

1 ELLISON FOLK (State Bar No. 149232)  
BRIANNA R. FAIRBANKS (State Bar No. 254939)  
2 SHUTE, MIHALY & WEINBERGER LLP  
396 Hayes Street  
3 San Francisco, CA 94102  
Telephone: (415) 552-7272  
4 Facsimile: (415) 552-5816  
folk@smwlaw.com  
5 fairbanks@smwlaw.com

6 Attorneys for Plaintiff  
AS YOU SOW

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 POR-15, Inc., and DOES 1 through 100,  
15 inclusive,

16 Defendant.

Case No. CGC-10-502664

**[PROPOSED] CONSENT JUDGMENT**

1 **INTRODUCTION**

2 1.1 **Plaintiff:** Plaintiff As You Sow (“AYS” or “Plaintiff”), is a non-profit corporation  
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 August 17, 2010, Plaintiff filed a complaint in the Superior Court for  
7 the City and County of San Francisco (hereafter referred to as the “Action”) charging POR-15, 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 ethylbenzene, a chemical known to the State of California to cause cancer and reproductive harm,  
11 without providing clear and reasonable warnings to such individuals. The alleged violations addressed  
12 in the Action were described in Plaintiff’s 60-Day Notices of Violation of Proposition 65 dated March  
13 26, 2010 and June 3, 2010 (“Plaintiff’s Notices”), which Plaintiff had sent to the Defendant and to  
14 public enforcers as required by Health & Safety Code section 25249.7. The alleged violations at issue in  
15 the Action arise from alleged exposure to ethylbenzene that is contained in paint and stripping products  
16 and related products identified in Plaintiff’s Notices that are imported, distributed, marketed and are sold  
17 by Defendant. These products are: Pelucid (aerosol and liquid), Hardnose, White Cote, Accelerator,  
18 Hardener, Self-Etching Primer (liquid and aerosol), Floor Armor Part A, Floor Armor Part B, and  
19 Glisten PC (“Covered Products”).

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

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

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

13 **2. INJUNCTIVE RELIEF: WARNINGS**

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

15           2.1 **Warnings:** On the date this Consent Judgment is entered by the Court, Defendant agrees  
16 to provide Proposition 65 warnings for all Covered Products that it ships into California directly or  
17 through distribution in California that contain ethylbenzene. Such warnings shall be deemed to be “clear  
18 and reasonable” within the meaning of Proposition 65 and the implementing regulations that appear at  
19 Cal. Code Regs, tit. 22, § 12601, 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                   **WARNING:** This product contains ethylbenzene, a chemical known to  
27                   the State of California to cause cancer.

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

2 3.1 **Waiver and Release of Claims Against Defendant:** As to those matters raised in this  
3 Action and in Plaintiff’s Notices brought in the public interest, Plaintiff hereby releases Defendant and  
4 waives any claims against Defendant for injunctive relief or damages, penalties, fines, sanctions,  
5 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses or any other sum  
6 incurred or claimed, for the alleged failure of Defendant to provide clear and reasonable warnings under  
7 Proposition 65 about exposure to ethylbenzene arising from the sale, distribution or use of the Covered  
8 Products in California.

9 3.2 **Defendant’s Waiver and Release of Plaintiff:** Defendant hereby releases Plaintiff from  
10 and waive any claims against Plaintiff for injunctive relief or damages, penalties, fines, sanctions,  
11 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum  
12 incurred or claimed or which could have been claimed for matters related to the Action.

13 3.3 **Matters Covered By This Consent Judgment/Release of Future Claims:** As to the  
14 Covered Products, this Consent Judgment is a full, final, and binding resolution between the Plaintiff,  
15 acting on behalf of itself and, as to those matters raised in Plaintiff’s Notice, in the public interest  
16 pursuant to Health and Safety Code section 25249.7(d), and Defendant for its alleged failure to provide  
17 clear, reasonable, and lawful warnings of exposure to ethylbenzene contained in the Covered Products .  
18 As to the Covered Products, compliance with the terms of this Consent Judgment resolves any issue,  
19 now and in the future, concerning compliance by Defendant with existing requirements of Proposition  
20 65 to provide clear and reasonable warning about exposure to ethylbenzene in the Covered Products.

21 3.4 For purposes of this paragraph 3, the terms “Plaintiff” and “Defendant” are defined as  
22 follows. The term “Plaintiff” includes the Plaintiff as defined at Paragraph 1.1 above, and also includes  
23 its members, subsidiaries, successors, and assigns and its directors, officers, agents, attorneys,  
24 representatives, and employees. The term “Defendant” includes the Defendant, as that term is defined in  
25 Paragraph 1.2 above, and also includes its corporate affiliates, including any and all corporate parents  
26 and subsidiaries and their directors, officers, agents, attorneys, representatives, employees, licensors,  
27 heirs, predecessors, successors, and assigns, and their suppliers, distributors and customers of the  
28 Covered Products.

1 **4. MONETARY PAYMENTS**

2 4.1 Defendant shall pay \$5000 to Plaintiff as stipulated civil penalties under Proposition 65  
3 for any violations arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State  
4 of California as required under Proposition 65. Plaintiff shall furnish Defendant with proof of payment  
5 with thirty (30) days of the execution of this consent judgment. In lieu of any and all claimed additional  
6 civil penalties, defendant further shall pay \$29,500 to be used by As You Sow for grants to California  
7 non-profit organizations and by AYS Foundation Environmental Enforcement Fund. These funds shall  
8 be used to reduce exposures to toxic chemicals and to increase consumer, worker and community  
9 awareness of the health hazards posed by toxic chemicals in California. In deciding among the grantee  
10 proposals, the As You Sow Board of Directors (“Board”) shall take into consideration a number of  
11 important factors, including: (1) the nexus between the alleged harm done in the underlying case, and  
12 the grant program work; (2) the potential for toxics reduction, prevention, remediation or education  
13 benefits to California citizens from the proposal; (3) the budget requirements of the proposed grantee  
14 and the alternate funding sources available to it for its project; and (4) the Board’s assessment of the  
15 grantee’s chances for success in its program work. AYS shall ensure that all funds will be disbursed and  
16 used in accordance with AYS’ mission statement, articles of incorporation, and bylaws and applicable  
17 state and federal laws and regulations.

18 4.2 Defendant shall pay \$28,500 as reimbursement for the investigation fees and costs,  
19 testing costs, expert witness fees, attorneys fees, and other litigation costs and expenses.

20 4.3 Payments for the foregoing amounts shall be made according to the following schedule.  
21 No later than fifteen (15) days after the execution of this Consent Judgment by the Parties, Defendant  
22 shall pay \$33,000 in a check delivered by overnight delivery to Ellison Folk, Shute, Mihaly &  
23 Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102. Subsequent payments shall be made in  
24 the amount of \$3,000 per payment on the 15th day of each month for 10 months, beginning in March  
25 2011.

26 4.4 In the event that any payment by Defendant to Plaintiff is not remitted to Plaintiff’s  
27 counsel within ten (10) days of its due date, the entire balance of the unpaid portion of the \$63,000  
28 settlement shall be immediately due and payable, and Defendant shall be deemed to be in default of its

1 obligations under this Consent Judgment. A late fee of five (5) percent on the full amount of the  
2 remaining unpaid portion of the \$63,000 settlement shall be assessed in addition to the remaining  
3 amount due. This late fee shall be calculated per annum from the date the payment was due to the date it  
4 is paid. Plaintiff shall provide written notice to Defendant in the event of any default hereunder, and if  
5 Defendant fails to remedy said default within ten(10) business days thereafter, Plaintiff may seek relief  
6 pursuant to Section 664.6 of the California Code of Civil Procedure, and shall be entitled to recover its  
7 attorneys' fees and costs for doing so.

8           4.5     All checks shall be made out to the Shute, Mihaly & Weinberger Trust Account and  
9 Plaintiff will ensure that the checks are distributed according to the terms of this Consent Judgment. In  
10 the event this Consent Judgment becomes null and void under either Paragraph 11 *infra*, Plaintiff shall,  
11 within fifteen days, return the payment made under this paragraph to Defendant.

12 **5. SEVERABILITY**

13           In the event that any of the non material provisions of this Consent Judgment are held by a court  
14 to be unenforceable, the validity of the enforceable provisions remaining so long as they do not  
15 materially effect the terms of this consent judgment shall not be adversely affected thereby.

16 **6. MODIFICATION OF CONSENT JUDGMENT**

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

20 **7. ENFORCEMENT OF CONSENT JUDGMENT**

21           7.1     The Parties may, by motion or order to show cause before this Court, and upon notice  
22 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the  
23 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies  
24 (including reasonable attorneys' fees and costs) are provided by law.

25           7.2     The Parties may enforce the terms and conditions of this Consent Judgment pursuant to  
26 paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party  
27  
28

1 allegedly failing to comply with the terms and conditions of the Consent Judgment and has attempted, in  
2 an open and good faith manner, to resolve such Party's alleged failure to comply.

3 **8. GOVERNING LAW**

4 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance  
5 with, the laws of the State of California.

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

15 **9. ENTIRE AGREEMENT**

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

1 **10. NOTICES**

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

6  
7 For Plaintiffs: AS YOU SOW FOUNDATION  
8 Attn: Larry Fahn / Kara Buchner  
9 311 California Street, Suite 510  
San Francisco, CA 94104  
415 391 3245 fax

10 With a copy to: Ellison Folk  
11 Shute, Mihaly & Weinberger LLP  
12 396 Hayes Street  
San Francisco, CA 94102  
(415) 552-5816 Fax

13 For Defendant: POR-15, Inc.  
14 P.O. Box 1235  
Whippany, NJ 07962  
ATTN: Christopher Wright

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

17 **11. COURT APPROVAL**

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

22 Defendant agrees to support the motion to approve this Consent Judgment in full, and shall take  
23 all reasonable measures to ensure that it is entered without delay. In the event that the Court fails to  
24 approve and order entry of the Consent Judgment without any change whatsoever (unless otherwise so  
25 stipulated by the Parties), this Consent Judgment shall become null and void upon the election of either  
26 Party and upon written notice to all of the Parties to the Action pursuant to the notice provisions herein.  
27  
28

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

4 **12. AUTHORIZATION**

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

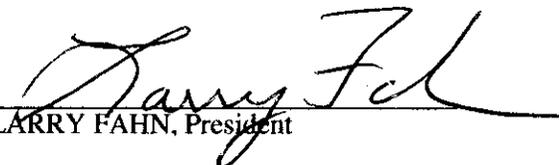
7 **13. COUNTERPARTS/FACSIMILE SIGNING**

8 This Consent Judgment may be executed in one or more counterparts, each of which shall be  
9 deemed an original, and all of which, when taken together, shall constitute one and the same 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 **IT IS SO STIPULATED:**

13  
14 Dated: 2/11/2011

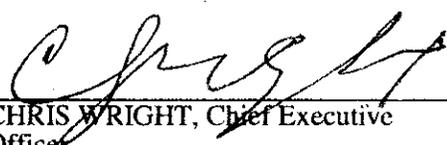
AS YOU SOW FOUNDATION

15  
16 BY: 

LARRY FAHN, President

17  
18  
19 Dated: 2/9/11

POR-15, INC.

20  
21 By: 

CHRIS WRIGHT, Chief Executive  
Officer

22  
23  
24 In accordance with the stipulation of Plaintiff and Defendant,

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

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

3  
4 Dated: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

5  
6  
7  
8 **APPROVED AS TO FORM:**

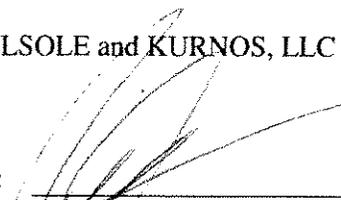
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10 DATED: 2-14-11, 2011

SHUTE, MIHALY & WEINBERGER LLP

11  
12 By:   
13 \_\_\_\_\_  
14 ELLISON FOLK  
Attorneys for Plaintiff  
AS YOU SOW

15 DATED: 2-14-11, 2011

BELSOLE and KURNOS, LLC

16  
17  
18 By:   
19 \_\_\_\_\_  
20 Roy Kurnos  
Attorneys for Defendant  
POR-15, Inc.

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23 P:\aysport\final. consent decree.doc