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10 AS YOU SOW

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18 Attorneys for Defendant
19 COLART AMERICAS INC.

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AS YOU SOW, a non-profit California corporation

Plaintiff,

v.

COLART AMERICAS INC., a New Jersey Corporation,

Defendants.

Case No. RG13700344

[PROPOSED] CONSENT JUDGMENT

Health and Safety Code § 25249.6, *et seq.*

Dept: 17

This Consent Judgment is entered into by and between Plaintiff As You Sow (“AYS”) and Defendant ColArt Americas Inc. (“ColArt”), to resolve all claims raised in the Plaintiff’s Complaint filed in the above-captioned action, which was filed on October 23, 2013. This Consent Judgment shall be effective upon entry. AYS and ColArt (collectively “the Parties”) agree to the terms and conditions set forth below.

1. INTRODUCTION

1.1 AYS is a non-profit corporation dedicated to, among other causes, the protection of

1 the environment, the promotion of human health, the improvement of worker and consumer rights,
2 environmental education, and corporate accountability. AYS is based in Oakland, California and is
3 incorporated under the laws of the State of California.

4 1.2 ColArt manufactures and/or distributes products in California, including Winsor &
5 Newton All Purpose High Gloss Varnish for General Purpose Arts & Crafts and Winsor & Newton
6 All Purpose Matt Varnish for General Purpose Arts & Crafts. These products that are currently
7 manufactured, distributed and/or sold in California by ColArt are the subject of this Consent
8 Judgment (“Covered Products”).

9 1.3 AYS alleges in the Complaint that the Covered Products contain ethylbenzene, a
10 chemical listed by the State of California as known to cause cancer pursuant to the Safe Drinking
11 Water and Toxic Enforcement Act of 1986 (“Proposition 65”), California Health and Safety Code
12 §25249.5 *et seq.*

13 1.4 On March 21, 2013, AYS sent 60-day Notices of Violation to ColArt and public
14 enforcers as required by Health & Safety Code Section 25249.7, regarding alleged exposures to
15 ethylbenzene contained in ColArt’s products.

16 1.5 The Parties have agreed to enter into this Consent Judgment to settle claims as set
17 forth herein, and to avoid prolonged and costly litigation.

18 1.6 By executing and complying with this Consent Judgment, neither Party admits
19 any facts or conclusions of law alleged in the Complaint, or the existence of any other statutory,
20 common law, or equitable claim or requirement relating to or arising from the sale or distribution
21 of Covered Products by ColArt in California.

22 1.7 This Consent Judgment shall not be construed as an admission that any warning
23 regarding the alleged exposure to chemicals listed under Proposition 65 from Covered Products are
24 required under Proposition 65 or any other statute, regulation, or by the common law. ColArt
25 denies that any of the Covered Products were in violation of Proposition 65 at any time. Nothing
26 in this Consent Judgment shall prejudice, waive, or impair any right, remedy, or defense that AYS
27 and ColArt may have in any other or in future legal proceeding unrelated to this action. However,
28 this paragraph shall not diminish or otherwise affect the obligation, responsibilities, and duties of

1 the Parties under this Consent Judgment.

2 1.8 The term "Effective Date" means the date of entry of this Consent Judgment.

3 **2. JURISDICTION**

4 2.1 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over ColArt as to the allegations contained in the Complaint, venue is proper in
6 Alameda County, the Court has jurisdiction to enter this Consent Judgment as a resolution of all
7 claims alleged in the Complaint, and the Court shall retain jurisdiction to enforce the Consent
8 Judgment.

9 **3. CLEAR AND REASONABLE WARNINGS AND REFORMULATION**

10 3.1 Within 30 days of the Effective Date, all Covered Products being produced,
11 distributed or sold in California by ColArt shall have labels that provide the following warning
12 statement:

13 **WARNING: This product contains chemicals known to the State of**
14 **California to cause cancer.**

15 3.2 The warning statement required in Paragraph 3.1 shall be prominently affixed to or
16 printed on the product or its packaging by ColArt and shall be displayed with such
17 conspicuousness, as compared with other words, statements, designs, or devices on those products,
18 as to render the warning statement likely to be read and understood by an ordinary individual under
19 customary conditions of purchase and use.

20 3.3 By June 30, 2014, Defendant agrees that all Covered Products that are imported,
21 manufactured, packaged, distributed, or marketed for sale in California have been reformulated to
22 remove ethylbenzene. For such reformulated Covered Products, the warning set forth in Paragraph
23 3.2 shall not be required.

24 3.4 If ColArt contends that the Covered Products have been so reformulated, then at
25 least once each year, starting within thirty (30) days after the Effective Date, ColArt shall
26 undertake testing of the Covered Products on which it does not intend to place a warning label
27 pursuant to the reformulation as set forth in paragraph 3.3 above, by testing at least two (2)
28 randomly-selected samples of each such Covered Products for ethylbenzene content to confirm that

1 ethylbenzene is not present in the tested samples at detectable levels. All testing pursuant to this
2 Consent Judgment shall be performed by a laboratory certified by the California Environmental
3 Laboratory Accreditation Program for the analysis of ethylbenzene. Nothing in this Consent
4 Judgment shall limit Defendant's ability to conduct, or require that others conduct, additional
5 testing of the Covered Products, including the raw materials used in their manufacture. For the first
6 two years from the date of this Consent Judgment, Defendant shall provide any test results and
7 documentation to AYS within 30 working days of completion of the testing; thereafter upon
8 reasonable written request from AYS, which request shall not be made after five (5) years after the
9 Effective Date, and shall retain all test results and documentation from the date testing commenced
10 for no more than five (5) years after the Effective Date.

11 **4. SETTLEMENT PAYMENTS**

12 4.1 Within 30 days of the Effective Date, ColArt shall pay \$5,000 in the form of a check
13 made payable to As You Sow as a civil penalty pursuant to Health and Safety Code Section
14 25249.7(b). AYS shall remit seventy-five percent (75%) of this amount to the State of California
15 pursuant to Health and Safety Code Section 25249.12(b), equal to \$3,750 with AYS retaining
16 \$1,250.

17 4.2 Payment in lieu of civil penalties: Additionally, within 30 days of the Effective
18 Date, ColArt shall pay \$23,500 to AYS, with this amount to be used by AYS for grants to
19 California non-profit organizations and by the AYS Environmental Enforcement Fund. These
20 funds shall not be construed as forfeitures, fines, or penalties, and shall be used to reduce or
21 remediate exposures to toxic chemicals and to increase consumer, worker, and community
22 awareness of the health hazards posed by toxic chemicals in California. In deciding among the
23 grant proposals, the As You Sow Board of Directors ("Board") takes into consideration a number
24 of important factors, including: (1) the nexus between the harm done in the underlying case(s), and
25 the grant program work; (2) the potential for toxics reduction, prevention, remediation or education
26 benefits to California citizens from the proposal; (3) the budget requirements of the proposed
27 grantee and the alternate funding sources available to it for its project; and (4) the Board's
28 assessment of the proposed grantee's chances for success in its program work. AYS shall ensure

1 that all funds will be disbursed and used in accordance with AYS's mission statement, articles of
2 incorporation, and bylaws and applicable state and federal laws and regulations to promote
3 awareness of and responses to the health hazards posed by toxic chemicals in California.

4 4.3 Within 30 days of the Effective Date, ColArt shall pay \$34,000 in the form of a
5 check made payable to the Lozeau Drury Attorney-Client Trust Account as reimbursement for
6 plaintiff's attorneys' fees, investigation costs, and other reasonable litigation costs and expenses.

7 **5. ENFORCEMENT OF CONSENT JUDGMENT**

8 5.1 The Parties may, by motion filed in this Court, enforce the terms and conditions of
9 this Consent Judgment. Prior to the filing of any such motion, in the event a dispute arises with
10 respect to any of the provisions of this Consent Judgment, the Parties shall meet and confer within
11 10 days after either Party receives written notice of an alleged violation of this Consent Judgment.
12 If the dispute is not resolved and initiation of an enforcement action becomes necessary, in any
13 such proceeding the moving party shall be entitled to seek its reasonable fees and costs incurred, in
14 addition to whatever remedies are provided by law for failure to comply with California Health and
15 Safety Code §25249.5 *et seq.*

16 **6. CLAIMS COVERED, RELEASE AND COVENANT NOT TO SUE**

17 6.1 This Consent Judgment, is the product of negotiation and compromise, and is
18 accepted by the parties for purposes of settling, compromising, and resolving issues disputed in this
19 action, including future compliance by Defendant with this Consent Judgment, and shall not be
20 used for any other purpose, or in any other matter.

21 6.2 Compliance with the terms of this Consent Judgment shall constitute compliance
22 with Proposition 65 with respect to exposures to ethylbenzene in the Covered Products as alleged
23 in the Notice and Complaint.

24 6.3 As to the Covered Products, this Consent Judgment is a full, final, and binding
25 resolution between AYS, acting in the public interest, and ColArt, its parents, subsidiaries,
26 affiliates, divisions, and their shareholders, officers, directors, employees, agents, insurers and
27 representatives, and their successors and assigns, and each entity to whom ColArt directly or
28 indirectly distributes or sells the Covered Products, including, but not limited, to downstream

1 distributors, wholesalers, customers, retailers, franchisees, (“ColArt Releasees”) of all claims
2 brought or which could have been brought by AYS in the public interest for any alleged violation
3 of Proposition 65 based on the alleged failure to provide clear and reasonable warnings of exposure
4 to ethylbenzene in the Covered Products distributed or sold by ColArt for consumer use before the
5 Effective Date. AYS, on behalf of itself and in the public interest, releases all claims that were or
6 could have been brought against ColArt and the ColArt Releasees relating to any alleged violation
7 of Proposition 65 based on the alleged failure to provide clear and reasonable warnings of
8 exposures to ethylbenzene in the Covered Products distributed or sold by ColArt for consumer use
9 before the Effective Date.

10 6.4 ColArt, by this Consent Judgment, waives all rights to institute any form of legal
11 action against AYS for all actions or statements made or undertaken by AYS in the course of
12 seeking enforcement of Proposition 65 against the Defendant by means of the 60-day Notice of
13 Violation.

14 6.5 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
15 hearing or trial on the allegations of the Complaint.

16 **7. GOVERNING LAW AND CONSTRUCTION**

17 7.1 This Consent Judgment shall be governed by, and construed in accordance with, the
18 laws of the State of California.

19 7.2 The Parties, including their counsel, have participated in the preparation of this
20 Consent Judgment which is the result of the joint efforts of the Parties. This Consent Judgment
21 was subject to revision and modification by the Parties and has been accepted and approved as to
22 form by the Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this
23 Consent Judgment shall not be interpreted against any Party as a result of the manner of the
24 preparation of this Consent Judgment.

25 **8. MODIFICATION OF CONSENT JUDGMENT**

26 8.1 This Consent Judgment may be modified only upon written agreement of the Parties
27 with approval of the Court, or pursuant to court order issued upon noticed motion of a Party for
28 good cause shown and upon entry of a modified Consent Judgment by the Court. Any Party

1 seeking to modify this Consent Judgment shall make reasonable efforts to meet and confer in good
2 faith with the other Party prior to filing a motion to modify the Consent Judgment and shall
3 reasonably attempt to resolve any differences.

4 **9. COURT APPROVAL**

5 9.1 The Court shall either approve or disapprove of this Consent Judgment in its
6 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
7 and their counsel. Defendant agrees not to oppose this Consent Judgment.

8 9.2 In the event the Court fails to approve and order entry of the Consent Judgment
9 without any change whatsoever (unless otherwise so stipulated by the Parties), this Consent
10 Judgment shall become null and void upon the election of any Party and upon written notice to all
11 of the Parties to the Action pursuant to the notice provisions herein, and shall not be introduced
12 into evidence or otherwise used in any proceeding for any purpose.

13 **10. APPLICATION OF CONSENT JUDGMENT**

14 10.1 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
15 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

16 10.2 The terms of this Consent Judgment shall not apply to Covered Products
17 manufactured, distributed, or sold by ColArt for use outside of California.

18 **11. ATTORNEYS' FEES**

19 11.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
20 own attorneys' fees and costs incurred in connection with the 60-day Notices and Plaintiff's
21 Complaint.

22 **12. COMPLIANCE WITH HEALTH AND SAFETY CODE §25249.7**

23 12.1 Plaintiff shall comply with the reporting requirements referred to in Health and
24 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of Regulations
25 sections 3000-3008), and shall move for approval of this Consent Judgment pursuant to the terms
26 thereof.

27 12.2 Upon reasonable request by AYS, ColArt shall provide a declaration in support of a
28 motion to approve this Consent Judgment.

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13. PROVISION OF NOTICE

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

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

With a copy to:
Richard Drury
Lozeau Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607

To Defendants ColArt:
Marie D. Huelster
Senior Financial Controller/VP of Finance
ColArt Americas, Inc.
11 Constitution Ave.
Piscataway, NJ 08854

With a copy to:
Ann G. Grimaldi
Grimaldi Law Offices
50 California Street, Suite 1500
San Francisco, CA 94111

14. EXECUTION AND COUNTERPARTS

14.1 This Consent Judgment may be executed in one or more counterparts and with signatures transmitted by means of facsimile or electronically by portable document format (pdf), which taken together shall be deemed to constitute one document.

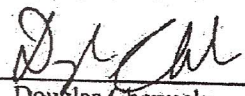
15. AUTHORIZATION

15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized

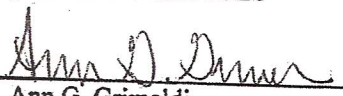
1 the Consent Judgment on behalf of the Party represented and legally bind that Party. The
2 undersigned have read, understand, and agree to all of the terms and conditions of this Consent
3 Judgment.

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6 **APPROVED AS TO FORM:**

7 Dated: Jan. 31, 2014.

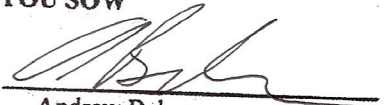
LOZEAU DRURY LLP
By: 
Douglas Chermak
Attorneys for Plaintiff AS YOU SOW

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12 Dated: Feb. 6, 2014.

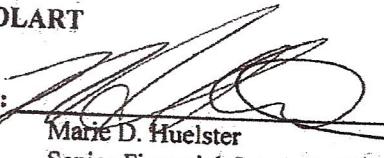
GRIMALDI LAW OFFICES
By: 
Ann G. Grimaldi
Attorneys for Defendant COLART
AMERICAS, INC.

15
16 **SO AGREED:**

17 Dated: FEB 24, 2014.

AS YOU SOW
By: 
Andrew Behar
Chief Executive Officer

21 Dated: Feb 14, 2014.

COLART
By: 
Marie D. Huelster
Senior Financial Controller/VP of Finance

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IT IS SO ORDERED AND ADJUDGED:

The Court hereby incorporates the terms of this Consent Judgment into this Order. The Court retains jurisdiction to enforce this Consent Judgment.

Dated: _____, 2014.

HON. GEORGE C. HERNANDEZ, JR.
JUDGE OF THE SUPERIOR COURT