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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 LUCKY
VITAMIN, LLC**

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 Lucky Vitamin, LLC (“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 certain moringa
7 products that are sold and 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 CEH’s claims in the Complaint based on the facts
23 alleged therein with respect to moringa products sold by Settling Defendant.

24 1.6. Nothing in this Consent Judgment is or shall be construed as an admission by the
25 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
26 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
27 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
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1 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
2 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
3 and compromise and is accepted by the Parties solely for purposes of settling, compromising and
4 resolving issues disputed in this action.

5 **2. DEFINITIONS**

6 2.1. “Covered Products” means moringa products sold in powder, capsule or other
7 form supplied to Settling Defendant by Moringa Source LLC, Bio Nutrition, Inc., Emerald Labs,
8 Inc.

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

11 2.3. “Lead” means lead and lead compounds.

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

25 **3. INJUNCTIVE RELIEF**

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

4 3.1.1. **Warning Language.** A Clear and Reasonable Warning under this
5 Agreement shall state:



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

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

9
10 3.1.2. **Placement of Warning Language.** The warning language set forth in
11 Section 3.1.1 must be displayed with such conspicuousness as compared with other words,
12 statements, designs or devices as to render the warning likely to be read and understood by an
13 ordinary consumer under customary conditions of purchase and use. The warning language shall
14 appear on the Covered Product's label, set off from other surrounding information or enclosed in
15 a box. If the Covered Product's label contains other warnings or nutritional information in a
16 language other than English, the warning language set forth in Section 3.1.1 must also be
17 displayed on the label in that language in addition to English.

18 3.1.3. **Internet Sales.** With respect to internet sales of Covered Products, the
19 warning language set forth in Section 3.1.1 must be prominently displayed in such a manner that
20 it is likely to be read and understood as being applicable to the Covered Product being sold prior
21 to the authorization of or actual payment by the purchaser. For purposes of this Section 3.1.3, the
22 warning language is not prominently displayed if the customer must search for the warning
23 language in the general content of Settling Defendant's website or if a reasonable consumer
24 cannot determine the specific Covered Product to which the warning applies. If the product
25 display page contains other warnings or nutritional information in a language other than English,
26 the warning language set forth in Section 3.1.1 must also be displayed on the label in that
27 language in addition to English.

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 CCP §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 December 15, 2019, Settling
20 Defendant shall pay the total sum of \$37,500 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 \$5,013 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 \$3,760 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 \$1,253 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 \$3,759 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 \$28,728 as a reimbursement of a portion of
 10 CEH’s reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement shall be
 11 made in two separate checks as follows: (a) \$24,142 payable to the Lexington Law Group and
 12 associated with taxpayer identification number 94-3317175; and (b) \$4,586 payable to the Center
 13 for Environmental Health and associated with taxpayer identification number 94-3251981. Both
 14 of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San
 15 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:

18 Payee	Type	Amount	Deliver To
19 OEHHA	Penalty	\$3,760_____	OEHHA per Section 5.2.1
20 Center For Environmental Health	Penalty	\$1,253	LLG
21 Center For Environmental Health	ASP	\$3,759_	LLG
22 Lexington Law Group	Fees and Costs	\$24,142_____	LLG
23 Center For Environmental Health	Fees and Costs	\$4,586	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”) of any violation of Proposition 65 based on failure
14 to warn about exposure to Lead contained in Covered Products that were sold, offered for sale,
15 shipped, distributed, used or otherwise provided to customers by Settling Defendant prior to the
16 Effective Date.

17 7.2. Provided that Settling Defendant complies in full with its obligations under
18 Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever
19 discharges its claims against Settling Defendant and Defendant Releasees arising from any
20 violation of Proposition 65 or any other statutory or common law claims that have been or could
21 have been asserted by CEH individually or in the public interest regarding the failure to warn
22 about exposure to Lead contained in Covered Products that were sold, offered for sale, shipped,
23 distributed, used or otherwise provided to customers by Settling Defendant prior to the Effective
24 Date.

25 7.3. Provided that Settling Defendant complies in full with its obligations under
26 Section 5, compliance with the terms of this Consent Judgment by Settling Defendant shall
27 constitute compliance with Proposition 65 by Settling Defendant and its Defendant Releasees
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1 with respect to any alleged failure to warn about Lead contained in Covered Products sold,
2 offered for sale, shipped, distributed, used or otherwise provided to customers by Settling
3 Defendant after the Effective Date.

4 **8. PROVISION OF NOTICE**

5 8.1. When CEH is entitled to receive any notice under this Consent Judgment, the
6 notice shall be sent by first class and electronic mail to:

7 Eric S. Somers
8 Lexington Law Group
9 503 Divisadero Street
10 San Francisco, CA 94117
11 esomers@lexlawgroup.com

12 8.2. When Settling Defendant is entitled to receive any notice under this Consent
13 Judgment, the notice shall be sent by first class and electronic mail to:

14 Christina Manfredi McKinley
15 Cohen & Grigsby, P.C.
16 625 Liberty Avenue
17 Pittsburgh, Pennsylvania 15222-3152
18 cmckinley@cohenlaw.com

19 8.3. Any Party may modify the person and address to whom the notice is to be sent by
20 sending the other Party notice by first class and electronic mail.

21 **9. COURT APPROVAL**

22 9.1. This Consent Judgment shall become effective as a contract upon the date signed
23 by CEH and Settling Defendant, whichever is later, provided however, that CEH shall also
24 prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall
25 support approval of such Motion.

26 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
27 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
28 purpose.

10. GOVERNING LAW AND CONSTRUCTION

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

1 **11. ATTORNEYS' FEES**

2 11.1. A Party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
4 unless the unsuccessful Party has acted with substantial justification. For purposes of this
5 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
6 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

7 11.2. Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
8 action brought pursuant to Section 4 may seek an award of attorneys' fees pursuant to Code of
9 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
10 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
11 provision shall not be construed as altering any procedural or substantive requirements for
12 obtaining such an award.

13 11.3. Nothing in this Section 11 shall preclude a party from seeking an award of
14 sanctions pursuant to law.

15 **12. ENTIRE AGREEMENT**

16 12.1. This Consent Judgment contains the sole and entire agreement and understanding
17 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
18 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
19 and therein. There are no warranties, representations, or other agreements between the Parties
20 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
21 other than those specifically referred to in this Consent Judgment have been made by any Party
22 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
23 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
24 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
25 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
26 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
27 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
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1 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
2 whether or not similar, nor shall such waiver constitute a continuing waiver.

3 **13. RETENTION OF JURISDICTION**

4 13.1. This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

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

7 14.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
9 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

10 **15. SUCCESSORS AND ASSIGNS**

11 15.1. This Consent Judgment shall apply to and be binding upon CEH and Settling
12 Defendant, and their respective divisions, subdivisions, and subsidiaries, and the successors or
13 assigns of any of them.

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

15 16.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
16 against an entity that is not Settling Defendant on terms that are different than those contained in
17 this Consent Judgment.


18 **17. EXECUTION IN COUNTERPARTS**

19 17.1. The stipulations to this Consent Judgment may be executed in counterparts and by
20 means of facsimile or portable document format (pdf), which taken together shall be deemed to
21 constitute one document.

22 **IT IS SO STIPULATED:**
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Dated: <u>9/30</u> , 2019	CENTER FOR ENVIRONMENTAL HEALTH  <hr/> Michael Green Printed Name CEO Title
Dated: _____, 2019	DEFENDANT LUCKY VITAMIN, LLC <hr/> Printed Name <hr/> Title

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: _____, 2019

Judge of the Superior Court of California

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Dated: _____, 2019


CENTER FOR ENVIRONMENTAL HEALTH

Printed Name

Title

Dated: September 20, 2019

DEFENDANT LUCKY VITAMIN, LLC



Sam Wolf
Printed Name

CEO
Title

IT IS SO ORDERED, ADJUDGED, AND DECREED:

Dated: _____, 2019

Judge of the Superior Court of California