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1 WILLIAM VERICK, SBN 140972
2 KLAMATH ENVIRONMENTAL LAW CENTER
3 424 FIRST STREET
4 EUREKA, CA 95001
5 Telephone: (707) 268-8900
6 Facsimile: (707) 268-8901

7
8 Attorneys for Plaintiff
9 MATEEL ENVIRONMENTAL JUSTICE
10 FOUNDATION

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

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11 MATEEL ENVIRONMENTAL JUSTICE
12 FOUNDATION,
13 Plaintiff,
14 v.
15 SAFEWAY, INC., et al.,
16 Defendants.

No. CGC-09-486680

CONSENT JUDGMENT

Dept.: 302
Date: February __, 2011
Time: 9:30 am

**ENDORSED
FILED**
San Francisco County Superior Court
FEB 25 2011
CLERK OF THE COURT
BY: ERICKA LARNAUTI *EL*
Deputy Clerk

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On or about June 24, 2010, plaintiff MATEEL ENVIRONMENTAL JUSTICE
3 FOUNDATION (“MEJF”), provided a 60-day notice of violation (“Notice”) to the California
4 Attorney General, the District Attorneys of every county in California, the City Attorneys of every
5 California city with a population greater than 750,000, and defendant Ben Myerson Candy
6 Company, Inc. (“Settling Defendant”). The Notice alleged that Settling Defendant, through its sales
7 in California of leaded crystal products, including, but not limited to, leaded crystal tumblers, wine
8 glasses, champagne flutes, and cocktail glasses (“Covered Products”), was in violation of certain
9 provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
10 § 25249.5, *et seq.* (“Proposition 65”), by knowingly and intentionally exposing persons to
11 chemicals, including lead, known to the State of California to cause cancer and/or birth defects or
12 other reproductive harm, without first providing a clear and reasonable warning.

13 On or about March 27, 2009, plaintiff MEJF, acting in the public interest pursuant to Health
14 and Safety Code § 25249.7(d), filed a Complaint for Civil Penalties and Injunctive Relief in San
15 Francisco County Superior Court, Case No. 486680 against Safeway, Inc., based on allegations
16 related to the allegations contained in the Notice. On September 7, 2010, Mateel filed an Amended
17 Complaint (“Amended Complaint”) which made the same allegations as alleged in the March 27,
18 2009 original complaint, but which added Settling Defendant Ben Myerson Candy Company, Inc.
19 as an additional defendant.

20 1.2 For purposes of this Consent Judgment only, the parties stipulate that this Court has
21 jurisdiction over the allegations of violations contained in the Notices and Amended Complaint and
22 personal jurisdiction over Settling Defendant as to the acts alleged in the Amended Complaint, that
23 venue is proper in the County of San Francisco and that this Court has jurisdiction to enter this
24 Consent Judgment as a full and final settlement and resolution of the allegations contained in the
25 Amended Complaint and of all claims which were or could have been raised based on the facts
26 alleged therein or arising therefrom.

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1 1.3 The parties enter into this Consent Judgment pursuant to a full and final settlement of
2 disputed claims between the parties for the purpose of avoiding prolonged litigation. This Consent
3 Judgment and compliance with it shall not constitute an admission with respect to any allegation
4 made in the Notice or the Amended Complaint, each and every allegation of which Settling
5 Defendant denies, nor may this Consent Judgment or compliance with it be used as an admission or
6 evidence of any fact, wrongdoing, misconduct, culpability or liability on the part of the Settling
7 Defendant.

8 2. **INJUNCTIVE RELIEF-CLEAR AND REASONABLE WARNINGS**

9 2.1 Except as set forth below, within thirty (30) business days of the date notice of entry
10 of this Consent Judgment is filed and served upon Settling Defendant, Settling Defendant shall
11 provide Proposition 65 warnings for those Covered Products, and only those Covered Products, that
12 are intended for use in storing or serving food or drink, in the manner provided for in Paragraph 2.2
13 and/or in the manner specified in Paragraphs 2.3 through 2.4.

14 2.2 Product Labeling: Settling Defendant may provide a warning affixed to the
15 packaging or labeling of, or directly to, the Covered Product. The warning shall contain the same
16 language as that appearing on Exhibit A. The warning must be affixed to the packaging, labeling,
17 or the Covered Product in the condition the product is given to or chosen by the customer, and
18 displayed in a size and manner that is likely to be read and understood by an ordinary individual
19 under customary conditions of purchase.

20 2.3 By no later than thirty (30) days after the entry of this Consent Judgment, Settling
21 Defendant shall mail to the central purchasing office for all retail stores with whom it transacts
22 business for sale in California of Covered Products 1) At least five copies of the sign contained in
23 Exhibit B (“Warning Sign”) printed on 65-pound cover stock. The Warning Sign shall be 8-1/2” by
24 11” in size and shall have the exact content, form, and print style as Exhibit B. 2) A letter
25 explaining the warning program and providing posting instructions. Said items shall be sent to all
26 retail customers regardless of size, by certified mail, return receipt requested.

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1 2.4 In the event that a Settling Defendant does not receive a return receipt from the
2 certified mailing referred to in Paragraph 2.3 above, the Settling Defendant shall contact the retailer
3 to verify the address and re-mail the material referred to in paragraph 2.3 above.

4 2.5 Provided that Settling Defendant who has complied with the requirements of
5 paragraphs 2.2 and/or 2.3 and 2.4 above, Settling Defendant shall be deemed to have complied with
6 the warning requirements of Proposition 65 as to Covered Products sold at the stores owned or
7 operated by retailers that received the warning sign and letter of explanation. Provided that Settling
8 Defendant has complied with the requirements of paragraphs 2.2 and/or 2.3 and 2.4 above, Settling
9 Defendant shall not be found to have violated this Consent Judgment or Proposition 65 where a
10 retail store or any other person required to provide Proposition 65 warnings for leaded crystal fails
11 to provide such warnings.

12 2.6 Any changes to the language, format, size, or posting location of the warning
13 required by this paragraph shall only be made following receipt of written approval from the
14 California Attorney General's office.

15 2.7 The warning requirements contained in this Consent Judgment shall have no effect
16 on Covered Products sold to or shipped by Settling Defendant to a customer outside of the State of
17 California.

18 3. **MONETARY RELIEF**

19 No later than four (4) days prior to the date of the hearing on MEJF's Motion for Entry of
20 this Consent Judgment, Settling Defendant shall pay the sum of \$25,000 to the Ecological Rights
21 Foundation. The funds paid pursuant to this Paragraph 3 are to be used to inform the California
22 public about exposures to toxic chemicals and/or to help prevent exposures to such chemicals. All
23 payments made pursuant to this Paragraph 3 shall be mailed to the attention of William Verick,
24 Klamath Environmental Law Center, 424 First Street, Eureka, California 95501.

25 4. **ATTORNEYS' FEES**

26 No later than four (4) days prior to the date of the hearing on MEJF's Motion for Entry of
27 this Consent Judgment, Settling Defendant shall pay the sum of \$200,000 to the "Klamath
28 Environmental Law Center" as reimbursement for costs and attorneys' fees incurred by MEJF. The

1 attorney's fees payment shall be mailed to the attention of William Verick, Klamath Environmental
2 Law Center, 424 First Street, Eureka, California 95501. If this Consent Judgment has not been
3 approved and entered by the Court within 120 days of the execution of the agreement by the parties,
4 the payments described in paragraphs 3.1 and 4.1 above shall be promptly returned to Settling
5 Defendant. If this Consent Judgment has not been approved and entered by the Court within 120
6 days of the execution of the agreement by the parties, the payments described above shall be
7 promptly returned to Settling Defendant, and the terms of this agreement shall be null and void.

8 **5. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES**

9 The terms of this Consent Judgment are enforceable by and among the parties hereto or,
10 with respect to the injunctive relief provided for herein, by the California Attorney General.

11 **6. MATTERS COVERED BY THIS CONSENT JUDGMENT**

12 As to Covered Products, this Consent Judgment is a full, final and binding resolution
13 between the Plaintiff, acting on behalf of the public interest pursuant to Health and Safety Code §
14 25249.7(d), on the one hand, and Settling Defendant, on the other hand, of any violation of
15 Proposition 65, of all claims made or which could have been made in the Notice and/or the
16 Amended Complaint, and of any other statutory, regulatory or common law claim that could have
17 been asserted against Settling Defendant and/or its affiliates, subsidiaries, divisions, successors,
18 assigns, distributors, retailers, and/or customers for failure to provide clear, reasonable, and lawful
19 warnings of exposure to lead contained in or otherwise associated with Covered Products
20 manufactured, sold or distributed by, for, or on behalf of Settling Defendant. As to Covered
21 Products, compliance with the terms of this Consent Judgment resolves any issue, now and in the
22 future, concerning compliance by Settling Defendant and/or its affiliates, subsidiaries, divisions,
23 successors, assigns, distributors, retailers, and/or customers with the requirements of Proposition 65
24 with respect to the Covered Products. Notwithstanding any other provision of this Consent
25 Judgment, no release is given, and no issue is resolved, as to any retail seller of Covered Products
26 who, after entry of this Consent Judgment, sells Covered Products at retail, but fails to provide
27 and/or pass on the warnings that Settling Defendant has provided to that retail seller pursuant to
28 paragraphs 2.2 and/or 2.3 and 2.4 above.

1 7. **COMPREHENSIVE AND GLOBAL RELEASE**

2 7.1 As to Covered Products, MEJF, for itself and, as to matters referenced in the 60
3 Day Notice Letters, acting on behalf of the public interest pursuant to Health and Safety Code §
4 25249.7(d), releases and forever discharges any and all claims against Settling Defendant and its
5 past, present, and future parents, subsidiaries, divisions, successors, assigns, distributors, retailers,
6 and/or customers arising from any violation of Proposition 65 or the Business and Professions
7 Code, or any other statutory, common law or other claim, that was or could have been asserted
8 against such Defendant based on the facts alleged in the Amended Complaint, or facts similar to
9 those alleged. As to Covered Products, MEJF, for itself and, and as to matters referenced in the 60
10 Day Notice Letters, acting on behalf of the public interest pursuant to Health and Safety Code §
11 25249.7(d), releases and forever discharges any and all claims against Settling Defendant and its
12 past, present, and future parents, subsidiaries, divisions, successors, assigns, distributors, retailers,
13 and/or customers arising from any violation of Proposition 65 or the Business and Professions
14 Code, or any other statutory, common law or other claim, that was or could have been asserted
15 against such Defendant based on the facts alleged in the Amended Complaint, or facts similar to
16 those alleged.

17 7.2 In furtherance of the parties' intention that this Consent Judgment shall be effective
18 as a full and final accord, satisfaction and release as to Settling Defendant and its past, present, and
19 future parents, subsidiaries, divisions, successors, assigns, distributors, retailers, and/or customers of
20 and from any and all matters released hereunder, MEJF, on its own and on behalf of the public
21 interest pursuant to Health and Safety Code § 25249.7(d), acknowledges familiarity and
22 understanding of California Civil Code § 1542, which provides as follows:

23 **A general release does not extend to claims which the creditor does not**
24 **know or suspect to exist in his favor at the time of executing the release,**
25 **which if known by him must have materially affected his settlement with**
 the debtor.

26 To the extent that Section 1542 or any similar law or statute may otherwise apply to this Consent
27 Judgment, MEJF hereby waives and relinquishes as to all matters released hereunder all rights and
28 benefits it has, or may have, under Section 1542 or under the laws of any other jurisdiction to the

1 same or similar effect. MEJF further acknowledges that, subsequent to the execution of this
2 Consent Judgment, it may discover claims that were unsuspected at the time this Consent Judgment
3 was executed, and which might have materially affected its decision to execute this Consent
4 Judgment, but nevertheless MEJF releases Settling Defendant and its past, present, and future
5 parents, subsidiaries, divisions, successors, assigns, distributors, retailers, and/or customers of any
6 from any and all such claims whether known or unknown, suspected or unsuspected, at the time of
7 the execution of this Consent Judgment. Notwithstanding any other provision of this Consent
8 Judgment, no release is given, and no issue is resolved, as to any retail seller of Covered Products
9 who, after entry of this Consent Judgment, sells Covered Products at retail, but fails to provide
10 and/or pass on the warnings that Settling Defendant has provided to that retail seller pursuant to
11 paragraphs 2.2 and/or 2.3 and 2.4 above.

12 7.3 Provided that, as to plaintiff MEJF, Defendant Safeway, Inc. has stipulated to waive
13 costs in this action, then Safeway, Inc. is dismissed from this action with prejudice and MEJF shall
14 within five business days from entry of this Consent Judgment file a request for dismissal with
15 prejudice of Safeway, Inc.

16 8. **APPLICATION OF JUDGMENT**

17 The obligations of this Consent Judgment shall apply to and be binding upon all plaintiffs
18 acting in the public interest pursuant to Health and Safety Code § 25249.7 and Settling Defendant,
19 and its successors or assigns. The terms of injunctive relief contained in this Consent Judgment
20 were submitted to and discussed with the California Attorney General's office prior to the entry of
21 this Consent Judgment by the Court.

22 9. **MODIFICATION OF JUDGMENT**

23 This Consent Judgment may be modified only upon written agreement of the parties and
24 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
25 provided by law and upon entry of a modified Consent Judgment by the Court. Notwithstanding
26 any other provision of law, or the refusal to consent thereto by MEJF, the warning provisions of
27 Paragraph 2 may be modified upon a showing that the Attorney General's office consents in writing
28 to such modification. Any request to the Attorney General to modify this Consent Judgment must

1 be simultaneously served on MEJF with an opportunity for MEJF to provide its views on any
2 proposed modification to the Attorney General and to Settling Defendant.

3 **10. NOTICE**

4 10.1 When any party is entitled to receive any notice or report under this Consent
5 Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to the persons
6 listed on Exhibit C to this Consent Judgment.

7 10.2 Any party to this Consent Judgment may modify the person and address to whom
8 notice is to be sent by sending each other party notice in accordance with this Paragraph.

9 **11. AUTHORITY TO STIPULATE**

10 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
11 party he or she represents to enter into this Consent Judgment and to execute it on behalf of the
12 party represented and legally to bind that party.

13 **12. RETENTION OF JURISDICTION**

14 This Court shall retain jurisdiction of this matter to implement this Consent Judgment.

15 **13. ENTIRE AGREEMENT**

16 This Consent Judgment contains the sole and entire agreement and understanding of the
17 parties with respect to the entire subject matter hereof, and any and all prior discussions,
18 negotiations, commitments and understandings related hereto. No representations, oral or
19 otherwise, express or implied, other than those contained herein have been made by any party
20 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
21 to exist or to bind any of the parties.

22 **14. GOVERNING LAW**

23 The laws of the State of California shall govern the validity, construction and performance
24 of this Consent Judgment.

25 **15. EXECUTION IN COUNTERPARTS**

26 This Consent Judgment may be executed in counterparts and/or by facsimile, which taken
27 together shall be deemed to constitute one original document.

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3 **16. COURT APPROVAL**

4 If the Court does not approve this Consent Judgment, it shall be of no force or effect, and
5 cannot be used in any proceeding for any purpose.

6 IT IS SO STIPULATED:

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8 DATED: 1-7-11

KLAMATH ENVIRONMENTAL LAW CENTER

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By: 

William Verick
Attorneys for Plaintiff
MATEEL ENVIRONMENTAL
JUSTICE FOUNDATION

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15 DATED: 1/4/11

BEN MYERSON CANDY COMPANY, INC.

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By: 

Is: 

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25 IT IS SO ORDERED, ADJUDGED AND DECREED:

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FEB 25 2011

Dated: _____

LORETTA M. GIORGI
JUDGE OF THE SUPERIOR COURT

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EXHIBIT A

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WARNING LABEL LANGUAGE:

Consuming foods or beverages that have been kept or served in leaded crystal products exposes you to lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

EXHIBIT B

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Proposition 65 WARNING: Consuming foods or beverages that have been kept or served in leaded crystal products will expose you to lead, a chemical known to the State of California to cause birth defects or other reproductive harm.

EXHIBIT C

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[LIST OF PARTIES/COUNSEL TO RECEIVE NOTICES]

For Ben Myerson Candy Company, Inc.

Michael B. Fisher
Buchalter Nemer
1000 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90017-2457

And

Sherwood Sterling
Ben Myerson Candy Co., Inc.
6550 E. Washington Blvd.
Commerce, California 90040

For Mateel Environmental Justice Foundation

William Verick
Klamath Environmental Law Center
424 First Street
Eureka, Ca 95001