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SACRAMENTO COURTS
DEPT. #54

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10 Attorneys for Plaintiff

11 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO**

12 DAVID COLE,

13 Plaintiff,

14 vs.

15 SOLGAR INC.,

16 Defendant.

) **CASE NO. 34-2009-000039614-CU-NP**

) **CONSENT JUDGMENT**

) Date: May 28, 2009

) Time: 9:00 a.m.

) Dept.: 54

) Complaint Filed: April 1, 2009

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20 **1. INTRODUCTION**

21 1.1. On June 10, 2008, David Cole, a California resident, on behalf of himself and the
22 People of the State of California ("Plaintiff"), issued a Proposition 65 60-day Notice Letter to
23 Solgar, Inc. ("Defendant"). The Notice Letter also listed NBTY, Inc. and Solgar Vitamin and Herb
24 Company, but those entities are not defendants because neither manufactures, distributes or sells the
25 product at issue. Plaintiff has or will file a complaint for civil penalties and injunctive relief alleging
26 violations of Proposition 65. Plaintiff's Complaint alleges that use of Defendant's Product (as
27 defined in Section 2.1) results in exposure to a chemical known to the State of California to cause
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1 birth defects or other reproductive harm. The Complaint further alleges or will allege that under the
2 Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code §§ 25249.6 *et*
3 *seq.*, also known as "Proposition 65," Defendant must provide persons with a "clear and reasonable
4 warning" within the meaning of Proposition 65 before exposing individuals to these chemicals, and
5 that the Defendant failed to do so. Prior to the filing of the Complaint, Plaintiff and Defendant
6 resolved this matter in accordance with the terms herein.

7 1.2. Defendant is a corporation or other business entity that employs ten or more persons, or
8 employed ten or more persons at some time relevant to the allegations of the Complaint, and which
9 either manufactures, and/or distributes and/or sells Product in the State of California or to consumers
10 in the State of California, or has done so in the past.

11 1.3. For purposes of this Consent Judgment only, the parties stipulate that this Court has
12 jurisdiction over the allegations of violations contained in the Plaintiff's Complaint and personal
13 jurisdiction over Defendant as to the acts alleged in the Plaintiff's Complaint, that venue is proper in
14 the County of Sacramento, and that this Court has jurisdiction to enter this Consent Judgment as a
15 full and final resolution of all claims which were or could have been raised in the Complaint based
16 on the facts alleged therein, as set forth in Part 7.

17 1.4. Shortly after receipt of Plaintiff's 60 Day Notice Letter, Defendant investigated the
18 allegations therein. Defendant contacted Plaintiff to resolve the matter. The parties negotiated a
19 resolution, as embodied in this Consent Judgment.

20 1.5. The Plaintiff and Defendant enter into this Consent Judgment as a full and final
21 settlement of all claims that were raised in the Complaint, or which could have been raised in the
22 Complaint, arising out of the facts or conduct alleged therein. By execution of this Consent
23 Judgment and agreeing to provide the relief and remedies specified herein, Defendant does not admit
24 any fact, any conclusion of law, nor any violation of Proposition 65, or any other statutory, common
25 law or equitable requirements. Neither this Consent Judgment, nor compliance with this Consent
26 Judgment, shall be construed as an admission by Defendant of any fact, conclusion of law, issue of
27 law or violation of law. Defendant specifically does not admit that lead is present in any Product

1 except, if at all, at “naturally occurring” levels within the meaning of 27 Cal. Code Reg. § 25501.
2 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, or defense
3 Plaintiff or Defendant may have in any other or in future legal proceedings unrelated to this Consent
4 Judgment. However, this Section 1.5 shall not diminish or otherwise affect the obligations,
5 responsibilities, and duties of the parties under this Consent Judgment.

6 **2. INJUNCTIVE RELIEF; CLEAR AND REASONABLE WARNINGS**

7 2.1. “Product” means the nutritional or dietary supplement “Solgar Turmeric Root Extract”
8 vegetable capsules No. 04161 that is manufactured, or distributed or sold by or on behalf of
9 Defendant and intended for sale to, or use by, consumers within the State of California.

10 2.2. In 2008 Defendant terminated shipments of Product to California customers. For any
11 Product shipped by Defendant after entry of this Consent Judgment, if required under Section 2.3,
12 Defendant shall provide a warning for its respective Product on the labels of such Product.
13 Warnings shall be provided by May 1, 2009, or when new labels for each Product are prepared and
14 printed in the ordinary course of business, whichever is earlier. If required under Section 2.3,
15 Defendant shall be obligated to apply warnings only on those Products intended for sale to, or use
16 by, consumers within the State of California and that are manufactured, distributed or sold by
17 Defendant. The warning language shall be in at least the same type size as the “FDA disclaimer”
18 (i.e., “This claim has not been evaluated by the FDA”), or the directions for product use and other
19 warning information. The warning shall be affixed to the bottle or container from which the
20 California consumer obtains the product. The warning shall consist the following text:
21 **“WARNING: This product contains a chemical known to the State of California to cause birth**
22 **defects or other reproductive harm.”**

23 2.3. Defendant is required to provide a warning only if the “daily dose” of lead in a Product
24 exceeds 0.50 ug/day (“micrograms/day”), the safe harbor level set forth in 27 Cal. Code Reg. §§
25 25805. The “daily dose” is conclusively established for purposes of this Consent Judgment to be the
26 maximum daily dose recommended on a Product label.

27 (a) A program of laboratory testing shall be undertaken by Defendant or on
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1 their behalf to confirm lead levels in the Products subject to this Consent
2 Judgment to document whether there is a warning obligation hereunder.
3 The verification program shall include Defendant obtaining a test result
4 documenting lead levels in the turmeric root powder ingredient used in the
5 Products at least four (4) times a year, unless Defendant orders and
6 receives the turmeric root powder ingredient less than four (4) times a
7 year, in which case Defendant shall obtain a test result for each lot
8 delivered that year. Defendant may order such tests, conduct them in-
9 house or obtain test results from suppliers of the turmeric root powder, or
10 any combination of the three. Defendant may conduct additional
11 verification activities.

12 (b) For the first two years after the date of entry of this Consent Judgment,
13 once per year Plaintiff in writing may request review of Defendant's
14 laboratory data documenting lead levels in a daily dose of the Product.
15 Plaintiff agrees to hold such data as confidential and not to disclose it to
16 third parties except, upon request, to the Office of the Attorney General.
17 If Plaintiff determines the laboratory data document a violation of this
18 Consent Judgment, the parties shall meet and confer in good faith within
19 sixty (60) days of such initial determination. If Plaintiff still determines
20 after consultation there is a violation of this Consent Judgment, Plaintiff
21 may seek legal or equitable relief.

22 (c) Nothing in this Consent Judgment shall impair the right of Defendant to
23 establish that any amount of lead in excess of 0.50 ug/day in a daily dose
24 is "naturally occurring" within the meaning of 27 Cal. Code Reg. § 25501.
25 Defendant shall make any such showing by a preponderance of the
26 evidence.

27 (d) In the event of a dispute under this Section 2.3 which the parties cannot
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1 resolve after meeting and conferring in good faith, any party may move to
2 modify the Consent Judgment as provided for in Section 4.1 in order to
3 permit modification of the standard for a warning set forth in Section 2.2
4 above or to seek other modification as allowed by law or equity.

5 2.4. If Defendant sells a Product through the Internet, via telephone, or through a mail order
6 catalog for shipment to a consumer at a California address, if a warning is required Defendant shall
7 provide a warning in the same language as the label warning, in prominent type and face, displayed
8 next to the product image, before or after the product description, next to the product name or on the
9 order form. Alternatively, Defendant may provide a warning if required in the same language as the
10 label warning after a California consumer places an order and provides a California address for
11 shipment, so long as the warning is provided to the consumer before the product is shipped. Such
12 warnings shall be provided for all orders placed no later than May 1, 2009 or, for catalog sales, no
13 later than the next time that catalogs shipped to California addresses are prepared in the ordinary
14 course of business. Defendant shall not be obligated to provide, or to require a retailer or any other
15 person to provide, any in-store warnings for Product sold within the State of California, excepting
16 warnings on labels as set forth in Section 2.2.

17 2.5. Nothing in this Consent Judgment requires that warnings be given, or the other
18 obligations herein be discharged, for Product sold for use outside the State of California.

19 **3. PAYMENTS**

20 3.1 Defendant shall make the following payments within thirty days of entry of this Consent
21 Judgment:

- 22 a. \$500.00 in civil penalties pursuant to Health and Safety Code section 25249.7(b).
- 23 b. \$10,000.00 as reimbursement of the Plaintiff's costs in investigating, bringing and
24 resolving this action.

25 3.2 Payments (a) and (b) shall be made through delivery of two separate checks to Gene
26 J. Stonebarger, Lindsay & Stonebarger PC, 620 Coolidge Drive, Suite 225, Folsom, CA, 95630.
27 Plaintiff shall be responsible for remitting 75% of the \$500.00 payment to the State of California
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1 pursuant to California Health & Safety Code section 25249.12.(b).

2 **4. MODIFICATION OF CONSENT JUDGMENT**

3 4.1. This Consent Judgment may be modified by written agreement of the Plaintiff and
4 Defendant, after noticed motion, including service upon the Office of the Attorney General, and
5 upon entry of a modified consent judgment by the court thereon, or as provided by law and upon
6 entry of a modified consent judgment by the court.

7 **5. ENFORCEMENT**

8 5.1. The Plaintiff may, by motion or application for an order to show cause before this
9 Court, enforce the terms and conditions contained in this Consent Judgment. In any such
10 proceeding, the Plaintiff may seek whatever fines, costs, penalties, or remedies are provided by law
11 for failure to comply with the Consent Judgment. Where said violations of this Consent Judgment
12 constitute violations of Proposition 65 or laws other than the claims released below in Section 7.1, or
13 concern products which are not Product, the Plaintiff is not limited to enforcement of the Consent
14 Judgment, but may seek in another action, whatever fines, costs, penalties, or remedies are provided
15 for by law for failure to comply with Proposition 65 or other laws. In any action brought by the
16 Plaintiff alleging subsequent violations of Proposition 65 or laws other than the claims released
17 below in Section 7.1, Defendant may assert any and all defenses that are available.

18 **6. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

19 6.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized by
20 the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the
21 Consent Judgment on behalf of the party represented and legally to bind that party.

22 **7. CLAIMS COVERED**

23 7.1. This Consent Judgment is a full, final, and binding resolution between the Plaintiff
24 acting on his own behalf and on behalf of the People of the State of California, and Defendant, of
25 any violation of Proposition 65, or any other statutory or common law claims that have been or could
26 have been asserted in the Complaint against Defendant or its predecessors, successors, assigns,
27 corporate parents, subsidiaries, divisions, affiliates, along with the officers, directors, employees,
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1 agents, principals, attorneys, insurers, and assigns of such persons or entities ("Released Parties"),
2 for failure to provide clear and reasonable warnings required by Proposition 65 of exposure to lead
3 to consumers from the use of the Products, by Defendant or by any entity to whom it distributes or
4 sells Product. As to Products, compliance with the terms of this Consent Judgment resolves and
5 releases any issue or claim now, in the past, and in the future concerning compliance by Defendant,
6 the Released Parties, their franchisees, cooperative members, and licensees, their distributors,
7 suppliers, and retailers who sell Products and the predecessors, successors, and assigns of any of
8 them, with the requirements of Proposition 65 that have been or could have been asserted in the
9 Complaint.

10 **8. RETENTION OF JURISDICTION**

11 8.1. This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

12 **9. PROVISION OF NOTICE**

13 9.1. When any party is entitled to receive any notice under this Consent Judgment, the notice
14 shall be sent by overnight courier service with a tracking and delivery verification system to the
15 person and address set forth in this Paragraph. Any party may modify the person and address to
16 whom the notice is to be sent by sending each other party notice. Said change shall take effect for
17 any notice mailed five days after the date delivery is acknowledged by the party receiving the
18 change.

19 9.2. Notices shall be sent to the following when required:

20 (i) For the Attorney General:

21 Edward G. Weil, Supervising Deputy Attorney General
22 1515 Clay St., 20th Floor.
23 Oakland, CA 94612
24 Telephone: (510) 622-2149
25 Facsimile: (510) 622-2270.

26 (ii) For Defendant:

27 Irene Fisher, Esq., General Counsel
28 Solgar, Inc.
2100 Smithtown Avenue
Ronkonkoma, New York 11779
Telephone: (631) 200-7327
Facsimile: (631) 218-7341.

Judith M. Praitis, Esq.
Amy P. Lally, Esq.
Sidley Austin LLP
555 West Fifth Street,
Los Angeles, CA 90013
Telephone: (213) 896-6000
Facsimile: (213) 896-6600.

(iii) For Plaintiff:

Mr. David Cole
c/o Gene J. Stonebarger, Esq.
Linsday & Stonebarger PC
620 Coolidge Drive, Suite 225
Folsom, CA 95630
Telephone: (916) 294-0002
Facsimile: (916) 294-0012.

10. COURT APPROVAL

10.1. This Consent Judgment shall be submitted to the Court by Plaintiff for entry by noticed motion. If this Consent Judgment is not approved by the Court, it shall be of no force or effect. Plaintiff shall comply with the obligations set forth at 11 Cal. Code Reg. §§ 3000 *et seq.*

11. EXECUTION IN COUNTERPARTS

11.1. The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

IT IS SO STIPULATED:

Dated: 2/2/09

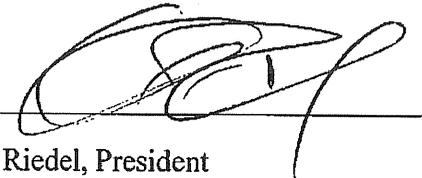
By:



David Cole

Dated:

By:



Karl Riedel, President

for Solgar, Inc.

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IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: JUN -4 2009



JUDGE OF THE SUPERIOR COURT
SHELLEYANNE W.L. CHANG