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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,

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Plaintiff,

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v.

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15 DGL Group Ltd., and DOES 1 through 100,
inclusive,

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Defendants.

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Case No. CGC-11-511875

[PROPOSED] CONSENT JUDGMENT

Date:

Time:

Dept: 302

Judge: Harold E. Kahn

Action Filed: June 21, 2011

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
4 Francisco, California. As You Sow is dedicated to, among other causes, the protection of the
5 environment, the promotion of human health, the improvement of worker and consumer safety,
6 environmental education and corporate accountability.

7 1.2 **The Action:** On June 21, 2011, Plaintiff filed a complaint in the Superior Court
8 for the City and County of San Francisco (hereafter referred to as the “Action”) charging DGL
9 Group Ltd. (hereinafter “Defendant”) with having violated the Safe Drinking Water and Toxic
10 Enforcement Act of 1986 (“Proposition 65”), Health and Safety Code section 25249.5 et seq., by
11 exposing individuals to Di(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of
12 California to cause cancer and reproductive harm, and di-n-butyl phthalate (“DBP”), a chemical
13 known to the State of California to cause reproductive harm, without providing clear and
14 reasonable warnings to such individuals. The alleged violations addressed in the Action were
15 described in Plaintiff’s Notice of Intent to Sue dated March 9, 2011 (“Plaintiff’s Notice”), which
16 Plaintiff sent to the Defendant and to public enforcers as required by Health & Safety Code
17 section 25249.7. The alleged violations at issue in the Action arise from alleged exposure to
18 DEHP and DBP that is contained in ear buds, headphones and headsets identified in Plaintiff’s
19 Notice that are imported, manufactured, packaged, distributed, marketed, and/or sold by
20 Defendant (“Covered Products”).

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

27 1.4 **No Admissions:** The Parties enter into this Consent Judgment as a compromise of
28 disputed claims for the purpose of avoiding prolonged litigation. Neither the Consent Judgment

1 nor any of its provisions shall be construed as an admission by any Party of any fact, finding,
2 issue of law, or violation of law, including Proposition 65 or any other statute, regulation, or
3 common law requirement related to exposure to DEHP and DBP or other chemicals listed under
4 Proposition 65 from the Covered Products. By executing this Consent Judgment and agreeing to
5 provide the relief and remedies specified herein, Defendant does not admit any violations of
6 Proposition 65, or any other law or legal duty and specifically denies that it has committed any
7 such violations. Defendant maintains that all Covered Products distributed, marketed and/or
8 sold by Defendant in California have at all times been in compliance with all applicable laws.
9 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or
10 defense that Plaintiff and Defendant may have in any other or in future legal proceedings
11 unrelated to these proceedings. Defendant reserves all of its rights and defenses with regard to
12 any claim by any person under Proposition 65 or otherwise. Nevertheless, this paragraph shall
13 not diminish or otherwise affect the obligations, responsibilities, waivers, releases, and/or duties
14 provided for under this Consent Judgment.

15 1.5 **Effective Date.** The “Effective Date” of this Consent Decree shall be the date on
16 which it is entered by the Court.

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

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

19 2.1 **Reformulation.** Defendant agrees that 180 days after the Effective Date all
20 Covered Products that are imported, manufactured, packaged, distributed, or marketed for sale
21 in California will be reformulated in a manner consistent with the requirements of Health and
22 Safety Code section 108939, so as not to contain DEHP or DBP in concentrations exceeding
23 0.1% or 1000 parts per million. In reformulating the Products to remove DEHP and DBP,
24 Defendant may not replace DEHP with DBP, DBP with DEHP, or either chemical with butyl
25 benzyl phthalate (“BBP”), di-n-hexyl phthalate (“DnHP”), or di-isodecyl phthalate (“DIDP”) in
26 amounts of more than 0.1%. Defendant may rely on a reasonable testing program to determine
27 whether the products comply with this Paragraph 2.1, provided that any product testing uses
28 EPA Method 8270/8270 SIMs or Consumer Product Safety Improvement Act method CPSC-

1 CH-C1001-09.3 to assess DEHP content by weight of a solid substance This injunction shall
2 not apply to any Covered Products that have been imported, manufactured, packaged,
3 distributed, shipped or sold by Defendant on or before 180 days after the Effective Date.

4 **2.2 Availability of Test Data:** Defendant shall retain copies of its test data for a
5 period of three years from the date testing commenced and shall provide all test data for the
6 Covered Products to As You Sow within 10 business days of a written request for such test data.

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

8 **3.1 Waiver and Release of Claims Against Defendant:** This Consent Judgment is a
9 full, final, and binding resolution between Plaintiff and in the public, on behalf of itself, and
10 Defendant, of any alleged violations of Proposition 65 or its implementing regulations, and fully
11 and finally resolves all claims that have been or could have been asserted in this action against
12 Defendant for failure to provide Proposition 65 warnings, for the Covered Products regarding
13 DEHP and DBP. Plaintiff acting on its own behalf and in the public interest hereby releases and
14 discharges Defendant and its respective officers, directors, shareholders, employees, agents,
15 parent companies, subsidiaries, divisions, affiliates, franchisees, licensees, distributors,
16 wholesalers, retailers, and all other entities in the distribution chain of any Covered Product, and
17 the predecessors, successors and assigns of any of them (collectively, “Released Parties”), from
18 all claims for violations of Proposition 65 up through the Effective Date based on exposure to
19 DEHP and DBP from the Covered Products as set forth in the Notice of Violation and the
20 Complaint.
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24 **3.2 Compliance with the terms of this Consent Judgment shall constitute compliance**
25 **by the Released Parties with Proposition 65 with respect to alleged exposures to DEHP and DBP**
26 **contained in the Covered Products.**
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1 **3.3 Defendant’s Waiver and Release of Plaintiff:** Defendant hereby releases
2 Plaintiff from and waives any claims against Plaintiff for injunctive relief or damages, penalties,
3 fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others), costs,
4 expenses, or any other sum incurred or claimed or which could have been claimed for matters
5 related to the Action.
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8 **3.4** For purposes of this paragraph 3, the terms “Plaintiff” and “Defendant” are
9 defined as follows. The term “Plaintiff” includes the Plaintiff as defined at Paragraph 1.1 above,
10 and also includes its members, subsidiaries, successors, and assigns and its directors, officers,
11 agents, attorneys, representatives, and employees. The term “Defendant” includes the
12 Defendant, as that term is defined in Paragraph 1.2 above, and also includes its corporate
13 affiliates, including any and all corporate parents and subsidiaries and their directors, officers,
14 agents, attorneys, representatives, employees, licensors, retailers, heirs, predecessors,
15 successors, and assigns, and their , distributors and customers of the Covered Products.
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18 **4. MONETARY PAYMENTS**

19 **4.2** Within fifteen (15) days following entry of this Consent Judgment by the Court,
20 Defendant shall pay \$5,000.00 as stipulated civil penalties under Proposition 65 for any
21 violations arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State
22 of California as required under Proposition 65. Defendant shall make this check payable to
23 “Shute, Mihaly & Weinberger Trust Account.” Plaintiff shall distribute these payments to the
24 Plaintiff and to the State of California as required under Proposition 65. In lieu of additional
25 civil penalties, Defendant shall also pay \$15,000 in the form of a check made payable to “Shute,
26 Mihaly & Weinberger Trust Account,” with this amount to be used by As You Sow for grants to
27 California non-profit organizations and by the AYS Environmental Enforcement Fund. These
28 funds shall be used to reduce exposures to toxic chemicals and to increase consumer, worker and

1 community awareness of the health hazards posed by toxic chemicals in California. In deciding
2 among the grantee proposals, the As You Sow Board of Directors (“Board”) takes into
3 consideration a number of important factors, including: (1) the nexus between the harm done in
4 the underlying case(s), and the grant program work; (2) the potential for toxics reduction,
5 prevention, remediation or education benefits to California citizens from the proposal; (3) the
6 budget requirements of the proposed grantee and the alternate funding sources available to it for
7 its project; and (4) the Board’s assessment of the grantee’s chances for success in its program
8 work. AYS shall ensure that all funds will be disbursed and used in accordance with AYS’
9 mission statement, articles of incorporation, and bylaws and applicable state and federal laws
10 and regulations. Both checks shall be delivered by overnight delivery to Robert S. Perlmutter,
11 Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco, CA 94102.

12 4.3 Within fifteen (15) days following the parties’ execution of this Consent
13 Judgment, Defendant shall pay \$20,000 in the form of a check made payable to “Shute, Mihaly
14 & Weinberger Trust Account” as reimbursement for the investigation fees and costs, testing
15 costs, expert witness fees, attorneys fees, and other litigation costs and expenses. The check
16 shall be delivered by overnight delivery to Robert S. Perlmutter, Shute, Mihaly & Weinberger
17 LLP, 396 Hayes Street, San Francisco, CA 94102.

18 **5. SEVERABILITY**

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

22 **6. MODIFICATION OF CONSENT JUDGMENT**

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

26 **7. ENFORCEMENT OF CONSENT JUDGMENT**

27 7.1 The Parties may, by motion or order to show cause before this Court, and upon
28 notice having been given to all Parties in accordance with Paragraph 10 below, unless waived,

1 enforce the terms and conditions of this Consent Judgment and seek whatever fines, costs,
2 penalties, or remedies (including reasonable attorneys' fees and costs) are provided by law.

3 7.2 The Parties may enforce the terms and conditions of this Consent Judgment
4 pursuant to paragraph 7.1 only after the complaining party has first given thirty (30) days notice
5 to the Party allegedly failing to comply with the terms and conditions of the Consent Judgment
6 and has attempted, in an open and good faith manner, to resolve such Party's alleged failure to
7 comply.

8 **8. GOVERNING LAW**

9 8.1 The terms of this Consent Judgment shall be governed by, and construed in
10 accordance with, the laws of the State of California and apply within the State of California

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

20 **9. ENTIRE AGREEMENT**

21 This Consent Judgment constitutes the sole and entire agreement and understanding
22 between the Parties with respect to the subject matter hereof, and any prior discussions,
23 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
24 and therein. There are no warranties, representations, or other agreements between the Parties,
25 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
26 other than those specifically referred to herein, shall be deemed to exist or bind any of the
27 Parties hereto. No supplementation, modification, waiver, or termination of this Consent
28 Judgment shall be binding unless executed in writing by the Party to be bound thereby. No

1 waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a
2 waiver of any of the other provisions hereof, whether or not similar, nor shall such waiver
3 constitute a continuing waiver.

4 **10. NOTICES**

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

9 For Plaintiffs: AS YOU SOW
10 Attn: Danielle Fugere
11 1611 Telegraph Avenue, Suite 1450
12 Oakland, CA 94612

13 With a copy to: Ellison Folk
14 Shute, Mihaly & Weinberger LLP
15 396 Hayes Street
16 San Francisco, CA 94102
17 (415) 552-5816 Fax

18 For Defendant: DGL GROUP Ltd.
19 Attn: Ezra Zaafarani
20 195 Raritan Center Parkway
21 Edison, NJ 08837

22 With a copy to: Peg Carew Toledo
23 Mennemeier, Glassman & Stroud LLP
24 980 9th Street, Suite 1700
25 Sacramento, CA 95814

26 The contacts and/or addresses stated immediately above may be amended by giving notice to all
27 Parties to this Consent Judgment.
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1 **11. COURT APPROVAL**

2 The Court shall either approve or disapprove of this Consent Judgment in its entirety,
3 without alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their
4 counsel. Defendant agrees to support the motion to approve this Consent Judgment in full, and
5 shall take all reasonable measures to ensure that it is entered without delay. In the event that the
6 Court fails to approve and order entry of the Consent Judgment without any change whatsoever
7 (unless otherwise so stipulated by the Parties), this Consent Judgment shall become null and
8 void upon the election of either Party and upon written notice to all of the Parties to the Action
9 pursuant to the notice provisions herein.

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

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

14 **12. AUTHORIZATION**

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

18 **13. COUNTERPARTS/FACSIMILE SIGNING**

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

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IT IS SO STIPULATED:

DATED: 11/27/12 AS YOU SOW

BY: 
Andrew Behar
Chief Executive Officer

DATED: _____ DGL GROUP LTD.

BY: _____
EZRA ZAAFARANI
Chief Executive Officer

In accordance with the stipulation of Plaintiff and Defendant,

IT IS HEREBY 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: _____ JUDGE OF THE SUPERIOR COURT

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IT IS SO STIPULATED:

DATED: _____ AS YOU SOW _____

BY: _____
Andrew Behar
Chief Executive Officer

DATED: 12/14/12 _____ DGL GROUP LTD.

BY:  _____
EZRA ZAAFARANI
Chief Executive Officer

In accordance with the stipulation of Plaintiff and Defendant,

IT IS HEREBY 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: _____

JUDGE OF THE SUPERIOR COURT

1 Approved as to Form:

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3 DATED: November 30, 2012

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SHUTE, MIHALY & WEINBERGER LLP

By: 
ELLISON FOLK
ROBERT "PERL" PERLMUTTER

DATED: November 30, 2012

MENNEMEIER, GLASSMAN & STROUD LLP

By: 
PEG CAREW TOLEDO
Attorneys for DGL Group Ltd.

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