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5 Attorneys for Plaintiff
6 AS YOU SOW

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

10 AS YOU SOW,
11 Plaintiff,
12
13 v.
14 HOUSE OF CHEATHAM, and DOES 1 through
10, inclusive,
15 Defendant.

Case No. CGC-14-536649

[PROPOSED] CONSENT JUDGMENT

Action Filed: January 8, 2014

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 January 8, 2014, Plaintiff filed a complaint in the Superior Court for
8 the City and County of San Francisco (hereafter referred to as the “Action”) charging House of
9 Cheatham, Inc. (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 formaldehyde, a chemical known to the State of California to cause cancer,
12 without providing clear and reasonable warnings to such individuals. The alleged violations addressed
13 in the Action were described in Plaintiff’s Notice of Intent to sue dated June 12, 2013 (“Plaintiff’s
14 Notice”), which Plaintiff sent to the Defendant and to public enforcers as required by Health & Safety
15 Code section 25249.7. The alleged violations at issue in the Action arise from alleged exposure to
16 formaldehyde contained in the Africa’s Best No-Lye Relaxer System that is identified in Plaintiff’s
17 Notice and is manufactured, packaged, distributed, marketed, or sold by Defendant (“Covered
18 Product”).

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
27 any of its provisions shall be construed as an admission by any Party of any fact, finding, issue of law,
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1 or violation of law, including Proposition 65 or any other statute, regulation, or common law
2 requirement related to exposure to formaldehyde or other chemicals listed under Proposition 65 from
3 the Covered Product. By executing this Consent Judgment and agreeing to provide the relief and
4 remedies specified herein, Defendant does not admit any violations of Proposition 65, or any other law
5 or legal duty and specifically denies that it has committed any such violations. Defendant maintains
6 that the Covered Product distributed, marketed and/or sold by Defendant in California has at all times
7 been in compliance with all applicable laws. Nothing in this Consent Judgment shall prejudice, waive,
8 or impair any right, remedy, or defense that Plaintiff and Defendant may have in any other, or in future,
9 legal proceedings unrelated to these proceedings. Defendant reserves all of its rights and defenses with
10 regard to any claim by any person under Proposition 65 or otherwise. Nevertheless, this paragraph
11 shall not diminish or otherwise affect the obligations, responsibilities, waivers, releases, and/or duties
12 provided 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 the Covered Product, to the following injunctive relief.

17 2.1 **Reformulation.** Defendant agrees that, as of the Effective Date, it shall reformulate the
18 Covered Product to remove any formaldehyde donors, including DMDM Hydantoin. In addition, after
19 the Effective Date, Defendant agrees it will not import into California, or manufacture, package,
20 distribute, or market for sale in California, any Covered Product containing formaldehyde donors,
21 including DMDM Hydantoin.

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

23 3.1 **Waiver and Release of Claims Against Defendant:** As to those matters raised in this
24 Action and in Plaintiff’s Notice, this Consent Judgment is a full, final, and binding resolution between
25 the Plaintiff, acting on behalf of itself and in the public interest pursuant to Health and Safety Code
26 section 25249.7(d), and Defendant for its alleged failure to provide clear, reasonable, and lawful
27 warnings of exposure to formaldehyde contained in the Covered Product. As to the Covered Product,
28 compliance with the terms of this Consent Judgment resolves any issue, now and in the future,

1 concerning compliance by Defendant with existing requirements of Proposition 65 to provide clear and
2 reasonable warning about exposure to formaldehyde in the Covered Product before the Effective Date.

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

7 **3.3 Matters Covered By This Consent Judgment:** For purposes of this paragraph 3, the
8 terms “Plaintiff” and “Defendant” are defined as follows. The term “Plaintiff” includes the Plaintiff as
9 defined at Paragraph 1.1 above, and also includes its members, subsidiaries, successors, and assigns
10 and its directors, officers, agents, attorneys, representatives, and employees. The term “Defendant”
11 includes the Defendant, as that term is defined in Paragraph 1.2 above, and also includes corporate
12 parents and subsidiaries and their directors, officers, agents, attorneys, representatives, employees,
13 licensors, heirs, predecessors, successors, and assigns, and their distributors, retailers, and customers of
14 the Covered Product.

15 **4. MONETARY PAYMENTS**

16 **4.1** In full satisfaction of any claims for civil penalties that were made or could have been
17 made in this Action with respect to the allegation that Defendant failed to provide clear and reasonable
18 warnings under Proposition 65 about exposure to formaldehyde arising from the sale, distribution or
19 use of the Covered Product in California, Defendant shall make the payments described in this
20 paragraph. Within fifteen (15) days following the approval and entry of this Consent Judgment by the
21 Court, Defendant shall pay three thousand dollars (\$3,000) as stipulated civil penalties under
22 Proposition 65. Defendant shall make this check payable to “Shute, Mihaly & Weinberger Trust
23 Account.” Plaintiff shall distribute these payments to the Plaintiff and to the State of California as
24 required under Proposition 65.

25 **4.2** Within fifteen (15) days following the approval and entry of this Consent Judgment by
26 the Court, Defendant shall pay two thousand dollars (\$2,000) in the form of a check made payable to
27 As You Sow as a payment in lieu of additional civil penalties. These funds shall be used by As You
28 Sow to reduce or remediate exposures to toxic chemicals and to increase consumer, worker and

1 community awareness of the health hazards posed by toxic chemicals in California via its program
2 work, but primarily through grants to other 501(c)(3) non-profit organizations working in toxics
3 reduction, remediation and/or environmental education. In deciding among the grantee proposals, the
4 As You Sow Board of Directors (“Board”) takes into consideration a number of important factors,
5 including: (1) the nexus between the harm done in the underlying case(s), and the grant program work;
6 (2) the potential for toxics reduction, prevention, remediation or education benefits to California
7 citizens from the proposal; (3) the budget requirements of the proposed grantee and the alternate
8 funding sources available to it for its project; and (4) the Board’s assessment of the grantee’s chances
9 for success in its program work. AYS shall ensure that all funds will be disbursed and used in
10 accordance with AYS’ mission statement, articles of incorporation, and bylaws and applicable state and
11 federal laws and regulations. These payments shall not be construed as a credit against the personal
12 claims of absent third parties for restitution against Defendant. The checks shall be delivered by
13 overnight delivery to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco,
14 CA 94102. In the event this Consent Judgment becomes null and void under Paragraph 11 infra,
15 Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

16 4.3 Within fifteen (15) days following the entry of this Consent Judgment, Defendant shall
17 pay twenty-five thousand dollars (\$25,000) in the form of a check made payable to “Shute, Mihaly &
18 Weinberger Trust Account” as reimbursement for the investigation fees and costs, testing costs, expert
19 witness fees, attorneys fees, and other litigation costs and expenses. The check shall be delivered by
20 overnight delivery to Ellison Folk, Shute, Mihaly & Weinberger LLP, 396 Hayes Street, San Francisco,
21 CA 94102. In the event this Consent Judgment becomes null and void under either Paragraph 11 infra,
22 Plaintiff shall, within fifteen days, return the payment made under this paragraph to Defendant.

23 **5. SEVERABILITY**

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

1 **6. MODIFICATION OF CONSENT JUDGMENT**

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

5 **7. ENFORCEMENT OF CONSENT JUDGMENT**

6 7.1 The Parties may, by motion or order to show cause before this Court, and upon notice
7 having been given to all Parties in accordance with Paragraph 10 below, unless waived, enforce the
8 terms and conditions of this Consent Judgment and seek whatever fines, costs, penalties, or remedies
9 (including reasonable attorneys' fees and costs) are provided by law.

10 7.2 The Parties may enforce the terms and conditions of this Consent Judgment pursuant to
11 paragraph 7.1 only after the complaining party has first given thirty (30) days notice to the Party
12 allegedly failing to comply with the terms and conditions of the Consent Judgment and has attempted,
13 in an open and good faith manner, to resolve such Party's alleged failure to comply.

14 **8. GOVERNING LAW**

15 8.1 The terms of this Consent Judgment shall be governed by, and construed in accordance
16 with, the laws of the State of California.

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

26 **9. ENTIRE AGREEMENT**

27 This Consent Judgment constitutes the sole and entire agreement and understanding between the
28 Parties with respect to the subject matter hereof, and any prior discussions, negotiations, commitments,

1 or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties,
2 representations, or other agreements between the Parties, except as expressly set forth herein. No
3 representations, oral or otherwise, express or implied, other than those specifically referred to herein,
4 shall be deemed to exist or bind any of the Parties hereto. No supplementation, modification, waiver, or
5 termination of this Consent Judgment shall be binding unless executed in writing by the Party to be
6 bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall
7 constitute a waiver of any of the other provisions hereof, whether or not similar, nor shall such waiver
8 constitute a continuing waiver.

9 **10. NOTICES**

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

14 For Plaintiffs:

AS YOU SOW
Attn: Danielle Fugere
1611 Telegraph Ave., Suite 1450
Oakland, CA 94612
(510) 735-8158

18 For Plaintiffs:
19 With a copy to:

Ellison Folk
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
(415) 552-5816 Fax

21 For Defendant:

HOUSE OF CHEATHAM
Attn: Mike Barker
1550 Roadhaven Drive
Stone Mountain, GA 30083

26 With a copy to:

Albert Tong
Burke, Williams & Sorensen, LLP
1901 Harrison St., Suite 900
Oakland, CA 94612
(510) 903-8802

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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 deemed an original, and all of which, when taken together, shall constitute one and the same document. All signatures need not appear on the same page of the document and signatures of the Parties transmitted by facsimile shall be deemed binding.

IT IS SO STIPULATED:

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DATED: _____ AS YOU SOW

BY: _____
ANDREW BEHAR
Executive Director

DATED: 1-21-14 HOUSE OF CHEATHAM, INC.

BY: 

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 over this matter

DATED: _____
JUDGE OF THE SUPERIOR COURT

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DATED: 1/13/14

AS YOU SOW

BY: 
ANDREW BEHAR
Executive Director

DATED: _____

HOUSE OF CHEATHAM, INC.

BY: _____

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 over this matter

DATED: _____

JUDGE OF THE SUPERIOR COURT

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