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6 AS YOU SOW

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11 Attorneys for Defendants
12 SPRAY PRODUCTS CORPORATION;
CHARTPAK, INC.; UTRECHT
13 MANUFACTURING CORPORATION

14 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF ALAMEDA

16 AS YOU SOW, a non-profit California
corporation

17 Plaintiff,

18 vs.

19 SPRAY PRODUCTS
CORPORATION, a Pennsylvania
20 corporation; CHARTPAK, INC., a
Massachusetts corporation; and
21 UTRECHT MANUFACTURING
CORPORATION, a New Jersey
22 corporation,

23 Defendants.
24

Case No. RG14715992

[PROPOSED] CONSENT JUDGMENT

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

Dept: 17

25 This Consent Judgment is entered into by and between Plaintiff As You Sow (“AYS”) and
26 Defendant Spray Products Corporation (“Spray Products”), Defendant Chartpak, Inc.
27 (“Chartpak”); and Defendant Utrecht Manufacturing Corporation (“Utrecht”) (all defendants
28 collectively referred to as “Defendants”), to resolve all claims raised in the Plaintiff’s Complaint

1 filed in the above-captioned action, which was titled “Complaint for Injunctive Relief and civil
2 Penalties” and was filed on March 4, 2014 (the “Complaint”). This Consent Judgment shall be
3 effective upon entry. AYS and Defendants (each individually, a “Party”, and collectively “the
4 Parties”) agree to the terms and conditions set forth below.

5 **1. INTRODUCTION**

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

10 1.2 Chartpak manufactures, packages, distributes, markets, and/or sells products in
11 California, including Grumbacher Workable Fixative (Matte), Grumbacher Final Fixative (Matte),
12 and Grumbacher Final Fixative (Gloss Brilliant). These products, which are currently marketed,
13 distributed and/or sold in California by Chartpak, are subject to this Consent Judgment (“Covered
14 Chartpak Products”).

15 1.3 Utrecht manufactures, packages, distributes, markets, and/or sells products in
16 California, including Utrecht UV-Resistant Clear Acrylic Coating and Utrecht Workable Fixative.
17 These products, which are currently marketed, distributed and/or sold in California by Utrecht, are
18 subject to this Consent Judgment (“Covered Utrecht Products”).

19 1.4 Spray Products manufactures, packages, distributes, markets, and/or sells products
20 in California, (“Covered S.P. Products”), the Covered Chartpak Products and the Covered Utrecht
21 Products that are the subject of this Consent Judgment. The Covered S.P. Products, the Covered
22 Chartpak Products and the Covered Utrecht Products are referred to collectively as the “Covered
23 Products.”

24 1.5 AYS alleges in the Complaint that the Covered Products contain ethylbenzene, a
25 chemical listed by the State of California as known to cause cancer pursuant to the Safe Drinking
26 Water and Toxic Enforcement Act of 1986 (“Proposition 65”), California Health and Safety Code
27 §25249.5 *et seq.*

28 1.6 On March 21, 2013, and May 16, 2013, AYS sent 60-day Notices of Violations to

1 Chartpak and public enforcers (“Chartpak NOV”) as required by Health & Safety Code Section
2 25249.7, regarding alleged exposures to ethylbenzene contained in the Covered Chartpak Products.

3 1.7 On March 21, 2013, AYS sent 60-day Notices of Violations to Utrecht and public
4 enforcers (“Utrecht NOV”) as required by Health & Safety Code Section 25249.7, regarding
5 alleged exposures to ethylbenzene contained in the Covered Utrecht Products.

6 1.8 On June 19, 2013, AYS sent 60-day Notices of Violations to Spray Products and
7 public enforcers (“Spray Products NOV”) as required by Health & Safety Code Section 25249.7,
8 regarding alleged exposures to ethylbenzene contained in Covered Products manufactured by
9 Spray Products.

10 1.9 The Parties have agreed to enter into this Consent Judgment to settle claims as set
11 forth herein, and to avoid prolonged and costly litigation.

12 1.10 By executing and complying with this Consent Judgment, none of the Parties
13 admits any facts or conclusions of law alleged in the Complaint, or the existence of any other
14 statutory, common law, or equitable claim or requirement relating to or arising from the
15 manufacture, packaging, marketing, distribution and/or sale of the Covered Products by
16 Defendants in California.

17 1.11 This Consent Judgment shall not be construed as an admission that any warning
18 regarding the alleged exposure to chemicals listed under Proposition 65 from Covered Products are
19 required under Proposition 65 or any other statute, regulation, or by the common law. Defendants
20 deny that any of the Covered Products were in violation of Proposition 65 at any time. Nothing in
21 this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument or defense
22 that AYS or Defendants may have in any other or in future legal proceeding unrelated to this
23 action. However, this paragraph shall not diminish or otherwise affect the obligation,
24 responsibilities, and duties of the Parties under this Consent Judgment.

25 1.12 The term “Effective Date” means the date of entry of this Consent Judgment.

26 **2. JURISDICTION**

27 2.1 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over Defendants as to the allegations contained in the Complaint, venue is proper in

1 Alameda County, the Court has jurisdiction to enter this Consent Judgment as a resolution of all
2 claims alleged in the Complaint, and the Court shall retain jurisdiction to enforce the Consent
3 Judgment.

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

5 3.1 Within thirty (30) days of the Effective Date, all Covered Chartpak Products being
6 manufactured, produced, distributed or sold in California by Chartpak or Spray Products shall have
7 a label that provide the following warning statement:

8 **WARNING: This product contains a chemical known to the State of**
9 **California to cause cancer.**

10 3.2 Within thirty (30) days of the Effective Date, all Covered Utrecht Products being
11 manufactured, produced, distributed or sold in California by Utrecht or Spray Products shall have a
12 label that provide the following warning statement:

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

15 3.3 The warning statement required in Paragraphs 3.1 and 3.2 shall be prominently
16 affixed to or printed on the product or its packaging by the respective Defendants and shall be
17 displayed with such conspicuousness, as compared with other words, statements, designs, or
18 devices on those products, as to render the warning statement likely to be read and understood by
19 an ordinary individual under customary conditions of purchase and use.

20 3.4 The Parties agree that the content and the placement of the warning statements as
21 shown in Attachment A hereto meet the requirements of Paragraphs 3.1 through 3.3 of this Consent
22 Judgment.

23 3.5 The Parties further agree that a Covered Product may be manufactured, produced,
24 marketed, sold and/or distributed in California or shipped to California without the warnings
25 required under paragraphs Section 3.1 or 3.2 if the Covered Product has been reformulated to
26 remove ethylbenzene, and the requirements set forth in paragraphs 3.6 and 3.9 below have been
27 met.

28

1 3.6 At least sixty (60) days before the discontinuance of any warning statement required
2 pursuant to Paragraphs 3.1 and 3.2, the Defendant seeking to sell a reformulated version of a
3 Covered Product without the Proposition 65 warning shall provide testing results to As You Sow
4 demonstrating that each of the Covered Product(s) subject to such reformulation do not contain
5 detectable levels of ethylbenzene (Reformulated Product). Such testing shall consist of at least two
6 (2) randomly-selected samples of each of the Reformulated Product(s) for ethylbenzene content to
7 confirm that ethylbenzene is not present in each Reformulated Product at detectable levels.

8 3.7 Once each year, for two years following the initial year of reformulation, the
9 reformulating party shall provide As You Sow with test results of at least two (2) randomly-
10 selected samples of each of the Reformulated Product for ethylbenzene content to confirm that
11 ethylbenzene is not present in the tested samples at detectable levels. Full test result packets,
12 including all accompanying quality assurance/quality control (“QA/QC”) documentation shall be
13 provided to AYS within thirty (30) working days of completion of the testing; thereafter such
14 testing shall be performed upon written request from AYS, which request shall not be made more
15 frequently than once per calendar year, unless a reformulation request has been made after AYS
16 received test results in a given year, and which request shall not be made after five (5) years
17 following the year of initial reformulation. The reformulating party shall retain all final test results
18 and documentation relating thereto from the date testing commences for at least five (5) years after
19 the testing was performed and, within that five (5) year time period, shall make such final test
20 results available to AYS as reasonably requested.

21 3.8 All testing pursuant to this Consent Judgment shall be performed by a laboratory
22 certified by the California Environmental Laboratory Accreditation Program.

23 **4. SETTLEMENT PAYMENTS**

24 4.1 In full and final satisfaction of all potential civil penalties, payment in lieu of civil
25 penalties, attorneys’ fees and costs, and any other potential fines, penalties, costs, liabilities and
26 claims or causes of action to be imposed upon or asserted against the Defendants, individually and
27 collectively, for the violations set alleged in the Complaint, Spray Products shall make a total
28 payment of \$80,000.00 (“Total Settlement Amount”) to AYS according to the following schedule:

- 1 a. \$15,000 within 5 days of the Effective Date.
- 2 b. \$15,000 within 60 days of the Effective Date.
- 3 c. \$15,000 within 120 days of the Effective Date.
- 4 d. \$15,000 by January 15, 2016..
- 5 e. \$15,000 by March 15, 2016.
- 6 f. \$5,0000 by June 15, 2016

7 Spray Products shall make these payments by check made payable to As You Sow. The
8 Total Settlement Amount shall be apportioned as follows:

9 4.2 \$8,160.00 shall be considered as a civil penalty pursuant to Health and Safety Code
10 Section 25249.7(b). AYS shall remit seventy-five percent (75%) of this amount to the State of
11 California pursuant to Health and Safety Code Section 25249.12(b), equal to \$6,120.00 with AYS
12 retaining the remaining \$2,040.00.

13 4.3 \$8,160.00 shall be distributed to AYS in lieu of further civil penalties, with this
14 amount to be used by AYS for grants to California non-profit organizations and by the AYS
15 Environmental Enforcement Fund. These funds shall not be construed as forfeitures, fines, or
16 penalties, and shall be used to reduce or remediate exposures to toxic chemicals and to increase
17 consumer, worker, and community awareness of the health hazards posed by toxic chemicals in
18 California. In deciding among the grant proposals, the As You Sow Board of Directors (“Board”)
19 takes into consideration a number of important factors, including: (1) the nexus between the harm
20 done in the underlying case(s), and the grant program work; (2) the potential for toxics reduction,
21 prevention, remediation or education benefits to California citizens from the proposal; (3) the
22 budget requirements of the proposed grantee and the alternate funding sources available to it for its
23 project; and (4) the Board’s assessment of the proposed grantee's chances for success in its
24 program work. AYS shall ensure that all funds will be disbursed and used in accordance with
25 AYS’s mission statement, articles of incorporation, and bylaws and applicable state and federal
26 laws and regulations to promote awareness of and responses to the health hazards posed by toxic
27 chemicals in California.

28 4.4 \$63,680.00 shall be distributed to AYS as reimbursement for Plaintiff’s attorneys’

1 fees, investigation costs, and other reasonable litigation costs and expenses incurred by Plaintiff in
2 litigating and negotiating a settlement in this matter in the public interest.

3 **5. ENFORCEMENT OF CONSENT JUDGMENT**

4 5.1 The Parties may, by motion filed in this Court, enforce the terms and conditions of
5 this Consent Judgment. Prior to the filing of any such motion, in the event a dispute arises with
6 respect to any of the provisions of this Consent Judgment, the Parties shall meet and confer within
7 10 days after either Party receives written notice of an alleged violation of this Consent Judgment.

8 5.2 AYS is entitled to seek recovery of its reasonable attorneys' fees and costs incurred
9 in any such motion or proceeding in any dispute regarding compliance with the terms of this
10 Consent Judgment pursuant to the provisions of Code of Civil Procedure section 1021.5.

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

12 6.1 This Consent Judgment is the product of negotiation and compromise, and is
13 accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in this
14 action, and shall not be used for any other purpose, or in any other matter.

15 6.2 Compliance with the terms of this Consent Judgment shall constitute compliance
16 with Proposition 65 with respect to exposures to ethylbenzene in the Covered Products as alleged
17 in the Chartpak NOV, the Utrecht NOV, the Spray Products NOV and in the Complaint.

18 6.3 This Consent Judgment is a full, final, and binding resolution between AYS, acting
19 in the public interest, and

- 20 • Chartpak, its parents, subsidiaries, affiliates, divisions, and their shareholders,
21 officers, directors, employees, agents, attorneys, insurers and representatives, and
22 their successors and assigns, and each entity to whom Chartpak directly or indirectly
23 markets, distributes or sells the Covered Chartpak Products, including, but not
24 limited, to downstream distributors, wholesalers, customers, retailers, and
25 franchisees (“Chartpak Releasees”);
- 26 • Utrecht, its parents, subsidiaries, affiliates, divisions, and their shareholders,
27 officers, directors, employees, agents, insurers and representatives, and their
28 successors and assigns, and each entity to whom Utrecht directly or indirectly

1 markets, distributes or sells the Covered Utrecht Products, including, but not
2 limited, to downstream distributors, wholesalers, customers, retailers, and
3 franchisees (“Utrecht Releasees”);
4 • and Spray Products, its parents, subsidiaries, affiliates, divisions, and their
5 shareholders, officers, directors, employees, agents, insurers and representatives,
6 and their successors and assigns, and each entity to whom Spray Products directly or
7 indirectly markets, distributes or sells the Covered Products, including, but not
8 limited, to downstream distributors, wholesalers, customers, retailers, and
9 franchisees (“Spray Products Releasees”),
10 of any alleged violation of Proposition 65, based on the failure to provide clear and reasonable
11 warnings of exposure to ethylbenzene in the Covered Products distributed or sold for consumer use
12 before the Effective Date.

13 6.4 Chartpak, by this Consent Judgment, waives all rights to institute any form of legal
14 action against AYS for all actions or statements made or undertaken by AYS prior to the Effective
15 Date in the course of seeking enforcement of Proposition 65 against Chartpak in connection with
16 the alleged presence of ethylbenzene in the Covered Chartpak Products.

17 6.5 Utrecht, by this Consent Judgment, waives all rights to institute any form of legal
18 action against AYS for all actions or statements made or undertaken by AYS prior to the Effective
19 Date in the course of seeking enforcement of Proposition 65 against Utrecht in connection with the
20 alleged presence of ethylbenzene in the Covered Utrecht Products.

21 6.6 Spray Products, by this Consent Judgment, waives all rights to institute any form of
22 legal action against AYS for all actions or statements made or undertaken by AYS prior to the
23 Effective Date in the course of seeking enforcement of Proposition 65 against Spray Products in
24 connection with the alleged presence of ethylbenzene in the Covered Products.

25 6.7 AYS, its directors, officers, employees, attorneys, agents, insurers and
26 representatives, and their successors and assigns hereby release the Chartpak Releasees, the Utrecht
27 Releasees, and the Spray Products Releasees for any claims that were in the Chartpak NOV, the
28 Utrecht NOV, the Spray Products NOV or the Complaint against Defendants, individually and

1 collectively, based on the alleged presence of ethylbenzene in the Covered Products distributed or
2 sold for consumer use before the Effective Date.

3 6.8 Upon entry of the Consent Judgment, the Parties waive their respective rights to a
4 hearing or trial on the allegations in the Complaint.

5 **7. GOVERNING LAW AND CONSTRUCTION**

6 7.1 This Consent Judgment shall be governed by, and construed in accordance with, the
7 laws of the State of California.

8 **8. MODIFICATION OF CONSENT JUDGMENT**

9 8.1 This Consent Judgment may be modified only upon written agreement of the Parties
10 with approval of the Court, or pursuant to court order issued upon noticed motion of a Party for
11 good cause shown and upon entry of a modified Consent Judgment by the Court. Any Party
12 seeking to modify this Consent Judgment shall make reasonable efforts to meet and confer in good
13 faith with the other Parties prior to filing a motion to modify the Consent Judgment and shall
14 reasonably attempt to resolve any differences.

15 **9. COURT APPROVAL**

16 9.1 The Court shall either approve or disapprove of this Consent Judgment in its
17 entirety, without alteration, deletion or amendment, unless otherwise so stipulated by the Parties
18 and their counsel. Defendant agrees not to oppose this Consent Judgment.

19 9.2 In the event the Court fails to approve and order entry of the Consent Judgment
20 without any change (unless otherwise so stipulated by the Parties), this Consent Judgment shall
21 become null and void upon the election of any Party and upon written notice to all of the Parties to
22 the Action pursuant to the notice provisions herein, and shall not be introduced into evidence or
23 otherwise used in any proceeding for any purpose.

24 **10. APPLICATION OF CONSENT JUDGMENT**

25 10.1 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
26 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

27 10.2 The terms of this Consent Judgment shall not apply to Covered Chartpak Products
28 manufactured, distributed, or sold by Chartpak for use outside of California.

1 10.3 The terms of this Consent Judgment shall not apply to Covered Utrecht Products
2 manufactured, distributed, or sold by Utrecht for use outside of California.

3 10.4 The terms of this Consent Judgment shall not apply to Covered Products
4 manufactured, distributed, or sold by Spray Products for use outside of California.

5 **11. ATTORNEYS' FEES**

6 11.1 Except as specifically provided in this Consent Judgment, each Party shall bear its
7 own attorneys' fees and costs incurred in connection with the Chartpak NOV, the Utrecht NOV,
8 the Spray Products NOV and the Complaint.

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

10 12.1 Plaintiff shall comply with the reporting requirements referred to in Health and
11 Safety Code section 25249.7(f) (and established in Title 11 of the California Code of Regulations
12 sections 3000-3008), and shall move for approval of this Consent Judgment pursuant to the terms
13 thereof.

14 12.2 Upon reasonable request by AYS, Defendants shall provide a declaration in support
15 of a motion to approve this Consent Judgment.

16 **13. PROVISION OF NOTICE**

17 13.1 All correspondence and notices required by this Consent Judgment to the Parties
18 shall be sent:

19
20 To Plaintiff As You Sow

21 As You Sow Foundation
22 Attn: Danielle Fugere President and Chief Counsel
23 1611 Telegraph Street, Suite 1450
24 Oakland, CA 94612

25 With a copy to:

26 Douglas Chermak
27 Lozeau Drury LLP
28 410 12th Street, Suite 250
 Oakland, CA 94607

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To Defendants:

Bart Bastian, President
Spray Products Corporation
1323 Conshohocken Road
Plymouth Meeting, PA 19462

With a copy to:

John Epperson
Cooper, White & Cooper LLP
201 California Street, 17th Floor
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.

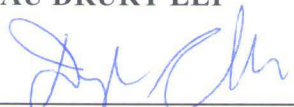
15. AUTHORIZATION

15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and legally bind that Party. The undersigned have read, understand, and agree to all of the terms and conditions of this Consent Judgment.

APPROVED AS TO FORM:

Dated: 7 May, 2015.

LOZEAU DRURY LLP

By: 

Douglas Chermak
Attorneys for Plaintiff AS YOU SOW

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Dated: _____, 2015.

COOPER, WHITE & COOPER LLP

By: _____
John Epperson
Attorneys for Defendants SPRAY
PRODUCTS CORPORATION, CHARTPAK,
INC., and UTRECHT MANUFACTURING
CORPORATION

SO AGREED:

Dated: May 7, 2015.

AS YOU SOW
By: 
Andrew Behar
Chief Executive Officer

Dated: _____, 2015.

SPRAY PRODUCTS CORPORATION

By: _____
Bart Bastian
President

Dated: _____, 2015.

CHARTPAK, INC.

By: _____
Steven W. Roth
President

Dated: _____, 2015.

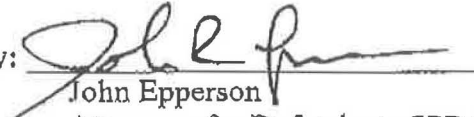
**UTRECHT MANUFACTURING
CORPORATION**

By: _____
Nancy P. Hensel
Vice President of Merchandising

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Dated: 4/28, 2015.

COOPER, WHITE & COOPER LLP

By: 
John Epperson
Attorneys for Defendants SPRAY
PRODUCTS CORPORATION, CHARTPAK,
INC., and UTRECHT MANUFACTURING
CORPORATION

SO AGREED:


Dated: _____, 2015.

AS YOU SOW

By: _____
Andrew Behar
Chief Executive Officer

Dated: 5/6, 2015.

SPRAY PRODUCTS CORPORATION

By: 
Bart Bastian
President

Dated: _____, 2015.

CHARTPAK, INC.

By: _____
Steven W. Roth
President

Dated: _____, 2015.


**UTRECHT MANUFACTURING
COPORATION**

By: _____
Nancy P. Hensel
Vice President of Merchandising

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Dated: 4/28, 2015.

COOPER, WHITE & COOPER LLP

By: 
John Epperson
Attorneys for Defendants SPRAY
PRODUCTS CORPORATION, CHARTPAK,
INC., and UTRECHT MANUFACTURING
CORPORATION

SO AGREED:

Dated: _____, 2015.

AS YOU SOW

By: _____
Andrew Behar
Chief Executive Officer

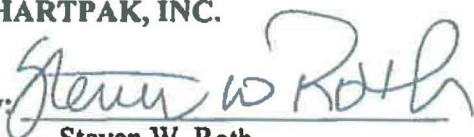
Dated: _____, 2015.

SPRAY PRODUCTS CORPORATION

By: _____
Bart Bastian
President

Dated: 4/29, 2015.

CHARTPAK, INC.

By: 
Steven W. Roth
President

Dated: _____, 2015.

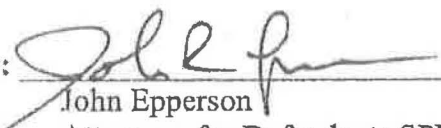
**UTRECHT MANUFACTURING
CORPORATION**

By: _____
Nancy P. Hensel
Vice President of Merchandising

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Dated: 4/28, 2015.

COOPER, WHITE & COOPER LLP

By: 

John Epperson
Attorneys for Defendants SPRAY
PRODUCTS CORPORATION, CHARTPAK,
INC., and UTRECHT MANUFACTURING
CORPORATION

SO AGREED:

Dated: _____, 2015.

AS YOU SOW

By: _____
Andrew Behar
Chief Executive Officer

Dated: _____, 2015.

SPRAY PRODUCTS CORPORATION

By: _____
Bart Bastian
President

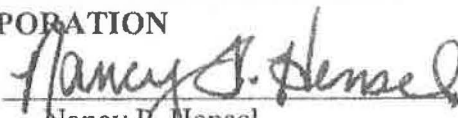
Dated: _____, 2015.

CHARTPAK, INC.

By: _____
Steven W. Roth
President

Dated: 5/1, 2015.

**UTRECHT MANUFACTURING
CORPORATION**

By: 
Nancy H. Mensel
Vice President of Merchandising

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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: _____, 2015.

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