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7 AS YOU SOW

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

11 AS YOU SOW,
12 Plaintiff,
13
14 v.
15 BEST BUY, and DOES 1 through 10, inclusive,
16 Defendant.

Case No. CGC-11-515239
[PROPOSED] CONSENT JUDGMENT
Dept.: 301
Judge: Peter J. Busch
Action Filed: October 20, 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 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 20,2011, Plaintiff filed a complaint in the Superior Court for
8 the City and County of San Francisco (hereafter referred to as the “Action”) charging Best Buy, Inc.
9 (hereinafter “Defendant”) with having violated the Safe Drinking Water and Toxic Enforcement Act of
10 1986 (“Proposition 65”), Health and Safety Code section 25249.5 et seq., by exposing individuals to
11 Di(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause reproductive
12 harm, without providing clear and reasonable warnings to such individuals. The alleged violations
13 addressed in the Action were described in Plaintiff’s Notice of Intent to Sue dated April 14, 2011 and
14 Plaintiff’s Notice of Intent to Sue dated June 9, 2011 (“Plaintiff’s Notices”), which Plaintiff had sent to
15 the Defendant and to public enforcers as required by Health & Safety Code section 25249.7. The
16 alleged violations at issue in the Action arise from alleged exposure to DEHP that is contained in ear
17 buds and headsets that are identified in Plaintiff’s Notices and are imported, manufactured, packaged,
18 distributed, marketed, or sold by Defendant (“Covered Products”).

19 1.3 **Jurisdiction:** For purposes of this Consent Judgment, the Parties stipulate that the San
20 Francisco Superior Court has jurisdiction over the allegations in the Action and personal jurisdiction
21 over Defendant as to the acts alleged in the Action; that venue is proper in the City and County of San
22 Francisco; that this Court has jurisdiction to enter this Consent Judgment as a resolution of all claims
23 which were alleged in the Action; and that the Court shall retain jurisdiction to implement the Consent
24 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
28

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 denies that it has 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: WARNINGS OR 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 are imported,
18 manufactured, packaged, distributed, or marketed for sale in California after the Effective Date have
19 been reformulated, in a manner consistent with the requirements of Health and Safety Code section
20 108939, so as not to contain DEHP in concentrations exceeding 0.1% or 1000 parts per million. In
21 reformulating the Products to remove DEHP, Defendant may not replace DEHP with dibutyl phthalate
22 (“DBP”), butyl benzyl phthalate (“BBP”), di-n-hexyl phthalate (“DnHP”) or di-isodecyl phthalate
23 (“DIDP”) in amounts of more than 0.1%. For any Covered Products that contain DEHP in amounts
24 equal to or less than concentrations of 0.1%, no Proposition 65 warning shall be required for DEHP.
25 Until January 1, 2013, this paragraph 2.1 shall not apply to any products that were imported,
26 manufactured, or distributed for sale in California prior to July 1, 2011.

27 2.2 **Availability of Test Data:** To the extent that Defendant is otherwise required by law to
28 perform phthalate testing on the Covered Products, Defendant shall, upon request by AYS, provide the

1 results of such testing to AYS on a confidential basis.

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

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

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

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

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

1 Covered Products.

2 **4. MONETARY PAYMENTS**

3 4.1 In full satisfaction of any claims for civil penalties that were made or could have been
4 made in this Action with respect to the allegation that Defendant failed to provide clear and reasonable
5 warnings under Proposition 65 about exposure to DEHP arising from the sale, distribution or use of any
6 Covered Products in California, Defendant shall make the payments described in this paragraph. Within
7 fifteen (15) days following the approval and entry of this Consent Judgment by the Court, Defendant
8 shall pay ten thousand dollars (\$10,000) as stipulated civil penalties under Proposition 65. Defendant
9 shall make this check payable to "Shute, Mihaly & Weinberger Trust Account." Plaintiff shall distribute
10 these payments to the Plaintiff and to the State of California as required under Proposition 65. In lieu of
11 additional civil penalties, Defendant further shall pay sixty thousand dollars (\$60,000) in the form of a
12 check made payable to "Shute, Mihaly & Weinberger Trust Account" with this amount to be used by As
13 You Sow for grants to California non-profit organizations and by AYS Environmental Enforcement
14 Fund. These funds shall be used to reduce exposures to toxic chemicals and to increase consumer,
15 worker and community awareness of the health hazards posed by toxic chemicals in California. In
16 deciding among the grantee proposals, the As You Sow Board of Directors ("Board") takes into
17 consideration a number of important factors, including: (1) the nexus between the harm done in the
18 underlying case(s), and the grant program work; (2) the potential for toxics reduction, prevention,
19 remediation or education benefits to California citizens from the proposal; (3) the budget requirements
20 of the proposed grantee and the alternate funding sources available to it for its project; and (4) the
21 Board's assessment of the grantee's chances for success in its program work. AYS shall ensure that all
22 funds will be disbursed and used in accordance with AYS' mission statement, articles of incorporation,
23 and bylaws and applicable state and federal laws and regulations. The check shall be delivered by
24 overnight delivery to Robert Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San
25 Francisco, CA 94102. In the event this Consent Judgment becomes null and void under Paragraph 11
26 infra, Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

27 4.2 Within fifteen (15) days following the entry of this Consent Judgment, Defendant shall
28 pay twenty-five thousand dollars (\$25,000) in the form of a check made payable to "Shute, Mihaly &

1 Weinberger Trust Account” as reimbursement for the investigation fees and costs, testing costs, expert
2 witness fees, attorneys fees, and other litigation costs and expenses. The check shall be delivered by
3 overnight delivery to Robert Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San
4 Francisco, CA 94102. In the event this Consent Judgment becomes null and void under either Paragraph
5 11 infra, Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

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
28 revision and modification by the Parties and has been accepted and approved as to its final form by all

1 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
2 shall not be interpreted against any Party as a result of the manner of the preparation of this Consent
3 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing
4 that ambiguities are to be resolved against the drafting party should not be employed in the interpretation
5 of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
6 1654.

7 **9. ENTIRE AGREEMENT**

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

18 **10. NOTICES**

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

23 For Plaintiffs:

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

26 For Plaintiffs:
27 With a copy to:

Robert Perlmutter
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102

(415) 552-5816 Fax

For Defendant:

Leona E. Lewis
Best Buy Corporate Counsel
Location: B6 - 114
7601 Penn Avenue South, Richfield, MN 55423

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

11. COURT APPROVAL/EFFECTIVE DATE

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

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

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

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

12. AUTHORIZATION

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

13. COUNTERPARTS/FACSIMILE SIGNING

This Consent Judgment may be executed in one or more counterparts, each of which shall be

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
6
7 DATED: 1/6/2012

AS YOU SOW

8 BY: 

9 LARRY FAHN
President

10
11 DATED: _____

BEST BUY, INC.

12 BY: _____
13
14
15

16 In accordance with the stipulation of Plaintiff and Defendant,

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

18 The Court hereby incorporates the terms of the Consent Judgment into this Order. If a party
19 violates the provisions of this Consent Judgment, this Court retains over this matter
20
21

22 DATED: _____

JUDGE OF THE SUPERIOR COURT

23
24
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26 290340.1
27
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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
6
7 DATED: _____ AS YOU SOW

8 BY: _____
9 LARRY FAHN
10 *President*

11 DATED: Jan 9, 2012 BEST BUY, INC.
12 BY: 

13
14 Patrick McGinnis, Vice President
15 Best Buy Exclusive Brands Global Sourcing
16 7601 Penn Avenue South
17 Richfield, MN 55423

16 In accordance with the stipulation of Plaintiff and Defendant,

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

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

20
21
22 DATED: _____
23 JUDGE OF THE SUPERIOR COURT

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26 290340.1