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6 Attorneys for AS YOU SOW

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

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

12 Plaintiff,

13 v.

14 ZEIKOS, INC., and DOES 1 through 10,
15 inclusive,

16 Defendants.

Case No. CGC-11-514883

**NOTICE OF ENTRY OF CONSENT
JUDGMENT**

1 PLEASE TAKE NOTICE that on June 14, 2012, the Court signed and filed a Consent
2 Judgment in the above-referenced matter . A copy of the Consent Judgment is attached hereto
3 as Exhibit A.

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DATED: June 14, 2012

SHUTE, MIHALY & WEINBERGER LLP

By: 

ELLISON FOLK
ROBERT S. PERLMUTTER

Attorneys for AS YOU SOW

EXHIBIT A

1 ELLISON FOLK (State Bar No. 149232)
ROBERT S. PERLMUTTER (State Bar No. 183333)
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3 San Francisco, CA 94102
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Folk@smwlaw.com
5 Perlmutter@smwlaw.com

6 Attorneys for AS YOU SOW

ENDORSED
FILED
San Francisco County Superior Court

JUN 14 2012

CLERK OF THE COURT
BY: CYNTHIA S. HERBERT
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN FRANCISCO

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

12 Plaintiff,

13 v.

14 ZEIKOS, INC., and DOES 1 through 10,
15 inclusive,

16 Defendants.

Case No. CGC-11-514883

~~[PROPOSED]~~ CONSENT JUDGMENT

California Health and Safety Code § 25249.5
et seq.

EXHIBIT A

1 **1. INTRODUCTION**

2 1.1 **Plaintiff:** Plaintiff As You Sow (“AYS” or “Plaintiff”), is a 501 (c) (3) non-profit
3 corporation, organized in California in 1992, with its principal place of business in San Francisco,
4 California. As You Sow is dedicated to, among other causes, the protection of the environment, the
5 promotion of human health, the improvement of worker and consumer safety, environmental education,
6 and corporate accountability.

7 1.2 **The Action:** On October 5, 2011, Plaintiff filed a complaint in the Superior Court for the
8 City and County of San Francisco (hereafter referred to as the “Action”) charging Zeikos, Inc.
9 (hereinafter “Defendant”) with having violated the Safe Drinking Water and Toxic Enforcement Act of
10 1986 (“Proposition 65”), Health and Safety Code section 25249.5 et seq., by exposing individuals to
11 Di(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause cancer and
12 reproductive harm, without providing clear and reasonable warnings to such individuals. The alleged
13 violations addressed in the Action were described in Plaintiff’s Notice of Intent to Sue dated June 16,
14 2011 (“Plaintiff’s Notice”), which Plaintiff had sent to the Defendant and to public enforcers as required
15 by Health & Safety Code section 25249.7. The alleged violations at issue in the Action arise from
16 alleged exposure to DEHP that is contained in ear buds and headsets identified in Plaintiff’s Notice that
17 are imported, manufactured, packaged, distributed, marketed, and/or sold by Defendant (“Covered
18 Products”).

19 1.3 **Jurisdiction:** For purposes of this Consent Judgment, the Parties stipulate that the San
20 Francisco Superior Court has jurisdiction over the allegations in the Action and personal jurisdiction
21 over Defendant as to the acts alleged in the Action; that venue is proper in the City and County of San
22 Francisco; that this Court has jurisdiction to enter this Consent Judgment as a resolution of all claims
23 which were alleged in the Action; and that the Court shall retain jurisdiction to implement the Consent
24 Judgment.

25 1.4 **No Admissions:** The Parties enter into this Consent Judgment as a compromise of
26 disputed claims for the purpose of avoiding prolonged litigation. Neither the Consent Judgment nor any
27 of its provisions shall be construed as an admission by any Party of any fact, finding, issue of law, or
28 violation of law, including Proposition 65 or any other statute, regulation, or common law requirement

1 related to exposure to DEHP or other chemicals listed under Proposition 65 from the Covered Products.
2 By executing this Consent Judgment and agreeing to provide the relief and remedies specified herein,
3 Defendant does not admit any violations of Proposition 65, or any other law or legal duty and
4 specifically denies that it has committed any such violations. Defendant maintains that all Covered
5 Products distributed, marketed, and/or sold by Defendant in California have at all times been in
6 compliance with all applicable laws. Nothing in this Consent Judgment shall prejudice, waive, or impair
7 any right, remedy, or defense that Plaintiff and Defendant may have in any other or in future legal
8 proceedings unrelated to these proceedings. Defendant reserves all of its rights and defenses with regard
9 to any claim by any person under Proposition 65 or otherwise. Nevertheless, this paragraph shall not
10 diminish or otherwise affect the obligations, responsibilities, waivers, releases, and/or duties provided
11 for under this Consent Judgment.

12 1.5 **Effective Date.** The “Effective Date” of this Consent Decree shall be the date on which
13 it is entered by the Court.

14 **2. INJUNCTIVE RELIEF: WARNINGS OR REFORMULATION**

15 Defendant agrees, with respect to all Covered Products, to the following forms of injunctive relief.

16 2.1 **Warnings:** As of the Effective Date, Defendant agrees to provide Proposition 65
17 warnings for all Covered Products that contain DEHP. Such warnings shall be deemed to be “clear and
18 reasonable” within the meaning of Proposition 65 and the implementing regulations that appear at Cal.
19 Code Regs, tit. 27, § 25601, provided that the statement that appears below is printed on the label or
20 labeling, for such Covered Products, or is affixed to such labels or labeling by means of adhesive
21 stickers on such Covered Products that identify the Covered Products to which the warnings pertain,
22 provided that such warnings, whether they appear on labels or labeling shall be printed and/or affixed
23 with such conspicuousness, as compared to other words or statements on the label or labeling so as to
24 render the warnings reasonably likely to be read by an ordinary individual under customary conditions
25 of purchase or use:

26
27 **WARNING:** This product contains chemicals known to the
28 State of California to cause cancer and/or birth defects or
other reproductive harm.

1 2.2 **Reformulation.** Defendant agrees that all Covered Products that are imported,
2 manufactured, packaged, distributed, or marketed for sale or use in California will be reformulated, in a
3 manner consistent with the requirements of Health and Safety Code section 108939, so as not to contain
4 DEHP in concentrations exceeding 0.1% or 1000 parts per million. In reformulating the Products to
5 remove DEHP, Defendant may not replace DEHP with dibutyl phthalate (“DBP”), butyl benzyl
6 phthalate (“BBP”), di-n-hexyl phthalate (“DnHP”) or di-isodecyl phthalate (“DIDP”) in amounts of
7 more than 0.1%. For any Covered Products that contain DEHP in amounts equal to or less than
8 concentrations of 0.1%, no Proposition 65 warning shall be required for DEHP.

9 2.3 **Availability of Test Data:** To the extent that Defendant is otherwise required by law to
10 perform phthalate testing on the Products, Defendant shall, upon request by AYS, provide the results of
11 such testing to AYS on a confidential basis.

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

13 3.1 **Waiver and Release of Claims Against Defendant:** As to those matters raised in this
14 Action and in Plaintiff’s Notice brought in the public interest, Plaintiff hereby releases Defendant and
15 waives any claims against Defendant for injunctive relief or damages, penalties, fines, sanctions,
16 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum
17 incurred or claimed, for the alleged failure of Defendant to provide clear and reasonable warnings under
18 Proposition 65 about exposure to DEHP arising from the sale, distribution, or use of any Covered
19 Products in California.

20 3.2 **Defendant’s Waiver and Release of Plaintiff:** Defendant hereby releases Plaintiff from
21 and waives any claims against Plaintiff for injunctive relief or damages, penalties, fines, sanctions,
22 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum
23 incurred or claimed or which could have been claimed for matters related to the Action.

24 3.3 **Matters Covered By This Consent Judgment/Release of Future Claims:** As to the
25 Covered Products, this Consent Judgment is a full, final, and binding resolution between the Plaintiff,
26 acting on behalf of itself and, as to those matters raised in Plaintiff’s Notice, in the public interest
27 pursuant to Health and Safety Code section 25249.7(d), and Defendant for its alleged failure to provide
28 clear, reasonable, and lawful warnings of exposure to DEHP contained in the Covered Products. As to

1 the Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now and
2 in the future, concerning compliance by Defendant with existing requirements of Proposition 65 to
3 provide clear and reasonable warning about exposure to DEHP in the Covered Products.

4 3.4 For purposes of this paragraph 3, the terms "Plaintiff" and "Defendant" are defined as
5 follows. The term "Plaintiff" includes the Plaintiff as defined at Paragraph 1.1 above, and also includes
6 its members, subsidiaries, successors, and assigns and its directors, officers, agents, attorneys,
7 representatives, and employees. The term "Defendant" includes the Defendant, as that term is defined in
8 Paragraph 1.2 above, and also includes its corporate affiliates, including any and all corporate parents
9 and subsidiaries and their directors, officers, agents, attorneys, representatives, employees, licensors,
10 heirs, predecessors, successors, and assigns, and their suppliers, distributors, and customers of the
11 Covered Products.

12 4. MONETARY PAYMENTS

13 4.1 Defendant shall pay \$4,000.00 as stipulated civil penalties under Proposition 65 for any
14 violations arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State of
15 California as required under Proposition 65. Plaintiff shall distribute these payments to the Plaintiff and
16 to the State of California as required under Proposition 65. In lieu of additional civil penalties,
17 defendant further shall pay \$18,000.00, with this amount to be used by As You Sow for grants to
18 California non-profit organizations and by AYS Environmental Enforcement Fund. These funds shall
19 be used to reduce exposures to toxic chemicals and to increase consumer, worker and community
20 awareness of the health hazards posed by toxic chemicals in California. In deciding among the grantee
21 proposals, the As You Sow Board of Directors ("Board") takes into consideration a number of important
22 factors, including: (1) the nexus between the harm done in the underlying case(s), and the grant
23 program work; (2) the potential for toxics reduction, prevention, remediation or education benefits to
24 California citizens from the proposal; (3) the budget requirements of the proposed grantee and the
25 alternate funding sources available to it for its project; and (4) the Board's assessment of the grantee's
26 chances for success in its program work. AYS shall ensure that all funds will be disbursed and used in
27 accordance with AYS' mission statement, articles of incorporation, and bylaws and applicable state and
28 federal laws and regulations.

1 4.2 Defendant shall pay \$20,000 as reimbursement for the investigation fees and costs,
2 testing costs, expert witness fees, attorneys fees, and other litigation costs and expenses.

3 4.3 Payments for the foregoing amounts shall be made according to the following schedule.
4 Within five (5) days following the execution of this Consent Judgment by the Parties, Defendant shall
5 pay \$14,000 in a check delivered by overnight delivery to Robert S. Perlmutter, Shute, Mihaly &
6 Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102 or by wire to:

7 Bank: Wells Fargo Bank, NA

8 Account Name: Shute, Mihaly & Weinberger LLP Legal Services Trust

9 Account Number: 0006134134

10 Wire Routing Number 121000248

11 Reference: AYS.ZEIKOS

12
13 4.4 Within five (5) days following the approval and entry of this Consent Judgment by the
14 Court, Defendant shall pay an additional \$14,000 in a check delivered by overnight delivery to Robert S.
15 Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102 or by wire to
16 the account listed above. No more than thirty (30) days following the approval and entry of this Consent
17 Judgment by the Court, Defendant shall pay an additional \$14,000 in a check delivered by overnight
18 delivery to Robert S. Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco,
19 CA 94102 or by wire to the account listed above. Defendant shall make all checks payable to "Shute,
20 Mihaly & Weinberger LLP Trust Account."

21 4.5 In the event that any payment by Defendant to Plaintiff is not remitted to Plaintiff's
22 counsel within ten (10) days of its due date, the entire balance of the unpaid portion of the \$42,000
23 settlement shall be immediately due and payable, and Defendant shall be deemed to be in default of its
24 obligations under this Consent Judgment. Plaintiff shall provide written notice to Defendant in the event
25 of any default hereunder, and if Defendant fails to remedy said default within ten (10) business days
26 thereafter, Plaintiff may seek relief pursuant to Section 664.6 of the California Code of Civil Procedure,
27 and shall be entitled to recover its attorneys' fees and costs for doing so.

28

1 4.6 In the event this Consent Judgment becomes null and void under Paragraph 11, *infra*,
2 Plaintiff shall, within fifteen days, return any payments made under this Consent Judgment to
3 Defendant.

4 **5. SEVERABILITY**

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

8 **6. MODIFICATION OF CONSENT JUDGMENT**

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

12 **7. ENFORCEMENT OF CONSENT JUDGMENT**

13 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
14 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
15 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
16 (including reasonable attorneys' fees and costs) are provided by law.

17 7.2 Except as otherwise provided in Paragraph 4.5, the Parties may enforce the terms and
18 conditions of this Consent Judgment pursuant to paragraph 7.1 only after the complaining Party has first
19 given thirty (30) days notice to the Party allegedly failing to comply with the terms and conditions of the
20 Consent Judgment and has attempted, in an open and good faith manner, to resolve such Party's alleged
21 failure to comply.

22 **8. GOVERNING LAW**

23 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance
24 with, the laws of the State of California.

25 8.2 The Parties have participated in the preparation of this Consent Judgment and this
26 Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to
27 revision and modification by the Parties and has been accepted and approved as to its final form by all
28 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment

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

6 **9. ENTIRE AGREEMENT**

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

17 **10. NOTICES**

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

22 For Plaintiff: AS YOU SOW
23 Attn: Larry Fahn
24 311 California Street, Suite 510
25 San Francisco, CA 94104
26 415 391 3245 fax

25 For Plaintiff: Robert S. Perlmutter
26 With a copy to: Shute, Mihaly & Weinberger LLP
27 396 Hayes Street
28 San Francisco, CA 94102
(415) 552-5816 Fax

1
2 For Defendant:

Zeikos, Inc.
Attn: Sion Chams
1410 Broadway, 12th Floor
New York, NY 10018

3
4
5
6 For Plaintiff:
7 With a copy to:

Brian S. Tretter
Oved & Oved LLP
401 Greenwich Street
New York, NY 10013

8
9
10
11 The contacts and/or addresses stated immediately above may be amended by giving notice to all Parties
12 to this Consent Judgment.

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

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

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

23 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days after the
24 Effective Date, electronically provide or otherwise serve a copy of it and the report required pursuant to
25 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

26 The Effective Date of this Consent Judgment shall be the date it is entered by the Court.
27
28

1 **12. AUTHORIZATION**

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

4 **13. COUNTERPARTS/FACSIMILE SIGNING**

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

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

9 **IT IS SO STIPULATED:**

10
11 DATED: _____ AS YOU SOW

12 BY: _____
13 LARRY FAHN
14 *President*

15 DATED: 4/26/12 _____ ZEIKOS, INC.

16 BY:  _____
17 Sion Chams
18 *Chief Operating Officer*

19 In accordance with the stipulation of Plaintiff and Defendant,

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

21 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
22 violates the provisions of this Consent Judgment, this Court retains over this matter.
23

24
25 DATED: _____
26 JUDGE OF THE SUPERIOR COURT

1 **12. AUTHORIZATION**

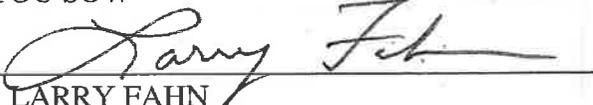
2 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
3 Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

4 **13. COUNTERPARTS/FACSIMILE SIGNING**

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

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

9 **IT IS SO STIPULATED:**

10
11 DATED: 4/26/2012 AS YOU SOW
12 BY: 
13 LARRY FAHN
14 President

15 DATED: _____ ZEIKOS, INC.
16 BY: _____
17 Sion Chams
18 Chief Operating Officer

19 In accordance with the stipulation of Plaintiff and Defendant,

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

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

23
24 JUN 14 2012 HAROLD KAHN
25 DATED: _____
26 JUDGE OF THE SUPERIOR COURT
27

28 323719.4

1 **PROOF OF SERVICE**

2 *As You Sow v. Zeikos, Inc.*
3 *Case No. CGC-11-514883*
4 *San Francisco Superior Court*

5 At the time of service, I was over 18 years of age and **not a party to this action**. I am
6 employed in the City and County of San Francisco, State of California. My business address is
7 396 Hayes Street, San Francisco, California 94102.

8 On June 14, 2012, I served true copies of the following document(s) described as:

9 **NOTICE OF ENTRY OF CONSENT JUDGMENT**

10 on the parties in this action as follows:

11 **SEE ATTACHED SERVICE LIST**

12 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
13 persons at the addresses listed in the Service List and placed the envelope for collection and
14 mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly &
15 Weinberger LLP's practice for collecting and processing correspondence for mailing. On the
16 same day that the correspondence is placed for collection and mailing, it is deposited in the
17 ordinary course of business with the United States Postal Service, in a sealed envelope with
18 postage fully prepaid.

19 I declare under penalty of perjury under the laws of the State of California that the
20 foregoing is true and correct.

21 Executed on June 14, 2012, at San Francisco, California.

22 
23 Sean P. Mulligan

SERVICE LIST

As You Sow v. Zeikos, Inc.
Case No.: CGC-11-514883
San Francisco Superior Court

Brian S. Tretter
OVED & OVED LLP
401 Greenwich Street
New York, NY 10013
Telephone: 212.226.2376
Facsimile: 212.226.7555
E-mail: btretter@ovedlaw.com

Proposition 65 Enforcement Reporting
Attention: Prop 65 Coordinator
1515 Clay Street, Suite 2000
Post Office Box 70550
Oakland, California 94612-0550

Attorney for Defendant Zeikos, Inc.

394870.1