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8
9 Attorneys for Plaintiff
10 AS YOU SOW

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO

14 AS YOU SOW, a non-profit corporation,

15 Plaintiff,

16 vs.

17 BOTANICAL LABORATORIES, INC., doing
18 business as ZAND HERBAL FORMULAS,
19 NATURALIFE ECO VITE LABORATORIES,
20 INC., dba PARAGON LABORATORIES,
21 PACIFIC NUTRITIONALS, INC., PRO PAC
22 LABS, INC. and DOES 4 through 20, inclusive,

23 Defendants.

24 AS YOU SOW, a non-profit corporation,

25 Plaintiff,

26 vs.

NATURALIFE ECO VITE LABORATORIES,
INC., dba PARAGON LABORATORIES,
PACIFIC NUTRITIONALS, INC., PRO PAC
LABS, INC. and DOES 1 through 20, inclusive,

Defendants.

AND RELATED CROSS-ACTIONS

Case No. CGC-04-429563

**NOTICE OF ENTRY OF ORDER
RE: MOTION TO APPROVE
PROPOSITION 65 SETTLEMENT
AND FOR ENTRY OF CONSENT
JUDGMENT**

Complaint filed: March 12, 2004

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PLEASE TAKE NOTICE that on May 23, 2005, the Court in the above-referenced action entered the Order attached hereto as Exhibit A and the Consent Judgment attached hereto as Exhibit B.

DATED: May 25, 2005

Law Offices of Andrew L. Packard


Andrew L. Packard
Michael P. Lynes
Attorneys for Plaintiff
As You Sow

1 **PROOF OF SERVICE**

2
3 I, Justine Villanueva declare under penalty of perjury under the laws of the State of
4 California that the following is true and correct:

5 I am a citizen of the United States, over the age of 18 years of age, and am not a party to
6 the within entitled action. My business address is 294 Page Street, San Francisco, California
7 94102.

8 On May 26, 2005, I served the following document:

9 **NOTICE OF ENTRY OF ORDERS RE: MOTION TO APPROVE
10 PROPOSITION 65 SETTLEMENT AND FOR ENTRY OF CONSENT
11 JUDGMENT**

12 on the following parties in this action by placing a true and correct copy thereof in a sealed
13 envelope, first class, postage pre-paid, addressed to the parties listed below, and depositing it in a
14 United States Postal Service mail box:

13 Judith M. Praitis
14 Sidley Austin Brown & Wood
15 555 West Fifth Street
16 Los Angeles, CA 90013
17 (Counsel for Botanical Laboratories, Inc.)

Trent Norris, Esq.
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA
(Counsel for Naturalife Eco Vite
Laboratories, Inc. and Pro Pac Labs)

17 Edward G. Weil
18 Deputy Attorney General
19 California Attorney General's Office
20 1515 Clay Street, 20th Floor
21 Oakland, CA 94612-1413

C. Todd Norris
Bullivant House Bailey PC
601 California Street, Suite 1800
San Francisco, CA 94108
(Counsel for Pacific Nutritional, Inc.)

22 Executed on May 26, 2005, at San Francisco, California.

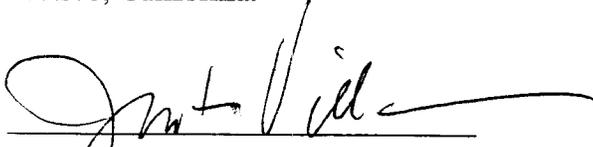
23 
24 _____
25 Justine Villanueva
26

EXHIBIT A

1 After consideration of the papers submitted by the parties, and oral argument of
2 counsel, the Court makes the following findings pursuant to Health & Safety Code
3 §25249.7(f)(4):

- 4 (a) Any warning that is required by the settlement complies with Chapter
5 6.6 of the Health & Safety Code;
6 (b) the award of attorney's fees is reasonable under California law; and,
7 (c) the penalty amount is reasonable based on the criteria set forth in
8 Health & Safety Code §25249.7(b)(2).

9 The Court further finds that while the Attorney General raises important issues
10 concerning the settlement, these issues have been adequately addressed in the parties'
11 [Proposed] Revised Consent Judgment.

12 **IT IS THEREFORE ORDERED THAT:**

- 13 (1) Plaintiff's motion is GRANTED; and,
14 (2) Judgment as to BLI shall be entered in accordance with the terms of the Revised
15 Consent Judgment.

16
17 DATED: May 19, 2005

18 
19 _____
20 Hon. James L. Warren
21 Judge of the Superior Court
22
23
24
25
26

EXHIBIT B

LAW OFFICES
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8 Attorneys for Plaintiff
9 AS YOU SOW

ENDORSED
FILED
San Francisco County Superior Court

MAY 23 2005

GORDON PARK-LI, Clerk
BY: JOCELYN C. ROQUE
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 BOTANICAL LABORATORIES, INC., dba
13 ZAND HERBAL FORMULAS; NATURALIFE
14 ECO VITE LABORATORIES, INC., dba
15 PARAGON LABORATORIES, PACIFIC
16 NUTRITIONAL, INC., PRO PAC LABS, INC.

Defendants.

Case No. CGC-04-429563

(JCR)
~~[PROPOSED]~~ CONSENT JUDGMENT
AS TO DEFENDANT BOTANICAL
LABORATORIES, INC. dba ZAND
HERBAL FORMULAS

17 This Consent Judgment is entered into by and between AS YOU SOW, a non-profit
18 organization ("Plaintiff" or "AYS"), and Botanical Laboratories, Inc. dba Zand Herbal Formulas.
19 Botanical Labs is a Washington corporation in good standing. This Consent Judgment shall be
20 effective upon entry (the "Effective Date") by the court. Plaintiff and Defendant (each a "Party"
21 and collectively, "the Parties") agree to the terms and conditions set forth below.

22 1. INTRODUCTION

23 1.1 AYS is a Section 501(c)(3) non-profit foundation dedicated to, among other
24 causes, the protection of the environment, the promotion of human health, the improvement of
25 worker and consumer rights, environmental education, and corporate accountability. AYS is
26 based in San Francisco, California and incorporated under the laws of the State of California.
27 AYS is a corporation in good standing.

FINAL REVISED [PROPOSED] CONSENT JUDGMENT

COPY

1 1.2 Defendant directly or indirectly sells to California consumers certain herbs, herbal
2 products, traditional patent medicines (defined as “herbal and patent medicines consisting of
3 single or multiple herbal ingredients, including botanical, mineral and animal products,
4 formulated into tablets, capsules, pills, powders and liquids”), bulk herbs, infusions, extracted
5 powders, tea pills, traditional pills, patent formulas, teas, bulk teas, liquid herbal extracts and/or
6 capsules (the “Products”), all of which AYS alleges contain chemicals listed by the State of
7 California as known to cause cancer and/or reproductive toxicity pursuant to the Safe Drinking
8 Water and Toxic Enforcement Act of 1986 (“Proposition 65”), California Health and Safety Code
9 § 25249.5 et seq.; Title 22, California Code of Regulations § 12000 et seq. For purposes of this
10 Consent Judgment only, each of the Products is deemed to be a “food” within the meaning of
11 Title 22, California Code of Regulations § 12501.

12 1.3 The specific Products covered by this Consent Judgment as of the Effective Date
13 are set forth in Exhibit A hereto. Any products not set forth in Exhibit A hereto are not covered
14 by the injunctive provisions herein, except as specifically provided in Section 9: *New Products*,
15 and are not covered by the release of liability set forth in Section 6 herein.

16 1.4 Pursuant to Health & Safety Code § 25249.8: (a) on February 27, 1987, the State
17 of California listed the chemical lead as a chemical known to cause reproductive toxicity; (b) on
18 October 1, 1992, the State of California listed the chemicals lead and lead compounds as
19 chemicals known to cause cancer; (c) on July 1, 1990 the State of California listed the chemicals
20 mercury and mercury compounds as chemicals known to cause reproductive toxicity; (d) on
21 February 27, 1987, the State of California officially listed the chemical arsenic as a chemical
22 known to cause cancer; (e) on May 1, 1997, the State of California officially listed the chemical
23 arsenic as a chemical known to cause reproductive toxicity; (f) on October 1, 1987, the State of
24 California officially listed the chemicals cadmium and cadmium compounds as chemicals known
25 to cause cancer; (g) on May 1, 1997, the State of California officially listed the chemical
26 cadmium as a chemical known to cause reproductive toxicity. For purposes of this Consent
27 Judgment, the foregoing chemicals as listed under Proposition 65 shall be the “Metals”.

1 1.5 Beginning on December 23, 2003, AYS began serving Defendant and each of the
2 appropriate public enforcement agencies with "60-Day Notices" that provided Defendant and the
3 public enforcement agencies with a notice alleging that Defendant was in violation of Proposition
4 65 for failing to warn the purchasers and individuals using the Products that the use of the
5 Products exposes them to certain chemicals known to the State of California to cause cancer
6 and/or reproductive toxicity (each, a "60-Day Notice"). A copy of each such 60-Day Notice
7 issued to Defendant is attached hereto as Exhibit B. AYS served an additional 60-Day Notice on
8 or about February 25, 2005, a copy of which has been filed and served with AYS' Motion for
9 Approval & Entry of Consent Judgment. (See Section 7 hereinbelow). Defendant stipulates for
10 the purpose of this Consent Judgment that the 60-Day Notice or 60-Day Notices sent to it are
11 adequate to comply with Title 22, California Code of Regulations §12903.

12
13 1.6 On March 12, 2004, AYS filed a Complaint (the "Action") in San Francisco
14 Superior Court, alleging violations of Proposition 65 and California Business and Professions
15 Code § 17200 et seq. AYS brings the Action in the public interest. AYS has provided 60-Day
16 Notice(s) to Defendant and the appropriate public enforcement agencies and none of the public
17 enforcement agencies has commenced and begun diligently prosecuting an action against
18 Defendant for such alleged violations.

19 1.7 For purposes of this Consent Judgment, each Party stipulates that venue is proper
20 and that this Court has subject matter jurisdiction over the allegations contained in the Action and
21 to enter this Consent Judgment as a full and final resolution of all causes of action pled, or which
22 could have been pled based on the facts alleged in the Action. The Parties enter into this Consent
23 Judgment to settle disputed claims between them and to avoid prolonged litigation. By execution
24 of this Consent Judgment, Defendant does not admit any violations or the applicability of
25 Proposition 65 or the Business and Professions Code, or any other law or standard applicable to
26 warning or disclosure concerning the manufacture, distribution and/or sale of the Products.

27 Except for the representations made above, nothing in this Consent Judgment shall be construed

1 as an admission by Defendant or Plaintiff of any fact, issue of law, or violation of law, nor shall
2 compliance with this Consent Judgment constitute or be construed as an admission by Defendant
3 or Plaintiff of any fact, issue of law, or violation of law.

4 **1.8** Except as expressly provided herein, nothing in this Consent Judgment shall
5 prejudice, waive or impair any right, remedy or defense the Parties may have in any other or
6 further legal proceeding. This paragraph shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of any Party to this Consent Judgment.

8 **2. INJUNCTIVE PROVISIONS**

9 **2.1 Defendant's Duty To Ascertain The Metals Content of The Products On Or**
10 **Before Sixty Days Following the Effective Date.** On or before sixty (60) days following the
11 Effective Date, Defendant shall ascertain the concentration of Metals in each of the Products as
12 follows.

13 **2.1.1 Lead, Arsenic And Cadmium Testing Protocol.** In accordance with
14 Sections 2.1.5 and 2.1.6, to ascertain a Product's concentration of lead, arsenic and cadmium,
15 respectively, Defendant shall test the Product (or rely on testing of the Product by others provided
16 it is undertaken in the manner set forth herein), using inductively coupled plasma mass
17 spectrometry ("ICP-MS") under the protocol set forth in EPA Method 6020.

18 **2.1.2 Mercury Testing Protocol.** In accordance with Sections 2.1.5 and 2.1.6,
19 to ascertain a Product's concentration of mercury, Defendant shall test the Product (or rely on
20 testing of the Product by others provided it is undertaken in the manner set forth herein) using the
21 protocol set forth in EPA Method 7471A (including, at Defendant's option, conformity with EPA
22 Method 3052), or the protocol set forth in EPA Method 7473, or the protocol set forth in EPA
23 Method 6020.

24 **2.1.3 Additional Testing Protocols.** In the event that equally or more accurate
25 testing methods are developed or identified and accepted by the scientific community as accurate
26 enough to allow for detection and quantification of any Metal to ascertain compliance under this
27 Consent Judgment, any Party shall have the right to move the court to modify this Consent

1 Judgment as set forth in Section 8 herein, to allow testing by such equally or more accurate
2 testing method in addition to the methods authorized herein.

3 **2.1.4 Approved Laboratories.** Product or raw material testing may be
4 undertaken at Defendant's in-house laboratories or by third-party testing laboratories; however,
5 all third-party laboratory testing shall be performed only at laboratories that are certified,
6 accredited, or registered by a federal or California state agency, including but not limited to the
7 U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, or the California
8 Department of Health Services for the purposes of administering the specific protocol used in
9 such testing. If a given agency does not certify specific protocols for testing for Metals in dietary
10 supplements, the certification, accreditation or registration customarily bestowed upon
11 laboratories testing dietary supplements or ingredients in dietary supplements for Metals in
12 accordance with that agency's standards shall be required; if no such agency standards exist
13 specifically for dietary supplements, then the standards for foods shall be required.

14 **2.1.5 Sampling Protocol For Ascertaining Metals Content.** In fulfilling its
15 duty to ascertain the concentration of each Metal in each Product, Defendant may at its option,
16 test (or rely on testing of the Product by others) Representative Samples of the finished Products,
17 or test (or rely on testing of raw materials by others) Representative Samples of each of the raw
18 materials comprising the finished Product(s). Any results relied upon must use the analytical
19 methods and sampling requirements specified herein, except that a Defendant (or a laboratory
20 conducting tests for Defendant) may modify or adjust an analytical method if necessary to ensure
21 accurate results in light of the nature, composition, quantity, or other characteristic of the test
22 specimen, the nature of the test, or the specific equipment being used to conduct the test so as to
23 enhance the quality and reliability of the test results. If Defendant (or a laboratory conducting
24 tests for Defendant) modifies or adjusts any analytical method specified in this Consent
25 Judgment, in the event of an enforcement action by AYS under this Consent Judgment contesting
26 such modification or adjustment. Defendant shall bear the burden of showing by a preponderance
27 of the evidence that the modification or adjustment was (a) necessary, appropriate and reasonable
under the circumstances; and (b) fully consistent with generally accepted scientific principles and

1 practices concerning analytical testing and test methods for Metals in foods, including dietary
2 supplements.

3 **2.1.6 Representative Sampling.**

4 (a) Finished Products. "Representative Sampling" as used herein shall mean with respect
5 to the testing of finished Products, any of the following, at a Defendant's option: (a) testing of
6 two (2) or more samples, each from a different final Product of the most recent manufacturing,
7 labeling or processing lot or batch ("Manufacturing Lot") of that Product; or (b) testing of one (1)
8 sample from the most recent Manufacturing Lot of a Product, provided that the one sample
9 actually tested is a composite of three (3) or more samples taken from three (3) or more final
10 Products from that most recent such Manufacturing Lot of that Product. Each of the three (3) or
11 more samples taken from three (3) or more final Products must be equal to the other samples
12 (e.g., 4 capsules taken from each of three final Products, or 1 gram taken from each of three final
13 Products).

14 (b) Raw Materials. "Representative Sampling" as used herein shall mean with respect to
15 the testing of raw material, testing of one (1) sample from the most recent shipping lot received
16 by Defendant of each raw material comprising the Product, provided that the one sample actually
17 tested is a composite of three (3) or more samples from the most recent shipping lot of that raw
18 material. Each of the three (3) or more raw material samples which comprise the composite
19 sample actually tested shall be equal to the other samples.

20 (c) First Two Year's Frequency of Sampling. During each of the two years after the
21 Effective Date, for purposes of documenting compliance with Sections 2.2, 2.4 and 9 of this
22 Consent Judgment after sixty (60) days from the Effective Date, Defendant shall conduct (or have
23 conducted on its behalf) Representative Sampling meeting the definition of either Section 2.1.6(a)
24 or 2.1.6(b), or any combination of the two, as Defendant shall elect in its sole discretion. The
25 Parties agree that Representative Sampling shall for the first two years after the Effective Date
26 mean the testing either of (1) each Manufacturing Lot of a finished Product pursuant to 2.1.6(a),
27 or (2) each raw material comprising a finished Product, or (3) any combination of the two,

1 provided Defendant has laboratory test data with respect to each Product Defendant ships for sale
2 to California between the Effective Date and the second anniversary of the Effective Date.

3 (d) Sampling Frequency After Second Anniversary of Effective Date. After the second
4 anniversary of the Effective Date, Defendant shall conduct (or have conducted on its behalf)
5 Representative Sampling on raw materials or finished Products, as the case may be, but
6 Defendant may adjust the frequency of the sampling regime set forth in Section 2.1.6(c). Any
7 adjustments to the sampling regime shall be sufficient to allow Defendant to continue to
8 accurately determine levels of Metals in Products or in raw materials. Any adjustments to the
9 sampling regime shall be based upon Defendant's consideration of the following factors: (i)
10 existing data, (ii) the variability of Metals levels in a raw material or in a Product, as documented
11 through testing, (iii) the predictability of the distribution of the range of Metals levels in a raw
12 material, based on prior laboratory test data, (iv) the amount of a raw material used in a finished
13 Product, and (v) other relevant considerations. In any proceeding to enforce this Consent
14 Judgment, Defendant bears the burden of showing by substantial evidence that any testing regime
15 adopted under this Section 2.1.6(d) is reasonable and is sufficient to accurately determine Metals
16 levels in raw materials or finished Products. This Section 2.1.6(d) governs the frequency of
17 sampling, and does not alter the definitions of Representative Sampling set forth in Sections
18 2.1.6(a), (b), or (c) the testing protocols set forth herein. Defendants are not limited to providing
19 only Representative Sampling data to Plaintiff in the event Plaintiff conducts compliance
20 monitoring under Section 2.1.7 or otherwise moves to enforce this Consent Judgment.

21 **2.1.7 Compliance Monitoring.** At any time following 60 days after the
22 Effective Date, AYS may request that Defendant provide, within thirty-five (35) days of the date
23 of its request, documentation supporting the sale in California of any Product without the health
24 hazard warnings specified in this Consent Judgment. For the first three years after the Effective
25 Date, such requests may be made with respect to as many as twenty-five (25) percent, annually,
26 of the number of Products listed on Defendant's then current Product list, up to a maximum of
27 thirty (30) requests in total for up to thirty (30) different Products in a year. For subsequent years

four and five after the Effective Date, AYS may request information on no more than ten (10)

1 percent, annually, of the number of Products listed on Defendant's then current Product list, up to
2 a maximum of twelve (12) requests in total for up to twelve (12) different Products in a year.
3 After the fifth year after the Effective Date, AYS shall not be entitled to request information
4 pursuant to this Section 2.1.7, unless a violation of this Consent Judgment previously was
5 established within the three years preceding the date of the AYS request, in which case AYS shall
6 be entitled to tender up to twelve (12) requests in total for information respecting up to twelve
7 (12) different Products for up to one more year after the date of the AYS request. With respect to
8 each Product for which any request under this Section 2.1.7 is made, the Defendant shall provide
9 a declaration from the persons responsible for the testing, verifying quality assurance and quality
10 control procedures, and verifying that the testing was conducted in strict accord with Section 2.1.
11 For any Product for which AYS' request for such documentation is not provided within sixty (60)
12 days of the date of the request, such Product will be deemed sold in violation of this Consent
13 Judgment as to all sales in California of that Product after the date of AYS' request through the
14 date upon which such documentation is received by AYS and therefore will be subject to the
15 provisions of Section 3.1 (Civil Penalties) herein; provided, however, that Defendant's mere
16 contesting of any assertion by AYS concerning inadequacies in the documentation produced to
17 AYS shall not, in and of itself, be deemed a violation of this Section 2.1.7. For AYS to establish
18 a violation of this Section, the documentation provided or other documentation must show that a
19 health hazard warning was required under this Consent Judgment. Violations of this Section 2.1.7
20 may be enforced as specified hereinbelow and are not exclusive of other remedies, if any,
21 available to Plaintiff.

22 **2.1.3 Limited Exemptions from Testing.** Defendant need not test (or have
23 tested on its behalf) all excipients, fillers, flavors, colors or binders ("Standardized Ingredients")
24 if it reasonably and in good faith believes such Standardized Ingredients do not contain Metals at
25 levels that might cause or contribute to a violation of this Consent Judgment. Defendant's good
26 faith belief shall be based on periodic laboratory test data, vendor certifications, or other such
27 reasonable and appropriate information including consideration of the reliability and consistency
of the supplier, the nature of the ingredient, the amount used and other relevant factors.

1 Defendant periodically shall monitor and evaluate such Standardized Ingredients for Metals
2 levels. In the event that AYS should move to enforce this Consent Judgment, Defendant bears
3 the burden of establishing by a preponderance of evidence that any failure to test an excipient,
4 filler, flavor, color or binder for Metals content was reasonable and in good faith, and must
5 produce all such supporting evidence in the context of the meet and confer process concerning
6 enforcement of this Consent Judgment contemplated under Section 8.1 herein. Defendant's
7 failure to test an excipient, filler, flavor, color or binder for Metals content, in the absence of a
8 reasonable and good faith belief that such ingredient does not contain Metals at levels that might
9 cause or contribute to a violation of this Consent Judgment, shall constitute a material breach of
10 this Consent Judgment and be subject to stipulated civil penalties as provided for herein if such
11 failure to test causes or contributes to a failure to provide a warning when required under Section
12 2.2 or causes or contributes to a violation of Section 2.4 of this Consent Judgment.

13 **2.1.9. Product or Ingredient Specifications.** On or before the date that is sixty (60)
14 days after the Effective Date, Defendant shall establish, at its option, either: (a) specifications for
15 the Metals content of all raw materials used in the Products, or (b) specifications for the Metals
16 content in finished Products. Defendant shall not use raw materials which fail to meet the Metals
17 specifications Defendant established for raw materials used in the manufacture of Products.
18 Defendant shall not ship for sale or use in California Products which fail to meet Defendant's
19 specifications for Metals content in finished Products, unless such Products meet all terms of this
20 Consent Judgment, including the warning obligations in Section 2 and Section 9. Defendant may
21 from time to time adjust specifications for raw materials or for finished Products.

22 **2.2 Provision of Clear and Reasonable Warnings.**

23 **2.2.1 On-Product Warnings.** On or before the date that is sixty (60) days
24 following the Effective Date, Defendant shall permanently cease and no longer ship for sale or
25 use in California any Products (as defined in Sections 1.2, 1.3 and 9.1) which require a warning
26 under the terms of this Consent Judgment, unless each individual Product (in the form intended
27 for sale to the end-user) bears one of the warning statements specified below on its individual unit
label or packaging.

1 (a) If use or consumption of the Product in accordance with Defendant's label directions
2 results in an exposure exceeding 10.0 micrograms/day of arsenic, but otherwise would not require
3 a warning under this Consent Judgment, then the warning shall state:

4 **WARNING: The use of this product will expose you to chemicals known to**
5 **the State of California to cause cancer.**

6 (b) If use or consumption of the Product in accordance with Defendant's label directions
7 results in an exposure exceeding 10.0 micrograms/day of arsenic, and exceeding any of the levels
8 set for lead, mercury, or cadmium in this Consent Judgment, then the warning shall state:

9 **WARNING: The use of this product will expose you to chemicals known to**
10 **the State of California to cause cancer and birth defects or other reproductive**
11 **harm.**

12 (c) If use or consumption of the Product in accordance with Defendant's label
13 directions results in an exposure that does not exceed 10.0 micrograms/day of arsenic, but that
14 does exceed any of the levels set for lead, mercury, or cadmium in this Consent Judgment, then
15 the warning shall state:

16 **WARNING: The use of this product will expose you to chemicals known to**
17 **the State of California to cause birth defects or other reproductive harm.**

18 (d) The warning statement shall be prominent and displayed on the label or
19 packaging of each Product with such conspicuousness, as compared with other words, statements,
20 or designs, so as to render it likely to be read and understood by an ordinary individual prior to
21 purchasing or using the Product. The warning statement shall be printed on the label or
22 packaging in a font size no smaller than any other precautionary statements or warnings printed
23 on the Product's label or packaging.

24 **2.2.2 Additional Warnings Concerning Mail Order & Internet Sales.** If a
25 Defendant sells a Product that requires a warning under this Consent Judgment, by mail order or
26 over the Internet to a purchaser in the State of California on or after the date that is sixty (60) days
27 after the Effective Date, the following additional requirements shall apply. For such mail order
sales, the warning language required under this Consent Judgment shall be included in the mail
order catalogue, either on the same page as any order form, or on the same page(s) upon which

1 the Product's price is listed, in the same type size as the surrounding, non-heading text (this
2 requirement shall be applicable only to all catalogues printed after the Effective Date). For such
3 Internet sales, the warning language required under this Consent Judgment shall be displayed (in
4 the same type size as the surrounding, non-heading text) either: (a) on the same page upon which
5 the Product is displayed or referenced; (b) on the same page as any order form for any Product; or
6 (c) on the same page as the price for the Product is displayed.

7 **2.3 Exceptions To Warning Requirements.** No Product that meets each of the
8 following criteria shall require a warning pursuant to this Consent Judgment:

9 **2.3.1 For Lead Warnings, Exposure Below "No Observable Effect Level."**

10 Use or consumption of a Product causes total daily exposure¹ to lead of less than 0.5 micrograms
11 when consumed or used in accordance with the Defendant's label directions, excluding any
12 naturally occurring lead, as defined for purposes of this Consent Judgment in Section 2.3.2
13 ("Naturally Occurring Lead"), in such Product. Prior to shipment for sale to California
14 consumers, Defendant shall provide consumer use instructions on the label or packaging of each
15 individual Product (in the form intended for sale to the end-user). If the consumer use
16 instructions include a range of consumption levels (e.g., "take 2 to 4 tablets daily"), then for
17 purposes of compliance with Sections 2.2, 2.4, 9 and otherwise under this Consent Judgment, the
18 highest dose instructed shall be the dose.

19 **2.3.2 "Naturally Occurring" Allowance For Lead for Products Shipped for**
20 **Sale After Sixty Days Following The Effective Date.**

21 (a) Initial Naturally Occurring Lead Level. Unless a Product contains a warning in
22 compliance with this Consent Judgment, the initial Naturally Occurring Lead level in any Product
23 subject to this Consent Judgment Defendant ships for sale or use in California after the date that is
24 sixty (60) days following the Effective Date, shall not exceed a concentration that will result in
25 3.5 micrograms lead ingested/day, assuming the Product is used or consumed in accordance with
26 the Defendant's consumer use instructions. Products where the concentration results in lead

27 ¹ For purposes of this Consent Judgment only, the term "exposure" is deemed to mean
"ingestion", consistent with Title 22, Cal. Code Regs., section 12102(i) (which defines the term
"expose" as "to cause to ingest....").

1 levels that exceed (i) this initial 3.5 micrograms ingested level or (ii) Products which exceed any
2 future Naturally Occurring Lead level subsequently established pursuant to this Consent
3 Judgment, (plus, in either the case of (i) or (ii) an additional 0.5 micrograms Lead as allowed by
4 regulation and under Section 2.3.1), shall be subject to the warning requirements set forth in
5 Sections 2.2.1, 2.2.2, and 9 herein, unless Defendant can show by a preponderance of the
6 evidence that all lead in such Products (except 0.5 micrograms ingested in a daily dose) is
7 naturally occurring per 22 Cal. Code Reg. § 12501. If Defendant in the future elects to make this
8 showing that more than 3.5 micrograms of lead is naturally occurring, Defendant agrees to
9 provide all evidence supporting such a showing to AYS in the context of the meet and confer
10 process concerning enforcement of this Consent Judgment contemplated under Section 8.1 herein.
11 Defendant's failure to produce this information or Defendant's failure to establish to the Court
12 that lead in excess of 0.5 micrograms in a daily dose, plus Naturally Occurring Lead, is naturally
13 occurring under the criteria in 22 Cal. Code Reg. § 12501 shall constitute a material breach of this
14 Consent Judgment and be subject to stipulated civil penalties as provided for herein if a Product
15 which requires a health hazard warning under this Consent Judgment was sold in California
16 without such warning. Nothing in this Section 2.3.2 constitutes a waiver of Defendant's right to
17 establish, in accordance with the procedures set forth in Sections 2.3.2 and 8.1, that levels of
18 Metals other than lead are naturally occurring under the criteria of 22 Cal. Code Reg. § 12501.
19 The Parties agree that the initial 3.5 micrograms Naturally Occurring Lead level is the result of
20 negotiations and a review of the available information and shall be applicable to the Products
21 subject to this Consent Judgment at this time and shall have no application to other products.

22 (b) Evaluation of Future Naturally Occurring Lead Levels. In recognition of the
23 possibility that the "lowest level feasible" of Lead may change over time, the Parties agree to
24 evaluate the Naturally Occurring Lead level annually for five (5) years as set forth below.
25 Commencing January 15, 2006 and ending January 15, 2011 for each year Defendant shall tender
26 a statement of determination whether an adjustment to the Naturally Occurring Lead level can be
27 supported by substantial evidence. Such a determination respecting the Naturally Occurring Lead

level shall be made by Defendant in good faith and be based on Representative Sampling and

1 “Feasibility.” “Feasibility” for purposes of this Consent Judgment shall mean consideration of
2 the following: (1) the availability and reliability of a supply to Defendant of raw materials in
3 question; (2) the reasonable cost to Defendant of Products or raw materials therein, (3) any
4 resulting unreasonable increase in cost to a Defendant to procure a Product or raw materials with
5 lower levels of lead; (4) performance characteristics, including formulation, performance, safety,
6 taste, efficacy and stability, of any raw materials or finished Product; (5) the lawfulness of
7 alternatives (no alternative shall result in a violation law, or a breach of a standard of identity);
8 and (6) other relevant and reasonable considerations. If upon determination of either Party a
9 change is warranted, then that Party within sixty (60) days of the statement date shall proceed to
10 modify this Consent Judgment in accordance with Section 8 herein. Defendant’s obligations
11 under this Section 2.3.2(b) are without prejudice to any rights of Plaintiff under Section 8 or
12 otherwise herein. If either Party seeks to modify the initial or any subsequently established
13 Naturally Occurring Lead level as defined herein, such modification shall only be effective upon
14 an order by the Court, after a noticed motion, notice of which motion shall be served on the
15 Office of the Attorney General at least forty-five (45) days prior to the hearing date, and which
16 motion shall include the information supporting the request for modification.

17 **2.3.3 Conditions Under Which “Naturally Occurring” Allowance For Lead**

18 **Applies.** For purposes of compliance with Section 2.2, Defendant shall exclude that amount of
19 lead specified in Section 2.3.2, provided Defendant has not intentionally or unintentionally added
20 any lead to a Product and Defendant has done or caused to be done all of the following: (a) used,
21 or required the manufacturer of the Product to use, “Good Manufacturing Practices,” as defined in
22 Exhibit C hereto in connection with each ingredient in the Product and with the Product; (b) used
23 or, if Defendant is purchasing an ingredient used in a Product directly from the grower of that
24 ingredient, required the grower to use, in those instances where Defendant has the commercially
25 reasonable ability to do so, Good Agricultural Practices; (c) used, at all times relevant to the
26 production of the Product, quality control measures that reduce natural chemical contaminants to
27 the “lowest level currently feasible.” as that phrase is used in Title 21 Code of Federal

Regulations. Section 110.110(c) (2001). If the United States Food & Drug Administration adopts

1 Good Manufacturing Practices (“GMPs”) regulations applicable to Defendant’s dietary
2 supplement manufacturing, Defendant, as of the effective date of those federal regulations, shall
3 proceed under such new regulatory GMPs in lieu of the obligations set forth on Exhibit C within
4 thirty (30) days of such adoption.

5 **2.3.4 Stipulated Exposure Levels Triggering Warning Requirements For**
6 **Arsenic, Cadmium and Mercury.** Prior to shipment for sale to California consumers,
7 Defendant shall provide consumer use instructions on the label or packaging of each individual
8 Product (in the form intended for sale to the end-user). If the consumer use instructions include a
9 range of consumption levels (e.g., “take 2 to 4 tablets daily”), then for purposes of compliance
10 with Sections 2.2 and 9 and otherwise under this Consent Judgment, the highest dose instructed
11 shall be the dose. For arsenic, cadmium and mercury, the health hazard warnings set forth in
12 Section 2.2.1 shall be required if use or consumption of a Product in accordance with Defendant’s
13 label directions results in an exposure exceeding any of the following levels: (a) (1) mercury and
14 mercury compounds, except inorganic mercury, 0.30 micrograms/day; (2) inorganic mercury, 3.0
15 micrograms/day; (b) cadmium, 4.10 micrograms/day; (c) arsenic, 10.0 micrograms/day. For
16 purposes of this Consent Judgment, and in the absence of knowledge to the contrary on the part of
17 Defendant, Defendant shall presume that all mercury in a Product is not inorganic mercury and
18 therefore is subject to the standard in 2.3.4(a)(1) unless Defendant, through laboratory testing and,
19 if applicable, other relevant information, establishes that a Product contains only inorganic
20 mercury, in which case that Product shall be subject to the standard in 2.3.4(a)(2). Records
21 supporting Defendant’s determination respecting inorganic mercury content in a Product shall be
22 provided to Plaintiff in accordance with Defendant’s obligations under Section 2.1.7, Section 8
23 and Section 9.1.

24 **2.4 Ban on Sales of Products Causing Exposures to Lead in Excess of 14**
25 **Micrograms Per Day.** No Product may be shipped by Defendant for sale in the State of
26 California after sixty (60) days following the Effective Date if, when used or consumed in
27 accordance with the Defendant’s label directions, it causes an exposure to lead in excess of 14
micrograms/day.

1 **3. CIVIL PENALTIES**

2 **3.1 Stipulated Civil Penalties For Future Violations of This Agreement.**

3 Proposition 65 provides for civil penalties of up to \$2500 per violation per day, pursuant to
4 California Health & Safety Code § 25249.7. In the event that after sixty (60) days following the
5 Effective Date, Defendant violates Sections 2 or 9 herein, the Parties stipulate that Defendant
6 shall be liable for a stipulated civil penalty in the amount of \$5.00 per unit item sold in violation
7 of this Consent Judgment, unless the Defendant's actual per unit sale price to the buyer was less
8 than \$5.00, in which case the stipulated penalty shall be fifty percent (50%) of the sale price
9 Defendant received from the relevant buyer for the Products at issue. Total civil penalties
10 concerning all Products sold in violation of this Consent Judgment shall not exceed \$70,000 for
11 such violations in any calendar year. Plaintiff may establish such violation(s) hereunder by a
12 preponderance of the evidence upon a duly noticed motion in the San Francisco Superior Court
13 and subject to the provisions of Section 8 herein. AYS shall remit 75% of this amount to the
14 State of California pursuant to Health & Safety Code § 25249.12(b).

15 **3.2 Civil Penalty Assessment.** Defendant shall pay a civil penalty in the amount of
16 \$30,000 to AYS, pursuant to Health & Safety Code § 25249.7(b). AYS shall remit 75% of this
17 amount to the State of California pursuant to Health & Safety Code § 25249.12(b).

18 **3.3 Payment in Lieu of Additional Civil Penalties.** Defendant shall make a payment
19 in lieu of additional penalties in the amount of \$104,000 to AYS. AYS shall forward at least one-
20 half of these funds to California non-profit groups to reduce exposures to toxic chemicals, and to
21 increase consumer, worker and community awareness of the health hazards posed by toxic
22 chemicals. Any remaining funds shall be deposited in the AYS Foundation Environmental
23 Enforcement Fund and shall be use to reduce exposures to toxic chemicals, and to increase
24 consumer, worker and community awareness of the health hazards posed by toxic chemicals. In
25 deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into
26 consideration a number of important factors, including: (1) the nexus between the harm done in
27 the underlying case(s), and the grant program work; (2) the potential for toxics reduction,
prevention, remediation or education benefits to California citizens from the proposal; (3) the

1 budget requirements of the proposed grantee and the alternate funding sources available to it for
2 its project; and (4) the Board's assessment of the grantee's chances for success in its program
3 work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS'
4 mission statement, articles of incorporation, and bylaws and applicable state and federal laws and
5 regulations.

6 **3.4 Penalties are not a credit.** No penalties paid herein shall be construed as a
7 credit against future claims against Defendant.

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

9 **4.1 Reimbursement of Plaintiff's Investigative, Expert and Legal Fees and Costs.**
10 Defendant shall reimburse AYS in the amount of \$121,000 for AYS' reasonable investigative,
11 expert, and legal fees and costs incurred as a result of investigating and negotiating a settlement in
12 the public interest.

13 **5. PAYMENT OBLIGATIONS**

14 **5.1** Pursuant to Sections 3.2, 3.3 and 4.1 herein, Defendant agrees to remit the total
15 amount of \$255,000 to AYS, payable to "As You Sow" (Employer Identification Number 94-
16 3169008) within fifteen (15) days of the Parties' execution of this Consent Judgment, with the
17 last signature date triggering the fifteen (15) day period (if AYS is the last signatory, this fifteen
18 (15) day period shall run from the date of transmission of facsimile notice of AYS' signature to
19 Defendant and Defendant's counsel).

20 **6. RELEASE OF LIABILITY**

21 **6.1 Release of Liability.** AYS, on its own behalf, and on behalf of the general public,
22 waives all rights to institute or participate in, directly or indirectly, any claim or form of legal
23 action against Defendant, its officers, directors, employees, agents, attorneys, representatives,
24 shareholders, parents, subsidiaries, affiliates, divisions, predecessors, successors, subdivisions,
25 downstream distributors, downstream retailers, downstream customers, and upstream suppliers
26 (including manufacturers of the Products and manufacturers of the raw materials of the Products)

27 whether under Proposition 65, Business & Professions Code §§17200 or 17500, based upon
Defendant's alleged failure to warn, within the meaning of Proposition 65, about exposure to

1 lead, arsenic, cadmium or mercury contained in any of the Products sold in California on or
2 before sixty (60) days after the Effective Date or based on any other legal claim or theory that
3 was or could have been alleged in the Action based on the facts alleged in the Complaint.

4 **6.2 Release of Liability of AYS.** Defendant waives all of its rights to institute any
5 claim, or form of legal action against AYS, its officers, directors, employees, agents, attorneys
6 and representatives (the "AYS Releasees") for all actions or statements made or undertaken by
7 the AYS Releasees in the course of seeking enforcement of Proposition 65 or Business &
8 Professions Code §§ 17200 and 17500 et seq. in the Action.

9 **7. CONSENT JUDGMENT**

10 **7.1 Consent Judgment.** Upon execution of this [Proposed] Consent Judgment by all
11 Parties, AYS had noticed a Motion for Approval & Entry of Consent Judgment in the San
12 Francisco Superior Court pursuant to Title 11, Cal. Code of Regs. §3000, *et seq.* This Motion
13 was served and any future Motions shall be served upon all of the Parties to the Action and upon
14 the California Attorney General's Office. In the event that the Court fails to approve and order
15 entry of the judgment, this Consent Judgment shall become null and void upon the election of any
16 Party as to them and upon written notice to all of the Parties to the Action pursuant to the notice
17 provisions herein. If this Consent Judgment becomes null and void, or is not approved by the
18 Court within one hundred and eighty (180) days of its execution by all Parties, AYS shall refund
19 all sums paid by Defendant pursuant to Sections 3.2, 3.3 and 4.1 within fifteen (15) days of
20 written notice to AYS by Defendant that a refund is due. Defendant and AYS shall use best
21 efforts to support entry of this Consent Judgment in the form submitted to the Office of the
22 Attorney General. If the Attorney General objects in writing to any term in this Consent
23 Judgment, the Parties shall use best efforts to resolve the concern in a timely manner and prior to
24 the hearing on the motion to approve this Consent Judgment. If the Parties cannot resolve an
25 objection of the Attorney General, then Plaintiff and Defendant shall proceed with seeking entry
26 of an order by the court approving this Consent Judgment in the form originally submitted to the
27 Office of the Attorney General, or in such other form as the Parties shall mutually agree upon
after consideration of any comments of the Attorney General. If the Attorney General elects to

1 file a notice or motion with the Court stating that the People shall appear at the hearing for entry
2 of this Consent Judgment so as to oppose entry of the Consent Judgment, then a party may
3 withdraw from this Consent Judgment prior to the date of the hearing, with notice to all parties
4 and the Attorney General, and upon such notice this Consent Judgment shall be null and void and
5 any sums paid hereunder shall be returned to Defendant within fifteen (15) days of the date of the
6 notice.

7 **7.2 Amendment To Complaint.** Upon the expiration of the 60-Day Notice issued on
8 or about February 22, 2005, the Complaint herein shall be deemed amended to include all
9 violations described in that 60-Day Notice.

10 **7.3 Dismissals.** Upon approval by the Court of the settlement agreement pursuant to
11 Section 7.1 herein, and before entry of judgment, AYS shall dismiss with prejudice its claims
12 against NATURALIFE ECO VITE LABORATORIES, INC., dba PARAGON
13 LABORATORIES, PACIFIC NUTRITIONAL, INC., and PRO PAC LABS, INC. that are based
14 upon Botanical Laboratories Inc.'s Products (as defined in paragraph 1.2).

15 **8. ENFORCEMENT AND MODIFICATION**

16 **8.1 Enforcement and Stipulated Civil Penalties.** In the event that a dispute arises
17 with respect to any of the provisions of this Consent Judgment, the Parties shall meet and confer
18 within twenty (20) days after any Party receives written notice of an alleged violation of this
19 Consent Judgment from another Party. In the event the affected Parties cannot resolve the
20 dispute, this Consent Judgment may be enforced pursuant to Code of Civil Procedure § 664.6 or
21 any other valid provision of law. The prevailing party in any dispute regarding compliance with
22 the terms of this Consent Judgment shall be awarded its reasonable fees and costs incurred, in
23 addition to any other relief otherwise ordered by the Court, including but not limited to civil
24 penalties assessed pursuant to Section 3 herein.

25 **8.2 Modification of Judgment - Grounds.** This Consent Judgment shall not
26 obligate Defendant to provide a health hazard warning (as described in Section 2 herein) for a
27 Product if that Product causes an exposure below the "No Significant Risk Level" or "Maximum

Allowable Daily Level," as those terms are defined in Proposition 65 and its implementing

1 regulations. Any such levels adopted in a final regulation or law pursuant to Proposition 65 after
2 the Effective Date shall become the standard under this Consent Judgment on the date of adoption
3 without need for formal modification of this Consent Judgment, but Defendant retains its rights
4 and obligations under Section 2.3.2. to establish naturally occurring levels of Metals. The Parties
5 acknowledge that new toxicological information or exposure assessments concerning hazardous
6 substances and testing methodologies are continuously becoming available, and that statutory and
7 regulatory standards applicable to the Products may evolve in the future. Accordingly, the Parties
8 agree that any Party may file a motion pursuant to § 664.6 of the California Code of Civil
9 Procedure, and under the conditions set forth below, move the Court for modification of the
10 warning requirement or any other term set forth in Section 2 herein on the grounds that (a) they
11 conflict with the applicable legal standards concerning the Products or any ingredient therein, or
12 (b) the warning requirement or any other term set forth in Section 2 herein are more stringent than
13 the warning requirements Plaintiff after the Effective Date in an order, judgment or settlement
14 under Proposition 65 agrees to with respect to any dietary supplements that are substantially
15 similar to the Products herein. Absent good cause shown by Plaintiff, Plaintiff shall allow
16 modification of this Consent Judgment to permit Defendant to adhere to such less stringent
17 warning requirements. Any disputes regarding the issues set forth in this subsection shall be
18 resolved in accordance with the procedures set forth in Section 8.3 below.

19 **8.3 Modification of Judgment – Procedure.** In the spirit of cooperation and in the
20 interests of minimizing the investigative, expert and attorneys' fees and costs associated with
21 such a motion, the Parties agree to meet and confer in good faith as follows. Prior to filing a
22 motion pursuant to Section 8.2 herein, the Party seeking to modify the judgment shall first
23 provide the non-moving Party and the California Attorney General's Office with any legal or
24 scientific data upon which the motion would rely. The non-moving Party and the California
25 Attorney General's Office shall be allowed a period of forty-five (45) days to review that data and
26 to provide the moving Party with its formal written response (the Attorney General's Office's
27 failure to respond to this submission shall not be construed in any manner to reflect any particular
view, on the part of the Attorney General's Office, of this Consent Judgment or of the applicable

1 law or science). The Parties shall then meet and confer within twenty (20) days of the non-
2 moving Party's written response. If, after meeting and conferring, the moving Party elects to
3 proceed with a motion to amend this judgment, it may do so with proper notice to the other Party
4 and the Attorney General's Office as required under the California Code of Civil Procedure.
5 Such a motion may be accompanied by scientific data, studies, written declarations, and live
6 testimony or discovery responses. In the event that the Court determines that a Party seeking or
7 opposing a motion to modify this Consent Judgment did so without justification or failed to meet
8 and confer in good faith prior to moving for such modification, the other Party shall be awarded
9 reasonable fees and costs incurred.

10 **9. NEW PRODUCTS.**

11 **9.1 New Product Testing Prior to Sale in California.** If, after the date that is sixty (60)
12 days after the Effective Date, Defendant elects to ship for sale in California any new product(s) of
13 the type set forth in Section 1.2 hereinabove (herbs, herbal products, traditional patent medicines,
14 bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas, teas, bulk
15 teas, liquid herbal extracts, and capsules) but not identified on Exhibit A hereto, Defendant shall,
16 before shipping the new product(s) for sale in California, conduct the testing set forth in Section
17 2.1 and adhere to the requirements of this Consent Judgment with respect to such new product(s).
18 If the Product requires a warning under the standards in Sections 2.2 and 2.3, Defendant shall,
19 prior to shipment for sale in California of such new product(s) provide AYS with a test result,
20 using the testing methods set forth in Section 2.1 above, and a notice that all of the warning
21 requirements set forth in Section 2.2 hereinabove are complied with as to such new product(s).
22 Failure to provide the warning if required under Section 2.2 shall be a violation of this Consent
23 Judgment subject to stipulated penalties in accordance with Section 3.1. Such new product(s)
24 shall then be deemed Product(s) subject to all of the terms of this Consent Judgment. Before the
25 date that is sixty (60) days after the Effective Date, Defendant may ship for sale to California
26 customers new or reformulated products of the type set forth in Section 1.2 that are not listed on
27 Exhibit A, and the sales of such products shall not be deemed in violation of any term of this
Consent Judgment.

1 9.2 Annual New Product Update List. Commencing January 15, 2006 and through
2 and including January 15, 2011, Defendant shall provide AYS with an annual updated list of new
3 Products Defendant shipped for sale or use in California in the preceding calendar year for which
4 Defendant has ascertained that warnings are not required under this Consent Judgment. If
5 Plaintiff cannot ascertain and in good faith inquires in writing as to whether a specific Product is a
6 new Product in a given year (for the period commencing January 15, 2006 and through and
7 including January 15, 2011) Defendant shall promptly (and in any event within thirty-five (35)
8 days of the date of Plaintiff's request) reply to advise whether the Product is a new Product for
9 that year or is an existing Product.

10 **10. GOVERNING LAW**

11 **10.1 Governing Law.** The terms of this Consent Judgment shall be governed by the
12 laws of the State of California. This Consent Judgment shall not govern Products or products
13 sold to consumers or other persons outside the State of California.

14 **11. NOTICES**

15 **11.1 Notices.** All correspondence and notices required to be provided under this
16 Agreement shall be in writing and shall be sent by first class registered or certified mail, or via a
17 reputable overnight delivery service with a tracking mechanism, addressed as follows:

18 All correspondence to AYS shall be mailed to:
19 Attn: Lawrence E. Fahn, Executive Director
20 As You Sow
21 311 California Street, Suite 510
22 San Francisco, CA 94104

With a copy to:
 Andrew L. Packard, Esq.
 Law Offices of Andrew L. Packard
 294 Page Street
 San Francisco, CA 94102

23 All correspondence to Defendants shall be mailed to:
24 Attn: James Coyne, President and CEO
25 Botanical Laboratories/Zand Herbal Formulas
26 1441 West Smith Road
27 Ferndale, WA 98248

With a copy in each case to:
 Judith M. Praitis, Esq.
 Sidley Austin Brown & Wood LLP
 555 West 5th Street
 Los Angeles, CA 90013

12. INTEGRATION AND MODIFICATION

12.1 Integration & Modification. This Consent Judgment, together with the Exhibits
hereto which are specifically incorporated herein by this reference, constitutes the entire
agreement between the Parties relating to the rights and obligations herein granted and assumed.

LAW OFFICES
ANDREW L. PACKARD
294 PAGE STREET SAN FRANCISCO CALIFORNIA 94102
TEL 415-431-2970 FAX 415-431-0410

1 and supersedes all prior agreements and understandings between the Parties. Except as set forth
2 in Section 8, this Consent Judgment may be modified only upon the written agreement of the
3 Parties to be bound. If any term of this Consent Judgment is found by the court to be invalid,
4 then such term shall be stricken and the remaining terms shall not be affected thereby. In the
5 interpretation hereof, references to general "Sections" (e.g., "Section 8") shall include all
6 subsections within said section (e.g., Sections 8.1, 8.2 and 8.3), but references to specific
7 subsections (e.g., "Section 2.2.1") shall refer only to that specific subsection.

8 **13. COUNTERPARTS**

9 **13.1 Counterparts.** This Consent Judgment may be executed in counterparts, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

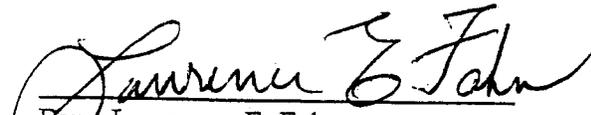
12 **14. AUTHORIZATION**

13 **14.1 Authorization.** The undersigned are authorized to execute this Agreement on
14 behalf of their respective parties and have read, understood, and agree to all of the terms and
15 conditions of this Agreement.

16
17 **IT IS SO STIPULATED:**

18
19 DATED: 5-9-05

AS YOU SOW

20
21 
22 By: Lawrence E. Fahn
Executive Director

23
24 DATED: _____

BOTANICAL LABORATORIES, INC. dba
ZAND HERBAL FORMULAS

25
26
27 By: _____

28 **IT IS SO ORDERED:**

FINAL REVISED [PROPOSED] CONSENT
JUDGMENT

LAW OFFICES
ANDREW L. PACKARD
294 PAGE STREET SAN FRANCISCO CALIFORNIA 94102
TEL 415-431-2970 FAX 415-431-0410

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2 in Section 8, this Consent Judgment may be modified only upon the written agreement of the
3 Parties to be bound. If any term of this Consent Judgment is found by the court to be invalid,
4 then such term shall be stricken and the remaining terms shall not be affected thereby. In the
5 interpretation hereof, references to general "Sections" (e.g., "Section 8") shall include all
6 subsections within said section (e.g., Sections 8.1, 8.2 and 8.3), but references to specific
7 subsections (e.g., "Section 2.2.1") shall refer only to that specific subsection.

8 **13. COUNTERPARTS**

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10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

12 **14. AUTHORIZATION**

13 **14.1 Authorization.** The undersigned are authorized to execute this Agreement on
14 behalf of their respective parties and have read, understood, and agree to all of the terms and
15 conditions of this Agreement.

16 **IT IS SO STIPULATED:**

17 DATED: _____

AS YOU SOW

18
19 By: Lawrence E. Fahn
Executive Director

20
21 DATED: May 4, 2005

BOTANICAL LABORATORIES, INC. dba
ZAND HERBAL FORMULAS

22
23 By: Marybeth Waters

JAMES L. WARREN

24
25 IT IS SO ORDERED: 5/23/05
26 FINAL REVISED [PROPOSED] CONSENT
27 JUDGMENT

28
29 James L. Warren
Judge of the Superior Court

(See following page for description of attached exhibits)

1 DATED _____

2 _____
3 Judge of the Superior Court

4 **INDEX OF ATTACHED EXHIBITS**

5 EXHIBIT A - Product List

6 EXHIBIT B - Notices of Proposition 65 Violations

7 EXHIBIT C - BMPs In Place until Federal GMPs Apply to Defendant

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LAW OFFICES
ANDREW L. PACKARD
294 PAGE STREET SAN FRANCISCO CALIFORNIA 94102
TEL 415-431-2970 FAX 415-431-0410

EXHIBIT A

**Exhibit A Final
Botanical Laboratories, Inc.
Zand Solid Dose Products
February 14, 2005**

- ZAND Astragalus Formula Tablets
- ZAND Decongest Herbal Capsules
- ZAND PMS Herbal Formula Capsules
- ZAND Cleansing Fiber Capsules and Powder
- ZAND Allergy Season Formula Capsules
- ZAND Insure Herbal Tablets
- ZAND Active Herbal Capsules
- ZAND Saw Palmetto Formula Capsules
- ZAND Cleansing Laxative Tablets
- ZAND Thistle Cleanse Capsules

EXHIBIT B



As You Sow

Tel: (415) 391-3212

A Foundation Planting Seeds for Social Change

Fax: (415) 391-3245

A NON-PROFIT CORPORATION
311 California Street, Suite 510
San Francisco, California 94104
www.asyousow.org

December 23, 2003

NOTICE OF VIOLATION OF CALIFORNIA HEALTH & SAFETY CODE §25249.5 ET SEQ.

Dear Public Enforcement Agencies:

As You Sow ("AYS") is a non-profit foundation organized under California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among other causes, the protection of the environment, the promotion of human health, the improvement of worker and consumer safety, and environmental education.

AYS has documented violations of California's Safe Drinking Water & Toxic Enforcement Act of 1986 ("Proposition 65"), codified at Health & Safety Code §25249.5 *et seq.* This letter serves to provide AYS' notification of these violations to the public enforcement agencies and to the violator. Pursuant to §25249.7(d) of the statute, AYS intends to bring an enforcement action sixty (60) days after effective service of this notice unless the public enforcement agencies have commenced and are diligently prosecuting an action to rectify these violations.

A summary of the statute and its implementing regulations, which was prepared by the lead agency designated under the statute, is enclosed with the copy of this notice served upon the violator. The specific details of the violations that are the subject of this notice are provided below.

Alleged violator. The name of the violator covered by this notice is **BOTANICAL LABORATORIES INC. doing business as ZAND HERBAL FORMULAS ("Zand").**

Chemicals. These violations involve exposures to lead, lead compounds, mercury and mercury compounds from the products listed below. On February 27, 1987, the State of California officially listed lead as a chemical known to cause reproductive toxicity. On October 1, 1992, the State of California officially listed lead and lead compounds as chemicals known to cause cancer. On July 1, 1990, the State of California officially listed mercury and mercury compounds as chemicals known to cause reproductive toxicity.

Consumer products. The products that are the subject of this notice are herbs and herbal products, traditional patent medicines, bulk herbs, infusions, extracted powders, tea pills, traditional pills, patent formulas, bulk teas, liquid extracts and/or capsules that are imported, exported, manufactured, packaged, distributed, marketed and/or sold by Zand. The phrase "traditional patent medicines" above is used herein as defined by the California Department of



Health Services: "herbal and patent medicines consisting of single or multiple herbal ingredients, including botanical, mineral and animal products, formulated into tablets, pills, powders and liquids." The products that are the subject of this notice include but are not limited to the following:

<u>Product</u>	<u>Chemical</u>
Allergy Season Formula	lead and lead compounds mercury and mercury compounds
Astragalus Formula	lead and lead compounds mercury and mercury compounds
Insure Herbal Formula	lead and lead compounds
Thistle Cleanse	lead and lead compounds
Active Herbal Formula	lead and lead compounds
Decongest Herbal	lead and lead compounds
PMS Herbal Formula	lead and lead compounds
Saw Palmetto Formula	mercury and mercury compounds

Route of exposure. The consumer exposures that are the subject of this notice result from the purchase, acquisition, handling and use of these products as recommended by the manufacturer. Accordingly, the consumer exposures have occurred and continue to occur primarily through the ingestion exposure route, but also may occur through inhalation and/or and dermal contact.

Duration of violations. Each of these ongoing violations has occurred on every day since December 23, 1999, and will continue every day until clear and reasonable warnings are provided or until these known toxic chemicals are removed from the products.

Pursuant to Title 11, C.C.R. § 3100, a certificate of merit is attached hereto.

In keeping with its public interest mission and to expeditiously rectify these ongoing violations of California law, AYS is interested in seeking a constructive resolution of this matter without engaging in costly and protracted litigation. Please direct all communications regarding this notice to AYS' counsel in this matter:

Andrew L. Packard, Esq.
Law Offices of Andrew L. Packard
294 Page Street
San Francisco, CA 94102
Tel. (415) 431-2970 Fax (415) 431-0410

Enclosure

CERTIFICATE OF MERIT

**(for As You Sow's Notice of Proposition 65 Violation on
BOTANICAL LABORATORIES INC. doing business as ZAND HERBAL FORMULAS)**

I, Andrew L. Packard, declare:

1. This Certificate of Merit accompanies the attached sixty-day notice in which it is alleged that **BOTANICAL LABORATORIES INC. doing business as ZAND HERBAL FORMULAS** has violated Health & Safety Code §25249.6 by failing to provide clear and reasonable warnings.
2. I am the attorney for the noticing party.
3. I have consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemicals that are the subject of the action.
4. Based on the information obtained through those consultations, and on all other information in my possession, I believe there is a reasonable and meritorious case for the private action. I understand that "reasonable and meritorious case for the private action" means that the information provides a credible basis that all elements of the plaintiffs' case can be established and that the information did not prove that the alleged violator will be able to establish any of the affirmative defenses set forth in the statute.
5. The copy of this Certificate of Merit served on the Attorney General attaches to it factual information sufficient to establish the basis for this certificate, including the information identified in Health and Safety Code §25249.7(h)(2), i.e., (1) the identity of the persons consulted with and relied on by the certifier, and (2) the facts, studies, or other data reviewed by those persons.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action; my business address is: 311 California Street, Suite 510, San Francisco, California 94104.

On December 23, 2003, I served the following documents:

- Notice of Violation of California Health & Safety Code § 25249.5 et seq.
- Certificate of Merit
- "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary"

on the following party by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below, and depositing it at a United States Postal Service Office for delivery by Certified Mail:

Botanical Laboratories Inc. doing business as Zand Herbal Formulas
Jim Coyne, CEO
P.O. Box 1596
Ferndale, WA 98248

On December 23, 2003, I served the following document(s):

- Notice of Violation of California Health & Safety Code § 25249.5 et seq.
- Certificate of Merit, including Supporting Documentation Required by Title 11, C.C.R. § 3102

on the following party by placing a true and correct copy thereof in a sealed envelope, addressed to the party listed below, and depositing it at a United States Postal Service Office for delivery by Certified Mail:

Attn: Craig Thompson, Deputy Attorney General
California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

On December 23, 2003, I served the following document(s):

- Notice of Violation of California Health & Safety Code § 25249.5 et seq.
- Certificate of Merit

on each of the parties on the service list attached hereto by placing a true and correct copy thereof in a sealed envelope, addressed to each of the parties on the service list attached hereto, and depositing it at United States Postal Service mail box for delivery by First Class Mail.

Executed on December 23, 2003, at San Francisco, California.

PUBLIC ENFORCEMENT AGENCIES SERVICE LIST (updated 04/18/03)

THE HONORABLE THOMAS J ORLOFF
ALAMEDA COUNTY DISTRICT ATTORNEY
1225 FALLON ST RM 900
OAKLAND CA 94612

THE HONORABLE ARTHUR MAILLET
INYO COUNTY DISTRICT ATTORNEY
PO CRAWER D
INDEPENDENCE CA 93526

THE HONORABLE DEAN FLIPPO
MONTEREY COUNTY DISTRICT ATTORNEY
240 CHURCH ST #101
SALINAS CA 93902

THE HONORABLE WILLIAM RICHMOND
ALPINE COUNTY DISTRICT ATTORNEY
PO BOX 248
MARKLEEVILLE CA 96120

THE HONORABLE EDWARD R JAGELS
KERN COUNTY DISTRICT ATTORNEY
1215 TRUXTUN AVE
BAKERSFIELD CA 93301

THE HONORABLE GARY LIEBERSTEIN
NAPA COUNTY DISTRICT ATTORNEY
931 PARKWAY MALL
NAPA CA 94559

THE HONORABLE TODD O RIEBE
AMADOR COUNTY DISTRICT ATTORNEY
708 COURT ST STE 202
JACKSON CA 95842

THE HONORABLE RON CALHOUN
KINGS COUNTY DISTRICT ATTORNEY
1400 W LACEY BLVD
HANFORD CA 93230

THE HONORABLE MICHAEL FERGUSON
NEVADA COUNTY DISTRICT ATTORNEY
201 CHURCH ST STE 8
NEVADA CITY CA 95959

THE HONORABLE MICHAEL RAMSEY
BUTTE COUNTY DISTRICT ATTORNEY
25 COUNTY CTR DR
OROVILLE CA 95965

THE HONORABLE GERHARD LUCK
LAKE COUNTY DISTRICT ATTORNEY
255 N FORBES ST
LAKEPORT CA 95453

THE HONORABLE TONY RACKAUCKAS
ORANGE COUNTY DISTRICT ATTORNEY
401 CIVIC CTR DR WEST
SANTA ANA CA 92701

THE HONORABLE JEFFREY TUTTLE
CALAVERAS COUNTY DISTRICT ATTORNEY
891 MTN RANCH RD
SAN ANDREAS CA 95249

THE HONORABLE ROBERT BURNS
LASSEN COUNTY DISTRICT ATTORNEY
220 S LASSEN ST STE 8
SUSANVILLE CA 96130

THE HONORABLE BRAD FENOCCHIO
PLACER COUNTY DISTRICT ATTORNEY
11562 B AVE
AUBURN CA 95603

THE HONORABLE JOHN POYNER
COLUSA COUNTY DISTRICT ATTORNEY
547 MARKET ST
COLUSA CA 95932

THE HONORABLE STEVE COOLEY
LA COUNTY DISTRICT ATTORNEY
210 W TEMPLE ST STE 18000
LOS ANGELES CA 90012-3210

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PLUMAS COUNTY DISTRICT ATTORNEY
520 MAIN ST RM 404
QUINCY CA 95971

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PO BOX 670
MARTINEZ CA 94553

THE HONORABLE ERNEST LICALSI
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THE HONORABLE GROVER C TRASK II
RIVERSIDE COUNTY DISTRICT ATTORNEY
4075 MAIN ST
RIVERSIDE CA 92501

THE HONORABLE MICHAEL RIESE
DEL NORTE COUNTY DISTRICT ATTORNEY
450 H ST
CRESCENT CITY CA 95531

THE HONORABLE PAULA FRESCHI KAMENA
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3501 CIVIC CTR DR RM 130
SAN RAFAEL CA 94903

THE HONORABLE JAN SCULLY
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SACRAMENTO CA 95814

THE HONORABLE GARY L LACY
EL DORADO COUNTY DISTRICT ATTORNEY
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PLACERVILLE CA 95667

THE HONORABLE ROBERT BROWN
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MARIPOSA CA 95338

THE HONORABLE JOHN SANSFIELD
SAN BENITO COUNTY DISTRICT ATTORNEY
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HOLLISTER CA 95023

THE HONORABLE ELIZABETH EGAN
FRESNO COUNTY DISTRICT ATTORNEY
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FRESNO CA 93721

THE HONORABLE NORMAN VROMAN
MENDOCINO COUNTY DISTRICT ATTORNEY
PO BOX 1000
UKIAH CA 95482

THE HONORABLE MICHAEL RAMOS
SAN BERNARDINO COUNTY DISTRICT ATTORNEY
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SAN BERNARDINO CA 92415-0004

THE HONORABLE ROBERT HOLZAPFEL
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WILLOWS CA 95988

THE HONORABLE GORDON SPENCER
MERCED COUNTY DISTRICT ATTORNEY
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MERCED CA 95340

THE HONORABLE BONNIE DUMANIS
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SAN DIEGO CA 92101

THE HONORABLE PAUL GALLEGOS
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EUREKA CA 95501

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SAN FRANCISCO CA 94103

THE HONORABLE GILBERT OTERO
IMPERIAL COUNTY DISTRICT ATTORNEY
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EL CENTRO CA 92243

THE HONORABLE GEORGE BOOTH
MONO COUNTY DISTRICT ATTORNEY
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BRIDGEPORT CA 93517

THE HONORABLE JOHN D PHILLIPS
SAN JOAQUIN COUNTY DISTRICT ATTORNEY
PO BOX 990
STOCKTON CA 95201-0990

THE HONORABLE GERALD T SHEA
SAN LUIS OBISPO COUNTY DISTRICT ATTORNEY
COUNTY GOVERNMENT CTR RM 450
SAN LUIS OBISPO CA 93408

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THE HONORABLE JAMES P FOX
SAN MATEO COUNTY DISTRICT ATTORNEY
400 COUNTY CTR FL 3
REDWOOD CITY CA 94063

THE HONORABLE PHILLIP J CLINE
TULARE COUNTY DISTRICT ATTORNEY
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VISALIA CA 93291

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70 W HEDDING ST
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THE HONORABLE GREG TOTTEN
VENTURA COUNTY DISTRICT ATTORNEY
800 S VICTORIA AVE
VENTURA CA 93029

THE HONORABLE BOB LEE
SANTA CRUZ COUNTY DISTRICT ATTORNEY
701 OCEAN ST STE 200
SANTA CRUZ CA 95060

THE HONORABLE DAVID C HENDERSON
YOLO COUNTY DISTRICT ATTORNEY
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SUTTER COUNTY DISTRICT ATTORNEY
446 SECOND ST
YUBA CITY CA 95991

THE HONORABLE GREGG COHEN
TEHAMA COUNTY DISTRICT ATTORNEY
PO BOX 519
RED BLUFF CA 96080

Exhibit C
Botanical Laboratories, Inc.

The following are the Good Manufacturing Practices BLI will utilize for the products listed on Exhibit A

- Use 3rd party contract manufacturers which are independently audited for food GMP compliance for the manufacture of dietary supplements by a reputable auditing organization or are audited by BLI.
- BLI Vendor audit program includes food GMP audit processes and forms consistent with BLI standard operating procedures.
- Manufacturers will maintain facilities consistent with food GMPs including grounds, facility and manufacturing environment.
- Manufacturers will be required to use water meeting municipal standards for foods and drinking water use.
- Manufacturers will be required to utilize equipment and processes which have product contact surfaces made of stainless steel or equally non-additive materials and which are designed to perform processes which will not intentionally add heavy metals to the materials being processed.
- Manufacturers will obtain raw materials from vendors accompanied by a COA.
- All equipment product contact surfaces will be cleaned between each different product.
- BLI will supply the specific heavy metal specifications for each product.
- BLI will select or approve the testing laboratory and methodology for heavy metal testing.
- BLI will review all testing results for conformance to established requirements.
- Manufacturers will provide a COA for each product production lot.
- All manufacturing, testing and audit records will be maintained for not less than one year past the expiration date of the product.