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 5
 6 Attorneys for Plaintiff,
 CONSUMER ADVOCACY GROUP, INC.

FILED
ALAMEDA COUNTY

MAY 25 2011

CLERK OF THE SUPERIOR COURT
By R. James Legall DEARY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

11
12 CONSUMER ADVOCACY GROUP, INC., in
the public interest,

13 Plaintiff,

14 v.

15
16 EJK CORP., a Washington Corporation; DE
ANZA TRUE VALUE HARDWARE &
17 BUILDING SUPPLY, a business entity, form
unknown; and DOES 1-20;

18 Defendant.

CASE NO. RG09487700

^{af}
[PROPOSED] CONSENT JUDGMENT;
[PROPOSED] ORDER.

Health & Safety Code § 25249.5 et seq.

ACTION FILED: December 4, 2009
TRIAL DATE:
TIME:

FILE BY FAX

20 1. INTRODUCTION

21 1.1. Parties

22 This Consent Judgment is entered into by and between Consumer Advocacy Group, Inc.
23 ("CAG"), a non-profit corporation, and EJK Corp. ("EJK"), Walco-Linck Company, Inc.
24 ("Walco"), The Homax Group, Inc. ("Homax Group"), and Homax BF Holding Corp. ("Homax
25 BF") (EJK, Walco, Homax Group, and Homax BF collectively referred to as "Alleged Violators")
26 (CAG and Alleged Violators collectively referred to as "Parties").

27 1.2. Complaint

1 On December 4, 2009, CAG, a non-profit corporation, filed a complaint in the Alameda
2 County Superior Court entitled *Consumer Advocacy Group, Inc. v. EJK Corp.*, Case No.
3 RG09487700 (the "Action") for civil penalties and injunctive relief pursuant to the provisions of
4 California Health & Safety Code § 25249.5, *et seq.* ("Proposition 65"). CAG's Complaint named
5 EJK and De Anza True Value Hardware & Building Supply ("De Anza") as defendants.

6 **1.3. Plaintiff**

7 CAG is a registered corporation based in California who seeks to promote awareness of
8 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.4. Alleged Violators**

11 EJK, Walco, Homax Group, and Homax BF are all corporations, each of which employed
12 10 or more persons during part of the three-year period immediately preceding the filing of the
13 Complaint in the Action, and are persons in the course of doing business for purposes of
14 Proposition 65.

15 **1.5. Covered Products**

16 The products that are covered by this Consent Judgment are defined as follows: Pesticide
17 Products with SKU numbers 37024, 37524, 39324, 39524, 35224, 36224, 5600101, and 5600102,
18 including but not limited to Tat® Ant Bait, containing Propoxur. All such items shall be referred
19 to herein as the "Products."

20 **1.6. General Allegations**

21 CAG alleges that Alleged Violators manufactured, distributed, and/or sold in the State of
22 California the Products. Propoxur is listed under Proposition 65 as a chemical known to the State
23 of California to cause cancer. Propoxur is referred to herein as the "Listed Chemical."

24 **1.7. Notices of Violation**

25 On or about December 7, 2008, CAG served EJK, De Anza, and the appropriate public
26 enforcement agencies with notice claiming that EJK and De Anza were in violation of Proposition
27 65 in regard to Tat® Ant Bait. CAG's notice and the Complaint in this Action allege that EJK and
28 De Anza exposed people to Propoxur without first providing clear and reasonable warnings, in

1 violation of California Health & Safety Code § 25249.6.

2 On or about February 7, 2011, CAG served the Alleged Violators and the appropriate
3 public enforcement agencies with notice claiming that Alleged Violators were in violation of
4 Proposition 65 in regard to the Products. CAG's notice and the Complaint in this Action allege
5 that Alleged Violators exposed people to Propoxur without first providing clear and reasonable
6 warnings, in violation of California Health & Safety Code § 25249.6

7 The notices dated December 7, 2008 and February 7, 2011 are referred to herein as the
8 "Notices."

9 **1.8. No Admissions.**

10 Alleged Violators deny the material allegations of the Notices and the Complaint, and deny
11 liability for the cause of action alleged in the Complaint and in connection with the Action.

12 Nothing in this Consent Judgment shall be construed as an admission by the Parties of any
13 fact, conclusion of law, issue of law or violation of law, including without limitation, any
14 admission concerning any violation of Proposition 65 or any other statutory, regulatory, common
15 law, or equitable doctrine, or the meaning of the terms "knowingly and intentionally expose" or
16 "clear and reasonable warning" as used in Health and Safety Code section 25249.6. Nothing in this
17 Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission
18 by the Parties of any fact, conclusion of law, issue of law, or violation of law, or of fault,
19 wrongdoing, or liability by Alleged Violators, their officers, directors, employees, or parent,
20 subsidiary or affiliated corporations, or be offered or admitted as evidence in any administrative or
21 judicial proceeding or litigation in any court, agency, or forum.

22 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
23 argument, or defense the Parties may have in any other or future legal proceeding, except as
24 expressly provided in this Consent Judgment.

25 **1.9. Purpose of Consent Judgment**

26 The Parties enter into this Consent Judgment pursuant to a settlement of certain disputed
27 claims as alleged in the Notices and the Complaint for the purpose of avoiding prolonged and
28

1 costly litigation, including without limitation the expenditure of significant funds by Alleged
2 Violators for scientific analysis and related proceedings before the Office of Environmental
3 Hazard Assessment and/or the Courts related to the Products, and similar expenditures by CAG to
4 oppose such analysis and proceedings.

5 This Consent Judgment is the product of negotiation and compromise and is accepted by
6 the Parties, for purposes of settling, compromising and resolving issues disputed in this action,
7 including future compliance by Alleged Violators with Section 2 of this Consent Judgment, and
8 shall not be used for any other purpose, or in any other matter.

9 **1.10. Consent to Jurisdiction**

10 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
11 jurisdiction over the allegations of violations contained in CAG's Complaint and personal
12 jurisdiction over Alleged Violators as to the acts alleged in CAG's Complaint, that venue is proper
13 in the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
14 full and final resolution of all claims which were or could have been raised in the Action and
15 Complaint based on the facts alleged therein.

16 **1.11. Effective Date.**

17 For purposes of this Consent Judgment, the Effective Date is the date on which the
18 Consent Judgment is entered as a judgment by this Court.

19
20 **2. PROPOSITION 65 COMPLIANCE**

21 **2.1. Reformulation**

22 By July 1, 2012, Alleged Violators agree to reformulate the Products to remove Propoxur
23 as the active ingredient or stop distributing or selling the Products in California if they elect not to
24 reformulate them.

25 **2.2. Warnings**

26 By the later of July 1, 2011 or 90 days after the last regulatory agency has approved, in
27 writing, any proposed label changes, Alleged Violators agree to not knowingly sell, ship, or offer
28 to be shipped for sale in California, Products containing the Listed Chemical unless such Products

1 are sold or shipped with clear and reasonable warnings including the following, or substantially
2 similar, language:

3 **WARNING:** This product contains a chemical known to the State of
4 California to cause cancer, birth defects, or other reproductive harm.

5 Any warning issued for the Products shall be prominently placed with such
6 conspicuousness as compared with other words, statements, designs or devices as to render it
7 likely to be read and understood by an ordinary individual under customary conditions before
8 purchase or, for Products shipped directly to an individual in California, before use. For purposes
9 of Proposition 65 and this Consent Judgment, Alleged Violators' placement of the warnings on,
10 and use of, unit cartons and/or blister cards shall be deemed sufficient to comply with the
11 requirements set forth in Proposition 65 and this Consent Judgment.

12 **2.3. Permission by Federal and State Agencies**

13 The Parties acknowledge that no changes to the label or labeling for any Products that are
14 the subject of this Consent Judgment can be made except as permitted by certain federal and
15 California agencies in their implementation of federal and state laws, other than Proposition 65,
16 that regulate the manufacture, sale, labeling, distribution and use of these Products. Alleged
17 Violators have agreed to submit to the applicable federal or state agencies, including the U.S.
18 Environmental Protection Agency, revised labels for the Products incorporating the warning
19 statement described in Section 2.2 above, and Alleged Violators shall not be required to
20 implement the warning provisions of Section 2.2 until 90 days after the last regulatory agency has
21 approved, in writing, the proposed label change. Alleged Violators shall not be required to re-
22 label or recall any Products in the stream of commerce at the time that this Consent Judgment is
23 approved by the Court, and Alleged Violators shall not be required to change the use instructions
24 on the label from those approved previously by such federal and California agencies. Under no
25 circumstances shall this Consent Judgment be interpreted to require Alleged Violators to make any
26 other applications or secure any other approvals from federal or state agencies regarding the
27 labeling (including specifically the use instructions or warnings thereon) for the Products, on any
28 other aspect of their manufacture, distribution, sale or use or to distribute any Products in violation

1 of federal and California labeling requirements as such labeling requirements are interpreted by
2 the applicable federal and California agency.

3

4 **3. SETTLEMENT PAYMENT**

5 EJK shall pay a total of \$32,500 in settlement of this action to defray CAG's costs, costs of
6 investigation, attorney fees, or other costs incurred relating to this matter. A total payment of
7 \$32,500 shall be made payable to "Yeroushalmi & Associates," and shall be delivered within
8 fifteen (15) business days from the Effective Date to the following address:

9 Reuben Yeroushalmi, Esq.
10 Yeroushalmi & Associates
11 9100 Wilshire Blvd., Suite 610E
12 Beverly Hills, CA 90212

13 **4. DISMISSAL OF DE ANZA**

14 Within ten (10) business days from the date that CAG signs this Consent Judgment, CAG
15 shall file a Request for Dismissal without prejudice as to De Anza. CAG shall file a Request for
16 Dismissal with prejudice as to De Anza within ten (10) business days from the date of receipt by
17 Yeroushalmi & Associates of the payment as discussed above in Section 3.

18 **5. MODIFICATION OF STIPULATED CONSENT JUDGMENT**

19 This written Stipulated Consent Judgment may be modified only by written agreement of
20 CAG and Alleged Violators upon stipulation and Order of the Court, or after noticed motion, and
21 upon entry of a Consent Judgment by the Court thereon, or upon motion of CAG or Alleged
22 Violators as provided by law and upon entry of a modified Stipulated Consent Judgment by the
23 Court.

24

25 **6. ENFORCEMENT OF CONSENT JUDGMENT**

26 Any party may, by motion or application for an order to show cause before the Superior
27 Court of the County of Alameda, consistent with the terms and conditions set forth in paragraphs
28

1 10.1 and 10.2 of this Consent Judgment, enforce the terms and conditions contained in this
2 Consent Judgment. The prevailing party shall be entitled to its reasonable attorneys' fees and costs
3 associated with such motion or application.
4

5 **7. APPLICATION OF CONSENT JUDGMENT**

6 This Consent Judgment shall apply to and be binding upon the parties hereto, their
7 divisions, subdivisions and subsidiaries, officers, directors, employees, agents and their successors
8 or assigns, and to the extent allowed by law, on the general public.
9

10 **8. CLAIMS COVERED AND RELEASED**

11 **8.1 Release**

12 CAG, on behalf of itself and in the public interest, hereby releases and discharges Alleged
13 Violators, their related affiliates, customers, retailers, distributors, other entities in their
14 distribution chain down to the consumer of the Products, predecessors, successors and assigns, and
15 all officers, directors, employees, and shareholders of them (collectively, "Released Parties") from
16 any and all claims asserted, or that could have been asserted, in this litigation arising from the
17 alleged failure to provide Proposition 65 warnings for the Products regarding the exposure of
18 individuals to the Listed Chemical in the Products. CAG, on behalf of itself only, hereby releases
19 and discharges the Released Parties from any and all known and unknown past, present, and future
20 rights, claims, causes of action, damages, suits, penalties, liabilities, injunctive relief, declaratory
21 relief, and attorney fees, costs, and expenses related to or arising out of the facts and claims
22 asserted, or that could have been asserted, under state or federal law in this litigation arising from
23 or related to the Products or the facts alleged in CAG's Notices or the Complaint, including
24 without limitation any and all claims concerning exposure of any person to the Listed Chemical in
25 the Products. Compliance with the terms of this Consent Judgment shall constitute compliance by
26 the Released Parties with Proposition 65 with respect to exposures to Propoxur contained in the
27 Products. This release does not limit or affect the obligations of any party created under this
28 Consent Judgment, except as otherwise set forth herein.

1 8.2 **Unknown Claims.**

2 It is possible that other injuries, damages, liability, or claims not now known to the Parties
3 arising out of the facts alleged in the Complaint and relating to the Products will develop or be
4 discovered, and this Consent Judgment is expressly intended to cover and include all such injuries,
5 damages, liability, and claims, including all rights of action therefor. CAG has full knowledge of
6 the contents of Section 1542 of the Civil Code. CAG, on behalf of itself only, acknowledges that
7 the claims released in section 8.1 above may include unknown claims and waives Section 1542 as
8 to any such unknown claims. Section 1542 reads as follows:

9 **"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
10 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
11 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR"**

12 CAG acknowledges and understands the significance and consequences of this specific waiver of
13 Civil Code Section 1542.

14

15 9. **SEVERABILITY**

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

18

19 10. **NOTICE AND CURE**

20 10.1 No action to enforce this Consent Judgment may be commenced, and no notice of
21 violation related to the Products may be served or filed against Alleged Violators by CAG, unless
22 the party seeking enforcement or alleging violation notifies the other party of the specific acts
23 alleged to breach this Consent Judgment at least 90 days before serving or filing any motion,
24 action, or Notice of Violation and the entity receiving the notice fails to comply with the
25 requirements set forth in Section 10.2 below. Any notice to Alleged Violators must contain (a) the
26 name of the product, (b) specific dates when the product was sold in California without a
27 Proposition 65 compliant warning, (c) the store or other place at which the product was available
28 for sale to consumers, and (d) any other evidence or other support for the allegations in the notice.

1 **10.2** Within 30 days of receiving the notice described in Section 10.1, Alleged Violators
2 shall either (1) withdraw the product, (2) provide a Proposition 65 compliant warning for the
3 product, or (3) refute the information provided under Section 10.1. Should the parties be unable to
4 resolve the dispute, any party may seek relief under Section 6.

5
6 **11. GOVERNING LAW**

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

9
10 **12. PROVISION OF NOTICE**

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

13 For Consumer Advocacy Group, Inc.:

14 Reuben Yeroushalmi
15 YEROUSHALMI & ASSOCIATES
16 9100 Wilshire Boulevard, Suite 610 E
17 Beverly Hills, CA 90212
18 Facsimile No: (310) 623-1930

19 For EJK Corp.:

20 George Gigounas, Esq.
21 DLA Piper
22 555 Mission Street, Suite 2400
23 San Francisco, California 94105-2933
24 (415) 615-6005 (Office)
25 (415) 659-7305 (Fax)
26 george.gigounas@dlapiper.com (E-Mail)

27 With a copy to:

28 Stephen M. Lerner, Esq.
 MURPHY AUSTIN ADAMS SCHOENFELD LLP
 304 S Street
 Sacramento, CA 95811
 (916) 446-2300 (Office)
 (916) 329-3086 (Fax)
 slerner@murphyaustin.com (E-Mail)

1 For The Homax Group, Inc., Homax BF Holding Corp., and/or Walco-
2 Linck Company, Inc.:

3 Stephen Hill, President
4 Homax BF Holding Corp.
5 750 West Lake Cook Road, Suite 480
6 Buffalo Grove, IL 60089
7 (847) 495-4708 (Office)
8 (847) 215-4838 (Fax)

9 and

10 Ross Clawson, President
11 The Homax Group, Inc.
12 200 Westerly Road
13 Bellingham, WA 98226
14 (360) 733-9029 ext. 2700 (Office)
15 (360) 647-1071 (Fax)

16 With a copy to:

17 Stephen M. Lerner, Esq.
18 MURPHY AUSTIN ADAMS SCHOENFELD LLP
19 304 S Street
20 Sacramento, CA 95811
21 (916) 446-2300 (Office)
22 (916) 329-3086 (Fax)
23 slerner@murphyaustin.com (E-Mail)

24 **13. COURT APPROVAL**

25 13.1 If this Stipulated Consent Judgment is not approved by the Court, it shall be of no
26 further force or effect and shall never be introduced into evidence or otherwise used in any
27 proceeding for any purpose other than to allow the Court to determine if there was a material
28 breach of this Section.

13.2 CAG shall comply with Health and Safety Code section 25249.7(f) and with Title
11 California Code of Regulations section 3003.

14. EXECUTION AND COUNTER PARTS

1 This Consent Judgment may be signed in counterparts and shall be binding upon the
2 Parties hereto as if all of the Parties executed the original hereof. A facsimile or PDF signature
3 shall be valid as the original.
4

5 **15. AUTHORIZATION**

6 Each signer of this Consent Judgment certifies that he or she is fully authorized by the
7 party he or she represents to stipulate to the terms and conditions of this Consent Judgment and to
8 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
9 that party. The undersigned have read, understand and agree to all of the terms and conditions of
10 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own
11 attorneys' fees, investigative fees, and costs.
12

13 **16. RETENTION OF JURISDICTION**

14 This Court shall retain jurisdiction of this matter to implement or modify this Consent
15 Judgment and to determine the outcome of any disputed matters in the event legal proceedings are
16 initiated pursuant to Section 6 hereof.
17

18 **17. INTEGRATION**

19 This Consent Judgment contains the sole and entire agreement and understanding of the
20 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
21 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
22 and therein. There are no warranties, representations, or other agreements between the Parties
23 except as expressly set forth herein. No representations, oral or otherwise, express, or implied,
24 other than those specifically referred to in this Consent Judgment have been made by any Party
25 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
26 shall be deemed to exist or to bind any of the parties thereto.
27
28

1 CONSUMER ADVOCACY GROUP, INC.

2 Am H Marcus

Dated: 3/7/11

3
4 Name: lyn H Marcus

5 Title: President

6
7 EJK CORP.

Dated: _____

8
9 Name: _____

10
11 Title: _____

12 WALCO-LINCK COMPANY, INC.

Dated: _____

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14
15 Name: _____

16 Title: _____

17
18 THE HOMAX GROUP, INC.

Dated: _____

19
20 Name: _____

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22 Title: _____

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24 HOMAX BF HOLDING CORP.

Dated: _____

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26 Name: _____

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28 Title: _____

1 CONSUMER ADVOCACY GROUP, INC.

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Dated: _____

3

4 Name: _____

5 Title: _____

6

7 EJK CORP.

8

Dated: _____

9

10 Name: _____

11

11 Title: _____

12

12 WALCO-LINCK COMPANY, INC.

13

13 *[Signature]*

Dated: 3/3/11

14

14 Name: Ross Clawson

15

15 Title: President

16

17

17 THE HOMAX GROUP, INC.

18

18 *[Signature]*

Dated: 3/3/11

20

20 Name: Ross Clawson

21

21 Title: President

22

23

23 HOMAX BF HOLDING CORP.

24

24 *[Signature]*

Dated: 3/3/11

25

25 Name: Ross Clawson

26

26 Title: President

27

28

1 CONSUMER ADVOCACY GROUP, INC.

2

Dated: _____

3

4 Name: _____

5 Title: _____

6

7 EJK CORP.

8

Dated: 3-5-11

9

10 Name: ALBERTO

11 Title: CEO

12 WALCO-LINCK COMPANY, INC.

13

Dated: _____

14

15 Name: _____

16 Title: _____

17

18 THE HOMAX GROUP, INC.

19

Dated: _____

20

21 Name: _____

22 Title: _____

23

24 HOMAX BF HOLDING CORP.

25

Dated: _____

26

27 Name: _____

28 Title: _____

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ORDER AND JUDGMENT

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Based upon the [~~Proposed~~^{WFO}] Stipulated Consent Judgment between Consumer Advocacy Group, Inc. and EJK Corp., Walco-Linck Company, Inc. The Homax Group, Inc., and Homax BF Holding Corp, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to the terms herein.
IT IS SO ORDERED, ADJUDGED, AND DECREED.

Dated: MAY 25 2011

Winfred Y. Smith
WFS
Judge, Superior Court of the State of California
WINIFRED Y. SMITH