

1 Laura J. Baughman (SBN 263944)
Thomas M. Sims (SBN 264174)
2 BARON & BUDD, P.C.
3102 Oak Lawn Avenue, Suite 1100
3 Dallas, TX 75219
Tel: (214) 521-3605
4 Fax: (214) 520-1181
lbaughman@baronbudd.com
5 tsims@baronbudd.com

6 April Strauss (SBN 163327)
LAW OFFICE OF APRIL STRAUSS
7 2500 Hospital Drive, Suite 3B
Mountain View, CA 94040
8 Tel: (650) 281-7081
astrauss@sfaclp.com

9 James R. Wheaton (SBN 115230)
10 ENVIRONMENTAL LAW FOUNDATION
1736 Franklin Street, 9th Floor
11 Oakland, CA 94612
Tel: (510) 208-4555
12 Fax: (510) 208-4562
wheaton@envirolaw.org
13 Attorneys for Plaintiff
ENVIRONMENTAL LAW FOUNDATION

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **COUNTY OF SAN FRANCISCO**

16 ENVIRONMENTAL LAW FOUNDATION,
17 on behalf of the General Public,

18 Plaintiff,

19 vs.

20 ABBOTT LABORATORIES, et al.

21 Defendants.

22 ENVIRONMENTAL LAW FOUNDATION,
23 on behalf of the General Public,

24 Plaintiff,

25 vs.

26 CHAMPION NUTRITION, et al.

27 Defendants.
28

Case No. CGC-10-503002
Complaints Filed: August 26, 2010
and December 17, 2010

**[PROPOSED] CONSENT
JUDGMENT AS TO VITAMIN
SHOPPE, INC.; ORDER**

1 **I. INTRODUCTION**

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

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

8 WHEREAS, on November 12, 2010, ELF individually and on behalf of the public
9 interest filed a complaint for injunctive relief and civil penalties in San Francisco Superior
10 Court in an action entitled *Environmental Law Foundation v. Champion Nutrition, Inc., et al.*,
11 Case No. CGC-10-505382 and on December 17, 2010, ELF filed a First Amended Complaint in
12 such action.

13 WHEREAS, on April 13, 2011, the two above-referenced cases were consolidated for all
14 purposes, including trial, and papers in both cases were thereafter filed under the common Case
15 No. CGC-10-503002 (the operative complaints in the two above-referenced consolidated cases
16 are collectively referred to herein as the “Complaint.”)

17 WHEREAS, Defendant Vitamin Shoppe Industries, Inc. (hereinafter, collectively,
18 “Settling Defendant”) manufactures, packages, distributes, markets, and/or sells protein
19 supplement products (“Protein Supplement Products” as defined below) to persons in the State
20 of California and is a defendant named in the consolidated complaints identified above.

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

27 WHEREAS, analysis of the general category of products, including but not limited to
28 the subject Protein Supplement Products, also reveals that there can be variations in lead

1 concentrations from flavor to flavor within a single protein supplement product line.

2 WHEREAS, even with use of good manufacturing practices, protein supplement
3 products can still have detectable concentrations of lead.

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

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

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

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

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

24 WHEREAS, the Consent Judgment in *As You Sow v. Nature’s Way Products Inc.*, San
25 Francisco Superior Court Case No. CGC-03-422848 (filed 5/24/05) allows, *inter alia*, similar
26 protein supplement products containing a concentration of lead in the products of up to four (4)
27 micrograms per day, assuming the product is used or consumed according to the defendant’s
28 consumer use instructions, to be sold in California without a warning, provided that each

1 covered defendant uses Good Manufacturing Practices, uses ingredients grown using Good
2 Agricultural Practices when possible, and uses Quality Control measures to reduce
3 contaminants to the “lowest level currently feasible,” as that phrase is defined by
4 California Code of Regulations, Title 27, Section 25501(a)(4).

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

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

23 WHEREAS, the Consent Judgment in *As You Sow v. Botanical Laboratories, Inc. et al.*,
24 San Francisco Superior Court Case No. CGC-04-429563 (filed 5/23/05) allows, *inter alia*,
25 similar supplement products containing a concentration of lead in the products of up to four (4)
26 micrograms per day, assuming the product is used or consumed according to the defendant’s
27 consumer use instructions, to be sold in California without a warning, provided that each
28 covered defendant use Good Manufacturing Practices, use ingredients grown using Good

1 Agricultural Practices when possible, and use Quality Control measures to reduce
2 contaminants to the “lowest level currently feasible,” as that phrase is defined by California
3 Code of Regulations, Title 27, Section 25501(a)(4).

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

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

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

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

22 WHEREAS, Settling Defendant contends that they should be provided a naturally
23 occurring allowance for lead that may be present in calcium and other ingredients encompassed
24 by the Consent Judgment in *People v. Warner-Lambert Co. et al.*, San Francisco Superior Court
25 Case No. 984503 (filed 11/13/1998 and modified in April 2011), which allows, *inter alia*, a
26 naturally occurring allowance of 0.8 micrograms of lead per 1000 milligrams of calcium, and
27 naturally occurring allowances of 0.4 mcg/g for ferrous fumarate, 8.0 mcg/g for zinc oxide, 0.4
28 mcg/g for magnesium oxide, 0.332 mcg/g for magnesium carbonate, 0.4 mcg/g magnesium

1 hydroxide, 0.8 mcg/g zinc gluconate, and 1.1 mcg/g potassium chloride. In 2012 the People
2 afforded the same naturally occurring allowances to dozens of defendants in a series of consent
3 judgments resolving a case styled *People v. 21st Century Healthcare, Inc. et al.*, Alameda
4 Superior Court Case No. RG08426937.

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

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

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

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

17 NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

18 **1.1** In its Complaint, ELF alleges that Defendant manufactured, packaged,
19 distributed, marketed and/or sold protein supplement products for human consumption
20 containing lead in an amount that resulted in an exposure to consumers in violation of the
21 provisions of Health & Safety Code §§ 25249.5 et seq. (“Proposition 65”) by knowingly and
22 intentionally exposing persons to a chemical known to the State of California to cause
23 reproductive toxicity and cancer, namely lead, without first providing a clear and reasonable
24 warning to such individuals. The protein supplement products that ELF alleges contain lead,
25 and which are covered by this Consent Judgment, are those described in the Attachment A for
26 the Settling Defendant (the “Protein Supplement Products”). Upon entry of the Consent
27 Judgment, the Complaint shall be deemed amended such that the term “PROTEIN
28

1 SUPPLEMENTS” in the Complaint is defined, as to each Settling Defendant, as the Protein
2 Supplement Products identified in Attachment A corresponding to the Settling Defendant.

3 **1.2** For purposes of this Consent Judgment only, ELF and Settling Defendant
4 (hereafter referred to as the “Parties”), stipulate that this Court has jurisdiction over
5 allegations of violations contained in the Complaint and personal jurisdiction over the Settling
6 Defendant as to the acts alleged in the Complaint, that venue is proper in the County of San
7 Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
8 all claims which could have been raised in the Complaint based on the facts alleged therein.
9 Settling Defendant denies the allegations set forth in the Complaint.

10 **1.3** For the purpose of avoiding prolonged and costly litigation, the Parties
11 enter into this Consent Judgment as a full settlement of all claims that were raised in
12 the Complaint based on the facts alleged therein, or which could have been raised in
13 the Complaint arising out of the facts alleged therein. By execution of this Consent
14 Judgment, Settling Defendant does not admit any violation of Proposition 65 or any
15 other law and specifically denies that it has committed any such violations and
16 maintains that all Protein Supplement Products that it has sold and distributed in
17 California have been and are in compliance with all laws. Nothing in this Consent
18 Judgment shall be construed as an admission by Settling Defendant of any fact,
19 finding, conclusion, issue of law, or violation of law. However, this paragraph shall not
20 diminish or affect the responsibilities and duties of the Parties under this Consent
21 Judgment.

22 **II. MONITORING**

23 **2.1** No later than one hundred and eighty (180) days after entry of this
24 Consent Judgment, Settling Defendant will test or arrange for the testing for lead of each of
25 its Protein Supplement Products that it intends to distribute or sell in California. In
26 establishing an initial data set for purposes of this Consent Judgment, Settling Defendant may
27 rely on testing conducted prior to entry of this Consent Judgment if such testing documents
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1 lead levels in Protein Supplement Products either already in the stream of commerce, in
2 process, or which are ready for distribution or sale.

3 **2.1.1** Settling Defendant may use a testing laboratory with
4 Environmental Laboratory Certification from the State of California, Department of
5 Health Services, Environmental Laboratory Accreditation Program; NSF
6 International; American Association for Laboratory Accreditation for Chemical Testing;
7 International Standards Organization/IEC via ANSI-ASQ; or an in-house laboratory or
8 other facility experienced in testing for lead levels in foods that complies with the
9 Production and Process Control System: Requirements for Laboratory Operations set
10 forth in 21 C.F.R. Part 111, Subpart J, including but not limited to the requirements
11 for written procedures, requirements for laboratory control processes, requirements
12 for laboratory methods for testing and examination, record retention policies, and
13 other laboratory requirements.

14 **2.1.2.** The lead concentrations must be measured using inductively
15 coupled plasma mass spectrometry ("ICP-MS") utilizing scientifically appropriate
16 adherence to the protocols set forth in EPA Methods 6020, 6020a, isotope
17 dilution. The laboratory must digest at least 0.5 grams of each sample,
18 analyze each sample undiluted by ICP-MS, and use an instrument quantitation
19 limit corresponding to less than three (3) micrograms lead (Pb) in the finished
20 product.

21
22 **2.2** To fulfill its monitoring obligation under Section 2.1 and using a testing
23 method described therein, Settling Defendant must test or cause to be tested three (3)
24 samples of the final product which comprises each Protein Supplement Product, with
25 samples randomly selected from three (3) different lots (or from the maximum number
26 of lots that are available for testing if there are fewer than three (3) lots available). The
27 testing required under this Section 2.2 will be repeated annually for two years
28 following the compilation of the initial data set described in Section 2.1.

1 Notwithstanding any language to the contrary herein, if at any time there is a material change in
2 formula of a Protein Supplement Product that is reasonably likely to affect the lead levels in the
3 product, that product shall be tested pursuant to Sections 2.1 and 2.2 for a minimum of two
4 years. All laboratory test data and certifications (if applicable) must be retained by
5 Settling Defendant for a period of three years from the date of testing. However,
6 Settling Defendant is not required to test any Protein Supplement Products if it is
7 providing a warning for those products that complies with Section 3.2.

8 **2.2.1** On and after the Effective Date, any single test result which exceeds 5.75
9 ug/day lead as calculated under this Section 2 shall be deemed an outlier. On and after the first
10 anniversary of the Effective Date, any single test result which exceeds 5.0 ug/day lead as
11 calculated under this Section 2 shall be deemed an outlier. Any outlier result as described in
12 this Section 2.2.1 is referred to hereinafter as an “Outlier.”

13 **2.2.2** At Settling Defendant’s option, any single Outlier test result may be
14 subject to validation before it is deemed a final Outlier result for purposes of this Consent
15 Judgment. The validation process shall consist of two steps.

16 (a) First, Settling Defendant shall check its equipment, test processes,
17 validation procedures, laboratory contamination, operator error and any other factors which
18 could have produced an erroneous result. If the result is determined erroneous due to testing
19 error or failure to satisfy quality assurance or quality control procedures, the result shall be
20 discarded and not used for any purpose under this Consent Judgment. The Protein Supplement
21 Product shall then be re-tested as if such test were the first test.

22 (b) Second, if a single Outlier test result is obtained and the steps in
23 2.2.2(a) have not invalidated the result, then Settling Defendant may collect up to three (3) more
24 samples from the same lot or batch and have those samples tested in accordance with this
25 Section 2. The arithmetic mean of the test results of all samples tested from the single lot or
26 batch (including the original Outlier test result) shall then be determined. That mean test result
27 shall be deemed the final result and shall constitute the applicable test result for purposes of this
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1 Consent Judgment. If this validated test result is an Outlier as defined in Section 2.2.1, then the
2 terms of Section 3.3 shall apply to that Outlier test result.

3 **2.3** If there is an allegation that a Protein Supplement Product is in violation
4 of Section 3.4, ELF may make a written request to the Settling Defendant responsible
5 for producing that Protein Supplement Product, delivered to the address of the Settling
6 Defendant as set forth on Attachment B, for data generated in compliance with
7 Sections 2.1 and 2.2. In response to such a request, Settling Defendant will provide to
8 ELF the date the analysis was performed, the name of the laboratory conducting the
9 test, the test method used by the laboratory, the detection limit used by the laboratory,
10 the lot numbers of the samples tested, and the analytical results within thirty (30) days
11 of ELF's written request. ELF shall keep all such information and data confidential,
12 including from other Defendants. Settling Defendant shall provide to ELF within 45 days of
13 completing the initial testing of its Protein Supplement Products under Section 2.1, and annually
14 thereafter during the testing period set forth in Section 2.2, a list of all such products for which
15 the test results obtained pursuant to this Section II indicate a Proposition 65 warning is required
16 pursuant to Section III herein.

17 **III. CLEAR AND REASONABLE WARNINGS**

18 **3.1** Pursuant to this Consent Judgment, warnings are required under
19 Proposition 65 only with respect to Protein Supplement Products a Settling Defendant
20 sells to California consumers that expose users to more than three (3.0) micrograms of
21 lead in a Daily Serving, unless the Protein Supplement Product is a Gainer Product or a
22 Chocolate Product, as those terms are defined in this paragraph and identified on
23 Attachment A for each Settling Defendant. Warnings are required for Gainer Products
24 and Chocolate Products a Settling Defendant sells to California consumers that expose
25 users to more than four (4.0) micrograms of lead in a Daily Serving. "Gainer Products"
26 are Protein Supplement Products that are marketed primarily as "weight gainers", "mass
27 gainers", "extra calories" or any similar designation, to a sports nutrition/weight-
28 lifting/bodybuilding-oriented consumer, or to consumers seeking additional calories to

1 supplement their diets for purposes of gaining weight or for purposes of maximizing caloric
2 intake per consumption episode. “Chocolate Products” are Protein Supplement Products that
3 contain any variety or form of the ingredient generally referred to as “chocolate,” including
4 without limitation, the ingredients chocolate, chocolate liquor, cocoa, cocoa mass, cocoa butter,
5 cocoa powder, cacao, fudge, or any variation of, or substitute for, any of those ingredients.

6 **3.2** A “Daily Serving” for purposes of determining Proposition 65
7 compliance for chemicals present in the Protein Supplement Products shall be defined
8 as one of the following, as applicable: (a) if the Protein Supplement Product label
9 recommends a single serving, then the single recommended serving size; (b) if the
10 Protein Supplement Product label includes no recommended number of servings, then
11 the serving size set forth on the “Nutritional Facts” or “Supplement Facts” portion of
12 the label; or (c) if the Protein Supplement Product label recommends a range of
13 servings in one day, then the amount which is two-thirds (2/3) of the maximum number
14 of servings recommended on the label; (d) if the Protein Supplement Product label
15 recommends a specific number of servings per day that is more than one serving per day, then
16 the amount which is two-thirds (2/3) of the specifically recommended servings; or (e)
17 commencing on the first anniversary of the Effective Date, if the Protein Supplement Product
18 label recommends a specific number of servings per day that is more than one serving per day,
19 then the specifically recommended number of servings. On the first anniversary of the
20 Effective Date, Section 3.2(d) shall terminate.

21 **3.3** When calculating whether a Protein Supplement Product exceeds the
22 warning threshold: (1) Settling Defendant must compare the warning threshold value to
23 the arithmetic mean of at least three (3) samples tested in accordance with Section 2.1.
24 However, Settling Defendant may, at its option, calculate the arithmetic mean using up
25 to ten (10) samples; and (2) Settling Defendant must base its calculation on the Daily
26 Serving amount as defined in section 3.2. Notwithstanding the foregoing, Settling
27 Defendant may not include an Outlier test result (as defined in Section 2.2.1) in calculating the
28 arithmetic mean, and if Settling Defendant elects to sell a Protein Supplement Product to

1 California consumers for which an Outlier test result is obtained and validated as provided for
2 in Section 2.2.2, then that specific product lot or batch from which the Outlier result was
3 derived shall be subject to the warning obligations of this Section 3. Settling Defendant shall
4 have thirty (30) days from the date the relevant test result mean is calculated to satisfy the
5 applicable obligations of this Section 3 for Protein Supplement Products manufactured,
6 distributed or sold after that date.

7 **3.4 Warning Standard.** No later than one year after entry of this Consent
8 Judgment, Settling Defendant shall not manufacture for sale in the State of California,
9 distribute into the State of California, or sell in the State of California any Protein
10 Supplement Product the ingestion of which results in an exposure greater than the
11 applicable warning threshold set forth in Section 3.1, as calculated in accordance with
12 Section 3.3, unless a warning is placed on the packaging, labeling or directly to or on
13 the Protein Supplement Product that states:

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

16 (hereinafter “Product Warning”). The text contained in the brackets is optional per
17 Settling Defendant’s sole discretion. Product Warnings shall be placed with such
18 conspicuousness as compared with other words, statements, designs and/or devices on the
19 labeling or packaging as to render it likely to be read and understood by an ordinary individual
20 under customary conditions of use or purchase. If the Product Warning is displayed on the
21 product container or labeling, the warning shall be at least the same size as the largest of any
22 other health or safety warnings on the container or labeling, and the word “warning” shall
23 be in all capital letters and in bold print. If printed on the labeling itself, the Product Warning
24 shall be contained in the same section of the labeling that states other safety warnings
25 concerning the use of the Protein Supplement Product.

26 **3.4.1 Mail Order Sales**

27 For any mail order sales by Settling Defendant to a consumer in California, the warning
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1 language required under this Consent Judgment shall also be included in the mail order
2 catalogue, either on the same page as any order form, or on the same page upon which the
3 Protein Supplement Product's price is listed, in the same type size as the surrounding,
4 non-heading text. If necessary, the Product Warning shall be added in the first print run of the
5 mail order catalogue which occurs following one year after entry of this Consent Judgment.

6 **3.4.2 Internet Sales**

7 For internet sales by Settling Defendant to a California consumer of Protein Supplement
8 Products subject to the warning requirements of Section 3.3, the warning language required
9 under this Consent Judgment shall be displayed in the same type size as the surrounding, non-
10 heading text, either: (a) on the same page upon which the Protein Supplement Product is
11 displayed or referenced; (b) on the same page as the order form for the Protein Supplement
12 Product; (c) on the same page as the price for the Protein Supplement Product is displayed; or
13 (d) in a dialogue box which appears when a California address for delivery is provided by the
14 consumer, so long as the dialogue box appears prior to the completion of the internet sale and
15 requires the consumer to affirmatively accept receipt of the warning set forth in the dialogue
16 box (which shall be displayed in the same type size as the surrounding, non-heading text on
17 the screen at the time of the appearance of the dialogue box), as a condition precedent to
18 completing the sale. If necessary, the Product Warning shall be added following one year after
19 entry of this Consent Judgment.

20 **3.5** Any changes to the language or format of the warnings required under
21 Section 3.3 shall be made only after Court approval and following written notice to
22 Plaintiff and to the Attorney General.

23 **3.6** Settling Defendant may sell or distribute in California or ship to California a
24 Protein Supplement Product without any of the warnings required under Section 3.3 following
25 one year after entry of this Consent Judgment only if Settling Defendant has conducted
26 testing in accordance with the requirements referenced in Section 3.1 demonstrating that the
27 Protein Supplement Product does not expose users to more lead in a Daily Serving than
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1 allowed under Section 3.4 without a warning, as determined using the calculation set
2 forth in Section 3.3.

3 **3.7** So long as Settling Defendant complies and remains in compliance with the
4 requirements of Section 3.1 through 3.5 for each of its Protein Supplement Products, the Parties
5 agree that such Protein Supplement Products shall be deemed to comply with Proposition 65
6 with respect to lead beginning immediately upon entry of the Consent Judgment, and that
7 compliance with this Consent Judgment shall fully and completely satisfy Settling
8 Defendant's obligations under Proposition 65 to provide warnings for such Protein
9 Supplement Products with respect to the presence of lead, regardless of when manufactured,
10 distributed or sold.

11 **3.8** At least sixty (60) days before any discontinuance of any warnings that any
12 Settling Defendant has issued pursuant to this Consent Judgment, Settling Defendant shall
13 conduct the testing required to demonstrate that the Protein Supplement Products conform to
14 Sections 3.1, using the analytical methods set forth in Section 2.1. If there is an allegation that a
15 Protein Supplement Product for which there has been a discontinued warning is in violation of
16 Section 3.4, then ELF may, as provided for in Section 2.3, request all related data generated in
17 compliance with this Consent Judgment. ELF shall keep confidential, including from other
18 Settling Defendants, all such information and data received from Settling Defendant. This
19 Section 3.8 shall not apply to a Protein Supplement Product which is discontinued.

20 **3.9** Should ELF reach a settlement or be subject to a binding disposition (judicial,
21 contractual or otherwise) with or concerning any other defendant, person or entity in any
22 threatened, pending or future lawsuit involving claims of Proposition 65 violations and protein
23 supplement products, or with terms that set forth less stringent lead standards than those herein
24 defining when Proposition 65 warnings will not be required ("Alternative Standards"),
25 then ELF shall provide Settling Defendant with a copy of the settlement or binding disposition
26 (only in the case of a settlement or binding disposition entered into by, or binding upon, ELF),
27 and ELF agrees to join Settling Defendant's motion, if any, to modify this Consent Judgment
28 so that the Alternative Standards apply to any protein supplement products that Settling

1 Defendant manufactures for sale in California, distributes into California, or sells to California
2 consumers.

3 **3.10** Should ELF reach a settlement or be subject to a binding disposition (judicial,
4 contractual or otherwise) with or concerning any other defendant, person or entity in any
5 threatened, pending or future lawsuits involving claims of Proposition 65 violations and protein
6 supplement products that permit warnings that are different in content, method or appearance
7 than is specified in Section 3.4 of this Consent Judgment, then ELF shall provide Settling
8 Defendant with a copy of the settlement, or binding disposition (only in the case of a settlement
9 or binding disposition entered into by, or binding upon, ELF), and ELF agrees to join Settling
10 Defendant’s motion to modify this Consent Judgment to allow such Settling Defendant to warn
11 in the manner specified in such settlement or binding disposition, as to any protein supplement
12 products that the Settling Defendant sells, or distributes for sale, in California, if Settling
13 Defendant so moves.

14 **IV. MONETARY RELIEF**

15 **4.1** Within fifteen (15) days after entry of this Consent Judgment, Settling
16 Defendant shall pay ELF a total of \$92,000, with \$84,500 to be applied towards ELF’s
17 costs and attorney’s fees and \$7,500 as penalties (collectively, “Settlement Proceeds”).
18 Defendant shall pay the Settlement Proceeds with a check made payable to Baron &
19 Budd, P.C. and delivered to Laura Baughman at Baron & Budd, P.C., 3102 Oak Lawn Ave.,
20 Suite 1100, Dallas, Texas 75219. ELF shall bear all responsibility for apportioning and paying
21 to the State of California any portion of the Settlement Proceeds as required by California
22 Health & Safety Code § 25249.12(d), and Settling Defendant shall not have any liability if
23 payments to the State of California are not made by ELF. The payment made pursuant to
24 Section 4.1 shall be the only monetary obligation of Settling Defendant with respect to this
25 Consent Judgment, including as to any fees, costs, or expenses ELF has incurred in relation to
26 this action.

27 **V. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

28 ELF agrees to comply with the reporting requirements referenced in California Health &

1 Safety Code § 25249.7(f). Pursuant to the regulations promulgated under that section, ELF
2 shall present this Consent Judgment to the California Attorney General’s Office within
3 two (2) days after receipt of all necessary signatures. The Parties acknowledge that, pursuant
4 to Health & Safety Code § 25249.7, a noticed motion must be filed to obtain judicial approval
5 of the Consent Judgment. Accordingly, a motion for approval of the Consent Judgment shall be
6 prepared and filed by ELF within a reasonable period of time after the date this Consent
7 Judgment is signed by all Parties.

8 **VI. MODIFICATION OF SETTLEMENT**

9 This Consent Judgment may be modified by: (1) written agreement among the Parties
10 and upon entry of a modified Consent Judgment by the Court thereon, or (2) motion of ELF or
11 Settling Defendant as provided by law and upon entry of a modified Consent Judgment by the
12 Court thereon. All Parties and the California Attorney General’s Office shall be served
13 with notice of any proposed modification to this Consent Judgment at least fifteen (15) days in
14 advance of its consideration by the Court.

15 **VII. APPLICATION OF CONSENT JUDGMENT**

16 **7.1** Each signatory to this Consent Judgment certifies that he or she is fully
17 authorized by the Party that he or she represents to enter into and execute the Consent Judgment
18 on behalf of the Party represented and legally bind that Party.

19 **7.2** This Consent Judgment shall apply to and be binding upon ELF and Settling
20 Defendant, their officers, directors, and shareholders and the predecessors, successors or assigns
21 of each of them.

22 **VIII. CLAIMS COVERED**

23 **8.1** This Consent Judgment is a final and binding resolution between ELF, on its
24 behalf and in the public interest, and Settling Defendant of any violation of Proposition 65 up
25 through the date of entry of this order by the Court that could have been asserted against
26 Settling Defendant for failure to provide clear, reasonable and lawful warnings of exposures to
27 lead that result from ingestion of Protein Supplement Products as defined herein. No claim is
28 reserved as between ELF on its own behalf and Settling Defendant, and ELF on its behalf and

1 Settling Defendant expressly waive any and all rights which they may have under the provisions
2 of Section 1542 of the Civil Code of the State of California, which provides:

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

7 **8.2 ELF Release of Settling Defendant.** In further consideration of the
8 promises and agreements herein contained, and for the payment to be made pursuant to Section
9 4.1, ELF, on behalf of itself and in the public interest, its past and current agents,
10 representatives, attorneys, successors and/or assignees, hereby waives all rights to institute or
11 participate in, directly or indirectly, any form of legal action addressing all claims occurring on
12 or before the entry of this Consent Judgment, and releases all claims occurring on or before the
13 entry of this Consent Judgment, including, without limitation, all actions, causes of action, in
14 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses
15 or expenses, including, but not limited to, investigation fees, expert fees and attorneys'
16 fees of any nature whatsoever, whether known or unknown, fixed or contingent against Settling
17 Defendant and its past, present and future owners, direct and indirect parent companies,
18 corporate affiliates, subsidiaries, upstream and downstream suppliers, distributors,
19 manufacturers or customers, direct and indirect retailers, clients, and each of their respective
20 officers, directors, attorneys, representatives, shareholders, agents, insurers, employees
21 successors and assigns arising under Proposition 65 related to the alleged failure to warn
22 about exposures to or identification of lead contained in the Protein Supplement Products
23 manufactured, packaged, distributed, marketed, or sold by Settling Defendants.

24 ELF, on behalf of itself, its past and current agents, representatives, attorneys, successors
25 and/or assignees, and in the public interest, and Settling Defendant further agree and
26 acknowledge that this Consent Judgment is a full, final, and binding resolution of any violations
27 occurring on or before the entry of this Consent Judgment by Settling Defendant and its past,
28 present and future owners, direct and indirect parent companies, corporate affiliates,
subsidiaries, upstream and downstream suppliers, distributors, manufacturers or customers,

1 direct and indirect retailers, clients, and each of their respective officers, directors, attorneys,
2 representatives, shareholders, agents, insurers, employees, successors and assigns arising
3 under Proposition 65 related to the alleged failure to warn about exposures to or
4 identification of lead contained in the Protein Supplement Products as set forth in the
5 Attachment A hereto for Settling Defendant.

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

16 **8.3 Release of ELF.** Settling Defendant waives all rights to institute any
17 form of legal action against ELF or its officers, employees, agents, attorneys or
18 representatives, for all actions taken or statements made or undertaken by ELF and its
19 officers, employees, agents, attorneys or representatives, in the course of seeking
20 enforcement of Proposition 65 in this action.

21 **IX. RETENTION OF JURISDICTION**

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

24 **X. COURT APPROVAL**

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

27 **XI. ENFORCEMENT**

28 In the event that a dispute arises with respect to any provisions of this Consent

1 Judgment, the Parties shall meet and confer within thirty (30) days of receiving written
2 notice of the alleged violation from another party. In the event that the Parties are
3 unable to resolve their dispute through the meet and confer process, this Consent
4 Judgment may be enforced using any available provision of law. This Consent
5 Judgment shall be enforceable by the Parties hereto and by the Attorney General of the
6 State of California. Notwithstanding any language to the contrary in Section 2.3, 3.8 or
7 otherwise herein, ELF and/or the Attorney General may disclose Settling Defendant's test
8 results in a court filing in support of any motion to enforce this Consent Judgment provided that
9 ELF and/or the Attorney General first provides Settling Defendant an opportunity to make a
10 motion for leave to seal such data pursuant to the Protective Order entered by the Court in this
11 action on February 29, 2012.

12 **XII. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the State
14 of California. In the event that Proposition 65 is repealed or is otherwise rendered
15 inapplicable by reason of law generally, or as to the Protein Supplement Products
16 specifically, then Settling Defendant shall have no further obligations pursuant to this
17 Consent Judgment with respect to those Protein Supplement Products that are so
18 affected.

19 **XIII. EXCHANGE IN COUNTERPARTS**

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

23 **XIV. NOTICES**

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

1 shall be sent.

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

3
4 Laura J. Baughman
5 Baron & Budd, P.C.
6 3102 Oak Lawn Avenue, Suite 1100
7 Dallas, TX 75219.

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

10 William F. Tarantino
11 Morrison & Foerster LLP
12 425 Market St. Suite 330
13 San Francisco, California 94105

14 With a copy to

15 General Counsel
16 Vitamin Shoppe, Inc.
17 2101 91st Street
18 North Bergen, New Jersey 07047

19 **XV. SEVERABILITY**

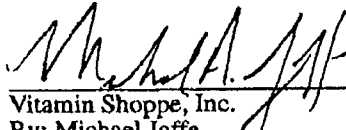
20 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
21 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
22 provisions remaining shall not be adversely affected.

23 **XVI. ENTIRE AGREEMENT**

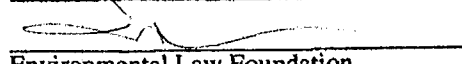
24 This Consent Judgment contains the sole and entire agreement and understanding of the
25 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
26 negotiations, commitments, and understandings related hereto. No representations, oral or
27 otherwise, express or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

1 **APPROVED AS TO SUBSTANCE:**

2
3 Dated: January 22, 2014

4 
Vitamin Shoppe, Inc.
By: Michael Jaffe
Its: Associate General Counsel

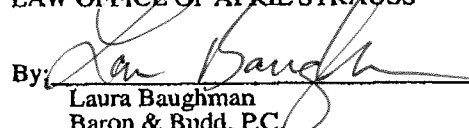
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6 Dated: 1/22/14

7 
Environmental Law Foundation
By: ON F. WHEATON
Its: PROSECUTOR

8
9
10 **APPROVED AS TO FORM:**

11 Dated: 1/22/2014

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

13 By: 
14 Laura Baughman
15 Baron & Budd, P.C.
16 Attorneys for Plaintiff

17 Dated: January 22, 2014

18 **MORRISON & FOERSTER LLP**

19 By: 
20 William F. Tarantino

21 Attorneys for Defendant:
22 Vitamin Shoppe, Inc.

23 **APPROVED AND ORDERED:**

24
25 Dated: _____

26 Honorable Curtis E.A. Karnow
27 Judge of the Superior Court
28 Department 304

ATTACHMENT 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

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ATTACHMENT B

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

William F. Tarantino
Morrison & Foerster LLP
425 Market St. Suite 330
San Francisco, California 94105