

1 ELLISON FOLK (State Bar No. 149232)
LAURA D. BEATON (State Bar No. 294466)
2 SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
3 San Francisco, California 94102
Telephone: (415) 552-7272
4 Facsimile: (415) 552-5816
Folk@smwlaw.com
5 Beaton@smwlaw.com

6 Attorneys for Plaintiff
AS YOU SOW
7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**

10
11 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

12 Plaintiff,

13 v.

14 GENERAL NUTRITION
15 CORPORATION, and DOES 1 through
16 10, inclusive,

17 Defendants.

Case No. CGC-14-542561

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On June 2, 2014, As You Sow, Inc. (“AYS”) issued a 60-day notice of violation
3 (“Original Notice”) under California Health and Safety Code sections 25249.5 *et seq.* (“Proposition 65”)
4 that was served on General Nutrition Corporation (“GNC”) and all required California public enforcers.
5 In the Original Notice, AYS alleges that GNC SuperFoods 25 Berry Flavor (the “Product”), which is
6 manufactured, distributed, or sold by GNC, causes exposures to lead and cadmium and that such product
7 requires warnings under Proposition 65.

8 1.2 On November 5, 2014, AYS individually and on behalf of the public interest, initiated
9 this action (“Action”) against GNC. The Complaint (“Complaint”) asserted a cause of action under
10 Proposition 65 on the basis of the allegations contained in the Original Notice.

11 1.3 GNC denies AYS’s claims that the Product requires warnings under Proposition 65.

12 1.4 AYS and GNC are referred to collectively as the “Parties.”

13 1.5 Court-approved consent judgments in *Environmental Law Foundation v. Abbott*
14 *Laboratories et al.*, San Francisco Superior Court Lead Case No. CGC-10-503002 (filed February 18,
15 2014) (“*Abbott Labs*”) as to fourteen defendants set the following warning thresholds for lead: 4.0
16 micrograms of lead per day for chocolate and gainer protein supplement products and 3.0 micrograms of
17 lead per day for all other protein supplement products. The Product in this case is similar to the types of
18 products covered in the *Abbott Labs* consent judgments, and certain of those products covered in the
19 *Abbott Labs* consent judgments are competitor products to GNC’s Product.

20 1.6 Accordingly, the Product in this case will be subject to the same lead standards as in the
21 *Abbott Labs* consent judgments to ensure that the Product does not experience a competitive advantage
22 or disadvantage in the marketplace as a result of this Consent Judgment.

23 1.7 For the purpose of avoiding prolonged and costly litigation concerning the claims and
24 defenses in this Action, the Parties enter into this Consent Judgment as a full settlement of all claims that
25 were raised in the Complaint based on the facts alleged therein or which could have been raised in the
26 Complaint arising out of the facts alleged therein. By execution of this Consent Judgment, GNC does
27 not admit any violation of Proposition 65 or any other law. Nothing in this Consent Judgment shall be
28 construed as an admission by GNC or AYS of any fact, finding, conclusion, issue of law, or violation of

1 law. However, this paragraph shall not diminish or affect the responsibilities and duties of the Parties
2 under this Consent Judgment.

3 **1.8** Upon execution of this Consent Judgment, AYS shall immediately file a Notice of
4 Settlement with the Court.

5 **1.9** The “Effective Date” of this Consent Judgment is the date on which AYS serves the
6 Notice of Entry of Judgment by this Court on GNC.

7 **2. MONITORING**

8 **2.1** No more than ninety (90) days after the Effective Date, GNC will test or arrange for the
9 testing of its Product for lead and cadmium. This data will establish an initial data set for purposes of
10 this Consent Judgment. In lieu of conducting new tests for lead and cadmium to establish this initial
11 data set, GNC may rely on testing conducted prior to entry of this Consent Judgment if such testing
12 includes lead and cadmium levels in the Product either already in the stream of commerce or ready for
13 distribution or sale. Notwithstanding the foregoing, such testing must have occurred within the last six
14 (6) months. Upon request from AYS, GNC shall provide these test results to AYS within thirty (30)
15 days. AYS shall keep all such information and data confidential.

16 **2.2** GNC must use a testing laboratory certified by the EPA, FDA, or the State of California.
17 The lead and cadmium concentrations must be measured using inductively coupled plasma mass
18 spectrometry (“ICP-MS”), utilizing scientifically appropriate adherence to the protocols set forth in EPA
19 Methods 6020 or 6020a. The laboratory must digest at least 0.5 grams of each sample with a level of
20 detection of at least 4 parts per billion. The sample preparation method must use a microwave- or heat-
21 assisted acid digestion method.

22 **2.3** To fulfill its monitoring obligation, GNC must test or cause to be tested three (3) samples
23 of the final product for the Product, with samples randomly selected from three (3) different lots (or
24 from the maximum number of lots that are available for testing if there are fewer than three (3) lots
25 available). For this testing, GNC must use the testing methods described in Section 2.4. As long as
26 GNC continues to sell the Product in California, the testing required under this Section 2.3 will be
27 repeated annually following the compilation of the initial data set described in Section 2.1. If no new
28 lots of the Product have been produced in the year since the Product was last tested, GNC does not need

1 to conduct testing until a new lot is produced. All laboratory test data and certifications must be retained
2 by GNC for a period of three (3) years from the date of testing. The requirements of Sections 2.1 and
3 2.3 do not apply if GNC has provided a warning that complies with Section 3.5 on the label of the
4 Product.

5 **2.4** The testing requirements of Sections 2.1, 2.2, and 2.3 also do not apply if the Product is
6 not being sold in California.

7 **2.5** AYS may make a written request to GNC for test results described in Section 2.3. AYS
8 will send its written request for test results to the addresses of GNC and GNC's counsel as set forth in
9 Section 14, below. Within thirty (30) days of receiving a request from AYS, GNC shall send to AYS a
10 full copy of all laboratory analyses and test results, including the date the analysis was performed, the
11 name of the laboratory conducting the test, the test method used by the laboratory, the detection limit
12 used by the laboratory, the lot numbers of the samples tested, and the analytical results reports obtained.
13 AYS shall keep all such information and data confidential.

14 **2.6 Good Faith Commitment to Pursue Further Lead and Cadmium Reduction:** During
15 the term of this Consent Judgment, GNC shall continue to take good-faith and commercially reasonable
16 efforts to further reduce any lead and cadmium in the Product. These efforts shall include, at a
17 minimum: efforts to secure ingredients with lower lead and cadmium content; obligating suppliers to
18 use the highest quality materials (with respect to lead or cadmium content) that are feasible in the
19 manufacturing process; and contacting suppliers of product ingredients in an effort to reduce lead or
20 cadmium in the ingredients through means such as review of supplier manufacturing process, alternative
21 formulation, product sourcing, and reformulation(s) of the Product to reduce lead and cadmium. The
22 requirements of this Section 2.6 do not apply if the Product that is not being sold in California or if the
23 Product contains less than 0.5 micrograms of lead in a Daily Serving or 4.1 micrograms of cadmium in a
24 Daily Serving.

25 **3. CLEAR AND REASONABLE WARNINGS**

26 **3.1** Pursuant to this Consent Judgment, warnings are required under Proposition 65 only with
27 respect to the Product that GNC sells to California consumers that exposes users to more than 0.5
28 micrograms of lead, or to more than 4.1 micrograms of cadmium, in a Daily Serving ("Warning

1 Threshold Value”), excluding amounts of naturally occurring lead in the ingredients listed in the table
2 below, in accordance with the Attorney General’s Stipulation Modifying Consent Judgments in *People*
3 *v. Warner Lambert, et al.*, San Francisco Superior Court Case No. 984503.

INGREDIENT	NATURALLY OCCURRING AMOUNT OF LEAD
Calcium	0.8 micrograms/gram
Ferrous Fumarate	0.4 micrograms/gram
Zinc Oxide	8.0 micrograms/gram
Magnesium Oxide	0.4 micrograms/gram
Magnesium Carbonate	0.332 micrograms/gram
Magnesium Hydroxide	0.4 micrograms/gram
Zinc Gluconate	0.8 micrograms/gram
Potassium Chloride	1.1 micrograms/gram

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13 **3.2** Notwithstanding the allowance for naturally occurring lead in Section 3.1, if the testing
14 of the Product using the measuring technique described in Section 2.2 reveals that the Product will
15 expose a user to more than 3.0 micrograms of lead in a Daily Serving, the Product shall display a
16 warning as described in Section 3.5.

17 **3.3** A “Daily Serving” (for purposes of determining Proposition 65 compliance for chemicals
18 present in the Product) shall be defined as the higher of any one of the following, as applicable: (a) if
19 the Product label includes a recommended number of servings, then the recommended daily serving
20 size; (b) if the Product label includes no recommended number of servings, then the serving size set
21 forth on the “Nutritional Facts” or “Supplement Facts” portion of the label; or (c) if the Product label
22 recommends a range of servings in one day, then the amount that is the higher recommended serving
23 size.

24 **3.4** When calculating whether a Product exceeds the Warning Threshold Value set forth in
25 Section 3.1: (1) GNC must compare the Warning Threshold Value to the arithmetic mean of at least
26 three (3) samples tested in accordance with Section 2, minus the allowances for naturally occurring lead
27 in the table in Section 3.1, and (2) GNC must base its calculation on the Daily Serving amount as
28 defined in Section 3.3.

1 **3.5 Warning Standards**

2 **3.5.1** On and after the Effective Date, GNC shall not distribute or ship into the State of
3 California the Product if its ingestion exposes a user to greater than the applicable warning threshold set
4 forth in Sections 3.1 and 3.2, as calculated in accordance with Section 3.4, unless a warning is provided
5 pursuant to this Section 3.5.

6 **3.5.2** Until ninety (90) days after the Effective Date, GNC may sell units of the Product
7 already present in California as of the Effective Date. Ninety (90) days after the Effective Date, GNC
8 shall not manufacture for sale in the State of California, distribute into the State of California, or sell in
9 the State of California the Product if its ingestion exposes a user to greater than the applicable warning
10 threshold set forth in Sections 3.1 and 3.2, as calculated in accordance with Section 3.4, unless a
11 warning is provided pursuant to this Section 3.5.

12 **3.5.3 Product Warnings**

13 **(a)** A warning must be placed or affixed on the packaging, labeling, or
14 directly to or on the Product that states:

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

18 (hereinafter “Product Warning”).

19 **(b)** The warning text contained in the brackets is only required if the product
20 exposes users to lead in excess of the Proposition 65 No Significant Risk Level (“NSRL”) of 15
21 micrograms per day. Product Warnings shall be placed with such conspicuousness as compared with
22 other words, statements, designs, and devices on the labeling or packaging as to render it likely to be
23 read and understood by an ordinary individual under customary conditions of use or purchase. In
24 addition, if the Product Warning is displayed on the product container or labeling, the warning shall be
25 at least the same size as the largest of any other health or safety warnings on the container or labeling,
26 and the word “warning” shall be in all capital letters.

1 **3.5.4 Internet Sales**

2 **(a)** For internet sales by GNC to a California consumer of the Product, the
3 Product Warning set forth in Section 3.5.3 above shall be displayed in the same type size as the
4 surrounding, non-heading text, either: (a) on the same screen view as the order form for the Product; (b)
5 on the same screen view as the price for the Product; or (c) in a dialogue box which appears and is
6 visible when a California address for delivery is provided by the consumer, so long as the dialogue box
7 appears prior to the completion of the internet sale and requires the consumer to affirmatively confirm
8 receipt of the Product Warning set forth in the dialogue box prior to completing the sale (the Product
9 Warning in the dialogue box shall be displayed conspicuously and in a font size no smaller than any
10 other language appearing on the source webpage). The Product Warning shall be added within one (1)
11 month of the date that testing identifies the need for a Product Warning.

12 **(b)** For sales of the Product to California consumers through the website of an
13 online retail customer of GNC, within 60 days of the Effective Date, GNC shall send by first class mail
14 or overnight delivery a letter instructing the online retail customer to provide warning in the same
15 manner as required under subsection 3.5.4(a). The letter shall state that failure to provide these
16 warnings may result in liability for the online retailer. In the letter, GNC shall request that the online
17 retail customer respond with a written acknowledgement that it will comply with the letter's
18 instructions. If GNC complies with the requirements of this subsection 3.5.4(b), GNC shall not be found
19 to have violated this Consent Judgment where an online retail customer fails to provide the warnings
20 required under this subsection 3.5.4(b).

21 **3.5.5 Mail-Order Sales:** For any mail-order sales by GNC to a consumer in
22 California, the Product Warning required under this Consent Judgment, as set forth in Section 3.5.3(a),
23 shall also be included in the mail-order catalogue, either on the same page as any order form or on the
24 same page upon which the Product's price is listed, in the same type size as the surrounding, non-
25 heading text, and shall identify the product requiring a warning. If a warning is necessary pursuant to
26 Sections 3.1 and 3.2 above, the Product Warning shall be added in the first print run of the mail-order
27 catalogue that occurs following testing that establishes the need for a Product Warning or within three
28 (3) months, whichever occurs first.

1 **3.6** Any changes to the language or format of the warnings required under Section 3.5 shall
2 be made only after Court approval and following written notice to AYS and to the Attorney General.

3 **3.7** At least sixty (60) days before any discontinuance of any Product Warnings that GNC has
4 issued pursuant to this Consent Judgment, GNC shall conduct the testing required to demonstrate that
5 the Product conforms to Sections 3.1 and 3.2, using the analytical methods set forth in Section 2. If
6 GNC intends to discontinue a warning, it shall promptly notify AYS no later than twenty-one (21) days
7 prior to discontinuing the warning. This Section 3.7 shall not apply if the Product is discontinued.

8 **4. MONETARY RELIEF**

9 **4.1** Within fifteen (15) days of the Effective Date, GNC shall pay \$46,000 as reimbursement
10 for AYS's attorneys' fees, investigative costs, and other reasonable litigation costs and expenses.

11 **4.2** Within fifteen (15) days of the Effective Date, GNC shall pay \$12,000 as a civil penalty
12 pursuant to Health and Safety Code section 25249.7(b). AYS shall remit 75% of this amount to the
13 State of California pursuant to Health and Safety Code section 25249.12(b). GNC shall have no liability
14 if payments to the State of California are not made by AYS.

15 **4.3** Additional Settlement Payments: Additionally, within fifteen (15) days of the Effective
16 Date, GNC shall pay \$12,000 as an Additional Settlement Payment in lieu of additional civil penalties,
17 with this amount to be used by AYS for grants to California non-profit organizations by the AYS
18 Environmental Enforcement Fund. These funds shall be used to reduce or remediate exposures to toxic
19 chemicals and to increase consumer, worker, and community awareness of the health hazards posed by
20 toxic chemicals in California. For purposes of grantmaking, in deciding among grantee proposals, the
21 AYS Board of Directors ("Board") takes into consideration a number of important factors, including: (1)
22 the nexus between the harm done in the underlying case and the grant program work; (2) the potential
23 for toxics reduction, prevention, remediation, or education benefits to California citizens from the
24 proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources
25 available to it for its project; and (4) the Board's assessment of the grantee's chances for success in its
26 program work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS's
27 mission statement, articles of incorporation, bylaws, and applicable state and federal laws and
28 regulations.

1 4.4 AYS shall maintain adequate records to document that the Additional Settlement
2 Payment funds are spent in the way described in Section 4.3. AYS will require entities receiving grants
3 from these funds to provide AYS with documentation accounting for how the funds are spent.

4 4.5 Within thirty (30) days of a request by the Attorney General, AYS shall provide to the
5 Attorney General all documentation demonstrating how the Additional Settlement Payment funds have
6 been spent.

7 4.6 GNC shall make these payments with a check made payable to Shute, Mihaly &
8 Weinberger LLP and delivered to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street,
9 San Francisco, CA 94102.

10 4.7 Except as provided in Section 11, the payment made pursuant to this Section 4 shall be
11 the only monetary obligation of GNC with respect to this Consent Judgment, including as to any fees,
12 costs, or expenses AYS has incurred in relation to this Action.

13 **5. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(f)**

14 AYS agrees to comply with the reporting requirements referenced in California Health and
15 Safety Code section 25249.7(f). Pursuant to the regulations promulgated under that section, AYS shall
16 present this Consent Judgment to the California Attorney General's Office within five (5) days after
17 receipt of all necessary signatures. The Parties acknowledge that, pursuant to Health and Safety Code
18 section 25249.7, a noticed motion must be filed to obtain judicial approval of the Consent Judgment.
19 Accordingly, a motion for approval of the Consent Judgment shall be prepared and filed by AYS within
20 a reasonable period of time after the date this Consent Judgment is signed by all Parties, and GNC
21 agrees to support the motion.

22 **6. MODIFICATION OF SETTLEMENT**

23 This Consent Judgment may be modified by: (1) written agreement among the Parties and upon
24 entry of a modified Consent Judgment by the Court thereon, or (2) motion of AYS or GNC as provided
25 by law and upon entry of a modified Consent Judgment by the Court thereon. All Parties and the
26 California Attorney General's Office shall be served with notice of any proposed modification to this
27 Consent Judgment at least forty-five (45) days in advance of its consideration by the Court.

1 **7. APPLICATION OF CONSENT JUDGMENT**

2 This Consent Judgment shall apply to and be binding upon AYS and GNC, their respective
3 officers, directors, and shareholders and the predecessors, successors, or assigns of each of them.

4 **8. RELEASES**

5 **8.1** This Consent Judgment is a full, final, and binding resolution between AYS, on behalf of
6 itself and in the public interest, and GNC of any alleged violation of Proposition 65 for failure to provide
7 Proposition 65 warnings of exposure to lead and cadmium in the Product. AYS, on behalf of itself, its
8 agents, officers, representatives, attorneys, successors, and assignees, and on behalf of the general public
9 in the public interest, hereby waives all rights to institute or participate in (directly or indirectly) any
10 form of legal action and releases and discharges: (a) GNC and its parent companies, subsidiaries,
11 affiliates, and divisions; (b) each of their vendors, packagers, and contractors; (c) each of the
12 distributors, wholesalers, retailers, users, and packagers of the persons and entities described in (a) and
13 (b); and (d) each of the respective officers, directors, shareholders, employees, and agents of the persons
14 and entities described in (a) through (c) (the persons and entities identified in (a), (b), (c), and (d),
15 including the predecessors, successors, and assigns of any of them, are collectively referred to as the
16 “Released Parties”) from any and all claims, actions, causes of action, suits, demands, liabilities,
17 damages, penalties, fees (including but not limited to investigation fees, attorneys’ fees, and expert fees),
18 costs, and expenses (collectively, “Claims”) as to any alleged violation of Proposition 65 arising from
19 the failure to provide Proposition 65 warnings regarding alleged exposures to lead and cadmium in the
20 Product manufactured, distributed, or sold before the Effective Date.

21 **8.2 Defendant’s Waiver and Release of Plaintiff:** Defendant, on behalf of itself, its agents,
22 officers, representatives, attorneys, successors, and assignees, and all Released Parties set forth above,
23 hereby releases Plaintiff from and waives any claims against Plaintiff, its officers, directors,
24 shareholders, employees, agents, successors, and assigns for injunctive relief or damages, penalties,
25 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or
26 any other sum incurred or claimed or which could have been claimed for matters related to the Original
27 Notice or Complaint.

1 **8.3** Compliance with the terms of this Consent Judgment shall be deemed to constitute
2 compliance by any Released Party with Proposition 65 regarding alleged exposures to lead and cadmium
3 in the Product.

4 **8.4** Nothing in this Section 8 shall affect or limit any Party's right to seek to enforce the
5 terms of this Consent Judgment.

6 **9. RETENTION OF JURISDICTION**

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

8 **10. COURT APPROVAL**

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

11 **11. ENFORCEMENT**

12 In the event that a dispute arises with respect to any provisions of this Consent Judgment, the
13 Parties shall meet and confer within thirty (30) days of receiving written notice of the alleged violation
14 from another Party. In the event that the Parties are unable to resolve their dispute through the meet and
15 confer process, this Consent Judgment may be enforced using any available provision of law. The
16 prevailing Party in any dispute regarding compliance with the terms of this Consent Judgment, may seek
17 any fines, costs, penalties, or remedies provided by law for failure to comply with California Health and
18 Safety Code sections 25249.5 *et seq.* A prevailing Party in such a dispute regarding compliance with the
19 terms of this Consent Judgment is entitled to seek recovery of its reasonable attorneys' fees and costs
20 incurred in any such motion or proceeding pursuant to the provisions of Code of Civil Procedure section
21 1021.5. Notwithstanding any language to the contrary in Sections 2.1, 2.4, or otherwise herein, AYS
22 may disclose GNC's test results in a court filing in support of any motion to enforce this Consent
23 Judgment provided that AYS first provides GNC an opportunity to make a motion for leave to seal such
24 data pursuant to a protective order.

25 **11.1** In the event that GNC misses any deadline required under this Consent Judgment for the
26 submission of reports, testing, or of any other notifications to AYS required under the Consent
27 Judgment, GNC shall nonetheless be deemed to be in compliance with such a deadline if it submits the
28

1 required information or notification to AYS within fourteen (14) days of discovering the missed
2 deadline.

3 **12. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the State of California.

5 **13. EXCHANGE IN COUNTERPARTS**

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

9 **14. NOTICES**

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

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

16 Danielle Fugere
17 President
18 As You Sow
19 1611 Telegraph Avenue, Suite 1450
20 Oakland, CA 94612

21 and

22 Ellison Folk
23 Shute, Mihaly & Weinberger LLP
24 396 Hayes Street
25 San Francisco, CA 94102

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

27 General Nutrition Corporation – Legal Dept.
28 Attn: Gary R. Kelly 300 Sixth Avenue
Pittsburgh, PA 15222

and

Anthony Cortez
Greenberg Traurig, LLP
1201 K Street, Suite 1100

1 Sacramento, CA 95814

2 **15. SEVERABILITY**

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

6 **16. ENTIRE AGREEMENT**

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

13 **17. AUTHORITY**

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

17
18 Dated: 5/31/16

AS YOU SOW

19
20 By: 

Danielle Fugere
President

GENERAL NUTRITION CORPORATION

21
22
23 Dated: 5/20/2016

24 By: 

James M. Sander
Chief Legal Officer and Secretary

1 In accordance with the agreement of Plaintiff and Defendant,

2 **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED.**

3 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
4 violates the provisions of this Consent Judgment, the Court retains jurisdiction of this matter.

5 DATED: _____, 2016

6
7 _____
8 Judge of the Superior Court

9 774571.1