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6 CENTER FOR ENVIRONMENTAL HEALTH
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
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11 CENTER FOR ENVIRONMENTAL,)
HEALTH, a non-profit corporation,)
12 Plaintiff,)
13 v.)
14 A & W PRODUCTS CO., INC.; and)
15 Defendant DOES 1 through 200, inclusive;)
16 Defendants.)
17

CASE NO. CGC-10-496081

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT A & W PRODUCTS
CO., INC.**

ENDORSED
FILED
San Francisco County Superior Court

MAY 18 2010

CLERK OF THE COURT
BY: MARJORIE SCHWARTZ-SCOTT
Deputy Clerk

1 **1. INTRODUCTION**

2 **1.1** On January 15, 2010, Plaintiff The Center for Environmental Health
3 ("CEH"), a non-profit corporation acting in the public interest, filed a complaint in San Francisco
4 County Superior Court, entitled *Center for Environmental Health v. A & W Products Co., Inc.*,
5 San Francisco County Superior Court Case Number CGC-10-496081 (the "Action"), for civil
6 penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5 et seq. ("Proposition 65").

8 **1.2** Defendant A & W Products Co., Inc. ("A & W") is a "person in the course
9 of doing business" under Proposition 65 and manufactures, distributes and/or sells vinyl pencil
10 pouches (the "Products") in the State of California. A & W and CEH are referred to collectively
11 herein as the Parties.

12 **1.3** On or about September 25, 2009, CEH served A & W and the appropriate
13 public enforcement agencies with the requisite 60-day notice that A & W is in violation of
14 Proposition 65. CEH's notice and the Complaint in this Action allege that A & W exposes
15 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
16 interchangeably herein as "Lead"), chemicals known to the State of California to cause cancer,
17 birth defects and other reproductive harm, without first providing clear and reasonable warning
18 to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and
19 Complaint allege that A & W's conduct violates Health & Safety Code §25249.6, the warning
20 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 CEH's Complaint and
23 personal jurisdiction over A & W as to the acts alleged in CEH's Complaint, that venue is proper
24 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 effective on the date when
28 this Consent Judgment is approved by the Court by the signing of the Order below, and

1 conditional upon such approval, pursuant to a settlement of certain disputed claims between the
2 Parties as alleged in the Complaint. By executing this Consent Judgment, the Parties do not
3 admit any facts or conclusions of law. It is the Parties' intent that nothing in this Consent
4 Judgment shall be construed as an admission by the Parties of any fact, conclusion of law, issue
5 of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
6 construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation
7 of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
8 argument or defense the Parties may have in any other or future legal proceedings. This Consent
9 Judgment is the product of negotiation and compromise and is accepted by the parties, for
10 purposes of settling, compromising and resolving issues disputed in this action, including future
11 compliance by A & W with Section 2 of this Consent Judgment, and shall not be used for any
12 other purpose, or in any other matter.

13 **2. COMPLIANCE - REFORMULATION**

14 **2.1 Lead Reformulation.** As of the date when the Court signs the Order
15 below approving this Consent Judgment, (the "Compliance Date"), A & W agrees as follows:

16 (a) A&W shall not manufacture, ship, or sell or offer for sale, or cause to be
17 manufactured, distributed, shipped, or sold, any Product that contains any component, or is made
18 of any material, that contains more than 0.03 percent Lead by weight (300 parts per million
19 ("ppm"));

20 (b) A & W shall not, on or after August 14, 2011, A & W shall not manufacture,
21 distribute, ship, or sell, or cause to be manufactured, distributed, shipped, or sold, any Product
22 unless such Product contains less than 0.01 percent Lead by weight (100 ppm), provided that, if
23 the Consumer Product Safety Commission ("CPSC") determines prior to August 14, 2011 that it
24 is not technically feasible for manufacturers of Products to meet this 100 ppm limit, A & W shall
25 be required to comply with the provisions of 2.1(a) herein.

26 **2.2 Supplier Specifications, Certification, and Testing.** A & W shall
27 include in its specifications a requirement that suppliers provide Product that complies with the
28 Lead content requirements of Section 2.1 of this Consent Judgment. A & W shall request from

1 its suppliers written certification with corresponding test results of the Products certifying that
2 the Products meet the requirements of Section 2.1.

3 **2.3 Pre-market testing.** On or before the Compliance Date, A & W, itself or
4 through its agents, shall test a representative sample of the various designs of the Product it is
5 currently offering for sale to determine whether such Products comply with the levels of lead as
6 set forth in Section 2.1 of this Consent Judgment. Such testing shall be conducted by an
7 independent laboratory.

8 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
9 of the Products. Such testing shall be conducted by an independent laboratory. In the event that
10 CEH's testing demonstrates Lead levels in excess of the requirements of Section 2.1 for any
11 Product sold in California, CEH shall inform A & W of the alleged violation(s), including
12 information sufficient to permit A & W to identify the Product(s). A & W shall, within twenty
13 (20) days following such notice, provide CEH at the address listed in Section 11, with: (a)
14 information demonstrating its compliance with Sections 2.2 and 2.3 of this Consent Judgment;
15 and (b) a detailed description of corrective action that it has undertaken or proposes to undertake
16 to address the alleged violation. If there is a dispute over the sufficiency of the proposed
17 corrective action or its implementation, CEH shall promptly notify A & W and the Parties shall
18 meet and confer before CEH seeks the intervention of the Court to resolve the dispute. This
19 remedy is in addition to any other remedies available to enforce the terms of this Consent
20 Judgment.

21 **2.5 Documentation.** The certifications and results of all testing performed
22 and obtained from suppliers pursuant to this Consent Judgment shall be retained by A & W for a
23 period of three years from the date of the certification or testing and shall be made available to
24 CEH upon request.

25 **3. SETTLEMENT PAYMENTS**

26 **3.1** A & W shall pay a total of \$30,000 as a settlement payment. This total
27 shall be paid as follows: (a) \$15,000 within thirty (30) days after the last signature on this
28 consent agreement; (b) \$15,000 thirty (30) days thereafter. In the event that the Consent

1 Judgment is not approved by the Court, the total amount paid by A & W shall be repaid by CEH
2 to A & W within three (3) days of that decision. Each payment by A & W shall be made by
3 check payable to the Lexington Law Group and shall be delivered to the offices of the Lexington
4 Law Group at the address set forth in Section 11 below. Any failure by A & W to comply with
5 the payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each
6 day after the delivery date the payment is received. The late fees required under this section
7 shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding
8 brought pursuant to section 5 of this Consent Judgment. The total amount paid by A & W shall
9 be allocated by CEH as follows:

10 **3.1.1 Penalty:** The sum of \$1,000 in penalties pursuant to Health and
11 Safety Code § 25249.7(b). CEH shall provide \$750 of this amount (75% of the civil penalty) to
12 the Safe Drinking Water and Toxic Enforcement Fund in accordance with Health and Safety
13 Code § 25249.12.

14 **3.1.2 Monetary Payment in Lieu of Penalty:** \$9,500 shall be paid to
15 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use
16 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
17 this work, CEH intends to conduct periodic testing of the Products as set forth in Section 2.4. In
18 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
19 percent of such funds to award grants to grassroots environmental justice groups working to
20 educate and protect people from exposures to toxic chemicals. The method of selection of such
21 groups can be found at the CEH web site at www.ceh.org/justicefund

22 **3.1.3 Attorneys' Fees and Costs:** \$19,500 shall be used to reimburse
23 CEH and its attorneys for a portion of their reasonable investigation fees and costs, attorneys'
24 fees, and any other costs incurred as a result of investigating, bringing this matter to A & W's
25 attention, litigating and negotiating a settlement in the public interest, and securing entry of this
26 Consent Judgment.

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1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** This Consent Judgment may be modified by written agreement of CEH
3 and A & W, or upon motion of CEH or A & W 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 before the Superior Court of the County of San Francisco, enforce the terms and conditions
7 contained in this Consent Judgment. Should the moving party prevail on any motion,
8 application for an order to show cause or other proceeding to enforce a violation of this Consent
9 Judgment, the moving party shall be entitled to its reasonable attorneys' fees and costs incurred
10 as a result of such motion or application.

11 **6. APPLICATION OF CONSENT JUDGMENT**

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

15 **7. RELEASE**

16 **7.1** This Consent Judgment is a full, final and binding resolution between
17 CEH, on behalf of itself and on behalf of the general public, and A & W of any violation of
18 Proposition 65 that was or could have been asserted in the Complaint against A & W or its
19 parents, subsidiaries, or directors, based on failure to warn about alleged exposure to Lead
20 contained in the Products, with respect to any Products manufactured, distributed or sold by A &
21 W on or prior to the date of entry of this Consent Judgment. Compliance with the terms of this
22 Consent Judgment by A & W shall constitute compliance with Proposition 65 by A & W with
23 respect to any alleged failure to warn about exposure to Lead contained in the Products. This
24 release does not limit or effect the obligations of any party created under this Consent Judgment.

25 **8. SEVERABILITY**

26 **8.1** In the event that any of the provisions of this Consent Judgment are held
27 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
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9. GOVERNING LAW

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

10. RETENTION OF JURISDICTION

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

11. PROVISION OF NOTICE

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

For CEH: Howard Hirsch
Lexington Law Group
1627 Irving Street
San Francisco, CA 94122

For A & W: Shelley Hurwitz
Holland & Knight
633 West Fifth Street, 21st Floor
Los Angeles, CA 90071

12. COURT APPROVAL

12.1 If this Consent Judgment is not approved by the Court, it shall be of no further force or effect. CEH will prepare and file a Motion for Approval of this Consent Judgment. The Parties agree to support a Motion for Approval of this Consent Judgment.

13. EXECUTION AND COUNTERPARTS

13.1 The stipulations to this Consent Judgment maybe 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 provided herein, each party is to bear its own fees and costs.

1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH

Dated: March 16, 2010

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4 _____
Signature

5 CHARLIE PIZARRO

6 _____
Printed Name

7 ASSOCIATE DIRECTOR

8 _____
Title

9
10 A & W PRODUCTS CO., INC.

Dated: March ____, 2010

11 _____
Signature

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13 _____
Printed Name

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15 _____
Title

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1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH

Dated: March ____, 2010

3 _____
4 Signature

5 _____
6 Printed Name

7 _____
8 Title

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10 A & W PRODUCTS CO., INC.

Dated: March 5th, 2010

11 *Georg Augustin*
Signature

12 *Georg Augustin*
13 Printed Name

14 *Executive*
15 Title

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between the Parties, the settlement is approved and judgment is hereby entered according to the terms herein.

MAY 18 2010

Dated: _____

PETER J. BUSCH
Judge, Superior Court of the State of California

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PETER J. BUSCH