836-4200  
Fax: 510-836-4205  
Email: [rebecca@lozeaudrury.com](mailto:rebecca@lozeaudrury.com)

### **For Metagenics, Inc.:**

Paul Konney  
General Counsel  
Metagenics, Inc.  
25 Enterprise  
Ste. 200  
Aliso Viejo CA 92656

## **10. 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.

## **11. 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.

## **12. 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.

## **13. ENTIRE AGREEMENT, AUTHORIZATION**

**13.1** 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.

**13.2** 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.

Dated: 12/9, 2018

COMMUNITY SCIENCE INSTITUTE

By: Denny A. Larson  
Denny Larson  
Executive Director

Metagenics, Inc.

Dated: \_\_\_\_\_, 2018

By: \_\_\_\_\_  
Its: \_\_\_\_\_



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**13.2** 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.

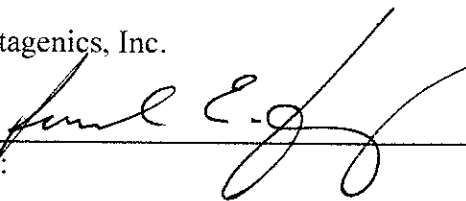
Dated: \_\_\_\_\_, 2018

COMMUNITY SCIENCE INSTITUTE

By: \_\_\_\_\_  
Denny Larson  
Executive Director

Dated: Jan. 9, 2018<sup>9</sup>

Metagenics, Inc.


By:   
Its: \_\_\_\_\_

Paul E. Koney  
Executive Vice President  
& General Counsel

**APPROVED AS TO FORM:**

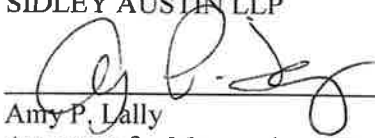
Dated: Dec. 4, 2018

LOZEAU DRURY LLP

  
\_\_\_\_\_  
Rebecca L. Davis  
Attorneys for Community Science  
Institute

Dated: 1-9, 2018<sup>9</sup>

SIDLEY AUSTIN LLP

  
\_\_\_\_\_  
Amy P. Lally  
Attorneys for Metagenics, Inc.