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**ENDORSED
FILED**
San Francisco County Superior Court

AUG 06 2010

CLERK OF THE COURT
BY: GINA GONZALES
Deputy Clerk

6 Attorneys for Plaintiff:
AS YOU SOW
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF SAN FRANCISCO
10

11 AS YOU SOW)

Case No. CGC 09-485921

12 Plaintiff,)

**CONSENT JUDGMENT FOR
DEFENDANTS PET FOOD
EXPRESS, LTD. AND VO-TOYS
INCORPORATED**

13 vs.)

14 PET FOOD EXPRESS, LTD.; VO-TOYS
INCORPORATED; MULTIPET
INTERNATIONAL, INC.; and DOES 1 through)
15 100, inclusive,)

16 Defendants.)
_____ /

17 This Consent Judgment is entered into by and between Plaintiff AS YOU SOW and
18 Defendants PET FOOD EXPRESS, LTD. AND VO-TOYS INCORPORATED (“Defendants”) to
19 resolve the claims raised in Plaintiff’s Complaint filed in the above-captioned action with respect to
20 these defendants. This Consent Judgment shall be effective upon entry. As You Sow and Defendants
21 collectively “the Parties”) agree to the terms and conditions set forth below.

22 **1. INTRODUCTION**

23 1.1 As You Sow is a 501(c)(3) non-profit California corporation dedicated to, among other
24 causes, the protection of the environment, the promotion of human health, the improvement of worker
25 and consumer rights, environmental education, and corporate accountability. As You Sow is based
26 in San Francisco, California and incorporated under the laws of the State of California.

27 1.2 Plaintiff alleges that Defendants are “persons in the course of doing business”
28

1 pursuant to Health and Safety Code section 25249.11, subdivision (b), and have manufactured and/or
2 distributed for sale in California products that contain Di(2-ethylhexyl) phthalate ("DEHP"). DEHP
3 is a chemical regulated by the State of California as known to cause cancer and reproductive toxicity
4 pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), at
5 California Health and Safety Code section 25249.5 et seq., and Title 27, California Code of
6 Regulations, section 25102 et seq.

7 1.3 On November 26, 2008, As You Sow sent a 60-day Notice of Violation to Defendants
8 and to public enforcers as required by Health & Safety Code section 25249.7 alleging that Defendants
9 violated Proposition 65 by failing to provide clear and reasonable warning before exposing users to
10 DEHP in its products.

11 1.4 The "Glo Toy" ball for pets referenced in As You Sow's November 26, 2008 60-day
12 Notice is defined herein as "the Covered Product."

13 1.5 On March 9, 2009, As You Sow filed a Complaint in the San Francisco Superior
14 Court, Case No. CGC 09-485921, alleging, *inter alia*, that Defendants violated Proposition 65 due
15 to the alleged failure to provide clear and reasonable warning that users of the Covered Product were
16 exposed to DEHP, a chemical known to the state of California to cause cancer and reproductive
17 toxicity.

18 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper
20 in San Francisco County, that this Court has jurisdiction to enter this Consent Judgment as a
21 resolution of all claims that were alleged in the Complaint, and that the Court shall retain jurisdiction
22 to implement and enforce the Consent Judgment.

23 1.7 The Parties enter into this agreement to settle certain disputed claims as alleged in the
24 Complaint, and to avoid prolonged and costly litigation. By executing and complying with this
25 agreement, neither Party admits any facts or conclusions of law including, but not limited to, any
26 facts or conclusions of law regarding any violations of Proposition 65, or any other statutory,
27 common law or equitable claim or requirement relating to or arising from the sale of the Covered
28 Product in California. Neither shall this Consent Judgment be construed as an admission that any act

1 provided for herein, or any warnings regarding exposure to DEHP from the Covered Product are
2 required under Proposition 65 or any other statute, regulation, or common law requirement. Nothing
3 in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or defense that Plaintiff
4 and Defendants may have in any other or in future legal proceedings unrelated to these proceedings.
5 However, this paragraph shall not diminish or otherwise affect the obligation, responsibilities, and
6 duties of the Parties under this Consent Judgment.

7 1.8 The term "Effective Date" means the date it is executed by all Parties.

8 1.9 Within 2 court days of the Effective Date each of the Parties will take all pending
9 motions off the Court's calendar.

10 **2. REPRESENTATIONS**

11 2.1 Defendants hereby represent that Defendants are no longer selling, distributing, or
12 manufacturing the Covered Product, and will not do so in the future.

13 2.2 If the representation set forth in Section 2.1 above is false, Plaintiff may pursue its
14 claims for injunctive relief as specified in the Complaint identified in Section 1.5, notwithstanding
15 the release contained in Section 6 of this Consent Judgment.

16 **3. INJUNCTIVE RELIEF**

17 3.1 At all times after the Effective Date, if Defendants should sell, distribute, or
18 manufacture for sale in California any Covered Product containing DEHP, Defendants shall provide
19 the following warning statement:

20 **WARNING:** This product contains Di(2-ethylhexyl) phthalate (DEHP), a chemical
known to the State of California to cause cancer and reproductive toxicity.

21 3.2 The warning statement required in Section 3.1 shall be prominently affixed to or
22 printed on the front of the Covered Product's packaging and labeling by Defendants. The warning
23 statement required in Section 3.1 shall also be provided for the Covered Product on any website
24 maintained by Defendants. The warnings shall be legible, in bold, and greater than 12-point type
25 face. The warnings shall be displayed with such conspicuousness, as compared with other words,
26 statements, designs, or devices on the Covered Product, or its packaging or labeling, as to render it
27 likely to be read and understood by an ordinary individual under customary conditions of purchase
28

1 or use.

2 3.3 No later than ten (10) days following the Parties' execution of this Consent Judgment,
3 Vo-Toys, Inc. shall provide notice by mail on its letterhead to all the Downstream Defendant
4 Releasees (as defined in ¶ 6.1 *infra*) as follows:

5 WARNING: Our records indicate that your inventory may contain Di(2-ethylhexyl)
6 phthalate DEHP), a chemical known to the State of California to cause reproductive
7 toxicity, in the following product: "Glo Toy" ball for pets, manufactured by Vo-Toys,
8 Incorporated.

9 The notice provided by Vo-Toys, Inc. pursuant to this section shall also instruct the
10 Downstream Defendant Releasees that they must attach stick-on labels to the front of the Products
11 in the inventory of the Downstream Defendant Releasees.

12 3.4 The stick-on labels provided by Vo-Toys, Inc. shall comply with Sections 3.1 and 3.2
13 above. Vo-Toys, Inc. shall provide such stick-on labels to all Downstream Defendant Releasees in
14 sufficient quantity and for sufficient duration to meet the inventory needs of each Downstream
15 Defendant Releasee.

16 3.5 No later than June 1, 2010, Vo-Toys, Inc. shall remove DEHP and any other phthalate
17 known by the State of California to cause cancer or reproductive toxicity, as identified by Proposition
18 65 ("Prop 65 phthalates"), from its entire product line (including the Covered Product), and shall
19 cease to ship for sale in California all products that contain DEHP or any other Prop 65 phthalate.

20 3.6 Within 120 days of the Effective Date of this Consent Judgment, Vo-Toys, Inc. shall
21 notify As You Sow in writing whether it has reformulated its product line (including the Covered
22 Product) pursuant to Section 3.5 of this Consent Judgment, whether Vo-Toys has ceased all
23 shipments of the Covered Product to California or elsewhere, and whether Defendants have complied
24 with Sections 3.1 through 3.5 of this Consent Judgment.

25 4. SETTLEMENT PAYMENT

26 4.1 The total settlement payment shall be \$45,000.00, which shall be paid by Vo-Toys,
27 Inc. pursuant to Section 4.2, and distributed by As You Sow pursuant to Section 4.3.

28 4.2 Vo-Toys, Inc. shall make an initial payment of \$5,000.00 to As You Sow within thirty
(30) days of the Effective Date, and a second payment of \$ 5,000.00 to As You Sow within sixty (60)

1 days of the Effective Date. The remaining \$35,000.00 shall be paid as follows:

2 a) commencing ninety (90) days after the Effective Date, Vo-Toys, Inc. shall pay \$1,250 per month
3 for twenty (20) months;

4 b) commencing 690 days after the Effective Date, Vo-Toys, Inc. shall pay \$2,500 per month for two
5 months;

6 c) commencing 750 days after the Effective Date, Vo-Toys, Inc. shall pay \$1,000 per month for five
7 months.

8 All payments shall be made payable to the As You Sow Environmental Enforcement Fund, and
9 delivered by overnight delivery to As You Sow, 311 California Street, Suite 510, San Francisco, CA
10 94104.

11 4.3 As You Sow shall allocate the payments made pursuant to Section 4.1 as follows:

12 4.3.1 \$31,500.00 as reimbursement for the investigation costs, laboratory testing
13 costs, Plaintiff's attorneys fees, and other reasonable litigation costs and expenses.

14 4.3.2 \$3,000.00 as a civil penalty pursuant to Health and Safety Code section
15 25249.7, subdivision (b). As You Sow shall remit 75 percent of this amount to the State of California
16 pursuant to Health and Safety Code section 25249.12, subdivision (b).

17 4.3.3 \$10,500.00 as payments in lieu of additional civil penalties. These funds shall
18 be used by As You Sow to reduce or remediate exposures to toxic chemicals and to increase
19 consumer, worker, and community awareness of the health hazards posed by toxic chemicals in
20 California via its program work, but primarily through grants to other 501(c)(3) non-profit
21 organizations working in toxics reduction, remediation, and/or environmental education. In deciding
22 among the grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration
23 a number of important factors, including: (1) the nexus between the harm done in the underlying
24 case(s), and the grant program work; (2) the potential for toxics reduction, prevention, remediation,
25 or education benefits to California citizens from the proposal; (3) the budget requirements of the
26 proposed grantee and the alternate funding sources available to it for its project; and (4) the Board's
27 assessment of the grantee's chances for success in its program work. As You Sow shall ensure that
28 all funds will be disbursed and used in accordance with As You Sow's mission statement, articles of

1 incorporation, and bylaws and applicable state and federal laws and regulations.

2 **5. ENFORCEMENT OF CONSENT JUDGMENT**

3 5.1 The Parties may, by motion or order to show cause before the Superior Court of the
4 County of San Francisco, enforce the terms and conditions of this Consent Judgment. In the event
5 that a dispute arises with respect to any of the provisions of this Consent Judgment, the Parties shall
6 meet and confer within ten (10) days after either Party receives written notice of an alleged violation
7 of this agreement. In any dispute regarding compliance with the terms of this Consent Judgment,
8 Plaintiff shall be awarded any fines, costs, penalties, or remedies provided by law.

9 **6. CLAIMS COVERED AND RELEASE**

10 6.1 As to the Covered Product, this Consent Judgment is a full, final, and binding
11 resolution between As You Sow and Defendants and their parents, shareholders, divisions,
12 subdivisions, subsidiaries, partners, sister companies, and their successors and assigns (“Defendant
13 Releasees”), and all entities to whom they distribute or sell the Covered Product, including but not
14 limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and
15 licensees (“Downstream Defendant Releasees”) of any actual and potential claims that were or could
16 have been brought by As You Sow for the alleged failure to provide clear, reasonable, and lawful
17 warnings of exposure to DEHP used or contained in the Covered Product manufactured, distributed,
18 and/or sold by Defendants.

19 6.2 As to the Covered Product, compliance with the terms of this Consent Judgment by
20 Defendants resolves any issue from the date of entry of this Consent Judgment into the future
21 concerning compliance by Defendants, Defendant Releasees, and Downstream Defendant Releasees
22 with regard to Proposition 65 as to the presence of, or exposure to, DEHP in the Covered Product
23 manufactured, distributed, or sold by Defendants.

24 6.3 Upon entry of this Consent Judgment, the Parties waive their respective rights to a
25 hearing or trial on the allegations of the Complaint.

26 6.4 Defendants are relieved of its obligations under sections 2.1 through 3.4 inclusive of
27 this Consent Judgment by sale or assignment of the Covered Product product line.

28 **7. GOVERNING LAW AND CONSTRUCTION**

1 7.1 This agreement shall be governed by, and construed in accordance with, the laws of
2 the State of California.

3 7.2 The Parties, including their counsel, have participated in the preparation of this
4 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties as
5 achieved through informal settlement negotiations. This Consent Judgment was subject to revision
6 and modification by the Parties and has been accepted and approved as to its final form by all Parties
7 and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall
8 not be interpreted against any Party as a result of the manner of the preparation of this Consent
9 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
10 providing that ambiguities are to be resolved against the drafting Party should not be employed in
11 the interpretation of this Consent Judgment, and, in this regard, the Parties hereby waive the
12 protections of California Civil Code section 1654.

13 **8. MODIFICATION OF CONSENT JUDGMENT**

14 8.1 This Consent Judgment may be modified only upon written agreement of the Parties,
15 with approval of the Court, or pursuant to Court order issued upon noticed motion of a Party for good
16 cause shown, and upon entry of a modified Consent Judgment by this Court. Any Party seeking to
17 modify this Consent Judgment shall meet and confer with all affected Parties prior to filing a motion
18 to modify the Consent Judgment in a good faith to attempt to resolve any differences.

19 **9. COURT APPROVAL**

20 9.1 The Court shall either approve or disapprove of this Consent Judgment in its entirety,
21 without alteration, deletion, or amendment, unless otherwise so stipulated by the Parties and their
22 counsel. Defendants agree not to oppose the Court's approval of this Consent Judgment.

23 9.2 In the event that the Court fails to approve and order entry of the Consent Judgment
24 without any change whatsoever (unless otherwise so stipulated by the Parties), this Consent Judgment
25 shall become null and void upon the election of any Party and upon written notice to all of the Parties
26 to the Action pursuant to the notice provisions herein, and shall not be introduced into evidence or
27 otherwise used in any proceeding for any purpose.

28 **10. ENTIRE AGREEMENT**

1 10.1 The Parties declare and represent that no promise, inducement, or other agreement has
2 been made conferring any benefit upon any Party except those contained herein and that this
3 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
4 supersedes any prior or contemporaneous negotiations, representations, agreements, and
5 understandings of the Parties with respect to such matters, whether written or oral. Parol evidence
6 shall be inadmissible to show agreement by, between, or among the Parties to any term or condition
7 contrary to or in addition to the terms and conditions contained in this Consent Judgment. The
8 Parties acknowledge that each has not relied on any promise, representation, or warranty, expressed
9 or implied, not contained in this agreement.

10 **11. APPLICATION OF CONSENT JUDGMENT**

11 11.1 This Consent Judgment, and compliance therewith, shall apply to and be binding upon
12 the Parties hereto, their divisions, subdivisions, and subsidiaries, and the successors or assigns of any
13 of them.

14 **12. ATTORNEYS FEES**

15 12.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
16 own attorneys fees and costs incurred in connection with the 60-day Notices of Violation and
17 Plaintiff's Complaint.

18 **13. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7**

19 13.1 Plaintiff shall comply with the reporting requirements referred to in Health and Safety
20 Code section 25249.7, subdivision (f) (and established in Title 11 of the California Code of
21 Regulations, sections 3000 to 3008), and shall move for approval of this Consent Judgment pursuant
22 to the terms thereof.

23 **14. PROVISION OF NOTICE**

24 All correspondence and notices required by this Consent Judgment to the Parties shall be sent
25 as follows:

26 To Plaintiff As You Sow:
27 As You Sow
28 ATTN: Kara Buchner / Larry Fahn
 311 California Street, Suite 510
 San Francisco, CA 94104

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With a copy to:
Jennifer Naegele
LIPPE GAFFNEY WAGNER LLP
329 Bryant Street, Suite 3D
San Francisco, CA 94107

To Defendants:
VO-TOYS INCORPORATED
ATTN: Gary Hirschberg
400 South 5th Street
Harrison, New Jersey 07029-2225

PET FOOD EXPRESS, LTD.
ATTN: John Moore
2131 Williams Street
San Leandro, California 94577

With a copy to:
John Douglas Moore
Henn, Etzel & Moore, Inc.
1970 Broadway, Suite 950
Oakland, CA 94612

15. EXECUTION AND COUNTERPARTS

15.1 This Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document. All signatures need not appear on the same page of the document and signatures of the Parties transmitted by facsimile shall be deemed binding.

16. AUTHORIZATION

16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally bind that party. The undersigned have read, understand, and agree to all of the terms and conditions of this Consent Judgment.

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1 **APPROVED AS TO FORM:**

2 Dated: MARCH 22, 2010

LIPPE GAFFNEY WAGNER LLP

By: Brian Gaffney
Brian Gaffney
Attorney for Plaintiff

3
4
5 Dated: _____, 2010

HENN, ETZEL & MOORE, INC.

By: _____
John Douglas Moore
Attorney for Defendants

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7
8 **IT IS SO STIPULATED:**

9 Dated: _____, 2010

AS YOU SOW

By: _____

Its: _____

10
11
12 Dated: _____, 2010

VO-TOYS, INCORPORATED

By: _____

Its: _____

13
14
15 Dated: _____, 2010

PET FOOD EXPRESS, LTD.

By: _____

Its: _____

16
17
18 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

19 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a Party
20 violates the provisions of this Consent Judgment, this Court retains jurisdiction over this matter.

21
22 Dated: _____, 2010

JUDGE OF THE SUPERIOR COURT

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APPROVED AS TO FORM:

Dated: _____, 2010

LIPPE GAFFNEY WAGNER LLP

By: _____
Brian Gaffney
Attorney for Plaintiff

Dated: 3/22, 2010

MIENN, ETZEL & MOORE, INC.

By: _____
John Douglas Moore
Attorney for Defendants

IT IS SO STIPULATED:

Dated: _____, 2010

AS YOU SOW

By: _____

Its: _____

Dated: 3/22, 2010

VO-TOYS, INCORPORATED

By: _____
Hans [Signature]

Its: EXECUTIVE V.P.

Dated: _____, 2010

PET FOOD EXPRESS, LTD.

By: _____

Its: _____

IT IS SO ORDERED, ADJUDGED, AND DECREED:

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

Dated: _____, 2010

JUDGE OF THE SUPERIOR COURT

FILED BY: PLS/AYJ/Pet/Seid/VoToys and PFB/S01/CJ VoToys/PFB.wpd

LIPPE GAFFNEY
WAGNER LLP
1100 BROADWAY
SUITE 1500
SAN FRANCISCO, CA 94107
TEL. (415) 777-0800

1 **APPROVED AS TO FORM:**

2 Dated: _____, 2010

LIPPE GAFFNEY WAGNER LLP

3 By: _____
4 Brian Gaffney
Attorney for Plaintiff

5 Dated: _____, 2010

HENN, ETZEL & MOORE, INC.

6 By: _____
7 John Douglas Moore
Attorney for Defendants

8 **IT IS SO STIPULATED:**

9 Dated: 3/19, 2010

AS YOU SOW

10 By: Larry Felt

11 Its: Executive Director

12 Dated: _____, 2010

VO-TOYS, INCORPORATED

13 By: _____

14 Its: _____

15 Dated: _____, 2010

PET FOOD EXPRESS, LTD.

16 By: _____

17 Its: _____

18 **IT IS SO ORDERED, ADJUDGED, AND DECREED:**

19 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a Party
20 violates the provisions of this Consent Judgment, this Court retains jurisdiction over this matter.

21
22 Dated: _____, 2010

23 JUDGE OF THE SUPERIOR COURT

24 _____

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1 APPROVED AS TO FORM:
2 Dated: _____, 2010

LIPPE GAFFNEY WAGNER LLP
By: Brian Gaffney
Attorney for Plaintiff

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5 Dated: 3/22, 2010

HENN, ETZEL & MOORE, INC.
By: John Douglas Moore
Attorney for Defendants

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7
8 IT IS SO STIPULATED:
9 Dated: _____, 2010

AS YOU SOW
By: _____
Its: _____

10
11
12 Dated: 3/22, 2010

VO-TOYS, INCORPORATED
By: [Signature]
Its: EXECUTIVE V.P.

13
14
15 Dated: 3/24, 2010

PET FOOD EXPRESS, LTD.
By: [Signature]
Its: Vice Pres. PFE LTD.

16
17
18 IT IS SO ORDERED, ADJUDGED, AND DECREED:
19 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a Party
20 violates the provisions of this Consent Judgment, this Court retains jurisdiction over this matter.

21
22 Dated: AUG 06 2010, 2010

PETER J. BUSCH
JUDGE OF THE SUPERIOR COURT
PETER J. BUSCH

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LIPPE GAFFNEY
WAGNER LLP
1100 River Street
San Francisco, CA 94107
TEL: (415) 771-0600

Consent Judgment for Defendants Pet Food Express, Ltd. and Vo-Toys, Inc. Case No. C110 09-485921