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As You Sow  
6  
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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF ALAMEDA**

10 **(Unlimited Jurisdiction)**  
11

12 AS YOU SOW,	)	CASE NO. RG-08-404572
	)	
13 Plaintiff,	)	<b>CONSENT JUDGMENT</b>
	)	
14 v.	)	
	)	
15 HOMAX PRODUCTS INC; HOMAX	)	
HOLDINGS, INC.; JASCO CHEMICAL	)	
16 CORPORATION; FLUID ENTERPRISES,	)	
INC.; OLYMPUS PARTNERS; ACE	)	
17 HARDWARE CORPORATION; KELLY-	)	
MOORE PAINT COMPANY, INC.; and DOES	)	
18 1 through 100 INCLUSIVE,	)	
	)	
19 Defendants.	)	
	)	

20

21 This Consent Judgment is entered into by and between Plaintiff AS YOU SOW and  
22 Defendants Homax Products Inc; Homax Holdings, Inc; Fluid Enterprises, Inc; Olympus  
23 Partners (collectively "Homax") to resolve all claims raised in the Plaintiff's Complaint filed in  
24 the above-captioned action. This Consent Judgment shall be effective upon entry. As You  
25 Sow and Homax (collectively "the Parties") agree to the terms and conditions set forth below.

26 **1. INTRODUCTION**

27 1.1 As You Sow is a non-profit foundation dedicated to, among other causes, the  
28 protection of the environment, the promotion of human health, the improvement of worker and

1 consumer rights, environmental education, and corporate accountability. As You Sow is based  
2 in San Francisco, California and incorporated under the laws of the State of California.

3 1.2 Homax is a person in the course of doing business pursuant to Health and Safety  
4 Code § 25249.11(b), and has manufactured and distributed for sale in California products that  
5 contain ethylbenzene. Ethylbenzene is a chemical regulated by the State of California as  
6 known to cause cancer pursuant to the Safe Drinking Water and Toxic Enforcement Act of  
7 1986 ("Proposition 65"), California Health and Safety Code § 25249.5 et seq.; Title 22,  
8 California Code of Regulations, §12000 et seq.

9 1.3 On June 3, 2008 As You Sow sent a 60-day Notice of Violation to Homax and  
10 to public enforcers as required by Health & Safety Code § 25249.7 alleging that Homax  
11 violated Proposition 65 by failing to provide clear and reasonable warning before exposing  
12 users to ethylbenzene in their products.

13 1.4 The Oops Multi Purpose Remover 4.5 fl oz and Oops Multi Purpose Remover 1  
14 pint products in As You Sow's June 3, 2008 60-day Notice shall be referred to collectively as  
15 "the Covered Products."

16 1.5 On August 18, 2008, As You Sow filed a Complaint against Homax and  
17 Defendants Jasco Chemical Corporation, Ace Hardware Corporation and Kelly-Moore Paint  
18 Company, Inc., in the Alameda Superior Court, No.RG-08-404572, alleging that Defendants  
19 violated Proposition 65 due to the alleged failure to provide clear and reasonable warning that  
20 users of the products identified in the June 3, 2008 60-day Notice were exposed to  
21 ethylbenzene, a chemical known to the state of California to cause cancer.

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

27 1.7 The Parties enter into this agreement to settle certain disputed claims as alleged  
28 in the Complaint, and to avoid prolonged and costly litigation. By executing and complying

1 with this agreement, neither Party admits any facts or conclusions of law including, but not  
2 limited to, any facts or conclusions of law regarding any violations of Proposition 65, or any  
3 other statutory, common law or equitable claim or requirement relating to or arising from the  
4 sale of Covered Products in California. Neither shall this Consent Judgment be construed as  
5 an admission that any act provided for herein, or any warnings regarding exposure to  
6 ethylbenzene from the Covered Products are required under Proposition 65 or any other statute,  
7 regulation, or common law requirement. Nothing in this Consent Judgment shall prejudice,  
8 waive, or impair any right, remedy, or defense that Plaintiff and Defendants may have in any  
9 other or in future legal proceedings unrelated to these proceedings. However, this paragraph  
10 shall not diminish or otherwise affect the obligation, responsibilities, and duties of the Parties  
11 under this Consent Judgment.

12 1.8 The term "Effective Date" means the date of entry of this Consent Judgment.

13 **2. INJUNCTIVE RELIEF**

14 2.1 At all times after the Effective Date, Homax shall provide the following warning  
15 statement for all Covered Products which contain ethylbenzene and are sold, distributed or  
16 manufactured for sale or use in the State of California:

17 **"WARNING: This product contains a chemical known to the State of**  
18 **California to cause cancer."**

19 In the event the Covered Products contain a chemical known to the State of  
20 California to be a reproductive toxin, all such Covered Products sold, distributed or  
21 manufactured for sale or use in the State of California shall read:

22 **"WARNING: This product contains a chemical known to the State of**  
23 **California to cause cancer, birth defects, or other reproductive harm."**

24 2.2 The warning statement required in Section 2.1 shall be prominently affixed to or  
25 printed on the Covered Products' packaging and labeling by Homax. The warnings shall be  
26 legible, in bold and shall be displayed with such conspicuousness, as compared with other  
27 words, statements, designs, or devices on the Covered Product, or its packaging or labeling, as  
28

1 to render it likely to be read and understood by an ordinary individual under customary  
2 conditions of purchase or use.

3 2.3 No later than 25 days following the Parties' execution of this Consent Judgment,  
4 Homax shall provide notice by mail on Defendants' letterhead to all the Downstream  
5 Defendant Releasees (as defined in ¶5.1 *infra*), in part, as follows:

6 This letter is sent as a **notice and warning** that your California sales inventory may  
7 contain Ethylbenzene, a chemical known to the State of California to cause cancer, in  
8 the following Homax Products, Inc. ("Homax") products: (1) Oops! Multipurpose  
9 Remover (4.5 fl. oz. size), (2) Oops! Multipurpose Remover (pint size), (3) Jasco Brush  
Cleaner (pint size), (4) Jasco Brush Cleaner (quart size), and (5) Jasco Brush Cleaner  
size)..

10 The notice provided by Homax pursuant to this section shall also instruct the  
11 Downstream Defendant Releasees that they must attach stick-on labels to the front of  
12 Oops! Multipurpose Remover (4.5 fluid ounce), Oops! Multipurpose Remover (pint),  
13 Jasco Brush Cleaner (pint), Jasco Brush Cleaner (quart), and Jasco Brush Cleaner  
14 (gallon) in the inventory of the Downstream Defendant Releasees. The stick-on labels  
15 provided by Homax shall comply with Sections 2.1 and 2.2 above. Homax shall provide  
16 such stick-on labels in sufficient quantity and for sufficient duration to meet the inventory  
17 needs of each Downstream Defendant Releasee.

18 2.4 No later than June 1, 2009, Homax shall remove ethylbenzene from all Covered  
19 Products, shall cease to ship for sale in California all Covered Products that contain  
20 ethylbenzene. No later than July 15, 2009, Homax shall provide notice to As You Sow of its  
21 reformulation of the Covered Products pursuant to this section and that it has ceased all such  
22 shipments of ethylbenzene-containing Oops! products to California.

23 2.5 Within 120 days of the Effective Date of this Consent Judgment, Homax will  
24 notify As You Sow in writing of Homax's efforts to comply with Sections 2.1, 2.2, 2.3, and 2.4  
25 of this Consent Judgment.

26 3. **SETTLEMENT PAYMENT**

27 3.1 On July 2, 2009, Homax shall pay \$196,750.00 in the form of a check made  
28 payable to "Lippe Gaffney Wagner, Attorney Client Trust Account" as reimbursement for

1 plaintiff's attorneys fees, investigation costs, and other reasonable litigation costs and expenses.  
2 The check shall be delivered by overnight delivery to Brian Gaffney, LIPPE GAFFNEY  
3 WAGNER LLP, 329 Bryant Street, Suite 3D, San Francisco, CA, 94107. In the event this  
4 Consent Judgment becomes null and void under Paragraph 8 infra, Plaintiff shall, within fifteen  
5 days, return the payment made under this paragraph to Homax.

6 3.2 As You Sow shall allocate the payments made pursuant to Sections 3.1 as  
7 follows:

8 3.2.1 \$52,240.00 as reimbursement for the investigation costs, laboratory  
9 testing costs, plaintiff's attorneys fees, and other reasonable litigation costs and expenses.

10 3.2.2 \$26,000.00 as a civil penalty pursuant to Health and Safety Code  
11 Section 25249.7(b). As You Sow shall remit 75% of this amount to the State of California  
12 pursuant to Health and Safety Code Section 25249.12(b).

13 3.2.3 \$118,510.00 in lieu of additional civil penalties. These funds shall be  
14 used by As You Sow to reduce or remediate exposures to toxic chemicals and to increase  
15 consumer, worker and community awareness of the health hazards posed by toxic chemicals in  
16 California via its program work, but primarily through grants to other 501(c)(3) non-profit  
17 organizations working in toxics reduction, remediation and/or environmental education. In  
18 deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into  
19 consideration a number of important factors, including: (1) the nexus between the harm done in  
20 the underlying case(s), and the grant program work; (2) the potential for toxics reduction,  
21 prevention, remediation or education benefits to California citizens from the proposal; (3) the  
22 budget requirements of the proposed grantee and the alternate funding sources available to it  
23 for its project; and (4) the Board's assessment of the grantee's chances for success in its  
24 program work. As You Sow shall ensure that all funds will be disbursed and used in  
25 accordance with As You Sow' mission statement, articles of incorporation, and bylaws and  
26 applicable state and federal laws and regulations.

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1     **4.     ENFORCEMENT OF CONSENT JUDGMENT**

2             4.1     The Parties may, by motion or order to show cause before the Superior Court of  
3     the County of Alameda, enforce the terms and conditions of this Consent Judgment. In the  
4     event that a dispute arises with respect to any of the provisions of this Consent Judgment, the  
5     Parties shall meet and confer within 10 days after either Party receives written notice of an  
6     alleged violation of this Agreement. The prevailing party in any dispute regarding compliance  
7     with the terms of this Consent Judgment shall be awarded any fines, costs, penalties, or  
8     remedies provided by law. Additionally, if As You Sow is the prevailing party in such a  
9     dispute, it shall be awarded its reasonable attorney's fees and costs.

10    **5.     CLAIMS COVERED AND RELEASE**

11            5.1     As to the Covered Products, this Consent Judgment is a full, final, and binding  
12    resolution between As You Sow and Homax and its parents, shareholders, divisions,  
13    subdivisions, subsidiaries, partners, sister companies and their successors and assigns  
14    ("Defendant Releasees"), and all entities to whom they distribute or sell Covered Products,  
15    including but not limited to distributors, wholesalers, customers, retailers, franchisees,  
16    cooperative members, and licensees ("Downstream Defendant Releasees"), of any actual and  
17    potential claims that were or could have been brought by As You Sow for the alleged failure to  
18    provide clear, reasonable, and lawful warnings of exposure to ethylbenzene used or contained  
19    in the Covered Products manufactured, distributed, and/or sold by Homax.

20            5.2     As to the Covered Products, compliance with the terms of this Consent  
21    Judgment by Homax resolves any issue from the date of entry of this Consent Judgment into  
22    the future concerning compliance by Homax, Defendant Releasees and Downstream Defendant  
23    Releasees with regard to Proposition 65 as to the presence of, or exposure to, ethylbenzene in  
24    the Covered Products. manufactured, distributed or sold by Homax.

25            5.3     Upon entry of this Consent Judgment, the Parties waive their respective rights to  
26    a hearing or trial on the allegations of the complaint. As You Sow shall dismiss the Complaint  
27    with prejudice as to Defendants Jasco Chemical Corporation, Ace Hardware Corporation and  
28    Kelly-Moore Paint Company, Inc., on a form provided by counsel for Homax.

1           5.4   Notwithstanding section 5.1, 5.2 and 5.3 above, nothing in this Consent  
2 Judgment precludes As You Sow from providing notice to entities other than Homax pursuant  
3 to Health & Safety Code § 25249.7 or filing suit for alleged violations of Proposition 65 related  
4 to manufacture, sale or distribution of Jasco products, including Jasco Brush Cleaner products,  
5 after sale of the Jasco product line by Homax on or about July 31, 2008.

6           5.5   Homax is not relieved of its obligations under sections 2.1 through 3.2.3  
7 inclusive of this Consent Judgment by sale or assignment or of the Covered Products product  
8 lines.

9   **6.   GOVERNING LAW AND CONSTRUCTION**

10          6.1   This agreement shall be governed by, and construed in accordance with, the  
11 laws of the State of California.

12          6.2   The Parties, including their counsel, have participated in the preparation of this  
13 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties as  
14 achieved through formal mediation. This Consent Judgment was subject to revision and  
15 modification by the Parties and has been accepted and approved as to its final form by all  
16 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent  
17 Judgment shall not be interpreted against any Party as a result of the manner of the preparation  
18 of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule  
19 of construction providing that ambiguities are to be resolved against the drafting Party should  
20 not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties  
21 hereby waive California Civil Code section 1654.

22   **7.   MODIFICATION OF CONSENT JUDGMENT**

23          7.1   This Consent Judgment may be modified only upon written agreement of the  
24 Parties, with approval of the Court, or pursuant to court order issued upon noticed motion of a  
25 Party for good cause shown, and upon entry of a modified Consent Judgment by this Court.  
26 Any Party seeking to modify this Consent Judgment shall meet and confer with all affected  
27 Parties prior to filing a motion to modify the Consent Judgment in a good faith to attempt to  
28 resolve any differences.

1     **8. COURT APPROVAL**

2             8.1     The Court shall either approve or disapprove of this Consent Judgment in its  
3     entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the  
4     Parties and their counsel. Defendants agree not to oppose this Consent Judgment.

5             8.2     In the event that the Court fails to approve and order entry of the Consent  
6     Judgment without any change whatsoever (unless otherwise so stipulated by the Parties), this  
7     Consent Judgment shall become null and void upon the election of either Party and upon  
8     written notice to all of the Parties to the Action pursuant to the notice provisions herein, and  
9     shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

10    **9. ENTIRE AGREEMENT**

11            9.1     The Parties declare and represent that no promise, inducement or other  
12    agreement has been made conferring any benefit upon any Party except those contained herein  
13    and that this agreement contains the entire agreement pertaining to the subject matter hereof.  
14    This agreement supersedes any prior or contemporaneous negotiations, representations,  
15    agreements and understandings of the Parties with respect to such matters, whether written or  
16    oral. Parol evidence shall be inadmissible to show agreement by, between, or among the  
17    Parties to any term or condition contrary to or in addition to the terms and conditions contained  
18    in this Consent Judgment. The Parties acknowledge that each has not relied on any promise,  
19    representation or warranty, expressed or implied, not contained in this agreement.

20    **10. APPLICATION OF CONSENT JUDGMENT**

21            10.1    This Consent Judgment, and compliance therewith, shall apply to and be binding  
22    upon the Parties hereto, their divisions, subdivisions and subsidiaries, and the successors or  
23    assigns of any of them.

24    **11. ATTORNEYS' FEES**

25            11.1    Except as specifically provided in this Consent Judgment, each Party shall bear  
26    its own attorney's fees and costs incurred in connection with the 60-day Notices of Violation  
27    and Plaintiff's Complaint.

28    //



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

2           12.1 Plaintiff shall comply with the reporting requirements referred to in Health and  
3 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of  
4 Regulations sections 3000-3008), and shall move for approval of this Consent Judgment  
5 pursuant to the terms thereof.

6    **13. PROVISION OF NOTICE**

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

9    To Plaintiff As You Sow

10   As You Sow Foundation  
11   ATTN: Kara Buchner / Larry Fahn  
12   311 California Street, Suite 510  
13   San Francisco, CA 94104

With a copy to:

Brian Gaffney  
LIPPE GAFFNEY WAGNER LLP  
329 Bryant Street, Suite 3D  
San Francisco, CA 94107

13   To Defendants

14   Ross W. Clawson  
15   The Homax Group, Inc.  
16   200 Westerly Road  
17   Belingham, WA 98226

With a copy to:

Jim Mattesich  
Tom Woods  
GREENBERG TRAUIG  
1201 K Street, Suite 1100  
Sacramento, CA 95814 -3938

18   **14. EXECUTION AND COUNTERPARTS**

19           14.1 This Consent Judgment may be executed in counterparts and by means of  
20 facsimile or portable document format (pdf), which taken together shall be deemed to constitute  
21 one document.

22   **15. AUTHORIZATION**

23           15.1 Each signatory to this Consent Judgment certifies that he or she is fully  
24 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter  
25 into and execute the Consent Judgment on behalf of the party represented and legally bind that  
26 party. The undersigned have read, understand, and agree to all of the terms and conditions of  
27 this Consent Judgment.

28

1 APPROVED AS TO FORM:

2 DATED: 5/29, 2009

GREENBERG TRAURIG, LLP

3

4

By: Tom Woods

5

Tom Woods  
Attorneys for Defendants

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Homax Products, Inc.; Homax Holdings,  
Inc.; Jasco Chemical Corporation; Fluid  
Enterprises, Inc.; Olympus Partners; Ace  
Hardware Corporation; And Kelly-Moore  
Paint Company, Inc.

7

8

9 DATED: \_\_\_\_\_, 2009

LIPPE GAFFNEY WAGNER LLP

10

11

By: \_\_\_\_\_

12

Brian Gaffney  
Attorneys for Plaintiff  
As You Sow

13

IT IS SO STIPULATED:

14

Dated: \_\_\_\_\_, 2009

AS YOU SOW

15

By: \_\_\_\_\_

16

Its: \_\_\_\_\_

17

18

Dated: 5/29, 2009

HOMAX

19

By: Paul Green

20

Its: President

21

22

IT IS SO ORDERED, ADJUDGED AND DECREED:

23

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.

25

26

Dated: \_\_\_\_\_, 2009

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JUDGE OF THE SUPERIOR COURT

28

1 **APPROVED AS TO FORM:**

2 DATED: \_\_\_\_\_, 2009

GREENBERG TRAURIG, LLP

4 By: \_\_\_\_\_

Tom Woods

Attorneys for Defendants

Homax Products, Inc.; Homax Holdings, Inc.; Jasco Chemical Corporation; Fluid Enterprises, Inc.; Olympus Partners; Ace Hardware Corporation; And Kelly-Moore Paint Company, Inc.

9 DATED: 5/29/09, 2009

LIPPE GAFFNEY WAGNER LLP

11 By: Brian Gaffney

Brian Gaffney  
Attorneys for Plaintiff  
As You Sow

13 **IT IS SO STIPULATED:**

14 Dated: 5/29/09, 2009

AS YOU SOW

16 By: Laurence E. Fal

17 Its: Executive Director

18 Dated: \_\_\_\_\_, 2009

HOMAX

19 By: \_\_\_\_\_

20 Its: \_\_\_\_\_

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

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

26 Dated: \_\_\_\_\_, 2009

JUDGE OF THE SUPERIOR COURT