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December 1, 2011

VIA E-MAIL AND U.S. MAIL

Karen A. Evans, Esq.
Environmental Research Center
5694 Mission Center Road #199
San Diego, CA 92108

RE: Settlement Between Environmental Research Center and Vitamin Power Inc.

Dear Ms. Evans:

On November 14, 2011, we received a "Settlement Agreement and Release" between Environmental Research Center ("ERC") and Vitamin Power, Inc. ("Vitamin Power"). We are writing to inform you that ERC failed to follow proper Proposition 65 procedures in entering into and reporting this agreement and that the agreement contains terms that are legally invalid and not binding.

ERC served Proposition 65 notices of violation on Vitamin Power on August 17, 2010, and on January 14, 2011, alleging that consumers were exposed to lead in certain of Vitamin Power's dietary supplements without receiving a warning, in violation of Proposition 65. ERC filed a complaint against Vitamin Power in Los Angeles County Superior Court (case number BC458576) on April 1, 2011, alleging violations of Proposition 65 and citing to the August 17, 2010, and January 14, 2011, notices of violation. On August 8, 2011, ERC requested that the court dismiss the complaint (without prejudice). The "Settlement Agreement and Release" between ERC and Vitamin Power that we received appears to have been signed by the parties on September 23 and 26, 2011.¹

¹ ERC did not follow proper procedures in reporting this settlement to the Attorney General. Because ERC served Proposition 65 notices of violation on Vitamin Power, any subsequent settlement must be reported to the Attorney General, whether or not the settlement is submitted to or approved by a court. (Health & Saf. Code, § 25249.7, subd. (f)(1).) The Attorney General's regulations specify that such settlements must be reported no more than five days from the time that the written settlement agreement has been signed. (Cal. Code Regs, tit. 11, § 3003, subd. (a).) ERC did not report the "Settlement Agreement and Release" with Vitamin Power until 49 days after the document appears to have been signed.

The "Settlement Agreement and Release" incorrectly purports to be a settlement of alleged violations of Proposition 65 on behalf of the general public and in the public interest. For example, the "Settlement Agreement and Release" states in section 1.9 that, "[t]he Parties enter into this Settlement Agreement and Release in order to achieve a settlement of disputed claims between the Parties as alleged in the Notices of Violation dated August 17, 2010 and January 14, 2011. ERC is settling this case in the public interest." Vitamin Power agreed to pay to ERC "the sum of \$4,843.82 as reimbursement to ERC for investigative fees and costs incurred as a result of bringing this matter to the attention of [Vitamin Power], and settling this matter in the public interest." (§ 3.2.) In exchange for the settlement payment, ERC agreed to "withdraw both of the Notices of Violation." (§ 2.3(e).) The "Settlement Agreement and Release" purports to be "a full, final and binding resolution between ERC, acting on behalf of the general public and in the public interest pursuant to Health & Safety Code Section 25249.7(d)" and Vitamin Power. (§ 5.1.)

Once a private party, such as ERC, files a complaint alleging a violation of Proposition 65, any settlement of that case must be submitted "to the court for approval upon noticed motion, and the court may approve the settlement only if the court makes all of the following findings:

- (A) Any warning that is required by the settlement complies with this chapter.
- (B) Any award of attorney's fees is reasonable under California law.
- (C) Any penalty amount is reasonable based on the criteria set forth [in the penalty provision]."

(Health & Saf. Code, § 25249.7, subd. (f)(4).) The Attorney General must be served with all papers supporting such motion, and the Attorney General is permitted to appear on the matter without intervening. (§ 25249.7, subd. (f)(5).) With one exception, a private plaintiff cannot avoid this procedure simply by dismissing the case before finalizing a settlement. The single exception is for a "voluntary dismissal *in which no consideration is received from the defendant.*" (§ 25249.7, subd. (f)(4) [emphasis added].) For every other settlement after a Proposition 65 complaint is filed, court approval is mandatory. (*Ibid.*)

Since ERC filed a complaint against Vitamin Power, ERC was required to obtain court approval of the settlement of the matter unless it dismissed the lawsuit with no consideration. (Health & Saf. Code, § 25249.7, subd. (f)(4).) Although the "Settlement Agreement and Release" states that "[t]here was no agreement as to injunctive relief or payment of any monies at the time of the Dismissal" (§ 1.4), in order to settle the matter Vitamin Power did agree to pay \$4,843.82 "as reimbursement to ERC for investigative fees and costs incurred." (§ 3.2) It appears therefore that ERC has in effect received consideration for its dismissal of the lawsuit. The exception for dismissals with no consideration does not apply to circumstances that would undermine the general requirement that a settlement of a filed lawsuit must be approved by a court upon a finding that attorney's fees are reasonable. (Health & Saf. Code, § 25249.7, subd. (f)(4).) ERC served Proposition 65 notices of violation on Vitamin Power to obtain legal authority to sue, then filed a complaint based on those notices, and then later resolved the claims in those notices in exchange for consideration (i.e., \$4,843.82). This course of events indicates that the "Settlement Agreement and Release" is the sort of Proposition 65 settlement that the

Legislature intended be subject to judicial approval, even though the exchange of money may not have occurred simultaneously with the dismissal.

Further, we understand that one of the reasons ERC dismissed the complaint is that it learned that Vitamin Power had fewer than 10 employees. If Vitamin Power had fewer than 10 employees during the time period covered by ERC's notices of violation, Vitamin Power could not have been in violation of Proposition 65 at all, as it would not be a "person in the course of doing business" under the law. (Health & Saf. Code, §§ 25249.6 & 25249.11, subd. (f).) It follows that ERC provided no public benefit since there was no violation. In such a case, ERC is not entitled to recover any fees, costs, penalties, or other payments in exchange for a release of liability, since such fees would not be reasonable under California law, and we believe that a court would not approve such fees. (*Id.* subd. (f)(4)(B); see also Code Civ. Proc., § 1021.5, subd. (a) [awarding fees only upon showing of a significant benefit to the general public].)

The "Settlement Agreement and Release" between ERC and Vitamin Power is not binding on anyone besides the parties to the agreement because it is an out-of-court agreement and not a judgment of the court. In order for a Prop 65 settlement to have preclusive effect, court approval under the procedures mandated by Proposition 65 is required. (*Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 684-85.) Because ERC did not follow these procedures, its settlement with Vitamin Power has no preclusive effect. (*Ibid.*) Thus, the assertions in the "Settlement Agreement and Release" that ERC was resolving the matters on behalf of the public and in the public interest are incorrect as a matter of law, and those provisions are invalid. ERC only had the power to release its own claims against Vitamin Power, not the claims of the general public or claims in the public interest. As a result, ERC's agreement with Vitamin Power does not prevent any private Proposition 65 enforcer from suing Vitamin Power for the same violations alleged by ERC in its August 17, 2010, and January 14, 2011, notices of violation, if Vitamin Power was in violation of Proposition 65.

We have concluded that the settlement between ERC and Vitamin Power is void and unenforceable because ERC failed to obtain court approval of the agreement and because the purported release of liability in the "Settlement Agreement and Release" is invalid.

To the extent ERC chooses to enter into private, out-of-court settlements of alleged Proposition 65 violation in the future without filing a complaint, ERC should make clear to the settling parties that it is only settling on behalf of ERC and not on behalf of any other entity or the general public. ERC must not represent to settling parties that such a settlement precludes enforcers from filing a lawsuit alleging the same violations. Further, once ERC files a complaint, it must obtain judicial approval of any settlement, unless it dismisses the complaint and does not obtain any consideration from the noticed party thereafter.

Karen A. Evans
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Please contact me if you would like to discuss this matter further.

Sincerely,



TIMOTHY E. SULLIVAN
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

cc: Gideon Kracov, Esq., Law Office of Gideon Kracov
David H. Friedlander, Vitamin Power, Inc.

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