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6 CENTER FOR ENVIRONMENTAL HEALTH
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN
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12 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

13 Plaintiff,)
14)

15 v.)

16 ASPEN PET PRODUCTS, INC.; DOSKOCIL)
MANUFACTURING CO., INC.; PETSMART,)
17 INC.; SWING LTD.; and Defendant DOES 1)
through 200, inclusive,)
18)

19 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
AS TO SWING LTD**

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 (the "CEH Action"), for civil penalties and injunctive relief pursuant to the
6 provisions of Cal. Health & Safety Code § 25249.5, *et seq.* ("Proposition 65"). The Complaint in
7 the CEH Action named Swing Ltd. ("Defendant") as a defendant.

8 **1.2** Defendant is a corporation that manufactured, distributed and/or sold
9 keychains (the "Products") in the State of California.

10 **1.3** On or about May 15, 2008, CEH served Defendant and the appropriate
11 public enforcement agencies with the requisite 60-day Notice (the "Notice") alleging that
12 Defendant was in violation of Proposition 65. CEH's Notice and the Complaint in the CEH
13 Action allege that Defendant exposes people who use or otherwise handle the Products to lead
14 and lead compounds (collectively referred to herein as "Lead"), chemicals known to the State of
15 California to cause cancer, birth defects and other reproductive harm, without first providing
16 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
17 toxicity of Lead. The Notice and Complaint allege that Defendant's conduct violates Health &
18 Safety Code § 25249.6, the warning provision of Proposition 65. Defendant disputes such
19 allegations and asserts that all of its Products are safe and comply with all applicable laws.

20 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
21 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
22 personal jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is
23 proper in the County of Marin, and that this Court has jurisdiction to enter this Consent Judgment
24 as a full and final resolution of all claims which were or could have been raised in the Complaint
25 based on the facts alleged therein.

26 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
27 certain disputed claims between the Parties as alleged in the Complaint. By executing this
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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.

8 **2. COMPLIANCE - REFORMULATION**

9 **2.1 Reformulation Standard.** From and after October 1, 2009 (the
10 "Effective Date"), Defendant shall not manufacture, distribute, ship, or sell, or cause to be
11 manufactured, distributed or sold, any Product in the United States that is made of any material,
12 or contains any component, that is more than 0.02 percent Lead by weight (200 parts per million
13 ("ppm")) (the "Reformulation Standard")

14 **2.2 Certification From Suppliers.** Defendant shall issue specifications to its
15 suppliers requiring that the Products comply with the Reformulation Standard. Defendant shall
16 obtain written certification from its suppliers of the Products certifying that the Products meet
17 and comply with the Reformulation Standard.

18 **2.3 Defendant's Testing.** In order to ensure compliance with the
19 Reformulation Standard, Defendant shall cause to be conducted testing to confirm compliance.
20 Such testing shall be conducted by an independent laboratory using the most recent version of
21 United States Environmental Protection Agency Method 3050B or 3051, the most recent version
22 of National Food Laboratory Method MN5013, or any replacements thereof (the "Test
23 Protocol"). At the request of CEH, the results of the testing performed pursuant to this section
24 shall be made available to CEH.

25 **2.3.1 Testing Frequency.** Defendant shall arrange for testing of a
26 random sample of each of the first two lots of vinyl material used in manufacturing the Products
27 by each of its suppliers that is acquired after the Effective Date. Following the testing of the first
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1 two lots as described above, Defendant shall, arrange for testing of a random sample from every
2 fifth lot of vinyl material used in manufacturing the Products by each of its suppliers. Defendant
3 shall also randomly select and test two sample finished Products from each of (a) the first
4 shipment received in the United States after the date six months after Effective Date, (b) then
5 one year after the Effective Date, (c) then annually thereafter. Such testing shall be conducted at
6 a United States laboratory. Defendant's obligation to test vinyl material and finished Product
7 under this Consent Judgment shall continue until such time as Defendant has accumulated four
8 consecutive years of test data demonstrating compliance with the reformulation requirements of
9 the Consent Judgment (and showing no failed tests during such time).

10 **2.3.2 Products That Contain Lead Pursuant to Defendant's Testing.**

11 If the results of the testing required pursuant to Section 2.3 show Lead in excess of 200 ppm in a
12 Product, Defendant shall: (1) refuse to accept all of the Products that were purchased under the
13 particular purchase order; (2) send a notice to the supplier explaining that such Products do not
14 comply with the suppliers' certification; (3) apply the testing frequency set forth in Section 2.3.1
15 as though the next shipment from the supplier were the first one following the Compliance Date;
16 and (4) send notice of the failed test and subsequent actions taken pursuant to this Section to
17 CEH.

18 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
19 testing of the Products. Any such testing shall be conducted by CEH at an independent
20 laboratory, in accordance with the Test Protocols. In the event that CEH's testing demonstrates
21 that the Products contain Lead in excess of 200 ppm subsequent to the Compliance Date, CEH
22 shall inform Defendant of the test results, including information sufficient to permit Defendant to
23 identify the Product(s). Defendant shall, within 30 days following such notice, provide CEH, at
24 the address listed in Section 11.1, with the certification and testing information demonstrating its
25 compliance with Sections 2.2 and 2.3 of this Consent Judgment. If Defendant fails to provide
26 CEH with information demonstrating that it complied with Sections 2.2 and/or 2.3, Defendant
27 shall be liable for stipulated payments in lieu of penalties for Products for which CEH produces
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1 tests demonstrating the presence of Lead in excess of 200 ppm in the Products. The payments
2 shall be made to CEH and used for the purposes described in Section 3.2.

3 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments
4 in lieu of penalties are warranted under Section 2.4, the stipulated payment amount shall be as
5 follows for each unit of Product for which CEH produces a test result showing that Defendant
6 sold a Product containing Lead in excess of 200 ppm after the Compliance Date:

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

11 **3. SETTLEMENT PAYMENTS**

12 **3.1 Payments From Defendant.** Defendant shall pay the total sum of
13 \$25,000 as a settlement payment pursuant to this Section.

14 **3.1.1 Civil Penalty.** Defendant shall pay \$1,000 as a civil penalty
15 pursuant to Health and Safety Code § 25249.7(b), such money to be apportioned by CEH in
16 accordance with Health & Safety Code §25249.12.

17 **3.1.2 Monetary Payment in Lieu of Penalty.** Defendant shall pay to
18 CEH \$7,800 in lieu of penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use
19 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
20 this work, CEH intends to conduct periodic testing of the Products as set forth in Section 2.4.

21 **3.1.3 Attorneys' Fees and Costs.** Defendant shall pay \$16,200 to
22 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,
23 and any other costs incurred as a result of investigating, bringing this matter to Defendant's
24 attention, litigating and negotiating a settlement in the public interest.

25 **3.2 Timing and Delivery of Payments.** All payments shall be delivered to
26 the offices of the Lexington Law Group (Attn: Eric Somers), 1627 Irving Street, San Francisco,
27 California 94122.

1 **3.2.1** On or before December 1, 2009, Defendant shall deliver three
2 separate checks as follows: (1) a check in the amount of \$500 made payable to the Center For
3 Environmental Health as a civil penalty; (2) a check in the amount of \$2,650 made payable to the
4 Center For Environmental Health as a payment in lieu of additional civil penalty; and (3) a check
5 in the amount of \$6,850 made payable to the Lexington Law Group as reimbursement of
6 attorneys' fees and costs.

7 **3.2.2** On or before March 1, 2010, Defendant shall deliver three separate
8 checks as follows: (1) a check in the amount of \$500 made payable to the Center For
9 Environmental Health as a civil penalty; (2) a check in the amount of \$2,650 made payable to the
10 Center For Environmental Health as a payment in lieu of additional civil penalty; and (3) a check
11 in the amount of \$6,850 made payable to the Lexington Law Group as reimbursement of
12 attorneys' fees and costs.

13 **3.2.3** On or before June 1, 2010, Defendant shall deliver two checks as
14 follows: (1) a check in the amount of \$2,500 made payable to the Center for Environmental
15 Health as a payment in lieu of additional civil penalty; and (2) a check in the amount of \$2,500
16 made payable to the Lexington Law Group as reimbursement of attorneys' fees and costs.

17 **4. MODIFICATION OF CONSENT JUDGMENT**

18 **4.1** This Consent Judgment may be modified by written agreement of CEH
19 and Defendant, or upon motion of CEH or Defendant 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, enforce
22 the terms and conditions contained in this Consent Judgment. Should CEH prevail on any such
23 motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with
24 enforcing the Consent Judgment.

25 **6. APPLICATION OF CONSENT JUDGMENT**

26 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
27 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
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1 them.

2 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

3 **7.1** This Consent Judgment is a full, final and binding resolution between
4 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
5 the Complaint against Defendant (including any claims that could be asserted in connection with
6 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,
7 directors, officers, employees, agents, attorneys, distributors, customers or retailers (collectively,
8 "Defendant Releasees") based on failure to warn about alleged exposures to Lead resulting from
9 any Products manufactured, distributed or sold by Defendant ("Covered Claims") on or prior to
10 the date of entry of this Consent Judgment. CEH, its directors, officers, employees and attorneys
11 hereby release all Covered Claims against Defendant Releasees. Compliance with the terms of
12 this Consent Judgment constitutes compliance with Proposition 65 for purposes of Lead
13 exposures from the Products.

14 **8. SEVERABILITY**

15 **8.1** In the event that any of the provisions of this Consent Judgment are held
16 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
17 affected.

18 **9. GOVERNING LAW**

19 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
20 State of California.

21 **10. RETENTION OF JURISDICTION**

22 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
23 the terms this Consent Judgment.

24 **11. PROVISION OF NOTICE**

25 **11.1** All notices required pursuant to this Consent Judgment and
26 correspondence shall be sent to the following:

27 For CEH:
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Eric S. Somers
Lexington Law Group
1627 Irving Street
San Francisco, CA 94122

For Defendant:

Bruce Nye
Adams | Nye | Trapani | Becht LLP
222 Kearny Street, 7th Floor
San Francisco, CA 94108-4521

12. COURT APPROVAL

12.1 CEH will comply with the settlement notice provisions of Health and Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

13. COUNTERPARTS

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

14. AUTHORIZATION

14.1 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.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH




Dated: 11/21/09

MICHAEL GREEN
[Name]

EXECUTIVE DIRECTOR
[Title]

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SWING LTD



William Haley
President

Dated: 11/19/09

1 **ORDER AND JUDGMENT**

2 Based upon the stipulated Consent Judgment between CEH and Swing Ltd., the
3 settlement is approved and the clerk is directed to enter judgment in accordance with the terms
4 herein.

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6 Dated: MAR 30 2010

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8 **VERNA ADAMS**
9 Judge, Superior Court of the State of California
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