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CENTER FOR ENVIRONMENTAL HEALTH

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL HEALTH,
Plaintiff,
v.
LUCKY VITAMIN, LLC, *et al.*,
Defendants.

Case No. CIV 1900778
Assigned for all purposes to Judge
Andrew E. Sweet
**[PROPOSED] CONSENT
JUDGMENT AS TO SUNFOOD
CORPORATION**

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 Sunfood Corporation (“Settling Defendant”).
4 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain
5 claims asserted by CEH against Settling Defendant as set forth in the operative complaint
6 (“Complaint”) in the above-captioned matter. This Consent Judgment covers moringa products
7 that are sold and offered for sale by Settling Defendant to individuals in California.

8 1.2. On November 20, 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. **Reformulation of Covered Products.** After the Effective Date, Settling
25 Defendant shall not manufacture, ship, sell or offer for sale any Covered Product that contains
26 Lead in excess of the Lead Limit that will be sold or offered for sale in California.

1 **4. ENFORCEMENT**

2 4.1. **Enforcement Procedures.** This Court shall have exclusive jurisdiction over all
3 matters regarding enforcement of the Consent Judgment. Prior to bringing any motion or order to
4 show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
5 provide the violating party thirty (30) days advanced written notice of the alleged violation. The
6 Parties shall meet and confer during such thirty (30) day period in an effort to try to reach
7 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the
8 Party seeking to enforce may, by new action, motion or order to show cause before the Superior
9 Court of Marin, seek to enforce Proposition 65 or the terms and conditions contained in this
10 Consent Judgment.

11 4.2. **Failure to Comply With Payment Obligations.** Notwithstanding the provisions
12 of the Enforcement of Judgments Law and C.C.P. §780.160, in the event that Settling Defendant
13 does not comply fully with its payment obligations under Section 5, in addition to any other
14 enforcement mechanism available to CEH, CEH may obtain an order requiring Settling
15 Defendants to submit to a debtors exam. In the event that Settling Defendants fail to submit to
16 any such Debtors Exam ordered by the Court, CEH may seek an order holding Settling Defendant
17 in contempt of Court.

18 **5. PAYMENTS**

19 5.1. **Payments by Settling Defendant.** On or before April 30, 2020, Settling
20 Defendant shall pay the total sum of \$27,500 as a settlement payment as further set forth in this
21 Section.

22 5.2. **Allocation of Payments.** The total settlement amount shall be paid in five (5)
23 separate checks in the amounts specified below and delivered as set forth below. Any failure by
24 Settling Defendant to comply with the payment terms herein shall be subject to a stipulated late
25 fee to be paid by Settling Defendant in the amount of \$100 for each day the full payment is not
26 received after the applicable payment due date set forth in Section 5.1. The late fees required
27 under this Section shall be recoverable, together with reasonable attorneys' fees, in an
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1 enforcement proceeding brought pursuant to Section 4 of this Consent Judgment. The funds paid
2 by Settling Defendant shall be allocated as set forth below between the following categories and
3 made payable as follows:

4 5.2.1. Settling Defendant shall pay \$3,641 as a civil penalty pursuant to Health &
5 Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with
6 Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of
7 Environmental Health Hazard Assessment (“OEHHA”). Accordingly, Settling Defendant shall
8 pay the OEHHA portion of the civil penalty payment for \$2,732 by check made payable to
9 OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be
10 delivered as follows:

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

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

18 Settling Defendant shall pay the CEH portion of the civil penalty payment for \$909 by check
19 made payable to the Center for Environmental Health and associated with taxpayer identification
20 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
21 Street, San Francisco, CA 94117.

22 5.2.2. Settling Defendant shall pay \$2,731 as an Additional Settlement Payment
23 (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of
24 Regulations, Title 11, § 3204. CEH intends to place these funds in CEH’s Toxics in Food Fund
25 and use them to support CEH programs and activities that seek to educate the public about Lead
26 and other toxic chemicals in food and dietary supplements, to work with the food and dietary
27 supplements industry and agriculture interests to reduce exposure to Lead and other toxic
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1 chemicals, and to thereby reduce the public health impacts and risks of exposure to Lead and
 2 other toxic chemicals in food and dietary supplements sold in California. CEH shall obtain and
 3 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to
 4 provide such documentation to the Attorney General within thirty days of any request from the
 5 Attorney General. The payment pursuant to this Section shall be made payable to the Center for
 6 Environmental Health and associated with taxpayer identification number 94-3251981. This
 7 payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA
 8 94117.

9 5.2.3. Settling Defendant shall pay \$21,128 as a reimbursement of a portion of
 10 CEH’s reasonable attorneys’ fees and costs (including but not limited to expert and investigative
 11 costs). The attorneys’ fees and cost reimbursement shall be made in two separate checks as
 12 follows: (a) \$17,742 payable to the Lexington Law Group and associated with taxpayer
 13 identification number 94-3317175; and (b) \$3,386 payable to the Center for Environmental
 14 Health and associated with taxpayer identification number 94-3251981. Both of these payments
 15 shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

16 5.2.4. To summarize, Settling Defendant shall deliver checks made out to the
 17 payees and in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$2,732	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$909	LLG
Center For Environmental Health	ASP	\$2,731	LLG
Lexington Law Group	Fees and Costs	\$17,742	LLG
Center For Environmental Health	Fees and Costs	\$3,386	LLG

1 **6. MODIFICATION OF CONSENT JUDGMENT**

2 6.1. **Modification.** This Consent Judgment may be modified from time to time by
3 express written agreement of the Parties, with the approval of the Court, or by an order of this
4 Court upon motion and in accordance with law.

5 6.2. **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
6 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
7 modify the Consent Judgment.

8 **7. CLAIMS COVERED AND RELEASE**

9 7.1. Provided that Settling Defendant complies in full with its obligations under
10 Section 5, this Consent Judgment is a full, final and binding resolution between CEH on behalf of
11 itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities
12 that are under common ownership, directors, officers, employees, shareholders, successors,
13 assigns and attorneys (“Defendant Releasees”), and all entities to which Settling Defendant
14 directly or indirectly sells Covered Products, including but not limited to distributors,
15 wholesalers, customers, retailers, franchisees, licensors and licensees (“Downstream Defendant
16 Releasees”), of any violation of Proposition 65 based on failure to warn about exposure to Lead
17 contained in Covered Products that were sold, offered for sale, shipped, distributed, used or
18 otherwise provided to customers by Settling Defendant prior to the Effective Date.

19 7.2. Provided that Settling Defendant complies in full with its obligations under
20 Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever
21 discharges any and all claims against each Settling Defendant, Defendant Releasees and
22 Downstream Defendant Releasees arising from any violation of Proposition 65 or any other
23 statutory or common law claims that have been or could have been asserted by CEH individually
24 or in the public interest regarding the failure to warn about exposure to Lead contained in
25 Covered Products that were sold, offered for sale, shipped, distributed, used or otherwise
26 provided to customers by Settling Defendant prior to the Effective Date.

1 7.3. Provided that Settling Defendant complies in full with its obligations under
2 Section 5, compliance with the terms of this Consent Judgment by Settling Defendant and its
3 Downstream Defendant Releasees shall constitute compliance with Proposition 65 by Settling
4 Defendant, its Defendant Releasees and its Downstream Defendant Releasees with respect to any
5 alleged failure to warn about Lead contained in Covered Products sold, offered for sale, shipped,
6 distributed, used or otherwise provided to customers by Settling Defendant after the Effective
7 Date.

8 **8. PROVISION OF NOTICE**

9 8.1. When CEH is entitled to receive any notice under this Consent Judgment, the
10 notice shall be sent by first class and electronic mail to:

11 Eric S. Somers
12 Lexington Law Group
13 503 Divisadero Street
14 San Francisco, CA 94117
15 esomers@lexlawgroup.com

16 8.2. When Settling Defendant is entitled to receive any notice under this Consent
17 Judgment, the notice shall be sent by first class and electronic mail to:

18 Frederick M. Reich, Esq.
19 Teepie Hall, LLP
20 9255 Towne Centre Drive, Suite 500
21 San Diego, CA 92121
22 fritz@teepiehall.com

23 8.3. Any Party may modify the person and address to whom the notice is to be sent by
24 sending the other Party notice by first class and electronic mail.

25 **9. COURT APPROVAL**

26 9.1. This Consent Judgment shall become effective as a contract upon the date signed
27 by CEH and Settling Defendant, whichever is later, provided however, that CEH shall also
28 prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall
support approval of such Motion.

1 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **10. GOVERNING LAW AND CONSTRUCTION**

5 10.1. The terms of this Consent Judgment shall be governed by the laws of the State of
6 California.

7 **11. ATTORNEYS' FEES**

8 11.1. A Party who unsuccessfully brings or contests an action arising out of this Consent
9 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
10 unless the unsuccessful Party has acted with substantial justification. For purposes of this
11 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
12 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

13 11.2. Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
14 action brought pursuant to Section 4 may seek an award of attorneys' fees pursuant to Code of
15 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
16 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
17 provision shall not be construed as altering any procedural or substantive requirements for
18 obtaining such an award.

19 11.3. Nothing in this Section 11 shall preclude a party from seeking an award of
20 sanctions pursuant to law.

21 **12. ENTIRE AGREEMENT**

22 12.1. This Consent Judgment contains the sole and entire agreement and understanding
23 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
25 and therein. There are no warranties, representations, or other agreements between the Parties
26 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
27 other than those specifically referred to in this Consent Judgment have been made by any Party
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1 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
2 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
3 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
4 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
5 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
6 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
7 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
8 whether or not similar, nor shall such waiver constitute a continuing waiver.

9 **13. RETENTION OF JURISDICTION**

10 13.1. This Court shall retain jurisdiction of this matter to implement or modify the
11 Consent Judgment.

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

13 14.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
14 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
15 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

16 **15. SUCCESSORS AND ASSIGNS**

17 15.1. This Consent Judgment shall apply to and be binding upon CEH and Settling
18 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
19 assigns of any of them.

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

21 16.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
22 against an entity that is not Settling Defendant on terms that are different than those contained in
23 this Consent Judgment.

24 **17. EXECUTION IN COUNTERPARTS**

25 17.1. The stipulations to this Consent Judgment may be executed in counterparts and by
26 means of facsimile or portable document format (pdf), which taken together shall be deemed to
27 constitute one document.

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IT IS SO STIPULATED:

<p>Dated: <u>1/22/20</u>, 2020</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <p><u><i>Michael Green</i></u></p> <p><u>Michael Green</u></p> <p>Printed Name</p> <p><u>CEO</u></p> <p>Title</p>
<p>Dated: _____, 2020</p>	<p>DEFENDANT SUNFOOD CORPORATION</p> <p>_____</p> <p>_____</p> <p>Printed Name</p> <p>_____</p> <p>Title</p>

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: _____, _____

 Judge of the Superior Court of California

1 **IT IS SO STIPULATED:**

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Dated: _____, 2019

CENTER FOR ENVIRONMENTAL HEALTH

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Printed Name

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Title

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Dated: 1-24-20, ~~2019~~

DEFENDANT SUNFOOD CORPORATION

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Printed Name

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Title

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IT IS SO ORDERED, ADJUDGED, AND DECREED:

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Dated: _____,

Judge of the Superior Court of California

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