

HHS



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LEXINGTON LAW GROUP, LLP
Eric S. Somers, State Bar No. 139050
Mark N. Todzo, State Bar No. 168389
Howard Hirsch, State Bar No. 213209
1627 Irving Street
San Francisco, CA 94122
Telephone: (415) 759-4111
Facsimile: (415) 759-4112

Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

FILED
ALAMEDA COUNTY

JAN 21 2009

CLERK OF THE SUPERIOR COURT
By Kieran M. Conroy
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

Plaintiff,)

v.)

ALEXX, INC., BUILD-A-BEAR WORKSHOP,)
INC.; THE FAITH COLLECTION, INC.;)
DRAKE DESIGN; PURE & SIMPLE)
SOLUTIONS, LLP; SAN FRANCISCO)
BASEBALL ASSOCIATES, L.P.; and)
Defendant DOES 1 through 200, inclusive;)

Defendants.)

Case No. RG-08-399102

~~PROPOSED~~ CONSENT JUDGMENT
AS TO DEFENDANT PURE & SIMPLE
SOLUTIONS, LLP

1 **1. INTRODUCTION**

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

8 **1.2** Defendant Pure & Simple Solutions, LLP ("Pure & Simple") is a "person
9 in the course of doing business" under Proposition 65 and manufactures, distributes and/or sells
10 keychains and charms (the "Products") in the State of California. Pure & Simple and CEH are
11 referred to collectively herein as the Parties.

12 **1.3** On or about December 6, 2007, CEH served Pure & Simple and the
13 appropriate public enforcement agencies with the requisite 60-day notice that Pure & Simple is
14 in violation of Proposition 65. CEH's notice and the Complaint in this Action allege that Pure &
15 Simple exposes individuals who use or otherwise handle the Products 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
18 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
19 toxicity of Lead. The notice and Complaint allege that Pure & Simple's conduct violates Health
20 & Safety 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 Pure & Simple as to the acts alleged in CEH's Complaint, that venue
24 is 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 Pure & Simple with Section 2 of
10 this Consent Judgment, and shall not be used for any other purpose, or in any other matter.

11 **2. COMPLIANCE - REFORMULATION**

12 **2.1 Lead Reformulation.** After December 1, 2008 (the "Compliance Date"),
13 Pure & Simple shall not manufacture, distribute, ship, or sell, or cause to be manufactured,
14 distributed, or sold, any Product unless such Product contains less than 100 parts per million
15 lead.

16 **2.2 Certification of level from suppliers.** Pure & Simple shall obtain written
17 certification with corresponding test results from its suppliers of the Products certifying that the
18 Products meet the requirements of Section 2.1.

19 **2.3 Pre-market testing.** On or before the Compliance Date, Pure & Simple
20 shall test each style of Product it is currently offering for sale to ensure that such Products meet
21 the requirements of Section 2.1. Such testing shall be conducted by an independent laboratory
22 using the most recent version of United States Environmental Protection Agency Method 3050B
23 (the "Test Protocol"). Pure & Simple shall conduct such testing each time it offers a new style
24 of Product for sale or changes suppliers or ingredients with respect to an existing style of
25 Product.

26 **2.4 Ongoing testing.** After the Compliance Date, Pure & Simple shall test at
27 least 1 randomly selected Product from each delivered shipment of each of the Products. Such
28 testing shall be conducted by an independent laboratory using the Test Protocol. If the results of

1 the testing required pursuant to this section shows levels of Lead exceeding the requirements of
2 Section 2.1 for a Product, Pure & Simple shall return all of the Products that were purchased
3 under the particular purchase order to the supplier with a letter explaining that such Products do
4 not comply with the supplier's certification. In addition, Pure & Simple shall increase the
5 number of units tested to at least 2 randomly selected Products from each delivered shipment of
6 each of the Products from such supplier for the two shipments purchased immediately following
7 a Product test exceeding the requirements of Section 2.1. Should the testing of Products
8 purchased from a particular supplier demonstrate Lead levels exceeding the requirements of
9 Section 2.1 more than once, Pure & Simple shall cease purchasing Products from such supplier
10 for a period of at least five years.

11 **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
12 of the Products. Such testing shall be conducted by an independent laboratory using the Test
13 Protocol. In the event that CEH's testing demonstrates Lead levels in excess of the requirements
14 of Section 2.1, CEH shall inform Pure & Simple of the violation(s), including information
15 sufficient to permit Pure & Simple to identify the Product(s). Pure & Simple shall, within 10
16 days following such notice, provide CEH, at the address listed in section 12, with its supplier
17 certification and testing information demonstrating its compliance with sections 2.2, 2.3, and 2.4
18 of this Consent Judgment. Pure & Simple shall then increase the amount of testing performed on
19 the Products supplied by the supplier of the Product(s) for which CEH demonstrates a test with
20 Lead levels exceeding the requirements of Section 2.1 to at least 5 randomly selected Products
21 from each delivered shipment from each purchase order of each of the Products from such
22 supplier for the two purchase orders following a Product test exceeding the requirements of
23 Section 2.1. Pure & Simple shall also be liable for stipulated payments in lieu of penalties for
24 Products for which CEH produces tests demonstrating Lead levels exceeding the requirements of
25 Section 2.1 as set forth below. These payments shall be made to CEH and used for the purposes
26 described in section 4.1 and to pay for related attorneys' fees and costs. The stipulated payments
27 in lieu of penalties and other remedies provided for herein are in addition to any other remedies
28 available to enforce the terms of this Consent Judgment.

1 **2.5.1 Stipulated penalty assuming compliance with sections 2.2, 2.3,**
2 **and 2.4.** Assuming Pure & Simple provides CEH with information demonstrating that it
3 complied with sections 2.2, 2.3, and 2.4 for the Products purchased pursuant to the same
4 purchase order as those with tests showing Lead levels exceeding the requirements of Section
5 2.1, the stipulated penalty shall be as follows for each unit of Product for which CEH produces a
6 test result with Lead levels exceeding the requirements of Section 2.1:

- 7 First Occurrence: \$500
- 8 Second Occurrence: \$1,000
- 9 Third Occurrence: \$2,000
- 10 Thereafter: \$5,000

11 **2.5.2 Stipulated penalty assuming non-compliance with sections 2.2**
12 **and 2.3.** Assuming Pure & Simple fails to provide CEH with information demonstrating that it
13 complied with sections 2.2, 2.3, and 2.4 for the Products purchased pursuant to the same
14 purchase order as those with tests showing Lead levels exceeding the requirements of Section
15 2.1, the stipulated penalty shall be as follows for each unit of Product for which CEH produces a
16 test result with Lead levels exceeding the requirements of Section 2.1:

- 17 First Occurrence: \$2,000
- 18 Second Occurrence: \$5,000
- 19 Third Occurrence: \$10,000
- 20 Thereafter: \$20,000

21 **3. SETTLEMENT PAYMENTS**

22 **3.1** Pure & Simple shall pay a total of \$30,000 as a settlement payment
23 according to the following schedule: (a) \$10,000 shall be paid by December 1, 2008; (b) \$10,000
24 shall be paid by January 20, 2009; and (c) \$10,000 shall be paid by February 20, 2009. Each of
25 these payments shall be made check payable to "Lexington Law Group" and delivered to the
26 offices of the Lexington Law Group, LLP at the address set forth in section 12 below. Any
27 failure by Pure & Simple to comply with the payment terms herein shall be subject to a
28 stipulated late fee in the amount of \$100 for each day after the delivery date the payment is

1 received. The late fees required under this section shall be recoverable, together with reasonable
2 attorneys' fees, in an enforcement proceeding brought pursuant to section 5 of this Consent
3 Judgment. The total \$30,000 settlement payment shall be allocated as follow.

4 **3.1.1 Penalty:** The sum of \$1,000 shall be allocated as penalties
5 pursuant to Health and Safety Code § 25249.7(b). CEH shall provide \$750.00 of this amount
6 (75% of the civil penalty) to the Safe Drinking Water and Toxic Enforcement Fund in
7 accordance with Health and Safety Code § 25249.12.

8 **3.1.2 Monetary Payment in Lieu of Penalty:** The sum of \$9500 shall
9 be paid allocated to CEH as a payment in lieu of penalty pursuant to Health and Safety Code
10 § 25249.7(b). CEH shall use such funds to continue its work protecting people from exposures
11 to toxic chemicals. As part of this work, CEH intends to conduct periodic testing of the Products
12 as set forth in section 2.5.

13 **3.1.3 Attorneys' Fees and Costs:** The sum of \$19,500 shall be allocated
14 to reimburse CEH and its attorneys for a portion of their reasonable investigation fees and costs,
15 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to
16 Pure & Simple's attention, litigating and negotiating a settlement in the public interest.

17 **4. MODIFICATION OF CONSENT JUDGMENT**

18 **4.1** This Consent Judgment may be modified by written agreement of CEH
19 and Pure & Simple, or upon motion of CEH or Pure & Simple as provided by law.

20 **5. ENFORCEMENT OF CONSENT JUDGMENT**

21 **5.1** CEH may, by motion or application for an order to show cause before the
22 Superior Court of the County of Alameda, enforce the terms and conditions contained in this
23 Consent Judgment. Should CEH prevail on any motion or application under this section, CEH
24 shall be entitled to recover its reasonable attorneys' fees and costs associated with such motion
25 or application.

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
3 between CEH and Pure & Simple of any violation of Proposition 65 that was or could have been
4 asserted in the Complaint against Pure & Simple or its parents, subsidiaries, affiliates, directors,
5 officers, employees, agents, attorneys, distributors, or customers based on failure to warn about
6 alleged exposure to Lead contained in the Products, with respect to any Products manufactured,
7 distributed or sold by Pure & Simple on or prior to the date of entry of this Consent Judgment.
8 This release does not limit or effect the obligations of any party created under this Consent
9 Judgment.

10 **8. SEVERABILITY**

11 **8.1** In the event that any of the provisions of this Consent Judgment are held
12 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
13 affected.

14 **9. SPECIFIC PERFORMANCE**

15 **9.1** The Parties expressly recognize that Pure & Simple's obligations under
16 this Consent Judgment are unique. In the event that Pure & Simple is found to be in breach of
17 this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties
18 agree that it would be extremely impracticable to measure the resulting damages and that such
19 breach would cause irreparable damage. Accordingly, CEH, in addition to any other available
20 rights or remedies, may sue in equity for specific performance, and Pure & Simple expressly
21 waives the defense that a remedy in damages will be adequate.

22 **10. GOVERNING LAW**

23 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
24 State of California.

25 **11. RETENTION OF JURISDICTION**

26 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
27 the terms this Consent Judgment.

28 ////

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. PROVISION OF NOTICE

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

For CEH:

Howard Hirsch
Lexington Law Group, LLP
1627 Irving Street
San Francisco, CA 94122

For Pure & Simple:

Nathan A. White
The White Law Group PLLC
811 N. Main Street, Suite 201
Royal Oak, MI 48067

13. COURT APPROVAL

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

14. EXECUTION AND COUNTERPARTS

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

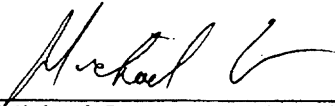
15. AUTHORIZATION

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

////

1 **AGREED TO:**

2 **CENTER FOR ENVIRONMENTAL HEALTH**
3

4 
5 _____
6 Michael Green, Executive Director
Center for Environmental Health

7 **PURE & SIMPLE SOLUTIONS, LLP**

8
9 _____
10 Signature

11 _____
12 Printed Name

13 _____
14 Title

15
16
17
18
19
20
21
22
23
24
25
26
27
28

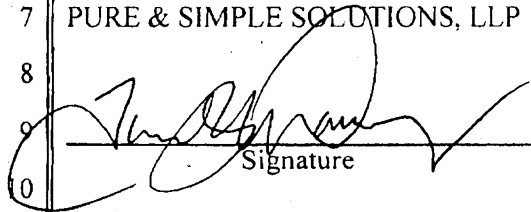
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Michael Green, Executive Director
Center for Environmental Health

PURE & SIMPLE SOLUTIONS, LLP


Signature

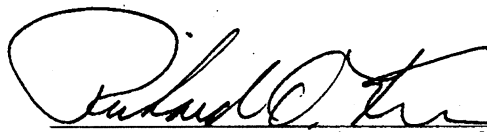
TIMOTHY W. DOWNEY
Printed Name

VICE PRESIDENT OF OPERATIONS
Title

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: 1-21-09



Judge, Superior Court of the State of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLERK'S CERTIFICATE OF MAILING

CASE NO: RG08399102

CASE NAME: Center for Environmental Health vs. Alexx, Inc.

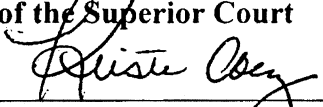
DECLARATION OF SERVICE BY MAIL (C.C.P. 1013a(3), 2015.5)

On the date shown below, I served the foregoing document by depositing a true copy thereof, enclosed in a separate sealed envelope, with the postage thereon fully prepaid, in the United States mail box at 24405 Amador, Hayward, California; each of which envelopes was addressed respectively to the persons and addresses shown.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on **1/22/09** at Hayward, California.

**Executive Officer/
Clerk of the Superior Court**

By



Kriste Corey, Deputy Clerk

Lexington Law Group
Howard Hirsch
1627 Irving Street
San Francisco, CA 94122

Brett A. Lovejoy
Jones Day
555 California Street, 26th Fl.
San Francisco, CA 94104

Gregory Trimarche
Susannah Mitchell
Lana Kraus
Bryan Cave LLP
3161 Michelson Sr. Suite 1500
Irvine, CA 92612

Nathan White
The White Law Group PLLC
811 N. Main Street, Suite 201
Royal Oak, MI 48067

Mark Elliott
Pillsbury Winthrop Shaw Pittman
725 South Figueroa Street, Ste 2800
Los Angeles, CA 90017