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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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COUNTY OF SAN FRANCISCO

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11 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,

Case No. CGC-11-514937

12

Plaintiff,

[PROPOSED] CONSENT JUDGMENT

13

v.

Action Filed: October 7, 2011

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Judge: Harold E. Kahn

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BEST CASE AND ACCESSORIES, INC.,
dba JUST WIRELESS, INC and DOES 1
through 10, inclusive,

Dept.: 302

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Defendants.

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1 **1. INTRODUCTION**

2 1.1 **Plaintiff:** Plaintiff As You Sow (“AYS” or “Plaintiff”), is a 501 (c) (3) non-profit
3 corporation, organized in California in 1992, with its principal place of business in San Francisco,
4 California. As You Sow is dedicated to, among other causes, the protection of the environment, the
5 promotion of human health, the improvement of worker and consumer safety, environmental education
6 and corporate accountability.

7 1.2 **The Action:** On October 7, 2011, Plaintiff filed a complaint in the Superior Court for the
8 City and County of San Francisco (hereafter referred to as the “Action”) charging Best Case and
9 Accessories, Inc., originally named as Case Best and Accessories, Inc., (hereinafter “Defendant”) with
10 having violated the Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), Health
11 and Safety Code section 25249.5 et seq., by exposing individuals to Di(2-ethylhexyl) phthalate
12 (“DEHP”), a chemical known to the State of California to cause cancer and reproductive harm, without
13 providing clear and reasonable warnings to such individuals. The alleged violations addressed in the
14 Action were described in Plaintiff’s Notice of Intent to Sue dated March 9, 2011 (“Plaintiff’s Notice”),
15 which Plaintiff had sent to the Defendant and to public enforcers as required by Health & Safety Code
16 section 25249.7. The alleged violations at issue in the Action arise from alleged exposure to DEHP that
17 is contained in ear buds and headsets identified in Plaintiff’s Notice that are imported, manufactured,
18 packaged, distributed, marketed and are sold by Defendant (“Covered Products”).

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

25 1.4 **No Admissions:** The Parties enter into this Consent Judgment as a compromise of
26 disputed claims for the purpose of avoiding prolonged litigation. Neither the Consent Judgment nor any
27 of its provisions shall be construed as an admission by any Party of any fact, finding, issue of law, or
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1 violation of law, including Proposition 65 or any other statute, regulation, or common law requirement
2 related to exposure to DEHP or other chemicals listed under Proposition 65 from the Covered Products.
3 By executing this Consent Judgment and agreeing to provide the relief and remedies specified herein,
4 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 1.5 **Effective Date.** The "Effective Date" of this Consent Decree shall be the date on which
14 it is entered by the Court.

15 **2. INJUNCTIVE RELIEF: REFORMULATION**

16 Defendant agrees, with respect to all Covered Products, to the following injunctive relief.

17 2.1 **Reformulation.** Defendant agrees that all Covered Products that Defendant imports,
18 manufactures, packages, distributes, or markets for sale or use in California will be reformulated within
19 three months of the Effective Date of this Consent Judgment, in a manner consistent with the
20 requirements of Health and Safety Code section 108939, so as not to contain DEHP in concentrations
21 exceeding 0.1% or 1000 parts per million. In reformulating the Covered Products to remove DEHP,
22 Defendant may not replace DEHP with dibutyl phthalate ("DBP"), butyl benzyl phthalate ("BBP"), di-n-
23 hexyl phthalate ("DnHP") or di-isodecyl phthalate ("DIDP") in amounts of more than 0.1%. This
24 commitment to reformulate Covered Products regarding DEHP does not prohibit Defendant from also
25 providing a Proposition 65 warning on Covered Products should it deem such warning is necessary or
26 appropriate under Proposition 65 (for chemicals other than DEHP). Until January 1, 2013, this
27 paragraph 2.1 shall not apply to any products that were imported, manufactured, or distributed for sale in
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1 California prior to July 1, 2011.

2 **2.2 Availability of Test Data:** To the extent that Defendant is otherwise required by law to
3 perform phthalate testing on the Products, Defendant shall, upon request by AYS, provide the results of
4 such testing to AYS on a confidential basis.

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

6 **3.1 Plaintiff's Waiver and Release of Claims Against Defendant:** As to those matters
7 raised in this Action and in Plaintiff's Notice brought in the public interest, Plaintiff and its members,
8 subsidiaries, successors, and assigns and its directors, officers, agents, attorneys, representatives, and
9 employees hereby release Defendant and Defendant's parents, subsidiaries, affiliated entities that are
10 under common ownership or control, directors, officers, employees, and attorneys ("Defendant
11 Releasees"), and each entity to whom Defendant directly or indirectly distributes or sells Covered
12 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
13 cooperative members, licensors, and licensees ("Downstream Defendant Releasees") and waives any
14 claims against Defendant Releasees and Downstream Defendant Releasees for injunctive relief or
15 damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others),
16 costs, expenses or any other sum incurred or claimed, for the alleged failure of Defendant to provide
17 clear and reasonable warnings under Proposition 65 about exposure to DEHP arising from the sale,
18 distribution or use of any Covered Products in California.

19 **3.2 Defendant's Waiver and Release of Claims Against Plaintiff:** Defendant hereby
20 releases from, and waives any claims against Plaintiff and its members, subsidiaries, successors, and
21 assigns and its directors, officers, agents, attorneys, representatives, and employees for injunctive relief
22 or damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others),
23 costs, expenses, or any other sum incurred or claimed or which could have been claimed for matters
24 related to the Action.

25 **3.3 Matters Covered By This Consent Judgment/Release of Future Claims:** As to the
26 Covered Products, this Consent Judgment is a full, final, and binding resolution between the Plaintiff,
27 acting on behalf of itself and, as to those matters raised in Plaintiff's Notice, in the public interest
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1 pursuant to Health and Safety Code section 25249.7(d), and Defendant for its alleged failure to provide
2 clear, reasonable, and lawful warnings of exposure to DEHP contained in the Covered Products. As to
3 the Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now and
4 in the future, concerning compliance by Defendant with existing requirements of Proposition 65 to
5 provide clear and reasonable warning about exposure to DEHP in the Covered Products.

6 **4. MONETARY PAYMENTS**

7 4.1 Within fifteen (15) days following the approval and entry of this Consent Judgment by
8 the Court, Defendant shall pay \$ 3,000.00 as stipulated civil penalties under Proposition 65 for any
9 violations arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State of
10 California as required under Proposition 65. Defendant shall make this check payable to "Shute, Mihaly
11 & Weinberger LLP Trust Account." Plaintiff shall distribute these payments to the Plaintiff and to the
12 State of California as required under Proposition 65. In lieu of additional civil penalties, defendant
13 further shall pay \$25,000.00 in the form of a check made payable to "Shute, Mihaly & Weinberger LLP
14 Trust Account" with this amount to be used by As You Sow for grants to California non-profit
15 organizations and by AYS Environmental Enforcement Fund. These funds shall be used to reduce
16 exposures to toxic chemicals and to increase consumer, worker and community awareness of the health
17 hazards posed by toxic chemicals in California. In deciding among the grantee proposals, the As You
18 Sow Board of Directors ("Board") takes into consideration a number of important factors, including: (1)
19 the nexus between the harm done in the underlying case(s), and the grant program work; (2) the
20 potential for toxics reduction, prevention, remediation or education benefits to California citizens from
21 the proposal; (3) the budget requirements of the proposed grantee and the alternate funding sources
22 available to it for its project; and (4) the Board's assessment of the grantee's chances for success in its
23 program work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS'
24 mission statement, articles of incorporation, and bylaws and applicable state and federal laws and
25 regulations. Both checks shall be delivered by overnight delivery to Robert S. Perlmutter, Shute, Mihaly
26 & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102.

27 4.2 Within fifteen (15) days following the approval and entry of this Consent Judgment,
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1 Defendant shall pay \$20,000 in the form of a check made payable to “Shute, Mihaly & Weinberger LLP
2 Trust Account” as reimbursement for any and all investigation fees and costs, testing costs, expert
3 witness fees, attorneys fees, and other litigation costs and expenses. The check shall be delivered by
4 overnight delivery to Robert S. Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San
5 Francisco, CA 94102.

6 **5. SEVERABILITY**

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

10 **6. MODIFICATION OF CONSENT JUDGMENT**

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

14 **7. ENFORCEMENT OF CONSENT JUDGMENT**

15 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
16 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
17 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
18 (including reasonable attorneys’ fees and costs) are provided by law.

19 7.2 The Parties may enforce the terms and conditions of this Consent Judgment pursuant to
20 paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party
21 allegedly failing to comply with the terms and conditions of the Consent Judgment and has attempted, in
22 an open and good faith manner, to resolve such Party’s alleged failure to comply.

23 **8. GOVERNING LAW**

24 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance
25 with, the laws of the State of California.

26 8.2 The Parties have participated in the preparation of this Consent Judgment and this
27 Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to
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1 revision and modification by the Parties and has been accepted and approved as to its final form by all
2 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
3 shall not be interpreted against any Party as a result of the manner of the preparation of this Consent
4 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing
5 that ambiguities are to be resolved against the drafting party should not be employed in the interpretation
6 of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
7 1654.

8 **9. ENTIRE AGREEMENT**

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

19 **10. NOTICES**

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

24 For Plaintiffs:

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

27 For Plaintiffs:

Robert S. Perlmutter

1 With a copy to:

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

3 For Defendant:

Melissa A. Jones
Stoel Rives LLP
500 Capitol Mall, 16th Floor
Sacramento, CA 95814
(916) 319-4649

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

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

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

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

19 If the Court enters this Consent Judgment, Plaintiff shall, within ten (10) working days after the
20 Effective Date, electronically provide or otherwise serve a copy of it and the report required pursuant to
21 11 Cal. Code Regs. § 3004 to/on the California Attorney General's Office.

22 The Effective Date of this Consent Judgment shall be the date it is entered by the Court.

23 **12. AUTHORIZATION**

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

26 **13. COUNTERPARTS/FACSIMILE SIGNING**

27 This Consent Judgment may be executed in one or more counterparts, each of which shall be
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1 deemed an original, and all of which, when taken together, shall constitute one and the same document.
2 All signatures need not appear on the same page of the document and signatures of the Parties
3 transmitted by facsimile shall be deemed binding.

4 **IT IS SO STIPULATED:**

5 DATED: 2/6/2012

AS YOU SOW

6 BY: 
7 LARRY FAHN
8 President

9
10 DATED: _____

BEST CASE AND ACCESSORIES, INC.

11 BY: _____

12
13
14 In accordance with the stipulation of Plaintiff and Defendant,

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

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

18
19 DATED: _____

JUDGE OF THE SUPERIOR COURT

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21 290489.1

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

4 **IT IS SO STIPULATED:**

5 DATED: _____ AS YOU SOW
6
7 BY: _____
8 LARRY FAHN
9 President

10 DATED: February 9, 2012 BEST CASE AND ACCESSORIES, INC.
11 BY: [Signature]
12 as President

13
14 In accordance with the stipulation of Plaintiff and Defendant,

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

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

18
19 DATED: _____
20 JUDGE OF THE SUPERIOR COURT

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