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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ENVIRONMENTAL LAW FOUNDATION, on behalf of the General Public, Plaintiff, vs. ABBOTT LABORATORIES; BIOCHEM, a brand of COUNTRY LIFE, LLC; BIO-ENGINEERED SUPPLEMENTS & NUTRITION, INC.; DYMATIZE ENTERPRISES, INC.; HEALTHWATCHERS, (DE) INC.; OPTIMUM NUTRITION, INC.; VITAMIN SHOPPE, INC.; and DOES 1 through 200, Defendants.	Case No.: CGC-10-503002 and Consolidated Case No: CGC-10-503002 **[PROPOSED] CONSENT JUDGMENT AS TO VITAMIN SHOPPE INDUSTRIES, INC. ORDER**

I. INTRODUCTION

WHEREAS, Plaintiff, the Environmental Law Foundation ("ELF") seeks to protect the general public of the State of California from exposure to lead and other toxic substances.

WHEREAS, on August 26, 2010, ELF individually and on behalf of the public interest, filed a complaint for injunctive relief and civil penalties in San Francisco County Superior Court ("Court") in an action entitled *Environmental Law Foundation v. Abbott Laboratories, et al.*, Case No. CGC-10-503002.

WHEREAS, on November 12, 2010, ELF individually and on behalf of the public interest filed a complaint for injunctive relief and civil penalties in San Francisco Superior Court in an action entitled *Environmental Law Foundation v. Champion Nutrition, Inc., et al.*, Case No. CGC-10-505382.

WHEREAS, on April 13, 2011, the two above-referenced cases were consolidated for all purposes, including trial, and papers in both cases were thereafter filed under the common Case No. CGC-10-503002.

WHEREAS, Defendant Vitamin Shoppe Industries, Inc. ("Settling Defendant") markets and sells certain protein supplement products ("Protein Supplement Products" as defined below) to persons in the State of California and is a defendant named in the consolidated complaints identified above.

WHEREAS, analysis of this general category of products, including but not limited to these Protein Supplement Products, using inductively coupled plasma mass spectrometry reveals that there can be detectable lead in some production lots of such products, there can be variations in lead concentrations within a single lot of any particular product, there can be variation among different lots of the same product and, finally, there can be variation among Protein Supplement Products made by the same and by different Defendants.

WHEREAS, analysis of the general category of products, including but not limited to the subject Protein Supplement Products, also reveals that there can be variations in lead concentrations from flavor to flavor within a single protein supplement product line.

WHEREAS, even with use of good manufacturing practices, Protein Supplement Products can still have detectable concentrations of lead.

WHEREAS, ELF and Settling Defendant dispute how exposure to the Protein Supplement Products is to be calculated, including the amount of consumption per eating occasion, whether the frequency of consumption should be considered, and the frequency of consumption by the average users of the Protein Supplement Products.

WHEREAS, Settling Defendant contends that the lead, if any is detectable, contained in the Protein Supplement Products is "naturally occurring" within the meaning of California Code of Regulations, Title 27, Section 25501.

WHEREAS, ELF disputes that contention, contending that the lead contained in these Protein Supplement Products is not naturally occurring for purposes of Proposition 65.

WHEREAS, ELF and Settling Defendant recognize and acknowledge that proving or disproving that any particular quantity of lead that may be contained in the Protein Supplement Products is naturally occurring would be extremely expensive and time-consuming, requiring the expenditure of resources out of proportion with any benefits to be derived from that process.

WHEREAS, the Consent Judgment in *Edgerton v. Conopco (dba Slim Fast Foods Co.), Atkins Nutritionals, Inc., Metabolife International, Kashi Company, and Rexall Sundown*, Los Angeles Superior Court Case No. BC26906 (dated 12/19/03) allows, inter alia, similar protein supplement products to be sold in California without a warning, regardless of the concentration of lead in those products, provided that each covered defendant uses its "Best Practices" in manufacturing its products, and keeps the lead levels in the water at its manufacturing facilities under ten (10) parts per billion ("ppb").

WHEREAS, the Consent Judgment in *As You Sow v. Nature's Way Products Inc.*, San Francisco Superior Court Case No. CGC-03-422848 (filed 5/24/05) allows, *inter alia*, similar protein supplement products containing a concentration of lead in the products of up to four (4) micrograms per day, assuming the product is used or consumed according to the

defendant's consumer use instructions, to be sold in California without a warning, provided that each covered defendant uses Good Manufacturing Practices, uses ingredients grown using Good Agricultural Practices when possible, and uses Quality Control measures to reduce contaminants to the "lowest level currently feasible," as that phrase is defined by California Code of Regulations, Title 27, Section 25501(a)(4).

WHEREAS, the Consent Judgment in *As You Sow v. Irwin Naturals, et al.*, San Francisco Superior Court Case No. 429279 (filed 6/30/05) allows, *inter alia*, similar supplement products containing a concentration of lead in the products of up to four (4) micrograms per day, assuming the product is used or consumed according to the defendant's consumer use instructions, to be sold in California without a warning, provided that each covered defendant use Good Manufacturing Practices, use ingredients grown using Good Agricultural Practices when possible, and use Quality Control measures to reduce contaminants to the "lowest level currently feasible," as that phrase is defined by California Code of Regulations, Title 27, Section 25501(a)(4).

WHEREAS, the Consent Judgment in *As You Sow v. Threshold Enterprises, Ltd. et al.*, San Francisco Superior Court Case No. 422847 (filed 9/8/05) allows, *inter alia*, similar supplement products containing a concentration of lead in the products of up to four (4) micrograms per day, assuming the product is used or consumed according to the defendant's consumer use instructions, to be sold in California without a warning, provided that each covered defendant use Good Manufacturing Practices, use ingredients grown using Good Agricultural Practices when possible, and use Quality Control measures to reduce contaminants to the "lowest level currently feasible," as that phrase is defined by California Code of Regulations, Title 27, Section 25501(a)(4).

WHEREAS, the Consent Judgment in *As You Sow v. Botanical Laboratories, Inc. et al.*, San Francisco Superior Court Case No. CGC-04-429563 (filed 5/23/05) allows, *inter alia*, similar supplement products containing a concentration of lead in the products of up to four (4) micrograms per day, assuming the product is used or consumed according to the

defendant's consumer use instructions, to be sold in California without a warning, provided that each covered defendant use Good Manufacturing Practices, use ingredients grown using Good Agricultural Practices when possible, and use Quality Control measures to reduce contaminants to the "lowest level currently feasible," as that phrase is defined by California Code of Regulations, Title 27, Section 25501(a)(4).

WHEREAS, in the case styled *Nasseri v. CytoSport, Inc.,* Los Angeles Superior Court Case No. BC 439181, as of November 2012 the parties thereto had negotiated Proposition 65 warning trigger levels for lead in products which are competitor products to many Protein Supplement Products and those warning trigger levels exceed the warning trigger levels herein, and Settling Defendant contends that they should have the benefit of such higher warning trigger levels if the Los Angeles Superior Court approves the pending motion to approve the settlement.

WHEREAS Plaintiff does not agree that Settling Defendant should be afforded the same Proposition 65 warning trigger levels for lead which are set forth in the pending *Nasseri v. CytoSport* action and further believe the lead levels herein should instead be used in the *Nasseri v. CytoSport* action.

WHEREAS, Settling Defendant contends that it should be provided a naturally occurring allowance of up to one (1) part per million (1000 ppb) of lead for any cocoa powder found in Products, pursuant to the letter dated September 28, 2001 from the California Office of the Attorney General to Roger Lane Carrick and Michele Corash.

WHEREAS, ELF disputes that contention, contending that the position reflected in the letter dated September 28, 2001 no longer represents the current state of scientific understanding regarding the origins of lead in chocolate.

WHEREAS, Settling Defendant contends that it should be provided a naturally occurring allowance for lead that may be present in calcium and other ingredients encompassed by the Consent Judgment in *People v. Warner-Lambert Co. et al.*, San Francisco Superior Court Case No. 984503 (filed 11/13/1998 and modified in April 2011),

which allows, *inter alia*, a naturally occurring allowance of 0.8 micrograms of lead per 1000 milligrams of calcium, and naturally occurring allowances of 0.4 mcg/g for ferrous fumarate, 8.0 mcg/g for zinc oxide, 0.4 mcg/g for magnesium oxide, 0.332 mcg/g for magnesium carbonate, 0.4 mcg/g magnesium hydroxide, 0.8 mcg/g zinc gluconate, and 1.1 mcg/g potassium chloride. In 2012 the People afforded the same naturally occurring allowances to dozens of defendants in a series of consent judgments resolving a case styled *People v. 21st Century Healthcare, Inc. et al.,* Alameda Superior Court Case No. RG08426937.

WHEREAS, ELF disputes Settling Defendant's contention, as the Consent Judgment in *Warner-Lambert* contains language at paragraphs 1.5 and 9.1 specifically limiting the application of that Consent Judgment to the particular products at issue therein, and noting that nothing in that Consent Judgment shall be construed as an admission of any fact or law, being the product of negotiation and compromise.

WHEREAS, Settling Defendant contends that it is unfairly prejudicial to subject different businesses within the same competitive marketplace to different lead warning thresholds pursuant to Proposition 65.

WHEREAS, ELF contends that marketplace uniformity does not exempt Settling Defendant from compliance with Proposition 65 warning standards.

WHEREAS, the Parties desire to achieve the lowest level of lead in these Protein Supplement Products that is reasonably feasible.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

I. INTRODUCTION

1.1 In its Complaint, ELF alleges that Settling Defendant manufactured, packaged, distributed, marketed and/or sold protein supplement products for human consumption containing lead in an amount that resulted in an exposure to consumers in violation of the provisions of Health & Safety Code §§ 25249.5 et seq. ("Proposition 65") by knowingly and intentionally exposing persons to a chemical known to the State of California to cause reproductive toxicity and cancer, namely lead, without first providing a clear and reasonable warning to such individuals. The protein supplement products that ELF alleges contain lead,

and which are covered by this Consent Judgment, include those described in Attachment A (the "Protein Supplement Products").

1.2 For purposes of this Consent Judgment only, ELF and Settling Defendant (hereafter referred to as the "Parties"), stipulate that this Court has jurisdiction over allegations of violations contained in the Complaint and personal jurisdiction over the Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of all claims which could have been raised in the Complaint based on the facts alleged therein.

1.3 Settling Defendant denies the allegations set forth in the Complaint.

1.4 For the purpose of avoiding prolonged and costly litigation, the Parties enter into this Consent Judgment as a full settlement of all claims that were raised in the Complaint based on the facts alleged therein, or which could have been raised in the Complaint arising out of the facts alleged therein. By execution of this Consent Judgment, Settling Defendant does not admit any violation of Proposition 65 or any other law and specifically denies that it has committed any such violations and maintains that all Protein Supplement Products that it has sold and distributed in California have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Settling Defendant of any fact, finding, conclusion, issue of law, or violation of law. However, this paragraph shall not diminish or affect the responsibilities and duties of the Parties under this Consent Judgment.

II. MONITORING

2.1 No later than one hundred and eighty (180) days after entry of this Consent Judgment, Settling Defendant will test or arrange for the testing for lead of each of its Protein Supplement Products that it intends to distribute or sell in California. In establishing an initial data set for purposes of this Consent Judgment, Settling Defendant may rely on testing conducted prior to entry of this Consent

Judgment if such testing documents lead levels in Protein Supplement Products either already in the stream of commerce, in process, or which are ready for distribution or sale. Settling Defendant may use a testing laboratory with Environmental Laboratory Certification from the State of California, Department of Health Services, Environmental Laboratory Accreditation Program, an equivalent certification acceptable to ELF, or an in-house laboratory or other facility experienced in testing for lead levels in foods. The lead concentrations must be measured using inductively coupled plasma mass spectrometry ("ICP-MS") under the protocol set forth in EPA Method 6020, 6020a, or an equivalent method acceptable to ELF that incorporates an appropriate acid or microwave digestion method as selected by the analytical laboratory. The laboratory must digest 0.5 to 2 grams of each sample obtaining a final volume of digestate of fifty (50) milliliters, analyze each sample undiluted by ICP-MS, and use an instrument quantitation limit corresponding to less than three (3) micrograms lead (Pb) in the finished product.

2.2 To fulfill its monitoring obligation under Section 3.1 and using a testing method described therein, Settling Defendant may test or cause to be tested three (3) samples of the final product which comprises each Protein Supplement Product, with samples randomly selected from three (3) different lots (or from the maximum number of lots that are available for testing if there are fewer than three (3) lots available). The testing required under this Section 2.2 will be repeated annually for two years following the compilation of the initial data set described in Section 2.1. All laboratory test data and certifications (if applicable) must be retained by Settling Defendant for a period of three years from the date of testing. However, Settling Defendant is not required to test any Protein Supplement Products if it is providing a warning for those products that complies with Section 3.2.

2.3 If there is an allegation that a Protein Supplement Product is in violation of Section 3.4, ELF may make a written request to Settling Defendant for data

generated in compliance with Sections 2.1 and 2.2. In response to such a request, Settling Defendant will provide to ELF the date the analysis was performed, the name of the laboratory conducting the test, the test method used by the laboratory, the detection limit used by the laboratory, the lot numbers of the samples tested, and the analytical results within thirty (30) days of ELF's written request. ELF shall keep all such information and data confidential, including from other Defendants.

III. CLEAR AND REASONABLE WARNINGS

3.1 Pursuant to this Consent Judgment, warnings are required under Proposition 65 only with respect to Protein Supplement Products that Settling Defendant sells to California consumers that expose users to more than three (3.0) micrograms of lead in a Daily Serving, unless the Protein Supplement Product is a Gainer Product or a Chocolate Product, as those terms are defined in this paragraph and identified on Attachment A. Warnings are required for Gainer Products and Chocolate Products that Settling Defendant sells to California consumers that expose users to more than four (4.0) micrograms of lead in a Daily Serving. "Gainer Products" are Protein Supplement Products that are marketed primarily as "weight gainers", "mass gainers", "extra calories" or any similar designation, to a sports nutrition/weight-lifting/bodybuilding-oriented consumer, or to consumers seeking additional calories to supplement their diets for purposes of gaining weight or for purposes of maximizing caloric intake per consumption episode. "Chocolate Products" are Protein Supplement Products that include chocolate or cocoa-based flavoring agents as ingredients, including, without limitation cocoa powder and dutch cocoa.

3.2 A "Daily Serving" for purposes of determining Proposition 65 compliance shall be defined as one of the following, as applicable: (a) if the Protein Supplement Product label recommends a single serving, then the single recommended serving size; (b) if the Protein Supplement Product label includes no recommended number of servings, then the serving size set forth on the "Nutritional Facts" or

"Supplement Facts" portion of the label; or (c) if the Protein Supplement Product label recommends more than one serving in one day, then the amount which is two-thirds (2/3) of the maximum number of servings recommended on the label.

3.3 When calculating whether a Protein Supplement Product exceeds the warning threshold: (1) Settling Defendant must compare the warning threshold value to the arithmetic mean of at least three (3) samples tested in accordance with Section 2.1. However, a Settling Defendant may, at its option, calculate the arithmetic mean using up to ten (10) samples; and (2) Settling Defendant must base its calculation on the Daily Serving amount as defined in section 3.2.

3.4 **Warning Standard**. No later than one year after entry of this Consent Judgment, Settling Defendant shall not manufacture for sale in the State of California, distribute into the State of California, or sell in the State of California any Protein Supplement Product the ingestion of which results in an exposure greater than the applicable warning threshold set forth in Section 3.1, as calculated in accordance with Section 3.3, unless a warning is placed on the packaging, labeling or directly to or on the Protein Supplement Product in accordance with Section 3.5

3.5 **Warning Language**. Settling Defendant shall provide the warnings for the Protein Supplement Products using the language specified below:

> [CALIFORNIA PROPOSITION 65] WARNING:
>
> This product contains lead, a chemical known [to the State of California] to cause [cancer,] birth defects[,] or other reproductive harm.

The text in brackets in the warnings above is optional, except that the term "cancer" must be included if the maximum daily dose recommended on the label contains more than 15 micrograms of lead. Vitamin Shoppe Industries, Inc. and the California Attorney General have previously negotiated a Consent Judgment in *People v. 21st Century Healthcare, Inc.,* Alameda County Super. Ct. Case No. RG08426937. In recognition of that Consent Judgment, for this

Settling Defendant only, the warning language authorized in that Consent Judgment may be used in lieu of the warning language set forth above.

(a) For sales in retail stores, the Warning may be provided by either of the following methods, (1) Identifying Signs and Designated Symbol in Retail Stores, or (2) Other Clear and Reasonable Warnings in Retail Stores, below:

(1) Identifying Signs and Designated Symbol in Retail Stores. In retail stores, the Warning may be provided through the use of a system that combines both a designated symbol and an identifying sign that explains the meaning of the designated symbol. The designated symbol ("Symbol") shall be either:

Symbol #1: The Symbol shown on Exhibit B, which shall appear as shown on Exhibit B, with black "Prop 65" and "!" text, black border, and yellow background, wherever it is displayed;

-or-

Symbol #2: The Symbol shown on Exhibit C, which shall appear as shown on Exhibit C, with the words "Prop 65" placed above the word "Warning!", wherever it is displayed.

(A) *Covered Products Displayed in Retail Stores: Signs*.

(i) Form of Sign. A Sign shall be rectangular and at least 36 square inches in size, with the word "WARNING" centered one-half of an inch from the top of the sign all in one-half inch capital letters. For the body of the warning message, left and right margins of at least one-half of an inch, and a bottom margin of at least one-half inch shall be observed. The Symbol must be at least one inch high. Larger signs shall bear substantially the same proportions of type size and spacing to sign dimension as a sign that is 36 square inches in size. Unless modified by agreement of the parties, the sign shall contain the following text (text in brackets is optional, except as described above):

[CALIFORNIA PROPOSITION 65] WARNING:

Products with the symbol
[Shown on Exhibit B or C]
contain lead, a chemical known [to
the State of California] to
cause [cancer,] birth defects[,]
or other reproductive harm.

The text in brackets in the warnings above is optional, except that the term "cancer" must be included if the maximum daily dose recommended on the label contains more than 15 micrograms of lead. Vitamin Shoppe Industries, Inc. and the California Attorney General have previously negotiated a Consent Judgment in *People v. 21st Century Healthcare, Inc.*, Alameda County Super. Ct. Case No. RG08426937. In recognition of that Consent Judgment, for this Settling Defendant only, the warning language authorized in that Consent Judgment may be used in lieu of the warning language set forth above.

(ii) Placement of Sign. Signs shall be placed by January 1, 2013 in each California establishment in which any of Defendant's Covered Products that requires a warning are sold. Where Defendant's retail establishment sells only products that do not require a warning, it is not required to post the Sign. Signs shall not be covered or obscured, and shall be placed and displayed in a manner rendering them likely to be read and understood by an ordinary individual prior to purchase. At least one Sign shall be posted in each aisle or on each shelf or display where the Covered Products for which the warning is being provided are offered or displayed for sale, unless the retail establishment has less than 7,500 square feet of retail space and no more than two cash registers, or the retail establishment's principal purpose is to sell dietary supplements, in which case the Sign may be posted at each cash register. Additional signs shall be posted as are necessary to assure that any potential purchaser of Covered Products would be reasonably likely to see a Sign prior to purchase.

(iii) Defendant shall provide an exemplar Sign to each of Defendant's retail establishments that sell Covered Products in California that require a warning. Defendant shall convey to each such entity instructions to post the Sign in accordance with this

Consent Judgment. Defendant shall maintain files demonstrating compliance with this provision.

(B) *Covered Products Sold in Retail Stores: Symbol*. The Symbol shall be prominently displayed by January 1, 2013 and with such conspicuousness, as compared with other words, statements, designs, or devices used at the point the Covered Product is offered for sale, as to render the Symbol likely to be seen by an ordinary individual prior to purchase. The Symbol shall be displayed on or adjacent to the Covered Products in any one or more of the following locations:

(i) The Symbol may be permanently affixed to or prominently printed on any placards, signs, or shelf stickers adjacent to the Covered Product that identify the name or price of the Covered Product displayed, in which case the Symbol shall be no less than one- quarter inch (0.25 inch) high; or

(ii) The Symbol may be permanently affixed to or printed on (at the point of manufacture, prior to shipment to California, or prior to distribution within California) the outside packaging or container of each unit of the Covered Product, in which case the Symbol must be large enough that the characters in the Symbol are in a type size no smaller than 6 point, and in no case shall the Symbol be less than one-quarter inch (0.25 inch) high; or

(iii) The Symbol may be permanently affixed to or printed on a "hang tag" secured to the container of each unit of the Covered Product, in which case the Symbol shall be at least one-half inch tall.

(2) Other Clear and Reasonable Warnings in Retail Stores. In stores not using the Identifying Signs and Designated Symbol in Retail Stores system described above in Section 3.2(a)(1), the Warning shall be permanently affixed to or printed on (at the point of manufacture, prior to shipment to California, or prior to distribution within California) the outside packaging or container of each unit of the Covered Product, or on a "hang tag" secured to the container of each unit of the Covered Product. The Warning shall be displayed with such conspicuousness, as compared with other words, statements, designs, or devices on the

packaging or labeling, as to render it likely to be read and understood by an ordinary individual prior to purchase. If the Warning is displayed on the product container or labeling, the Warning shall be at least the same size as the largest of any other health or safety warnings on the product container or labeling, and the word "warning" shall be in all capital letters and in bold print. If printed on the labeling itself, the Warning shall be contained in the same section of the labeling that states other safety warnings concerning the use of the product.

(b) For Covered Products sold to California consumers through the Internet, the Warning shall be prominently displayed on each webpage describing the ingredients or attributes of the Covered Product, or the Warning may be provided at the time the customer enters a California address for the shipping address. For sales of Covered Products to California consumers through websites of third parties not affiliated with Defendant, where the Covered Product may be returned by the consumer for a full refund with no extra charge or shipping or handling fee, the Warning may alternatively be displayed on the outside packaging or container of each unit of the Covered Product or on an invoice that accompanies the shipment of the Covered Product. In all circumstances, the Warning shall be displayed with such conspicuousness, as compared with other words, statements, designs, or devices on the webpages, packaging, container, or invoice, as to render it likely to be read and understood by an ordinary individual prior to use. The Warning shall be at least the same size as the largest of any other health or safety warnings on the webpage, invoice, or product packaging, and the word "warning" shall be in all capital letters and in bold print. A Warning printed on an invoice must be in a type size at be at least as tall as the largest letter or numeral in the name or price of the Covered Product printed on the invoice.

(c) For Covered Products sold to California consumers through a printed catalog, the Warning shall be prominently displayed on a catalog page describing the ingredients or attributes of the Covered Product. Where the Covered Product may be returned by the consumer for a full refund with no extra charge or shipping or handling fee, the Warning may alternatively be displayed on the outside packaging or container of each unit of the Covered

Product or on an invoice that accompanies the shipment of the Covered Product. The Warning shall be displayed with such conspicuousness, as compared with other words, statements, designs, or devices on the catalog page, invoice, or product packaging, as to render it likely to be read and understood by an ordinary individual prior to the time of use. The Warning shall be at least the same size as the largest of any other health or safety warnings on the catalog page, invoice, or product packaging, and the word "warning" shall be in all capital letters and in bold print. A Warning printed on an invoice must be in a type size at be at least as tall as the largest letter or numeral in the name or price of the Covered Product printed on the invoice.

(d) For sales and distribution of Covered Products not described in subsections (a), (b), and (c), above, the Warning shall be provided at the point of sale or distribution prior to purchase by the consumer. The Warning shall be displayed with such conspicuousness, as compared with other words, statements, designs, or devices, as to render it likely to be read and understood by an ordinary individual prior to purchase. The Warning shall be at least the same size as the largest of any other health or safety warnings presented, and the word "warning" shall be in all capital letters and in bold print.

3.6 The warning requirements set forth herein are imposed pursuant to the terms of this Consent Judgment, and are recognized by the parties as not being the exclusive methods of providing a warning for the Covered Products under Proposition 65 and its implementing regulations.

3.7 At least 60 days before any proposed discontinuance of any warnings issued pursuant to this Consent Judgment, Settling Defendant shall provide to ELF the results, the underlying data, and a description of the test methodology used. ELF shall keep all such information confidential except as is necessary to contest the exception from warning of the product. Should ELF dispute for any reason the discontinuance of any warning, the dispute may be submitted by either party to the Court for resolution on motion. If ELF does not respond to that request for discontinuance for at least 90 days, then Settling Defendant may move the Court for a modification of the Consent Judgment with notice to ELF and may act

upon subsequent receipt of the Court's approval. Unless and until such is resolved favorably to Settling Defendant, the warning in question may not be discontinued. If there is no objection or the objection is resolved favorably to Settling Defendant, future units of the subject product with lead concentrations that result in an exposure to lead of less than 3.0 ug of lead per day (or 4.0 ug of lead per day for Gainer Products or Chocolate Products) may be sold in California without the warnings as prescribed in Section 3.1 and 3.2 of this Consent Judgment.

3.8 Settling Defendant's compliance with Sections 3.1 through 3.7 of this Consent Judgment shall fully and completely satisfy such Settling Defendant's obligations to provide warnings for all Protein Supplement Products with respect to the presence of lead under Proposition 65.

3.9 Should ELF or the Attorney General reach a settlement or be subject to a binding disposition (judicial, contractual or otherwise) with or concerning any other defendant, person or entity in any threatened, pending or future lawsuit involving claims of Proposition 65 violations and Protein Supplement Products, or with terms that set forth less stringent lead standards than those herein defining when Proposition 65 warnings will not be required ("Alternative Standards"), then ELF shall provide each Settling Defendant with a copy of the settlement or binding disposition (only in the case of a settlement or binding disposition entered into by, or binding upon, ELF), and the Parties shall stipulate that this Consent Judgment shall be modified so that the Alternative Standards apply to any Protein Supplement Products that Settling Defendants manufacture for sale in California, distribute into California, or sell to California consumers, with respect to any Settling Defendant that so notifies ELF.

IV. MONETARY RELIEF

4.1 Within fifteen (15) days after entry of this Consent Judgment, Settling Defendant shall pay ELF a total of $92,000 as settlement proceeds ("Settlement Proceeds") to

be applied towards ELF's costs, attorney's fees, and civil penalties. The distribution of these Settlement Proceeds shall be as follows: $7,500 to be paid as civil penalties, and the remaining $84,500 to be allocated between ELF's costs and attorney's fees, in amounts to be determined by ELF without interference by the Settling Defendant in conjunction with ELF's motion for approval of this Consent Judgment by the Court. The Settlement Proceeds shall be made payable to Baron & Budd, P.C. and delivered to Laura Baughman at Baron & Budd, P.C., 3102 Oak Lawn Ave., Suite 1100, Dallas, Texas 75219. ELF shall bear all responsibility for apportioning and paying to the State of California any portion of the Settlement Proceeds as required by California Health & Safety Code § 25249.12(d), and Settling Defendant shall not have any liability if payments to the State of California are not made by ELF.

4.2 The payment made pursuant to Section 4.1 shall be the only monetary obligation of Settling Defendant with respect to this Consent Judgment, including as to any fees, costs, or expenses ELF has incurred in relation to this Action.

V. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

ELF agrees to comply with the reporting requirements referenced in California Health & Safety Code § 25249.7(f). Pursuant to the regulations promulgated under that section, ELF shall present this Consent Judgment to the California Attorney General's Office within two (2) days after receipt of all necessary signatures. The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion must be filed to obtain judicial approval of the Consent Judgment. Accordingly, a motion for approval of the settlement shall be prepared and filed by ELF within a reasonable period of time after the date this Consent judgment is signed by all Parties. ELF agrees to serve a copy of the noticed motion to approve and enter the Consent Judgment on the Attorney General's Office at least forty-five (45) days prior to the date set for hearing of the motion in the Superior Court of the City and County of San Francisco.

VI. MODIFICATION OF CONSENT JUDGMENT

This Consent Judgment may be modified by: (1) written agreement among the Parties and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of ELF or

Settling Defendant as provided by law and upon entry of a modified Consent Judgment by the Court thereon. All Parties and the California Attorney General's Office shall be served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days in advance of its consideration by the Court.

VII. APPLICATION OF CONSENT JUDGMENT

7.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party that he or she represents to enter into and execute the Consent Judgment on behalf of the Party represented and legally bind that Party.

7.2 This Consent Judgment shall apply to and be binding upon ELF and Settling Defendant, their officers, directors, and shareholders, divisions, subdivisions, parent entities or subsidiaries, and successors or assigns of each of them.

VIII. CLAIMS COVERED

8.1 This Consent Judgment is a final and binding resolution between ELF and Settling Defendant of any violation of Proposition 65 or any other statutory or common law claim that could have been asserted against Settling Defendant for failure to provide clear, reasonable and lawful warnings of exposures to lead that result from ingestion of the Protein Supplement Products. No claim is reserved as between the Parties hereto, and each Party expressly waives any and all rights which it may have under the provisions of Section 1542 of the Civil Code of the State of California, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

8.2 **ELF Release of Settling Defendant**. In further consideration of the promises and agreements herein contained, and for the payment to be made pursuant to Section 4.1, ELF, on behalf of itself and in the public interest, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action addressing all claims occurring on or before the entry of this Consent Judgment, and releases all claims occurring on or before the entry of this Consent Judgment, including, without limitation, all actions, causes of action, in law or in equity, suits,

liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses, including, but not limited to, investigation fees, expert fees and attorneys' fees of any nature whatsoever, whether known or unknown, fixed or contingent against the Settling Defendant and its owners, parent companies, corporate affiliates, subsidiaries and its respective officers, directors, attorneys, representatives, shareholders, agents, and employees arising under Proposition 65 related to the alleged failure to warn about exposures to or identification of lead contained in the Protein Supplement Products as described in Attachment A hereto.

ELF, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, and in the public interest, and the Settling Defendant further agree and acknowledge that this Consent Judgment is a full, final, and binding resolution of any violations occurring on or before the entry of this Consent Judgment by the Settling Defendant and its owners, parent companies, corporate affiliates, subsidiaries and its respective officers, directors, attorneys, representatives, shareholders, agents, and employees arising under Proposition 65 related to the alleged failure to warn about exposures to or identification of lead contained in the Protein Supplement Products as described in Attachment A hereto for the Settling Defendant.

In addition, ELF, on behalf of itself, its attorneys and its agents, waives all rights to institute or participate in, directly or indirectly, any form of legal action addressing all claims occurring on or before the entry of this Consent Judgment, and releases all claims occurring on or before the entry of this Consent Judgment against the Settling Defendant arising under Proposition 65 related to the Settling Defendant's alleged failure to warn about exposures to or identification of lead contained in the Protein Supplement Products and for all actions or statements regarding the alleged failures to warn about exposures to or identification of lead contained in the Protein Supplement Products made by the Settling Defendant or its attorneys or representatives in the course of responding to those alleged violations of Proposition 65 as alleged in the Complaint.

8.3 Release of ELF. Settling Defendant waives all rights to institute any form of legal action against ELF or its officers, employees, agents, attorneys or representatives, for all actions taken or statements made or undertaken by ELF and its officers, employees, agents, attorneys or representatives, in the course of seeking enforcement of Proposition 65 in this Action.

IX. RETENTION OF JURISDICTION

This Court shall retain jurisdiction of this matter to implement this Consent Judgment.

X. COURT APPROVAL

If this Consent Judgment is not approved by this Court, it shall be of no force or effect and cannot be used in any proceeding for any purpose.

XI. ENFORCEMENT

In the event that a dispute arises with respect to any provisions of this Consent Judgment, the Parties shall meet and confer within thirty (30) days of receiving written notice of the alleged violation from another party. In the event that the Parties are unable to resolve their dispute through the meet and confer process, this Consent Judgment may be enforced using any available provision of law.

XII. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within 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 Protein Supplement Products specifically, then Settling Defendant shall have no further obligations pursuant to this Consent Judgment with respect to those Protein Supplement Products that are so affected.

XIII. EXCHANGE IN COUNTERPARTS

Stipulations to this Consent Judgment may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall be deemed to constitute one document.

XIV. NOTICES

All correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (a) first-class, registered, certified return receipt requested, or (b) by overnight courier on ELF or Settling Defendant by the others at the addresses set forth below. Either ELF or Settling Defendant may specify in writing to the other Party a change of address to which all notices and other communications shall be sent.

Whenever notice or a document is required to be sent to Plaintiffs, it shall be sent to:

Laura J. Baughman
Baron & Budd, P.C.
3102 Oak Lawn Avenue, Suite 1100
Dallas, TX 75219

Whenever notice or a document is required to be sent to Defendant, it shall be sent to:

William F. Tarantino
Morrison & Foerster LLP
425 Market St. Suite 3300
San Francisco, California 94105

With a copy to

General Counsel
Vitamin Shoppe, Inc.
2101 91st Street
North Bergen, New Jersey 07047

XV. SEVERABILITY

If, subsequent to court approval of this Consent Judgment, any of the provisions of this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

XVI. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party

hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

AGREED.

Dated: December 28, 2012

Environmental Law Foundation

By: _____
James Wheaton, President

Dated: December ___, 2012

Vitamin Shoppe Industries, Inc.

By: _____

_____
Name, Title

APPROVED AS TO FORM:

Dated: December 28, 2012

BARON & BUDD, P.C.
LAW OFFICE OF APRIL STRAUSS

By: _____
April Strauss
Attorneys for Plaintiffs

Dated: December _____, 2012

MORRISON & FOERSTER, LLP

By: _____
William F. Tarantino
Attorneys for Defendant
Vitamin Shoppe Industries, Inc.

hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

AGREED.

Dated: February ___, 2013

Environmental Law Foundation

By: _____
James Wheaton, President

Dated: February 13, 2013

Vitamin Shoppe Industries, Inc.

By: _____

Name, Title JEAN W. FRYDMAN
Vice President of Legal,
General Counsel & Corporate Secretary

APPROVED AS TO FORM:

Dated: February ___, 2013

BARON & BUDD, P.C.
LAW OFFICE OF APRIL STRAUSS

By: _____
April Strauss
Attorneys for Plaintiffs

Dated: February 14, 2013

MORRISON & FOERSTER, LLP

By: _____
William F. Tarantino
Attorneys for Defendant
Vitamin Shoppe Industries, Inc.

APPROVED AND ORDERED:

Dated: January _____, 2013

_____

Honorable Judge Richard A. Kramer
Judge of the Superior Court
Department 304

EXHIBIT A
(List of Covered Products)

SKU	Description
1655208	WHEY TECH PRO 24 CHOCOLATE^
1655232	WHEY TECH PRO 24 CHOCOLATE^
1655166	WHEY TECH PRO 24 VANILLA
1735703	100% CASEIN CHOCOLATE^
1655158	WHEY TECH PRO 24 VANILLA
1735679	100% CASEIN VANILLA
1655216	WHEY TECH PRO 24 BANANA
1565605	WHEY TECH CHOCOLATE^
1565597	WHEY TECH VANILLA
1655224	WHEY TECH PRO 24 BANANA
1655190	WHEY TECH 24 CHOCOLATE MINT^
1655182	WHEY TECH 24 CHOCOLATE MINT^
1320812	WHEY TECH VANILLA
1320748	WHEY TECH CHOCOLATE^
1049915	VEGETABLE PROTEIN SOY-FREE
1464191	SOY PROTEIN W/PHYTO 100%
1643105	TECH X MASS CHOCOLATE**^
1569615	TECH X MASS CHOCOLATE**^
1569623	TECH X MASS VANILLA**
1761444	PRIMAL PRO CHOCOLATE^
1464205	SOY PROTEIN 100%
1761410	PRIMAL PRO CHOCOLATE^
1469473	SPIRU-SOY VANILLA
1761469	PRIMAL PRO VANILLA
1643097	TECH X MASS VANILLA**
1464457	SOY PROTEIN NON-GMO 100%
1761485	PRIMAL PRO VANILLA
1464465	SOY PROTEIN W/PHYTO100% NONGMO
1772342	WHEY ENHANCED VANILLA
1772334	WHEY ENHANCED CHOCOLATE^

^ - Chocolate Product
** - Gainer Product

EXHIBIT B: Designated Symbol #1

EXHIBIT C: Designated Symbol #2

PROP 65 WARNING!