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10 AS YOU SOW

FILED
San Francisco County Superior Court

AUG 20 2003

GORDON PARK-LI, Clerk
BY: Jocelyn C. Rogers
Deputy Clerk

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 CITY AND COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

9 AS YOU SOW, a non-profit corporation,

10 Plaintiff,

11 vs.

12 GENERAL NUTRITION CORPORATION and
13 DOES 1 to 20, inclusive,

14 Defendants.

Case No. 415739

**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT GENERAL
NUTRITION CORPORATION**

15
16 This Consent Judgment is entered into by and between AS YOU SOW (“Plaintiff” or
17 “AYS”) and GENERAL NUTRITION CORPORATION (“GNC”) to resolve all claims raised in
18 the Complaint filed in the above-captioned action. This Consent Judgment shall be effective
19 upon entry. Plaintiff and GNC (collectively, “the Parties”) agree to the terms and conditions set
20 forth below.

21 **1. INTRODUCTION**

22 **1.1** AYS is a non-profit foundation dedicated to, among other causes, the protection of
23 the environment, the promotion of human health, the improvement of worker and consumer
24 rights, environmental education, and corporate accountability. AYS is based in San Francisco,
25 California and incorporated under the laws of the State of California.

26 **1.2** GNC is a Pennsylvania corporation that sells in California Natural Brand shark
27 cartilage (item codes 002411 and 002421), Herbal Plus Fo-Ti (item codes 467110 and 467111),
28

[PROPOSED] CONSENT JUDGMENT

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1 and Source Natural Wellness Formula (item code 585934) (collectively, the "Products"), all of
2 which allegedly contain a chemical listed by the State of California as known to cause cancer
3 and/or reproductive toxicity pursuant to the Safe Drinking Water and Toxic Enforcement Act of
4 1986 ("Proposition 65"), California Health and Safety Code § 25249.5 et seq.; Title 22, California
5 Code of Regulations, § 12000 et seq.

6 1.3 The names of each of the Products covered by this Consent Judgment are set forth
7 in Exhibit A hereto (any items not appearing on Exhibit A are not covered by the injunctive
8 provisions or the release of liability set forth herein).

9 1.4 The Products have been imported, manufactured, distributed and/or sold by GNC
10 for use in California since at least December 16, 1998.

11 1.5 On February 27, 1987, the State of California officially listed the chemical lead as
12 a chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code
13 § 25249.8.

14 1.6 On October 1, 1992, the State of California officially listed the chemicals lead and
15 lead compounds as chemicals known to cause cancer, pursuant to California Health and Safety
16 Code § 25249.8.

17 1.7 On September 23, 2002, AYS served GNC and each of the appropriate public
18 enforcement agencies with documents entitled "60-Day Notice" that provided GNC and the
19 public enforcement agencies with notice that GNC was in violation of Proposition 65 for failing
20 to warn the purchasers and individuals using the Products that use of the Products exposes them
21 to certain chemicals known to the State of California to cause cancer and/or reproductive toxicity.
22 A copy of this notice is attached hereto as Exhibit B. GNC stipulates for the purpose of this
23 Consent Judgment that the Notice is adequate to comply with Title 22, California Code of
24 Regulations, § 12903.

25 1.8 On December 16, 2002, AYS filed a complaint in the case entitled As You Sow v.
26 General Nutrition Corporation, et al., Case Number 415739 (the "Action") in San Francisco
27
28

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1 Superior Court, alleging violations of Proposition 65 and California Business and Professions
2 Code § 17200, *et seq.*

3 **1.9** The Action was brought against GNC by AYS in the public interest at least sixty
4 (60) days after AYS provided notice of the Proposition 65 violations to GNC and the appropriate
5 public enforcement agencies, and none of the public enforcement agencies had commenced and
6 begun diligently prosecuting an action against GNC for such violations.

7 **1.10** For purposes of this Consent Judgment, the Parties stipulate that this Court has
8 subject matter jurisdiction over the allegations contained in the Complaint. GNC does not contest
9 the exercise of jurisdiction by this Court to enter this Consent Judgment as a full and final
10 resolution of all causes of action pled in the Complaint.

11 **1.11** The Parties enter into this Consent Judgment to settle disputed claims between
12 them and to avoid prolonged litigation. By execution of this Consent Judgment, GNC does not
13 admit any violations of Proposition 65, the Business and Professions Code, or any other law or
14 standard applicable to warning or disclosure concerning the import, manufacture, distribution
15 and/or sale of the Products. Nothing in this Consent Judgment shall be construed as an admission
16 by GNC of any fact, issue of law, or violation of law, nor shall compliance with this Consent
17 Judgment constitute or be construed as an admission by GNC of any fact, issue of law, or
18 violation of law.

19 **1.12** Nothing in this Consent Judgment shall prejudice, waive, or impair any right,
20 remedy, or defense that the Parties may have in any other or further legal proceeding. This
21 paragraph does not diminish or otherwise affect the obligations, responsibilities, and duties of
22 GNC under this Consent Judgment.

23 **2. INJUNCTIVE PROVISIONS**

24 **2.1 Provision of Clear and Reasonable Health Hazard Warnings.** On or before
25 September 1, 2003, GNC shall permanently cease selling and no longer sell in California any
26 units of Herbal Plus Fo-Ti or Source Natural Wellness Formula unless each individual unit
27 thereof bears the following warning statement on its individual unit label packaging:

WARNING: Use of this product will expose you to lead, a chemical known to the State of California to cause cancer and birth defects or other reproductive harm. DO NOT USE DURING PREGNANCY.

The warning statement shall be prominent and displayed on the unit packaging of each Product with such conspicuousness, as compared with other words, statements, or designs, so as to render it likely to be read and understood by an ordinary individual purchasing or using the Product.

2.2 Relabeling of the Natural Brand Shark Cartilage Product To Reflect Dosage Change. On or before September 1, 2003, GNC shall permanently cease selling and no longer sell in California any units of the Natural Brand shark cartilage product identified in Section 1.2 above unless it is relabeled to reflect a recommended daily dose of not more than one tablet.

2.3 Cessation of Sales of Certain Products Through Franchisees. In recognition of the limited control GNC has over its franchisees, GNC shall, within five (5) days of the entry of this judgment, place the following products on its list of "Disapproved Products" sold in California: Source Naturals Wellness Formula, Shen Herbal Products Dr. Shen's Yin Chao Pills, and Ayurherbal Corporation Herbal-Vedic Shakti Energy Tonic ("Disapproved Products"). In order for GNC to sell the Disapproved Products in the future, it must follow the procedure set forth in Section 8.5. GNC shall regularly monitor its franchisees' compliance with the Disapproved Products list. If GNC should discover that a Disapproved Product is being sold in California by a GNC franchisee store, GNC will promptly inform AYS as to the identity of such Disapproved Product(s), and provide AYS with the identity of the franchisee who owns that store, and the location of the store or stores selling the Disapproved Product(s).

3. CIVIL PENALTIES

3.1 Stipulated Civil Penalties For Future Violations of This Agreement.

Proposition 65 provides for penalties of up to \$2500, per violation, per day, pursuant to Health & Safety Code § 25249.7(b). In the event that GNC violates Section 2.1 or 2.2 above, the Parties stipulate to a civil penalty in the amount of \$100 per individual unit item sold in violation. Before GNC will be required to pay any amount in stipulated civil penalty, and as part of Plaintiff's meet and confer obligation pursuant to Paragraph 8.1 below, Plaintiff must show evidence of each such

1 violation. Any alleged such violation may be shown by test results undertaken according to
2 standard procedures by a reputable laboratory. Such standard procedures include, but are not
3 limited to, compounding 20 tablets before testing a sample of the aggregate. AYS agrees to
4 provide to GNC the test results and the original package from which the tested tablets came,
5 including the untested tablets, with an appropriate chain of custody, to the extent these items are
6 available. AYS will remit 75% of any amount paid according to this Section to the State of
7 California pursuant to Health & Safety Code § 25192.

8 **3.2 Civil Penalty Assessment.** GNC shall pay a civil penalty in the amount of \$5000,
9 pursuant to Health & Safety Code § 25249.7(b). AYS shall send 75% of this amount to the State
10 of California pursuant to Health & Safety Code § 25192.

11 **3.3 Payment in Lieu of Additional Civil Penalties.** GNC shall make a payment in
12 lieu of additional penalties in the amount of \$45,000. AYS shall forward these funds to (a)
13 California non-profit groups, and (b) the AYS Foundation Environmental Enforcement Fund;
14 these funds will be used to reduce exposures to toxic chemicals, and to increase consumer,
15 worker, and community awareness of the health hazards posed by toxic chemicals. In deciding
16 among the grantee proposals, the As You Sow Board of Directors ("Board") shall take into
17 consideration factors including: (1) the nexus between the harm done in the underlying case(s),
18 and the grant program work; (2) the potential for toxics reduction, prevention, remediation, or
19 education benefits to California citizens from the proposal; (3) the budget requirements of the
20 proposed grantee and alternative funding sources available to it for its project; and (4) the Board's
21 assessment of the grantee's chances for success in its program work.

22 **3.4 Penalties are not a credit.** No penalties paid herein shall be construed as a
23 credit against future claims against GNC.

24 **4. REIMBURSEMENT OF FEES AND COSTS**

25 **4.1 Reimbursement of Plaintiff's Investigative, Expert and Legal Fees and Costs.**
26 GNC agrees to reimburse AYS in the amount of \$35,000 for AYS' reasonable investigative,
27 expert, and legal fees and costs incurred as a result of investigating, bringing this matter to GNC's
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1 attention, and negotiating a settlement in the public interest.

2 **5. PAYMENT OBLIGATIONS**

3 **5.1** Pursuant to Sections 3.2, 3.3 and 4.1 herein, GNC agrees to remit the total amount
4 of \$85,000, payable to "As You Sow" (Employer Identification Number 94-3169008). This
5 payment shall be remitted directly to AYS within 5 days of notice of entry of the judgment.

6 **5.2** In the event that any payment owed to AYS under this Consent Judgment is late,
7 GNC shall be deemed to be in default of its obligations under this Consent Judgment. AYS shall
8 provide written notice to GNC of any default. If GNC fails to remedy its default within two (2)
9 business days of such notice, interest shall accrue on any unpaid balance at the prevailing federal
10 funds rate.

11 **6. RELEASE OF LIABILITY**

12 **6.1 Release of Liability of GNC.** AYS, on its own behalf, and on behalf of the
13 general public, waives all rights to institute any form of legal action against GNC, its officers,
14 directors, employees, attorneys, representatives, parents, subsidiaries, affiliates, divisions,
15 franchisees, licensees, and subdivisions, whether under Proposition 65 or Business & Professions
16 Code §17200, *et seq.* based upon GNC's alleged failure to warn, within the meaning of
17 Proposition 65, about exposure to lead and lead compounds allegedly contained in any of the
18 Products sold before September 1, 2003.

19 **6.2 Release of Liability of AYS.** GNC waives all rights to institute any form of legal
20 action against AYS, its officers, directors, employees, agents, attorneys, and representatives (the
21 "AYS Releasees") for all actions or statements made or undertaken by the AYS Releasees in the
22 course of seeking enforcement of Proposition 65 or Business & Professions Code §17200, *et seq.*
23 against GNC.

24 **7. CONSENT JUDGMENT**

25 **7.1 Consent Judgment.** Upon execution of this [Proposed] Consent Judgment, AYS
26 shall file a Motion for Approval & Entry of Consent Judgment in the San Francisco Superior
27 Court. Pursuant to Title 11, Cal. Code of Regs. § 3003, this motion shall be served upon all of
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1 the parties to the Action and upon the California Attorney General's Office. The Court shall
2 either approve or disapprove of this Consent Judgment in its entirety, without alteration, deletion,
3 or amendment, unless otherwise so stipulated by the parties or their counsel. GNC agrees to
4 support the motion to approve this Consent Judgment in full, and will take all reasonable
5 measures to ensure that it is entered without delay.

6 **8. ENFORCEMENT AND MODIFICATION**

7 **8.1 Enforcement and Stipulated Civil Penalties.** If a dispute arises with respect to
8 any of the provisions of this Consent Judgment, the Parties shall meet and confer within 20 days
9 after either Party receives written notice of an alleged violation of this Agreement from the other
10 Party. If the Parties cannot resolve the dispute, this Consent Judgment may be enforced pursuant
11 to Code of Civil Procedure § 664.6 or any other valid provision of law. The prevailing party in
12 any dispute regarding compliance with the terms of this Consent Judgment will be awarded its
13 reasonable fees and costs incurred, in addition to any other relief otherwise ordered by the Court,
14 including but not limited to civil penalties assessed pursuant to Section 3 herein.

15 **8.2 Modification of Judgment - Grounds.** The Parties acknowledge that new
16 toxicological information or exposure assessments concerning hazardous substances are
17 continuously becoming available, and that statutory and regulatory standards applicable to the
18 Products may evolve in the future. Accordingly, the Parties agree that either Party may elect to
19 file a motion pursuant to § 664.6 of the California Code of Civil Procedure, and under the
20 conditions set forth below, move the Court for modification of the warning requirement set forth
21 in Section 2 herein on the ground that it conflicts with the applicable law or science concerning
22 the Products. Any disputes regarding the issues set forth in this subsection shall be resolved in
23 accordance with the procedures set forth in subsection 8.3 below.

24 **8.3 Modification of Judgment - Procedure.** In the spirit of cooperation and in the
25 interests of minimizing the investigative, expert and attorneys' fees and costs associated with
26 such a motion, the Parties agree to meet and confer in good faith as follows. Before filing a
27 motion pursuant to subsection 8.2 herein, the Party seeking to modify the judgment shall first
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1 provide the non-moving Party and the California Attorney General's Office with any legal or
2 scientific data upon which the motion would rely. The non-moving party and the California
3 Attorney General's Office shall be allowed a period of thirty (30) days to review that data and to
4 provide the moving party with its formal written response (the Attorney General's Office's failure
5 to respond to this submission shall not be construed in any manner to reflect any particular view
6 on the part of the Attorney General's Office, of this Consent Judgment or of the applicable law or
7 science). The Parties shall then meet and confer within ten (10) days of the non-moving party's
8 written response. If, after meeting and conferring, the moving party elects to proceed with a
9 motion to amend this judgment, it may do so with proper notice to the other Party and the
10 Attorney General's Office as required under the California Code of Civil Procedure. Such a
11 motion may be accompanied by scientific data, studies, written declarations, live testimony, or
12 discovery responses.

13 **8.4 Modification of Judgment – Product Exemption As Additional Grounds.**

14 GNC will also be entitled to seek a modification of this Consent Judgment on the additional
15 ground that a Product has been reformulated or otherwise modified so it does not require a
16 warning under Proposition 65. In seeking such a modification of this judgment, the burden will
17 rest on GNC to adduce clear and convincing evidence that the modification is warranted as a
18 matter of law. GNC shall produce, as part of its obligation to meet and confer pursuant to
19 subsection 8.3 herein, test results from at least three different manufacturing batches of the
20 Product, each batch manufactured at least one month apart from any other, conducted by an EPA-
21 accredited laboratory using inductively coupled plasma-mass spectrometry. GNC may produce
22 such testing data as to any batch lot for any given Product to demonstrate that such batch lot is
23 identifiable on the container of the Product. If the Parties are in agreement that such test results
24 demonstrate that a warning for a Product or batch lot of a Product is not required, then the Parties
25 may memorialize their agreement by letter, and no motion shall be required. If the Parties
26 disagree, then any such motion under this subsection shall comply with the procedural
27 requirements of Section 8.3 herein.

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1 **8.5 Sales Pending Modification – Product Exemption**

2 If and when GNC seeks a modification of this Consent Judgment on the additional ground
3 that a Product has been reformulated or otherwise modified so it does not require a warning under
4 Proposition 65, GNC may sell or allow for sale in California any reformulated or otherwise
5 modified Product without a Proposition 65 warning during the pendency of the process described
6 in subsections 8.2, 8.3, and 8.4 of this Consent Judgment subject to the following conditions:

7 a. GNC must inform AYS in writing of its intention to engage in such conduct at
8 least 30 days before doing so;

9 b. GNC will be liable for the stipulated penalties described in subsection 3.1 for
10 Products sold during the pendency of the process described in subsections 8.2, 8.3, and 8.4 of this
11 Consent Judgment if it should be found by the appropriate court that the Products sold during the
12 pendency of that process were not reformulated or otherwise modified so as to not require a
13 warning under Proposition 65;

14 c. If, at the conclusion of the process described in subsections 8.2, 8.3, and 8.4 of this
15 Consent Judgment, it should be found or agreed that the Products sold during the pendency of that
16 process were reformulated or otherwise modified so as to not require a warning under Proposition
17 65, then the Consent Judgment modification will have retroactive effect to the first sales of the
18 modified Product 30 days after notification to AYS under subsection 8.5(a), and GNC will not be
19 liable for any penalties potentially accruing for those sales under Proposition 65.

20 **9. GOVERNING LAW**

21 **9.1 Governing Law.** The terms of this Agreement are governed by the laws of the
22 State of California.

23 **10. NOTICES**

24 **10.1 Notices.** All correspondence and notices required to be provided under this
25 Agreement shall be in writing and shall be sent by first class registered or certified mail addressed
26 as follows:

27 All correspondence to AYS shall be mailed to:

With a copy to:

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1 Attn: Lawrence E. Fahn, Executive Director
2 As You Sow
3 311 California Street, Suite 510
4 San Francisco, CA 94104

Andrew L. Packard
The Law Offices of Andrew L. Packard
294 Page Street
San Francisco, CA 94102

4 All correspondence to GNC shall be mailed to:

With a copy to:

5 Attn: David J. Sullivan
6 Assistant General Counsel
7 General Nutrition Corporation
8 300 Sixth Avenue
9 Pittsburgh, PA 15222

Daniel M. Fuchs
Livingston & Mattesich
1201 K Street, Suite 1100
Sacramento, CA 95814

9 **11. INTEGRATION AND MODIFICATION**

10 **11.1 Integration & Modification.** This Agreement, together with the Exhibits hereto
11 which are specifically incorporated herein by this reference, constitutes the entire agreement
12 between the Parties relating to the rights and obligations herein granted and assumed, and
13 supersedes all prior agreements and understandings between the Parties. This Agreement may be
14 modified only upon the written agreement of the Parties.

15 **12. COUNTERPARTS**

16 **12.1 Counterparts.** This Agreement may be executed in counterparts, each of which
17 will be deemed an original, and all of which, when taken together, will constitute one and the
18 same document.

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13. AUTHORIZATION

13.1 Authorization. The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read and understood, and agree to all of the terms and conditions of this Agreement.

IT IS SO STIPULATED:

DATED: 6/27/03

AS YOU SOW


By: Lawrence E. Fahn
Executive Director

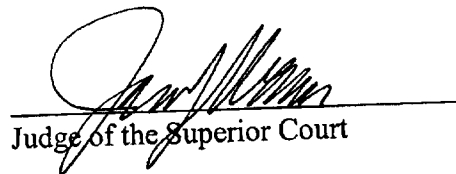
DATED: _____

GENERAL NUTRITION CORPORATION

By: James M. Sander
Vice-President

IT IS SO ORDERED:

DATED: 8/20/03


Judge of the Superior Court

JAMES L. WARREN

INDEX OF ATTACHED EXHIBITS

EXHIBIT A - Product List

EXHIBIT B - Notice of Proposition 65 Violation

07/01/2003 08:28 FAX 412 338 8900
JUN 30 2003 10N US-31 PM

GNC LEGAL DEPT

FAX NO.

002

P. 04

JUN-30-2003 14:59

ANDREW PACKARD

415 431 8418

P.02

1 13. AUTHORIZATION

2 13.1 Authorization. The undersigned are authorized to execute this Agreement on
3 behalf of their respective parties and have read and understood, and agree to all of the terms and
4 conditions of this Agreement.

6 IT IS SO STIPULATED:

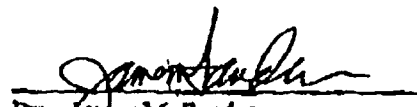
8 DATED: 6/27/03

AS YOU SOW

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10 
11 By: Lawrence E. Fahn
12 Executive Director

13 DATED: 6-27-03

GENERAL NUTRITION CORPORATION

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15 
16 By: James M. Sander
17 Vice-President

18 IT IS SO ORDERED:

19 DATED: *JCN*
20 Judge of the Superior Court

22 INDEX OF ATTACHED EXHIBITS

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- 24 EXHIBIT B - Notice of Proposition 65 Violation

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