

ENDORSED FILED
SUPERIOR COURT
COUNTY OF SAN FRANCISCO

DEC 05 2006

GORDON PARK-LI, CLERK
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Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

BABY UNIVERSE, INC.; BUY BUY
BABY, INC.; and Defendant DOES 1
through 200, inclusive,

Defendants.

No. CGC-06-448559

Action Filed: January 17, 2006

~~PROPOSED~~ [PROPOSED] CONSENT JUDGMENT
RE DEFENDANT BABYUNIVERSE,
INC.

HOWARD
RICE
NEMEROVSKI
CANADY
FALK
& RABKIN
A Professional Corporation

[PROPOSED] CONSENT JUDGMENT RE DEFENDANT BABYUNIVERSE, INC.

1 **1. INTRODUCTION**

2 **1.1** On January 17, 2006, plaintiff the Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in San Francisco
4 County Superior Court, entitled *Center for Environmental Health v. Baby Universe, Inc., et*
5 *al.*, San Francisco County Superior Court Case Number CGC-06-448559 (the “CEH
6 Action”), for civil penalties and injunctive relief pursuant to the provisions of California
7 Health & Safety Code §25249.5 *et seq.* (“Proposition 65”).

8 **1.2** Defendant BabyUniverse, Inc. (“Defendant”) is alleged in the Complaint to be a
9 corporation that employs 10 or more persons that manufactured, distributed and/or sold soft
10 food and beverage containers such as lunchboxes and coolers made of materials containing
11 lead and/or lead compounds (the “Products”) in the State of California. CEH and Defendant
12 are together referred to herein as the “Parties.”

13 **1.3** On or about October 13, 2005, CEH served Defendant and the appropriate public
14 enforcement agencies with the requisite 60-day notice that Defendant was in violation of
15 Proposition 65. CEH’s notice and the Complaint in this Action allege that Defendant
16 exposes individuals who use or otherwise handle the Products to lead and/or lead
17 compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of
18 California to cause cancer, birth defects and other reproductive harm, without first providing
19 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
20 toxicity of Lead. The notice and Complaint allege that Defendant’s conduct violates
21 Health & Safety Code §25249.6, the warning provision of Proposition 65.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
23 has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
24 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
25 proper in the County of San Francisco, and that this Court has jurisdiction to enter this
26 Consent Judgment as a full and final resolution of all claims which were or could have been
27 raised in the Complaint based on the facts alleged therein.

28 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of certain

1 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
2 Judgment, the Parties do not admit any facts or conclusions of law. It is the parties' intent
3 that nothing in this Consent Judgment shall be construed as an admission by the Parties of
4 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
5 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
6 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
7 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in
8 this or any other or future legal proceedings.

9 **2. COMPLIANCE**

10 **2.1 Level.** Within ninety days of entry of this Consent Judgment (the "Compliance
11 Date"), Defendant shall not manufacture, distribute, ship, or sell, into California, or cause to
12 be manufactured, distributed, or sold into California, any Product that contains Lead
13 concentrations exceeding 200 parts per million ("ppm") in or on the interior lining of the
14 Products or in any polyvinyl chloride ("PVC") used on the exterior of the Products; and that
15 the exterior surface coatings of the Products may not contain Lead concentrations exceeding
16 600 ppm Lead.

17 **2.2 Issuance of Product specifications to suppliers.** In order to help ensure
18 compliance with section 2.1, Defendant shall, within 30 days of entry of this Consent
19 Judgment, issue specifications to its suppliers of the Products, if any, stating that the interior
20 lining and any PVC used on the exterior of the Products to be sold or distributed into
21 California may not contain Lead concentrations exceeding 200 ppm; and that the exterior
22 surface coatings of the Products may not contain Lead concentrations exceeding 600 ppm.

23 **2.3 Certification of Level By Suppliers.** Defendant shall obtain written certification
24 from their suppliers of the Products, if any, that such Products are in compliance with the
25 Product specifications for all orders of the Products received sixty days or more following
26 entry of the Consent Judgment.

27 **2.4 Testing.** In order to help ensure compliance with the requirements of Section
28 2.1, for any single order of an individual Product that exceeds 2500 units purchased by

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1 Defendant after the Compliance Date, Defendant shall conduct testing on randomly selected
2 units of the Products in an amount equal to 0.1% (but not to exceed a total of 4 units). All of
3 the testing pursuant to this section shall be conducted at an independent laboratory in
4 accordance with the test protocol attached hereto as Exhibit A (the "Test Protocol").

5 **2.4.1 Products that exceed the Level.** If the results of the testing required
6 pursuant to section 2.3 shows levels of lead exceeding 200 ppm for the interior lining or any
7 PVC used on the exterior of a Product, or 600 ppm for the exterior surface coating of a
8 Product, Defendant shall return all of the Products that were purchased under the particular
9 purchase order to the supplier with a letter explaining that such Products do not comply with
10 the supplier's certification. Should the testing of Products purchased from a particular
11 supplier demonstrate Lead levels exceeding those set forth in Section 2.1 more than twice in
12 a twelve month period, Defendant shall stop purchasing Products from such supplier.

13 **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing of the
14 Products. Any such testing will be conducted pursuant to the Test Protocol at an independent
15 laboratory. In the event that CEH's testing demonstrates Lead levels in excess of 200 ppm
16 for the interior lining or exterior PVC of one or more Products, or 600 ppm for the exterior
17 surface coating of one or more of the Products, CEH shall inform Defendant of the
18 violation(s), including information sufficient to permit Defendant to identify the Product(s).
19 Defendant, if Defendant still sells or distributes the Products into California, shall, within 10
20 days following such notice, demonstrate compliance with sections 2.2 and 2.3 of this
21 Consent Judgment by providing CEH, at the address listed in section 13, with a copy of the
22 specification issued to, and certification received from its supplier of the Product(s) that
23 tested above the level(s) set in this Consent Judgment. If the Defendant fails to provide
24 CEH with the information demonstrating its compliance with sections 2.2 and 2.3 for the
25 Product(s) Defendant purchased from the same supplier as those with tests showing Lead
26 levels exceeding the levels set forth in this Consent Judgment, the Defendant shall be liable
27 for stipulated penalties. The stipulated penalty shall be as follows for each unit of Product
28 for which CEH produces a test result with Lead levels exceeding the levels set in this

1 Consent Judgment for which Defendant has not complied with sections 2.2 – 2.4:

2 First Occurrence: \$1,250

3 Second Occurrence: \$1,500

4 Third Occurrence: \$1,750

5 Thereafter: \$2,500

6 **2.6 Inapplicability To Settling Suppliers.** This section 2 of the Consent Judgment
7 shall not apply to Products sold by Defendant that are manufactured, distributed and/or sold
8 by any other entity that has signed or signs a Consent Judgment with CEH regarding the
9 Products.

10 **3. INTERIM RELIEF**

11 **3.1** Defendant represents that it immediately stopped selling the Products upon
12 receipt of CEH's 60-day notice. Defendant shall not resume sale of the Products until such
13 Products comply with the requirements of Section 2 of this Consent Judgment.

14 **4. SETTLEMENT PAYMENTS**

15 **4.1 Monetary Payment in Lieu of Penalty:** \$3,500 shall be paid to CEH in lieu of
16 any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use such funds to
17 continue its work protecting people from exposures to toxic chemicals. As part of this work,
18 CEH intends to conduct periodic testing of the Products as set forth in section 2.4.

19 **4.2 Attorneys' Fees and Costs:** \$10,000 shall be used to reimburse CEH and its
20 attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other
21 costs incurred as a result of investigating, bringing this matter to Defendant's attention,
22 litigating and negotiating a settlement in the public interest.

23 **4.3 Timing of payments.** The payments required under this section shall be
24 delivered to the address set forth in section 13 below within 10 days of entry of this Consent
25 Judgment by the Court. Any failure by Defendant to comply with the payment terms herein
26 shall be subject to a stipulated late fee in the amount of \$50 for each day after the delivery
27 date the payment is received. The late fees required under this section shall be recoverable,
28 together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to

1 section 6 of this Consent Judgment.

2 **5. MODIFICATION OF CONSENT JUDGMENT**

3 **5.1** This Consent Judgment may be modified by written agreement of CEH and
4 Defendant, or upon motion of CEH or Defendant as provided by law.

5 **5.2** CEH intends to enter into agreements with other entities that distribute and/or sell
6 Products. Should Defendant determine that the provisions of any such Consent Judgment
7 with a similarly situated distributor or seller of Products are less stringent, Defendant may
8 request a modification of this Consent Judgment to conform with the terms of the later
9 entered Consent Judgment. Upon 30 days prior written notice of Defendant's request for a
10 modification, CEH shall inform Defendant whether it will agree to such modification. If
11 CEH does not agree, Defendant may move the Court for a modification pursuant to this
12 section.

13 **6. ENFORCEMENT OF CONSENT JUDGMENT**

14 **6.1** CEH may, by motion or application for an order to show cause before the
15 Superior Court of the County of San Francisco, enforce the terms and conditions contained
16 in this Consent Judgment. Should CEH prevail on any motion or application under this
17 section, CEH shall be entitled to its reasonable attorneys' fees and costs associated with such
18 motion or application.

19 **7. APPLICATION OF CONSENT JUDGMENT**

20 **7.1** This Consent Judgment shall apply to and be binding upon the parties hereto,
21 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

22 **8. CLAIMS COVERED**

23 **8.1** This Consent Judgment is a full, final and binding resolution between CEH and
24 Defendant of any violation of Proposition 65 that was or could have been asserted in the
25 Complaint against Defendant (including any claims that could be asserted in connection with
26 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,
27 directors, officers, employees, agents, attorneys, distributors, or customers (collectively,
28 "Defendant Releasees") based on failure to warn about alleged exposure to Lead contained

1 in the Products, with respect to any Products manufactured, distributed or sold by Defendant
2 on or prior to the date of entry of this Consent Judgment. Compliance with the terms of this
3 Consent Judgment constitutes compliance with Proposition 65 for purposes of Lead
4 exposures resulting from the Products.

5 **9. SEVERABILITY**

6 9.1 In the event that any of the provisions of this Consent Judgment are held by a
7 court to be unenforceable, the validity of the enforceable provisions shall not be adversely
8 affected.

9 **10. SPECIFIC PERFORMANCE**

10 10.1 The parties expressly recognize that Defendant's obligations under this Consent
11 Judgment are unique. In the event that any Settling Defendant is found to be in breach of
12 this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the
13 parties agree that it would be extremely impracticable to measure the resulting damages and
14 that such breach would cause irreparable damage. Accordingly, CEH, in addition to any
15 other available rights or remedies, may sue in equity for specific performance, and
16 Defendant expressly waives the defense that a remedy in damages will be adequate.

17 **11. GOVERNING LAW**

18 11.1 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California.

20 **12. RETENTION OF JURISDICTION**

21 12.1 This Court shall retain jurisdiction of this matter to implement and enforce the
22 terms this Consent Judgment.

23 **13. PROVISION OF NOTICE**

24 13.1 All notices required pursuant to this Consent Judgment and correspondence shall
25 be sent to the following:
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1 For CEH:

2 Mark N. Todzo
3 Lexington Law Group, LLP
4 1627 Irving Street
5 San Francisco, CA 94122

6 For Defendant:

7 Richard Jacobs, Esq.
8 Howard, Rice, Nemerovski, Canady, Falk & Rabkin, PC
9 Three Embarcadero Center, Seventh Floor
10 San Francisco, CA 94111-4024

11 **14. COURT APPROVAL**

12 **14.1** If this Consent Judgment is not approved by the Court, it shall be of no further
13 force or effect.

14 **15. EXECUTION AND COUNTERPARTS**

15 **15.1** The stipulations to this Consent Judgment may be executed in counterparts and
16 by means of facsimile, which taken together shall be deemed to constitute one document.
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16. AUTHORIZATION

16.1 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. Except as explicitly provided herein, each party is to bear its own fees and costs.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Michael Green

Dated: 8/30/06

Michael Green, Executive Director
Center for Environmental Health

BABYUNIVERSE, INC.

Dated: _____

Printed Name

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NEMEROVSKI
CANADY
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& RABKIN
ATTORNEYS AT LAW

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Michael Green, Executive Director
Center for Environmental Health

Dated: _____

BABYUNIVERSE, INC.

Printed Name

Dated: 9-26-06

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Exhibit A

(Test Methodology) The following protocol shall be applied separately to the interior and exterior material of a finished product.

1. Cut 5 small, discreet portions of the material to be analyzed.
2. Combine the portions into a composite sample.
3. Prepare the sample for analysis using microwave digestion. Microwave digestion protocols from the following two methods may be used provided that the samples are completely digested:
 - a. AOAC Official Method 999.10 (Lead, Cadmium, Zinc, Copper, and Iron in Foods)
 - b. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave Digestion for Lead in Paint Chips (and other matrices)
4. Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic Absorption Spectrophotometry (GFAAS) or Inductively Coupled Plasma Mass Spectrometry (ICP-MS) using standard operating procedures.
5. Lead content shall be expressed in parts per million (ppm).

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Baby Universe, Inc., the settlement is approved and judgment is hereby entered according to the terms herein.

DATED: DEC 05 2006

RONALD EVANS QUIDACHAY
Judge, Superior Court of the State of California

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