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CENTER FOR ENVIRONMENTAL HEALTH  
6

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF MARIN  
9

10 CENTER FOR ENVIRONMENTAL  
11 HEALTH a non-profit corporation,

12 Plaintiff,

13 v.

14 ASPEN PET PRODUCTS, INC.; DOSKOCIL  
MANUFACTURING CO., INC.;  
15 PETSMART, INC.; SWING LTD.; and  
Defendant DOES 1 through 200, inclusive,

16 Defendants.  
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**FILED**

**MAR 30 2010**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

By: K. Main, Deputy

CASE NO. CIV 09-0989

  
**[PROPOSED] CONSENT JUDGMENT RE:  
DOSKOCIL MANUFACTURING CO., INC.**

1           **1. INTRODUCTION**

2           **1.1**     On March 4, 2009, Plaintiff the Center for Environmental Health  
3     ("CEH"), a non-profit corporation acting in the public interest, filed a complaint entitled *Center*  
4     *for Environmental Health v. Aspen Pet Products, Inc., et al.*, Marin County Superior Court Case  
5     Number CIV 09-0989, for civil penalties and injunctive relief pursuant to the provisions of Cal.  
6     Health & Safety Code § 25249.5, *et seq.* ("Proposition 65"). The Complaint named, among  
7     others, Aspen Pet Products, Inc. ("Aspen"), Daskocil Manufacturing Co., Inc. ("Daskocil") and  
8     Petsmart, Inc. ("Petsmart") as defendants.

9           **1.2**     Daskocil represents and warrants that Aspen was merged into Daskocil in  
10    early 2009 and that Aspen no longer exists as a separate legal entity. Accordingly, Aspen is  
11    hereby dismissed from the case without prejudice. Defendant Daskocil is referred to herein as  
12    the "Settling Defendant."

13           **1.3**     Settling Defendant is a corporation that employs ten or more persons and  
14    manufactured, distributed and/or sold dog whistles (the "Products") in the State of California.

15           **1.4**     On or about May 15, 2008, CEH served defendants and the appropriate  
16    public enforcement agencies with a 60-day Notice (the "Notice") alleging that defendants were  
17    in violation of Proposition 65 by selling Products containing lead and lead compounds  
18    (collectively referred to herein as "Lead") without first providing a clear and reasonable warning.  
19    Lead is a chemical known to the State of California to cause cancer and reproductive harm. The  
20    Notice and Complaint allege that defendants' conduct violates Health & Safety Code § 25249.6,  
21    the warning provision of Proposition 65. The Settling Defendant disputes such allegations and  
22    asserts that its Products are safe and comply with all applicable laws.

23           **1.5**     For purposes of this Consent Judgment only, Settling Defendant stipulates  
24    that this Court has jurisdiction over the subject matter of the violations alleged in CEH's  
25    Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in CEH's  
26    Complaint, that venue is proper in the County of Marin, and that this Court has jurisdiction to  
27    enter this Consent Judgment as a full and final resolution of all claims regarding the Products  
28    which were or could have been raised in the Complaint based on the facts alleged therein.

1                   **1.6**     CEH and the Settling Defendant enter into this Consent Judgment as a full  
2 and final settlement of all claims that were raised in the Complaint, or that could have been  
3 raised in the Complaint, arising out of the facts alleged therein. By executing this Consent  
4 Judgment, the CEH and the Settling Defendant do not admit any facts or conclusions of law. It is  
5 the parties' intent that nothing in this Consent Judgment shall be construed as an admission by  
6 the parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance  
7 with the Consent Judgment constitute or be construed as an admission by the parties of any fact,  
8 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
9 prejudice, waive or impair any right, remedy, argument or defense the parties may have in this or  
10 any other or future legal proceedings.

11                   **2.       COMPLIANCE - REFORMULATION**

12                   **2.1     Reformulation Standard.** Upon entry of this Consent Judgment (the  
13 "Effective Date"), Settling Defendant shall not manufacture, distribute, ship, or sell, or cause to  
14 be manufactured, distributed or sold, in California any Products that are made of any material, or  
15 contains any component, that is more than 0.02 percent Lead by weight (200 parts per million  
16 ("ppm")) (the "Reformulation Standard"). On or before 30 days after the entry of this Consent  
17 Judgment and Order by the Court, Settling Defendant shall not manufacture, distribute, ship, or  
18 sell, or cause to be manufactured, distributed or sold, in the United States any Products that  
19 contain any material or component that exceeds the Reformulation Standard.

20                   **2.2     Market Withdrawal of Recall Products.** On or before the Effective  
21 Date, Settling Defendant shall cease shipping the Top Paw Silent Dog Whistle, Receipt ID  
22 No. 73725709865, Petsmart ID No. 3120584, and the Aristo Silent Dog Whistle, PETCO Item  
23 ID No. 000154857, which were identified as exemplar Products in the 60-Day Notice of  
24 Violation sent by CEH to defendants (the "Recall Products"), to stores and/or customers that sell  
25 or offer the Recall Products to California consumers, and Settling Defendant shall at a minimum,  
26 notify the retail distributors of the Recall Products in California to either cease offering such  
27 Recall Products for sale and to either return all Recall Products to Settling Defendant for  
28 destruction or directly destroy the Recall Products. Any destruction of the Recall Products shall

1 be in compliance with all applicable laws. Settling Defendant shall keep all records and  
2 correspondence regarding the market withdrawal and/or destruction of the Recall Products.  
3 Settling Defendant shall, upon reasonable written request, provide CEH with sufficient records  
4 or a written certification to document its market withdrawal and destruction of the Recall  
5 Products. If there is a dispute over the corrective action, CEH and the Settling Defendant shall  
6 meet and confer before seeking any remedy in court.

7               **2.3 Certification From Suppliers.** If Settling Defendant determines to sell  
8 the Products after the Effective Date, Settling Defendant shall issue specifications to all of its  
9 suppliers of the Products requiring that any Products manufactured by or for the Settling  
10 Defendant shall comply with the Reformulation Standard.

11               **2.4 Defendant's Testing.** If Settling Defendant undertakes to manufacture or  
12 sell the Products after the Effective Date, Settling Defendant shall cause to be conducted testing  
13 on any metal materials or components of the Products to confirm compliance of the Products  
14 with the Reformulation Standard. Such testing shall be conducted by an independent laboratory  
15 using the most recent version of United States Environmental Protection Agency Method 3050B  
16 (the "Test Protocol") or such other testing methods that are required or accepted for Lead testing  
17 under Federal or state product safety laws or regulations and that are able to measure Lead  
18 content at levels able to determine compliance with the reformulation requirements of this  
19 Consent Judgment. Upon reasonable request, no more frequently than once per twelve month  
20 period, Settling Defendant shall provide to CEH the results of its testing of the Products. The  
21 Settling Defendant's downstream distributors and retailers may rely on testing of the Products.

22               **2.4.1 Testing Frequency.** For each of the first two orders of Products  
23 purchased from each of Settling Defendant's suppliers after the Effective Date, Settling  
24 Defendant shall randomly select and test three Products purchased from each supplier of the  
25 Products. Following the testing of the first two orders as described above, Settling Defendant  
26 shall, for each subsequent order, randomly select and test the greater of 0.05% (one-twentieth of  
27 one percent) or two, but in no case more than four, of the total Products purchased in that  
28 calendar year from each supplier of the Products.

1                   **2.4.2 Products That Contain Lead Pursuant to Testing.** If the results  
2 of the testing required pursuant to Section 2.4 show Lead in excess of 200 ppm in a Product,  
3 Settling Defendant shall: (1) refuse to accept all of the Products that were purchased under the  
4 particular purchase order; (2) send a notice to the supplier explaining that such Products do not  
5 comply with the suppliers' certification; (3) apply the testing frequency set forth in Section 2.4.1  
6 as though the next shipment from the supplier were the first one following the Effective Date;  
7 and (4) send notice of the failed test result(s) and the actions taken pursuant to this Section to  
8 CEH at the address listed in Section 11.1.

9                   **2.5 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing  
10 of the Products. Any such testing shall be conducted by CEH at an independent laboratory, in  
11 accordance with the Test Protocols. In the event that CEH's testing demonstrates that any  
12 Product contains Lead in excess of 200 ppm subsequent to the Effective Date, CEH shall inform  
13 Settling Defendant of the test results and meet and confer prior to filing an enforcement action  
14 pursuant to Section 5 hereof.

15                   **3. SETTLEMENT PAYMENTS**

16                   **3.1 Payments From Defendant.** Settling Defendant shall pay the total sum  
17 of Thirty Thousand Dollars (\$30,000) as a settlement payment as allocated pursuant to this  
18 Section.

19                   **3.1.1 Civil Penalty.** Settling Defendant shall pay One Thousand Dollars  
20 (\$1,000.00) as a civil penalty pursuant to Health and Safety Code § 25249.7(b). The payment  
21 required under this Section shall be made by check payable to the Center for Environmental  
22 Health and apportioned by CEH in accordance with Health & Safety Code § 25249.12.

23                   **3.1.2 Monetary Payment in Lieu of Penalty.** Settling Defendant shall  
24 pay to CEH Nine Thousand Five Hundred Dollars (\$9,500.00) in lieu of penalty pursuant to  
25 Health and Safety Code § 25249.7(b). CEH shall use such funds to continue its work protecting  
26 people from exposures to toxic chemicals. As part of this work, CEH intends to conduct periodic  
27 testing of the Products as set forth in Section 2.5. In addition, as part of its *Community*  
28 *Environmental Action and Justice Fund*, CEH will use four percent of such funds to award grants

1 to grassroots environmental justice groups working to educate and protect people from exposures  
2 to toxic chemicals. The method of selection of such groups can be found at the CEH website at  
3 [www.ceph.org/justicefund](http://www.ceph.org/justicefund). The payment required under this Section shall be made by check  
4 payable to the Center for Environmental Health.

5 **3.1.3 Attorneys' Fees and Costs.** Settling Defendant shall pay  
6 Nineteen Thousand Five Hundred Dollars (\$19,500) to reimburse CEH and its attorneys for their  
7 reasonable investigation fees and costs, attorneys' fees and any other costs incurred as a result of  
8 investigating, bringing this matter to Settling Defendant's attention, litigating and negotiating a  
9 settlement in the public interest. The payment required under this Section shall be made by  
10 check payable to Lexington Law Group.

11 **3.2 Timing and Delivery of Payments.** All payments to be made under this  
12 Section 3 shall be delivered to the offices of the Lexington Law Group (Attn: Eric Somers),  
13 1627 Irving Street, San Francisco, California 94122, within five days of entry of this Consent  
14 Judgment.

15 **4. MODIFICATION OF CONSENT JUDGMENT**

16 **4.1** This Consent Judgment may be modified by written agreement of CEH  
17 and Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

18 **5. ENFORCEMENT OF CONSENT JUDGMENT**

19 **5.1** CEH may, by motion or application for an order to show cause, enforce  
20 the terms and conditions contained in this Consent Judgment. CEH agrees to meet and confer  
21 with Settling Defendant prior to bringing any such motion. Should CEH prevail on any such  
22 motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with  
23 enforcing the Consent Judgment.

24 **6. APPLICATION OF CONSENT JUDGMENT**

25 **6.1** This Consent Judgment shall apply to and be binding upon CEH and  
26 Settling Defendant, its divisions, subdivisions and subsidiaries, and the successors or assigns of  
27 any of them.  
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1           **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

2           **7.1** This Consent Judgment is a full, final and binding resolution between  
3 CEH and Settling Defendant of any violation of Proposition 65 that was or could have been  
4 asserted in the Complaint against Settling Defendant or their parents, subsidiaries, predecessors,  
5 and each of their directors, officers, employees, attorneys, and their downstream distributors,  
6 customers and retailers (collectively, "Defendant Releasees") and releases any and all claims  
7 against the Defendant Releasees based on failure to warn about exposures to Lead resulting from  
8 any Products manufactured, distributed or sold by Settling Defendant ("Covered Claims") on or  
9 prior to the date of entry of this Consent Judgment. Compliance with the terms of this Consent  
10 Judgment constitutes compliance with Proposition 65 for purposes of Lead exposures from the  
11 Products. CEH and Settling Defendant intend, and the Court finds, that nothing in this Section 7  
12 shall apply to any keychain product manufactured, distributed or sold by Settling Defendant.  
13 CEH shall dismiss its complaint against Petsmart without prejudice with respect to any products  
14 other than Products sold by Settling Defendant or its predecessor.

15           **8. SEVERABILITY**

16           **8.1** In the event that any of the provisions of this Consent Judgment are held  
17 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely  
18 affected.

19           **9. GOVERNING LAW**

20           **9.1** The terms of this Consent Judgment shall be governed by the laws of the  
21 State of California.

22           **10. RETENTION OF JURISDICTION**

23           **10.1** This Court shall retain jurisdiction of this matter to implement and enforce  
24 the terms this Consent Judgment.

25           **11. PROVISION OF NOTICE**

26           **11.1** All notices required pursuant to this Consent Judgment and  
27 correspondence shall be sent via certified mail to the following:

28 For CEH:

1 Eric S. Somers  
2 Lexington Law Group  
3 1627 Irving Street  
4 San Francisco, CA 94122

5 For Settling Defendant:

6 Mark Kaster  
7 Dorsey & Whitney LLP  
8 Suite 1500  
9 50 South Sixth Street  
10 Minneapolis, MN 55402

11 **12. COURT APPROVAL**

12 **12.1** CEH will comply with the settlement notice provisions of Health and  
13 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.  
14 Accordingly, CEH shall prepare and file a Motion for Approval of this Consent Judgment and  
15 Settling Defendant shall support approval of such Motion.

16 **13. COUNTERPARTS**

17 **13.1** The stipulations to this Consent Judgment may be executed in  
18 counterparts.

19 **14. AUTHORIZATION**

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

26 **AGREED TO:**

27 **CENTER FOR ENVIRONMENTAL HEALTH**

28 Michael Green

Dated: 11/13/10



1 DOSKOCIL MANUFACTURING CO., INC.

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Dated: 1/13/10

GARY KOHLSCHMIDT  
[Name]

CFO  
[Title]

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Doskocil Manufacturing Co., Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: MAR 30 2010

VERNA ADAMS

Judge, Superior Court of the State of California