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ENVIRONMENTAL RESEARCH CENTER, INC.

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

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

Plaintiff,
vs.

PERFORMANCE FOOD CENTERS CORP.,
individually and dba SIMPLE AGAIN and
SWIIG, a Pennsylvania corporation; and
DOES 1-25,

Defendants.

CASE NO. RG18933461

**STIPULATED CONSENT
JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Action Filed: December 26, 2018

Trial Date: None set

1. INTRODUCTION

1.1 On December 26, 2018, Plaintiff Environmental Research Center, Inc. (“ERC”), a non-profit corporation, as a private enforcer and in the public interest, initiated this action by filing a Complaint for Permanent Injunction, Civil Penalties and Other Relief (the “Complaint”) pursuant to the provisions of California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”), against PERFORMANCE FOOD CENTERS CORP., individually and dba SIMPLE AGAIN and SWIIG (“SWIIG”) and DOES 1-25. In this action, ERC alleges that a number of products manufactured, distributed, or sold by SWIIG contain lead and/or cadmium, chemicals listed under Proposition 65 as carcinogens and reproductive toxins, and expose

1 consumers to these chemicals at a level requiring a Proposition 65 warning. These products
2 (referred to hereinafter individually as a “Covered Product” or collectively as “Covered
3 Products”) are:

- 4 • **Swiig Daily Mass Protein Builder Yum! Chocolate - Lead**
- 5 • **Swiig Ancient Grains Plant Protein Vegan Raw Chocolate - Lead**
- 6 • **Swiig Ancient Grains Plant Protein Vegan Raw Madagascar Vanilla -**
7 **Lead**
- 8 • **Swiig Get Essentials Live Core - Lead**
- 9 • **Swiig Get Recovered Perform Core - Lead**
- 10 • **Swiig Daily Soy Protein Vegan Yum! Chocolate - Lead, Cadmium**
- 11 • **Swiig Daily Soy Protein Vegan Yum! Madagascar Vanilla - Lead**
- 12 • **Swiig Get Greens Protect Core - Lead**
- 13 • **Swiig Daily Whey Protein Matrix Yum! Chocolate - Lead**
- 14 • **Swiig PREcovery Trainers Only - Lead**
- 15 • **Swiig Get Energized Perform Core - Lead**
- 16 • **Swiig Get Youthful Protect Core - Lead**
- 17 • **Swiig Get Regular Live Core - Lead**
- 18 • **Swiig Get Resistance Protect Core - Lead**
- 19 • **Swiig Get Cardio Live Core - Lead**
- 20 • **Swiig Get Berries Protect Core - Lead**
- 21 • **Swiig Healthy Gut Thyroid - Lead**
- 22 • **Swiig Vital Support Thyroid - Lead**
- 23 • **Swiig The Energy Source Trainers Only - Lead**
- 24 • **Swiig Get Brainy Live Core - Lead**

25 **1.2** ERC and SWIIG are hereinafter referred to individually as a “Party” or
26 collectively as the “Parties.”

27 **1.3** ERC is a 501 (c)(3) California non-profit corporation dedicated to, among other
28 causes, helping safeguard the public from health hazards by reducing the use and misuse of

1 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees,
2 and encouraging corporate responsibility.

3 **1.4** For purposes of this Consent Judgment, the Parties agree that SWIIG is a business
4 entity that has employed ten or more persons at all times relevant to this action, and qualifies as a
5 “person in the course of doing business” within the meaning of Proposition 65. SWIIG
6 manufactures, distributes, and/or sells the Covered Products.

7 **1.5** The Complaint is based on allegations contained in ERC’s Notice of Violation
8 dated October 12, 2018 that was served on the California Attorney General, other public
9 enforcers, and SWIIG (“Notice”). A true and correct copy of the 60-Day Notice dated October
10 12, 2018 is attached hereto as **Exhibit A** and incorporated herein by reference. More than 60
11 days have passed since the Notice was served on the Attorney General, public enforcers, and
12 SWIIG and no designated governmental entity has filed a Complaint against SWIIG with
13 regard to the Covered Products or the alleged violations.

14 **1.6** ERC’s Notice and Complaint allege that use of the Covered Products exposes
15 persons in California to lead and/or cadmium without first providing clear and reasonable
16 warnings in violation of California Health and Safety Code section 25249.6. SWIIG denies all
17 material allegations contained in the Notice and Complaint.

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

25 **1.8** Except as expressly set forth herein, nothing in this Consent Judgment shall
26 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
27 current or future legal proceeding unrelated to these proceedings.
28

1 **1.9** The Effective Date of this Consent Judgment is the date on which notice is given
2 that it is entered as a Judgment by this Court.

3 **2. JURISDICTION AND VENUE**

4 For purposes of this Consent Judgment and any further court action that may become
5 necessary to enforce this Consent Judgment, the Parties stipulate that this Court has subject matter
6 jurisdiction over the allegations of violations contained in the Complaint, personal jurisdiction
7 over SWIIG as to the acts alleged in the Complaint, that venue is proper in Alameda County, and
8 that this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
9 claims up through and including the Effective Date which were or could have been asserted in this
10 action based on the facts alleged in the Notice and Complaint.

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

12 **3.1** Beginning on the Effective Date, SWIIG shall be permanently enjoined from
13 manufacturing for sale in the State of California, “Distributing into the State of California,” or
14 directly selling in the State of California, any Covered Products which expose a person to a
15 “Daily Lead Exposure Level” of more than 0.5 micrograms of lead per day and/or “Daily
16 Cadmium Exposure Level” of more than 4.1 micrograms of cadmium per day unless it meets
17 the warning requirements under Section 3.2.

18 **3.1.1** As used in this Consent Judgment, the term “Distributing into the State
19 of California” shall mean to directly ship a Covered Product into California for sale in
20 California or to sell a Covered Product to a distributor that SWIIG knows or has reason to
21 know will sell the Covered Product in California.

22 **3.1.2** For purposes of this Consent Judgment, the “Daily Lead Exposure Level”
23 shall be measured in micrograms, and shall be calculated using the following formula:
24 micrograms of lead per gram of product, multiplied by grams of product per serving of the
25 product (using the largest serving size appearing on the product label), multiplied by servings of
26 the product per day (using the largest number of recommended daily servings appearing on the
27 label), which equals micrograms of lead exposure per day, excluding, pursuant to Section 3.1.3,
28 the amount of lead in the ingredients listed in **Table 1** below, if applicable. If the label contains

no recommended daily servings, then the number of recommended daily servings shall be one.

3.1.3 In calculating the Daily Lead Exposure Level for a Covered Product, SWIIG shall be allowed to deduct the amount of lead which is deemed “naturally occurring” in the ingredients listed in **Table 1** that are contained in that Covered Product under the following conditions: For each calendar year that SWIIG claims entitlement to a “naturally occurring” allowance, SWIIG shall provide ERC, upon request, with the following information: (a) SWIIG must produce to ERC a written list of each ingredient in the Covered Product for which a “naturally occurring” allowance is claimed; (b) SWIIG must provide ERC with documentation of laboratory testing conducted during the year for which the “naturally occurring” allowance is claimed that complies with Sections 3.4.3 and 3.4.4 and that shows the amount of lead, if any, contained in each ingredient listed in **Table 1** that is contained in the Covered Product and for which SWIIG intends to deduct “naturally occurring” lead; (c) If the laboratory testing reveals the presence of lead in any of the ingredients listed in **Table 1** that are contained in the Covered Product, SWIIG shall be entitled to deduct up to the full amount of the allowance for those ingredients, as listed in **Table 1**, but not to exceed the total amount of lead actually contained in those ingredients that are in the Covered Product; and (d) If the Covered Product does not contain any of the ingredients listed in **Table 1**, SWIIG shall not be entitled to a deduction for “naturally occurring” lead in the Covered Product for those ingredients. The information required by Sections 3.1.3 (a) and (b) shall be provided to ERC upon request made by ERC within thirty (30) days of the Effective Date, or anniversary thereof, for any year that SWIIG shall claim entitlement to the “naturally occurring” allowance:

TABLE 1

INGREDIENT	ALLOWANCES OF AMOUNT OF LEAD
Calcium (elemental)	0.8 micograms/gram
Ferrous Fumarate	0.4 micograms/gram
Zinc Oxide	8.0 micograms/gram
Magnesium Oxide	0.4 micograms/gram

1	Magnesium Carbonate	0.332 micograms/gram
2	Magnesium Hydroxide	0.4 micograms/gram
3	Zinc Gluconate	0.8 micograms/gram
4	Potassium Chloride	1.1 micograms/gram
5	Cocoa-powder	1.0 micograms/gram

6
7 **3.1.3** For purposes of this Consent Judgment, the “Daily Cadmium Exposure
8 Level” shall be measured in micrograms, and shall be calculated using the following formula:
9 micrograms of cadmium per gram of product, multiplied by grams of product per serving of the
10 product (using the largest serving size appearing on the product label), multiplied by servings
11 of the product per day (using the largest number of recommended daily servings appearing on
12 the label), which equals micrograms of cadmium exposure per day. If the label contains no
13 recommended daily servings, then the number of recommended daily servings shall be one.

14 **3.2 Clear and Reasonable Warnings**

15 If SWIIG is required to provide a warning pursuant to Section 3.1, the following warning
16 must be utilized (“Warning”):

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

21 SWIIG shall use the phrase “cancer and” in the Warning if SWIIG has reason to believe that
22 the the “Daily Lead Exposure Level” is greater than 15 micrograms of lead as determined pursuant
23 to the quality control methodology set forth in Section 3.4 or if SWIIG has reason to believe that
24 another Proposition 65 chemical is present which may require a cancer warning. As identified in
25 the brackets, the warning shall appropriately reflect whether there is lead, cadmium, or both
26 chemicals present in each of the Covered Products.

27 The Warning above is derived from Tit. 27, Cal, Code Regs. § 25607.2, effective August
28 30, 2018. If the warning language in Section 25607.2 is amended after the date of entry of this
Consent Judgment in such a manner that the Warning is no longer valid, SWIIG make seek to

1 incorporate such amendments herein, at SWIIG's election, pursuant to Section 5.2.

2 The Warning shall be securely affixed to or printed upon the container or label of each
3 Covered Product. If the Warning is provided on the label, it must be set off from other
4 surrounding information and enclosed in a box. In addition, for any Covered Product sold over
5 the internet by SWIIG, the Warning shall appear, directly or through a hyperlink using the word
6 "WARNING" (in all capital letters and bold print), on the product display page or on the
7 checkout page, when a California delivery address is indicated for any purchase of any Covered
8 Product. An asterisk or other identifying method must be utilized to identify which products on
9 the checkout page are subject to the Warning.

10 The Warning shall be at least the same size as the largest of any other health or safety
11 warnings also appearing on the product display page or checkout page on SWIIG's website or on
12 the label or container of SWIIG's product packaging and the word "WARNING" shall be in all
13 capital letters and in bold print. The warning content may contain information that is
14 supplemental to the content required by this agreement only to the extent that it identifies the
15 source of the exposure or provides information on how to avoid or reduce exposure to the
16 identified chemical or chemicals. Further no statements may accompany the Warning that state or
17 imply that the source of the listed chemical has an impact on or results in a less harmful effect of
18 the listed chemical.

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

23 **3.3 Reformulated Covered Products**

24 A Reformulated Covered Product is a Covered Product for which the "Daily Lead
25 Exposure Level" is no greater than 0.5 micrograms of lead per day and/or "Daily Cadmium
26 Exposure Level" is no more than 4.1 micrograms of cadmium per day as determined by the quality
27 control methodology described in Section 3.4.

28 ///

3.4 Testing and Quality Control Methodology

3.4.1 Beginning within one year of the Effective Date, SWIIG shall arrange for lead and cadmium testing of the Covered Products, for which a warning is not being provided continuously and uninterrupted after the Effective Date, at least once a year for a minimum of three consecutive years by arranging for testing of five randomly selected samples of each of the Covered Products, in the form intended for sale to the end-user, which SWIIG 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 a Covered Product during each of three consecutive years, then the testing requirements of this Section will no longer be required as to that Covered Product. However, if during or after the three-year testing period, SWIIG changes ingredient suppliers for any of the Covered Products and/or reformulates any of the Covered Products, SWIIG shall test that Covered Product annually for at least two (2) consecutive years after such change is made.

3.4.2 For purposes of measuring the "Daily Lead Exposure Level" and/or "Daily Cadmium Exposure Level," the average lead and/or cadmium detection result of the five (5) randomly selected samples of the Covered Products will be controlling.

3.4.3 All testing pursuant to this Consent Judgment 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.

3.4.4 All testing pursuant to this Consent Judgment 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.

3.4.5 Nothing in this Consent Judgment shall limit SWIIG's ability to conduct, or require that others conduct, additional testing of the Covered Products, including the raw

1 materials used in their manufacture.

2 **3.4.6** Within thirty (30) days of ERC's written request, which request shall not
3 be made more than once per year, SWIIG shall deliver lab reports obtained pursuant to Section
4 3.4 to ERC. SWIIG shall retain all test results and documentation for a period of five years
5 from the date of each test.

6 **4. SETTLEMENT PAYMENT**

7 **4.1** In full satisfaction of all potential civil penalties, additional settlement payments,
8 attorney's fees, and costs, SWIIG shall make a total payment of \$90,000.00 ("Total Settlement
9 Amount") to ERC payable as follows (the "Periodic Payments"): \$15,000.00 within 5 business
10 days of the Effective Date and SWIIG's receipt of a W-9 for ERC ("Initial Due Date") and
11 \$15,000.00 per month for 5 months thereafter on the monthly anniversary of the Initial Due
12 Date. SWIIG shall make these payments by wire transfer to ERC's account, for which ERC
13 will give SWIIG the necessary account information. The Total Settlement Amount shall be
14 apportioned as follows:

15 **4.2** \$36,081.36 shall be considered a civil penalty pursuant to California Health and
16 Safety Code section 25249.7(b)(1). ERC shall remit 75% (\$27,061.02) of the civil penalty to
17 the Office of Environmental Health Hazard Assessment ("OEHHA") for deposit in the Safe
18 Drinking Water and Toxic Enforcement Fund in accordance with California Health and Safety
19 Code section 25249.12(c). ERC will retain the remaining 25% (\$9,020.34) of the civil penalty.

20 **4.3** \$4,865.24 shall be distributed to ERC as reimbursement to ERC for reasonable
21 costs incurred in bringing this action.

22 **4.4** \$27,060.99 shall be distributed to ERC as an Additional Settlement Payment
23 ("ASP"), pursuant to California Code of Regulations, title 11, sections 3203, subdivision (d) and
24 3204. ERC will utilize the ASP for activities that address the same public harm as allegedly
25 caused by Defendant in this matter. These activities are detailed below and support ERC's
26 overarching goal of reducing and/or eliminating hazardous and toxic chemicals in dietary
27 supplement products in California. ERC's asserts that its activities have had, and will continue
28 to have, a direct and primary effect within the State of California because California consumers

1 will be benefitted by the reduction and/or elimination of exposure to lead and/or cadmium in
2 dietary supplements and/or by providing clear and reasonable warnings to California consumers
3 prior to ingestion of the products.

4 Based on a review of past years' actual budgets, ERC is providing the following list of
5 activities ERC engages in to protect California consumers through Proposition 65 citizen
6 enforcement, along with a breakdown of how ASP funds will be utilized to facilitate those
7 activities: (1) ENFORCEMENT (65-80%): obtaining, shipping, analyzing, and testing dietary
8 supplement products that may contain lead and/or cadmium and are sold to California
9 consumers. This work includes continued monitoring and enforcement of past consent judgments
10 and settlements to ensure companies are in compliance with their obligations thereunder, with a
11 specific focus on those judgments and settlements concerning lead and/or cadmium. This work
12 also includes investigation of new companies that ERC does not obtain any recovery through
13 settlement or judgment; (2) VOLUNTARY COMPLIANCE PROGRAM (10-20%): maintaining
14 ERC's Voluntary Compliance Program by acquiring products from companies, developing and
15 maintaining a case file, testing products from these companies, providing the test results and
16 supporting documentation to the companies, and offering guidance in warning or implementing a
17 self-testing program for lead and/or cadmium in dietary supplement products; and (3) "GOT
18 LEAD" PROGRAM (up to 5%): maintaining ERC's "Got Lead?" Program which reduces the
19 numbers of contaminated products that reach California consumers by providing access to free
20 testing for lead in dietary supplement products (Products submitted to the program are screened
21 for ingredients which are suspected to be contaminated, and then may be purchased by ERC,
22 catalogued, sent to a qualified laboratory for testing, and the results shared with the consumer
23 that submitted the product).

24 ERC shall be fully accountable in that it will maintain adequate records to document and
25 will be able to demonstrate how the ASP funds will be spent and can assure that the funds are
26 being spent only for the proper, designated purposes described in this Consent Judgment. ERC
27 shall provide the Attorney General, within thirty days of any request, copies of documentation
28 demonstrating how such funds have been spent.

1 **4.5** \$8,285.00 shall be distributed to Aqua Terra Aeris Law Group as reimbursement
2 of ERC's attorney's fees, while \$13,707.41 shall be distributed to ERC for its in-house legal
3 fees. Except as explicitly provided herein, each Party shall bear its own fees and costs.

4 **4.6** In the event that SWIIG fails to remit any of the Periodic Payments owed
5 pursuant to Section Section 4.1 of this Consent Judgment on or before the applicable Due Date,
6 SWIIG shall be deemed to be in material breach of its obligations under this Consent Judgment.
7 ERC shall provide written notice of the delinquency to SWIIG via electronic mail. If SWIIG
8 fails to deliver the delinquent payment within five (5) days from the written notice, the Total
9 Settlement Amount shall be immediately due and owing and shall accrue interest at the
10 statutory judgment interest rate provided in the California Code of Civil Procedure section
11 685.010. Additionally, SWIIG agrees to pay ERC's reasonable attorney's fees and costs for
12 any efforts to collect the payment(s) due under this Consent Judgment.

13 **5. MODIFICATION OF CONSENT JUDGMENT**

14 **5.1** This Consent Judgment may be modified only as to injunctive terms (i) by written
15 stipulation of the Parties and upon entry by the Court of a modified consent judgment or (ii) by
16 motion of either Party pursuant to Section 5.3 or 5.4 and upon entry by the Court of a modified
17 consent judgment.

18 **5.2** If either party seeks to modify this Consent Judgment under Section 5.1, that
19 party must provide written notice to the other party of its intent ("Notice of Intent"). If the
20 party not seeking the modification wants to meet and confer regarding the proposed
21 modification in the Notice of Intent, then such party must provide written notice to the party
22 seeking the modification within thirty (30) days of receiving the Notice of Intent. The Parties
23 shall then meet and confer in good faith as required in this Section. The Parties shall meet in
24 person or via telephone within thirty (30) days of a party's notification of its intent to meet and
25 confer. Within thirty (30) days of such meeting, if the proposed modification is disputed, the
26 disputing party shall provide the party seeking the modification a written basis for its position.
27 The Parties shall continue to meet and confer for an additional thirty (30) days in an effort to
28

1 resolve any remaining disputes. Should it become necessary, the Parties may agree in writing
2 to different deadlines for the meet-and-confer period.

3 **5.3** In the event that either party initiates or otherwise requests a modification under
4 Section 5.1, and the meet and confer process leads to a joint motion or application for a
5 modification of the Consent Judgment, the party requesting the modification shall prepare, file
6 and argue the motion or application.

7 **5.4** Where the meet-and-confer process does not lead to a joint motion or
8 application in support of a modification of the Consent Judgment, then either Party may seek
9 judicial relief on its own.

10 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT** 11 **JUDGMENT**

12 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify, or terminate
13 this Consent Judgment.

14 **6.2** If ERC alleges that any Covered Product fails to qualify as a Reformulated
15 Covered Product (for which ERC alleges that no Warning has been provided), then ERC shall
16 inform SWIIG in a reasonably prompt manner of its test results, including information
17 sufficient to permit SWIIG to identify the Covered Products at issue. SWIIG shall, within thirty
18 (30) days following such notice, provide ERC with any testing information, from an
19 independent third-party laboratory meeting the requirements of Sections 3.4.3 and 3.4.4,
20 demonstrating SWIIG's compliance with the Consent Judgment. The Parties shall first attempt
21 to resolve the matter prior to ERC taking any further legal action.

22 **7. APPLICATION OF CONSENT JUDGMENT**

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

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

2 **8.1** This Consent Judgment is a full, final, and binding resolution between ERC,
3 on behalf of itself and in the public interest, and SWIIG and its respective officers, directors,
4 shareholders, employees, agents, parent companies, subsidiaries, affiliates, divisions, suppliers,
5 franchisees, licensees, customers (not including private label customers of SWIIG),
6 distributors, wholesalers, retailers, and all other upstream and downstream entities in the
7 distribution chain of any Covered Product, and the predecessors, successors, and assigns of any
8 of them (collectively, "Released Parties"). ERC, on behalf of itself and in the public interest,
9 hereby fully releases and discharges the Released Parties from any and all claims, actions,
10 causes of action, suits, demands, liabilities, damages, penalties, fees, costs, and expenses
11 asserted, or that could have been asserted from the handling, use, or consumption of the
12 Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations
13 arising from the failure to provide Proposition 65 warnings on the Covered Products regarding
14 lead and/or cadmium up to and including the Effective Date.

15 **8.2** ERC on its own behalf only, and SWIIG on its own behalf only, further
16 waive and release any and all claims they may have against each other for all actions or
17 statements made or undertaken in the course of seeking or opposing enforcement of Proposition
18 65 in connection with the Notice and Complaint up through and including the Effective Date,
19 provided, however, that nothing in Section 8 shall affect or limit any Party's right to seek to
20 enforce the terms of this Consent Judgment.

21 **8.3** It is possible that other claims not known to the Parties, arising out of the facts
22 alleged in the Notice and Complaint, and relating to the Covered Products, will develop or be
23 discovered. ERC on behalf of itself only, and SWIIG on behalf of itself only, acknowledge that
24 this Consent Judgment is expressly intended to cover and include all such claims up through
25 and including the Effective Date, including all rights of action therefore. ERC and SWIIG
26 acknowledge that the claims released in Sections 8.1 and 8.2 above may include unknown
27 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
28 claims. California Civil Code section 1542 reads as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
3 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
4 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
5 OR HER SETTLEMENT WITH THE DEBTOR.

6 ERC on behalf of itself only, and SWIIG on behalf of itself only, acknowledge and understand
7 the significance and consequences of this specific waiver of California Civil Code section
8 1542.

9 **8.4** Compliance with the terms of this Consent Judgment shall be deemed to
10 constitute compliance with Proposition 65 by any releasee regarding alleged exposures to lead
11 and/or cadmium in the Covered Products as set forth in the Notice and Complaint.

12 **8.5** Nothing in this Consent Judgment is intended to apply to any occupational or
13 environmental exposures arising under Proposition 65, nor shall it apply to any of SWIIG's
14 products other than the Covered Products.

15 **9. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

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

18 **10. GOVERNING LAW**

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

21 **11. PROVISION OF NOTICE**

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

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

26 Chris Heptinstall, Executive Director, Environmental Research Center
27 3111 Camino Del Rio North, Suite 400
28 San Diego, CA 92108
Ph: (619) 500-3090
Email: chris_erc501c3@yahoo.com

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1 With a copy to:
2 MATTHEW C. MACLEAR
3 ANTHONY M. BARNES
4 AQUA TERRA AERIS LAW GROUP
5 490 43rd Street, Suite 108
6 Oakland, CA 94609
7 Telephone: (415) 568-5200
8 Email: mcm@atalawgroup.com

9 **PERFORMANCE FOOD CENTERS CORP., individually and dba**
10 **SIMPLE AGAIN and SWIIG**
11 Dan Young
12 President
13 Simple Again
14 59 Airport Road
15 Pottstown, PA 19464

11 **12. COURT APPROVAL**

12 **12.1** Upon execution of this Consent Judgment by the Parties, ERC shall notice a
13 Motion for Court Approval. The Parties shall use their best efforts to support entry of this
14 Consent Judgment.

15 **12.2** If the California Attorney General objects to any term in this Consent Judgment,
16 the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible
17 prior to the hearing on the motion.

18 **12.3** If this Stipulated Consent Judgment is not approved by the Court, it shall be
19 void and have no force or effect.

20 **13. EXECUTION AND COUNTERPARTS**

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

24 **14. DRAFTING**

25 The terms of this Consent Judgment have been reviewed by the respective counsel for each
26 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
27 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and
28 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,

1 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
2 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
3 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
4 equally in the preparation and drafting of this Consent Judgment.

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

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

10 **16. ENFORCEMENT**

11 ERC may, by motion or order to show cause before the Superior Court of Alameda
12 County, enforce the terms and conditions contained in this Consent Judgment. In any action
13 brought by ERC to enforce this Consent Judgment, ERC may seek whatever fines, costs,
14 penalties, or remedies as are provided by law for failure to comply with the Consent Judgment.
15 To the extent the failure to comply with the Consent Judgment constitutes a violation of
16 Proposition 65 or other laws, ERC shall not be limited to enforcement of this Consent Judgment,
17 but may seek in another action whatever fines, costs, penalties, or remedies as are provided by
18 law for failure to comply with Proposition 65 or other laws.

19 **17. ENTIRE AGREEMENT, AUTHORIZATION**

20 **17.1** This Consent Judgment contains the sole and entire agreement and
21 understanding of the Parties with respect to the entire subject matter herein, and any and all
22 prior discussions, negotiations, commitments, and understandings related hereto. No
23 representations, oral or otherwise, express or implied, other than those contained herein have
24 been made by any Party. No other agreements, oral or otherwise, unless specifically referred to
25 herein, shall be deemed to exist or to bind any Party.

26 **17.2** Each signatory to this Consent Judgment certifies that he or she is fully
27 authorized by the Party he or she represents to stipulate to this Consent Judgment.

28 ///

1 **18. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**
2 **CONSENT JUDGMENT**

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

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

9 (2) Make the findings pursuant to California Health and Safety Code section
10 25249.7(f)(4), approve the Settlement, and approve this Consent Judgment.

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1 **IT IS SO STIPULATED:**

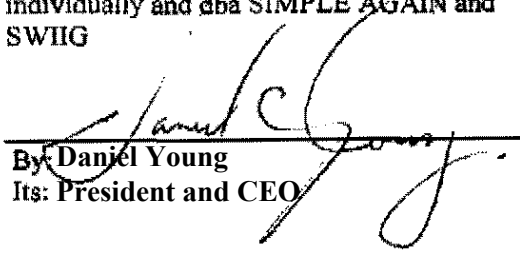
2 Dated: 12/31/ 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

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4 By: 
5 Chris Hopwood, Executive Director

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7 Dated: 1.2.19 2018

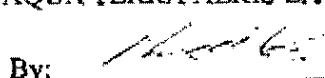
PERFORMANCE FOOD CENTERS CORP.,
individually and dba SIMPLE AGAIN and
SWIIG

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10 By: 
11 Its: President and CEO

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13 **APPROVED AS TO FORM:**

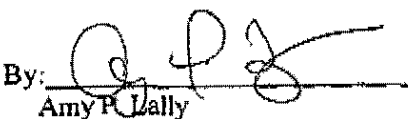
14
15 Dated: December 31 2018

AQUA TERRA AERIS LAW GROUP

16
17 By: 
18 Matthew C. Maclear
19 Anthony M. Barnes
Attorneys for Plaintiff Environmental
Research Center, Inc.

20
21 Dated: Jan. 2, 2019 2018

SIDLEY AUSTIN LLP

22
23 By: 
24 Amy P. Lally
25 Attorney for Defendant Performance Food
Centers Corp., individually and dba
Simple Again and Swiig

1 **IT IS SO STIPULATED:**

2 Dated: 12/31/, 2018

ENVIRONMENTAL RESEARCH
CENTER, INC.

3
4 By: 
5 Chris Hopkinson, Executive Director

6
7 Dated: _____, 2018


PERFORMANCE FOOD CENTERS CORP.,
individually and dba SIMPLE AGAIN and
8 SWIIG

9
10 _____
11 By:
12 Its:

13 **APPROVED AS TO FORM:**

14
15 Dated: December 31, 2018

AQUA TERRA AERIS LAW GROUP

16
17 By: 
18 Matthew C. Maclear
19 Anthony M. Barnes
Attorneys for Plaintiff Environmental
Research Center, Inc.

20
21 Dated: _____, 2018

SIDLEY AUSTIN LLP

22
23 By: _____
24 Amy P. Lally
25 Attorney for Defendant Performance Food
Centers Corp., individually and dba
Simple Again and Swiig

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IT IS SO ORDERED, ADJUDGED AND DECREED.

Judge of the Superior

Court