

1 Thomas N. Lippe, Esq. SB #104640
Jennifer L. Naegele, Esq., SB #232643
2 John H. Curran, Esq., SB #252497
LIPPE GAFFNEY WAGNER LLP
3 329 Bryant Street, Suite 3D
San Francisco, California 94107
4 Tel: (415) 777-5600
Fax: (415) 777-9809
5 Email: jnaegele@lgwlawyers.com

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)
12 Plaintiff,)
13 vs.)
14 PET FOOD EXPRESS, LTD.; VO-TOYS)
15 INCORPORATED; MULTIPET)
INTERNATIONAL, INC.; and DOES 1 through)
16 100, inclusive,)
Defendants.)

Case No. CGC 09-485921
**CONSENT JUDGMENT FOR
DEFENDANT MULTIPET
INTERNATIONAL, INC.**

17
18
19 This Consent Judgment is entered into by and between Plaintiff AS YOU SOW and Defendant
20 MULTIPET INTERNATIONAL, INC. ("Defendant") to resolve the claims raised in Plaintiff's
21 Complaint filed in the above-captioned action with respect to this defendant. This Consent Judgment
22 shall be effective upon entry. As You Sow and Defendant (collectively "the Parties") agree to the
23 terms and conditions set forth below.

24 **1. INTRODUCTION**

25 1.1 As You Sow is a 501(c)(3) non-profit California corporation dedicated to, among other
26 causes, the protection of the environment, the promotion of human health, the improvement of worker
27 and consumer rights, environmental education, and corporate accountability. As You Sow is based
28

1 in San Francisco, California and incorporated under the laws of the State of California.

2 1.2 Plaintiff alleges Defendant is a “person in the course of doing business” pursuant to
3 Health and Safety Code section 25249.11, subdivision (b), and has manufactured and distributed for
4 sale in California products that contain Di-*n*-butyl phthalate (“DBP”). DBP is a chemical regulated
5 by the State of California as known to cause reproductive toxicity pursuant to the Safe Drinking
6 Water and Toxic Enforcement Act of 1986 (“Proposition 65”), at California Health and Safety Code
7 section 25249.5 et seq., and Title 27, California Code of Regulations, section 25102 et seq.

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

12 1.4 The “Purrr-fection Galaxy balls” cat toy referenced in As You Sow’s November 26,
13 2008 60-day Notice is defined herein as “the Covered Product.”

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

18 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
20 San Francisco County, that this Court has jurisdiction to enter this Consent Judgment as a resolution
21 of all claims that were alleged in the Complaint, and that the Court shall retain jurisdiction to
22 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 facts
26 or conclusions of law regarding any violations of Proposition 65, or any other statutory, common law
27 or equitable claim or requirement relating to or arising from the sale of the Covered Product in
28 California. Neither shall this Consent Judgment be construed as an admission that any act provided

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

7 1.8 The term "Effective Date" means the date of entry of this Consent Judgment.

8 **2. REPRESENTATIONS**

9 2.1 Defendant hereby represents that Defendant is no longer selling, distributing, or
10 manufacturing the Covered Product, and will not do so in the future.

11 2.2 If the representation set forth in Section 2.1 above is false, Plaintiff may pursue its
12 claims for injunctive relief as specified in the Complaint identified in Section 1.5, notwithstanding
13 the release contained in Section 6 of this Consent Judgment.

14 **3. INJUNCTIVE RELIEF**

15 3.1 At all times after the Effective Date, if Defendant should sell, distribute, or
16 manufacture for sale in California any Covered Product containing DBP, Defendant shall provide the
17 following warning statement:

18 **WARNING: This product contains Di-*n*-butyl phthalate (DBP), a chemical known to
19 the State of California to cause reproductive toxicity.**

20 3.2 The warning statement required in Section 3.1 shall be prominently affixed to or
21 printed on the front of the Covered Product's packaging and labeling by Defendant. The warning
22 statement required in Section 3.1 shall also be provided for the Covered Product on any website
23 maintained by Defendant. The warnings shall be legible, in bold, and greater than 12-point type face.
24 The warnings shall be displayed with such conspicuousness, as compared with other words,
25 statements, designs, or devices on the Covered Product, or its packaging or labeling, as to render it
26 likely to be read and understood by an ordinary individual under customary conditions of purchase
27 or use.

28 3.3 No later than ten (10) days following the Parties' execution of this Consent Judgment,

1 Defendant shall provide notice by mail on Defendant's letterhead to all the Downstream Defendant
2 Releasees (as defined in ¶ 6.1 *infra*) as follows:

3 WARNING: Our records indicate that your inventory may contain Di-*n*-butyl
4 phthalate (DBP), a chemical known to the State of California to cause reproductive
5 toxicity, in the following product: Purrr-fection Galaxy balls pet toy, manufactured by
6 Multipet International, Inc.

7 The notice provided by Defendant pursuant to this section shall also instruct the Downstream
8 Defendant Releasees that they must attach stick-on labels to the front of the Products in the inventory
9 of the Downstream Defendant Releasees.

10 3.4 The stick-on labels provided by Defendant shall comply with Sections 3.1 and 3.2
11 above. Defendant shall provide such stick-on labels to all Downstream Defendant Releasees in
12 sufficient quantity and for sufficient duration to meet the inventory needs of each Downstream
13 Defendant Releasee.

14 3.5 No later than March 1, 2010, Defendant shall remove DBP and any other phthalate
15 known by the State of California to cause cancer or reproductive toxicity, as identified by Proposition
16 65 ("Prop 65 phthalates"), from its entire product line (including the Covered Product), and shall
17 cease to ship for sale in California all products that contain DBP or any other Prop 65 phthalate.

18 3.6 Within 120 days of the Effective Date of this Consent Judgment, Defendant shall
19 notify As You Sow in writing whether Defendant has reformulated its product line (including the
20 Covered Product) pursuant to Section 3.5 of this Consent Judgment, whether Defendant has ceased
21 all shipments of the Covered Product to California or elsewhere, and whether Defendant has complied
22 with Sections 3.1 through 3.5 of this Consent Judgment.

23 **4. SETTLEMENT PAYMENT**

24 4.1 The total settlement payment shall be \$50,000, which shall be paid by Defendant
25 pursuant to Section 4.2, and distributed by As You Sow pursuant to Section 4.3.

26 4.2 Defendant shall make an initial payment of \$10,000 to As You Sow within thirty (30)
27 days of the Effective Date, and a second payment of \$10,000 to As You Sow within sixty (60) days.
28 The remaining \$30,000 shall be payable over six (6) months, commencing ninety (90) days after the
Effective Date, and paid in six (6) equal monthly installments of \$5,000 each. The payments will thus

1 be due on the 90th, 120th, 150th, 180th, 210th, and 240th days after the Effective Date. All payments
2 shall be made payable to the As You Sow Environmental Enforcement Fund, and delivered by
3 overnight delivery to As You Sow, 311 California Street, Suite 510, San Francisco, CA 94104.

4 4.3 As You Sow shall allocate the payments made pursuant to Section 4.1 as follows:

5 4.3.1 \$19,500 as reimbursement for the investigation costs, laboratory testing costs,
6 Plaintiff's attorneys fees, and other reasonable litigation costs and expenses.

7 4.3.2 \$6,500 as a civil penalty pursuant to Health and Safety Code section 25249.7,
8 subdivision (b). As You Sow shall remit 75 percent of this amount to the State of California pursuant
9 to Health and Safety Code section 25249.12, subdivision (b).

10 4.3.3 \$24,000 as payments in lieu of additional civil penalties. These funds shall
11 be used by As You Sow to reduce or remediate exposures to toxic chemicals and to increase
12 consumer, worker, and community awareness of the health hazards posed by toxic chemicals in
13 California via its program work, but primarily through grants to other 501(c)(3) non-profit
14 organizations working in toxics reduction, remediation, and/or environmental education. In deciding
15 among the grantee proposals, the As You Sow Board of Directors ("Board") takes into consideration
16 a number of important factors, including: (1) the nexus between the harm done in the underlying
17 case(s), and the grant program work; (2) the potential for toxics reduction, prevention, remediation,
18 or education benefits to California citizens from the proposal; (3) the budget requirements of the
19 proposed grantee and the alternate funding sources available to it for its project; and (4) the Board's
20 assessment of the grantee's chances for success in its program work. As You Sow shall ensure that
21 all funds will be disbursed and used in accordance with As You Sow's mission statement, articles of
22 incorporation, and bylaws and applicable state and federal laws and regulations.

23 5. ENFORCEMENT OF CONSENT JUDGMENT

24 5.1 The Parties may, by motion or order to show cause before the Superior Court of the
25 County of San Francisco, enforce the terms and conditions of this Consent Judgment. In the event
26 that a dispute arises with respect to any of the provisions of this Consent Judgment, the Parties shall
27 meet and confer within ten (10) days after either Party receives written notice of an alleged violation
28 of this agreement. In any dispute regarding compliance with the terms of this Consent Judgment,

1 Plaintiff shall be awarded any fines, costs, penalties, or remedies provided by law.

2 **6. CLAIMS COVERED AND RELEASE**

3 6.1 As to the Covered Product, this Consent Judgment is a full, final, and binding
4 resolution between As You Sow and Defendant and its parents, shareholders, divisions, subdivisions,
5 subsidiaries, partners, sister companies, and their successors and assigns (“Defendant Releases”),
6 and all entities to whom they distribute or sell the Covered Product, including but not limited to
7 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
8 (“Downstream Defendant Releases”) of any actual and potential claims that were or could have been
9 brought by As You Sow for the alleged failure to provide clear, reasonable, and lawful warnings of
10 exposure to DBP used or contained in the Covered Product manufactured, distributed, and/or sold by
11 Defendant.

12 6.2 As to the Covered Product, compliance with the terms of this Consent Judgment by
13 Defendant resolves any issue from the date of entry of this Consent Judgment into the future
14 concerning compliance by Defendant, Defendant Releases, and Downstream Defendant Releases
15 with regard to Proposition 65 as to the presence of, or exposure to, DBP in the Covered Product
16 manufactured, distributed, or sold by Defendant.

17 6.3 Upon entry of this Consent Judgment, the Parties waive their respective rights to a
18 hearing or trial on the allegations of the Complaint.

19 6.4 Defendant is not relieved of its obligations under sections 2.1 through 3.4 inclusive
20 of this Consent Judgment by sale or assignment of the Covered Product product line.

21 **7. GOVERNING LAW AND CONSTRUCTION**

22 7.1 This agreement shall be governed by, and construed in accordance with, the laws of
23 the State of California.

24 7.2 The Parties, including their counsel, have participated in the preparation of this
25 Consent Judgment, and this Consent Judgment is the result of the joint efforts of the Parties as
26 achieved through informal settlement negotiations. This Consent Judgment was subject to revision
27 and modification by the Parties and has been accepted and approved as to its final form by all Parties
28 and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall

1 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
3 providing that ambiguities are to be resolved against the drafting Party should not be employed in the
4 interpretation of this Consent Judgment, and, in this regard, the Parties hereby waive the protections
5 of California Civil Code section 1654.

6 **8. MODIFICATION OF CONSENT JUDGMENT**

7 8.1 This Consent Judgment may be modified only upon written agreement of the Parties,
8 with approval of the Court, or pursuant to Court order issued upon noticed motion of a Party for good
9 cause shown, and upon entry of a modified Consent Judgment by this Court. Any Party seeking to
10 modify this Consent Judgment shall meet and confer with all affected Parties prior to filing a motion
11 to modify the Consent Judgment in a good faith to attempt to resolve any differences.

12 **9. COURT APPROVAL**

13 9.1 The Court shall either approve or disapprove of this Consent Judgment in its entirety,
14 without alteration, deletion, or amendment, unless otherwise so stipulated by the Parties and their
15 counsel. Defendant agrees not to oppose the Court's approval of this Consent Judgment.

16 9.2 In the event that the Court fails to approve and order entry of the Consent Judgment
17 without any change whatsoever (unless otherwise so stipulated by the Parties), this Consent Judgment
18 shall become null and void upon the election of either Party and upon written notice to all of the
19 Parties to the Action pursuant to the notice provisions herein, and shall not be introduced into
20 evidence or otherwise used in any proceeding for any purpose.

21 **10. ENTIRE AGREEMENT**

22 10.1 The Parties declare and represent that no promise, inducement, or other agreement has
23 been made conferring any benefit upon any Party except those contained herein and that this
24 agreement contains the entire agreement pertaining to the subject matter hereof. This agreement
25 supersedes any prior or contemporaneous negotiations, representations, agreements, and
26 understandings of the Parties with respect to such matters, whether written or oral. Parol evidence
27 shall be inadmissible to show agreement by, between, or among the Parties to any term or condition
28 contrary to or in addition to the terms and conditions contained in this Consent Judgment. The Parties

1 acknowledge that each has not relied on any promise, representation, or warranty, expressed or
2 implied, not contained in this agreement.

3 **11. APPLICATION OF CONSENT JUDGMENT**

4 11.1 This Consent Judgment, and compliance therewith, shall apply to and be binding upon
5 the Parties hereto, their divisions, subdivisions, and subsidiaries, and the successors or assigns of any
6 of them.

7 **12. ATTORNEYS FEES**

8 12.1 Except as specifically provided in this Consent Judgment, each Party shall bear its own
9 attorneys fees and costs incurred in connection with the 60-day Notices of Violation and Plaintiff's
10 Complaint.

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

12 13.1 Plaintiff shall comply with the reporting requirements referred to in Health and Safety
13 Code section 25249.7, subdivision (f) (and established in Title 11 of the California Code of
14 Regulations, sections 3000 to 3008), and shall move for approval of this Consent Judgment pursuant
15 to the terms thereof.

16 **14. PROVISION OF NOTICE**

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

19 To Plaintiff As You Sow:
20 As You Sow
21 ATTN: Kara Buchner / Larry Fahn
311 California Street, Suite 510
San Francisco, CA 94104

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

25 To Defendant:
26 Multipet International, Inc.
ATTN: _____

27 _____

28

1 With a copy to:
2 Randy M. Friedberg
3 WHITE AND WILLIAMS LLP
4 One Penn Plaza
5 41st Floor, Suite 4110
6 New York, NY 10119

7 **15. EXECUTION AND COUNTERPARTS**

8 15.1 This Consent Judgment may be executed in counterparts and by means of facsimile
9 or portable document format (pdf), which taken together shall be deemed to constitute one document.
10 All signatures need not appear on the same page of the document and signatures of the Parties
11 transmitted by facsimile shall be deemed binding.

12 **16. AUTHORIZATION**

13 16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
14 the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the
15 Consent Judgment on behalf of the party represented and legally bind that party. The undersigned
16 have read, understand, and agree to all of the terms and conditions of this Consent Judgment.

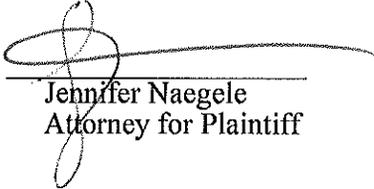
17 //
18 //
19 //
20 //
21 //
22 //
23 //
24 //
25 //
26 //
27 //

28

1 **APPROVED AS TO FORM:**

2 Dated: Feb. 9, 2010

LIPPE GAFFNEY WAGNER LLP

3
4 By: 
Jennifer Naegele
Attorney for Plaintiff

5
6 Dated: _____, 2010

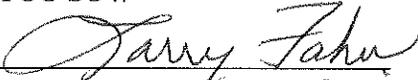
WHITE AND WILLIAMS LLP

7
8 By: _____
Randy M. Friedberg
Attorney for Defendant

9
10 **IT IS SO STIPULATED:**

11
12 Dated: Feb. 4, 2010

AS YOU SOW

13 By: 
14 Its: Executive Director

15 Dated: _____, 2010

MULTIPET INTERNATIONAL, INC.

16 By: _____

17 Its: _____

18
19
20
21 **IT IS SO 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 jurisdiction over this matter.

24 Dated: _____, 2010

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

APPROVED AS TO FORM:

Dated: _____, 2010

LIPPE GAFFNEY WAGNER LLP

By: _____
Jennifer Nasgele
Attorney for Plaintiff

Dated: 2/11, 2010

WHITE AND WILLIAMS LLP

By: _____
Randy M. Friedberg
Attorney for Defendant

IT IS SO STIPULATED:

Dated: _____, 2010

AS YOU SOW

By: _____
Its: _____

Dated: February 11, 2010

MULTIPET INTERNATIONAL, INC.
By: Max B. Hirschberg
Its: President

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