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11 As You Sow

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20 Attorneys for Defendant
21 CTS Cement Manufacturing Corporation

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23
24 SUPERIOR COURT OF THE STATE OF CALIFORNIA
25 FOR THE COUNTY OF ALAMEDA

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

28 Plaintiff,

29 vs.

30 CTS CEMENT MANUFACTURING
31 CORPORATION, a Nevada Corporation

32 Defendant.

Case No. _____

[PROPOSED] CONSENT JUDGMENT

33
34 This Consent Judgment is entered into by and between Plaintiff As You Sow
35 (“AYS”) and Defendant CTS Cement Manufacturing Corporation, a Nevada Corporation
36 (“CTS”), to resolve all claims raised in the Plaintiff’s Complaint filed in the above-
37 captioned action, which was filed simultaneously with the lodging of this Proposed
38 Consent Judgment (“Complaint”). This Consent Judgment shall be effective upon entry.

1 AYS and CTS (collectively “the Parties”) agree to the terms and conditions set forth
2 below.

3 **1. INTRODUCTION**

4 1.1 AYS is a non-profit corporation dedicated to, among other causes, the
5 protection of the environment, the promotion of human health, the improvement of worker
6 and consumer rights, environmental education, and corporate accountability. AYS is
7 based in Oakland, California and is incorporated under the laws of the State of California.

8 1.2 CTS manufactures and/or distributes Rapid Set® Concrete Mix (Very Rapid
9 Hardening Cement), Rapid Set® Cement All, and Rapid Set® Stucco Mix (collectively the
10 “Covered Products”).

11 1.3 AYS alleges in the Complaint that each of the Covered Products contains
12 chromium (hexavalent compounds) (hereinafter “chromium”), chemicals listed by the
13 State of California as known to cause cancer and reproductive toxicity pursuant to the Safe
14 Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”), California Health
15 and Safety Code §25249.5 et seq. AYS also alleges that Rapid Set® Stucco Mix contains
16 arsenic (inorganic compounds, including inorganic oxides) (hereinafter “arsenic”),
17 chemicals listed as carcinogens and reproductive toxins under Proposition 65. Chromium
18 and arsenic are collectively called herein “Covered Chemicals.”

19 1.4 On December 21, 2012, AYS sent a 60-day Notice of Violation to CTS and
20 to public enforcers as required by Health & Safety Code Section 25249.7, alleging that
21 CTS violated Proposition 65 by failing to provide clear and reasonable warnings before
22 exposing persons to chemicals listed under Proposition 65, which are contained in the
23 Covered Products (“AYS’s 60-Day Notice”).

24 1.5 CTS alleges that, for at least one year prior to AYS’s 60-Day Notice, it
25 provided Proposition 65 warnings on the packaging materials of the Covered Products.
26 AYS alleges that CTS’ warnings on the Covered Products are inadequate under
27 Proposition 65 because they use the word “may” in the following statement: “One or more
28 of the components contained in this product may contain chemicals known to the State of

1 California to cause cancer, birth defects, or other reproductive harm.” AYS also alleges
2 that warnings on Rapid Set ® Stucco Mix are inadequate under Proposition 65 because
3 they state: “One or more of the components contained in this product could contain
4 chemicals known to the State of California to cause cancer, birth defects, or other
5 reproductive harm. The State of California (Proposition 65) requires the above warning in
6 the absence of definitive testing to prove that the defined risks do not exist.” CTS believes
7 that its warning language is both accurate and in compliance with Proposition 65.
8 Nevertheless, the Parties have agreed to resolve their differences as set forth herein.

9 1.6 During the negotiations of this Consent Judgment, but prior to the Parties’
10 execution of this Consent Judgment, CTS modified the warning language on its packaging
11 materials for the Covered Products, by removing the condition words “may,” “could,” and
12 “other,” to state: “PROPOSITION 65 WARNING: This product contains chemicals known
13 to the State of California to cause cancer and birth defects or reproductive harm.”
14 Thereafter, CTS printed and commenced using the packaging materials with this modified
15 language. In finalizing this Consent Judgment, the Parties agreed to modify CTS’ revised
16 warning language to include the word “other,” which appears in 27 C.C.R § 25603.3(a)(2),
17 so that the warning language required by this Consent Judgment states: “PROPOSITION
18 65 WARNING: This product contains chemicals known to the State of California to cause
19 cancer and birth defects or other reproductive harm.”

20 1.7 The Parties have agreed to enter into this Consent Judgment to settle all
21 claims with regard to the Covered Products as alleged, or which could have been alleged,
22 in the Complaint, and to avoid prolonged and costly litigation.

23 1.8 By executing and complying with this Consent Judgment, neither Party
24 admits any facts or conclusions of law alleged in the Complaint, or to the existence of any
25 other statutory, common law, or equitable claim or requirement relating to or arising from
26 the sale of Covered Products by CTS in California.

27 1.9 This Consent Judgment shall not be construed as an admission that any
28 warning regarding the alleged exposure to chemicals listed under Proposition 65 from

1 Covered Products are required under Proposition 65 or any other statute, regulation, or by
2 the common law. Nothing in this Consent Judgment shall prejudice, waive, or impair any
3 right, remedy, or defense that AYS and CTS may have in any other or in future legal
4 proceeding unrelated to this action. However, this paragraph shall not diminish or
5 otherwise affect the obligation, responsibilities, and duties of the Parties under this
6 Consent Judgment.

7 1.10 The term "Effective Date" means the date of entry of this Consent Judgment.

8 **2. JURISDICTION**

9 2.1 For purposes of this Consent Judgment only, the Parties stipulate that this
10 Court has jurisdiction over CTS as to the allegations contained in the Complaint, venue is
11 proper in Alameda County, the Court has jurisdiction to enter this Consent Judgment as a
12 resolution of all claims alleged in the Complaint, and the Court shall retain jurisdiction to
13 enforce the Consent Judgment.

14 **3. INJUNCTIVE RELIEF**

15 3.1 Beginning no later than October 1, 2013, all Covered Products distributed or
16 sold by CTS for sale or use in the State of California shall provide the following warning
17 statement:

18 "PROPOSITION 65 WARNING: This product contains
19 chemicals known to the State of California to cause cancer and
20 birth defects or other reproductive harm."

21 3.2 The warning statement required in Paragraph 3.1 shall be prominently
22 affixed to or printed on the Covered Products' packaging and labeling by CTS and shall be
23 displayed with such conspicuousness, as compared with other words, statements, designs,
24 or devices on the Covered Products, or their packaging or labeling, as to render the
25 warning statement likely to be read and understood by an ordinary individual under
26 customary conditions of purchase and use.

1 3.3 The Parties agree, and the Court so finds, that the content and the placement
2 of the warning statement as shown on the example in Exhibit A hereto meets the
3 requirements of Paragraphs 3.1 and 3.2 of this Consent Judgment.

4 **4. SETTLEMENT PAYMENTS**

5 4.1 Within 30 days of the Effective Date, CTS shall pay \$7,000 in the form of a
6 check made payable to As You Sow as a civil penalty pursuant to Health and Safety Code
7 Section 25249.7(b). AYS shall remit seventy-five percent (75%) of this amount to the
8 State of California pursuant to Health and Safety Code Section 25249.12(b).

9 4.2 Additional In Lieu Payments: Additionally, within 30 days of the Effective
10 Date, CTS shall pay \$18,000 to AYS, with this amount to be used by AYS for grants to
11 California non-profit organizations and by the AYS Environmental Enforcement Fund.
12 These funds shall be used to reduce or remediate exposures to toxic chemicals and to
13 increase consumer, worker and community awareness of the health hazards posed by toxic
14 chemicals in California. In deciding among the grant proposals, the As You Sow Board of
15 Directors (“Board”) takes into consideration a number of important factors, including: (1)
16 the nexus between the harm done in the underlying case(s), and the grant program work;
17 (2) the potential for toxics reduction, prevention, remediation or education benefits to
18 California citizens from the proposal; (3) the budget requirements of the proposed grantee
19 and the alternate funding sources available to it for its project; and (4) the Board’s
20 assessment of the proposed grantee’s chances for success in its program work. AYS shall
21 ensure that all funds will be disbursed and used in accordance with AYS’s mission
22 statement, articles of incorporation, and bylaws and applicable state and federal laws and
23 regulations. These payments shall not be construed as a credit against the personal claims
24 of absent third parties for restitution against Defendant.

25 4.3 Within 30 days of the Effective Date, CTS shall pay \$15,000 in the form of a
26 check made payable to the Altshuler Berzon LLP Attorney-Client Trust Account as
27 reimbursement for plaintiff’s attorneys’ fees, investigation costs, and other reasonable
28 litigation costs and expenses.

1 **5. ENFORCEMENT OF CONSENT JUDGMENT**

2 5.1 The Parties may, by motion filed in this Court, enforce the terms and
3 conditions of this Consent Judgment. Prior to the filing of any such motion, in the event a
4 dispute arises with respect to any of the provisions of this Consent Judgment, the Parties
5 shall meet and confer within 10 days after either Party receives written notice of an alleged
6 violation of this Agreement. If a Party is successful in enforcing this Consent Judgment,
7 such Party shall be entitled to recover its costs and reasonable attorneys' fees.

8 **6. CLAIMS COVERED AND RELEASE**

9 6.1 As to the Covered Products, this Consent Judgment is a full, final, and
10 binding resolution between AYS and CTS and its parents, subsidiaries and their
11 shareholders, officers, directors, employees, agents, insurers and representatives, and their
12 successors and assigns ("CTS Releasees") of all claims that were or could have been
13 brought by AYS for the alleged failure to provide clear and reasonable warnings of
14 exposure to Covered Chemicals in the Covered Products distributed or sold by CTS before
15 the Effective Date, and all entities to whom the CTS Releasees distribute or sell Covered
16 Products, including but not limited to distributors, wholesalers, customers, retailers,
17 franchisees, cooperative members, and licensees ("CTS Downstream Releasees") of all
18 claims that were or could have been brought by AYS for the alleged failure to provide
19 clear and reasonable warnings of exposure to Covered Chemicals in the Covered Products
20 distributed or sold by CTS before the Effective Date.

21 6.2 In addition to the release set forth in paragraph 6.1, AYS acting on its own
22 behalf and in the public interest releases CTS Releasees and CTS Downstream Releasees
23 from all claims for violations of Proposition 65 up through the Effective Date based on
24 exposure to Covered Chemicals from the Covered Products as set forth in AYS's 60-Day
25 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
26 Proposition 65 with respect to exposure to Covered Chemicals from the Covered Products
27 as set forth in AYS's 60 Day Notice.

28

1 6.3 Upon entry of the Consent Judgment, the Parties waive their respective rights
2 to a hearing or trial on the allegations of the Complaint.

3 **7. GOVERNING LAW AND CONSTRUCTION**

4 7.1 This Consent Judgment shall be governed by, and construed in accordance
5 with, the laws of the State of California.

6 7.2 The Parties, including their counsel, have participated in the preparation of
7 this Consent Judgment which is the result of the joint efforts of the Parties. This Consent
8 Judgment was subject to revision and modification by the Parties and has been accepted
9 and approved as to form by the Parties and their counsel. Accordingly, any uncertainty or
10 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
11 result of the manner of the preparation of this Consent Judgment. Each Party to this
12 Consent Judgment agrees that any statute or rule of construction providing that ambiguities
13 are to be resolved against the drafting Party should not be employed in the interpretation of
14 this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code
15 section 1654.

16 **8. MODIFICATION OF CONSENT JUDGMENT**

17 8.1 This Consent Judgment may be modified only upon written agreement of the
18 Parties with approval of the Court, or pursuant to court order issued upon noticed motion
19 of a Party for good cause shown and upon entry of a modified Consent Judgment by the
20 Court. Any Party seeking to modify this Consent Judgment shall meet and confer in good
21 faith with the other Party prior to filing a motion to modify the Consent Judgment and
22 attempt to resolve any differences.

23 **9. COURT APPROVAL**

24 9.1 The Court shall either approve or disapprove of this Consent Judgment in its
25 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the
26 Parties and their counsel. Defendant agrees not to oppose this Consent Judgment.

27 9.2 In the event the Court fails to approve and order entry of the Consent
28 Judgment without any change whatsoever (unless otherwise so stipulated by the Parties),

1 this Consent Judgment shall become null and void upon the election of either Party and
2 upon written notice to all of the Parties to the Action pursuant to the notice provisions
3 herein, and shall not be introduced into evidence or otherwise used in any proceeding for
4 any purpose.

5 **10. ENTIRE AGREEMENT**

6 10.1 The Parties declare and represent that no promise, inducement or other
7 agreement has been made conferring any benefit upon any Party except those contained
8 herein and that this agreement contains the entire agreement pertaining to the subject
9 matter hereof. This agreement supersedes any prior or contemporaneous negotiations,
10 representations, agreements and understandings of the Parties with respect to such matters,
11 whether written or oral. The Parties acknowledge that each has not relied on any promise,
12 representation or warranty, expressed or implied, not contained in this agreement or in a
13 declaration provided pursuant to Section 13.2 of this agreement.

14 **11. APPLICATION OF CONSENT JUDGMENT**

15 11.1 This Consent Judgment shall apply to and be binding upon the Parties hereto,
16 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

17 11.2 The terms of this Consent Judgment shall not apply to Covered Products
18 manufactured, distributed, or sold by CTS for use outside of California.

19 **12. ATTORNEYS' FEES**

20 12.1 Except as specifically provided in this Consent Judgment, each Party shall
21 bear its own attorneys' fees and costs incurred in connection with the 60-day Notice and
22 Plaintiff's Complaint.

23 **13. COMPLIANCE WITH HEALTH AND SAFETY CODE §25249.7**

24 13.1 Plaintiff shall comply with the reporting requirements referred to in Health
25 and Safety Code section 25249.7(f) (and established in Title 11 of the California Code of
26 Regulations sections 3000-3008), and shall move for approval of this Consent Judgment
27 pursuant to the terms thereof.

28

1 13.2 Upon request by AYS, CTS shall provide a declaration in support of a
2 motion to approve this Consent Judgment.

3 **14. PROVISION OF NOTICE**

4 14.1 All correspondence and notices required by this Consent Judgment to the
5 Parties shall be sent:

6 To Plaintiff As You Sow

7 As You Sow Foundation
8 Attn: Danielle Fugere, President and Chief Counsel
9 1611 Telegraph Street, Suite 1450
Oakland, CA 94612

10 With a copy to:

11 Barbara Chisholm
12 Altshuler Berzon LLP
13 177 Post Street, Suite 300
San Francisco, CA
Tel.: (415) 421-7151

14 To CTS

15 William Stahr
16 CTS Cement Manufacturing Corporation
11065 Knott Avenue, Suite A
Cypress, CA 90630

17 With a copy to:

18 James L. Meeder
19 Allen Matkins, LLP
Three Embarcadero Center, Suite 1200
20 San Francisco, California 94111
Tel.: (415) 837-1515

21 **15. EXECUTION AND COUNTERPARTS**

22 15.1 This Consent Judgment may be executed in one or more counterparts and by
23 means of facsimile or portable document format (pdf), which taken together shall be
24 deemed to constitute one document.

25 **16. AUTHORIZATION**

26 16.1 Each signatory to this Consent Judgment certifies that he or she is fully
27 authorized by the Party he or she represents to stipulate to this Consent Judgment and to
28

1 enter into and execute the Consent Judgment on behalf of the Party represented and legally
2 bind that Party. The undersigned have read, understand, and agree to all of the terms and
3 conditions of this Consent Judgment.

4
5 **APPROVED AS TO FORM:**

6 Dated: Nov. 18, 2013

ALTSHULER BERZON LLP

7
8 By


BARBARA J. CHISHOLM

9
10 Attorneys for Plaintiff AS YOU SOW

11 Dated: Oct. 9, 2013

ALLEN MATKINS, LLP

12
13 By


JAMES L. MEEDER

14
15 Attorneys for Defendant CTS CEMENT
16 MANUFACTURING CORPORATION

17 **SO AGREED:**

18 Dated: 11/18, 2013

AS YOU SOW

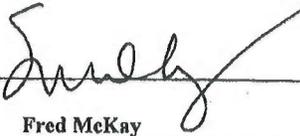
19
20 By


Name: Andrew Beiler
Title: CEO

21
22
23 Dated: October 7, 2013

**CTS CEMENT MANUFACTURING
CORPORATION**

24
25
26 By


Name: Fred McKay
Title: CFO

