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AS YOU SOW

SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

AS YOU SOW, Plaintiff, vs. SWANSON HEALTH PRODUCTS, INC., Defendant.	**Case No. CGC-07-466169** **[PROPOSED] CONSENT JUDGMENT AS TO DEFENDANT SWANSON HEALTH PRODUCTS, INC.**

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This Consent Judgment is entered into by and between As You Sow ("Plaintiff"), and Swanson Health Products, Inc., a North Dakota corporation ("Defendant"). This Consent Judgment shall be effective upon entry (the "Effective Date") by the court. Plaintiff and Defendant (each a "Party" and collectively, "the Parties") agree to the terms and conditions set forth below. This Consent Judgment applies solely to products manufactured, distributed or sold under the Swanson brand and set forth on Exhibit A (or properly added to Exhibit A subsequent to the Effective Date, as more fully described herein below), and does not apply to any other branded product lines manufactured, distributed or sold by Defendant.

1. INTRODUCTION

1.1 Plaintiff is a Section 501(c)(3) non-profit foundation dedicated to, among other causes, the protection of the environment, the promotion of human health, the improvement of

worker and consumer rights, environmental education, and corporate accountability. Plaintiff is based in San Francisco, California and incorporated under the laws of the State of California.

1.2 Defendant is a family-owned vitamin and health food manufacturer, distributor and retailer located in North Dakota. Defendant sells products for ingestion to California consumers under the Swanson branded product line. Plaintiff alleges that certain of the products contain one or more chemicals listed by the State of California as known to cause cancer and reproductive toxicity pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), California Health and Safety Code § 25249.5 et seq.; Title 27, California Code of Regulations § 25000 et seq. For purposes of this Consent Judgment only, each of the products is deemed to be a "food" within the meaning of Title 27, California Code of Regulations § 25501.

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

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

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1.5 Beginning on May 25, 2007 and again on April 22, June 17 and August 29, 2008, Plaintiff served on Defendant and each of the appropriate public enforcement agencies "60-Day Notices" that provided Defendant and the public enforcement agencies with a notice alleging that Defendant was in violation of Proposition 65 for failing to warn the purchasers and individuals using the Products that the use of the Products exposes them to certain chemicals known to the State of California to cause cancer and/or reproductive toxicity (each, a "60-Day Notice"). A copy of each such 60-Day Notice issued to Defendant is attached hereto as Exhibit B. Defendant stipulates for the purpose of this Consent Judgment only that the 60-Day Notices sent to it are adequate to comply with Title 27, California Code of Regulations § 25903.

1.6 On August 14, 2007, Plaintiff filed a Complaint (the "Action") in San Francisco Superior Court, alleging violations of Proposition 65. Plaintiff brings the Action in the public interest. Plaintiff has provided 60-Day Notice(s) to Defendant and the appropriate public enforcement agencies and none of the public enforcement agencies has commenced and begun diligently prosecuting an action against Defendant for such alleged violations.

1.7 For purposes of this Consent Judgment, each Party stipulates that venue is proper and that this Court has subject matter jurisdiction over the allegations contained in the Action. Defendant stipulates it employs ten (10) or more employees and employed ten (10) or more employees for one year prior to the date of the first 60-Day Notice. The Parties enter into this Consent Judgment to settle disputed claims between them and to avoid prolonged litigation. By execution of this Consent Judgment, Defendant does not admit any facts, violations of law, conclusions of law, the applicability of Proposition 65, or the applicability or violation of any other law or standard governing warnings or disclosures in connection with the manufacture, packaging, labeling, distribution and/or sale of the Products. Except for the stipulations made in Sections 1.5 and 1.7 by Defendant, nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, issue of law, conclusion of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, issue of law, conclusion of law, or violation of law. Except for the stipulations made in this Section 1.7 by Plaintiff, nothing in this Consent Judgment shall be construed as an

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

1.8 Except as expressly provided herein, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy or defense any Party may have in any other or further legal proceeding. This paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of any Party to this Consent Judgment. This Consent Judgment is a full and final settlement of all claims that were raised in the Action, or which could have been raised in the Action arising out of the facts or conduct alleged therein.

2. INJUNCTIVE PROVISIONS

2.1 Defendant's Duty To Ascertain The Metals Content of Products On Or Before One Hundred Twenty Days Following the Effective Date. On or before one hundred twenty (120) days following the Effective Date, Defendant shall ascertain the concentration of Metals in each of the Products as follows, except as provided in Section 9.1, *New Products*.

2.1.1 Lead, Arsenic And Cadmium Testing Protocol. In accordance with Sections 2.1.5 and 2.1.6, to ascertain a Product's concentration of lead, arsenic and cadmium, respectively, Defendant shall test the Product (or rely on testing of the Product by others provided it is undertaken in the manner set forth herein), using inductively coupled plasma mass spectrometry ("ICP-MS") under the protocol set forth in EPA Method 6020 or 6020A as set forth in this Section 2.1.

2.1.2 Mercury Testing Protocol. In accordance with Sections 2.1.5 and 2.1.6, to ascertain a Product's concentration of mercury, Defendant shall test the Product (or rely on testing of the Product by others provided it is undertaken in the manner set forth herein) using one of the following protocols: (1) the protocol set forth in EPA Method 7471A; (2) the protocol set forth in EPA Method 7473; (3) the protocol set forth in EPA Method 6020 or 6020A; (4) the protocol set forth in USP 231 Method, as revised in 2009; or (5) any newly developed EPA Method meeting Proposition 65's testing protocol requirements. For each of the protocols listed above, the sample preparation shall be in conformity with EPA Method 3052 as appropriate.

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2.1.3 Additional Testing Protocols. In the event that equally or more accurate testing methods are developed or identified and accepted by the scientific community as accurate enough to allow for detection and quantification of Metals to ascertain compliance under this Consent Judgment, any Party shall have the right to move the court to modify this Consent Judgment as set forth in Section 8 herein, to allow testing by such equally or more accurate testing method in addition to the methods authorized herein.

2.1.4 Approved Laboratories. Product or raw material testing may be undertaken by Defendant's in-house personnel or by third-party testing laboratories. All third-party laboratory testing shall be performed only at laboratories that are certified, accredited, or registered by an agency of the United States, Canada, California or another State of the United States or Province of Canada, including but not limited to the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, or the California Department of Health Services, for the purposes of administering the specific protocol used in such testing. If a given agency does not certify specific protocols for testing for Metals in dietary supplements, the certification, accreditation or registration customarily bestowed upon laboratories testing dietary supplements or ingredients in dietary supplements for Metals in accordance with that agency's standards shall be required; if no such agency standards exist specifically for dietary supplements, then the standards for foods shall be required.

2.1.5 Sampling Protocol For Metals Content. In fulfilling its duty to ascertain the concentration of Metals in each Product, Defendant may at its option, test (or rely on testing of the Product by others) Representative Samples of the finished Products, or test (or rely on testing of raw materials by others) Representative Samples of each of the raw materials comprising the finished Product(s). Any results relied upon must use the analytical methods and sampling requirements specified herein, except that Defendant (or a laboratory conducting tests for Defendant) may modify or adjust an analytical method if necessary to ensure accurate results in light of the nature, composition, quantity, or other characteristic of the test specimen, the nature of the test, or the specific equipment being used to conduct the test so as to enhance the quality and reliability of the test results. If Defendant (or a laboratory conducting tests for Defendant)

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modifies or adjusts any analytical method specified in this Consent Judgment, in the event of an enforcement action by Plaintiff under this Consent Judgment contesting such modification or adjustment, Defendant shall bear the burden of showing by a preponderance 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 practices concerning analytical testing and test methods for Metals in foods, including dietary supplements.

2.1.6 Representative Sampling.

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

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

(c) First Two Year's Frequency of Sampling. During each of the two years after the Effective Date, for purposes of documenting compliance with Sections 2.2, 2.4 and 9 of this Consent Judgment, Defendant shall conduct (or have conducted on its behalf) Representative Sampling of each Product meeting the definition of either Section 2.1.6(a) or 2.1.6(b), or any combination of the two, as Defendant shall elect in its sole discretion. The Parties agree that this frequency of Representative Sampling of each Product for the first two years after the Effective

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Date shall be the minimum amount of sampling required under this Consent Judgment. Defendant shall retain laboratory test data documenting the foregoing Representative Sampling with respect to each Product Defendant ships for sale to California between the Effective Date and the second anniversary of the Effective Date. Such laboratory test data for the initial two year testing period shall be retained for at least four years from the date of testing.

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

2.1.7 Compliance Monitoring. At any time following one hundred twenty (120) days after the Effective Date, Plaintiff may request that Defendant provide, within thirty-five (35) days of the date of its request, documentation supporting the sale in California of any Product manufactured after the Effective Date and sold without the health hazard warnings specified in this Consent Judgment. For the first two years after the Effective Date, such requests

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may be made with respect to as many as twenty-five (25) percent, annually, of the number of Products listed on Defendant's then current list of Products subject to this Consent Judgment, up to a maximum of twenty (20) requests in total for the year, concerning up to twenty (20) different Products in that year. After year two after the Effective Date, Plaintiff may request information on no more than ten (10) percent, annually, of the number of Products listed on Defendant's then current list of Products subject to this Consent Judgment, up to a maximum of ten (10) requests in total for the year, concerning up to ten (10) different Products in that year. After year three after the Effective Date, Plaintiff shall not be entitled to request information pursuant to this Section 2.1.7, unless a violation of this Consent Judgment previously was established within the three years preceding the date of the Plaintiff's request, in which case Plaintiff shall be entitled to tender up to twelve (12) requests in total for information respecting up to twelve (12) different Products for up to one more year after the date of Plaintiff's request. For any Product for which Plaintiff's request for such documentation is not provided within sixty (60) days of the date of the request, such Product will be deemed sold in violation of this Consent Judgment as to all sales in California of that Product after the date of Plaintiff's request through the date upon which such documentation is received by Plaintiff and therefore will be subject to the provisions of Section 3.1; provided, however, that Defendant's mere contesting of any assertion by Plaintiff concerning inadequacies in the documentation produced to Plaintiff shall not, in and of itself, be deemed a violation of this Section 2.1.7. For Plaintiff to establish a violation of this Section, the documentation provided or other documentation must show that a health hazard warning was required under this Consent Judgment. Violations of this Section 2.1.7 may be enforced as specified hereinbelow and are not exclusive of other remedies, if any, available to Plaintiff.

2.1.8 Limited Exemptions from Testing. Defendant need not test (or have tested on its behalf) all excipients, fillers, flavors, colors, binders or other ingredients of uniform manufacture or consistently uniform high purity ("Standardized Ingredients") if it reasonably and in good faith believes, after conducting the research and analysis described below, that it can demonstrate, with admissible evidence, such Standardized Ingredients do not contain Metals at levels that might cause or contribute to a violation of this Consent Judgment. Defendant's good

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faith belief shall be based on periodic laboratory test data, vendor certifications, or other such 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 scientific factors. Defendant periodically shall monitor and evaluate such Standardized Ingredients for Metals levels. In the event that Plaintiff should move to enforce this Consent Judgment, Defendant bears the burden of establishing by a preponderance of the evidence that any failure to test a Standardized Ingredient for Metals content was reasonable and in good faith, and must produce all such supporting evidence in the context of the meet and confer process concerning enforcement of this Consent Judgment contemplated under Section 8.1 herein. Defendant's failure to test a Standardized Ingredient for Metals content, in the absence of a reasonable and good faith belief that such ingredient does not contain Metals at levels that might cause or contribute to a violation of this Consent Judgment, shall constitute a material breach of this Consent Judgment and be subject to stipulated civil penalties as provided for herein if such failure to test causes or contributes to a failure to provide a warning when required under Section 2.2 or causes or contributes to a violation of Section 2.4 of this Consent Judgment.

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

2.1.10 Purchase of Testing Equipment. On or before the date that is sixty (60) days after the Effective Date, Defendant shall commence acquisition (either by purchase or lease) of an Inductively Coupled Plasma Mass Spectrometer, including re-circulating chiller,

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autosampler, digestion block, spectrophotometer, Reference Standards and NIST standards for USP testing, and all related software. Defendant has evaluated the following four models of Inductively Coupled Plasma Mass Spectrometers: (a) Perkin Elmer Elan (9000/DRC/DRC-e); (b) Varian 810/820; (c) Agilent 7500cx/7500cs; and (d) Thermo Scientific XSERIES2. The Parties agree that the timely purchase or lease of any of these models will satisfy this term of this Consent Judgment; in the event that Defendant chooses to satisfy this term of this Consent Judgment through the purchase or lease of any other functionally equivalent model, AYS must first consent in writing to such change. In compliance with this Consent Judgment, Defendant may utilize outside laboratories as well.

2.2 Provision of Clear and Reasonable Warnings.

2.2.1 On-Product Warnings. On or before the date that is one hundred twenty (120) days following the Effective Date, Defendant shall permanently cease and no longer ship for sale or use in California any Products (as defined in Sections 1.3 and 9.1) which require a warning under the terms of this Consent Judgment, unless each individual Product (in the form intended for sale to the end-user) bears one of the warning statements specified below on its individual unit label or unit packaging:

(a) Subject to Sections 2.3 and 2.4 herein, if use or consumption of the Product in accordance with Defendant's label directions results in an exposure exceeding 10.0 micrograms/day of arsenic, but otherwise would not require a warning under this Consent Judgment, then the warning shall state:

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

(b) Subject to Sections 2.3 and 2.4 herein, if use or consumption of the Product in accordance with Defendant's label directions results in an exposure exceeding 10.0 micrograms/day of arsenic, and exceeding any of the levels set for lead, mercury, or cadmium in this Consent Judgment, then the warning shall state:

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

(c) Subject to Sections 2.3 and 2.4 herein, if use or consumption of the Product in accordance with Defendant's label directions results in an exposure that does not exceed 10.0 micrograms/day of arsenic, but that does exceed any of the levels set for lead, mercury, or cadmium in this Consent Judgment, then the warning shall state:

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

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

2.2.2 Additional Warnings Concerning Mail Order And Internet Sales. If a Defendant sells a Product that requires a warning under this Consent Judgment, by mail order or over the Internet to a purchaser in the State of California on or after the date that is one hundred twenty (120) days after the Effective Date, the following additional requirements shall apply.

(a) For such mail order sales, the warning language required under this Consent Judgment shall also be included in the mail order catalogue, either on the same page as any order form, or on the same page(s) upon which the Product's price is listed, in the same type size as the surrounding, non-heading text (this requirement shall be applicable only to all catalogues featuring Products printed after the Effective Date). If Defendant determines, after a mail order catalogue is printed, that a Product featured therein requires a warning under this Consent Judgment, Defendant may provide a warning in compliance with Section 2.2.1 until the next printing of a mail order catalogue featuring that Product.

(b) For such Internet sales, the warning language required under this Consent Judgment shall be displayed in the same type size as the surrounding, non-heading text, either: (a) on the same page upon which the Product is displayed or referenced; (b) on the same page as the order

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form for the Product; (c) on the same page as the price for the Product is displayed; or (d) in a dialogue box (which cannot be suppressed by "pop up" box blocking software) which appears when a California address for delivery is provided by the consumer, so long as the dialogue box appears prior to the completion of the internet sale and requires the consumer to affirmatively accept receipt of the warning set forth in the dialogue box (which shall be displayed in the same type size as the surrounding, non-heading text on the screen at the time of the appearance of the dialogue box), as a condition precedent to completing the sale.

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

2.3.1 For Lead Warnings, Exposure Below "No Observable Effect Level." Use or consumption of a Product causes total daily exposure[1] to lead of less than 0.5 micrograms when consumed or used in accordance with the Defendant's label directions,[2] excluding any naturally occurring lead, as defined for purposes of this Consent Judgment in Section 2.3.2 ("Naturally Occurring Lead"), in such Product. Prior to shipment for sale to California consumers, Defendant shall provide consumer use instructions on the label or packaging of each individual Product unit (in the form intended for sale to the end-user). If the consumer use instructions include a range of consumption levels (e.g., "take 2 to 4 tablets daily"), then for purposes of determining compliance with Sections 2.2, 2.4, 9 and otherwise under this Consent Judgment, the highest dose instructed shall be the dose.

2.3.2 "Naturally Occurring" Allowance For Lead for Products Shipped for Sale After One Hundred Twenty (120) Days Following The Effective Date.

(a) Initial Naturally Occurring Lead Level. Unless a Product contains a warning in compliance with this Consent Judgment, the initial Naturally Occurring Lead level in any Product subject to this Consent Judgment Defendant ships for sale or use in California after the date that is

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[1] For purposes of this Consent Judgment only, the term "exposure" is deemed to mean "ingestion", consistent with Title 27, Cal. Code Regs., section 25102(i) (which defines the term "expose" as "to cause to ingest….").

[2] For non-dietary supplements, such as conventional food products, Defendant shall use the nutrition facts serving size information for this calculation. In the event that there is no serving size information, Defendant shall use the most relevant average consumption data.

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one hundred twenty (120) days following the Effective Date, shall not exceed a concentration that will result in 2.25 micrograms lead ingested/day, assuming the Product is used or consumed in accordance with the Defendant's consumer use instructions. Products where the concentration results in lead levels that exceed: (i) this initial 2.25 micrograms ingested level or (ii) Products which exceed any future Naturally Occurring Lead level subsequently established pursuant to this Consent Judgment (plus, in either the case of (i) or (ii), an additional 0.5 micrograms lead as allowed by regulation and under Section 2.3.1), shall be subject to the warning requirements set forth in Sections 2.2.1, 2.2.2 and 9 herein, unless Defendant can show by a preponderance of the evidence that all lead in such Products (except 0.5 micrograms ingested in a daily dose) is naturally occurring per 27 Cal. Code Reg. § 25501. If Defendant in the future elects to make this showing that more than 2.25 micrograms of lead is naturally occurring, Defendant agrees to provide all information on which it relies to support such a showing to Plaintiff in the context of the meet and confer process concerning enforcement of this Consent Judgment contemplated under Section 8.1 herein. Defendant's failure to produce complete information during the meet and confer process, or Defendant's' failure to establish to the Court, based on such information, by a preponderance of the evidence, that lead in excess of 0.5 micrograms in a daily dose, plus Naturally Occurring Lead, is naturally occurring under the criteria in 27 Cal. Code Reg. § 25501 shall constitute a material breach of this Consent Judgment and be subject to stipulated civil penalties as provided for herein if a Product which requires a health hazard warning under this Consent Judgment was sold in California without such warning. Nothing in this Section 2.3.2 constitutes a waiver of Defendant's' right to establish, in accordance with the procedures set forth in Sections 2.3.2 and 8.1, that levels of metals other than lead are naturally occurring under the criteria of 27 Cal. Code Reg. § 25501. The Parties agree that the initial 2.25 micrograms Naturally Occurring Lead level is the result of negotiations and a review of the available information and shall be applicable to the Products subject to this Consent Judgment and shall have no application to other products.

(b) Evaluation of Future Naturally Occurring Lead Levels. In recognition of the possibility that the "lowest level feasible" of lead may change over time, the Parties agree that for

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at least three years after the Effective Date, Defendant shall have the right to tender a statement of determination to AYS as to whether an adjustment to the Naturally Occurring Lead level can be supported by a preponderance of the evidence. If tendered, such statement of determination shall be tendered to AYS on or before April 15th for the years 2010, 2011 and 2012. Such a determination respecting the Naturally Occurring Lead level shall be made in good faith and be based on Representative Sampling and "Feasibility." "Feasibility" for purposes of this Consent Judgment shall mean consideration of the following: (1) the availability and reliability of a supply to Defendant of raw materials in question; (2) the reasonable cost to Defendant of Products or raw materials therein; (3) any resulting unreasonable increase in cost to a Defendant to procure a Product or raw materials with lower levels of lead; (4) performance characteristics, including formulation, performance, safety, taste, efficacy and stability, of any raw materials or finished Product; (5) the lawfulness of alternatives (no alternative shall result in a violation of law, or a breach of a standard of identity); and (6) other relevant and reasonable considerations. If upon determination of Defendant a change in the Naturally Occurring Lead level is warranted under the criteria above, then Defendant within sixty (60) days of the statement date may proceed to modify this Consent Judgment in accordance with Section 8 herein. Defendant's obligations under this Section 2.3.2(b) are without prejudice to any rights of Plaintiff under Section 8 or otherwise herein. If either Party seeks to modify the initial or any subsequently established Naturally Occurring Lead level as defined herein, such modification shall only be effective upon an order by the Court, after a noticed motion, notice of which motion shall be served on the Office of the Attorney General at least forty-five (45) days prior to the hearing date, and which motion shall include the information supporting the request for modification.

(c) Defendant also shall be entitled to exclude from the calculation of the daily lead exposure the amount of naturally occurring lead in the following non-herbal ingredients only, if used in a Product: calcium, ferrous fumarate, zinc oxide, magnesium oxide, magnesium chloride, magnesium hydroxide, zinc gluconate and potassium chloride. The amount of lead in each of these ingredients deemed naturally occurring shall be conclusively and irrefutably presumed to be the amount of lead that would be deemed naturally occurring under the consent judgment entered

on November 11, 1998 in *People v. Warner Lambert,* San Francisco Superior Court Case No. 984403.

2.3.3 Conditions Under Which "Naturally Occurring" Allowance For Lead Applies. For purposes of compliance with this Consent Judgment, Defendant shall be required to adhere to 27 Cal. Code Reg. § 25501 and Defendant shall be entitled to exclude the amount of lead specified in Section 2.3.2 pursuant to the provisions of this Consent Judgment. Defendant shall bear the burden of proof in establishing, by a preponderance of the evidence that, with respect to each Product unit subject to an enforcement proceeding, the conditions specified in this Section 2.3.3 have been satisfied.

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

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2.4 Ban on Sales of Products Causing Exposures to Lead in Excess of 10 Micrograms Per Day. No Product subject to this Consent Judgment may be shipped by Defendant for sale in the State of California after one hundred twenty (120) days following the Effective Date if, when used or consumed in accordance with the Defendant's label directions, it causes an exposure to lead in excess of ten (10.0) micrograms/day.

3. CIVIL PENALTIES

3.1 Stipulated Civil Penalties For Future Violations of This Agreement. Proposition 65 provides for civil penalties of up to $2500 per violation per day, pursuant to California Health & Safety Code § 25249.7. In the event that after one hundred twenty (120) days following the Effective Date Defendant violates Sections 2 or 9 herein, the Parties stipulate that Defendants shall be liable for a stipulated civil penalty in the amount of $10.00 per unit item sold in violation of this Consent Judgment, unless the Defendant's actual per unit sale price to the buyer was less than $10.00, in which case the stipulated penalty shall be fifty percent (50%) of the sale price Defendant received from the relevant buyer for the Products at issue. Total civil penalties concerning all Products sold in violation of this Consent Judgment shall not exceed $75,000 for such violations in any calendar year. Plaintiff may establish such violation(s) hereunder by a preponderance of the evidence upon a duly noticed motion in the San Francisco Superior Court and subject to the provisions of Section 8 herein. Plaintiff shall remit 75% of this amount to the State of California pursuant to Health & Safety Code § 25249.12(b).

3.2 Civil Penalty Assessment. In recognition of Defendant's commitment to purchase product testing equipment pursuant to Section 2.1.10 above, Defendant shall pay a reduced civil penalty in the amount of $85,000 to Plaintiff, pursuant to Health & Safety Code § 25249.7(b). Plaintiff shall remit 75% of this amount to the State of California pursuant to Health & Safety Code § 25249.12(b).

3.3 Payment & Capital Improvements in Lieu of Additional Civil Penalties.

(a) Defendant shall make a payment in lieu of additional penalties in the amount of $337,000 to Plaintiff. These funds shall be used by As You Sow for grants to other California non-profit groups and by the As You Sow Foundation Environmental Enforcement Fund to

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reduce exposures to toxic chemicals, and to increase consumer, worker and community awareness of the health hazards posed by toxic chemicals. In deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration a number of factors, including: (1) the nexus between the alleged harm in the underlying case(s), and the grant program work; (2) the potential for toxics reduction, prevention, remediation or education benefits to California residents from the proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources available to it for its project; and (4) the Board's assessment of the grantee's chances for success in its program work. Plaintiff shall ensure that all funds will be disbursed and used in accordance with Plaintiff' mission statement, articles of incorporation, and bylaws and applicable state and federal laws and regulations within one year of receipt.

(b) In lieu of additional civil penalties, within sixty (60) days after the Effective Date, Defendant shall order and commence the expenditure of at least $242,000 for the acquisition, installation, calibration, worker training, and related start up costs associated with the testing equipment identified in Section 2.1.10.

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

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Reimbursement of Plaintiff's Investigative, Expert and Legal Fees and Costs. Defendant shall reimburse Plaintiff in the amount of $260,500 for Plaintiff's reasonable investigative, expert, and legal fees and costs incurred as a result of investigating and negotiating a settlement in the public interest.

5. PAYMENT OBLIGATIONS

5.1 Pursuant to Sections 3.2, 3.3 and 4.1 herein, Defendant agrees to remit the total amount of $682,500 to Plaintiff, payable to "As You Sow" (Employer Identification Number 94-3169008) within fifteen (15) days of the Effective Date of this Consent Judgment.

6. RELEASE OF LIABILITY

6.1 Release of Liability. Plaintiff, on its own behalf, and on behalf of the general public, waives all rights to institute or participate in, directly or indirectly, any claim or form of

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legal action against Defendant, its officers, directors, employees, agents, attorneys, representatives, shareholders, parents, subsidiaries, affiliates, divisions, predecessors, successors, subdivisions, downstream distributors, downstream retailers, downstream customers, and upstream suppliers (including manufacturers of the Products and manufacturers of the raw materials of the Products) under Proposition 65 based upon Defendant's alleged failure to warn, within the meaning of Proposition 65, about exposure to Metals in any of the Products sold in California or to California consumers on or before one hundred twenty (120) days after the Effective Date or based on any other legal claim or theory that was or could have been alleged in the Action based on the facts alleged in the Action. This release of liability expressly applies to any liability against J & D Laboratories, Inc., Kabco Pharmaceuticals, Inc., and Nature's Value, Inc. as the manufacturers of any Products as defined herein prior to the Effective Date, under Proposition 65 based upon any alleged failure to warn, within the meaning of Proposition 65, about exposure to Metals in any of the Products sold in California or to California consumers on or before one hundred twenty (120) days after the Effective Date or based on any other legal claim or theory that was or could have been alleged in the Action based on the facts alleged in the Action.

6.2 Release of Liability of Plaintiff. Defendant waives all of its rights to institute any claim, or form of legal action against Plaintiff, its officers, directors, employees, agents, attorneys and representatives (the "Plaintiff Releasees") for all actions or statements made or undertaken by the Plaintiff Releasees in the course of seeking enforcement of Proposition 65 through the Action.

7. CONSENT JUDGMENT

7.1 Consent Judgment. Upon execution of this Consent Judgment by all Parties, Plaintiff shall promptly notice a Motion for Approval & Entry of Consent Judgment in the San Francisco Superior Court pursuant to Title 11, Cal. Code of Regs. §3000, *et seq*. This Motion shall be served upon all of the Parties to the Action and upon the California Attorney General's Office. In the event that the Court fails to approve and order entry of the judgment, this Consent Judgment shall become null and void upon the election of any Party as to them and upon written notice to all of the Parties to the Action pursuant to the notice provisions herein. If this Consent

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Judgment becomes null and void, or is not approved by the Court within one hundred and eighty (180) days of its execution by all Parties, Plaintiff shall refund all sums paid by Defendant pursuant to Sections 3.2, 3.3 and 4.1 within fifteen (15) days of written notice to Plaintiff by Defendant that a refund is due. Defendant and Plaintiff shall use best efforts to support entry of this Consent Judgment in the form submitted to the Office of the Attorney General. If the Attorney General objects in writing to any term in this Consent Judgment, the Parties shall use best efforts to resolve the concern in a timely manner and prior to the hearing on the motion to approve this Consent Judgment. If the Parties cannot resolve an objection of the Attorney General, then AYS and Defendant shall proceed with seeking entry of an order by the court approving this Consent Judgment in the form originally submitted to the 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 file a notice, brief or motion with the Court stating that the People shall appear at the hearing for entry of this Consent Judgment so as to oppose entry of the Consent Judgment, then a Party may withdraw from this Consent Judgment prior to the date of the hearing, with notice to all parties and the Attorney General, and upon such notice this Consent Judgment shall be null and void and any sums paid hereunder shall be returned to Defendant within fifteen (15) days of the date of the notice. If the Attorney General files a notice of appeal of this Consent Judgment, then a Party may withdraw from this Consent Judgment within forty-five (45) days of the People's notice of appeal and this Consent Judgment shall be null and void ab initio five (5) days after notice of the withdrawal and any sums paid hereunder shall be returned to Defendant within fifteen (15) day of the date of voiding. If the Attorney General successfully prosecutes an appeal resulting in a reversal of the Consent Judgment, any sums paid hereunder shall be returned to Defendant within fifteen (15) days of remittitur.

7.2 Amendment To Complaint. Upon the expiration of the 60-Day Notice issued on or about August 29, 2008, and in the event that no public prosecutors have commenced diligent prosecution against Defendants for such violations, the Complaint herein shall be deemed amended to include all violations described in that 60-Day Notice.

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8. ENFORCEMENT AND MODIFICATION

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

8.2 Modification of Judgment - Grounds. This Consent Judgment shall not obligate Defendant to provide a health hazard warning (as described in Section 2 herein) for a 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 regulations. Any such levels adopted in a final regulation or law pursuant to Proposition 65 after the Effective Date shall become the standard under this Consent Judgment on the date of adoption without need for formal modification of this Consent Judgment, but Defendant retains its rights and obligations under Section 2.3.2. to establish naturally occurring levels of lead. The Parties acknowledge that new toxicological information or exposure assessments concerning hazardous substances and testing methodologies are continuously becoming available, and that statutory and regulatory standards applicable to the Products may evolve in the future. Accordingly, the Parties agree that any Party may file a motion pursuant to § 664.6 of the California Code of Civil Procedure, and under the conditions set forth below, move the Court for modification of the warning requirement or any other term set forth in Section 2 herein on the grounds that (a) they conflict with the applicable legal standards concerning the Products or any ingredient therein, or (b) the warning requirement or any other term set forth in Section 2 herein are more stringent than the warning requirements AYS agrees to after the Effective Date in an order, judgment or settlement under Proposition 65 with respect to any products that are substantially similar to the

Products herein. Absent good cause shown by Plaintiff, Plaintiff shall allow modification of this Consent Judgment to permit Defendant to adhere to such less stringent warning requirements. Any disputes regarding the issues set forth in this subsection shall be resolved in accordance with the procedures set forth in Section 8.3 below.

8.3 Modification of Judgment – Procedure. In the spirit of cooperation and in the interests of minimizing the investigative, expert and attorneys' fees and costs associated with such a motion, the Parties agree to meet and confer in good faith as follows. Prior to filing a motion pursuant to Section 8.2 herein, the Party seeking to modify the judgment shall first provide the non-moving Party and the California Attorney General's Office with any legal or scientific information upon which the motion would rely. The non-moving Party and the California Attorney General's Office shall be allowed a period of forty-five (45) days to review that information and to provide the moving Party with its formal written response (the Attorney General's Office's 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 law or science). The Parties shall then meet and confer within twenty (20) days of the non-moving Party's written response. If, after meeting and conferring, the moving Party elects to proceed with a motion to amend this Consent Judgment, it may do so with proper notice to the other Party and the Attorney General's Office as required under the California Code of Civil Procedure. Such a motion may be accompanied by scientific data, studies, written declarations, and live testimony or discovery responses. In the event that the Court determines that a Party seeking or opposing a motion to modify this Consent Judgment did so without justification or failed to meet and confer in good faith prior to moving for such modification, the other Party shall be awarded reasonable fees and costs incurred.

9. NEW PRODUCTS.

9.1 New Product Testing Prior to Sale in California. If, after the date that is sixty (60) days after the Effective Date, Defendant elects to ship for sale in California any new ingestible products under the Swanson brand line, but not identified on Exhibit A hereto, Defendant shall, before shipping the new product(s) for sale in California, conduct the testing set

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forth in Section 2.1 and adhere to the requirements of this Consent Judgment with respect to such new product(s). Failure to provide the warning if required under Section 2.2 shall be a violation of this Consent Judgment subject to stipulated penalties in accordance with Section 3.1. Such new Swanson branded product(s) shall then be deemed Product(s) subject to all of the terms of this Consent Judgment. Before the date that is sixty (60) days after the Effective Date, Defendant may ship for sale to California customers new or reformulated products of the type set forth in Section 1.2 that are not listed on Exhibit A, and the sales of such products shall not be deemed in violation of any term of this Consent Judgment. Notwithstanding any other term of this Consent Judgment, Defendant also may ship for sale to California customers any finished Product units which were packaged in final form for sale to consumers and which are stock on hand on the Effective Date. The sale of such product units in such existing packaging are covered by Section 6.1 and shall not be deemed a violation of any term of this Consent Judgment, nor be subject to the terms, obligations or limits of Section 2.

9.2 Annual New Product Update List. Commencing on April 15, 2010 and annually on that date through and including April 15, 2012, Defendant shall provide Plaintiff with an annual updated list of new Swanson branded Products Defendant shipped for sale or use in California in the preceding calendar year for which Defendant has ascertained that warnings are not required under this Consent Judgment. Defendant shall include, for each new Product identified on the annual updated list, either: (a) at least one finished product test result documenting the lead level in each new Product or (b) a calculation of the total lead level in the Product, expressed in micrograms/day, based on Defendant's Representative Sampling data. If Plaintiff cannot ascertain and in good faith inquires in writing as to whether a specific Product is a new Product in a given year, Defendant shall promptly (and in any event within thirty-five (35) days the date of AYS' request) reply to advise whether the Product is a new Product for that year or is an existing Product.

10. GOVERNING LAW

10.1 Governing Law. The terms of this Consent Judgment shall be governed by the laws of the State of California. This Consent Judgment shall not govern Products or products

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sold to consumers or other persons outside the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendant shall provide written notice to Plaintiff of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

11. NOTICES

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

All correspondence to Plaintiff shall be mailed to:
Attn: Lawrence E. Fahn, Executive Director
As You Sow
311 California Street, Suite 510
San Francisco, CA 94104

With a copy to:
Andrew L. Packard, Esq.
Law Offices of Andrew L. Packard
319 Pleasant Street
Petaluma, CA 94952

All correspondence to Defendant shall be mailed to:
Attn: Doug Anderson, CFO
Swanson Health Products, Inc.
4175 40th Avenue, SW
Fargo, North Dakota, 58104

With a copy to:
Peg Carew Toledo, Esq.
Mennemeier, Glassman & Stroud
980 9th Street, Suite 1700
Sacramento, CA 95814

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

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13. COUNTERPARTS

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

14. AUTHORIZATION

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

IT IS SO STIPULATED:

DATED: _____ AS YOU SOW

_____

By: Lawrence E. Fahn
Executive Director

DATED: _____ SWANSON HEALTH PRODUCTS, INC.

_____

By: Doug Anderson
Chief Financial Officer

IT IS SO ORDERED:

DATED: _____ _____

Judge of the Superior Court

EXHIBIT A – Swanson Product List

EXHIBIT B - Notices of Proposition 65 Violations

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