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11 ENVIRONMENTAL JUSTICE FOUNDATION

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SAN FRANCISCO

15 MATEEL ENVIRONMENTAL
16 JUSTICE FOUNDATION,

17 Plaintiff,

18 vs.

19 HOME ESSENTIALS, INC., et al.,

20 Defendant.

Case No. CGC 07-469721

CONSENT JUDGMENT AS TO
DEFENDANT SMITH & HAWKEN

ENDORSED
FILED
San Francisco County Superior Court

MAY 19 2008

GORDON PARK-LI, Clerk
BY: JOCELYN C. ROQUE
Deputy Clerk

1 **1. INTRODUCTION**

2 **1.1** On or about April 18, 2007, MATEEL ENVIRONMENTAL JUSTICE
3 FOUNDATION ("Mateel") acting on behalf of itself and the general public, filed a
4 complaint for civil penalties and injunctive relief in the above captioned matter in San
5 Francisco County Superior Court against several defendants, including Smith & Hawken,
6 Ltd., ("Smith & Hawken" or "Settling Defendant"). The Complaint alleges, among other
7 things, that Settling Defendant violated provisions of the Safe Drinking Water and Toxic
8 Enforcement Act of 1986, Health and Safety Code sections 25249.5, et seq. ("Proposition
9 65"). In particular, Mateel alleges that Settling Defendant has knowingly and
10 intentionally exposed persons to products which use beverage dispensing jars or vessels
11 that incorporate leaded brass spigots through which the beverages are dispensed
12 ("Covered Products") which contain lead and/or lead compounds, which are chemicals
13 known to the State of California to cause cancer and birth defects or other reproductive
14 harm, without first providing a clear and reasonable warning to such individuals. Mateel
15 and Smith & Hawken are collectively referred to herein as the "Parties."

16 **1.2** On or about July 18, 2007, a 60 Day Notice Letter ("60 Day Notice Letter")
17 was sent by Mateel to Settling Defendant, the California Attorney General, all California
18 District Attorneys, and all City Attorneys of each California city with a population
19 exceeding 750,000.

20 **1.3** Settling Defendant is a business that employs ten or more persons and
21 manufactures, distributes, supplies and/or otherwise markets within the State of California
22 Covered Products, which are alleged to contain lead and/or lead compounds. Lead and
23 lead compounds are chemicals known to the State of California to cause cancer, and lead
24 is a chemical known to the State of California to cause reproductive toxicity pursuant to
25 Health and Safety Code section 25249.9. Under specified circumstances, products
26 containing lead and/or lead compounds that are sold or distributed in the State of
27 California are subject to the Proposition 65 warning requirement set forth in Health and
28 Safety Code section 25249.6. Plaintiff Mateel alleges that the Covered Products

1 manufactured, distributed, sold and/or marketed by Settling Defendant for use in
2 California require a warning under Proposition 65.

3 1.4 For purposes of this Consent Judgment, the Parties stipulate that this Court
4 has jurisdiction over the allegations of violations contained in the Complaint and personal
5 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is
6 proper in the County of San Francisco and that this Court has jurisdiction to enter this
7 Consent Judgment as a full settlement and resolution of the allegations contained in the
8 Complaint and of all claims that were or could have been raised by Mateel or, as to those
9 matters included in the 60 Day Notice Letter, raised by a member of the general public.

10 1.5 This Consent Judgment resolves claims that are denied and disputed. The
11 parties enter into this Consent Judgment pursuant to a full and final settlement of any and
12 all claims between the parties for the purpose of avoiding prolonged litigation. This
13 Consent Judgment shall not constitute an admission with respect to any material allegation
14 of the Complaint, each and every allegation of which Settling Defendant denies, nor may
15 this Consent Judgment or compliance with it be used as evidence of any wrongdoing,
16 misconduct, culpability or liability on the part of Settling Defendant.

17 2. SETTLEMENT PAYMENT

18 2.1 Settling Defendant shall make a combination of an offsetting payment and a
19 civil penalty payment, calculated as follows: The initial total calculated payment shall be
20 \$9,700, calculated based upon \$100 per Covered Product for each of the 97 units of the
21 Covered Products which Settling Defendant represents were sold in California during the
22 one year prior to this action being filed. This initial total shall be discounted by \$75 per
23 unit of Covered Product where, within a 120 day period following the entry of this
24 Consent Judgment, the Settling Defendant successfully contacts, informs and warns a
25 prior purchaser of the Covered Product of the lead exposure and provides the prior
26 purchaser with a lead free plastic spigot to replace the leaded brass spigot, as described
27 more completely in paragraph 7.2 below. The term "successfully contacts, informs and
28 warns a prior purchaser" as used herein shall mean to send via certified mail to the prior

1 purchaser at his/her last known address a letter in the form attached hereto as Exhibit A
2 and a lead free plastic spigot to replace the leaded brass spigot on the Covered Product.
3 Within 10 days following the end of this 120 day period, Settling Defendant will report to
4 Mateel its success in contacting prior purchasers and shall provide to Mateel payment
5 based upon an adjusted (discounted) total, equal to the initial total of \$9,700, minus \$75
6 times the number of prior purchasers successfully contacted. The final discounted total
7 payment shall be divided as follows. Twenty percent, rounded to the nearest \$100 shall
8 be paid as a civil penalty, allocated as required by statute. The remaining amount shall be
9 paid as a penalty offset to the Ecological Rights Foundation for work informing California
10 consumers about the hazards of and exposures to toxic chemicals and for work to reduce
11 exposures to and pollution from toxic chemicals. Ecological Rights Foundation is a
12 California non-profit environmental organization that advocate for workers' and
13 consumers' safety, and for awareness and reduction of toxic exposures.

14 **2.2** Within ten (10) calendar days of entry of this Consent Judgment, Settling
15 Defendant shall pay \$15,000 to the Klamath Environmental Law Center ("KELC") to
16 cover a portion of Mateel's attorneys' fees and costs.

17 **2.3** All payments shall be made by check, payable to the above specified
18 recipient and mailed, or sent by other overnight delivery, to William Verick, Klamath
19 Environmental Justice Foundation, 424 First Street, Eureka, CA 95501, to be distributed
20 within a commercially reasonable time by Mr. Verick to the ultimate recipients.

21 **3. ENTRY OF CONSENT JUDGMENT**

22 **3.1** The Parties hereby request that the Court promptly enter this Consent
23 Judgment. Upon entry of the Consent Judgment, Settling Defendant and Mateel waive
24 their respective rights to a hearing or trial on the allegations of the Complaint.

25 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

26 **4.1** This Consent Judgment is a final and binding resolution between Mateel,
27 acting on behalf of itself and, as to those matters raised in the 60 Day Notice Letter, the
28 general public, and Settling Defendant of any violation of Proposition 65 or the

1 regulations promulgated thereunder to the fullest extent that it could have been asserted by
2 Mateel against the Settling Defendant based upon, arising out of or relating to Settling
3 Defendant's compliance with Proposition 65 or regulations promulgated thereunder with
4 respect to the Covered Products sold at retail by Settling Defendant, whether based on
5 actions committed by Settling Defendant or by any other entity involved in the
6 manufacture, distribution and/or retail sale of the Covered Products, including but not
7 limited to parents, subsidiaries or affiliates, predecessors, officers, directors, employees of
8 Settling Defendant and all customers, vendors, suppliers, manufacturers (including but not
9 limited to Global Amici, Inc.), distributors, wholesalers, retailers or any other person in
10 the course of doing business that manufactured, distributed or sold the Covered Products.
11 As to alleged exposures from Covered Products sold at retail by Settling Defendants to
12 chemicals listed in the 60 Day Notice Letter pertaining to the Covered Products,
13 compliance with the terms of this Consent Judgment resolves any issue, now and in the
14 future, concerning compliance with Proposition 65 by Settling Defendant and its parents,
15 subsidiaries or affiliates, predecessors, officers, directors, employees, and all customers,
16 vendors, suppliers, manufacturers distributors, wholesalers, retailers or any other person in
17 the course of doing business involving the Covered Products (including but not limited to
18 Global Amici, Inc.), and the successors and assigns of any of these. Notwithstanding any
19 other provision in this Consent Judgment, the release of claims by the general public is
20 limited to those claims made and chemicals identified in the 60 Day Notice Letter.

21 4.2 As to alleged exposures to chemicals identified in the 60 Day Notice Letter
22 pertaining to the Covered Products sold by Settling Defendant, Mateel, acting on behalf of
23 itself and, as to the matters in the 60 Day Notice Letter, on behalf of the general public,
24 and its agents, successors and assigns, waives all rights to institute any form of legal
25 action and releases all claims which were or could have been brought against Settling
26 Defendant and its parents, subsidiaries or affiliates, predecessors, officers, directors,
27 employees, and all customers, vendors, suppliers, manufacturers (including but not limited
28 to Global Amici, Inc.), distributors, wholesalers, retailers or any other person in the course

1 of doing business involving the Covered Products and the successors and assigns of any of
2 them. This release of claims by the general public is not understood to extend beyond the
3 claims included in the 60 Day Notice Letter. In furtherance of the foregoing, Mateel,
4 acting on behalf of itself and the general public, hereby waives any and all rights and
5 benefits which it now has, or in the future may have, conferred upon it with respect to the
6 Covered Products by virtue of the provisions of Section 1542 of the California Civil Code,
7 which provides as follows:

8 "A GENERAL RELEASE DOES NOT EXTEND TO
9 CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR
10 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE
11 TIME OF EXECUTING THE RELEASE, WHICH IF
12 KNOWN BY HIM OR HER MUST HAVE MATERIALLY
13 AFFECTED HIS OR HER SETTLEMENT WITH THE
14 DEBTOR."

13 Mateel understands and acknowledges that the significance and consequence of this
14 waiver of California Civil Code section 1542 is that even if Mateel or any member of the
15 general public suffers future damages arising out of or resulting from, or related directly
16 or indirectly to, in whole or in part, the Covered Products, it will not be able to make any
17 claim for those damages against the Settling Defendant, its parents, subsidiaries or
18 affiliates, predecessors, officers, directors, employees, and all customers, vendors,
19 suppliers, manufacturers distributors, wholesalers, retailers or any other person in the
20 course of business involving the Covered Products (including but not limited to Global
21 Amici, Inc.), and the successors and assigns of any of them, who may manufacture, use,
22 maintain, distribute or sell the Covered Products. Furthermore, Mateel acknowledges that
23 it intends these consequences for any such claims which may exist as of the date of this
24 release but which Mateel does not know exist, and which, if known, would materially
25 affect its decision to enter into this Consent Judgment, regardless of whether its lack of
26 knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

27 4.3 Any and all notices made by the Parties pursuant to the provisions of this
28 Consent Judgment shall be made in writing and sent via U.S. Mail or other manner of

1 overnight delivery to the following: (a) on behalf of Mateel to William Verick, Klamath
2 Environmental Justice Foundation, 424 First Street, Eureka, CA 95501; and (b) on behalf
3 of Smith & Hawken to Nancy Knight, Smith & Hawken, 4 Hamilton Landing, Ste 100,
4 Novato, CA 94949, with a copy to Andrew Coogle, Esq., 14111 Scottslawn Road,
5 Marysville, Ohio 43041. .

6 **5. ENFORCEMENT OF JUDGMENT**

7 The terms of this Consent Judgment shall be enforced exclusively by the Parties
8 hereto. The Parties may, by noticed motion or order to show cause before the Superior
9 Court of San Francisco County, giving the notice required by law, enforce the terms and
10 conditions contained herein.

11 **6. MODIFICATION OF JUDGMENT**

12 This Consent Judgment may be modified only upon written agreement of the
13 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon
14 motion of any party as provided by law and upon entry of a modified Consent Judgment
15 by the Court.

16 **7. INJUNCTIVE RELIEF – CLEAR AND REASONABLE WARNINGS**

17 **7.1** Settling Defendant agrees that it has discontinued and will no longer offer for
18 sale any of the Covered Product that use leaded brass spigots, including those specifically
19 identified in the 60 Day Notice letter attached to the Complaint in this action. Settling
20 Defendant represents that it is not aware of any other beverage dispenser which it sells
21 that also uses a brass spigot for dispensing drinking liquids.

22 **7.2** Settling Defendant shall use the following efforts to contact California prior
23 purchasers of Covered Products. For those prior purchasers which can be specifically
24 identified, Settling Defendant shall contact each prior purchaser via certified mail to the
25 prior purchaser's last known address and thereby inform and provide a Proposition 65
26 warning to the prior purchaser of the Covered Product as to exposure to lead using a letter
27 of a form and content as set forth in Exhibit A hereto. Through this letter, the Settling
28 Defendant shall also inform the prior purchaser that the Covered Product may be returned

1 for a merchandise credit and shall provide to the prior purchaser a plastic replacement
2 spigot of a type which Mateel has tested and confirmed is not made of a leaded PVC or
3 other lead leaching plastic. If there remain more than 100 units of the Covered Product,
4 the prior purchasers of which could not be contacted as set forth above, then for those
5 prior purchasers that Settling Defendant cannot specifically identify (that is, whose last
6 known addresses are not readily available to Settling Defendant), Settling Defendant shall
7 use reasonable efforts to provide general information, either by a sign posted in its stores
8 or by general mailing, attempting to provide a Proposition 65 warning for the Covered
9 Product which identifies the chemical as lead, a reproductive toxin, and inform prior
10 purchasers that the Covered Product may be returned for a merchandise credit and a non
11 lead alternative spigot will be provided at no additional charge. Settling Defendant shall
12 maintain a list of those prior purchasers who contact Settling Defendant requesting a
13 merchandise credit or a replacement spigot and were not previously specifically identified.
14 Each such prior purchaser not previously specifically identified and who has requested a
15 merchandise credit or replacement spigot shall be counted as a unit by which the initial
16 total calculated payment shall be discounted as set forth in paragraph 2.1 above.

17 **8. AUTHORITY TO STIPULATE**

18 Each signatory to this Consent Judgment certifies that he or she is fully authorized
19 by the party he or she represents to enter into this Consent Judgment and to execute it on
20 behalf of the party represented and legally to bind that party.

21 **9. RETENTION OF JURISDICTION**

22 This Court shall retain jurisdiction of this matter to implement the Consent
23 Judgment.

24 **10. ENTIRE AGREEMENT**

25 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof, and any and all prior
27 discussions, negotiations, commitments and understandings related hereto. No
28 representations, oral or otherwise, express or implied, other than those contained herein

1 have been made by any party hereto. No other agreements not specifically referred to
2 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

3 **11. GOVERNING LAW**

4 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 **12. FEES AND EXPENSES**

8 The Parties acknowledge and agree that, except as provided in Section 2.1 of this
9 Consent Judgment, each party shall bear its own costs, expenses, consultant and expert
10 fees, and attorneys' fees arising out of and/or in connection with the litigation.

11 **13. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(F)**

12 Mateel agrees to comply with the reporting form and approval requirements
13 referenced in Health & Safety Code section 25249.7(f) and as implemented by various
14 regulations.

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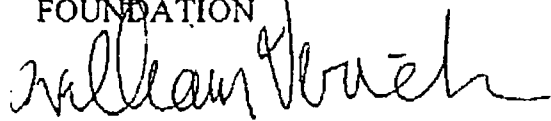
1 **14. COURT APPROVAL**

2 If this Consent Judgment is not approved by the Court, it shall be of no force or
3 effect, and cannot be used in any proceeding for any purpose.

4 **IT IS SO STIPULATED:**

5
6 Dated:

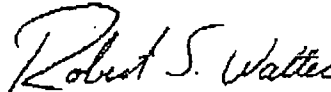
MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

7
8 

9 William Verick
10 CEO Mateel Environmental Justice Foundation,
Klamath Environmental Law Center

11 Dated:

SMITH & HAWKEN, LTD.,

12
13 

14 By: *Robert S. Walter*

15 Its: *CFO Smith & Hawken*

16 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

17
18 Dated:

MAY 19 2008

PETER J. BUSCH

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

1 February 20, 2008

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4
5 Re: Your Purchase of Glass Hexagon Jar with a Brass Spigot - Prop. 65

6 Dear Smith & Hawken Customer:

7
8 The safety of our customers is one of our highest priorities at Smith & Hawken. It has come to
9 our attention that you purchased from one of our California stores a glass hexagon jar with a brass
10 spigot manufactured by Global Amici, Inc. A picture of the Global Amici Jar is displayed below.
11 Smith & Hawken has been advised that the brass spigot on the Global Amici Jar leaches lead into
12 liquids dispensed through the spigot. Lead is a chemical known to the State of California to cause
13 cancer, and birth defects or other reproductive harm. [See enclosed.]

14 Enclosed is a lead-free replacement spigot. Please replace the brass spigot with the enclosed
15 replacement spigot by following the enclosed instructions. Alternatively you may also return the
16 Global Amici Jar to any of our California stores for a full refund.

17 We are sorry for any concern or distress that this situation may have caused you as well as any
18 inconvenience you have experienced and we look forward to serving you in the future.

19 Sincerely,

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SMITH & HAWKEN, LTD.,

1 WILLIAM VERICK, CSB #140972
2 KLAMATH ENVIRONMENTAL LAW CENTER
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12 Email: davidhwilliams@earthlink.net
13 brianacree@earthlink.net

10 Attorneys for Plaintiff
11 MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO

16 MATEEL ENVIRONMENTAL JUSTICE
17 FOUNDATION,

18 Plaintiff,

19 vs.

20 HOME ESSENTIALS, INC., ET AL.

21 Defendants.

CASE NO. CGC 07-469271

22 *(JUL)* ~~proposed~~ ORDER APPROVING
23 SETTLEMENT (Smith & Hawken)

24 Date: May 19, 2008
25 Time: 9:30 a.m.
26 Dept. 301

27 Plaintiff's motion for approval of settlement and entry of Consent Judgment was heard on
28 regular noticed motion on May 19, 2008, at 9:30 a.m., in Department 301. Having reviewed the
pleadings and the moving papers, having reviewed the terms of the proposed consent judgment
and having considered the arguments of counsel, the Court finds as follows:

1. The reformulation standards and warnings the Consent Judgment requires comply
with the requirements of Proposition 65.

ENDORSED
FILED
San Francisco County Superior Court

MAY 19 2008

GORDON PARK-LI, Clerk
BY: JOCELYN C. ROQUE
Deputy Clerk

