

ENDORSED
FILED
San Francisco County Superior Court

FEB 13 2007

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

1 Brian Gaffney, Esq. (CBN 168778)
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3 LAW OFFICES OF BRIAN GAFFNEY
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8 Attorneys for Plaintiff
9 AS YOU SOW

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 (Unlimited Jurisdiction)

13 AS YOU SOW,

CASE NO. CGC-06-457548

14 Plaintiff,

~~[PROPOSED]~~ CONSENT JUDGMENT

15 v.

16 ECKLER INDUSTRIES LLC; ECKLER
17 INDUSTRIES, INC.; SMART CHOICE
18 AUTOMOTIVE GROUP, INC.; and DOES 1
19 through 100 INCLUSIVE,

20 Defendants.
21 _____ /

22 **1. INTRODUCTION**

23 1.1 Plaintiff: Plaintiff As You Sow (“AYS” or “Plaintiff”), is a non-profit foundation
24 organized under California’s Non-Profit Public Benefit Corporation Law. AYS is dedicated to,
25 among other causes, the protection of the environment, the promotion of human health, the
26 improvement of worker and consumer safety, environmental education and corporate accountability.

27 1.2 The Action: On November 1, 2006, Plaintiff filed a complaint in the Superior Court
28 for the City and County of San Francisco (hereafter referred to as the “Action”) charging Eckler
Industries LLC; Eckler Industries, Inc.; and Smart Choice Automotive Group, Inc. (hereinafter
“Eckler” or “Defendants”) with having violated The Safe Drinking Water and Toxic Enforcement
Act of 1986 (“Proposition 65”), Health and Safety Code Section 25249.5 *et. seq.*, by exposing
individuals to Methylene Chloride (Dichloromethane) (a chemical known to the State of California

1 to cause cancer) and Toluene (a chemical known to the State of California to cause birth defects and
2 other reproductive harm), without providing clear and reasonable warnings to such individuals. The
3 alleged violations addressed in the Action were described in Plaintiff's Notice of Intent to Sue dated
4 June 29, 2006 ("Plaintiff's Notice"), which Plaintiff had sent to the Defendants and to public
5 enforcers as required by Health & Safety Code Section 25249.7. The alleged violations at issue in
6 the Action relate to exposure to Methylene Chloride (Dichloromethane) and/or Toluene from Spra
7 Strip ("Spra Strip" or "Covered Products"), which is a paint stripping product that is distributed,
8 marketed and/or sold by Defendants and which contains Methylene Chloride (Dichloromethane)
9 and/or Toluene at levels above the stated Proposition 65 limits.

10 1.3 Jurisdiction: For purposes of this Consent Judgment, the Parties stipulate that the San
11 Francisco Superior Court has jurisdiction over the allegations in the Action and personal jurisdiction
12 over Defendants as to the acts alleged in the Action, that venue is proper in the City and County of
13 San Francisco, that this Court has jurisdiction to enter this Consent Judgment as a resolution of all
14 claims which were alleged in the Action, and that the Court shall retain jurisdiction to implement
15 the Consent Judgment.

16 1.4 No Admissions: For the purpose of avoiding prolonged litigation, the Parties enter
17 into this Consent Judgment as a compromise of disputed claims and none of its provisions shall be
18 construed as an admission by any Party of any fact, finding, issue of law, or violation of law,
19 including Proposition 65, or any other statute, regulation, or common law requirement related to
20 exposure to Methylene Chloride (Dichloromethane) and/or Toluene or other chemicals listed under
21 Proposition 65 from the Covered Products. By executing this Consent Judgment and agreeing to
22 provide the relief and remedies specified herein, Defendants do not admit any violations of
23 Proposition 65, or any other law or legal duty and specifically deny that they have committed any
24 such violations. This Consent Judgment shall not be construed as an admission under Proposition
25 65 for the Covered Products. Defendants maintain that all Covered Products distributed, marketed
26 and/or sold by Defendants in California have at all times been in compliance with all applicable
27 laws. Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or
28 defense that Plaintiff and Defendants may have in any other or in future legal proceedings unrelated

1 to these proceedings. Defendants reserve all of their rights and defenses with regard to any claim by
2 any person under Proposition 65 or otherwise. However, this paragraph shall not diminish or
3 otherwise affect the obligations, responsibilities, waivers, releases, and/or duties provided for under
4 this Consent Judgment.

5 **2. INJUNCTIVE RELIEF**

6 2.1 Definition Of "Covered Products": For purposes of this Consent Judgment, the term
7 "Covered Products" means Spra Strip, a paint stripping product which contains Methylene Chloride
8 (Dichloromethane) and/or Toluene and which is distributed, marketed, and/or sold by Defendants.

9 2.2 Removal From Sale In California: After December 15, 2006, Defendants shall not,
10 by themselves or through others, distribute, market, ship for sale and/or sell in the State of California
11 any Covered Products containing Methylene Chloride (Dichloromethane) and/or Toluene.

12 2.3 Warnings to Past California Customers

13 Defendant will exert best faith reasonable efforts to identify all its customers in California
14 who have already purchased the Covered Products without a warning in the three-year period prior
15 to June 29, 2006, the date of Plaintiff's Notice. Within 60 days of the Effective Date of this Consent
16 Judgment, Defendant will provide the following warning by mail on Defendant's letterhead to each
17 such identified customer:

18 Warning: Our records indicate that you purchased the paint stripping product, Spra Strip,
19 distributed, marketed and/or sold by Eckler Industries, Inc. Spra Strip contains Methylene
20 Chloride (Dichloromethane) a chemical known to the State of California to cause cancer, and
21 contains Toulene a chemical known to the State of California to cause birth defects, and
22 other reproductive harm. Avoid inhalation and other direct contact with hands or body.
23 Wash your hands immediately after spraying or otherwise using.

24 Within 120 days of the Effective Date of this Consent Judgment, Defendant will notify Plaintiff of
25 its efforts to identify and provide warning by mail to such identified customers.

26 **3. WAIVER AND RELEASE OF ALL CLAIMS**

27 3.1 Waiver And Release of Claims Against Defendants: Plaintiff on its own behalf and
28 on behalf of its members, subsidiaries, successors, and assigns and its directors, officers, agents,
attorneys, representatives, and employees, and as to those matters raised in Plaintiff's Notice on
behalf of the general public, hereby releases Defendants and their directors, officers, agents,

1 attorneys, representatives, employees, licensors, heirs, subsidiaries, affiliates, suppliers, customers,
2 predecessors, successors, and assigns, and waives all claims for injunctive relief or damages,
3 penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs,
4 expenses or any other sum incurred or claimed, for the alleged failure of Defendants or their
5 subsidiaries, affiliates, suppliers, customers, predecessors, successors, and assigns to provide clear
6 and reasonable warning about exposure to Methylene Chloride (Dichloromethane) and/or Toluene
7 from the sale or use of any Covered Products distributed, and/or sold by Defendants in accordance
8 with and including, but not limited to, Proposition 65.

9 3.2 Defendants' Waiver And Release Of Plaintiff: Defendants on their own behalf and
10 on behalf of their subsidiaries, affiliates, successors, and assigns and their directors, officers, agents,
11 attorneys, representatives, and employees release Plaintiff and its members, directors, officers,
12 agents, attorneys, representatives, employees, heirs, successors, and assigns from, and waives all
13 claims for injunctive relief or damages, penalties, fines, sanctions, mitigation, fees (including fees
14 of attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed or which
15 could have been claimed for matters related to the Action.

16 3.3 Matters Covered By This Consent Judgment/Release of Future Claims: As to the
17 Covered Products, this Consent Judgment is a full, final, and binding resolution between the
18 Plaintiff, acting on behalf of itself and, as to those matters raised in Plaintiff's Notice in the public
19 interest pursuant to Health and Safety Code Section 25249.7(d) on the one hand, and Defendants on
20 the other hand, for the alleged failure to provide clear, reasonable, and lawful warnings of exposure
21 to Methylene Chloride (Dichloromethane) and/or Toluene used or contained in the Covered Products
22 marketed, distributed, and/or sold by Defendants. As to Covered Products, compliance with the
23 terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance
24 by Defendants with existing requirements of Proposition 65 to provide clear and reasonable warning
25 about exposure to Methylene Chloride (Dichloromethane) and/or Toluene in the Covered Products
26 distributed, marketed and/or sold by Defendants.

27 3.4 Waiver Of Civil Code Section 1542: This Consent Judgment is intended as a full
28 settlement and compromise of all claims arising out of or relating to Plaintiffs' Notice and/or the

1 Action regarding Covered Products, except as set forth herein. No claim is reserved as between the
2 Parties hereto, and each Party expressly waives any and all rights which it may have under the
3 provisions of Section 1542 of the Civil Code of the State of California, which provides:

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

6 **4. MONETARY PAYMENTS**

7 4.1 Within fifteen (15) days following the parties' execution of this Consent Judgment,
8 Defendants shall pay \$6,700.00 in the form of a check made payable to "Brian Gaffney, Attorney
9 Client Trust Account" with this amount to be used by As You Sow for grants to California non-profit
10 organizations and by AYS Foundation Environmental Enforcement Fund. These funds shall be used
11 to reduce exposures to toxic chemicals and to increase consumer, worker and community awareness
12 of the health hazards posed by toxic chemicals in California. In deciding among the grantee
13 proposals, the As You Sow Board of Directors ("Board") takes into consideration a number of
14 important factors, including: (1) the nexus between the harm done in the underlying case(s), and the
15 grant program work; (2) the potential for toxics reduction, prevention, remediation or education
16 benefits to California citizens from the proposal; (3) the budget requirements of the proposed grantee
17 and the alternate funding sources available to it for its project; and (4) the Board's assessment of the
18 grantee's chances for success in its program work. AYS shall ensure that all funds will be disbursed
19 and used in accordance with AYS' mission statement, articles of incorporation, and bylaws and
20 applicable state and federal laws and regulations. This payment shall not be construed as a credit
21 against the personal claims of absent third parties for restitution against Defendants. The check shall
22 be delivered by overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605
23 Market St., Suite 505, San Francisco, CA 94105. In the event this Consent Judgment becomes null
24 and void under Paragraph 11 infra, Plaintiff shall, within fifteen days, return the payment made under
25 this paragraph to Defendants.

26 4.2 Within fifteen (15) days following the parties' execution of this Consent Judgment,
27 Defendants shall pay \$13,400.00 in the form of a check made payable to "Brian Gaffney, Attorney
28 Client Trust Account" as reimbursement for the investigation fees and costs, testing costs, expert

1 witness fees, attorneys fees, and other litigation costs and expenses. The check shall be delivered by
2 overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St., Suite
3 505, San Francisco, CA 94105. In the event this Consent Judgment becomes null and void under
4 either Paragraph 11 infra, Plaintiff shall, within fifteen days, return the payment made under this
5 paragraph to Defendants.

6 **5. SEVERABILITY**

7 In the event that any of the provisions of this Consent Judgment are held by a court to be
8 unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected
9 thereby.

10 **6. MODIFICATION OF CONSENT JUDGMENT**

11 This Consent Judgment may be modified only upon the written agreement of the Parties, or
12 pursuant to court order issued upon motion of a Party, and upon entry of a modified Consent
13 Judgment by this Court.

14 **7. ENFORCEMENT OF CONSENT JUDGMENT**

15 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
16 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
17 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
18 (including reasonable attorneys' fees and costs) are provided by law.

19 7.2 The Parties may enforce the terms and conditions of this Consent Judgment pursuant
20 to paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party
21 allegedly failing to comply with the terms and conditions of the Consent Judgment and has
22 attempted, in an open and good faith manner, to resolve such Party's alleged failure to comply.

23 **8. GOVERNING LAW**

24 8.1 The terms of this Consent Judgment shall be governed by, and construed in
25 accordance with, the laws of the State of California.

26 8.2 The Parties have participated in the preparation of this Consent Judgment and this
27 Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject
28 *to revision and modification by the Parties and has been accepted and approved as to its final form*

1 by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent
2 Judgment shall not be interpreted against any Party as a result of the manner of the preparation of
3 this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of
4 construction providing that ambiguities are to be resolved against the drafting party should not be
5 employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
6 California Civil Code Section 1654.

7 **9. ENTIRE AGREEMENT**

8 This Consent Judgment constitutes the sole and entire agreement and understanding between
9 the Parties with respect to the subject matter hereof, and any prior discussions, negotiations,
10 commitments, or understandings related thereto, if any, are hereby merged herein and therein. There
11 are no warranties, representations, or other agreements between the Parties, except as expressly set
12 forth herein. No representations, oral or otherwise, express or implied, other than those specifically
13 referred to herein, shall be deemed to exist or bind any of the Parties hereto. No supplementation,
14 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
15 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
16 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof, whether
17 or not similar, nor shall such waiver constitute a continuing waiver.

18 **10. NOTICES**

19 All notices or correspondence to be given pursuant to this Consent Judgment shall be in
20 writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight
21 courier, and/or via facsimile transmission (with presentation of facsimile transmission confirmation)
22 addressed to the Parties as follows:

23 For Plaintiffs: AS YOU SOW FOUNDATION
24 Attn: Larry Fahn / Kara Buchner
25 311 California Street, Suite 510
San Francisco, CA 94104
415 391 3245 fax

26 With a copy to: Brian Gaffney
27 LAW OFFICES OF BRIAN GAFFNEY
28 605 Market Street, Suite 505
San Francisco, CA 94105
(415) 442 - 0713 Fax

1 For Defendant Eckler: Matt Jordan, Chief Financial Officer
2 ECKLER INDUSTRIES, INC.
3 5140 S. Washington Street
4 Titusville, FL. 32780-7318
5 Phone: 321-385-1737
6 Fax: 321-383-8822

7 The contacts and/or addresses stated immediately above may be amended by giving
8 notice to all Parties to this Consent Judgment.

9 **11. COURT APPROVAL/EFFECTIVE DATE**

10 The Court shall either approve or disapprove of this Consent Judgment in its entirety, without
11 alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their counsel.
12 If the Court approves of this Consent Judgment, then the terms of this Consent Judgment are
13 incorporated into the terms of the Court's Order.

14 Defendants agree to support the motion to approve this Consent Judgment in full, and shall
15 take all reasonable measures to ensure that it is entered without delay. In the event that the Court
16 fails to approve and order entry of the Consent Judgment without any change whatsoever (unless
17 otherwise so stipulated by the Parties), this Consent Judgment shall become null and void upon the
18 election of either Party and upon written notice to all of the Parties to the Action pursuant to the
19 notice provisions herein.

20 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days after
21 the Effective Date, electronically provide or otherwise serve a copy of it and the report required
22 pursuant to 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

23 The Effective Date of this Consent Judgment shall be the date it is entered by the Court.

24 **12. AUTHORIZATION**

25 The undersigned are authorized to execute this Consent Judgment on behalf of their
26 respective Parties and have read, understood, and agree to all of the terms and conditions of this
27 Consent Judgment.

28 **13. COUNTERPARTS/FACSIMILE SIGNING**

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

1 document. All signatures need not appear on the same page of the document and signatures of the
2 Parties transmitted by facsimile shall be deemed binding.

3 **IT IS SO STIPULATED:** AS YOU SOW FOUNDATION

4
5 Dated: _____ By: _____
6 Larry Fahn
7 Executive Director

8 Dated: 12-18-06 ECKLER INDUSTRIES, INC.

9
10 By: *Matt Jordan*
11 Matt Jordan
12 Chief Financial Officer

13 In accordance with the stipulation of Plaintiff and Defendants,

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

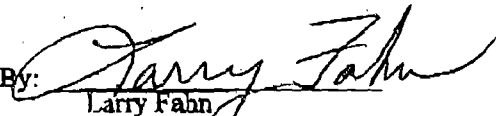
15 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
16 violates the provisions of this Consent Judgment, this Court retains over this matter.

17 Dated: _____

18 _____
19 JUDGE OF THE SUPERIOR COURT

1 document. All signatures need not appear on the same page of the document and signatures of the
2 Parties transmitted by facsimile shall be deemed binding.

3 **IT IS SO STIPULATED:** AS YOU SOW FOUNDATION

4
5 Dated: 12/18/06 By: 
6 Larry Fahn
7 Executive Director

8 Dated: _____ ECKLER INDUSTRIES, INC.

9
10 By: _____
11 Matt Jordan
12 Chief Financial Officer

13 In accordance with the stipulation of Plaintiff and Defendants,

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

15 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
16 violates the provisions of this Consent Judgment, this Court retains over this matter.

17 Dated: _____

18 _____
19 JUDGE OF THE SUPERIOR COURT

1 document. All signatures need not appear on the same page of the document and signatures of the
2 Parties transmitted by facsimile shall be deemed binding.

3 **IT IS SO STIPULATED:** AS YOU SOW FOUNDATION

4
5 Dated: _____ By: _____
6 Larry Fahn
7 Executive Director

8 Dated: _____ ECKLER INDUSTRIES, INC.

9
10 By: _____
11 Matt Jordan
12 Chief Financial Officer

13 In accordance with the stipulation of Plaintiff and Defendants,

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

15 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
16 violates the provisions of this Consent Judgment, this Court retains over this matter.

17 Dated: FEB 13 2007

PATRICK J. MAHONEY

18 _____
19 JUDGE OF THE SUPERIOR COURT
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22
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1 Brian Gaffney, Esq. (CBN 168778)
2 Matt McFarland, Esq. (CBN 225537)
3 LAW OFFICES OF BRIAN GAFFNEY
4 605 Market St., Suite 505
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6 Telephone: (415) 442-0711
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8 Attorneys for Plaintiff
9 AS YOU SOW

ENDORSED
FILED
San Francisco County Superior Court

FEB 13 2007

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

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 (Unlimited Jurisdiction)

13 AS YOU SOW,
14 Plaintiff,
15 v.

CASE NO. CGC-06-457548

(JCR)

~~PROPOSED~~ ORDER
APPROVING SETTLEMENT AND
~~CONSENT JUDGMENT~~

16 ECKLER INDUSTRIES LLC; ECKLER
17 INDUSTRIES, INC.; SMART CHOICE
18 AUTOMOTIVE GROUP, INC.; and DOES 1
19 through 100 INCLUSIVE,
20 Defendants.

Date: February 13, 2007
Time: 9:30 a.m.
Dept. No.: 302

21 _____ /

1 Plaintiff's motion for approval of settlement and entry of Consent Judgment was heard on
2 noticed motion on February 13, 2007. This Court finds that:

3 1. The warnings to past California Customers required by the Consent Judgment complies with
4 the clear and reasonable warning requirement of Proposition 65;

5 2. The removal, after December 15, 2006, of the Covered Products containing Methylene
6 Chloride (Dichloromethane) and/or Toluene from distribution, marketing, shipping for sale and/or
7 sale in the State of California is reasonable based on the requirements of Proposition 65;

8 3. The payments in lieu of civil penalty specified in the Consent Judgment are reasonable based
9 on the criteria in Cal Health & Safety Code section 25249.7(b)(2); and

10 4. The attorneys fees awarded under the Consent Judgment are reasonable under California law.
11 Based upon these findings, the settlement and Consent Judgment are approved.

12
13 **IT IS SO ORDERED.**

14
15 **FEB 13 2007**

16 Dated: _____

PATRICK J. MAHONEY

17 Judge of the Superior Court
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