

1 LEXINGTON LAW GROUP, LLP
Mark N. Todzo, State Bar No. 168389
2 Eric S. Somers, State Bar No. 139050
Howard Hirsch, State Bar No. 213209
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL
HEALTH

FILED

SEP 17 2009

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

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN

11 CENTER FOR ENVIRONMENTAL HEALTH,)
12)
13 Plaintiff,)
14 v.)
15 FETCO HOME DECOR, INC., et al.,)
16 Defendants.)

Case No. CIV 090292

AK
**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT YOUNG'S, INC.**

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 relief
6 pursuant to the provisions of California Health & Safety Code § 25249.5, *et seq.* (“Proposition
7 65”). On or about June 25, 2009, Plaintiff filed a “Doe” amendment naming Defendant
8 Young’s, Inc. (“Young’s”) as a defendant in the Action.

9 **1.2** Young’s is a corporation that employs 10 or more persons and that
10 manufactured, distributed and/or sold picture frames (the “Covered Products”) in the State of
11 California. Plaintiff and Young’s are referred to collectively herein as the “Parties.”

12 **1.3** On or about April 7, 2009, Plaintiff served Young’s and the appropriate
13 public enforcement agencies with the requisite 60-day notice that Young’s was in violation of
14 Proposition 65. Plaintiff’s Notice and the Complaint in this Action allege that Young’s exposes
15 individuals who use or otherwise handle the Covered Products to lead and/or lead compounds
16 (referred to interchangeably herein as “Lead”), chemicals known to the State of California to
17 cause cancer, birth defects and other reproductive harm, without first providing clear and
18 reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of
19 Lead. The Notice and Complaint allege that Young’s’ conduct violates Health & Safety Code §
20 25249.6, the warning provision of Proposition 65.

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 the Complaint and
23 personal jurisdiction over Young’s as to the acts alleged in the Complaint, that venue is proper in
24 the County of Marin, and that this Court has jurisdiction to enter this Consent Judgment as a full
25 and final resolution of all claims which were or could have been raised in the Complaint against
26 Young’s 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. By executing this

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.** Within sixty days of entry of this Consent
10 Judgment (the "Compliance Date"), Young's shall not manufacture, distribute, ship, or sell, or
11 cause to be manufactured, distributed, shipped or sold, any Covered Product that is comprised of
12 any material that contains Lead in concentrations that exceed 200 contains parts per million
13 ("ppm") Lead (the "Reformulation Standard").

14 **2.2 Certification of Level from Suppliers.** Young's shall obtain written
15 certification with corresponding test results from its suppliers of the Covered Products certifying
16 that the Covered Products meet the Reformulation Standard.

17 **2.3 Testing.** In order to ensure compliance with the requirements of Section
18 2.1, Young's shall conduct (or cause to be conducted) testing to confirm that the Covered
19 Products are not comprised of any materials that contain Lead concentrations exceeding the
20 Reformulation Standard. All testing pursuant to this section shall be performed by an
21 independent laboratory pursuant to the test protocol attached hereto as Exhibit A (the "Test
22 Protocol"). The results of all testing performed pursuant to this Section 2 shall be made
23 available to both CEH and Young's.

24 **2.3.1 Random Testing.** Testing pursuant to this Section 2.3
25 shall be performed on randomly selected units in accordance with Young's' usual testing
26 practices. At a minimum, Young's shall test at least 5 units of Covered Product from each of the
27 first two shipments from each supplier following the Compliance Date. For the remainder of the
28 shipments following the Compliance Date, Young's shall test at least 2 units per shipment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2.3.2 Products that Exceed Reformulation Standard

Pursuant to Young’s Testing. If the results of the testing required pursuant to Section 2.3 show levels of lead exceeding the Reformulation Standard, Young’s shall: (1) refuse to accept all of the Covered Products that were purchased under the particular purchase order; (2) send a notice to the supplier explaining that such Covered Products do not comply with the supplier’s certification; and (3) apply the testing frequency pursuant to Section 2.3.1 for the next order purchased from the supplier as if such purchase were the first shipment following the Compliance Date.

2.4 Plaintiff’s Confirmatory Testing. Plaintiff may, at its discretion, conduct periodic testing of the Covered Products. Any such testing will be conducted pursuant to the Test Protocol at an independent laboratory. In the event that Plaintiff’s testing demonstrates Lead levels in excess of the Reformulation Standard for one or more Covered Products, Plaintiff shall inform Young’s of the violation(s), including information sufficient to permit Young’s to identify the Covered Product(s). Plaintiff and Young’s shall then meet and confer in an attempt to informally resolve the alleged violation. Should the parties be unable to informally resolve the alleged violation within 30 days, Plaintiff may thereafter file a motion to enforce this Consent Judgment pursuant to Section 5.

2.5 Stipulated Penalties. In addition to any other remedies provided by law, Young’s shall be liable for stipulated penalties if it violates the Reformulation Standard. The stipulated penalty shall be as follows for each unit of Covered Product for which Plaintiff produces a test result with Lead levels exceeding the Reformulation Standard:

- First Occurrence: \$250
- Second Occurrence: \$500
- Third Occurrence: \$750
- Thereafter: \$1,000

3. SETTLEMENT PAYMENTS

3.1 Within 10 days of the Court’s entry of this Consent Judgment, Young’s shall pay the sum of \$22,500 as a settlement payment. This total shall be paid in three separate

1 checks delivered to the offices of the Lexington Law Group, LLP at the address set forth in
2 Section 12 below and made payable and allocated as follows. Any failure by Young's to comply
3 with the payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for
4 each day after the delivery date the payment is received. The late fees required under this
5 section shall be recoverable, together with reasonable attorneys' fees, in an enforcement
6 proceeding brought pursuant to Section 5 of this Consent Judgment.

7 **3.1.1 Penalty:** The sum of \$1,000 in penalties pursuant to Health and
8 Safety Code § 25249.7(b). This payment shall be made by check payable to Center for
9 Environmental Health. CEH shall apportion the penalties in accordance with Health and Safety
10 Code § 25249.12.

11 **3.1.2 Monetary Payment in Lieu of Penalty:** \$7,250 shall be paid to
12 Plaintiff in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment
13 shall be made by check payable to Center for Environmental Health. Plaintiff shall use such
14 funds to continue its work protecting people from exposures to toxic chemicals. As part of this
15 work, Plaintiff intends to conduct periodic testing of the Products as set forth in Section 2.4.

16 **3.1.3 Attorneys' Fees and Costs:** \$14,250 shall be used to reimburse
17 Plaintiff and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and
18 any other costs incurred as a result of investigating, bringing this matter to Young's' attention,
19 litigating and negotiating a settlement in the public interest. This payment shall be made by
20 check payable to Lexington Law Group, LLP.

21 **4. MODIFICATION OF CONSENT JUDGMENT**

22 4.1 This Consent Judgment may be modified by written agreement of Plaintiff
23 and Young's, or upon motion of Plaintiff or Young's as provided by law.

24 4.2 CEH intends to enter into agreements with other entities that manufacture,
25 distribute and/or sell Products. Should Young's determine that the provisions of any such
26 Consent Judgment with a similarly situated manufacturer or distributor of products are less
27 stringent, Young's may request a modification of this Consent Judgment to conform with the
28 terms of the later entered Consent Judgment. Upon 30 days prior written notice of Young's

1 request for a modification, CEH shall inform Defendant whether it will agree to such
2 modification. If CEH does not agree, Young's may move the Court for a modification pursuant
3 to this section.

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 **5.1** Plaintiff may, by motion or application for an order to show cause before
6 the Superior Court of the County of Marin, enforce the terms and conditions contained in this
7 Consent Judgment. Should Plaintiff prevail on any motion or application under this section,
8 Plaintiff shall be entitled to its reasonable attorneys' fees and costs associated with such motion
9 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 Young's of any violation of Proposition 65 that could have been asserted against
17 Young's in the Complaint based on Young's' failure to warn about exposure to Lead contained
18 in the Covered Products, with respect to any Covered Products manufactured, distributed or sold
19 by Young's on or prior to the date of entry of this Consent Judgment. CEH hereby releases and
20 discharges Young's and its parents, subsidiaries, affiliates, directors, officers, employees, agents,
21 attorneys, distributors, or customers (including but not limited to Wal-Mart Stores, Inc.) with
22 respect to any violation of Proposition 65 that was or could have been asserted against Young's
23 based arising from Products manufactured, distributed or sold by Young's on or prior to the date
24 of entry of this Agreement. Compliance with the terms of this Agreement constitutes
25 compliance with Proposition 65 for purposes of Lead exposures from the Products. This release
26 does not limit or effect the obligations of any party created under this Consent Judgment.

27 **8. SEVERABILITY**

28 **8.1** In the event that any of the provisions of this Consent Judgment are held

1 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
2 affected.

3 **9. SPECIFIC PERFORMANCE**

4 **9.1** The parties expressly recognize that Young's' obligations under this
5 Consent Judgment are unique. In the event that Young's is found to be in breach of this Consent
6 Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree that it
7 would be extremely impracticable to measure the resulting damages and that such breach would
8 cause irreparable damage. Accordingly, Plaintiff, in addition to any other available rights or
9 remedies, may sue in equity for specific performance, and Young's expressly waives the defense
10 that a remedy in damages will be adequate.

11 **10. GOVERNING LAW**

12 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
13 State of California.

14 **11. RETENTION OF JURISDICTION**

15 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
16 the terms this Consent Judgment.

17 **12. PROVISION OF NOTICE**

18 **12.1** All notices required pursuant to this Consent Judgment and
19 correspondence shall be sent to the following:

20 For Plaintiff:

21 Howard Hirsch
22 Lexington Law Group
23 1627 Irving Street
San Francisco, CA 94122

24 For Young's:

25 Bruce Nye
26 Adams | Nye | Trabani | Becht LLP
27 222 Kearny Street, 7th Floor
San Francisco, CA 94108-4521

28 **13. COURT APPROVAL**

13.1 If this Consent Judgment is not approved by the Court, it shall be of no

1 further force or effect.

2 **14. EXECUTION AND COUNTERPARTS**

3 **14.1** The stipulations to this Consent Judgment may be executed in
4 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
5 document.

6 **15. AUTHORIZATION**

7 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully
8 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
9 into and execute the Consent Judgment on behalf of the party represented and legally bind that
10 party. The undersigned have read, understand and agree to all of the terms and conditions of this
11 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
12 costs.

13 **AGREED TO:**

14
15 CENTER FOR ENVIRONMENTAL HEALTH

16
17 

18 Michael Green, Executive Director
19 Center for Environmental Health

Dated: 7/16/09

20 YOUNG'S, INC.

21
22 Dated: _____

23
24 _____
25 Printed Name

26 _____
27 Title

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORDER AND JUDGMENT

Based upon the Stipulated Consent Judgment between Plaintiff and Young's, 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

EXHIBIT A
(Test Methodology)

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

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