

ENDORSED  
FILED  
San Francisco County Superior Court

APR 01 2009

GORDON PARK-LI, Clerk  
BY MARJORIE SCHWARTZ-SCOTT  
Deputy Clerk

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5 Attorneys for Plaintiff  
6 AS YOU SOW

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN FRANCISCO

10  
11 AS YOU SOW,

12 Plaintiff,

13 v.

14 KAUFMAN, LEVINE AND PARTNERS  
15 INC., et al.,

16 Defendants.

CASE NO. CGC-08-473206

~~[PROPOSED]~~ CONSENT JUDGMENT

(Health and Safety Code § 25249 *et seq.*)

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18  
19 **1. INTRODUCTION**

20 1.1 **Plaintiff.** Plaintiff As You Sow ("AYS" or "Plaintiff"), is a non-profit foundation  
21 organized under California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to,  
22 among other causes, the protection of the environment, the promotion of human health, the  
23 improvement of worker and consumer safety, environmental education and corporate  
24 accountability.

25 1.2 **Defendants.** Defendants Kaufman, Levine and Partners, Inc. ("KL&P") and  
26 Products of Creative American Enterprises, Inc. ("PACE") import, manufacture, package,  
27 distribute, and/or sell book bags (the "Covered Products"). PACE and KL&P collectively are  
28 referred to herein as "Defendants." Plaintiff and Defendants are, for purposes of this Proposed

1 Consent Judgment (“Consent Judgment”), collectively referred to as the “Parties” and each of  
2 them as a “Party.”

3       **1.3 The Action.** On March 11, 2008, Plaintiff filed a complaint in the Superior Court  
4 for the City and County of San Francisco (hereafter referred to as the “Action”) alleging that  
5 KL&P has violated the Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition  
6 65”), Health and Safety Code § 25249.5 *et seq.*, by exposing individuals to Di(2-ethylhexyl)  
7 phthalate (“DEHP”) and lead and lead compounds (“lead”), chemicals known to the State of  
8 California to cause cancer and reproductive harm, without providing clear and reasonable  
9 warnings to such individuals. On or about August 8, 2008, Plaintiff filed a First Amended  
10 Complaint (“FAC”) naming PACE as a defendant in the Action. The FAC alleged, *inter alia*,  
11 that PACE had violated Proposition 65 by exposing individuals to DEHP and lead without clear  
12 and reasonable warnings of such exposures. The alleged violations in the Action arise from  
13 alleged exposures to DEHP and lead in the Covered Products.

14       **1.4 The Notices.** The alleged violations addressed in the Action were described in  
15 Plaintiff’s December 19, 2007 Notice of Intent To Sue KL&P (“KL&P Notice”) and in its March  
16 24, 2008 Notice of Intent To Sue PACE (“PACE Notice”) (collectively referred to as the  
17 “Notices”), which Plaintiff had sent to the respective Defendants and to public enforcers as  
18 required by Health & Safety Code § 25249.7.

19       **1.5 DEHP and Lead.** On February 27, 1987, the State of California officially listed  
20 lead as a chemical known to cause reproductive toxicity. On October 1, 1992, the State of  
21 California officially listed lead and lead compounds as chemicals known to cause cancer. On  
22 October 24, 2003, the State of California officially listed DEHP as a chemical known to cause  
23 reproductive toxicity. On January 1, 1988, the State of California officially listed DEHP as a  
24 chemical known to cause cancer. DEHP and lead are collectively referred to herein as the “Listed  
25 Chemicals.”

26       **1.6 Jurisdiction.** For purposes of this Consent Judgment, the Parties stipulate that the  
27 San Francisco Superior Court has jurisdiction over the allegations in the Action and personal  
28 jurisdiction over Defendants as to the acts alleged in the Action; that venue is proper in the City

1 and County of San Francisco; that this Court has jurisdiction to enter this Consent Judgment as a  
2 resolution of all claims which were alleged in the Action; and that the Court shall retain  
3 jurisdiction to implement the Consent Judgment.

4       **1.7 No Admissions.** The Parties enter into this Consent Judgment as a compromise of  
5 disputed claims for the purpose of avoiding prolonged litigation. Neither the Consent Judgment  
6 nor any of its provisions shall be construed as an admission by any Party of any fact, finding,  
7 issue of law, or violation of law, including Proposition 65 or any other statute, regulation, or  
8 common law requirement related to exposure to DEHP, lead, or other chemicals listed under  
9 Proposition 65 from the Covered Products. By executing this Consent Judgment and agreeing to  
10 provide the relief and remedies specified herein, Defendants do not admit any violations of  
11 Proposition 65, or any other law or legal duty, and specifically deny that they have committed any  
12 such violations. Defendants maintain that all Covered Products have at all times been in  
13 compliance with all applicable laws. Nothing in this Consent Judgment shall prejudice, waive, or  
14 impair any right, remedy, or defense that Plaintiff and Defendants may have in any other or in  
15 future legal proceedings unrelated to these proceedings. Defendants reserve all of their rights and  
16 defenses with regard to any claim by any person under Proposition 65 or otherwise.  
17 Nevertheless, this paragraph shall not diminish or otherwise affect the obligations,  
18 responsibilities, waivers, releases, and/or duties provided for under this Consent Judgment.

19       **1.8 Replacement Program.** KL&P has indicated that after receiving the KL&P  
20 Notice, it did not distribute or sell any book bags in California until the Parties agreed upon the  
21 reformulation standards set out in Paragraph 2.2 in mid-2008. After receiving the KL&P Notice,  
22 KL&P and PACE also maintain that they began a voluntary effort to identify and replace certain  
23 book bags previously distributed to the San Francisco Unified School District and to other school  
24 districts with book bags meeting the reformulation standards in Paragraph 2.2. KL&P and PACE  
25 further maintain that, in November 2008, they completed this replacement program.

26       **1.9 Effective Date.** The "Effective Date" of this Consent Decree shall be the date on  
27 which it is entered by the Court  
28

1 shareholders, partners, joint venturers, parent companies, subsidiaries, affiliates, employees,  
2 agents, attorneys, representatives, licensors, licensees, heirs, predecessors, successors, and  
3 assigns.

4       **3.2 Waiver and Release of Claims Against Defendants.** As to those matters alleged  
5 in this Action and in the Notices, Plaintiff, on behalf of itself and its past, present and future  
6 officers, directors, employees, agents, representatives, attorneys, successors and assigns, and on  
7 behalf of the general public, hereby waives, discharges, and releases Defendants, Defendants'  
8 "Downstream Customers" (as defined in Paragraph 3.6, below), and Defendants' suppliers  
9 (hereinafter, collectively, "Releasees") from and against any and all claims, causes of action,  
10 suits, demands, obligations, liabilities, damages, costs, fines, penalties, injunctive relief,  
11 mitigation, losses, costs, expenses (including, without limitation, any and all fees of attorneys,  
12 experts, investigators and others) and any other sum incurred or claimed, of any nature  
13 whatsoever, in law and equity, whether known or unknown, fixed or contingent, foreseen or  
14 unforeseen, arising under Proposition 65 or any other statute or common law, that was or could  
15 have been asserted in the FAC , including, without limitation, all matters in any way connected  
16 with the claims and assertions contained in the FAC, based on (1) the allegations in the Notices or  
17 the Action, and (2) and any exposure to the Listed Chemicals that was or could have been alleged  
18 by Plaintiff against any of the Releasees based on the facts alleged in the Notices or the Action.

19       **3.3 Defendants' Waiver and Release of Plaintiff.** Defendants hereby release  
20 Plaintiff from and waive any claims against Plaintiff for injunctive relief or damages, penalties,  
21 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs,  
22 expenses, or any other sum incurred or claimed or which could have been claimed for matters  
23 related to the Notices or the Action.

24       **3.4 Defendants' Mutual Waiver and Release.** Defendants hereby release and waive any  
25 and all claims against each other, Defendants' respective Downstream Customers, and Defendants'  
26 respective suppliers, for injunctive relief, damages, penalties, fines, sanctions mitigation, fees (including  
27 fees of attorneys, experts, and others), costs, expenses, or any other sum incurred or claimed or which  
28 could have been claimed, that result or arise from the allegations of violations of Proposition 65 in this

1 Action concerning alleged exposures to any and all of the Listed Chemicals in the Covered Products;  
2 provided however, that such release and waiver shall not apply to claims regarding any Covered Products  
3 that are sold, imported, manufactured, packaged, distributed or shipped, for sale or distribution in  
4 California, on or after the Effective Date.

5 **3.5 Matters Covered By This Consent Judgment/Release of Future Claims.** As to  
6 the Covered Products, this Consent Judgment is a full, final, and binding resolution between, on  
7 the one hand, Plaintiff, acting on behalf of itself and its officers, directors, employees, agents,  
8 representatives, attorneys, successors and assigns and, as to those matters raised in Plaintiff's  
9 Notices, on behalf of the public pursuant to Health and Safety Code § 25249.7(d), and, on the  
10 other hand, Defendants (including its Downstream Customers and suppliers) for Defendants'  
11 alleged failure to provide clear, reasonable, and lawful warnings of alleged exposure to DEHP  
12 and/or lead alleged to be contained in the Covered Products. As to the Covered Products,  
13 compliance with the terms of this Consent Judgment resolves any issue, now and in the future,  
14 concerning compliance by Defendants with the requirements of Proposition 65 with respect to  
15 any alleged exposures to lead and/or DEHP from the Covered Products.

16 **3.6 Definition of "Downstream Customers."** For purposes of this Consent  
17 Judgment, "Downstream Customers" shall mean and include all distributors, wholesalers,  
18 customers, and retailers of the Covered Products.

#### 19 **4. MONETARY PAYMENTS**

20 **4.1** In full and final settlement of all of Plaintiff's claims referred to in this Consent  
21 Judgment, KL&P shall pay a total of \$22,500 and PACE shall pay a total of \$62,500. These  
22 amounts shall be paid as follows:

23 (a) **Civil Penalties.** As civil penalties pursuant to Health & Safety Code §  
24 25249.7(b), within thirty (30) days following the Effective Date, KL&P shall pay \$1,060 and  
25 PACE shall pay \$2,940. These payments shall each be paid by check or wire transfer made  
26 payable to "Shute, Mihaly & Weinberger, Attorney Client Trust Account." Plaintiff shall  
27 distribute these payments to the Plaintiff and to the State of California as required under  
28 Proposition 65. If the payments are made by check, they shall be delivered to Ellison Folk, Shute,

1 Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102. In the event this  
2 Consent Judgment becomes null and void under Paragraph 13 *infra*, Plaintiff shall, within fifteen  
3 days, return the payment made under this paragraph to Defendants.

4 (b) **Supplemental Settlement Payments.** Within thirty (30) days following  
5 the Effective Date, KL&P shall pay \$10,231 and PACE shall pay \$28,377, as supplemental  
6 settlement payments. These payments shall each be paid by check or wire transfer made payable  
7 to "Shute, Mihaly & Weinberger, Attorney Client Trust Account" with this amount to be used by  
8 As You Sow for grants to California non-profit organizations and by AYS Foundation  
9 Environmental Enforcement Fund. These funds shall be used to reduce exposures to toxic  
10 chemicals, to fund environmental education programs, and to increase consumer, worker and  
11 community awareness of the health hazards posed by toxic chemicals in California. In deciding  
12 among the grantee proposals, the As You Sow Board of Directors ("Board") takes into  
13 consideration a number of important factors, including: (1) the nexus between the harm done in  
14 the underlying case(s), and the grant program work; (2) the potential for toxics reduction,  
15 prevention, remediation or education benefits to California citizens from the proposal; (3) the  
16 budget requirements of the proposed grantee and the alternate funding sources available to it for  
17 its project; and (4) the Board's assessment of the grantee's chances for success in its program  
18 work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS'  
19 mission statement, articles of incorporation, and bylaws and applicable state and federal laws and  
20 regulations. If the payments are made by check, they shall be delivered to Ellison Folk, Shute,  
21 Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102. In the event this  
22 Consent Judgment becomes null and void under Paragraph 13 *infra*, Plaintiff shall, within fifteen  
23 days, return the payment made under this paragraph to Defendants.

24 (c) **Reimbursement of Fees and Costs.** Within thirty (30) days following the  
25 Effective Date, KL&P shall pay \$11,209 and PACE shall pay \$31,183. These payments shall be  
26 reimbursement for Plaintiff's investigation fees and costs, testing costs, expert witness fees,  
27 attorneys' fees, and other litigation costs and expenses. These payments shall be made by check  
28 made payable to "Shute, Mihaly & Weinberger." The checks shall be delivered by overnight or

1 personal delivery to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San  
2 Francisco, CA 94102. In the event this Consent Judgment becomes null and void under  
3 Paragraph 13 *infra*, Plaintiff shall, within fifteen days, return the payment made under this  
4 paragraph to Defendants.

#### 5 **5. SEVERABILITY**

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

#### 9 **6. MODIFICATION OF CONSENT JUDGMENT**

10 6.1 This Consent Judgment may be modified only upon the written agreement of the  
11 Parties, or pursuant to court order issued upon motion of a Party, and upon entry of a modified  
12 Consent Judgment by this Court.

#### 13 **7. ENFORCEMENT OF CONSENT JUDGMENT**

14 7.1 The Parties may, by motion or order to show cause before this Court, and upon  
15 notice having been given to all Parties in accordance with Paragraphs 7.2 and 12, unless waived,  
16 enforce the terms and conditions of this Consent Judgment and seek whatever fines, costs,  
17 penalties, or remedies (including reasonable attorneys' fees and costs) are provided by law.

18 7.2 The Parties may enforce the terms and conditions of this Consent Judgment  
19 pursuant to paragraph 7.1 only after the complaining party has first given thirty (30) days' notice  
20 to the Party allegedly failing to comply with the terms and conditions of the Consent Judgment  
21 and has attempted, in an open and good faith manner, to resolve such Party's alleged failure to  
22 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  
28 subject to revision and modification by the Parties and has been accepted and approved as to its

1 With a copy to:

Trenton H. Norris  
ARNOLD & PORTER LLP  
275 Battery Street, Suite 2700  
San Francisco, CA 94111  
(415) 356-3099 (Fax)

4 For Defendant PACE:

Products of American Creative Enterprises, Inc.  
Attn: Dale Siler, Esq.  
c/o Hillyard, Anderson & Olsen  
595 South Riverwoods Parkway, Suite 100  
Logan, Utah 84321  
(435) 753-8895 (Fax)

8 With a copy to:

Chris M. Amantea, Esq.  
Hunton & Williams  
550 S. Hope St., Suite 2000  
Los Angeles, CA 90071  
(213) 532-2020 (Fax)

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

12 **13. COURT APPROVAL**

13 The Court shall either approve or disapprove of this Consent Judgment in its entirety,  
14 without alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their  
15 counsel. If the Court approves of this Consent Judgment in its entirety, then the terms of this  
16 Consent Judgment are incorporated into the terms of the Court's Order Approving the Consent  
17 Judgment. This Consent Judgment shall not take effect until it is approved and entered by the  
18 Court. In the event that the Court fails to approve and order entry of the Consent Judgment  
19 without any change whatsoever (unless otherwise so stipulated by the Parties), this Consent  
20 Judgment shall be null and void.

21 **14. AUTHORIZATION**

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

25 **15. COUNTERPARTS/FACSIMILE SIGNING**

26 This Consent Judgment may be executed in one or more counterparts, each of which shall  
27 be deemed an original, and all of which, when taken together, shall constitute one and the same  
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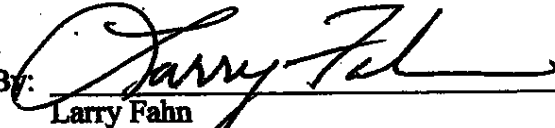
1 document. All signatures need not appear on the same page of the document and signatures of  
2 the Parties transmitted by facsimile shall be deemed binding.

3 **IT IS SO STIPULATED:**

4  
5 **AGREED TO:**

6  
7 Dated: 12/24/08

AS YOU SOW

8  
9 By:   
10 Larry Fahn  
Executive Director

11  
12 Dated: \_\_\_\_\_

KAUFMAN, LEVINE AND PARTNERS,  
INC.

13  
14  
15 By: \_\_\_\_\_  
Jennifer Katz  
President

16  
17 Dated: \_\_\_\_\_

PRODUCTS OF AMERICAN CREATIVE  
ENTERPRISES, INC.

18  
19  
20 By: \_\_\_\_\_  
Kim Anderson  
President

1 document. All signatures need not appear on the same page of the document and signatures of  
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5 **AGREED TO:**

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7 Dated: \_\_\_\_\_

AS YOU SOW

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9 By: \_\_\_\_\_  
10 Larry Fahn  
Executive Director

11  
12 Dated: 1/5/09

KAUFMAN, LEVINE AND PARTNERS,  
INC.

13  
14 By: Jennifer Katz  
15 Jennifer Katz  
16 President

17 Dated: \_\_\_\_\_

18 **PRODUCTS OF AMERICAN CREATIVE  
ENTERPRISES, INC.**

19  
20 By: \_\_\_\_\_  
21 Kim Anderson  
22 President

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

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5 **AGREED TO:**

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7 Dated: \_\_\_\_\_

AS YOU SOW

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9 By: \_\_\_\_\_  
10 Larry Fahn  
11 Executive Director

12 Dated: \_\_\_\_\_

KAUFMAN, LEVINE AND PARTNERS,  
13 INC.

14  
15 By: \_\_\_\_\_  
16 Jennifer Katz  
17 President

18 Dated: 1/2/2009

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20 PRODUCTS OF AMERICAN CREATIVE  
21 ENTERPRISES, INC.

22  
23 By: Kim Anderson  
24 Kim Anderson  
25 President  
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**APPROVED AS TO FORM:**

**SHUTE, MIHALY & WEINBERGER**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Robert S. Perlmutter  
Attorneys for Plaintiff  
AS YOU SOW

Dated: 1/5/09

**ARNOLD & PORTER LLP**

By: Trenton H. Norris  
Trenton H. Norris  
Attorneys for Defendant  
KAUFMAN, LEVINE & PARTNERS,  
INC.

Dated: \_\_\_\_\_

**HUNTON & WILLIAMS LLP**

By: \_\_\_\_\_  
Chris M. Amantea  
Attorneys for Defendant  
PRODUCTS OF AMERICAN  
CREATIVE ENTERPRISE, INC.

~~IT IS SO ORDERED:~~

Dated: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

*(um)*

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**APPROVED AS TO FORM:**

**SHUTE, MIHALY & WEINBERGER**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
**Robert S. Perlmutter**  
**Attorneys for Plaintiff**  
**AS YOU SOW**


Dated: \_\_\_\_\_

**ARNOLD & PORTER LLP**

By: \_\_\_\_\_  
**Trenton H. Norris**  
**Attorneys for Defendant**  
**KAUFMAN, LEVINE & PARTNERS,**  
**INC.**

Dated: 1/5/2009

**HUNTON & WILLIAMS LLP**

By:   
\_\_\_\_\_  
**Chris M. Arantea**  
**Attorneys for Defendant**  
**PRODUCTS OF AMERICAN**  
**CREATIVE ENTERPRISE, INC.**

**IT IS SO ORDERED:**

Dated: MAR 27 2009

**CHARLOTTE WALTER WOOLARD**  
\_\_\_\_\_  
**JUDGE OF THE SUPERIOR COURT**