

1 ANDREW L. PACKARD (State Bar No. 168690)
ERIC WILDGRUBE (State Bar No. 130734)
2 KATHARINE ESSICK (State Bar No. 219426)
Law Offices of Andrew L. Packard
3 294 Page Street
San Francisco, CA 94102
4 Tel. (415) 431-2970
5 Fax. (415) 431-0410

6 Attorneys for Plaintiff
7 AS YOU SOW

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 CITY AND COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION
11

12 AS YOU SOW, a non-profit corporation,

) Case No.: 409222

13)
14 Plaintiff,

) **NOTICE OF MOTION AND MOTION TO**
) **APPROVE PROPOSITION 65**
) **SETTLEMENT AND FOR ENTRY OF**
) **CONSENT JUDGMENT**

15 vs.

16 BRION HERBS CORPORATION, SUN TEN
LABORATORIES, INC., and DOES 1-20,

) Date: June 2, 2003
) Time: 9:30 a.m.
) Dept.: 302

17 Defendants.
18)
19)
20)

21
22 TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:


23 On June 2, 2003, at 9:30 a.m. or as soon thereafter as the matter may be heard, in
24 Department 302 of the above-entitled court located at 400 McAllister Street, San Francisco,
25 California. Plaintiff AS YOU SOW will move this Court for approval of a settlement as to
26

1 Defendants BRION HERBS CORPORATION and SUN TEN LABORATORIES, INC. and for
2 entry of the settlement as a consent judgment.

3 This motion will be based on this Notice, Memorandum of Points and Authorities, and
4 Declaration of Andrew L. Packard filed and served herewith, as well as records and file herein,
5 and any such evidence as may be presented at the hearing of this motion.

7 DATED: April 18, 2003

LAW OFFICES OF ANDREW L. PACKARD

8
9
10 
11 Andrew L. Packard
12 Attorneys for Plaintiff
13 AS YOU SOW

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 ANDREW L. PACKARD (State Bar No. 168690)
ERIC WILDGRUBE (State Bar No. 130734)
2 KATHARINE ESSICK (State Bar No. 219426)
Law Offices of Andrew L. Packard
3 294 Page Street
San Francisco, CA 94102
4 Tel. (415) 431-2970
Fax. (415) 431-0410

ENDORSED
FILED
San Francisco County Superior Court

JUN 2 2003

5
6 Attorneys for Plaintiff
AS YOU SOW

GORDON PARK-LI, Clerk
BY: JOCELYN C. ROQUE
Deputy Clerk

7
8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO – UNLIMITED JURISDICTION

10
11 AS YOU SOW, a non-profit corporation,
12 Plaintiff,

CASE NO. 409222

13 vs.

**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANTS BRION HERBS
CORPORATION AND SUN TEN
LABORATORIES**

14 BRION HERBS CORPORATION, SUN TEN
15 LABORATORIES, INC., and DOES 1-20,
16 Defendants.

17 This Consent Judgment is entered into by and between AS YOU SOW, a non-profit
18 organization (“Plaintiff”), and SUN TEN LABORATORIES, INC., AND BRION HERBS
19 CORPORATION, both of which are California corporations (collectively, “Defendants”), to
20 resolve all claims raised in the Complaint filed in the above-captioned action. This Consent
21 Judgment shall be effective upon entry. Plaintiff and Defendants (collectively, “the Parties”)
22 agree to the terms and conditions set forth below.

23
24 **1. INTRODUCTION**

25 1.1 AYS is a non-profit foundation dedicated to, among other causes, the protection of
26 the environment, the promotion of human health, the improvement of worker and consumer
27 rights, environmental education, and corporate accountability. AYS is based in San Francisco,
28 California and incorporated under the laws of the State of California.

[PROPOSED] CONSENT JUDGMENT

0048

FILED
ANDREW L. PACKARD
294 PAGE STREET SAN FRANCISCO CALIFORNIA 94102
TEL 415-431-2970 FAX 415-431-0410

DEW
ANDREW L. PACKARD
233 FAUCI STREET SAN FRANCISCO CALIFORNIA 94102
TEL. 415-441-2970 FAX 415-441-0410

1 **1.2** Brion Herbs Corporation and Sun Ten Laboratories, Inc., are California
2 corporations that import, manufacture, package, distribute or sell in California certain herbs and
3 herbal products, traditional patent medicines, bulk herbs, infusions, extracted powders, tea pills,
4 traditional pills, patent formulas, teas, bulk teas, liquid herbal extracts, capsules, tablets, plasters
5 and/or ointments (referred to collectively hereinafter as the "Products"), all of which allegedly
6 contain chemicals regulated by the State of California as known to cause cancer and/or
7 reproductive toxicity pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986
8 ("Proposition 65"), California Health and Safety Code §25249.5 et seq.; Title 22, California Code
9 of Regulations, §12000 et seq.

10 **1.3** The names of each of the Products covered by this Consent Judgment are set forth
11 in Exhibit A hereto (any items not designated on Exhibit A are not covered by the injunctive
12 provisions or the release of liability set forth herein).

13 **1.4** The Products have been imported, manufactured, packaged, distributed or sold by
14 Defendants for use in California since at least June 17, 1998.

15 **1.5** On February 27, 1987, the State of California officially listed the chemical lead as
16 a chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code
17 §25249.8.

18 **1.6** On October 1, 1992, the State of California officially listed the chemicals lead and
19 lead compounds as chemicals known to cause cancer, pursuant to California Health and Safety
20 Code §25249.8.

21 **1.7** On May 1, 1997, the State of California officially listed the chemical arsenic as a
22 chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code
23 §25249.8.

24 **1.8** On February 27, 1987, the State of California officially listed the chemical arsenic
25 as a chemical known to cause cancer, pursuant to California Health and Safety Code §25249.8.

26 **1.9** On July 1, 1990, the State of California officially listed the chemical mercury and
27 mercury compounds as chemicals known to cause reproductive toxicity, pursuant to California
28 Health and Safety Code §25249.8.

1.10 On May 1, 1997, the State of California officially listed the chemical cadmium as a chemical known to cause reproductive toxicity, pursuant to California Health and Safety Code § 25249.8.

1.11 On October 1, 1987, the State of California officially listed the chemicals cadmium and cadmium compounds as chemicals known to cause cancer, pursuant to California Health and Safety Code § 25249.

1.12 On April 27, 2001, AYS served Brion Corporation, and each of the appropriate public enforcement agencies with documents entitled "60-Day Notice" that alleged that Brion Corporation was in violation of Proposition 65 for failing to warn the purchasers and individuals using the Products that the use of the Products exposes them to certain chemicals known to the State of California to cause cancer and/or reproductive toxicity (the "First Notice"). AYS then filed an action entitled, *As You Sow v. Brion Corporation, et al.* on July 20, 2001 (the "First Action"). The Complaint alleged violations of Health & Safety Code §25249.6 *et seq.* (commonly referred to as "Proposition 65") as well as violations of the Business & Professions Code §17200 *et seq.* (prohibiting unlawful and unfair competition). Counsel for Brion Corporation informally asserted that it had fewer than ten employees and did not market or otherwise distribute the products and was thus exempt from Proposition 65.

1.13 On October 1, 2001, AYS issued additional Notices of Violation against Defendants (the "Second" and "Third" Notices). The Second and Third Notices expired on or about December 5, 2001. Defendants Brion Herbs Corporation and Sun Ten Laboratories Inc., were then named as Doe Defendants in the First Action on January 11, 2002. Copies of the Second and Third Notices are attached hereto as Exhibit B.

1.14 Defendants stipulate for the purpose of this Consent Judgment that the Second and Third Notices are adequate to comply with Title 22, California Code of Regulations, § 12903.

1.15 Brion Corporation demurred to the Complaint in the First Action on the ground that the First Notice failed to satisfy the applicable notice regulations. The demurrer was overruled on or about December 14, 2001.

1000 RECEIVED
ANDREW L. FACERD
301 EAST STREET SAN FRANCISCO CALIFORNIA 94102
TEL 415-431-2970 FAX 415-431-0410

1 **1.16** Defendants then moved to strike the Complaint in the First Action on jurisdictional
2 grounds, asserting that because AYS had sued the Defendants as Does at the time of the filing of
3 the First Action, and not six months later, when Defendants were formally named as Does in the
4 First Action, Defendants were sued prior to the expiration of a valid 60-day notice. The Court
5 granted the motion on or about April 16, 2002.

6 **1.17** AYS then dismissed the First Action against Defendants and Brion Corporation
7 and filed this action, Case Number 409222, against Defendants Brion Herbs Corporation and Sun
8 Ten Laboratories Inc., alleging violations of Proposition 65, The Sherman Food, Drug and
9 Cosmetic Law ("Sherman Law") and California Business and Professions Code §17200 et seq.
10 and §17500 et seq. on June 17, 2002 (the "Second Action"). A true and correct copy of the
11 Complaint in the Second Action is attached hereto as Exhibit C. The Second Action raises the
12 same causes of action against Defendants as those raised against Defendants in the First Action.

13 **1.18** The parties have engaged in extensive discovery over the past six months in
14 preparation for a May 12, 2003 trial date. On February 4, 2003, Defendants prevailed on their
15 motion to compel AYS to produce supplemental responses to Defendants' discovery. On March
16 7, 2003, AYS prevailed on its motion to compel Defendants to produce supplemental responses
17 and documents as to all of AYS' discovery to date.

18 **1.19** The Action was brought by AYS in the public interest at least sixty (60) days after
19 AYS provided notice of the alleged Proposition 65 violations to Defendants and the appropriate
20 public enforcement agencies and none of the public enforcement agencies had commenced and
21 begun diligently prosecuting an action against Defendants for such violations.

22 **1.20** For purposes of this Consent Judgment, the Parties stipulate that this Court has
23 subject matter jurisdiction over the allegations contained in the Complaint. Defendants do not
24 contest the exercise of jurisdiction by this Court to enter this Consent Judgment as a full and final
25 resolution of all causes of action pled in the Complaint.

26 **1.21** The Parties enter into this Consent Judgment to settle disputed claims between
27 them and to avoid prolonged litigation. By execution of this Consent Judgment, Defendants do
28 not admit any violations of Proposition 65, the Sherman Law, or the Business and Professions

1 Code, or any other law or standard applicable to warning or disclosure concerning the
2 manufacture, distribution and/or sale of the Products. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendants of any fact, issue of law, or violation of law, nor shall
4 compliance with this Consent Judgment constitute or be construed as an admission by Defendants
5 of any fact, issue of law, or violation of law.

6 1.22 Nothing in this Consent Judgment shall prejudice, waive or impair any right,
7 remedy or defense the Parties may have in any other or further legal proceeding. This paragraph
8 shall not diminish or otherwise affect the obligations, responsibilities, and duties of the Parties
9 under this Consent Judgment.

10 **2. INJUNCTIVE PROVISIONS**

11 2.1 **Provision of Proposition 65 Warnings On The Products On Or Before**
12 **January 31, 2004.** On or before January 31, 2004, Defendants shall cease and no longer ship (or
13 cause to be shipped) for sale or use in California any of the Products (as defined and except as
14 provided in Exhibit A per Section 1.3, above) unless each individual unit of such Product bears
15 the following warning statement on its individual unit label packaging:

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

19 The warning statement shall be prominent and displayed on the unit packaging of each Product
20 with such conspicuousness, as compared with other words, statements, or designs, so as to render
21 it likely to be read and understood by an ordinary individual purchasing or using the Product, and
22 shall be printed in a font size equal to or larger than the font size used to transmit any other health
23 or safety warnings on the Product container or labeling and in a comparable location in terms of
24 visibility. The Parties agree that, in the event that Defendants elect to invoke the arbitration
25 option set forth in Paragraph 3 below on or before July 15, 2003, and in the further event that
26 such proceeding results in the Arbitrator's determination that no warnings, or alternative
27 warnings, are required to be provided for any of the Products, then and only to such extent as the
28 Arbitrator may first determine, Defendants shall not be required to provide the warnings

1 described in this Paragraph as to such Products. The Parties further agree that, in the event that
2 Defendants are able to demonstrate, pursuant to the procedure described in Paragraph 10
3 hereinbelow, that no warnings are warranted, or that alternative warnings are warranted, for any
4 Product(s) then the Parties and their experts shall work together in good faith to ensure that
5 warnings are not provided where adequate testing demonstrates that none are required by law. In
6 the event that the Parties or the Court determine pursuant to Paragraph 10 that a given Product
7 requires *only* a health hazard warning for cancer and not for reproductive toxicity, the warning
8 may state, in the alternative:

9
10 **WARNING: The use of this product will expose you to chemicals known to the State
of California to cause cancer.**

11
12 Similarly, in the event that the Parties or the Court determine pursuant to Paragraph 10 that a
13 given Product requires *only* a health hazard warning for reproductive toxicity and not for cancer,
14 the warning may state, in the alternative:

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

16
17 **2.2 Provision of Additional Information On Or Before January 31, 2004 For**
18 **Products Sold To Intermediaries/Non-End Users.** On or before January 31, 2004 Defendants
19 shall send a Notification Letter to each of their customers who have purchased any of the
20 Products in a form other than in its individual unit packaging (for example, in bulk) in the year
21 preceding the entry of this Consent Judgment and who Defendants know or have reason to know
22 repackage the Products in any fashion (such customers are hereafter referred to as
23 “Intermediaries/Non-End Users”). This Notification Letter shall notify the Intermediaries/Non-
24 End Users regarding the warning requirements of Proposition 65 as they apply to each of the
25 Products, and instruct the Intermediaries/Non-End Users as to how they may comply with
26 Proposition 65 as it applies to each of the Products. The verbatim language of the Notification
27 Letter is attached hereto as Exhibit D. The Parties agree that, in the event that Defendants elect to
28

1 invoke the arbitration option set forth in Paragraph 3 below on or before July 15, 2003, and in the
2 further event that such proceeding results in the Arbitrator's determination that no warnings, or
3 alternative warnings, are required to be provided for any of the Products, then and only to such
4 extent as the Arbitrator may first determine, Defendants shall not be required to provide the
5 Notification Letter described in this Paragraph as to such Products. The Parties further agree that,
6 in the event that Defendants are able to demonstrate, pursuant to the procedure described in
7 Paragraph 10 hereinbelow, that no warnings are warranted, or that alternative warnings are
8 warranted, for any Product(s) then the Parties and their experts shall work together in good faith
9 to ensure that Notification Letters are not provided where adequate testing demonstrates that no
10 warnings are required by law. A verbatim copy of any Notification Letter sent in accordance with
11 this Section shall also be mailed to AYS simultaneously with the mailing to Intermediaries/Non-
12 End Users.

13
14 **3. DEFENDANTS' OPTION TO PURSUE BINDING ARBITRATION**
15 **CONCERNING APPLICABILITY OF "NATURALLY OCCURRING"**
16 **EXEMPTION FROM WARNING REQUIREMENT PURSUANT TO 22**
17 **CALIFORNIA CODE OF REGULATIONS SECTION 12501.**

18 **3.1 Agreement To Binding Arbitration.** The Parties agree that the Defendants may,
19 in their sole discretion, elect to submit to binding arbitration the determination of whether the
20 "Naturally Occurring" exemption from the warning requirement (as set forth in 22 C.C.R. Section
21 12501) is applicable to the Products. If Defendants decide to submit this question to arbitration,
22 they shall exercise their right to do so by so notifying AYS by July 15, 2003. The arbitration
23 shall then proceed as herein provided.

24 **3.2 Arbitration Schedule.** On or before September 1, 2003, Defendants shall submit
25 their opening brief and supporting papers to the Honorable Harry W. Low (Ret.) and to AYS. On
26 or before November 1, 2003, AYS shall submit its opposition brief and supporting papers.
27 Defendants shall have an option to file a reply brief on or before December 1, 2003. Opening and
28 opposition briefs, exclusive of attachments or declarations, shall be limited to 30 pages; the reply
brief, if any, shall be limited to ten pages. The arbitration hearing shall take place before Justice

100 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94102
TEL 415 431 2970 FAX 415 431 0410

1 Low in San Francisco over a 1 – 2 day period during the week of December 15, 2003 and shall be
2 conducted in accordance with Rule 22 of the *Jams Comprehensive Arbitration Rules and*
3 *Procedures, as Revised August 2002* (in the event that Justice Low becomes unable to act as
4 Arbitrator, the parties shall promptly meet and confer to decide on another arbitrator within ten
5 days and in accordance with Rule 15 of the *Jams Comprehensive Arbitration Rules and*
6 *Procedures, as Revised August 2002*). AYS represents and warrants that it has provided all test
7 results in its possession, custody or control for the Products to Defendants; Defendants represent
8 and warrant that they have never tested the Products specifically for lead, arsenic, mercury or
9 cadmium and therefore have no test results in their possession, custody or control. The Parties
10 agree to mutually exchange all test results concerning the Products generated after mutual
11 execution of this Agreement within five days of receipt of such test results. The Arbitrator’s
12 order determining whether and to what extent the “Naturally Occurring” exemption from the
13 warning requirement is applicable to the Products shall be rendered on or before January 1, 2004.

14 **3.3 Costs of the Arbitration Proceeding.** Defendants shall advance all required
15 JAMS fees for the arbitration.

16 **3.4 Arbitration Procedure.** To save costs and time, the parties agree that there shall
17 be no discovery or expert depositions associated with the arbitration proceeding; however, all
18 experts submitting declarations shall be required to either appear at the arbitration proceeding or
19 submit to a video-taped deposition at the cost of the Party submitting such declaration. The
20 arbitrator’s final order as to all issues shall be submitted for confirmation by the Court in
21 accordance with Code of Civil Procedure Section 1285.

22 **3.5 Arbitration Outcome.** In the event and to the extent that the Arbitrator decides
23 that the “Naturally Occurring” exemption from the warning requirement (as set forth in 22 C.C.R.
24 Section 12501) is applicable to the Products, Defendants’ obligations to provide warnings or send
25 notifications to Intermediaries/Non-End Users as set forth in Paragraph 2 herein, and the extent, if
26 any, to which Defendants are obligated to remit all or part of the fourth payment set forth in
27 Paragraph 6 herein (such amount, if any, up to \$50,000, to be determined in the sole discretion of
28

1000 11th St
Andrew L. Packard
301 Folsom Street San Francisco California 94107
Tel 415 401-0970 Fax 415 431-0110

1 the Arbitrator, and to be subject to the same limitations on the use of funds as provided for in
2 Section 4.3), shall not apply. In the event and to the extent that Defendants prevail in the
3 arbitration, AYS shall bear up to one half of the costs of the arbitration proceeding itself, as
4 determined by the arbitrator based upon the outcome of the arbitration proceeding. In the event
5 and to the extent that AYS prevails in the arbitration, Defendants shall pay AYS' reasonable
6 investigative, expert and attorneys' fees and costs associated with the arbitration, as determined
7 by the Arbitrator based upon the outcome of the arbitration proceeding, and, if requested by the
8 Arbitrator, based upon the Arbitrators' review of AYS' and/or its experts' time sheets and cost
9 summaries. Notwithstanding the above, in no event shall the Arbitrator award AYS investigative
10 and/or expert fees and costs in an amount exceeding \$25,000.

11 **4. CIVIL PENALTIES AND CHARITABLE DONATIONS**

12 **4.1 Stipulated Civil Penalties For Future Violations of This Agreement.**

13 Proposition 65 provides for penalties of up to \$2500, per violation, per day, pursuant to Health &
14 Safety Code §25249.7(b). The parties stipulate to a civil penalty in the amount of \$100 per
15 individual unit item sold in violation of Section 2 of this Agreement, subject to a satisfactory
16 evidentiary showing by Plaintiff of such violation(s) upon a duly noticed motion in the San
17 Francisco Superior Court. AYS shall remit 75% of this amount to the State of California pursuant
18 to Health & Safety Code §25192.

19 **4.2 Civil Penalties.** Defendants shall pay a civil penalty in the amount of \$5,000 to
20 AYS, pursuant to Health & Safety Code §25249.7(b), and in conformity with the payment
21 schedule set forth in Paragraph 6 below. AYS shall remit 75% of this amount to the State of
22 California pursuant to Health & Safety Code §25192.

23 **4.3 Payment in Lieu of Additional Civil Penalties.** Defendants shall make a
24 payment in lieu of additional penalties in the amount of \$200,000 pursuant to the payment
25 schedule set forth in Paragraph 6 herein and subject to the conditions set forth in Paragraph 3
26 herein. To the extent practicable, all funds paid pursuant to this Paragraph 4.3 shall be used to
27 study and/or to increase consumer, worker, and community awareness (specifically in California
28

1 if practicable) of safety issues concerning herbal products (specifically Traditional Chinese
2 Medicines if practicable), including without limitation any health hazards posed by and/or the
3 reduction of exposures to heavy metals contained in such products. One half of these funds shall
4 be forwarded by AYS to California non-profit groups or California colleges or universities, to be
5 determined by the Parties by meeting and conferring within the 30 days following the date of
6 mutual execution of this agreement. In the event that the Parties are unable to agree upon
7 appropriate grantees within this time period, the Parties shall submit the matter to Justice Low for
8 resolution. The other half of these funds shall be forwarded by AYS to (a) California non-profit
9 groups, and (b) the AYS Foundation Environmental Enforcement Fund, in both instances to be
10 subject to the same limitations on use as described above. In deciding among grantees, the As
11 You Sow Board of Directors ("Board") shall take into consideration the following factors: (1) the
12 nexus between the harm allegedly done in the underlying case(s), and the grant program work; (2)
13 the potential for toxics reduction, prevention, remediation or education benefits to California
14 citizens from the proposal; (3) the budget requirements of the proposed grantee and the alternate
15 funding sources available to it for its project; and (4) the Board's assessment of the grantee's
16 chances for success in its program work. No funds paid pursuant to this subsection shall be
17 construed as a credit against future claims against Defendants, nor shall any funds paid pursuant
18 to this subsection be used by AYS to pay attorneys' fees.

19 **5. REIMBURSEMENT OF FEES AND COSTS**

20 **5.1 Reimbursement of Plaintiff's Investigative, Expert and Legal Fees and Costs.**

21 Defendants shall reimburse AYS in the amount of \$140,000 for AYS' reasonable investigative,
22 expert, and legal fees and costs incurred as a result of investigating, bringing this matter to
23 Defendants' attention, and negotiating a settlement in the public interest.

24 **6. PAYMENT OBLIGATIONS**

25 Pursuant to subsections 4.2, 4.3 and 5.1, and subject to the conditions set forth in
26 Paragraph 3 herein. Defendants agree to remit the amount of \$345,000 to AYS, payable to "As
27 You Sow" (Employer Identification Number 94-3169008). This payment shall be remitted
28 pursuant to the following terms and conditions:(a) within ten days after the mutual execution date

1 of this Consent Judgment by the Parties, Defendants shall remit to AYS the amount of \$75,000 to
2 be held in escrow by AYS until entry of this Consent Judgment; (b) within ten days of the entry
3 of this Consent Judgment, Defendants shall remit to AYS a second payment in the amount of
4 \$100,000; (c) within sixty days of the entry of this Consent Judgment, Defendants shall remit to
5 AYS a third payment in the amount of \$120,000; and (d) by January 31, 2004, and subject to the
6 conditions set forth in Paragraph 3 herein, Defendants shall remit to AYS a fourth payment in the
7 amount of \$50,000. In the event that any payment obligation under this Consent Judgment is
8 more than three days late, Defendants shall be deemed to be in default of their obligations under
9 this Consent Judgment. AYS shall provide written notice to Defendants of any default. If
10 Defendants fail to remedy their default within two (2) business days of notice, then all future
11 payments shall become immediately due and payable with interest accruing on such unpaid
12 balance at the prevailing federal funds rate. All payments are conditioned upon approval of this
13 Consent Judgment by the Court per Section 8 below. If the Court does not approve the Consent
14 Judgment per Section 8 below, AYS shall return all monies paid by Defendants within ten (10)
15 business days of the Court's refusal to approve the Consent Judgment without change (unless
16 otherwise so stipulated by the Parties per Section 8) at the hearing on the motion to approve this
17 Consent Judgment.

18 **7. RELEASE OF LIABILITY**

19 **7.1 Release of Liability of Defendants.** AYS, on its own behalf and on behalf of the
20 general public, waives all rights to institute or participate in, directly or indirectly, any form of
21 legal action against Defendants, their officers, directors, employees, agents, attorneys,
22 representatives, parents, subsidiaries, affiliates, divisions, subdivisions and customers, under
23 Proposition 65, the Sherman Law, the Business & Professions Code or any other law based upon
24 Defendants' alleged failure to provide warnings regarding alleged exposure to lead, lead
25 compounds, mercury, mercury compounds, arsenic, cadmium and/or cadmium compounds, the
26 alleged manufacture and/or distribution of such Products so as to cause and/or increase the risk of
27 health risks to individuals in California, the alleged sale of such Products as medicines and as
28 being pure, safe and beneficial to human health, and the alleged failure to disclose significant

1 toxic hazards to individuals associated with the presence of such chemicals in the Products, as
2 sold by Defendants on or before January 31, 2004.

3 **7.2 Release of Liability of AYS.** Defendants waive all rights to institute any form of
4 legal action against AYS, its officers, directors, employees, agents, attorneys and representatives
5 (the "AYS Releasees") for all actions or statements made or undertaken by the AYS Releasees in
6 the course of seeking enforcement of Proposition 65 or Business & Profession Code §§17200 et
7 seq. against Defendants.

8 **8. CONSENT JUDGMENT**

9 **8.1 Consent Judgment.** Upon execution of this [Proposed] Consent Judgment, and
10 consistent with Health & Safety Code §25249.7(f)(4), Plaintiff shall notice a Motion for Approval
11 & Entry of Consent Judgment in the San Francisco Superior Court. Pursuant to Title 11, Cal.
12 Code of Regs. §3003, this motion shall be served upon all of the parties to the Action and upon
13 the California Attorney General's Office. The Court shall either approve or disapprove of this
14 [Proposed] Consent Judgment in its entirety, without alteration, deletion or amendment, unless
15 otherwise so stipulated by the Parties or their counsel at the hearing on the motion to approve this
16 Consent Judgment. Defendants agree to support the motion to approve this Consent Judgment in
17 full, and shall take all reasonable measures to ensure that it is entered without delay. In the event
18 that the Court fails to approve and order entry of the judgment without any change whatsoever
19 (unless otherwise so stipulated by the Parties), this Consent Judgment shall become null and void
20 upon the election of either Party and upon written notice to all of the Parties to the Action
21 pursuant to the notice provisions herein.

22 **9. SEVERABILITY**

23 **9.1 Severability.** In the event that any of the provisions of this Consent Judgment are
24 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
25 adversely affected.

26 **10. ENFORCEMENT AND MODIFICATION**

27 **10.1 Enforcement.** In the event that a dispute arises with respect to any of the
28

100 MARKET STREET
4TH FLOOR
SAN FRANCISCO, CALIFORNIA 94102
TEL 415-431-7970 FAX 415-431-7910

1 provisions of this Consent Judgment, the Parties shall meet and confer within 10 days after any
2 Party receives written notice of an alleged violation of this Agreement from any other Party. In
3 the event the Parties cannot resolve the dispute, this Consent Judgment may be enforced pursuant
4 to Code of Civil Procedure §664.6 or any other valid provision of law. The prevailing party in
5 any dispute regarding compliance with the terms of this Consent Judgment or any proceeding to
6 modify the terms herein shall be awarded its reasonable fees and costs incurred, in addition to any
7 other relief otherwise ordered by the Court, including but not limited to civil penalties assessed
8 pursuant to subsection 4.1 herein.

9 **10.2 Modification of Judgment - Grounds.** The Parties acknowledge that new
10 toxicological information or exposure assessments concerning hazardous substances are
11 continuously becoming available, and that statutory and regulatory standards applicable to the
12 Products may evolve in the future. Accordingly, the Parties agree that either Party may elect to
13 file a motion pursuant to §664.6 of the California Code of Civil Procedure, and under the
14 conditions set forth below, move the Court for modification of the warning requirement set forth
15 in Section 2 herein on the grounds that they conflict with the applicable law or science concerning
16 the Products.

17 **10.3 Modification of Judgment – Procedure.** In the spirit of cooperation and in the
18 interests of minimizing the investigative, expert and attorneys’ fees and costs associated with
19 such a motion, the Parties agree to meet and confer in good faith as follows. Prior to filing a
20 motion pursuant to subsection 10.2 herein, the Party seeking to modify the judgment shall first
21 provide the non-moving Party and the California Attorney General’s Office with any legal or
22 scientific data upon which the motion would rely. The non-moving party and the California
23 Attorney General’s Office shall be allowed a period of forty-five (45) days to review that data and
24 provide the moving party with its formal written response (the Attorney General’s Office’s failure
25 to respond to this submission shall not be construed in any manner to reflect any particular view,
26 on the part of the Attorney General’s Office, of this Consent Judgment or of the applicable law or
27 science). The Parties shall then meet and confer within ten (10) days of the non-moving party’s
28

RODNEY T. PATEL
ATTORNEY AT LAW
1111 E. 15TH AVE. SUITE 1000
DENVER, COLORADO 80202
TEL 303-733-2970 FAX 303-733-2971

1 written response. If, after meeting and conferring, the moving party elects to proceed with a
2 motion to amend this Consent Judgment, it may do so with proper notice to the other Party and
3 the Attorney General's Office as required under the California Code of Civil Procedure. Such a
4 motion may be accompanied by scientific data, studies, written declarations, live testimony or
5 discovery responses.

6 **10.4 Modification of Judgment – Product Exemption As Additional Grounds.**

7 Defendants shall also be entitled to seek a modification of this Consent Judgment on the
8 additional ground that a Product has been reformulated or otherwise modified or that new
9 information has become available such that Defendants believe in good faith that the Product
10 does not require a warning under Proposition 65 or that an alternative warning (as provided in
11 subsection 2.1) is appropriate. In seeking such a modification of this judgment, the burden shall
12 rest on Defendants to adduce evidence that the modification is warranted as a matter of law.
13 Defendants shall produce, as part of their obligation to meet and confer pursuant to subsection
14 10.3 herein, test results conducted by a state or federal EPA-certified laboratory, or other
15 independent laboratory outside of the United States that is accredited and/or certified by the
16 appropriate government body in the country where it is located, using inductively coupled
17 plasma-mass spectrometry or atomic absorption, or test results conducted by such other
18 laboratory or using such other technology as is acceptable to all Parties hereto, such acceptance
19 not to be unreasonably withheld. Any test results provided under this subsection shall be
20 accompanied by a detailed description of the methods and standards under which the Products
21 were tested. AYS reserves the right to challenge any results so provided on the grounds that the
22 methods and/or standards used were inadequately described, applied incorrectly or are otherwise
23 scientifically invalid for any reason. In the event that Defendants seek such a modification prior
24 to January 31, 2004, if a test result demonstrates on its face that no warning is required or that an
25 alternative warning (as provided in subsection 2.1) is appropriate for a Product, then the warning
26 and notification letter requirements of Paragraph 2 shall be held in abeyance pending the
27 resolution of the process set forth in this Paragraph 10. Except through any arbitration held
28

1 pursuant to Paragraph 3, Defendants shall not seek to modify the warning requirement prior to
2 January 31, 2004, on the ground that a Product is exempt from the warning requirement based on
3 the "Naturally Occurring" defense (as set forth in 22 C.C.R. 12501) prior to the issuance of and
4 except in conformity with any order of the Arbitrator pursuant to Paragraph 3 herein. Any motion
5 under this subsection shall comply with the procedural requirements of subsection 10.3 herein.

6 **11. GOVERNING LAW**

7 **11.1 Governing Law.** The terms of this Agreement shall be governed by the laws of
8 the State of California.

9 **12. NOTICES**

10 **12.1 Notices.** All correspondence and notices required to be provided under this
11 Agreement shall be in writing and shall be sent by first class registered or certified mail addressed
12 as follows:

13 All correspondence to AYS shall be mailed to:

14 Attn: Lawrence E. Fahn, Executive Director
15 As You Sow
16 311 California Street, Suite 510
17 San Francisco, CA 94104

18 With a copy to:

19 Andrew L. Packard
20 The Law Offices of Andrew L. Packard
21 294 Page Street
22 San Francisco, CA 94102

23 All correspondence to Defendants shall be mailed to:

24 Attn: Daniel Hsu, President
25 Brion Herbs Corporation
26 9200 Jeronimo Road
27 Irvine, CA 92618-1905

28 Attn: Christine M. Nakamoto, CEO
29 Sun Ten Laboratories, Inc.
30 9250 Jeronimo Road
31 Irvine, CA 92618-1905

ANDREW L. PACKARD
301 PAGE STREET SAN FRANCISCO CALIFORNIA 94104
TEL 415 431 2970 FAX 415 421 0410

1 With copies to:

2 Thomas R. Gibson
3 Best, Best & Krieger LLP
4 400 Capitol Mall, Suite 1650
5 Sacramento, CA 95814

6 Michael Lee
7 Law Offices of Michael G.W. Lee
8 360 Post Street, 8th Floor
9 San Francisco, CA 94108-4903

10 **13. INTEGRATION AND MODIFICATION**

11 **13.1 Integration & Modification.** This Agreement, together with the Exhibits hereto
12 which are specifically incorporated herein by this reference, constitutes the entire agreement
13 between the Parties relating to the rights and obligations herein granted and assumed, and
14 supersedes all prior agreements and understandings between the Parties. This Agreement may be
15 modified only upon the written agreement of the Parties.

16 **14. COUNTERPARTS**

17 **14.1 Counterparts.** This Agreement may be executed in counterparts, each of which
18 shall be deemed an original, and all of which, when taken together, shall constitute one and the
19 same document.

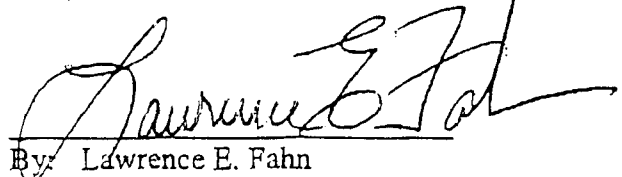
20 **15. AUTHORIZATION**

21 **15.1 Authorization.** The undersigned are authorized to execute this Agreement on
22 behalf of their respective parties and have read, understood, and agree to all of the terms and
23 conditions of this Agreement.

24 **IT IS SO STIPULATED:**

25 DATED: 4/16/03

26 AS YOU SOW

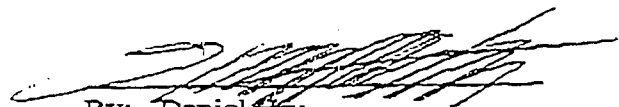
27 

28 By: Lawrence E. Fahn
Executive Director

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

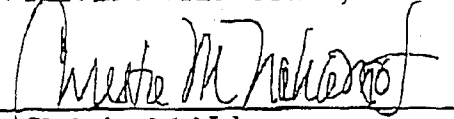
DATED: 4/14/03

BRION HERBS CORPORATION


By: Daniel Hsu
President

DATED: 4/14/03

SUN TEN LABORATORIES, INC.


By: Christine M. Nakamoto
Chief Executive Officer

APPROVED AS TO FORM:

DATED: _____

LAW OFFICES OF ANDREW L. PACKARD

By: Andrew L. Packard
Counsel for Plaintiff As You Sow

DATED: _____

BEST, BEST & KRIEGER
LAW OFFICES OF MICHAEL G.W. LEE

By: _____
Counsel for Defendants

IT IS SO ORDERED:

DATED: _____

Judge of the Superior Court

LAW OFFICES
ANDREW L. PACKARD
294 PASE STEELE SAN FRANCISCO CALIFORNIA 94102
TEL (415) 433-2970 FAX (415) 431-0410

DATED: _____

BRION HERBS CORPORATION

By: Daniel Hsu
President

DATED: _____

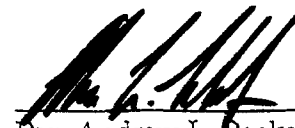
SUN TEN LABORATORIES, INC.

By: Christine M. Nakamoto
Chief Executive Officer

APPROVED AS TO FORM:

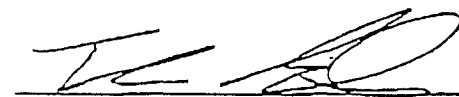
DATED: April 14, 2003

LAW OFFICES OF ANDREW L. PACKARD


By: Andrew L. Packard
Counsel for Plaintiff As You Sow

DATED: 4/14/03

BEST, BEST & KRIEGER
LAW OFFICES OF MICHAEL G.W. LEE


By: _____
Counsel for Defendants

IT IS SO ORDERED:

DATED: 6/2/03


Judge of the Superior Court

RONALD EVANS QUIDACHAY

LAW OFFICES OF
ANDREW L. PACKARD
201 F STREET SAN FRANCISCO CALIFORNIA 94102
TEL: 415 391 2970 FAX: 415 433 6418

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28