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6 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
San Francisco County Superior Court

MAY 21 2009

GORDON PARK-LI, Clerk

BY: _____ Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
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12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 v.)

16 ACME UNITED CORPORATION; ADENNA)
17 INC.; BECTON, DICKINSON & COMPANY;)
18 BETTY DAIN CREATIONS, INC.;)
19 DURASAFE INC.; IMPACT PRODUCTS,)
20 LLC; INVACARE CORPORATION;)
21 MICROFLEX CORPORATION; SHELBY)
GROUP INTERNATIONAL DBA MCR)
SAFETY; UNITED STATIONERS SUPPLY)
CO.; and Defendant DOES 1 through 200,)
inclusive,)

22 Defendants.)
23 _____)

Case No. CGC-08-482792

14 **[PROPOSED] CONSENT JUDGMENT**
15 **RE: BETTY DAIN CREATIONS, INC.**

1 **1. INTRODUCTION**

2 **1.1** On December 9, 2008, 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. Acme United Corporation, et al.*, San Francisco County Superior
5 Court Case Number CGC-08-482792 (the “CEH Action”), for civil penalties and injunctive
6 relief pursuant to the provisions of Cal. Health & Safety Code § 25249.5, *et seq.* (“Proposition
7 65”). The Complaint in the CEH Action named Betty Dain Creations, Inc. (“Defendant”) as a
8 defendant.

9 **1.2** Defendant is a corporation that employs 10 or more persons and
10 manufactured, distributed and/or sold vinyl gloves (the “Products”) in the State of California.

11 **1.3** On or about August 26, 2008, CEH served Defendant and the appropriate
12 public enforcement agencies with the requisite 60-day Notice (the “Notice”) alleging that
13 Defendant was in violation of Proposition 65. CEH’s Notice and the Complaint in the CEH
14 Action allege that Defendant exposes people who use or otherwise handle the Products to di(2-
15 ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause cancer,
16 birth defects and other reproductive harm, without first providing clear and reasonable warning
17 to such persons regarding the carcinogenicity and reproductive toxicity of DEHP. The Notice
18 and Complaint allege that Defendant’s conduct violates Health & Safety Code § 25249.6, the
19 warning provision of Proposition 65. Defendant disputes such allegations and asserts that all of
20 its products are safe and comply with all applicable laws.

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

27 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
28 certain disputed claims between the Parties as alleged in the Complaint for the purpose of

1 avoiding prolonged litigation. By executing this Consent Judgment, the Parties do not admit any
2 facts or conclusions of law and Defendant does not admit to any violation of Proposition 65 or
3 any other law. Furthermore, it is the Parties' intent that nothing in this Consent Judgment shall
4 be construed as an admission by the Parties of any fact, conclusion of law, issue of law or
5 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as
6 an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law.
7 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument
8 or defense the Parties may have in this or any other or future legal proceedings.

9 **2. COMPLIANCE - REFORMULATION**

10 **2.1 Reformulation Standard – Removal of DEHP.** After 60-days following
11 the entry of this Consent Judgment (the "Compliance Date"), Defendant shall not manufacture,
12 distribute, ship, or sell, or cause to be manufactured, distributed or sold, any Product that
13 contains in excess of trace amounts of DEHP. For purposes of this Consent Judgment only, "in
14 excess of trace amounts" is more than 600 parts per million ("ppm"). In reformulating the
15 Products to remove DEHP, Defendant may not use butyl benzyl phthalate ("BBP"), di-n-hexyl
16 phthalate ("DnHP"), di-n-butyl phthalate ("DBP") or di-isodecyl phthalate ("DIDP") in excess of
17 trace amounts. DEHP, BBP, DnHP, DBP and DIDP are together referred to herein as "Listed
18 Phthalates."

19 **2.2 Certification From Suppliers.** Defendant shall issue specifications to its
20 suppliers requiring that the Products shall not contain any Listed Phthalate in excess of trace
21 amounts. Defendant shall obtain written certification from its suppliers of the Products
22 certifying that the Products do not contain any Listed Phthalate in excess of trace amounts.

23 **2.3 Defendant's Testing.** In order to ensure compliance with the
24 requirements of Section 2.1, Defendant shall cause to be conducted testing to confirm that the
25 Products do not contain any Listed Phthalate in excess of trace amounts. All testing pursuant to
26 this Section shall be performed by an independent laboratory in accordance with both of the
27 following test protocols: (1) EPA SW8270C; and (2) EPA SW3580A (together referred to as the
28 "Test Protocols"). At the request of CEH, the results of the testing performed pursuant to this

1 section shall be made available to CEH on a confidential basis.

2 **2.3.1 Testing Frequency.** For each of the first two orders of Products
3 purchased from each of Defendant's suppliers after the Compliance Date, Defendant shall
4 randomly select and test the greater of 0.1% (one-tenth of one percent) or eight, but in no case
5 more than ten, of the total units of Products purchased from each supplier of the Products.
6 Following the testing of the first two orders as described above, Defendant shall, for each
7 subsequent order, randomly select and test the greater of 0.05% (one-twentieth of one percent) or
8 four, but in no case more than five, of the total units of Products purchased in that calendar year
9 from each supplier of the Products.

10 **2.3.2 Products That Contain Listed Phthalates Pursuant to**
11 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show Listed
12 Phthalates in excess of trace amounts in a Product, Defendant shall: (1) refuse to accept any
13 further units of Products that were purchased under the same purchase order; (2) send a notice to
14 the supplier explaining that such Products do not comply with the suppliers' certification; and
15 (3) apply the testing frequency set forth in Section 2.3.1 as though the next shipment from the
16 supplier were the first one following the Compliance Date.

17 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
18 testing of the Products. Any such testing shall be conducted by CEH at an independent
19 laboratory, in accordance with both of the Test Protocols. In the event that CEH's testing
20 demonstrates that the Products contain Listed Phthalates in excess of trace amounts subsequent
21 to the Compliance Date, CEH shall inform Defendant of the test results, including information
22 sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30 days
23 following such notice, provide CEH, at the address listed in Section 11.1, with the certification
24 and testing information demonstrating its compliance with Sections 2.2 and 2.3 of this Consent
25 Judgment. If Defendant fails to provide CEH with information demonstrating that it complied
26 with Sections 2.2 and/or 2.3, Defendant shall be liable for stipulated payments in lieu of
27 penalties for Products for which CEH produces tests demonstrating the presence of Listed
28 Phthalates in excess of trace amounts in the Products. The payments shall be made to CEH and

1 used for the purposes described in Section 3.1.

2 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
3 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount
4 shall be as follows for each unit of Product for which CEH produces a test result showing that
5 Defendant sold a Product containing Listed Phthalates in excess of trace amounts after the
6 Compliance Date:

7	First Occurrence:	\$500
8	Second Occurrence:	\$750
9	Third Occurrence:	\$1,000
10	Thereafter:	\$2,500

11 **3. SETTLEMENT PAYMENTS**

12 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
13 \$5,000 in lieu of any penalty allegedly due pursuant to Health and Safety Code § 25249.7(b).
14 CEH shall use such funds to continue its work protecting people from exposures to toxic
15 chemicals. As part of this work, CEH intends to conduct periodic testing of the Products as set
16 forth in Section 2.4. The payment required under this section shall be made payable to CEH.

17 **3.2 Attorneys' Fees and Costs.** Defendant shall pay \$10,000 to reimburse
18 CEH and its attorneys for the investigation fees and costs, attorneys' fees, and any other costs
19 incurred as a result of investigating, bringing this claim to Defendant's attention, litigating and
20 negotiating a settlement in the public interest. The payment required under this section shall be
21 made payable to Lexington Law Group, LLP.

22 **3.3 Delivery of payments.** All payments made pursuant to this Section 3
23 shall be delivered to the Lexington Law Group at the address set forth in Section 11.1, and shall
24 be delivered as follows: (1) the first payment of \$5,000, payable to CEH, shall be delivered
25 within 15 days of mutual execution of this Consent Judgment; (2) the second payment of \$5,000,
26 payable to the Lexington Law Group, shall be delivered within 90 days of mutual execution of
27 this Consent Judgment; and (3) the final payment of \$5,000, payable to the Lexington Law
28 Group, shall be delivered within 180 days of mutual execution of this Consent Judgment.

1 **4. MODIFICATION OF CONSENT JUDGMENT**

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

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 **5.1** Either Party may, by motion or application for an order to show cause,
6 enforce the terms and conditions contained in this Consent Judgment. The Party that prevails on
7 any such motion or application shall be entitled to recover its reasonable attorneys' fees and
8 costs associated with enforcing the Consent Judgment.

9 **6. APPLICATION OF CONSENT JUDGMENT**

10 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
11 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
12 them.

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

14 **7.1** This Consent Judgment is a full, final and binding resolution between
15 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
16 the Complaint against Defendant (including any claims that could be asserted in connection with
17 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,
18 directors, officers, employees, agents, attorneys, distributors, customers or retailers (collectively,
19 "Defendant Releasees") based on failure to warn about alleged exposures to DEHP resulting
20 from any Products manufactured, distributed or sold by Defendant ("Covered Claims") on or
21 prior to 60-days following the date of entry of this Consent Judgment. CEH, its directors,
22 officers, employees and attorneys hereby release all Covered Claims against Defendant
23 Releasees. Compliance with the terms of this Consent Judgment constitutes compliance with
24 Proposition 65 for purposes of DEHP exposures from the Products.

25 **7.2** In furtherance of the foregoing, CEH, its directors, officers, employees
26 and attorneys hereby waive any and all rights and benefits which they now have, or in the future
27 may have, conferred upon them with respect to DEHP exposures from the Products by virtue of
28 the provisions of Section 1542 of the California Civil Code, which provides as follows:

1 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
2 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
3 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
4 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
5 OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
6 HER SETTLEMENT WITH THE DEBTOR."

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9 **8. SEVERABILITY**

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

13 **9. GOVERNING LAW**

14 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
15 State of California.

16 **10. RETENTION OF JURISDICTION**

17 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
18 the terms this Consent Judgment.

19 **11. PROVISION OF NOTICE**

20 **11.1** All notices required pursuant to this Consent Judgment and
21 correspondence shall be sent to the following:

22 For CEH:

23 Mark N. Todzo
24 Lexington Law Group, LLP
25 1627 Irving Street
26 San Francisco, CA 94122

27 For Defendant:

28 Gregory R. McClintock
Akerman Senterfitt LLP
725 South Figueroa Street, 38th Floor
Los Angeles, CA 90017-5433

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.

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13. EXECUTION AND COUNTERPARTS

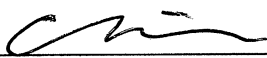
13.1 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

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: 3/30/09

CHARLIE PIZARRO
[Name]

ASSOCIATE DIRECTOR
[Title]

BETTY DAIN CREATIONS, INC.

Dated: _____

[Name]

[Title]

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

[Name]

[Title]

Dated: _____

BETTY DAIN CREATIONS, INC.

Richard Leebow

RICHARD LEEBOW
[Name]
V.P.

[Title]

Dated: 3/20/09

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ORDER AND JUDGMENT

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

Dated: MAY 21 2009

CHARLOTTE WALTER WOOLARD
Judge, Superior Court of the State of California