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CENTER FOR ENVIRONMENTAL HEALTH
8

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF MARIN

11 CENTER FOR ENVIRONMENTAL HEALTH,
12

13 Plaintiff,

14 v.

15 LUCKY VITAMIN, LLC, *et al.*,

16 Defendants.
17

Case No. CIV 1900778

Assigned for all purposes to Judge
Andrew E. Sweet

**[PROPOSED] CONSENT
JUDGMENT AS TO NUTS.COM,
INC.**

1 **1. INTRODUCTION**

2 1.1. The Parties to this Consent Judgment are the Center for Environmental Health
3 (“CEH”), a California non-profit corporation, and Nuts.com, Inc. (“Settling Defendant”). CEH
4 and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain claims
5 asserted by CEH against Settling Defendant as set forth in the operative complaint (“Complaint”)
6 in the above-captioned matter. This Consent Judgment covers moringa products that are sold and
7 offered for sale by Settling Defendant to individuals in California.

8 1.2. On September 13, 2018, CEH provided a 60-day Notice of Violation under
9 Proposition 65 to Settling Defendant, the California Attorney General, the District Attorneys of
10 every county in California and the City Attorneys of every California city with a population
11 greater than 750,000, alleging that Settling Defendant violated Proposition 65 by exposing
12 persons to lead and lead compounds contained in moringa products without first providing a clear
13 and reasonable Proposition 65 warning.

14 1.3. On February 27, 2019, CEH filed the Complaint in the above-captioned matter,
15 which named Settling Defendant as a defendant.

16 1.4. Settling Defendant is a corporation that sells and offers for sale moringa products
17 to individuals in the State of California.

18 1.5. For purposes of this Consent Judgment only, the Parties stipulate that this Court
19 has jurisdiction over the allegations of violations contained in the Complaint and personal
20 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in
21 the County of Marin, and that this Court has jurisdiction to enter and enforce this Consent
22 Judgment as a full and final resolution of all claims which were or could have been raised in the
23 Complaint based on the facts alleged therein with respect to moringa products sold by Settling
24 Defendant.

25 1.6. Nothing in this Consent Judgment is or shall be construed as an admission by the
26 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
27 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
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1 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
2 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
3 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
4 and compromise and is accepted by the Parties solely for purposes of settling, compromising and
5 resolving issues disputed in this action.

6 **2. DEFINITIONS**

7 2.1. “Covered Products” means moringa sold in powder, capsule or other form.

8 2.2. “Effective Date” means the date on which the Court enters this Consent Judgment
9 as a final judgment.

10 2.3. “Lead” means lead and lead compounds.

11 2.4. “Lead Limit” means a concentration of Lead at which an individual who ingests a
12 Covered Product in accordance with the maximum daily serving size listed on the Covered
13 Product’s packaging will not be exposed to more than 0.5 micrograms of Lead. The Lead Limit
14 shall be measured in micrograms, and shall be calculated using the following formula:
15 micrograms of Lead per gram of the Covered Product (parts per million), multiplied by grams per
16 serving of the Covered Product (using the largest serving size appearing on the Covered Product’s
17 packaging), multiplied by servings of the Covered Product per day (using the largest number of
18 servings in the recommended dosage appearing on the Covered Product’s packaging), which
19 equals micrograms of Lead exposure per day. If a Covered Product does not list a serving size on
20 the Covered Product packaging, the default Lead Limit shall be 50 parts per billion. To make this
21 determination, the Lead concentrations shall be determined by use of a test performed by an
22 accredited laboratory using inductively coupled plasma mass spectrometry (ICP-MS) equipment.

23 **3. INJUNCTIVE RELIEF**

24 3.1. **Clear and Reasonable Warnings.** After the Effective Date, Settling Defendant
25 shall not manufacture, ship, sell or offer for sale any Covered Product that contains Lead in
26 excess of the Lead Limit that will be sold or offered for sale in California unless Settling
27
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Defendant provides a Clear and Reasonable Warning that complies with the provisions of this Section 3.

3.1.1. **Warning Language.** A Clear and Reasonable Warning under this Agreement shall state:



WARNING: Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause cancer.

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

The cautionary symbol (as depicted in this section) is mandatory. The cautionary symbol used by Settling Defendant does not need to be presented in any particular color or size, and it may vary in appearance from the symbol depicted in this section.

3.1.2. **Placement of Warning Language.** The warning language set forth in Section 3.1.1 must be displayed with such conspicuousness as compared with other words, statements, designs or devices as to render the warning likely to be read and understood by an ordinary consumer under customary conditions of purchase and use. The warning language shall appear on the Covered Product's label, set off from other surrounding information or enclosed in a box. If the Covered Product's label contains other warnings or nutritional information in a language other than English, the warning language set forth in Section 3.1.1 must also be displayed on the label in that language in addition to English.

3.1.3. **Internet Sales.** With respect to internet sales of Covered Products, the warning language set forth in Section 3.1.1 must be prominently displayed in such a manner that it is likely to be read and understood as being applicable to the Covered Product being sold prior to the authorization of or actual payment by the purchaser. For purposes of this Section 3.1.3, the warning language is not prominently displayed if the customer must search for the warning language in the general content of Settling Defendant's website or if a reasonable consumer cannot determine the specific Covered Product to which the warning applies. If the product display page contains other warnings or nutritional information in a language other than English,

1 the warning language set forth in Section 3.1.1 must also be displayed on the label in that
2 language in addition to English.

3 **4. ENFORCEMENT**

4 4.1. **Enforcement Procedures.** This Court shall have exclusive jurisdiction over all
5 matters regarding enforcement of the Consent Judgment. Prior to bringing any motion or order to
6 show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
7 provide the violating party thirty (30) days advanced written notice of the alleged violation. The
8 Parties shall meet and confer during such thirty (30) day period in an effort to try to reach
9 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the
10 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
11 Court of Marin, seek to enforce Proposition 65 or the terms and conditions contained in this
12 Consent Judgment.

13 4.2. **Failure to Comply With Payment Obligations.** Notwithstanding the provisions
14 of the Enforcement of Judgments Law and CCP §780.160, in the event that Settling Defendant
15 does not comply fully with its payment obligations under Section 5, in addition to any other
16 enforcement mechanism available to CEH, CEH may obtain an order requiring Settling
17 Defendants to submit to a debtors exam. In the event that Settling Defendants fail to submit to
18 any such Debtors Exam ordered by the Court, CEH may seek an order holding Settling Defendant
19 in contempt of Court.

20 **5. PAYMENTS**

21 5.1. **Payments by Settling Defendant.** On or before five (5) days after the entry of
22 this Consent Judgment, Settling Defendant shall pay the total sum of \$20,000 as a settlement
23 payment as further set forth in this Section.

24 5.2. **Allocation of Payments.** The total settlement amount shall be paid in five (5)
25 separate checks in the amounts specified below and delivered as set forth below. Any failure by
26 Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late
27 fee to be paid by Settling Defendant in the amount of \$100 for each day the full payment is not
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1 received after the applicable payment due date set forth in Section 5.1. The late fees required
2 under this Section shall be recoverable, together with reasonable attorneys' fees, in an
3 enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid
4 by Settling Defendant shall be allocated as set forth below between the following categories and
5 made payable as follows:

6 5.2.1. Settling Defendant shall pay \$2,613 as a civil penalty pursuant to Health &
7 Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with
8 Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
9 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, Settling Defendant shall
10 pay the OEHHA portion of the civil penalty payment for \$1,961 by check made payable to
11 OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be
12 delivered as follows:

13 For United States Postal Service Delivery:
14 Attn: Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
 P.O. Box 4010, MS #19B
 Sacramento, CA 95812-4010

17 For Non-United States Postal Service Delivery:
18 Attn: Mike Gyurics
19 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street, MS #19B
 Sacramento, CA 95814

20 Settling Defendant shall pay the CEH portion of the civil penalty payment for \$652 by check
21 made payable to the Center for Environmental Health and associated with taxpayer identification
22 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
23 Street, San Francisco, CA 94117.

24 5.2.2. Settling Defendant shall pay \$1,959 as an Additional Settlement Payment
25 ("ASP") to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
26 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH's Toxics in Food Fund
27 and use them to support CEH programs and activities that seek to educate the public about Lead
28

1 and other toxic chemicals in food and dietary supplements, to work with the food and dietary
2 supplements industry and agriculture interests to reduce exposure to Lead and other toxic
3 chemicals, and to thereby reduce the public health impacts and risks of exposure to Lead and
4 other toxic chemicals in food and dietary supplements sold in California. CEH shall obtain and
5 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to
6 provide such documentation to the Attorney General within thirty days of any request from the
7 Attorney General. The payment pursuant to this Section shall be made payable to the Center for
8 Environmental Health and associated with taxpayer identification number 94-3251981. This
9 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
10 94117.

11 5.2.3. Settling Defendant shall pay \$15,428 as a reimbursement of a portion of
12 CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be
13 made in two separate checks as follows: (a) \$12,942 payable to the Lexington Law Group and
14 associated with taxpayer identification number 94-3317175; and (b) \$2,486 payable to the Center
15 for Environmental Health and associated with taxpayer identification number 94-3251981. Both
16 of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San
17 Francisco, CA 94117.

18 5.2.4. To summarize, Settling Defendant shall deliver checks made out to the
19 payees and in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$1,961	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$652_____	LLG
Center For Environmental Health	ASP	\$1,959	LLG
Lexington Law Group	Fees and Costs	\$12,942	LLG
Center For Environmental Health	Fees and Costs	\$2,486	LLG

6. MODIFICATION OF CONSENT JUDGMENT

Modification. This Consent Judgment may be modified from time to time by express written agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion and in accordance with law. One example of a potential ground for modification is Settling Defendant's contention that Proposition 65 has been changed, narrowed, limited, or otherwise rendered inapplicable in whole or in part to the Covered Product, the warning requirements, and/or the Lead Limit due to legislative change, a change in the implementing regulations, court decisions, and/or any other legal basis. The Parties may, but are not required to, modify this Consent Judgment to reflect the changes.

6.1. **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

7. CLAIMS COVERED AND RELEASE

7.1. Provided that Settling Defendant complies in full with its obligations under Section 5, this Consent Judgment is a full, final and binding resolution between CEH on behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, shareholders, successors, assigns and attorneys ("Defendant Releasees"), and all entities to which Settling Defendant directly or indirectly sells Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, licensors and licensees ("Downstream Defendant Releasees"), of any violation of Proposition 65 based on failure to warn about exposure to Lead contained in Covered Products that were sold, offered for sale, shipped, distributed, used or otherwise provided to customers by Settling Defendant prior to the Effective Date.

7.2. Provided that Settling Defendant complies in full with its obligations under Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever discharges any and all claims against each Settling Defendant, Defendant Releasees and Downstream Defendant Releasees arising from any violation of Proposition 65 or any other

1 statutory or common law claims that have been or could have been asserted by CEH individually
2 or in the public interest regarding the failure to warn about exposure to Lead contained in
3 Covered Products that were sold, offered for sale, shipped, distributed, used or otherwise
4 provided to customers by Settling Defendant prior to the Effective Date.

5 7.3. Provided that Settling Defendant complies in full with its obligations under
6 Section 5, compliance with the terms of this Consent Judgment by Settling Defendant and its
7 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
8 Defendant, its Defendant Releasees and its Downstream Defendant Releasees with respect to any
9 alleged failure to warn about Lead contained in Covered Products sold, offered for sale, shipped,
10 distributed, used or otherwise provided to customers by Settling Defendant after the Effective
11 Date.

12 **8. PROVISION OF NOTICE**

13 8.1. When CEH is entitled to receive any notice under this Consent Judgment, the
14 notice shall be sent by first class and electronic mail to:

15 Eric S. Somers
16 Lexington Law Group
17 503 Divisadero Street
18 San Francisco, CA 94117
19 esomers@lexlawgroup.com

20 8.2. When Settling Defendant is entitled to receive any notice under this Consent
21 Judgment, the notice shall be sent by first class and electronic mail to:

22 Carol Brophy
23 Steptoe & Johnson LLP
24 1 Market Street | Spear Tower, Suite 3900
25 San Francisco, California 94105
26 cbrophy@steptoe.com

27 8.3. Any Party may modify the person and address to whom the notice is to be sent by
28 sending the other Party notice by first class and electronic mail.

29 **9. COURT APPROVAL**

30 9.1. This Consent Judgment shall become effective as a contract upon the date signed
31 by CEH and Settling Defendant, whichever is later, provided however, that CEH shall also

1 prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall
2 support approval of such Motion, so long as it is consistent with the terms of this Agreement.

3 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
4 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
5 purpose.

6 **10. GOVERNING LAW AND CONSTRUCTION**

7 10.1. The terms of this Consent Judgment shall be governed by the laws of the State of
8 California.

9 **11. ATTORNEYS' FEES**

10 11.1. A Party who unsuccessfully brings or contests an action arising out of this Consent
11 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
12 unless the unsuccessful Party has acted with substantial justification. For purposes of this
13 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
14 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

15 11.2. Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
16 action brought pursuant to Section 4 may seek an award of attorneys' fees pursuant to Code of
17 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
18 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
19 provision shall not be construed as altering any procedural or substantive requirements for
20 obtaining such an award.

21 11.3. Nothing in this Section 11 shall preclude a party from seeking an award of
22 sanctions pursuant to law.

23 **12. ENTIRE AGREEMENT**

24 12.1. This Consent Judgment contains the sole and entire agreement and understanding
25 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
26 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
27 and therein. There are no warranties, representations, or other agreements between the Parties
28

1 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
2 other than those specifically referred to in this Consent Judgment have been made by any Party
3 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
4 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
5 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
6 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
7 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
8 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
9 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
10 whether or not similar, nor shall such waiver constitute a continuing waiver.

11 **13. RETENTION OF JURISDICTION**

12 13.1. This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 **14. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

15 14.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
16 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
17 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

18 **15. SUCCESSORS AND ASSIGNS**

19 15.1. This Consent Judgment shall apply to and be binding upon CEH and Settling
20 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
21 assigns of any of them.


22 **16. NO EFFECT ON OTHER SETTLEMENTS**

23 16.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
24 against an entity that is not Settling Defendant on terms that are different than those contained in
25 this Consent Judgment.

1 **17. EXECUTION IN COUNTERPARTS**

2 17.1. The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

5 **IT IS SO STIPULATED:**

Dated: <u>12/5</u> , 2019	CENTER FOR ENVIRONMENTAL HEALTH  <u>Michael Green</u> Printed Name <u>CEO</u> Title
Dated: _____, 2019	DEFENDANT NUTS.COM, INC. _____ Printed Name _____ Title

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3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

5 **IT IS SO STIPULATED:**

6
7 Dated: ~~11/18~~, 2019

CENTER FOR ENVIRONMENTAL HEALTH

8
9
10
11
12 Printed Name

13
14
15 Title

16 Dated: 11/18, 2019

DEFENDANT NUTS.COM, INC.

17
18
19
20 Printed Name

21
22
23 Title

1 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

2
3 Dated: _____, 2019

4 _____
Judge of the Superior Court of California