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9 CENTER FOR ENVIRONMENTAL
10 HEALTH

ENDORSED
FILED
San Francisco County Superior Court

OCT 20 2009

GORDON PARK-LI, Clerk
BY: _____
Deputy Clerk

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

13 CENTER FOR ENVIRONMENTAL HEALTH,
14 a non-profit corporation,

15 Plaintiff,

16 v.

17 CREATIVE DESIGN, LTD., and Defendant
18 DOES 1 through 200, inclusive,,

19 Defendant.

Case No. CGC-09-491452

~~PROPOSED~~ CONSENT
JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On August 14, 2009, plaintiff the Center for Environmental Health (“CEH”), a non-
3 profit corporation acting in the public interest, filed a complaint in San Francisco County Superior
4 Court, entitled *Center for Environmental Health v. Creative Design, Ltd.*, San Francisco County
5 Superior Court Case Number CGC-09-491452 (the “Action”), for civil penalties and injunctive relief
6 pursuant to the provisions of California Health & Safety Code §25249.5 *et seq.* (“Proposition 65”).

7 1.2 Defendant Creative Design, Ltd. (“Creative Design”) is a “person in the course of
8 doing business” under Proposition 65 and manufactures, distributes and/or sells decorative ornaments
9 (the “Products”) in the State of California. Creative Design and CEH are referred to collectively
10 herein as the Parties.

11 1.3 On or about June 5, 2009, CEH served Creative Design and the appropriate public
12 enforcement agencies with the requisite 60-day notice that Creative Design is in violation of
13 Proposition 65. CEH’s notice and the Complaint in this Action allege that Creative Design exposes
14 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
15 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer, birth
16 defects and other reproductive harm, without first providing clear and reasonable warning to such
17 persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and Complaint
18 allege that Creative Design’s conduct violates Health & Safety Code §25249.6, the warning provision
19 of Proposition 65.

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and personal
22 jurisdiction over Creative Design as to the acts alleged in CEH’s Complaint, that venue is proper in
23 the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
24 full and final resolution of all claims which were or could have been raised in the Complaint based on
25 the facts alleged therein.

26 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of certain
27 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
28 Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties’ intent that

1 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
2 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent Judgment
3 constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law,
4 or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right,
5 remedy, argument or defense the Parties may have in this or any other or future legal proceedings.
6 This Consent Judgment is the product of negotiation and compromise and is accepted by the parties,
7 for purposes of settling, compromising and resolving issues disputed in this action, including future
8 compliance by Creative Design with Section 2 of this Consent Judgment, and shall not be used for
9 any other purpose, or in any other matter.

10 **2. COMPLIANCE – INJUNCTIVE RELIEF**

11 2.1 **Lead Reformulation.** After the date of entry of this Consent Judgment (the
12 “Compliance Date”), Creative Design shall not manufacture, distribute, ship, or sell, or cause to be
13 manufactured, distributed, shipped or sold, any Product that contains Lead in concentrations that
14 exceed 200 parts per million (“ppm”) or is comprised of any material accessible to a consumer during
15 Product use that contains Lead in concentrations that exceed 200 ppm. Products that Creative Design
16 has manufactured or caused to be manufactured prior to the Compliance Date shall not be subject to
17 this requirement or any of the other requirements of Section 2, with the exception of Section 2.4.

18 2.2 **Certification of level from suppliers.** To effectuate the requirement of Section 2.1,
19 Creative Design shall require written certification from its supplier and test results for each Product
20 order showing that neither the Products, nor any materials of which the Products are comprised and
21 which are accessible to contact by a consumer during Product use, contain Lead concentrations
22 exceeding 200 ppm.

23 2.3 **Testing By Creative Design.** Creative Design shall conduct periodic and routine spot
24 testing of the Products to ensure that neither the Products, nor any materials of which the Products are
25 comprised and which are accessible to contact by a consumer during Product use, contain Lead
26 concentrations exceeding 200 ppm.

27 2.4 **Warnings for Products That Exceed the 200 ppm Lead Standard.** Regardless of
28 the date on which it was or is manufactured, if Creative Design obtains information indicating that

1 the levels of Lead exceed 200 ppm for a Product or any materials from which it is comprised that are
2 accessible to a consumer during Product use, Creative Design shall not ship the Product for sale
3 anywhere in the United States unless such Product, or associated consumer packaging in which it
4 resides, bears a label or hang tag containing the following language:

5 **“WARNING: This ornament contains lead, a chemical known to**
6 **cause birth defects and other reproductive harm. Wash hands**
after handling.”

7 This warning language must be displayed in a font size that it is legible to a consumer prior to
8 purchase and it shall not be preceded, followed, or surrounded by words that introduces, modifies,
9 qualifies, or explains the required text, such as “legal notice required by law.”

10 **2.5 Phase-out of warning option.** As of January 1, 2011, Creative Design shall not
11 manufacture, distribute, or ship, or cause to be manufactured, distributed, or shipped, with or without
12 the warning described in Paragraph 2.4 above, any Product that contains Lead in concentrations that
13 exceed 200 ppm or is comprised of any material accessible to a consumer during Product use that
14 contains Lead in concentrations that exceed 200 ppm.

15 **2.6 Documentation.** Creative Design shall maintain documentation of its compliance
16 with sections 2.2, 2.3, and 2.4, including not limited to copies of its supplier certifications and test
17 results, for a period of three years. Such documentation shall be made available to CEH upon CEH’s
18 reasonable written request.

19 **2.7 Testing by CEH.** CEH intends to conduct periodic testing of Products sold in
20 California for which the warning described in Section 2.4 is not provided. In the event that CEH’s
21 testing demonstrates Lead levels in excess of 200 ppm for one or more such Products, CEH shall
22 inform Creative Design of the alleged violation(s) and provide the associated test results and
23 information sufficient to permit Creative Design to identify the Product(s) in question. Creative
24 Design shall, within 30 days following receipt of such notice, provide CEH, at the address listed in
25 Section 12, with its supplier certification and testing information. Unless it can otherwise
26 demonstrate to CEH’s reasonable satisfaction that CEH’s test result is erroneous or that the Product
27 in question was shipped by Creative Design prior to the Compliance Date, Creative Design shall also
28 provide a stipulated payment in lieu of penalties as set forth below.

1 First Occurrence: \$500
2 Second Occurrence: \$1,000
3 Third Occurrence: \$2,000
4 Thereafter: \$5,000

5 If Creative Design fails to provide CEH with information demonstrating that it complied with
6 Section 2.1 for a Product without the warnings required by Section 2.4 that it shipped following the
7 Compliance Date, the stipulated penalty shall be as follows:

8 First Occurrence: \$1,000
9 Second Occurrence: \$2,500
10 Third Occurrence: \$5,000
11 Thereafter: \$10,000

12 3. SETTLEMENT PAYMENTS

13 3.1 Within 20 days of notice of entry of this Consent Judgment, Creative Design shall pay
14 a total of \$35,000 as a settlement payment. This total shall be paid in three separate checks delivered
15 to the offices of the Lexington Law Group, LLP at the address set forth in Section 12 below and
16 made payable and allocated as follows. Any failure by Creative Design to comply with the payment
17 terms herein shall be subject to a stipulated late fee in the amount of \$100 for each day after the
18 delivery date the payment is received. The late fees required under this Section shall be recoverable,
19 together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 5
20 of this Consent Judgment.

21 **3.1.1 Penalty:** The sum of \$1,000 in penalties pursuant to Health and Safety Code
22 § 25249.7(b). This payment shall be made by check payable to Center for Environmental Health.
23 CEH shall apportion the penalties in accordance with Health and Safety Code § 25249.12.

24 **3.1.2 Monetary Payment in Lieu of Penalty:** The sum of \$11,150 shall be paid to
25 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment shall be
26 made by check payable to Center for Environmental Health. CEH shall use such funds to continue its
27 work protecting people from exposures to toxic chemicals. As part of this work, CEH intends to
28 conduct periodic testing of the Products as set forth in Section 2.4.

3.1.3 Attorneys' Fees and Costs: The sum of \$22,850 shall be used to reimburse
CEH and its attorneys for a portion of their reasonable investigation fees and costs, attorneys' fees,

1 and any other costs incurred as a result of investigating, bringing this matter to Creative Design's
2 attention, litigating and negotiating a settlement in the public interest. This payment shall be made by
3 check payable to Lexington Law Group.

4 **4. MODIFICATION OF CONSENT JUDGMENT**

5 4.1 This Consent Judgment may be modified by written agreement of CEH and Creative
6 Design, or upon granting of a motion of CEH or Creative Design brought before this Court as
7 provided by law.

8 **5. ENFORCEMENT OF CONSENT JUDGMENT**

9 5.1 CEH may, by motion or application for an order to show cause before the Superior
10 Court of the County of San Francisco, seek to enforce the terms and conditions contained in this
11 Consent Judgment in the event that Creative Design does not to comply with them. Should CEH
12 prevail on any motion or application under this section, CEH shall also be entitled to seek its
13 reasonable attorneys' fees and costs associated with such motion or application.

14 **6. APPLICATION OF CONSENT JUDGMENT**

15 6.1 The obligations of this Consent Judgment shall apply to and be binding upon Creative
16 Design, its divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

17 **7. RELEASE**

18 7.1 This Consent Judgment is a full, final and binding resolution between CEH on behalf
19 of itself and the public interest and Creative Design of any violation of Proposition 65 that was or
20 could have been asserted in the Complaint against Creative Design or its parents, subsidiaries,
21 affiliates, directors, officers, employees, agents, attorneys, downstream distributors, and retailers or
22 other customers (including but not limited to Michaels Stores, Inc.) based on failure to warn about
23 alleged exposure to Lead contained in the Products, with respect to any Products shipped for sale by
24 Creative Design on or prior to the date of entry of this Consent Judgment. Compliance with the terms
25 of this Consent Judgment by Creative Design shall constitute compliance with Proposition 65 with
26 respect to Lead in any Products that are shipped for sale by Creative Design following the
27 Compliance Date. This release does not limit or effect the rights or obligations of any party created
28 under this Consent Judgment.

1 **8. SEVERABILITY**

2 8.1 In the event that any of the provisions of this Consent Judgment are held by a court to
3 be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

4 **9. SPECIFIC PERFORMANCE**

5 9.1 The Parties expressly recognize that Creative Design's obligations under this Consent
6 Judgment are unique. In the event that Creative Design is found to be in breach of this Consent
7 Judgment, the Parties agree that CEH may obtain specific performance in equity and Creative Design
8 expressly waives the defense that a remedy at law will be adequate.

9 **10. GOVERNING LAW**

10 10.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California.

12 **11. RETENTION OF JURISDICTION**

13 11.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
14 this Consent Judgment.

15 **12. PROVISION OF NOTICE**

16 12.1 All notices required pursuant to this Consent Judgment shall be sent by electronic mail
17 to the following:

18 For CEH: Howard Hirsch
19 Lexington Law Group, LLP
20 1627 Irving Street
21 San Francisco, CA 9412
22 Email: hhirsch@lexlawgroup.com

23 For Creative Design: Wayne Shen
24 Creative Design Ltd.
25 10-13, 14/F, Vanta Industrial Centre
26 21-33 Tai Lin Pai Road
27 Kwai Chung, NT, Hong Kong
28 Email: wshen@cdhk.net

With a courtesy copy to:

Robert L. Falk
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482

Email: RFalk@mofocom

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3 **13. COURT APPROVAL**

4 13.1 If this Consent Judgment is not approved by the Court, it shall be of no further force or
5 effect. The Parties agree to support a Motion for Approval of this Consent Judgment, which shall be
6 be promptly prepared and filed by CEH following its execution by the Parties.

7 **14. EXECUTION AND COUNTERPARTS**


8 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
9 means of facsimile, which taken together shall be deemed to constitute one document.

10 **15. AUTHORIZATION**

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

16 **AGREED TO:**

17 CENTER FOR ENVIRONMENTAL HEALTH

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20 _____
21 Michael Green, Executive Director
22 Center for Environmental Health
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CREATIVE DESIGN, LTD.


Signature

WAYNE SHEN
Printed Name

Executive Director
Title

