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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
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12 AS YOU SOW, a California Non-Profit
Public Benefit Corporation,
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14 Plaintiff,
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16 v.
17 EFORCITY CORPORATION dba ASCEND
DISTRIBUTION, and DOES 1 through 100,
18 inclusive;
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28 Defendants.

Case No. CGC-11-514214

[PROPOSED] CONSENT JUDGMENT

Date:
Time: 9:30 a.m.
Dept.: 302
Judge: Harold E. Kahn

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 September 13, 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 eForCity
9 Corporation (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, without providing clear and reasonable warnings to
13 such individuals. The alleged violations addressed in the Action were described in Plaintiff’s Notice of
14 Intent to Sue dated June 16, 2011 (“Plaintiff’s Notice”), which Plaintiff had sent to the Defendant and to
15 public enforcers as required by Health & Safety Code section 25249.7. The alleged violations at issue in
16 the Action arise from alleged exposure to DEHP that is contained in earbuds identified in Plaintiff’s
17 Notice as the “2 Piece White In-Ear Stereo Earbud Set for Apple iPod (Model # 230113)”, and any
18 components thereto, that are imported, manufactured, packaged, distributed, marketed, and/or sold by
19 Defendant (“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
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1 of its provisions shall be construed as an admission by any Party of any fact, finding, issue of law, or
2 violation of law, including Proposition 65 or any other statute, regulation, or common law requirement
3 related to exposure to DEHP or other chemicals listed under Proposition 65 from the Covered Products.
4 By executing this Consent Judgment and agreeing to provide the relief and remedies specified herein,
5 Defendant does not admit any violations of Proposition 65, or any other law or legal duty, and
6 specifically denies that it has committed any such violations. Defendant maintains that all Covered
7 Products distributed, marketed, and/or sold by Defendant in California have at all times been in
8 compliance with all applicable laws. Nothing in this Consent Judgment shall prejudice, waive, or impair
9 any right, remedy, or defense that Plaintiff and Defendant may have in any other or in future legal
10 proceedings unrelated to these proceedings. Defendant reserves all of its rights and defenses with regard
11 to any claim by any person under Proposition 65 or otherwise. Nevertheless, this paragraph shall not
12 diminish or otherwise affect the obligations, responsibilities, waivers, releases, and/or duties provided
13 for under this Consent Judgment.

14 1.5 **Effective Date.** The "Effective Date" of this Consent Decree shall be the date on which
15 it is entered by the Court.

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

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

19 2.1 **Warnings:** As of the Effective Date, Defendant agrees to provide Proposition 65
20 warnings for all Covered Products that contain DEHP. Such warnings shall be deemed to be "clear and
21 reasonable" within the meaning of Proposition 65 and the implementing regulations that appear at Cal.
22 Code Regs, tit. 27, § 25601, provided that the statement that appears below is printed on the packaging,
23 for such Covered Products, or is affixed to such packaging by means of adhesive stickers on such
24 Covered Products that identify the Covered Products to which the warnings pertain, provided that such
25 warnings, whether they appear on packaging , shall be printed and/or affixed with such conspicuousness,
26 as compared to other words or statements on packaging so as to render the warnings reasonably likely
27 to be read by an ordinary individual under customary conditions of purchase or use:

28 For all Covered Products on or after January 1, 2013, the following warning:

1
2 **WARNING:** This product contains Di (2ethyexyl) phthalate
3 (DEHP) a chemical known to the State of California to cause
4 cancer and birth defects or other reproductive harm.

5 For Covered Products until December 31, 2012, the following warning:

6 **CALIFORNIA PROPOSITION 65 WARNING:** This
7 product may contain one or more chemicals known to
8 the State of California to cause cancer, birth defects,
9 and/or other reproductive harm. Please wash hands
10 after use.

11 2.2 **Reformulation.** Defendant represents that it is not a manufacturer of the Covered
12 Products. However, Defendant agrees that all Covered Products that it imports, packages, distributes,
13 or markets for sale or use in California on or after January 1, 2013, will be reformulated in a manner
14 consistent with the requirements of Health and Safety Code section 108939, so as not to contain DEHP
15 in concentrations exceeding 0.1% or 1000 parts per million. In reformulating the Products to remove
16 DEHP, Defendant understands that DEHP may not be replaced with dibutyl phthalate (“DBP”), butyl
17 benzyl phthalate (“BBP”), di-n-hexyl phthalate (“DnHP”), or di-isodecyl phthalate (“DIDP”) in amounts
18 of more than 0.1%. For any Covered Products that contain DEHP in amounts equal to or less than
19 concentrations of 0.1%, no Proposition 65 warning shall be required for DEHP.

20 2.3 **Availability of Test Data:** To the extent that Defendant is otherwise required by law to
21 perform phthalate testing on the Covered Products, Defendant shall, upon request by AYS, provide the
22 results of such testing to AYS on a confidential basis.

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

24 3.1 **Waiver and Release of Claims Against Defendant:** As to those matters raised in this
25 Action and in Plaintiff’s Notice brought in the public interest, and except as expressly provided herein,
26 Plaintiff hereby releases Defendant and waives any claims against Defendant for injunctive relief or
27 damages, penalties, fines, sanctions, mitigation, fees (including fees of attorneys, experts, and others),
28 costs, expenses or any other sum incurred or claimed, for the alleged failure of Defendant to provide
clear and reasonable warnings under Proposition 65 about exposure to DEHP arising from the sale,
distribution, or use of any Covered Products in California.

1 3.2 **Defendant's Waiver and Release of Plaintiff:** Defendant hereby releases Plaintiff from
2 and waives any claims against Plaintiff for injunctive relief or damages, penalties, fines, sanctions,
3 mitigation, fees (including fees of attorneys, experts, and others), costs, expenses, or any other sum
4 incurred or claimed or which could have been claimed for matters related to the Action.

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

13 3.4 For purposes of this paragraph 3, the terms "Plaintiff" and "Defendant" are defined as
14 follows. The term "Plaintiff" includes the Plaintiff as defined at Paragraph 1.1 above, and also includes
15 its members, subsidiaries, successors, and assigns and its directors, officers, agents, attorneys,
16 representatives, and employees. The term "Defendant" includes the Defendant, as that term is defined in
17 Paragraph 1.2 above, and also includes its corporate affiliates, including any and all corporate parents
18 and subsidiaries and their directors, officers, agents, attorneys, representatives, employees, licensors,
19 heirs, predecessors, successors, and assigns, and their suppliers, distributors, and customers of the
20 Covered Products.

21 **4. MONETARY PAYMENTS**

22 4.1 Within fifteen (15) days following entry of this Consent Judgment by the Court,
23 Defendant shall pay \$4,000.00 as stipulated civil penalties under Proposition 65 for any violations
24 arising therefrom, to be distributed by the Plaintiff and to the Plaintiff and to the State of California as
25 required under Proposition 65. Defendant shall make this check payable to "Shute, Mihaly &
26 Weinberger Trust Account." Plaintiff shall distribute these payments to the Plaintiff and to the State of
27 California as required under Proposition 65. In lieu of additional civil penalties, Defendant shall also
28 pay \$20,000.00 in the form of a check made payable to "Shute, Mihaly & Weinberger Trust Account,"

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

14 4.2 Within fifteen (15) days following the parties' execution of this Consent Judgment,
15 Defendant shall pay \$19,000 in the form of a check made payable to "Shute, Mihaly & Weinberger
16 Trust Account" as reimbursement for the investigation fees and costs, testing costs, expert witness fees,
17 attorneys fees, and other litigation costs and expenses. The check shall be delivered by overnight
18 delivery to Robert S. Perlmutter, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco,
19 CA 94102.

20 5. SEVERABILITY

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

24 6. MODIFICATION OF CONSENT JUDGMENT

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

28

1 **7. ENFORCEMENT OF CONSENT JUDGMENT**

2 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
3 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
4 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
5 (including reasonable attorneys' fees and costs) are provided by law.

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

10 **8. GOVERNING LAW**

11 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance
12 with, the laws of the State of California.

13 8.2 The Parties have participated in the preparation of this Consent Judgment and this
14 Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to
15 revision and modification by the Parties and has been accepted and approved as to its final form by all
16 Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment
17 shall not be interpreted against any Party as a result of the manner of the preparation of this Consent
18 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing
19 that ambiguities are to be resolved against the drafting party should not be employed in the interpretation
20 of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
21 1654.

22 **9. ENTIRE AGREEMENT**

23 This Consent Judgment constitutes the sole and entire agreement and understanding
24 between the Parties with respect to the subject matter hereof, and any prior discussions,
25 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
26 and therein. There are no warranties, representations, or other agreements between the Parties,
27 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
28 other than those specifically referred to herein, shall be deemed to exist or bind any of the

1 Parties hereto. No supplementation, modification, waiver, or termination of this Consent
2 Judgment shall be binding unless executed in writing by the Party to be bound thereby. No
3 waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a
4 waiver of any of the other provisions hereof, whether or not similar, nor shall such waiver
5 constitute a continuing waiver.

6 **10. NOTICES**

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

11 For Plaintiffs:

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

15 With a copy to:

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

18 For Defendant:

eForCity Corporation
Attn: Chief Executive Officer
12339 Denholm Drive
El Monte, California 91732
Fax: (626) 442-3533

21 With a courtesy copy (that shall not constitute
22 "notice") to:

Alan J. Haus, Esq.
Lewis Brisbois Bisgaard & Smith LLP
One Sansome Street, Suite 1400
San Francisco, CA 94104
Fax: (415) 434-0882

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

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

28 The Court shall either approve or disapprove of this Consent Judgment in its entirety,

1 without alteration, deletion or amendment, unless otherwise so stipulated by the Parties and their
2 counsel. If the Court approves of this Consent Judgment, then the terms of this Consent
3 Judgment are incorporated into the terms of the Court's Order.

4 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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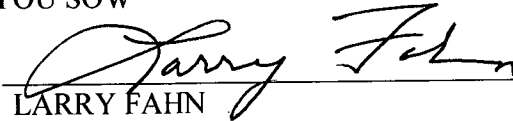
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1 **IT IS SO STIPULATED:**

2
3
4 DATED: 02/09/2012 AS YOU SOW

5 BY: 
6 LARRY FAHN
7 *President*

8 DATED: _____ EFORCITY CORPORATION

9 BY: _____
10
11 JACK SHENG, *CEO*

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

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

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

17
18
19 DATED: _____ JUDGE OF THE SUPERIOR COURT

1 **IT IS SO STIPULATED:**

2
3
4 DATED: _____ AS YOU SOW

5 BY: _____
6 LARRY FAHN
7 *President*

8 DATED: January 14, 2012 EFORCITY CORPORATION

9
10 BY: *Jack Sheng*
11 JACK SHENG, *CEO*

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

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

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

17
18
19 DATED: _____ JUDGE OF THE SUPERIOR COURT