

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

AS YOU SOW,

Plaintiff,

v.

TRUE VALUE COMPANY and DOES 1
through 100, INCLUSIVE,

Defendant.

) Case No. RG 07-356128

) Assigned For All Purposes To The
) Honorable

) **CONSENT JUDGMENT**

This Consent Judgment is entered into by and between Plaintiff AS YOU SOW(“AYS”) and Defendant TRUE VALUE COMPANY (“True Value”) to resolve all claims raised in the plaintiff’s complaint filed in the above-captioned action. This Consent Judgment shall be effective upon entry. AYS and True Value (collectively “the Parties”) agree to the terms and conditions set forth below.

1. INTRODUCTION

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

1 1.2 True Value manufactured and distributed a paint thinner, Xylol, for sale in True
2 Value stores, including those in California. True Value asserts that as of February 2007, True
3 Value ceased manufacturing Xylol products and by June 2007, True Value ceased shipping Xylol
4 products for sale in California.

5 1.3 AYS contends that Xylol contains ethylbenzene, a chemical regulated by the State
6 of California as known to cause cancer pursuant to the Safe Drinking Water and Toxic
7 Enforcement Act of 1986 ("Proposition 65"), California Health and Safety Code §25249.5 et seq.;
8 Title 22, California Code of Regulations, §12000 et seq.

9 1.4 On August 31, 2007 AYS sent a 60-day Notice of Violation to True Value and to
10 public enforcers as required by Health & Safety Code Section 25249.7 alleging that True Value
11 violated Proposition 65 by failing to provide clear and reasonable warning before exposing users
12 to ethylbenzene in paint thinners (specifically Xylol 16 fl. oz. products). The Xylol products shall
13 be referred to as "the Covered Products."

14 1.5 On November 14, 2007, AYS filed a Complaint against True Value in the
15 Alameda Superior Court, No. RG07-356128, alleging that Defendants violated Proposition 65
16 due to the alleged failure to provide clear and reasonable warning that users of the Covered
17 Products identified in the 60-day Notice were exposed to ethylbenzene, a chemical known to the
18 state of California to cause cancer.

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

24 1.7 The Parties enter into this agreement to settle certain disputed claims as alleged in
25 the complaint, and to avoid prolonged and costly litigation. By executing and complying with
26 this agreement, neither Party admits any facts or conclusions of law including, but not limited to,
27 any facts or conclusions of law regarding any violations of Proposition 65, or any other statutory,
28 common law or equitable claim or requirement relating to or arising from the sale of Xylol in

1 California. Neither shall this Consent Judgment be construed as an admission that any act
2 provided for herein, or any warnings regarding exposure to the Chemicals from the Products are
3 required under Proposition 65 or any other statute, regulation, or common law requirement.
4 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or defense
5 that Plaintiff and Defendants may have in any other or in future legal proceedings unrelated to
6 these proceedings. However, this paragraph shall not diminish or otherwise affect the obligation,
7 responsibilities, and duties of the Parties under this Consent Judgment.

8 1.8 The term "Effective Date" means the date of entry of this Consent Judgment.

9 **2. INJUNCTIVE RELIEF**

10 2.1 If, at any time after the Effective Date, True Value sells, distributes or
11 manufactures any Covered Products for sale or use in the State of California, it shall provide the
12 following warning statement:

13 "WARNING: This product contains a chemical known to the State of California
14 to cause cancer."

15 2.2 As to any Covered Product that contains ethylbenzene and a chemical listed under
16 Proposition 65 as a reproductive toxin, the following warning shall be provided:

17 "WARNING: This product contains chemicals known to the State of California to
18 cause cancer and birth defects and other reproductive harm"

19 2.3 The warning statements required in Section 2.1 and 2.2 shall be prominently
20 affixed to or printed on the Covered Product's packaging and labeling by True Value and shall be
21 displayed with such conspicuousness, as compared with other words, statements, designs, or
22 devices on the Covered Product, or its packaging or labeling, as to render it likely to be read and
23 understood by an ordinary individual under customary conditions of purchase or use. For
24 purposes of this Section, a warning may be contained in the same section of the packaging and
25 labeling that contains other safety warnings, if any, concerning the use of the Covered Product.
26 The type size of the warning must be legible, but need not be any larger than any other warning
27 provided for the Covered Product, and its relative size may take into account the nature,
28 immediacy, and acuteness of the risks for which other warnings are provided.

1 2.4 No later than 60 days following the parties' execution of this Consent Judgment,
2 True Value shall request all member stores in California that purchased Covered Products to
3 remove such products from store shelves, to return all Covered Products to True Value for a full
4 refund, and to no longer offer the Covered Products for sale, unless they contain warnings as
5 required above. Within 90 days of the Effective Date of this Consent Judgment, True Value will
6 notify Plaintiff of True Value's efforts requesting all member stores in California to remove
7 Covered Products from store shelves, to return all Covered Products to True Value for a full
8 refund, and to no longer offer the Covered Products for sale, and the member stores compliance
9 therewith. .

10 **3. SETTLEMENT PAYMENT**

11 3.1 Within 15 days following the parties' execution of this Consent Judgment , True
12 Value shall pay \$ 17,000.00 in the form of a check made payable to "Brian Gaffney, Attorney
13 Client Trust Account" as reimbursement for the investigation fees and costs, testing costs, expert
14 witness fees, attorneys fees, and other litigation costs and expenses. The check shall be delivered
15 by overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St.,
16 Suite 505, San Francisco, CA 94105. In the event this Consent Judgment becomes null and void
17 under Paragraph 8 infra, Plaintiff shall, within fifteen days, return the payment made under this
18 paragraph to Defendants.

19 3.2 Within 15 days following the parties' execution of this Consent Judgment, True
20 Value shall pay \$ 3,000.00 in the form of a check made payable to "Brian Gaffney, Attorney
21 Client Trust Account" as a civil penalty pursuant to Health and Safety Code Section 25249.7(b).
22 As You Sow shall remit 75% of this amount to the State of California pursuant to Health and
23 Safety Code Section 25249.12(b). The check shall be delivered by overnight delivery to Brian
24 Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St., Suite 505, San Francisco, CA
25 94105. In the event this Consent Judgment becomes null and void under Paragraph 8 infra,
26 Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendants.

27 3.3 Additional In Lieu Payments: Additionally, within 15 days following the parties'
28 execution of this Consent Judgment, True Value shall pay a total of \$ 22,000 in the form of a

1 check made payable to "Brian Gaffney, Attorney Client Trust Account" in lieu of additional civil
2 penalties. These funds shall be used by As You Sow to reduce or remediate exposures to toxic
3 chemicals and to increase consumer, worker and community awareness of the health hazards
4 posed by toxic chemicals in California via its program work, but primarily through grants to other
5 501(c)(3) non-profit organizations working in toxics reduction, remediation and/or environmental
6 education. In deciding among the grantee proposals, the As You Sow Board of Directors
7 ("Board") takes into consideration a number of important factors, including: (1) the nexus
8 between the harm done in the underlying case(s), and the grant program work; (2) the potential
9 for toxics reduction, prevention, remediation or education benefits to California citizens from the
10 proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources
11 available to it for its project; and (4) the Board's assessment of the grantee's chances for success
12 in its program work. AYS shall ensure that all funds will be disbursed and used in accordance
13 with AYS' mission statement, articles of incorporation, and bylaws and applicable state and
14 federal laws and regulations. This payment shall not be construed as a credit against the personal
15 claims of absent third parties for restitution against Defendants. The check shall be delivered by
16 overnight delivery to Brian Gaffney, LAW OFFICES OF BRIAN GAFFNEY, 605 Market St.,
17 Suite 505, San Francisco, CA 94105. In the event this Consent Judgment becomes null and void
18 under Paragraph 8 infra, Plaintiff shall, within fifteen days, return the payment made under this
19 paragraph to Defendants.

20 **4. ENFORCEMENT OF CONSENT JUDGMENT**

21 4.1 The Parties may, by motion or order to show cause before the Superior Court of
22 the County of Alameda, enforce the terms and conditions of this Consent Judgment. In the event
23 that a dispute arises with respect to any of the provisions of this Consent Judgment, the Parties
24 shall meet and confer within 10 days after either Party receives written notice of an alleged
25 violation of this Agreement. The prevailing party in any dispute regarding compliance with the
26 terms of this Consent Judgment shall be awarded any fines, costs, penalties, or remedies provided
27 by law. Additionally, the prevailing party shall be awarded its reasonable attorney's fees and
28 costs.

1 **5. CLAIMS COVERED AND RELEASE**

2 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
3 resolution between AYS and True Value and its parents, shareholders, divisions, subdivisions,
4 subsidiaries, partners, sister companies and their successors and assigns (“Defendant Releasees”),
5 and all entities to whom they distribute or sell Covered Products, including but not limited to
6 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
7 (“Downstream Defendant Releasees”), of any actual and potential claims that were or could have
8 been brought by AYS for the alleged failure to provide clear, reasonable, and lawful warnings of
9 exposure to ethylbenzene used or contained in the Covered Products manufactured, distributed,
10 and/or sold by True Value.

11 5.2 As to the Covered Products, compliance with the terms of this Consent Judgment
12 by True Value resolves any issue from the date of entry of this Consent Judgment into the future
13 concerning compliance by True Value, Defendant Releasees and Downstream Defendant
14 Releasees with regard to Proposition 65 as to the presence of, or exposure to, ethylbenzene in the
15 Covered Products manufactured, distributed or sold by True Value..

16 5.3 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
17 hearing or trial on the allegations of the complaint,.

18 **6. GOVERNING LAW AND CONSTRUCTION**

19 6.1 This agreement shall be governed by the laws of the State of California.

20 6.2 The Parties, including their counsel, have participated in the preparation of this
21 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties as
22 achieved through formal mediation. This Consent Judgment was subject to revision and
23 modification by the Parties and has been accepted and approved as to its final form by all Parties
24 and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
25 shall not be interpreted against any Party as a result of the manner of the preparation of this
26 Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of
27 construction providing that ambiguities are to be resolved against the drafting Party should not be
28

1 employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby
2 waive California Civil Code section 1654.

3 6.3 This Consent Judgment is intended as a full settlement and compromise of all
4 claims arising out of or relating to Plaintiff's Notice and/or the Action regarding Covered
5 Products. No claim is reserved as between the Parties hereto, and each Party expressly waives any
6 and all rights which it may have under the provisions of Section 1542 of the Civil Code of the
7 State of California, which provides:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
10 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
11 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
12 DEBTOR.

11 7. MODIFICATION OF CONSENT JUDGMENT

12 7.1 This Consent Judgment may be modified only upon written agreement of the
13 Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a
14 Party for good cause shown, and upon entry of a modified Consent Judgment by this Court. Any
15 Party seeking to modify this Consent Judgment shall meet and confer with all affected Parties
16 prior to filing a motion to modify the Consent Judgment in a good faith to attempt to resolve any
17 differences.

18 8. COURT APPROVAL

19 8.1 If this Consent Judgment is not entered by the Court, it shall be of no force or
20 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
21 purpose.

22 9. ENTIRE AGREEMENT

23 9.1 The Parties declare and represent that no promise, inducement or other agreement
24 has been made conferring any benefit upon any Party except those contained herein and that this
25 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
26 supersedes any prior or contemporaneous negotiations, representations, agreements and
27 understandings of the Parties with respect to such matters, whether written or oral. Parol
28

1 evidence shall be inadmissible to show agreement by, between, or among the Parties to any term
2 or condition contrary to or in addition to the terms and conditions contained in this Consent
3 Judgment. The Parties acknowledge that each has not relied on any promise, representation or
4 warranty, expressed or implied, not contained in this agreement.

5 **10. APPLICATION OF CONSENT JUDGMENT**

6 10.1 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
7 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

8 10.2 This Consent Judgment shall not apply to Covered Products manufactured,
9 distributed, or sold by True Value for use outside of California.

10 **11. ATTORNEYS' FEES**

11 11.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
12 own attorney's fees and costs incurred in connection with the 60-day Notice of Violation and
13 Plaintiff's complaint.

14 **12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7.**

15 12.1 Plaintiff shall comply with the reporting requirements referred to in Health and
16 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of Regulations
17 sections 3000-3008), and shall move for approval of this consent judgment pursuant to the terms
18 thereof.

19 **13. PROVISION OF NOTICE**

20 All correspondence and notices required by this Consent Judgment to the Parties shall be
21 sent.

22 To Plaintiff As You Sow
23 As You Sow Foundation
24 Attn: Kara Buchner / Larry Fahn
311 California Street, Suite 510
San Francisco, CA 94104

With a copy to:

Brian Gaffney
LAW OFFICES OF BRIAN GAFFNEY
605 Market Street, Suite 505
San Francisco, CA 94105

25 To True Value

26
27 Robert Bridge
True Value Company
28 8600 West Bryn Mawr Avenue

With a copy to:

Jeffrey B. Margulies, Esq.
Fulbright & Jaworski L.L.P.
555 S. Flower Street, 41st Floor

1 Chicago, IL 60631-3579

Los Angeles, California 90071
Tel: (213) 892-8986
Fax: (213) 892-9494
E-mail: jmargulies@fulbright.com

2
3
4 **14. EXECUTION AND COUNTERPARTS**

5 14.1 This Consent Judgment may be executed in counterparts and by means of
6 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
7 one document.

8 **15. AUTHORIZATION**

9 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
10 by the party he or she represents to stipulate to this Consent Judgment and to enter into and
11 execute the Consent Judgment on behalf of the party represented and legally bind that party. The
12 undersigned have read, understand, and agree to all of the terms and conditions of this Consent
13 Judgment.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

IT IS SO STIPULATED:

DATED: _____

AS YOU SOW

BY: _____

ITS: _____

DATED: 2-15-08

TRUE VALUE COMPANY

BY: [Signature]

ITS: ASST. GENERAL COUNSEL

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: _____

JUDGE OF THE SUPERIOR COURT

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

IT IS SO STIPULATED:

DATED: 6 Feb 2008

AS YOU SOW

BY: Darryl Fah

ITS: Executive Director

DATED: _____

TRUE VALUE COMPANY

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: _____

JUDGE OF THE SUPERIOR COURT