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10 CENTER FOR ENVIRONMENTAL
11 HEALTH

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF MARIN

15 CENTER FOR ENVIRONMENTAL HEALTH,
16 Plaintiff,
17 v.
18 FETCO HOME DÉCOR, INC., *et al.*,
19 Defendants.

Case No. CIV 090292

Kim
~~[PROPOSED]~~ CONSENT JUDGMENT
AS TO DEFENDANT FETCO HOME
DECOR, INC.

FILED

SEP 17 2009

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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1 **1. INTRODUCTION**

2 **1.1** On January 22, 2009, plaintiff Center for Environmental Health
3 (“Plaintiff”), acting in the public interest, filed a complaint in Marin County Superior Court,
4 entitled *Center for Environmental Health v. Fetco Home Decor, Inc., et al.*, Marin County
5 Superior Court Case Number CIV 090292 (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** Fetco Home Decor, Inc. (identified herein as “Fetco”) is a corporation
9 that employs 10 or more persons and that manufactured, distributed and/or sold picture
10 frames with a pewter substrate in the State of California (the “Covered Products”). Plaintiff
11 and Fetco are referred to collectively herein as the “Parties.” This agreement applies only to
12 picture frames with a pewter substrate sold or to be sold in the State of California.

13 **1.3** On or about August 26, 2008, Plaintiff served Fetco and the
14 appropriate public enforcement agencies with the requisite 60-day notice that Fetco was in
15 violation of Proposition 65. Plaintiff’s Notice and the Complaint in this Action allege that
16 Fetco exposes individuals who use or otherwise handle the Covered Products to lead and/or
17 lead compounds (referred to interchangeably herein as “Lead”), chemicals known to the
18 State of California to cause cancer, birth defects and other reproductive harm, without first
19 providing clear and reasonable warning to such persons regarding the carcinogenicity and
20 reproductive toxicity of Lead. The Notice and Complaint allege that Fetco’s conduct
21 violates Health & Safety Code § 25249.6, the warning provision of Proposition 65.

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

28 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement

1 of certain disputed claims between the Parties as alleged in the Complaint. By executing
2 this Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the
3 Parties' intent that nothing in this Consent Judgment shall be construed as an admission by
4 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall
5 compliance with the Consent Judgment constitute or be construed as an admission by the
6 Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this
7 Consent Judgment shall prejudice, waive or impair any right, remedy, argument or defense
8 the Parties may have in this or any other or future legal proceedings.

9 **2. COMPLIANCE - REFORMULATION**

10 **2.1 Reformulation Standard.** Within sixty days of entry of this Consent
11 Judgment (the "Compliance Date"), Fetco shall not manufacture, distribute, ship, or sell, for
12 purposes of distribution or sale in the State of California, any Covered Product that contains
13 Lead in concentrations that exceed the Reformulation Standard set forth herein. For
14 purposes of this Consent Judgment only, the Reformulation Standard means that: (a) the
15 pewter substrate used in the Covered Products contains no more than 200 parts per million
16 ("ppm") Lead; and (b) any other component of the Covered Products that is likely to be
17 touched, contacted or handled by a user of the Covered Product user during ordinary
18 installation, cleaning, maintenance, or use of such Covered Products contain no more than
19 200 ppm Lead.

20 **2.2 Certification of Level from Suppliers.** Fetco shall obtain written
21 certification with corresponding test results from its suppliers of the Covered Products
22 certifying that the Covered Products meet the Reformulation Standard.

23 **2.3 Testing.** In order to ensure compliance with the requirements of
24 Section 2.1, Fetco shall conduct (or cause to be conducted) testing to confirm that the
25 Covered Products do not contain Lead concentrations exceeding the Reformulation
26 Standard. All testing pursuant to this section shall be performed by an independent
27 laboratory in accordance with either EPA Method 3050B and Exhibit A attached hereto, or
28 EPA Method 3051 (the "Test Protocol").

1 **2.3.1. Random Testing.** Testing pursuant to this Section 2.3 shall be
2 performed on randomly selected units in accordance with Fetco's usual testing practices.

3 **2.3.2. Products that Exceed Stipulated Levels Pursuant to Fetco's**
4 **Testing.** If the results of the testing required pursuant to Section 2.3 show levels of lead
5 exceeding the Reformulation Standard, Fetco shall: (1) refuse to accept all of the Covered
6 Products that were purchased under the particular purchase order; and (2) send a notice to
7 the supplier explaining that such Covered Products do not comply with the supplier's
8 certification.

9 **2.4 Plaintiff's Confirmatory Testing.** Plaintiff may, at its discretion,
10 conduct periodic testing of the Covered Products. Any such testing will be conducted
11 pursuant to the Test Protocol attached hereto as Exhibit A at an independent laboratory. In
12 the event that Plaintiff's testing demonstrates Lead levels in excess of the Reformulation
13 Standard for one or more Covered Products, Plaintiff shall inform Fetco of the violation(s),
14 including information sufficient to permit Fetco to identify the Covered Product(s). Within
15 thirty (30) days following such notice, Fetco shall provide CEH, at the address listed in
16 Section 12, with the certification and testing information demonstrating its compliance with
17 Sections 2.2 and 2.3 of the Consent Judgment. If the testing and certification provided by
18 Fetco state that the product in question complies with the Reformulation Standard, then
19 Fetco shall not be subject to any further penalties for those products. If Fetco fails to
20 provide CEH with certification and testing information demonstrating that it complied with
21 Sections 2.2 and/or 2.3, Fetco shall be liable for stipulated payments in lieu of penalties for
22 Covered Products for which CEH produces tests demonstrating Lead levels exceeding the
23 Reformulation Standard, as set forth below. The payments shall be made to CEH for the
24 purposes described in Section 3.1.1.

25 **2.5 Stipulated Penalties.** In addition to any other remedies provided by
26 law, Fetco shall be liable for stipulated penalties if it violates the Reformulation Standard.
27 The stipulated penalty shall be as follows for each unit of Covered Product for which
28 Plaintiff produces a separate test result demonstrating Lead levels exceeding the

1 Reformulation Standard:

2 First Occurrence: \$250

3 Second Occurrence: \$500

4 Third Occurrence: \$750

5 Thereafter: \$1,000

6 **3. SETTLEMENT PAYMENTS**

7 **3.1** Within 10 days of the Court's entry of this Consent Judgment, Fetco
8 shall pay the sum of \$25,000 as a settlement payment. This total shall be paid in two
9 separate checks delivered to the offices of the Lexington Law Group, LLP at the address set
10 forth in Section 12 below and made payable and allocated as follows. Any failure by Fetco
11 to comply with the payment terms herein shall be subject to a stipulated late fee in the
12 amount of \$100 for each day after the delivery date the payment is received. The late fees
13 required under this section shall be recoverable, together with reasonable attorneys' fees, in
14 an enforcement proceeding brought pursuant to Section 5 of this Consent Judgment.

15 **3.1.1. Civil Penalty.** \$1,000 shall be paid to CEH as a civil penalty
16 pursuant to Health and Safety Code §25249.7(b). The penalty shall be made payable to CEH,
17 which will apportion the penalty in accordance with Health and Safety Code §25249.12.

18 **3.1.2. Monetary Payment in Lieu of Penalty:** \$7,500 shall be paid
19 to Plaintiff in lieu of any additional penalty pursuant to Health and Safety Code
20 §25249.7(b). This payment shall be made by check payable to Center for Environmental
21 Health. Plaintiff shall use such funds to continue its work protecting people from exposures
22 to toxic chemicals. As part of this work, Plaintiff intends to conduct periodic testing of the
23 Products as set forth in Section 2.4.

24 **3.1.3. Attorneys' Fees and Costs:** \$16,500 shall be used to
25 reimburse Plaintiff and its attorneys for their reasonable investigation fees and costs,
26 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter
27 to Fetco's attention, litigating and negotiating a settlement in the public interest. This
28 payment shall be made by check payable to Lexington Law Group, LLP.

1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** This Consent Judgment may be modified by written agreement of
3 Plaintiff and Fetco, or upon motion of Plaintiff or Fetco as provided by law.

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 **5.1** Plaintiff may, by motion or application for an order to show cause
6 before the Superior Court of the County of Marin, enforce the terms and conditions
7 contained in this Consent Judgment. Should Plaintiff prevail on any motion or application
8 under this section, Plaintiff shall be entitled to its reasonable attorneys' fees and costs
9 associated with such motion or application.

10 **6. APPLICATION OF CONSENT JUDGMENT**

11 **6.1** This Consent Judgment shall apply to and be binding upon the parties
12 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
13 them.

14 **7. CLAIMS COVERED**

15 **7.1** This Consent Judgment is a full, final and binding resolution between
16 Plaintiff and Fetco of any violation of Proposition 65 that could have been asserted against
17 Fetco in the Complaint based on Fetco's failure to warn about exposure to Lead contained in
18 the Covered Products, with respect to any Covered Products manufactured, distributed or
19 sold by Fetco on or prior to the date of entry of this Consent Judgment. This release does
20 not limit or effect the obligations of any party created under this Consent Judgment.

21 **8. SEVERABILITY**

22 **8.1** In the event that any of the provisions of this Consent Judgment are
23 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
24 adversely affected.

25 **9. SPECIFIC PERFORMANCE**

26 **9.1** The parties expressly recognize that Fetco's obligations under this
27 Consent Judgment are unique. In the event that Fetco is found to be in breach of this
28 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties

1 agree that it would be extremely impracticable to measure the resulting damages and that
2 such breach would cause irreparable damage. Accordingly, Plaintiff, in addition to any
3 other available rights or remedies, may sue in equity for specific performance, and Fetco
4 expressly waives the defense that a remedy in damages will be adequate.

5 **10. GOVERNING LAW**

6 **10.1** The terms of this Consent Judgment shall be governed by the laws of
7 the State of California.

8 **11. RETENTION OF JURISDICTION**

9 **11.1** This Court shall retain jurisdiction of this matter to implement and
10 enforce the terms this Consent Judgment.

11 **12. PROVISION OF NOTICE**

12 **12.1** All notices required pursuant to this Consent Judgment and
13 correspondence shall be sent to the following:

14 For Plaintiff:

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

17 For Fetco:

Duncan Joseph Moore
Latham & Watkins LLP
355 South Grand Avenue
Los Angeles CA 90071-1560

20 **13. COURT APPROVAL**

21 **13.1** If this Consent Judgment is not approved by the Court, it shall be of no
22 further force or effect.

23 **14. EXECUTION AND COUNTERPARTS**

24 **14.1** The stipulations to this Consent Judgment may be executed in
25 counterparts and by means of facsimile, which taken together shall be deemed to constitute
26 one document.


27 **15. AUTHORIZATION**

28 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully

1 authorized by the party he or she represents to stipulate to this Consent Judgment and to
2 enter into and execute the Consent Judgment on behalf of the party represented and legally
3 bind that party. The undersigned have read, understand and agree to all of the terms and
4 conditions of this Consent Judgment. Except as explicitly provided herein, each party is to
5 bear its own fees and costs.

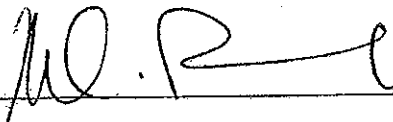
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7 **AGREED TO:**

8 CENTER FOR ENVIRONMENTAL HEALTH

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10 
11 Charlie Pizarro, Assistant Director
12 Center for Environmental Health
Michael Green, Executive

Dated: 6/17/09

13 FETCO HOME DECOR, INC.

14 
15 Michael A. Ricciarelli
16 Printed Name

Dated: 6-16-09

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18 CFO
19 Title

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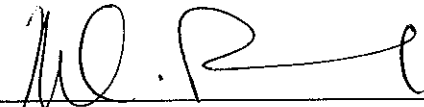
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2 enter into and execute the Consent Judgment on behalf of the party represented and legally
3 bind that party. The undersigned have read, understand and agree to all of the terms and
4 conditions of this Consent Judgment. Except as explicitly provided herein, each party is to
5 bear its own fees and costs.

6
7 **AGREED TO:**

8 CENTER FOR ENVIRONMENTAL HEALTH

9
10 _____ Dated: _____
11 Charlie Pizarro, Assistant Director
12 Center for Environmental Health

13 FETCO HOME DECOR, INC.

14  _____ Dated: 6-16-09
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16 Michael A. Ricciarelli
17 Printed Name

18 CFO
19 Title

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ORDER AND JUDGMENT

Based upon the Stipulated Consent Judgment between Plaintiff and Fetco Home Decor, Inc., the settlement is approved and judgment is hereby entered according to the terms therein.

Dated: SEP 17 2009

MICHAEL B. DUFFICY
Judge, Superior Court of the State of California

1 EXHIBIT A
2 (Test Methodology)

3 The following protocol shall be applied separately to each component of the Covered
4 Product:

- 5 a) Comminute a small, representative, and discreet portion of the material to be
6 analyzed.
- 7 b) Prepare the sample for analysis using microwave digestion. Microwave
8 digestion protocols from either of the following two methods may be used
9 provided that the samples are completely digested:
- 10 1. AOAC Official Method 999.10 (Lead, Cadmium, Zinc, Copper, and
11 Iron in Foods)
 - 12 2. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave Digestion
13 for Lead in Paint Chips (and other matrices)
- 14 c) In accordance with EPA Method 3050B, analyze the sample for total Lead
15 (Pb) content using Graphite Furnace Atomic Absorption Spectrophotometry
16 (GFAAS) or Inductively Coupled Plasma Mass Spectrometry (ICP-MS) using
17 standard operating procedures.
- 18 d) Lead content shall be expressed in parts per million (ppm).
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