

**ENDORSED  
FILED  
ALAMEDA COUNTY**

OCT 31 2012

K. McCoy, Exec. Off./Clerk

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11 Attorneys for Defendant  
12 Symmetry Corporation

13  
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF ALAMEDA**  
16

17  
18 **ENVIRONMENTAL RESEARCH CENTER,**  
a California non-profit corporation

19 Plaintiff,

20 v.

21  
22 **SYMMETRY CORPORATION and DOES**  
1-100,

23 Defendants.  
24  
25  
26  
27  
28

Case No. RG-10553800

*VM*  
~~[PROPOSED]~~ CONSENT  
JUDGMENT

[PROPOSED] CONSENT JUDGMENT

1     **1.     INTRODUCTION**

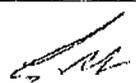
2           1.1     On December 30, 2010, Plaintiff Environmental Research Center ("ERC"), a non-profit  
3 corporation, as a private enforcer, and in the public interest, initiated this action by filing a Complaint  
4 for Civil Penalties pursuant to the provisions of Cal. Health & Safety Code Section 25249.5 et seq.  
5 ("Proposition 65"), against Defendant Symmetry Corporation ("Symmetry"). An Amended Complaint  
6 was filed on June 11, 2012. In this action, ERC claims that certain products manufactured and  
7 distributed by Symmetry contain lead, a chemical listed under Proposition 65 as a carcinogen and  
8 reproductive toxin, and expose consumers at a level requiring a Proposition 65 warning. ERC and  
9 Symmetry shall sometimes be referred to individually as a "Party" or collectively as the "Parties."

10           1.2     The Amended Complaint is based on allegations contained in four Notices of Violation  
11 dated June 29, 2010, November 5, 2010, December 23, 2010, and June 1, 2011 served on the California  
12 Attorney General, other public enforcers and Symmetry. The following products were noticed in these  
13 Notices of Violation: Botanicals Male Balance; Botanicals BotanaCleanse Formula 1; and Botanicals  
14 BotanaCleanse Formula 2; Symmetry Future Star Citrus Flavored; Symmetry Corp. Thermobalance;  
15 Symmetry Botanicals Clarity; Symmetry Botanicals OptiBreathe; Symmetry Lipo-Sorb; Symmetry  
16 Corp., CarbLess; Symmetry Corp. WOW Smoothie; and Symmetry Corp Ultra Vitality NutraPack.  
17 More than 60-days have passed since the Notices of Violation were served and no public enforcement  
18 entity has filed a complaint against Symmetry with regard to the Covered Products or the alleged  
19 violations.

20           1.3     ERC is a California non-profit corporation dedicated to, among other causes, helping  
21 safeguard the public from health hazards by bringing about a reduction in the use and misuse of  
22 hazardous and toxic chemicals, facilitating a safe environment for consumers and employees and  
23 encouraging corporate responsibility. ERC has diligently prosecuted this matter and is settling this case  
24 in the public interest.

25           1.4     Symmetry is a business entity that employs ten or more persons. Symmetry arranges the  
26 manufacture, distribution or sale of the Covered Products.

27           1.5     ERC's Notices of Violation and the Complaint allege that the Covered Products exposed  
28 persons in California to lead without first providing clear and reasonable warnings, in violation of Cal.



1 Health & Safety Code Section 25249.6. Symmetry denies all material allegations contained in the  
2 Notices of Violation and Complaint and specifically denies that the Covered Products required a  
3 Proposition 65 warning or otherwise cause harm to any person.

4 1.6 The Parties have entered into this Consent Judgment in order to settle, compromise and  
5 resolve disputed claims and thus avoid prolonged and costly litigation. Nothing in this Consent  
6 Judgment shall constitute or be construed as an admission by any of the Parties, or by any of their  
7 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
8 affiliates, franchises, licensees, customers, distributors, wholesalers, or retailers, of any fact, conclusion  
9 of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation, any  
10 admission concerning any alleged violation of Proposition 65, nor shall this Consent Judgment be  
11 offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court,  
12 agency, or forum, except with respect to an action seeking to enforce the terms of this Consent  
13 Judgment.

14 1.7 Except as expressly set forth herein, nothing in this Consent Judgment shall prejudice,  
15 waive or impair any right, remedy, argument, or defense the Parties may have in any other or future  
16 legal proceeding unrelated to these proceedings.

17 1.8 The Effective Date of this Consent Judgment shall be the date on which it is entered as a  
18 Judgment by this Court.

19 1.9 Subsequent to ERC's Notices of Violation, Symmetry has made reasonable efforts to  
20 investigate possible reformulations of all the Covered Products.

21 **2. JURISDICTION AND VENUE**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction  
23 over the allegations of violations contained in the Complaint and personal jurisdiction over Symmetry as  
24 to the acts alleged in the Complaint, that venue is proper in Alameda County, and that this Court has  
25 jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were or  
26 could have been asserted in this action based on the facts alleged in the Notices of Violation and the  
27 Complaint.

28



1     **3.     INJUNCTIVE RELIEF, WARNINGS, AND DETERMINING EXPOSURE LEVEL**

2             **3.1**     On or after the Effective Date, Symmetry will not knowingly ship Covered Products, to  
3 California or to a third party for distribution or sale in California, unless (1) these Covered Products do  
4 not expose any person to a daily dose of more than 0.5 micrograms of lead when the maximum daily  
5 dose is taken as directed on the product label; or (2) these Covered Products contain a Proposition 65 -  
6 warning (as set forth in Section 3.2 below); or (3) this Court or the California Office of Environmental  
7 Health Hazard Assessment ("OEHHA") determines that no such warning for these Covered Products is  
8 required. Symmetry will make reasonable efforts to determine when and if reformulation of a Covered  
9 Product is possible.

10            **3.2     Warnings**

11            The warning required by Section 3.1 above shall read as follows:

12            **WARNING:** This product contains lead, a chemical known to the State of California to cause  
13 [cancer,] or birth defects, or other reproductive harm.

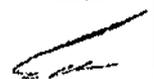
14            OR

15            **WARNING:** This product contains a chemical known to the State of California to cause  
16 [cancer,] or birth defects, or other reproductive harm.

17            The term "cancer" need not be included in the warning if the maximum daily dose recommended  
18 on the label contains less than 15 micrograms of lead as determined pursuant to Section 3.3. The  
19 warning shall, in compliance with section 25601 of Title 27 of the California Code of Regulations, be  
20 reasonably calculated, considering the alternative methods available under the circumstances, to make  
21 the warning message available to the individual prior to exposure.

22            **3.3     Calculation for Determining Microgram Per Day Level**

23            For purposes of this Consent Judgment, daily lead exposure levels shall be measured in  
24 micrograms, and shall be calculated using the following formula: micrograms of lead per gram of  
25 product, multiplied by grams of product per serving of the product (using the largest serving size  
26 appearing on the product label), multiplied by servings of the product per day (using the largest) number  
27 of servings in a recommended dosage appearing on the product label), which equals micrograms of lead  
28 exposure per day. All testing to determine concentrations of lead shall be performed using the following



1 criteria: Closed-vessel, microwave-assisted acid digestion employing high-purity reagents, followed by  
2 Inductively Coupled Plasma-Mass Spectrometry (ICP\_MS).

3 **4. SETTLEMENT PAYMENT**

4 In full and final satisfaction of all potential civil penalties, payment in lieu of civil penalties,  
5 attorneys' fees, and costs, Symmetry shall make a total payment of \$85,000.00, one-third of which will  
6 be due within ten business days of receiving the Notice of Entry of this Consent Judgment (the "First  
7 Payment"), an additional one-third (the "Second Payment") will be due thirty days after the First  
8 Payment, and the final third will be due thirty days after the Second Payment. The payment shall be  
9 distributed as follows with each amount being divided and paid according to the aforementioned  
10 schedule:

11 4.1 \$7,960.00 as civil penalties pursuant to California Health & Safety Code section  
12 25249.7(b)(1). Of this amount, \$5,970.00 shall be payable to OEHHA, and \$1,990.00 shall be payable  
13 to ERC. Cal. Health & Safety Code §§ 25249.12(c)(1) & (d). ERC's counsel shall forward the civil  
14 penalty payment to OEHHA, and send a copy of the transmittal letter to counsel for Symmetry.

15 4.2 \$23,870.00 in lieu of further civil penalties, payable to ERC, for activities such as  
16 (1) investigating, researching and testing consumer products that may contain Proposition 65 listed  
17 chemicals; (2) awarding a grant to St. Jude Children's Research Hospital as further described in the  
18 Addendum; (3) funding the ERC Eco Scholarship Fund for high school students in California interested  
19 in pursuing an education in the field of environmental sciences; (4) funding ERC's Voluntary  
20 Compliance Program to work with companies not subject to Proposition 65 to reformulate their products  
21 to reduce potential consumer exposures; (5) funding ERC's RxY Program to assist various medical  
22 personnel to provide testing assistance to independent distributors of various products; (6) funding  
23 ERC's Got Lead? Program to assist consumers in testing products for lead; (7) funding the ERC Cancer  
24 Scholarship Fund to provide scholarships to college students in California who have previously been  
25 diagnosed with a form of cancer; (8) aiding various cancer research centers and organizations in their  
26 ongoing efforts to assist families and children in cancer treatment facilities; (9) maintaining, supporting  
27 and increasing ERC's Database of lead-free and Proposition 65 compliant products; (10) increasing  
28 ERC's tracking and cataloging of contamination-free sources for specific ingredients used in the types of



1 products ERC test, and sharing this information with companies to try and reduce lead levels in their  
2 products; (11) post-settlement monitoring of past consent judgments; and (12) the continuing  
3 enforcement of Proposition 65.

4 4.3 \$22,570.00 payable to ERC, as reimbursement to ERC for reasonable investigation costs  
5 associated with the enforcement of Proposition 65 and other costs incurred as a result of investigating,  
6 bringing this matter to Symmetry's attention, litigating and negotiating this settlement in the public  
7 interest.

8 4.4 \$25,612.50 payable to Michael Freund, \$1,137.50 payable to Ryan Hoffman and  
9 \$3,850.00 payable to Karen Evans as reimbursement of ERC's attorneys' fees.

10 The above payments shall be mailed to the Law Office of Michael Freund.

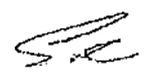
11 **5. MODIFICATION OF CONSENT JUDGMENT**

12 This Consent Judgment may be modified only by written agreement and stipulation of the  
13 Parties, or upon noticed motion filed by any Party, followed by entry of a modified consent judgment by  
14 the Court. A Party that wishes to modify the terms of this consent judgment shall attempt to meet and  
15 confer and reach an agreement with the other Party prior to filing a motion to modify. If a Party files a  
16 motion for a modification of the Consent Judgment without first trying to meet and confer and reach an  
17 agreement, or if the party fails to obtain a modification, the other Party shall be entitled to reasonable  
18 attorney's fees and costs to be determined by the Court. If a Party requests or initiates a modification  
19 that is made by stipulation or written agreement, the other Party shall be entitled to \$3,000 to defray the  
20 attorney's fees and costs associated with reviewing and negotiating the proposed modification and the  
21 requesting Party shall be responsible for drafting all papers to be submitted to the court.

22 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

23 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate this  
24 Consent Judgment.

25 6.2 Only after it complies with Section 10 below, any Party may, by motion or application  
26 for an order to show cause filed with this Court, enforce the terms and conditions contained in this  
27 Consent Judgment. The prevailing party may request that the Court award its reasonable attorneys' fees  
28 and costs associated with such motion or application. As used in the preceding sentence, the term



1 "prevailing party" means a party who is successful in obtaining relief more favorable to it than the relief  
2 that the other party was amenable to providing during the parties' good faith attempt to resolve the  
3 dispute that is the subject of such enforcement action.

4 **7. APPLICATION OF CONSENT JUDGMENT**

5 This Consent Judgment, as it relates to the Covered Products, shall apply to, be binding upon and  
6 benefit the Parties, and their respective officers, directors, shareholders, employees, agents, parent  
7 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers (except private  
8 labelers), distributors, wholesalers, retailers, and all other entities in the distribution chain of the  
9 Covered Products, the predecessors, successors and assigns of ERC on its own behalf and the public  
10 interest as set forth in Paragraph 8.

11 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

12 8.1 This Consent Judgment is a full, final, and binding resolution between ERC, on behalf of  
13 itself, and in the public interest, and Symmetry of any alleged violation of Proposition 65 or its  
14 implementing regulations, and fully and finally resolves all claims that have been or could have been  
15 asserted in this action against Symmetry for failure to provide Proposition 65 warnings for the Covered  
16 Products regarding lead. ERC, on behalf of itself, and in the public interest, hereby releases and  
17 discharges Symmetry and its respective officers, directors, shareholders, employees, agents, parent  
18 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers,  
19 retailers, and all other entities in the distribution chain of any Covered Product, and the predecessors,  
20 successors and assigns of the entities in the distribution chain (collectively, "Released Parties"), from  
21 any and all claims asserted, or that could have been asserted, in this action arising from or related to the  
22 alleged failure to provide Proposition 65 warnings for the Covered Products regarding lead. It is the  
23 intention of the Parties to this release that, upon entry of this Consent Judgment by the Court, this  
24 Consent Judgment shall be effective as a full and final accord and satisfaction and release of every  
25 released claim up to and including the date of entry of the Consent Judgment.

26 8.2 Compliance with the terms of this Consent Judgment shall constitute compliance by the  
27 Released Parties with Proposition 65 with respect to alleged exposures to lead contained in the Covered  
28 Products.

1           8.3    ERC, on the one hand, and Symmetry, on the other hand, release and waive all claims  
2 they may have against each other for any statements or actions made or undertaken by them in  
3 connection with the Notices of Violation or this action.

4    **9.       CONSTRUCTION OF CONSENT JUDGMENT, SEVERABILITY**

5           9.1    The terms and conditions of this Consent Judgment have been reviewed by the respective  
6 counsel for the Parties prior to its signing, and each Party has had an opportunity to fully discuss the  
7 terms and conditions with its counsel. In any subsequent interpretation or construction of this Consent  
8 Judgment, the terms and conditions shall not be construed against any Party.

9           9.2    In the event that any of the provisions of this Consent Judgment are held by a court to be  
10 unenforceable, the validity of the enforceable provisions shall not be adversely affected.

11   **10.     GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

12           In the event a dispute arises with respect to either party's compliance with the terms of this  
13 Consent Judgment entered by the Court, the Parties shall meet either in person or by telephone and  
14 endeavor to resolve the dispute in an amicable manner. No action or motion may be filed in the absence  
15 of such a good faith attempt to resolve the dispute beforehand.

16   **11.     GOVERNING LAW**

17           The terms and conditions of this Consent Judgment shall be governed by and construed in  
18 accordance with the laws of the State of California.

19   **12.     PROVISION OF NOTICE**

20           All notices required by this Consent Judgment shall be sent by first-class, registered, or certified  
21 mail, or overnight delivery, to the following:

22   **For Environmental Research Center:**

23   Chris Heptinstall, Executive Director  
24   Environmental Research Center  
25   3111 Camino del Rio North, Suite 400  
26   San Diego, CA 92108

26   Michael Bruce Freund  
27   Law Offices of Michael Freund  
28   1919 Addison Street, Suite 105  
Berkeley, CA 94704



1 Karen Evans  
2 Coordinating Counsel  
3 Environmental Research Center  
4 4218 Biona Place  
5 San Diego, CA 92116

6 For Symmetry:  
7 Steve Kole, Secretary  
8 Symmetry Corporation  
9 14205 Burnet Road, Suite 530  
10 Austin, TX 78728

11 Greenberg Traurig, LLP  
12 James Mattesich  
13 Nancy J. Doig  
14 1201 K Street, Suite 1100  
15 Sacramento, CA 95814-3938

16 **13. COURT APPROVAL**

17 13.1 If this Stipulated Consent Judgment is not approved by the Court, it shall be void and  
18 have no force or effect.

19 13.2 ERC shall comply with California Health & Safety Code section 25249.7(f) and with  
20 Title 11 of the California Code Regulations, section 3003.

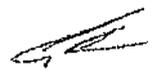
21 **14. EXECUTION AND COUNTERPARTS**

22 This Stipulated Consent Judgment may be executed in counterparts, which taken together shall  
23 be deemed to constitute one document. A facsimile or pdf signature shall be construed as valid as the  
24 original signature.

25 **15. ENTIRE AGREEMENT, AUTHORIZATION**

26 15.1 This Consent Judgment contains the sole and entire agreement and understanding of the  
27 Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,  
28 commitments and understandings related hereto. No representations, oral or otherwise, express or  
implied, other than those contained herein have been made by any Party. No other agreements not  
specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

15.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the  
Party he or she represents to stipulate to the terms and conditions of this Consent Judgment, to enter into



1 and execute this Consent Judgment on behalf of the Party represented, and legally to bind that Party to  
2 this Consent Judgment. The undersigned have read, understand and agree to all of the terms and  
3 conditions of this Consent Judgment. Except as explicitly provided herein, each Party shall bear its own  
4 fees and costs.

5 **16. REQUEST FOR FINDINGS, APPROVAL OF SETTLEMENT AND ENTRY OF**  
6 **CONSENT JUDGMENT**

7 16.1 This Consent Judgment has come before the Court upon the request of the Parties. The  
8 Parties request the Court to fully review this Consent Judgment and, being fully informed regarding the  
9 matters which are the subject of this action, to:

10 (1) Find that the terms and provisions of this Consent Judgment represent a fair and  
11 equitable settlement of all matters raised by the allegations of the Complaint, that the  
12 matter has been diligently prosecuted, and that the public interest is served by such  
13 settlement; and

14 (2) Make the findings pursuant to Health & Safety Code § 25249.7 (f) (4), approve  
15 the Settlement and approve this Consent Judgment.

16 **IT IS SO STIPULATED:**

17  
18 **ENVIRONMENTAL RESEARCH CENTER**

19  
20 \_\_\_\_\_  
Chris Heptinstall, Executive Director

Dated: \_\_\_\_\_

21  
22 **SYMMETRY CORPORATION**

23 *Steve Kole*  
24 \_\_\_\_\_  
Steve Kole, Secretary

Dated: 8/31/2012

1 and execute this Consent Judgment on behalf of the Party represented, and legally to bind that Party to  
2 this Consent Judgment. The undersigned have read, understand and agree to all of the terms and  
3 conditions of this Consent Judgment. Except as explicitly provided herein, each Party shall bear its own  
4 fees and costs.

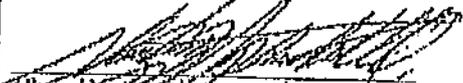
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12 matter has been diligently prosecuted, and that the public interest is served by such  
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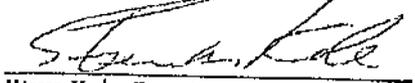
16 **IT IS SO STIPULATED:**

17  
18 **ENVIRONMENTAL RESEARCH CENTER**

19   
20 Chris Reptinjal, Executive Director

Dated: 8/23/12

21  
22 **SYMMETRY CORPORATION**

23   
24 Steve Kolt, Secretary

Dated: 8/31/2012

1 APPROVED AS TO FORM:  
2 LAW OFFICE OF MICHAEL FREUND

3 MF  
4 Michael Freund, Counsel for  
5 Environmental Research Center

Dated: 9/4/12

6 GREENBERG TRAURIG, LLC

7 [Signature]  
8 James Mattesich, Counsel for Symmetry  
9 Corporation

Dated: 9/4/2012

11 JUDGMENT

12 Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is  
13 approved and judgment is hereby entered according to its terms.

14  
15 IT IS SO ORDERED, ADJUDGED AND DECREED.

16  
17 Dated: ~~OCT 31 2012~~, 2012

18 STEVEN A. BRICK  
19 Judge, Superior Court of the State of California

20 Addendum

21 St. Jude Children's Research Hospital is a national resource whose impact is felt throughout the  
22 world. St. Jude freely shares all research findings with the global medical and scientific community, and  
23 plays a critical leadership role in groundbreaking studies on childhood cancer, sickle cell disease and  
24 infectious diseases. St. Jude is the first and only pediatric cancer center to be designated as a  
25 Comprehensive Cancer Center by the National Cancer Institute. During the past five years, 81 cents of  
26 every dollar received has supported the research and treatment of St. Jude Children's Research Hospital.

[Signature]