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14 Mateel Environmental Justice Foundation

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN FRANCISCO

17 MATEEL ENVIRONMENTAL JUSTICE)
18 FOUNDATION,,)
19)
20 Plaintiff,)
21)
22 v.)
23)
24 THE ASSOCIATED MERCHANDISING)
25 CORPORATION; TARGET CORPORATION.,)
26)
27 Defendant.

ENDORSED
FILED
San Francisco County Superior Court

OCT 22 2009

GORDON PARK-LI, Clerk

BY: _____ Deputy Clerk

Case No. CGC 08-477118

Corrected
CONSENT JUDGMENT
~~PROPOSED~~

28 **1. INTRODUCTION**

29 1.1 On December 5, 2008, the MATEEL ENVIRONMENTAL JUSTICE
30 FOUNDATION ("Plaintiff MEJF") acting on behalf of itself and the general public, filed a
31 Complaint for civil penalties and injunctive relief ("Complaint") in San Francisco Superior Court,
32 Case No. CGC 08-477118, against defendants THE ASSOCIATED MERCHANDISING
33 CORPORATION ("AMC") and TARGET CORPORATION ("Target," and collectively
34 "Defendants"). The Complaint alleges, among other things, that Defendants violated provisions
35 of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections
36 25249.5, et seq. (Proposition 65) by failing to give clear and reasonable warnings to those

1 residents of California who handle and use glass lamps and votive holders that contain lead that
2 handling and use of these products causes those residents to be exposed to lead and/or lead
3 compounds. Lead is known to the State of California to cause cancer and/or birth defects or other
4 reproductive harm. The Complaint was based upon 60-Day Notice letters dated December 20,
5 2007 and March 12, 2008, sent by MEJF to Defendants, the California Attorney General, all
6 District Attorneys, and all City Attorneys with populations exceeding 750,000.

7 1.2 Defendants are businesses that employ more than ten persons, and market and sells
8 glass lamps and votive holders that allegedly contain lead and/or lead compounds. Pursuant to
9 Health and Safety Code Section 25249.8, lead and lead compounds are chemicals known to the
10 State of California to cause cancer and reproductive toxicity. Plaintiff MEJF alleges that glass
11 lamps and votive holders that contain lead that are sold by Defendants for use in California
12 require a warning under Proposition 65, pursuant to Health and Safety Code Section 25249.6.
13 Defendants deny that a warning is required. For purposes of this Consent Judgment, the parties
14 stipulate that this Court has jurisdiction over the allegations of violations contained in the
15 Complaint and personal jurisdiction over Defendants as to the acts alleged in the Complaint, that
16 venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this
17 Consent Judgment as a full settlement and resolution of the allegations contained in the
18 Complaint and of all claims which were or could have been raised by any person or entity based
19 in whole or in part, directly or indirectly, on the facts alleged therein or arising therefrom or
20 related to.

21 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
22 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
23 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment
24 shall not constitute an admission with respect to any material allegation of the Complaint, each
25 and every allegation of which Defendants deny, nor may this Consent Judgment or compliance
26 with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
27 Defendants.

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1 1.4 For purposes of this Consent Judgment, the term "Covered Products" means
2 leaded stained glass lamps and/or votive holders marketed or sold by AMC or Target Corporation
3 under a Target Corporation private label ("Owned Brand").

4 1.5 The term "Effective Date" means 90 days after entry of this Consent Judgment.

5 1.6 The term "Accessible Component" means a metal component or solder that is
6 accessible to a user through normal and reasonably foreseeable use and abuse of a Covered
7 Product. A component part of a Covered Product is not an Accessible Component if it is not
8 physically exposed by reason of a sealed covering or casing and does not become physically
9 exposed through reasonably foreseeable use and abuse of the Covered Product.

10 **2. SETTLEMENT PAYMENT**

11 2.1 In settlement of all of the claims that are alleged, or could have been alleged, in the
12 Complaint concerning Covered Products, Defendants shall pay \$35,000 to the Klamath
13 Environmental Law Center ("KELC"), which shall subsequently and within a commercially
14 reasonable time be divided by KELC as follows: (i) \$30,000 shall be paid to KELC for attorneys'
15 fees and costs incurred by KELC on behalf of Plaintiff in investigating this matter and negotiating
16 this Consent Judgment, (ii) \$2,500 shall be distributed by KELC to the Ecological Rights
17 Foundation and \$2,500 shall be distributed by KELC to Californians for Alternatives to Toxics
18 for use toward reducing exposures to toxic chemicals and other pollutants, and toward increasing
19 consumer, worker and community awareness of health hazards posed by lead and other toxic
20 chemicals. The parties agree and acknowledge that the charitable contributions made pursuant to
21 this section shall not be construed as a credit against the personal claims of absent third parties for
22 restitution against the defendant. The above described payment shall be forwarded by Defendants
23 so that it is received at least 5 days prior to the hearing date scheduled for approval of this
24 Consent Judgment. If the Consent Judgment is not approved within 120 days of the date scheduled
25 for approval, the above described payment shall be returned and the provisions of this Consent
26 judgment shall become null and void.

27 2.2 Defendants shall not be required to pay a civil penalty pursuant to Health and
28 Safety Code Section 25249.7(b).

1 **3. ENTRY OF CONSENT JUDGMENT**

2 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
3 Upon entry of the Consent Judgment, Defendants and MEJF waive their respective rights to a
4 hearing or trial on the allegations of the Complaint.

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

6 4.1 As to alleged exposures to lead or lead compounds from Covered Products, this
7 Consent Judgment is a final and binding resolution between MEJF, acting on behalf of itself and
8 (as to those matters raised in the 60-Day Notice Letters) the general public, and Defendants of: (i)
9 any violation of Proposition 65 (including but not limited to the claims made in the Complaint);
10 and (ii) any other statutory or common law claim to the fullest extent that any of the foregoing
11 described in (i) or (ii) were or could have been asserted by any person or entity against
12 Defendants or their parents, subsidiaries or affiliates, and all of their suppliers, customers,
13 distributors, wholesalers, retailers, or any other person in the course of doing business, and the
14 successors and assigns of any of them, who may use, maintain, distribute or sell Covered
15 Products ("Released Entities"), based on exposure of persons to lead or lead compounds from
16 Covered Products or failure to provide a clear and reasonable warning of exposure to such
17 individuals; and (iii) as to alleged exposures to lead or lead compounds from Covered Products,
18 any other claim based in whole or in part on the facts alleged in the Complaint, whether based on
19 actions committed by the Released Entities or others. As to alleged exposures to lead or lead
20 compounds from Covered Products, compliance with the terms of this Consent Judgment resolves
21 any issue, now and in the future, concerning compliance by Defendants and the Released Entities,
22 with the requirements of Proposition 65 with respect to Covered Products, and any alleged
23 resulting exposure.

24 4.2 As to alleged exposures to lead or lead compounds from Covered Products, MEJF,
25 by and on behalf of itself and its respective agents, successors and assigns, waives any and all
26 rights to institute any form of legal action, and releases all claims against Defendants and the
27 Released Entities, and all of their respective parents, subsidiaries or affiliates, and all of their
28 suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of

1 doing business, and the successors and assigns of any of them, who may use, maintain, distribute
2 or sell the Covered Products, whether, under Proposition 65 or otherwise, arising out of or
3 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
4 including but not limited to any exposure to, or failure to warn with respect to, the Covered
5 Products (referred to collectively in this paragraph as the "Claims"). In furtherance of the
6 foregoing, as to alleged exposures to Covered Products, MEJF hereby waives any and all rights
7 and benefits which it now has, or in the future may have, conferred upon it with respect to the
8 Claims by virtue of the provisions of section 1542 of the California Civil Code, which provides as
9 follows:

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

15 4.3 MEJF understands and acknowledges that the significance and consequence of this
16 waiver of California Civil Code section 1542 is that even if MEJF suffers future damages arising
17 out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered
18 Products, including but not limited to any exposure to, or failure to warn with respect to exposure
19 to, lead or lead compounds from Covered Products, MEJF will not be able to make any claim for
20 those damages against Defendants or the Released Entities. Furthermore, MEJF acknowledges
21 that it intends these consequences for any such Claims as may exist as of the date of this release
22 but which MEJF does not know exist, and which, if known, would materially affect their decision
23 to enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of
24 ignorance, oversight, error, negligence, or any other cause.

25 5. ENFORCEMENT OF JUDGMENT

26 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
27 hereto. Subject to the requirements of Section 5.2, the Parties may, by noticed motion or order to
28 show cause before the Superior Court of San Francisco County, giving the notice required by law,
enforce the terms and conditions contained herein.

1 5.2 **Notice and Cure/Meet and Confer.** At any time more than 30 days after the
2 Effective Date, MEJF may provide Target with a Notice of Violation, alleging that a Covered
3 Product sold by Target in California is alleged to contain lead in excess of an applicable
4 reformulation standard in this Consent Judgment and/or does not comply with the applicable
5 warning requirement in this Consent Judgment ("Noncompliant Covered Product").

6 5.2.1 A Notice of Violation may be based on "swipe" testing which Mateel
7 believes establishes that lead is present on the surface of the Noncompliant Covered Product. The
8 Notice of Violation shall identify the Noncompliant Covered Product by name, description, SKU,
9 UPC, and any other identifying information available to Mateel. MEJF shall provide with the
10 Notice of Violation copies of all available purchase receipts, product tags, and labels, picture(s) of
11 the Noncompliant Covered Product, and any test results showing lead level in excess of the
12 applicable reformulation standard, if any.

13 5.2.2 Within 15 business days of receiving such a request, Target shall provide
14 notice to MEJF of its election to contest or not to contest the Notice of Violation. If Target elects
15 not to contest the Notice of Violation, it shall, within 5 business days after providing its notice of
16 election, either (a) stop sale of the Noncompliant Covered Product in California, or (b) provide
17 with the Noncompliant Covered Product a warning that complies with Section 7.3 above. If
18 Target complies with this Section 5.2.2, it shall be deemed to be in compliance with this Consent
19 Judgment, there shall be no further actions taken related to the Noncompliant Covered Product
20 and the Notice of Violation, and Target shall not be liable for any remedies, including injunctive
21 relief, penalties, sanctions, monetary award, attorney's fees, or costs associated with the
22 Noncompliant Covered Product or the Notice of Violation.

23 5.2.3 In the event that Target wishes to contest the allegations contained in any
24 Notice of Violation, Target may provide with its notice of election any evidence to MEJF that in
25 Target's judgment supports its position. In the event that, upon a good faith review of the
26 evidence, MEJF agrees with Target's position, it shall notify Target and no further action shall be
27 taken. If MEJF disagrees with Target's position, it shall, within 30 days, notify Target of such
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1 and provide Target, in writing, with the reasons for its disagreement. Thereafter, the Parties shall
2 meet and confer to attempt to resolve their dispute on mutually acceptable terms.

3 5.2.4 If either (a) there is no resolution of the meet and confer process required
4 under Section 5.2.3 within 45 days, (b) Target fails to provide written notice of its election to
5 correct or contest the violations identified in a Notice of Violation within 15 days, or (c) Target
6 fails to correct any uncontested violations identified in a Notice of Violation within 30 days,
7 MEJF may seek to enforce the terms and conditions contained in this Consent Judgment in the
8 Superior Court of the State of California, County of San Francisco, or may initiate an
9 enforcement action for new violations pursuant to Health and Safety Code § 25249.7(d).

10 5.3 As to any matters not covered by Section 5.2, a Party may enforce any of the terms
11 and conditions of this Consent Judgment only after that Party first provides 30-days notice to the
12 Party allegedly failing to comply with the terms and conditions of this Consent Judgment and
13 attempts to resolve such Party's failure to comply in an open and good faith manner. In any such
14 proceeding, the Party may seek whatever fines, costs, penalties or remedies as may be provided
15 by law for any violation of Proposition 65 or this Consent Judgment.

16 **6. MODIFICATION OF JUDGMENT**

17 6.1 This Consent Judgment may be modified only upon written agreement of the
18 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
19 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

20 6.2 If, with respect to Covered Products, the Attorney General of the State of
21 California or Plaintiff permit any other reformulation standard by way of settlement or
22 compromise with any other person in the course of doing business, or any other entity, or if
23 another reformulation standard for Covered Products is incorporated by way of final judgment as
24 to any other person in the course of doing business, or any other entity, then Defendants are
25 entitled to seek a modification to this Consent Judgment on the same terms as provided in those
26 settlements, compromises or judgments.

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1 **7. INJUNCTIVE RELIEF**

2 7.1 Covered Products that are shipped after the Effective Date for sale in California
3 shall either comply with the reformulation standards of Section 7.2, or bear a warning as provided
4 in Section 7.3.

5 7.2 Covered Products shall not require a warning if the requirements of Sections 7.2.1,
6 or 7.2.2 as applicable, are met.

7 7.2.1 Four randomly selected representative samples of the Covered Product
8 shall be tested according to the NIOSH 9100 protocol, attached hereto as Exhibit A. For
9 purposes of the test, the entire surface of the Accessible Component of the Covered Product shall
10 be wiped according to the test protocol. No warning shall be required for Covered Products if the
11 average of results of the NIOSH 9100 protocol tests are less than 1 µg of lead for each 20 square
12 inches of surface area tested.

13 7.2.2 Each Accessible Component used in the Covered Product has lead content
14 by weight of less than 0.06% (600 parts per million "600 ppm"), using a test method of sufficient
15 sensitivity to establish a limit of quantification (as distinguished from detection) of less than 600
16 ppm;

17 7.2.3 A Defendant may comply with the reformulation requirements of this
18 Section by relying on information obtained from the manufacturers and/or suppliers of Covered
19 Products, and/or the suppliers of the materials utilized in their manufacture, so long as such
20 reliance is in good faith.

21 7.3 A Defendant shall provide a warning through product labeling or point-of-sale
22 warning sign for each Covered Product that does not comply with one or more of the
23 reformulation standards of Section 7.2. The labeling or point-of-sale warning sign shall contain
24 one of the following warning statements:

25 "WARNING: This product contains lead, a chemical known to the State of
26 California to cause birth defects and other reproductive harm. *Wash hands after*
27 *handling*" or

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1 **“WARNING: Handling the brass parts/solder of this product will expose you to**
2 **lead, a chemical known to the State of California to cause birth defects and other**
3 **reproductive harm. *Wash hands after handling.*”**

4 The word “WARNING” shall be in bold text, and the phrase “Wash hands after handling”
5 shall be in bold italic text.

6 7.4 If product labeling is used, the warning statements described in Section 7.3 shall
7 be affixed to or printed on the Covered Product itself or to the Covered Product’s packaging or
8 labeling.

9 7.5 If point-of-sale warning signs are used, a single sign shall be posted at each
10 location where Covered Products are displayed. Warning signs posted at the point of display may
11 be free-standing, placed on the wall, hung, or displayed in any manner, so long as they are
12 reasonably likely to be seen by customers at or before the time of purchase.

12 **8. RETENTION OF JURISDICTION**

13 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
14 terms this Consent Judgment.

15 **9. AUTHORITY TO STIPULATE**

16 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
18 the party represented and legally to bind that party.

19 **10. DUTIES LIMITED TO CALIFORNIA**

20 10.1 This Consent Judgment shall have no effect on Covered Products sold by
21 Defendants outside the State of California.

22 **11. SERVICE ON THE ATTORNEY GENERAL**

23 11.1 KELC shall serve a copy of this Consent Judgment, signed by all parties, on the
24 California Attorney General on behalf of the parties so that the Attorney General may review this
25 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
26 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
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1 and in the absence of any written objection by the Attorney General to the terms of this Consent
2 Judgment, the parties may then submit it to the Court for approval.

3 **12. ENTIRE AGREEMENT**

4 12.1 This Consent Judgment contains the sole and entire agreement and understanding
5 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
6 negotiations, commitments and understandings related hereto. No representations, oral or
7 otherwise, express or implied, other than those contained herein have been made by any party
8 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
9 deemed to exist or to bind any of the parties.

10 **13. GOVERNING LAW**

11 13.1 The validity, construction and performance of this Consent Judgment shall be
12 governed by the laws of the State of California, without reference to any conflicts of law
13 provisions of California law.

14 **14. EXECUTION AND COUNTERPARTS**

15 14.1 This Consent Judgment may be executed in counterparts and by means of
16 facsimile, which taken together shall be deemed to constitute one document.

17 **15. COURT APPROVAL**

18 15.1 If this Consent Judgment, in its entirety, is not approved by the Court, it shall be of
19 no force or effect, and cannot be used in any proceeding for any purpose.

20 **16. NOTICES**

21 16.1 Any notices under this Consent Judgment shall be by personal delivery of First
22 Class Mail.

23 If to MEJF: William Verick, Esq.
24 Klamath Environmental Law Center
424 First Street
Eureka, CA 95501

25 If to Target
26 Corporation or AMC: Jeffrey B. Margulies
27 FULBRIGHT & JAWORSKI L.L.P.
555 South Flower Street, 41st Floor
28 Los Angeles, California 90071
Tel: (213) 892-9286/Fax: (213) 892-9494
jmargulies@fulbright.com

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With a copy to:

Tim Baer
General Counsel
Target Corporation
1000 Nicollet Mall
TPS-3255
Minneapolis, Minnesota 55403

IT IS SO STIPULATED:

DATED: _____

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

BY: 
WILLIAM VERICK

DATED: _____

THE ASSOCIATED MERCHANDISING
CORPORATION

BY: _____

ITS: _____

DATED: _____

TARGET CORPORATION

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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With a copy to:

Tim Baer
General Counsel
Target Corporation
1000 Nicollet Mall
TPS-3255
Minneapolis, Minnesota 55403

IT IS SO STIPULATED:

DATED: _____

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

BY: _____
WILLIAM VERICK

DATED: 8/28/09

THE ASSOCIATED MERCHANDISING
CORPORATION

BY: [Signature]
ITS: Senior Group Counsel

DATED: 8/28/09

TARGET CORPORATION
BY: [Signature]
ITS: Senior Group Counsel

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 10-22-09

[Signature]

JUDGE OF THE SUPERIOR COURT

CHARLOTTE WALTER WOOLARD

ATTACHMENT **A** TO CONSENT JUDGMENT

LEAD in Surface Wipe Samples

9100

Pb

MW: 207.19

CAS: 7439-92-1

RTECS: OF7525000

METHOD: 9100, Issue 1
1994

EVALUATION: PARTIAL

ISSUE 1: 15 August

- PURPOSE:** Determination of surface contamination by lead and its compounds.
- LIMIT OF DETECTION:** 2 µg Pb per sample (0.02 µg/cm² for 100-cm² area) by flame AAS or ICP;
0.1 µg Pb per sample (0.001 µg/cm² for 100-cm² area) by graphite furnace AAS.
- FIELD EQUIPMENT:**
1. Bags, plastic, sealable (e.g., with attached wire, tape or "zip"-type seal).
 2. Sample pads, 2" x 2", sterile cotton gauze (Curity™, Johnson & Johnson™, or equivalent), or ashless quantitative filter paper.
NOTE: Wash'n Dri™ wipes may also be used. Other wipes may not ash properly, or may have a significant lead blank value.
 3. Gloves, latex, disposable.
 4. Template, plastic, 10 cm x 10 cm, or other standard size.
 5. Water, distilled, in plastic squeeze bottle.
- SAMPLING:**
1. Using a new pair of gloves, remove a gauze pad from its protective package. Moisten the gauze pad with approximately 1 to 2 mL of distilled water.
NOTE 1: Apply no more distilled water than that necessary to moisten approximately the central 80% of the area of the gauze pad. Excess distilled water may cause sample loss due to dripping from the gauze pad.
NOTE 2: If using the premoistened Wash'n Dri™, omit the distilled water.
 2. Place the template over the area to be sampled. Wipe the surface to be sampled with firm pressure, using 3 to 4 vertical S-strokes. Fold the exposed side of the pad in and wipe the area with 3 to 4 horizontal S-strokes. Fold the pad once more and wipe the area with 3 to 4 vertical S-strokes.
 3. Fold the pad, exposed side in, and place it in a new plastic bag. Seal and label the bag clearly. Discard the gloves.
 4. Clean the template in preparation for the next wipe sample.
 5. Include two blank pads (moistened and placed in bags) with each sample set.
- SAMPLE PREP:** Use the procedure of NIOSH Method 7105, including final sample dilution to 10 mL.
NOTE: Additional portions of nitric acid may be needed for complete digestion of the sample, including the pad. Include appropriate media and reagent blanks.
- MEASUREMENT:** Screening of all samples by flame AAS or ICP, followed by graphite furnace AAS for those samples giving "Not Detected" is an efficient scheme. Use the procedures of NIOSH Methods 7082 (Lead by flame AAS), 7300 (Elements by ICP), 7105 (Lead by graphite furnace AAS), or other appropriate methods.

METHOD WRITTEN

WRITTEN BY: Peter M. Eller, Ph.D., QASA/DPSE