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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 OFFICE DEPOT, INC., and DOES 1 through 10,
inclusive,

15 Defendant.
16

Case No. CGC-09-485773

[PROPOSED] CONSENT JUDGMENT

Action Filed: March 5, 2009

1 **1. INTRODUCTION**

2 1.1 **Plaintiff:** Plaintiff As You Sow ("AYS" or "Plaintiff"), is a non-profit foundation
3 organized under California's Non-Profit Public Benefit Corporation Law. AYS is dedicated to, among
4 other causes, the protection of the environment, the promotion of human health, the improvement of
5 worker and consumer safety, environmental education and corporate accountability.

6 1.2 **The Action:** On March 5, 2009, Plaintiff filed a complaint in the Superior Court for the
7 City and County of San Francisco (hereafter referred to as the "Action") charging Office Depot, Inc.
8 (hereinafter "Defendant") with having violated the Safe Drinking Water and Toxic Enforcement Act of
9 1986 ("Proposition 65"), Health and Safety Code section 25249.5 *et seq.*, by exposing individuals to
10 Di(2-ethylhexyl) phthalate ("DEHP"), a chemical known to the State of California to cause cancer and
11 reproductive harm, without providing clear and reasonable warnings to such individuals. The alleged
12 violations addressed in the Action were described in Plaintiff's Notice of Intent to Sue dated November
13 17, 2008 ("Plaintiff's Notice"), which Plaintiff had sent to the Defendant and to public enforcers as
14 required by Health & Safety Code section 25249.7. The alleged violations at issue in the Action arise
15 from alleged exposure to DEHP that is contained in back packs identified in Plaintiff's Notice that are
16 imported, distributed, marketed and are sold by Defendant for use by children ("Covered Products").

17 1.3 **Jurisdiction:** For purposes of this Consent Judgment, the Parties stipulate that the San
18 Francisco Superior Court has jurisdiction over the allegations in the Action and personal jurisdiction
19 over Defendant as to the acts alleged in the Action; that venue is proper in the City and County of San
20 Francisco; that this Court has jurisdiction to enter this Consent Judgment as a resolution of all claims
21 which were alleged in the Action; and that the Court shall retain jurisdiction to implement the Consent
22 Judgment.

23 1.4 **No Admissions:** The Parties enter into this Consent Judgment as a compromise of
24 disputed claims for the purpose of avoiding prolonged litigation. Neither the Consent Judgment nor any
25 of its provisions shall be construed as an admission by any Party of any fact, finding, issue of law, or
26 violation of law, including Proposition 65 or any other statute, regulation, or common law requirement
27 related to exposure to DEHP or other chemicals listed under Proposition 65 from the Covered Products.
28 By executing this Consent Judgment and agreeing to provide the relief and remedies specified herein,

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

10 1.5 **Effective Date.** The "Effective Date" of this Consent Decree shall be the date on which
11 it is entered by the Court.

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

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

14 2.1 **Warnings:** As of the Effective Date, Defendant agrees to provide Proposition 65
15 warnings for all Covered Products that contain DEHP, to the extent that Defendant may ship such
16 Covered Products into California for sale in California prior to July 1, 2009. Such warnings shall be
17 deemed to be "clear and reasonable" within the meaning of Proposition 65 and the implementing
18 regulations that appear at Cal. Code Regs, tit. 22, § 12601, provided that the statement that appears
19 below is printed on the label or labeling, for such Covered Products, or is affixed to such labels or
20 labeling by means of adhesive stickers on such Covered Products that identify the Covered Products to
21 which the warnings pertain, provided that such warnings, whether they appear on labels or labeling shall
22 be printed and/or affixed with such conspicuousness, as compared to other words or statements on the
23 label or labeling so as to render the warnings reasonably likely to be read by an ordinary individual
24 under customary conditions of purchase or use:

25 **WARNING:** This product contains Di (2ethyexyl) phthalate (DEHP) a
26 chemical known to the State of California to cause cancer and birth defects
or other reproductive harm.

27 2.2 **Reformulation.** Defendant agrees that all Covered Products ordered after July 1, 2009,
28 that are imported, manufactured, packaged, distributed, or marketed for sale or use in California will be

1 reformulated, in a manner consistent with the requirements of Health and Safety Code section 108939,
2 so as not to contain DEHP in concentrations exceeding 1/10 of 1% by weight. For any Covered
3 Products that contain DEHP in amounts equal to or less than concentrations of 1/10 of 1%, no
4 Proposition 65 warning shall be required for DEHP.

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

6 **3.1 Waiver and Release of Claims Against Defendant:** As to those matters raised in this
7 Action and in Plaintiff's Notice brought in the public interest, Plaintiff hereby releases Defendant and
8 waives any claims against Defendant for injunctive relief or damages, penalties, fines, sanctions,
9 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses or any other sum
10 incurred or claimed, for the alleged failure of Defendant to provide clear and reasonable warnings under
11 Proposition 65 about exposure to DEHP arising from the sale, distribution or use of any Covered
12 Products in California.

13 **3.2 Defendant's Waiver and Release of Plaintiff:** Defendant hereby releases Plaintiff from
14 and waive any claims against Plaintiff for injunctive relief or damages, penalties, fines, sanctions,
15 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum
16 incurred or claimed or which could have been claimed for matters related to the Action.

17 **3.3 Matters Covered By This Consent Judgment/Release of Future Claims:** As to the
18 Covered Products, this Consent Judgment is a full, final, and binding resolution between the Plaintiff,
19 acting on behalf of itself and, as to those matters raised in Plaintiff's Notice, in the public interest
20 pursuant to Health and Safety Code section 25249.7(d), and Defendant for its alleged failure to provide
21 clear, reasonable, and lawful warnings of exposure to DEHP contained in the Covered Products. As to
22 the Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now and
23 in the future, concerning compliance by Defendant with existing requirements of Proposition 65 to
24 provide clear and reasonable warning about exposure to DEHP in the Covered Products.

25 **3.4** For purposes of this paragraph 3, the terms "Plaintiff" and "Defendant" are defined as
26 follows. The term "Plaintiff" includes the Plaintiff as defined at Paragraph 1.1 above, and also includes
27 its members, subsidiaries, successors, and assigns and its directors, officers, agents, attorneys,
28 representatives, and employees. The term "Defendant" includes the Defendant, as that term is defined in

Paragraph 1.2 above, and also includes its corporate affiliates, including any and all corporate parents and subsidiaries and their directors, officers, agents, attorneys, representatives, employees, licensors, heirs, predecessors, successors, and assigns, and their suppliers, distributors and customers of the Covered Products.

4. MONETARY PAYMENTS

4.1 Within fifteen (15) days following the parties' approval and entry of this Consent Judgment by the Court, Defendant shall pay \$7,000 as stipulated civil penalties under Proposition 65 for any violations arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State of California as required under Proposition 65. Defendant shall make this check payable to "Shute, Mihaly & Weinberger Trust Account." Plaintiff shall distribute these payments to the Plaintiff and to the State of California as required under Proposition 65. In lieu of additional civil penalties, defendant further shall pay \$46,000 in the form of a check made payable to "Shute, Mihaly & Weinberger Trust Account" with this amount to be used by As You Sow for grants to California non-profit organizations and by AYS Foundation Environmental Enforcement Fund. These funds shall be used to reduce exposures to toxic chemicals and to increase consumer, worker and community awareness of the health hazards posed by toxic chemicals in California. In deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration a number of important factors, including: (1) the nexus between the harm done in the underlying case(s), and the grant program work; (2) the potential for toxics reduction, prevention, remediation or education benefits to California citizens from the proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources available to it for its project; and (4) the Board's assessment of the grantee's chances for success in its program work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS' mission statement, articles of incorporation, and bylaws and applicable state and federal laws and regulations. The check shall be delivered by overnight delivery to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102. In the event this Consent Judgment becomes null and void under Paragraph 11 *infra*, Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

1 4.2 Within fifteen (15) days following the parties' execution of this Consent Judgment,
2 Defendant shall pay \$17,000 in the form of a check made payable to "Shute, Mihaly & Weinberger
3 Trust Account" as reimbursement for the investigation fees and costs, testing costs, expert witness fees,
4 attorneys fees, and other litigation costs and expenses. The check shall be delivered by overnight
5 delivery to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA
6 94102. In the event this Consent Judgment becomes null and void under either Paragraph 11 *infra*,
7 Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

8 **5. SEVERABILITY**

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

12 **6. MODIFICATION OF CONSENT JUDGMENT**

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

16 **7. ENFORCEMENT OF CONSENT JUDGMENT**

17 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
18 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
19 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
20 (including reasonable attorneys' fees and costs) are provided by law.

21 7.2 The Parties may enforce the terms and conditions of this Consent Judgment pursuant to
22 paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party
23 allegedly failing to comply with the terms and conditions of the Consent Judgment and has attempted, in
24 an open and good faith manner, to resolve such Party's alleged failure to comply.

25 **8. GOVERNING LAW**

26 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance
27 with, the laws of the State of California.
28

1 8.2 The Parties have participated in the preparation of this Consent Judgment and this
2 Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to
3 revision and modification by the Parties and has been accepted and approved as to its final form by all
4 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
5 shall not be interpreted against any Party as a result of the manner of the preparation of this Consent
6 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing
7 that ambiguities are to be resolved against the drafting party should not be employed in the interpretation
8 of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code
9 section 1654.

10 **9. ENTIRE AGREEMENT**

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

21 **10. NOTICES**

22 All notices or correspondence to be given pursuant to this Consent Judgment shall be in writing
23 and shall be personally delivered or sent by first-class, registered, certified mail, overnight courier,
24 and/or via facsimile transmission (with presentation of facsimile transmission confirmation) addressed
25 to the Parties as follows:
26
27
28

1 For Plaintiffs:

AS YOU SOW FOUNDATION
Attn: Larry Fahn / Kara Buchner
311 California Street, Suite 510
San Francisco, CA 94104
415 391 3245 fax

4 With a copy to:

Ellison Folk
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-5816 Fax

7 For Defendant:

Corporate Counsel
Office Depot, Inc.
6600 North Military Trail
Boca Raton, FL 33496

Jonathon Herzog
Weston, Herzog LLP
500 N. Central Ave., Suite 650
Glendale, CA 91203

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

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

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

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

25 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days after the
26 Effective Date, electronically provide or otherwise serve a copy of it and the report required pursuant to
27 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

28 The Effective Date of this Consent Judgment shall be the date it is entered by the 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: _____

AS YOU SOW FOUNDATION

12
13 By: _____

LARRY FAHN
Executive Director

14
15
16 Dated: _____

OFFICE DEPOT, INC.

17
18 By: DM 8.28.09

19
20 In accordance with the stipulation of Plaintiff and Defendant,

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

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

26 Dated: _____

JUDGE OF THE SUPERIOR COURT

27
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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.

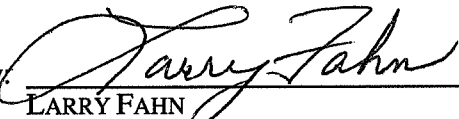
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6 deemed an original, and all of which, when taken together, shall constitute one and the same document.
7 All signatures need not appear on the same page of the document and signatures of the Parties
8 transmitted by facsimile shall be deemed binding.

9 **IT IS SO STIPULATED:**

10
11 Dated: 8/7/2009

AS YOU SOW FOUNDATION

12
13 By: 
14 LARRY FAHN
Executive Director

15
16 Dated: _____

OFFICE DEPOT, INC.

17
18 By: _____
19

20
21 In accordance with the stipulation of Plaintiff and Defendant,

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

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

25
26 Dated: _____

27 JUDGE OF THE SUPERIOR COURT