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FILED
ALAMEDA COUNTY

FEB 23 2011

CLERK OF THE SUPERIOR COURT
 By *J. Adalberto* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

11 CENTER FOR ENVIRONMENTAL HEALTH,
 12 a non-profit corporation,
 13 Plaintiff,
 14 vs.
 15 ALEX, INC., BUILD-A-BEAR WORKSHOP,
 INC.; THE FAITH COLLECTION, INC.;
 16 DRAKE DESIGN; PURE & SIMPLE
 SOLUTIONS, LLP; SAN FRANCISCO
 17 BASEBALL ASSOCIATES, L.P.; and
 Defendant DOES 1 through 200, inclusive;
 18 Defendants.

Case No. RG-08-399102

DM
[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT BUILD-A-BEAR
WORKSHOP, INC.

1 **1. INTRODUCTION**

2 **1.1** On July 18, 2008, plaintiff the Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in Alameda County Superior
4 Court, entitled *Center for Environmental Health v. Alexx, Inc., et al.*, Alameda County Superior
5 Court Case Number RG-08-399102 (the “Action”), for civil penalties and injunctive relief
6 pursuant to the provisions of California Health & Safety Code §25249.5 *et seq.* (“Proposition
7 65”).

8 **1.2** Defendant Build-A-Bear Workshop, Inc. (“Build-A-Bear”) is a “person in
9 the course of doing business” under Proposition 65 and manufactures, distributes and/or sells
10 keychains and charms in the State of California. Build-A-Bear and CEH are referred to
11 collectively herein as the Parties.

12 **1.3** On or about December 6, 2007, CEH served Build-A-Bear and the
13 appropriate public enforcement agencies with the requisite 60-day notice that Build-A-Bear is in
14 violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that Build-A-
15 Bear exposes individuals who use or otherwise handle keychains and charms to lead and/or lead
16 compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of
17 California to cause cancer, birth defects and other reproductive harm, without first providing clear
18 and reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of
19 Lead. The notice and Complaint allege that Build-A-Bear’s conduct violates Health & Safety
20 Code §25249.6, the warning provision of Proposition 65.

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
22 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
23 personal jurisdiction over Build-A-Bear as to the acts alleged in CEH’s Complaint, that venue is
24 proper in the County of Alameda, and that this Court has jurisdiction to enter this Consent
25 Judgment as a full and final resolution of all claims which were or could have been raised in the
26 Complaint based on the facts alleged therein.

27 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
28 certain disputed claims between the Parties as alleged in the Complaint. By executing this

1 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties'
2 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
3 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
4 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
5 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
6 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
7 any other or future legal proceedings. This Consent Judgment is the product of negotiation and
8 compromise and is accepted by the parties, for purposes of settling, compromising and resolving
9 issues disputed in this action, including future compliance by Build-A-Bear with Section 2 of this
10 Consent Judgment, and shall not be used for any other purpose, or in any other matter.

11 **1.6** For purposes of this Consent Judgment, the term "Product" shall mean
12 keychains and charms (including pins).

13 **2. COMPLIANCE - REFORMULATION**

14 **2.1 Lead Reformulation.** After January 1, 2009 (the "Compliance Date"),
15 Build-A-Bear shall not manufacture, distribute, ship, or sell, or cause to be manufactured,
16 distributed, or sold, any Product unless such Product complies with the following Lead Limits:

17 **2.1.1** "Paint or other Surface Coatings" as that term is defined in 16
18 C.F.R. § 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million ("ppm").

19 **2.1.2** All other materials: no more than .03 percent Lead by weight (300
20 ppm). Effective August 14, 2011, the Lead Limit established by this Section 2.1.2 shall be no
21 more than .01 percent Lead by weight (100 ppm), unless the Consumer Product Safety
22 Commission ("CPSC") determines that it is not technically feasible for manufacturers of Products
23 to meet this limit. If CPSC makes such a determination, the maximum Lead limit under this
24 Section 2.1.2 shall remain 300 ppm.

25 **2.2 Test Results from suppliers.** Build-A-Bear shall obtain test results from
26 its suppliers of the Products and/or their testing labs confirming that the Products comply with the
27 Lead Limits established by Section 2.1.

28

1 **2.3 Testing of Existing Inventory.** On or before the Compliance Date, Build-
2 A-Bear shall have tested each style of Product, it has in inventory to ensure that such Products
3 comply with the Lead Limits established by Section 2.1. Such testing shall be conducted by an
4 independent U.S. CPSC accredited laboratory (an "Accredited Lab") using the most current
5 version of the following CPSC-approved test methods: (a) for paint or other surface coatings (as
6 defined in Section 2.1.1), CPSC Procedure CPSC-CH-E1003-09; and (2) for all other materials (as
7 defined in Section 2.1.2), CPSC Procedure CPSC-CH-E1001-08 (metal children's products)
8 and/or CPSC Procedure CPSC-CH-E1002-08 (non-metal children's products) as appropriate (the
9 "Test Protocol"). Build-A-Bear shall ensure that such testing is conducted each time it offers a
10 new style of Product for sale or changes suppliers or ingredients with respect to an existing style
11 of Product.

12 **2.4 Ongoing testing.** After the Compliance Date, Build-A-Bear shall have
13 tested Products from each production run. Such testing shall be conducted by an Accredited Lab
14 using the Test Protocol. If the supplier attempts to deliver a product to Build-A-Bear for which
15 the results of the testing required pursuant to this section show levels of Lead exceeding the
16 requirements of Section 2.1 for a Product, Build-A-Bear shall not accept delivery of such Product
17 from the supplier. In addition, Build-A-Bear shall double the testing that would otherwise be
18 performed on such Products produced by the same supplier for the following two production runs.
19 Should the testing of Products purchased from a particular supplier demonstrate Lead levels
20 exceeding the requirements of Section 2.1 more than twice in a two-year period, Build-A-Bear
21 shall cease purchasing Products from such supplier of the failed component for a period of at least
22 five years.

23 **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
24 of the Products offered for sale in California. Such testing shall be conducted by an Accredited
25 Lab using the Test Protocol. At the time CEH purchases a Product offered for sale in California,
26 CEH shall, to the extent available, buy a duplicate Product at the same location that Build-A-Bear
27 may use for confirmatory testing using the Test Protocol at an Accredited Lab. In the event that
28 CEH's testing demonstrates Lead levels in excess of the requirements of Section 2.1, then CEH

1 shall inform Build-A-Bear of the violation(s), including information sufficient to permit Build-A-
2 Bear to identify the Product(s) and the location at which such Product was sold. CEH shall also
3 provide Build-A-Bear with a copy of its laboratory test results demonstrating Lead levels in excess
4 of the requirements of Section 2.1. Build-A-Bear shall, within 15 days following such notice,
5 provide CEH, at the address listed in section 12, with its supplier certification and testing
6 information demonstrating its compliance with sections 2.2 and either 2.3 or 2.4 of this Consent
7 Judgment, as applicable.

8 **3. SETTLEMENT PAYMENTS**

9 **3.1** Within five days of entry of this Consent Judgment, Build-A-Bear shall pay
10 a total of \$165,000 as a settlement payment. This total shall be paid in three separate checks
11 delivered to the offices of the Lexington Law Group, LLP at the address set forth in section 12
12 below and made payable and allocated as follows. Any failure by Build-A-Bear to comply with
13 the payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each
14 day after the delivery date the payment is received. The late fees required under this section shall
15 be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
16 pursuant to section ^{502H} 6 of this Consent Judgment.

17 **3.1.1 Penalty:** The sum of \$16,500 in penalties pursuant to Health and
18 Safety Code § 25249.7(b). This payment shall be made by check payable to Center for
19 Environmental Health. CEH shall provide \$12,375 of this amount (75% of the civil penalty) to
20 the Safe Drinking Water and Toxic Enforcement Fund in accordance with Health and Safety Code
21 § 25249.12.

22 **3.1.2 Monetary Payment in Lieu of Penalty:** The sum of \$41,500 shall
23 be paid to CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This
24 payment shall be made by check payable to Center for Environmental Health. CEH shall use such
25 funds to continue its work protecting people from exposures to toxic chemicals. As part of this
26 work, CEH intends to conduct periodic testing of the Products as set forth in section 2.5. In
27 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
28 percent of such funds to award grants to grassroots environmental justice groups working to

1 educate and protect people from exposures to toxic chemicals. The method of selection of such
2 groups can be found at the CEH web site at www.ceh.org/justicefund

3 **3.1.3 Attorneys' Fees and Costs:** The sum of \$107,000 shall be used to
4 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,
5 and any other costs incurred as a result of investigating, bringing this matter to Build-A-Bear's
6 attention, litigating and negotiating a settlement in the public interest. This payment shall be made
7 by check payable to Lexington Law Group.

8 **4. MODIFICATION OF CONSENT JUDGMENT**

9 **4.1** This Consent Judgment may be modified by written agreement of CEH and
10 Build-A-Bear, or upon motion of CEH or Build-A-Bear as provided by law.

11 **5. ENFORCEMENT OF CONSENT JUDGMENT**

12 **5.1** The Parties may, by motion or application for an order to show cause before
13 the Superior Court of the County of Alameda, enforce the terms and conditions contained in this
14 Consent Judgment. Prior to bringing any motion or application to enforce the requirements of
15 Section 2 above, the Parties shall meet and confer regarding the basis for the anticipated motion or
16 application in an attempt to resolve it informally. Should such attempts at meeting and conferring
17 fail, the initiating Party may file its enforcement motion or application. Any Party seeking to
18 enforce this Consent Judgment by motion, application for an order to show cause before this
19 Court, or other court proceeding, shall be entitled to recover from the Party or Parties against
20 whom enforcement was sought its reasonable attorneys' fees and costs incurred in connection with
21 such enforcement provided that it prevails in any such enforcement proceeding. Should the Party
22 initiating proceedings pursuant to this Consent Judgment not prevail on any motion or application
23 under this Section, the Party against whom such enforcement was sought shall be entitled to
24 recover its reasonable attorneys' fees and costs associated with such motion or application, where
25 such motion or application is found to have had no substantial basis.

26 **6. APPLICATION OF CONSENT JUDGMENT**

27 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
28 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

1 **7. RELEASE**

2 **7.1** This Consent Judgment is a full, final and binding resolution between CEH
3 and Build-A-Bear for any violation of Proposition 65 or any other statutory or common law claims
4 that have been, or could have been, asserted in the Complaint against Build-A-Bear, regarding the
5 failure to warn about alleged exposure to Lead contained in the Products, in connection with any
6 Products manufactured, distributed or sold by Build-A-Bear on or prior to the date of entry of this
7 Consent Judgment. Compliance with the terms of this Consent Judgment by Build-A-Bear
8 resolves any issue into the future concerning compliance by Build-A-Bear with Proposition 65
9 regarding failure to warn about exposure to Lead contained in the Products in connection with any
10 Products manufactured, distributed or sold by Build-A-Bear after the Compliance Date.

11 **7.2** CEH, for itself and acting on behalf of the public interest pursuant to Health
12 and Safety Code §25249.7(d), hereby releases, waives, and forever discharges any and all claims
13 against Build-A-Bear arising from any violation of Proposition 65 or any other statutory or
14 common law claims that have been, or could have been, asserted in the Complaint against Build-
15 A-Bear arising from any violation of Proposition 65 or any other statutory or common law claims
16 that have been, or could have been, asserted in the public interest regarding the failure to warn
17 about exposure to Lead contained in the Products, with respect to any Products manufactured,
18 distributed or sold by Build-A-Bear on or prior to the date of entry of this Consent Judgment. This
19 release does not limit or effect the obligations of any party created under this Consent Judgment.

20 **8. SEVERABILITY**

21 **8.1** In the event that any of the provisions of this Consent Judgment are held by
22 a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
23 affected.

24 **9. SPECIFIC PERFORMANCE**

25 **9.1** The Parties expressly recognize that Build-A-Bear's obligations under this
26 Consent Judgment are unique. In the event that Build-A-Bear is found to be in breach of this
27 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree
28 that it would be extremely impracticable to measure the resulting damages and that such breach

1 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
2 remedies, may sue in equity for specific performance, and Build-A-Bear expressly waives the
3 defense that a remedy in damages will be adequate.

4 **10. GOVERNING LAW**

5 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
6 State of California.

7 **11. RETENTION OF JURISDICTION**

8 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
9 the terms this Consent Judgment.

10 **12. PROVISION OF NOTICE**

11 **12.1** All notices required pursuant to this Consent Judgment and correspondence
12 shall be sent to the following:

13 For CEH: Howard Hirsch
14 Lexington Law Group
15 1627 Irving Street
San Francisco, CA 94122

16 For Build-A-Bear: Eric Fencil
17 General Counsel
18 Build-A-Bear Workshop
19 1954 Innerbelt Business Center Dr.
St. Louis, Missouri 63114

20 With a copy to: Gregory Trimarche
21 Susannah Mitchell
22 Bryan Cave LLP
3161 Michelson Drive, Suite 1500
Irvine, CA 92612-4414

23 **13. COURT APPROVAL**

24 **13.1** If this Consent Judgment is not approved by the Court, it shall be of no
25 further force or effect. The Parties agree to support a Motion for Approval of this Consent
26 Judgment.

1 14. **EXECUTION AND COUNTERPARTS**

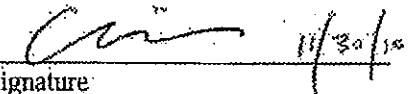
2 14.1 The stipulations to this Consent Judgment may be executed in counterparts
3 and by means of facsimile, which taken together shall be deemed to constitute one document.

4 15. **AUTHORIZATION**

5 15.1 Each signatory to this Consent Judgment certifies that he or she is fully
6 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into
7 and execute the Consent Judgment on behalf of the party represented and legally bind that party.
8 The undersigned have read, understand and agree to all of the terms and conditions of this Consent
9 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

10 **AGREED TO:**

11 CENTER FOR ENVIRONMENTAL HEALTH

12
13  11/30/10
14 _____
Signature

15 CHARLIE PIZZANO
16 _____
Printed Name

17 Associate Director
18 _____
Title

19 BUILD-A-BEAR WORKSHOP, INC.

20
21 _____
Signature

22
23 _____
Printed Name

24
25 _____
Title

26
27
28

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10 **AGREED TO:**

11 **CENTER FOR ENVIRONMENTAL HEALTH**

12
13
14 _____

Signature

15 _____

Printed Name

17 _____

Title

18
19 **BUILD-A-BEAR WORKSHOP, INC.**

20 *Tina Klocke*

Signature

22 *Tina Klocke*

Printed Name

24 *Chief Financial Bear*

Title

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ORDER AND JUDGMENT

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

Dated: 2-23-2011



Judge, Superior Court of the State of California