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10 CENTER FOR ENVIRONMENTAL HEALTH

FILED

DEC 30 2008

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: D. Taylor, Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF MARIN

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

16 Plaintiff,)

17 v.)

18 BABY BOOM CONSUMER PRODUCTS,)
19 INC., et al.,)

20 Defendants.)
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Case No. CV083678

**[PROPOSED] CONSENT JUDGMENT
RE: EASTSPORT, INC.**

1 **1. INTRODUCTION**

2 **1.1** On July 29, 2008, plaintiff Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in San Francisco County
4 Superior Court, entitled *Center for Environmental Health v. Baby Boom Consumer Products,*
5 *Inc., et al.*, Marin County Superior Court Case Number CV083678 (the “CEH Action”), for civil
6 penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5, *et seq.* (“Proposition 65”).

8 **1.2** Defendant EastSport, Inc. (“Defendant”) is a corporation that employs 10
9 or more persons and manufactured, distributed and/or diaper bags in the State of California (the
10 “Products”) that contain Lead.

11 **1.3** Beginning on or about May 15, 2008, CEH served Defendant and public
12 enforcement agencies with the requisite 60-day notice alleging that Defendant was in violation
13 of Proposition 65 (“Notice”). CEH’s Notice and the Complaint in this Action allege that
14 Defendant exposes people who use or otherwise handle the Products to lead and/or lead
15 compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of
16 California to cause cancer, birth defects and other reproductive harm, without first providing
17 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
18 toxicity of Lead. The Notice and Complaint allege that Defendant’s conduct violates Proposition
19 65, including Cal. Health & Safety Code §25249.6. Defendant disputes such allegations and
20 asserts that all of its Products are safe and comply with all applicable laws, including Consumer
21 Product Safety Commission and Federal Food and Drug Administration standards.

22 **1.4** Upon receipt of CEH’s Notice, Defendant took immediate measures to
23 address the allegations set forth therein and to investigate the substance of CEH’s allegations.

24 **1.5** For purposes of this Consent Judgment only, the Parties stipulate that this
25 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
26 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
27 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
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1 Judgment as a full and final resolution of all claims which were or could have been raised in the
2 Complaint and Notice based on the facts alleged therein.

3 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of
4 certain disputed claims between the Parties as alleged in the Notice and/or Complaint. By
5 executing this Consent Judgment, the Parties do not admit any facts or conclusions of law. It is
6 the Parties' intent that nothing in this Consent Judgment shall be construed as an admission by
7 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
8 with the Consent Judgment constitute or be construed as an admission of any fact, conclusion of
9 law, issue of law, or violation of law.

10 **2. COMPLIANCE - REFORMULATION**

11 **2.1 Level.** Defendant shall not manufacture, distribute, ship, or sell, or cause
12 to be manufactured, distributed, or sold, any Product with Lead concentrations exceeding the
13 following Reformulation Standard: (a) within ninety (90) days of entry of this Consent Judgment
14 (the "Compliance Date"), 200 parts per million ("ppm"); and (b) within three years after the
15 Compliance Date, 100 ppm.

16 **2.2 Certification.** Defendant shall obtain written certification from its
17 suppliers of the Products certifying that the Products do not contain Lead concentrations
18 exceeding the Reformulation Standard. Defendant shall obtain written certification with
19 corresponding test results from its suppliers of the Products certifying that neither the Products
20 nor any materials of which the Products are comprised contain Lead concentrations exceeding
21 the Reformulation Standard.

22 **2.3 Testing.** In order to ensure compliance with the requirements of Section
23 2.1, Defendant shall conduct (or cause to be conducted) testing to confirm that the Products do
24 not contain Lead concentrations exceeding the Reformulation Standard. All testing pursuant to
25 this Section shall be performed by an independent laboratory in accordance with EPA Method
26 3050B for the fabric of the Products, and either EPA Method 3050B (the "Test Protocol"). The
27 results of all testing performed pursuant to this Section 2 shall be made available to both CEH
28 and Defendant on a confidential basis.

1 **2.3.1 Random Testing.** Testing pursuant to this Section 2 shall be
2 performed on randomly selected units in accordance with Defendant's usual testing practices. At
3 a minimum, Defendant shall test at least 5 units of Product from each of the first two shipments
4 from each supplier following the Compliance Date. For the remainder of the shipments
5 following the Compliance Date, Defendant shall test at least 2 units per shipment.

6 **2.3.2 Products that Exceed Stipulated Levels Pursuant to**
7 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show levels of
8 lead exceeding the Reformulation Standard, Defendant shall: (1) refuse to accept all of the
9 Products that were purchased under the particular purchase order; (2) send a notice to the
10 supplier explaining that such Products do not comply with the supplier's certification; and (3)
11 apply the testing frequency pursuant to Section 2.3.1 for the next order purchased from the
12 supplier as if such purchase were the first shipment following the Compliance Date.

13 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing
14 of the Products. Any such testing will be conducted by CEH at an independent laboratory, in
15 accordance with the Test Protocol. In the event that CEH's testing demonstrates Lead levels in
16 excess of the Reformulation Standard for two or more Products, CEH shall inform Defendant of
17 the test results, including information sufficient to permit Defendant to identify the Product(s).
18 Within thirty (30) days following such notice, Defendant shall provide CEH, at the address listed
19 in Section 11, with the certification and testing information demonstrating its compliance with
20 Sections 2.2 and 2.3 of this Consent Judgment. If Defendant fails to provide CEH with
21 certification and testing information demonstrating that it complied with Sections 2.2 and/or 2.3,
22 Defendant shall be liable for stipulated payments in lieu of penalties for Products for which CEH
23 produces tests demonstrating Lead levels exceeding the Reformulation Standard, as set forth
24 below. In addition, Defendant shall then apply the testing frequency set forth in Section 2.3.1 for
25 the next two orders of Products from the supplier(s) of the Products at issue as if such orders
26 were the first ones following the Compliance Date. The payments shall be made to CEH and
27 used for the purposes described in Section 3.1.

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1 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
2 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount
3 shall be as follows:

4	First Occurrence:	\$1,250
5	Second Occurrence:	\$1,500
6	Third Occurrence:	\$1,750
7	Thereafter:	\$2,500

8 Notwithstanding the foregoing, the maximum stipulated payment amount in a calendar year,
9 regardless of the number of units of Defendant's Products tested by CEH with exceedances of
10 the Lead levels set forth in this Consent Judgment, shall be \$3,500.

11 **2.4.2 Products in the Stream of Commerce.** Defendant's Products
12 that have been manufactured, shipped, sold, or that are otherwise in the stream of commerce
13 prior to the Compliance Date shall be released from any claims that were brought or that could
14 have been brought by CEH in its Complaint, as though they were Covered Claims within the
15 meaning of Section 7, below.

16 **3. SETTLEMENT PAYMENTS**

17 **3.1** In consideration of the mutual covenants and releases provided in this
18 Consent Judgment, within 10 days of execution of this Consent Judgment, Defendant shall pay a
19 total of \$12,500 as a settlement payment. This total shall be paid in two separate checks
20 delivered to the address set forth in Section 12.1 within 10 days of execution of this Consent
21 Judgment and shall be made payable and allocated as follows.

22 **3.2 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
23 \$4,200 in lieu of any penalty pursuant to Health and Safety Code §25249.7(b). CEH shall use
24 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
25 this work, CEH intends to conduct periodic testing of the Products as set forth in section 2.4.
26 This payment shall be made payable to CEH.

27 **3.3 Attorneys' Fees and Costs.** Defendant shall pay \$8,300 to reimburse
28 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any

1 other costs incurred as a result of investigating, bringing this matter to Defendant' attention,
2 litigating and negotiating a settlement in the public interest. This payment shall be made payable
3 to Lexington Law Group, LLP

4 **4. MODIFICATION OF CONSENT JUDGMENT**

5 **4.1** This Consent Judgment may be modified by written agreement of
6 the parties.

7 **4.2** CEH intends to enter into agreements with other entities that manufacture,
8 distribute and/or sell Products. Should Defendant determine that the provisions of any such
9 agreement with a similarly situated manufacturer or distributor of products are less stringent,
10 Defendant may obtain a modification of this Consent Judgment to conform with the terms of the
11 later signed agreement.

12 **5. ENFORCEMENT OF CONSENT JUDGMENT**

13 **5.1** The Parties agree that the any action based on violation of this Consent
14 Judgment shall be brought in the Superior Court of California in San Francisco County. For
15 purposes of this Consent Judgment, notwithstanding Section 1.5 above, the Parties agree that the
16 Superior Court of California in San Francisco County has subject matter jurisdiction over any
17 disputes arising from this Consent Judgment and personal jurisdiction over each of the Parties,
18 and that venue is proper in the County of San Francisco. Should CEH prevail on any action to
19 enforce the terms of this Consent Judgment it shall be entitled to reasonable attorneys' fees and
20 costs associated with such enforcement.

21 **6. APPLICATION OF CONSENT JUDGMENT**

22 **6.1** This Consent Judgment shall apply to and be binding upon the parties
23 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
24 them.

25 **7. CLAIMS COVERED .**

26 **7.1** This Consent Judgment is a full, final and binding resolution between
27 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
28 the Notice of Complaint against Defendant (including any claims that could be asserted in

1 connection with any of the Products covered by this Consent Judgment) or its parents,
2 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or
3 customers (collectively, "Defendant Releasees") based on failure to warn about alleged
4 Proposition 65 exposures with respect to any Products manufactured, distributed or sold by
5 Defendant ("Covered Claims") on or prior to the date of entry of this Consent Judgment.
6 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
7 for purposes of Lead exposures from the Products.

8 **8. SEVERABILITY**

9 **8.1** In the event that any of the provisions of this Consent Judgment are
10 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
11 adversely affected.

12 **9. SPECIFIC PERFORMANCE**

13 **9.1** The parties expressly recognize that Defendant's obligations
14 under this Consent Judgment are unique. In the event that any Defendant is found to be in
15 breach of this Consent Judgment for failure to comply with the provisions of Section 2 hereof,
16 the parties agree that it would be extremely impracticable to measure the resulting damages and
17 that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
18 available rights or remedies, may sue in equity for specific performance, and Defendant
19 expressly waive the defense that a remedy in damages will be adequate.

20 **10. GOVERNING LAW**

21 **10.1** The terms of this Consent Judgment shall be governed by the laws of
22 the State of California.

23 **11. RETENTION OF JURISDICTION**

24 **11.1** This Court shall retain jurisdiction of this matter to implement and
25 enforce the terms this Consent Judgment.

26 **12. PROVISION OF NOTICE**

27 **12.1** All notices required pursuant to this Consent Judgment and
28 correspondence shall be sent to the following:

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 Charlie Epstein
8 27 Warren Street
9 Hackensack, NJ 07601

10 **13. EXECUTION AND COUNTERPARTS**

11 **13.1** The stipulations to this Consent Judgment may be executed in
12 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
13 document.

14 **14. AUTHORIZATION**

15 **14.1** Each signatory to this Consent Judgment certifies that he or she is
16 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
17 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
18 that party. The undersigned have read, understand and agree to all of the terms and conditions of
19 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
20 and costs.

21 **AGREED TO:**

22 CENTER FOR ENVIRONMENTAL HEALTH

23 

Dated: 10/30/08

24 ~~Michael Green, Executive Director~~
Center for Environmental Health
25 *Charlie Pizzano, Associate Director*

26 EASTSPORT, INC.

Dated: _____

27 _____
[Name]

28 _____
[Title]

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For CEH:

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

For Defendant:

Charlie Epstein
27 Warren Street
Hackensack, NJ 07601

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Michael Green, Executive Director
Center for Environmental Health

Dated: _____

EASTSPORT, INC.

Adora Mayuga

Dated: 10/22/08

V.P. - FINANCE

[Name]
[Title]

