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FILED

MAR 22 2011

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

10
11 CENTER FOR ENVIRONMENTAL HEALTH,
12 a non-profit corporation,

13 Plaintiff,

14 v.

15 CUSTOM ACCESSORIES, INC.; J&B
16 IMPORTERS, INC.; and Defendant DOES 1
through 200, inclusive,

17 Defendants.

Case No. CV-1005572

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[PROPOSED] CONSENT JUDGMENT
AS TO J&B IMPORTERS, INC.

1 **1. INTRODUCTION**

2 **1.1** On October 20, 2010, Plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint entitled *Center*
4 *for Environmental Health v. Custom Accessories, Inc., et al.*, Marin County Superior Court Case
5 Number CV-1005572, for civil penalties and injunctive relief pursuant to the provisions of Cal.
6 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) and naming J&B Importers, Inc.
7 (“Defendant”), among others, as a defendant.

8 **1.2** Defendant J&B Importers, Inc. is a corporation that employs ten or more
9 persons and has distributed and/or sold air pumps (the “Products”) in the State of California. J&B
10 Importers, Inc. asserts that it has endeavored to place the warning required by Health & Safety
11 Code § 25249.6 on the Products from October 2009 hence.

12 **1.3** On or about July 2, 2010, CEH served Defendant J&B Importers, Inc. and
13 the appropriate public enforcement agencies with the requisite 60-day Notice (the “Notice”)
14 alleging that Defendant was in violation of Proposition 65. Although Defendant J&B Importers,
15 Inc. claims it did not receive said Notice, J&B Importers, Inc. has agreed to address the issues
16 noted herein on behalf of itself and all wholesalers and retailers which were allegedly involved in
17 the distribution and sale of the Products. CEH’s Notice and the Complaint in the CEH Action
18 allege that Defendant J&B Importers, Inc. exposes people who use or otherwise handle the
19 Products to lead and lead compounds (collectively referred to herein as “Lead”), chemicals
20 known to the State of California to cause cancer, birth defects and other reproductive harm,
21 without first providing clear and reasonable warning to such persons regarding the
22 carcinogenicity and reproductive toxicity of Lead. The Notice and Complaint allege that
23 Defendant J&B Importers, Inc.’s conduct violates Health & Safety Code § 25249.6, the warning
24 provision of Proposition 65. Defendant disputes such allegations and asserts that all of its
25 Products comply with all applicable laws.

26 **1.4** For purposes of this Consent Judgment only, CEH and Defendant J&B
27 Importers, Inc. stipulate that this Court has jurisdiction over the subject matter of the violations
28 alleged in CEH’s Complaint and personal jurisdiction over Defendant J&B Importers, Inc. as to

1 the acts alleged in CEH's Complaint, that venue is proper in the County of Marin, and that this
2 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims
3 which were or could have been raised in the Complaint based on the facts alleged therein.

4 **1.5** CEH and Defendant J&B Importers, Inc. enter into this Consent Judgment
5 pursuant to a settlement of certain disputed claims between the parties as alleged in the
6 Complaint. By executing this Consent Judgment, CEH and Defendant J&B Importers, Inc. do not
7 admit any facts or conclusions of law. It is the intent of CEH and Defendant J&B Importers, Inc.
8 that nothing in this Consent Judgment shall be construed as an admission by J&B Importers, Inc.
9 of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
10 Consent Judgment constitute or be construed as an admission by J&B Importers, Inc. of any fact,
11 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
12 prejudice, waive or impair any right, remedy, argument or defense CEH and J&B Importers, Inc.
13 may have in this or any other or future legal proceedings.

14 **2. COMPLIANCE – REFORMULATION**

15 **2.1 Reformulation Standard.** Upon entry of this Consent Judgment (the
16 "Compliance Date"), Defendant J&B Importers, Inc. shall not distribute or sell, or cause to be
17 sold, any Products in the United States that contain any vinyl material or component or any Paint
18 or Surface Coating that contains more than 90 parts per million ("ppm") of Lead. For purposes of
19 this Consent Judgment, "Paint or Surface Coating" shall carry the same meaning as "Paint or
20 other similar surface coating" under 16 C.F.R. § 1303.2(b)(1) ("Paint and other similar surface-
21 coating materials means a fluid, semifluid, or other material, with or without a suspension of
22 finely divided coloring matter, which changes to a solid film when a thin layer is applied to a
23 metal, wood, stone, paper, leather, cloth, plastic, or other surface. This term does not include
24 printing inks or those materials which actually become a part of the substrate, such as the pigment
25 in a plastic article, or those materials which are actually bonded to the substrate, such as by
26 electroplating or ceramic glazing").

27 **2.2 Certification From Suppliers.** Prior to the Compliance Date, Defendant
28 J&B Importers, Inc. shall issue specifications to its suppliers requiring that the Products comply

1 with the reformulation requirements of Section 2.1.

2 **2.3 Defendant's Testing.** In order to assure compliance with the requirements
3 of Section 2.1, Defendant J&B Importers, Inc. shall cause to be conducted random, spot tests of
4 incoming Products to confirm that the Products do not exceed the reformulation requirements of
5 Section 2.1. This testing may be performed by Defendant J&B Importers, Inc. or an independent
6 laboratory. Defendant J&B Importers, Inc. or the independent laboratory, as the case may be,
7 shall use a method of sufficient sensitivity to detect Lead at or above 90 ppm, including but not
8 limited to a handheld, portable XRF scanning analyzer.

9 **2.3.1 Testing Frequency.** For each of the first two orders of Products
10 purchased from each of Defendant's suppliers after the Compliance Date, Defendant J&B
11 Importers, Inc. shall randomly select and test at least three of the total Products purchased from
12 each supplier. Following the testing of the first two orders as described above, Defendant J&B
13 Importers, Inc. shall, for at least an additional two years, annually randomly select and test at least
14 two of the total Products purchased from each supplier of the Products.

15 **2.3.2 Products That Contain Lead Pursuant to Defendant's Testing.**
16 If the results of the testing required pursuant to Section 2.3 show any Product exceeds the
17 reformulation requirements of Section 2.1, Defendant J&B Importers, Inc. shall: (1) refuse to
18 accept all of the Products that were purchased under the particular purchase order; (2) send a
19 notice to the supplier explaining that such Products do not comply with Defendant's
20 specifications and the suppliers' certification; and (3) randomly select and test at least three of the
21 total Products purchased from the supplier in the next two orders.

22 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
23 testing of the Products. Any such testing shall be conducted in accordance with Section 2.3
24 above. In the event that CEH's testing demonstrates that any Product distributed or sold by
25 Defendant J&B Importers, Inc. in California subsequent to the Compliance Date exceeds the
26 reformulation requirements of Section 2.1, CEH shall inform Defendant of the test results,
27 including information sufficient to permit Defendant to identify the Product(s). Defendant J&B
28 Importers, Inc. shall, within 30 days following such notice, provide CEH, at the address listed in

1 Section 11, with the certification and testing information demonstrating its compliance with
2 Sections 2.2 and 2.3 of this Consent Judgment. If Defendant fails to provide CEH with
3 information demonstrating that it complied with Sections 2.2 and/or 2.3, Defendant shall be liable
4 for stipulated payments in lieu of penalties for Products for which CEH produces tests
5 demonstrating the presence of Lead in excess of the requirements of Section 2.1 in the Products.
6 The payments shall be made to CEH and used for the purposes described in Section 3.2.2.

7 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments
8 in lieu of penalties are warranted under Section 2.4, the stipulated payment amount shall be as
9 follows for each unit of Product for which CEH produces a test result showing that Defendant
10 J&B Importers, Inc. sold a Product in California after the Compliance Date that exceeds the
11 reformulation requirements of Section 2.1:

| | | |
|----|--------------------|---------|
| 12 | First Occurrence: | \$500 |
| 13 | Second Occurrence: | \$750 |
| 14 | Third Occurrence: | \$1,000 |
| 15 | Thereafter: | \$2,500 |

16 **2.5 Products Sold Prior To Compliance Date.** If the Product identified by
17 CEH pursuant to Section 2.4 was distributed by Defendant for sale or sold by Defendant to
18 consumers in California prior to the Compliance Date, Defendant J&B Importers, Inc. agrees to
19 exercise good faith and to identify all entities selling such Product and CEH will assist Defendant
20 with the identification of all retail outlets for the Product. Defendant J&B Importers, Inc. shall
21 thereafter contact said entities and provide stickers to be placed upon the Product which comply
22 with the warning required by Health & Safety Code § 25249.6.

23 **3. SETTLEMENT PAYMENTS**

24 **3.1 Payments From Defendant.** Within thirty (30) days of entry of this
25 Consent Judgment, Defendant J&B Importers, Inc. shall pay the total sum of \$20,000 as a
26 settlement payment.

27 **3.2 Allocation of Payments.** The total settlement amount for Defendant J&B
28 Importers, Inc. shall be paid in three separate checks delivered to the offices of the Lexington

1 Law Group at the address set forth in Section 11 below, and made payable and allocated as
2 follows:

3 **3.2.1 Civil Penalty.** Defendant J&B Importers, Inc. shall pay \$2,000 as a
4 civil penalty pursuant to Health & Safety Code § 25249.7(b), such money to be apportioned by
5 CEH in accordance with Health & Safety Code § 25249.12. The penalty check shall be made
6 payable to the Center For Environmental Health.

7 **3.2.2 Monetary Payment in Lieu of Civil Penalty.** Defendant J&B
8 Importers, Inc. shall pay to CEH \$6,000 in lieu of penalty pursuant to Health & Safety Code
9 § 25249.7(b). CEH shall use such funds to continue its work protecting people from exposures to
10 toxic chemicals. As part of this work, CEH intends to conduct periodic testing of the Products as
11 set forth in Section 2.4. In addition, as part of its Community Environmental Action and Justice
12 Fund, CEH will use four percent of such funds to award grants to grassroots environmental
13 justice groups working to educate and protect people from exposures to toxic chemicals. The
14 method of selection of such groups can be found at the CEH web site at www.ceh.org/justicefund.
15 The payment in lieu of penalty check shall be made payable to the Center For Environmental
16 Health.

17 **3.2.3 Attorneys' Fees and Costs.** Defendant J&B Importers, Inc. shall
18 pay \$12,000 to reimburse CEH and its attorneys for their reasonable investigation fees and costs,
19 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to
20 Defendant's attention, litigating and negotiating a settlement in the public interest. The attorneys'
21 fees and cost reimbursement check shall be made payable to the Lexington Law Group.

22 **4. ENTIRE AGREEMENT**

23 **4.1** This Consent Judgment contains the sole and entire agreement and
24 understanding of CEH and Defendant J&B Importers, Inc. with respect to the entire subject
25 matter hereof, and any and all prior discussions, negotiations, commitments, and understandings
26 related hereto. No representations, oral or otherwise, express or implied, other than those
27 contained herein have been made by CEH or Defendant J&B Importers, Inc. No other
28 agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or bind

1 CEH or Defendant J&B Importers, Inc.

2 **5. MODIFICATION OF CONSENT JUDGMENT**

3 **5.1** This Consent Judgment may only be modified by written agreement of
4 CEH and Defendant J&B Importers, Inc., or upon motion of CEH or Defendant as provided by
5 law.

6 **6. ENFORCEMENT OF CONSENT JUDGMENT**

7 **6.1 Enforcement Procedures.** Prior to bringing any motion or order to show
8 cause to enforce the terms of this Consent Judgment, a party seeking to enforce shall provide the
9 violating party thirty (30) days advanced written notice of the alleged violation. CEH and
10 Defendant J&B Importers, Inc. shall meet and confer during such thirty (30) day period in an
11 effort to try to reach agreement on an appropriate cure for the alleged violation. After such thirty
12 (30) day period, the party seeking to enforce may, by motion or order to show cause before the
13 Superior Court of Marin, seek to enforce the terms and conditions contained in this Consent
14 Judgment. Should the party seeking to enforce prevail on any motion or application under this
15 section, such party shall be entitled to seek to recover its reasonable attorneys' fees and costs
16 associated with such motion or order to show cause from the non-moving party.

17 **7. APPLICATION OF CONSENT JUDGMENT**

18 **7.1** This Consent Judgment shall apply to and be binding upon CEH and
19 Defendant J&B Importers, Inc. hereto, their divisions, subdivisions and subsidiaries, and the
20 successors or assigns of any of them.

21 **8. CLAIMS COVERED AND RELEASE OF CLAIMS**

22 **8.1** This Consent Judgment is a full, final and binding resolution between
23 CEH, on behalf of itself and acting in the public interest pursuant to Proposition 65, and
24 Defendant J&B Importers, Inc. of any violation of Proposition 65 that was or could have been
25 asserted in the Complaint against Defendant (including any claims that could be asserted in
26 connection with any of the Products covered by this Consent Judgment) or its parents,
27 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, customers,
28 retailers, representatives, shareholders, or assigns including but not limited to Walgreen Co., Big

1 Rock Sports, LLC and AWR Sports LLC (collectively, "Defendant Releasees") based on failure
2 to warn about alleged exposures to Lead resulting from any Products distributed or sold by
3 Defendant J&B Importers, Inc. ("Covered Claims") on or prior to the date of entry of this
4 Consent Judgment. CEH, its directors, officers, employees and attorneys hereby release all
5 Covered Claims against Defendant Releasees. Compliance with the terms of this Consent
6 Judgment constitutes compliance with Proposition 65 for purposes of Lead exposures from the
7 Products.

8 **9. GOVERNING LAW**

9 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
10 State of California.

11 **10. RETENTION OF JURISDICTION**

12 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
13 the terms this Consent Judgment.

14 **11. PROVISION OF NOTICE**

15 **11.1** All notices required pursuant to this Consent Judgment and correspondence
16 shall be sent to the following:

17 For CEH:

18 Mark N. Todzo
19 Lexington Law Group
20 1627 Irving Street
San Francisco, CA 94122

21 For Defendant J&B Importers, Inc.:

22 Thomas H. Clarke, Jr.
23 Ropers, Majeski, Kohn & Bentley
24 201 Spear Street
Suite 1000
San Francisco, CA 94105

25 **12. ATTORNEYS' FEES**

26 **12.1** A party who unsuccessfully brings or contests an action arising out of this
27 Consent Judgment shall be required to pay the prevailing party's reasonable attorneys' fees and
28 costs unless the unsuccessful party has acted with substantial justification. For purposes of this

1 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
2 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

3 **12.2** Notwithstanding Section 12.1, a party who prevails in a contested
4 enforcement action brought pursuant to Section 6.1 may seek an award of attorneys' fees pursuant
5 to Code of Civil Procedure § 1021.5 against a party that acted with substantial justification. The
6 party seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and
7 this provision shall not be construed as altering any procedural or substantive requirements for
8 obtaining such an award.

9 **12.3** Nothing in this Section 12 shall preclude a party from seeking an award of
10 sanctions pursuant to law.

11 **13. COURT APPROVAL**

12 **13.1** CEH will comply with the settlement notice provisions of Health & Safety
13 Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003 by preparing and
14 filing a motion for approval of this Consent Judgment and Defendant J&B Importers, Inc. shall
15 support approval of such motion.

16 **14. COUNTERPARTS**

17 **14.1** The stipulations to this Consent Judgment may be executed in counterparts.

18 **15. AUTHORIZATION**

19 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully
20 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into
21 and execute the Consent Judgment on behalf of the party represented and legally bind that party.
22 The undersigned have read, understand and agree to all of the terms and conditions of this
23 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
24 costs.

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AGREED TO:
CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

J&B IMPORTERS, INC.

[Name]

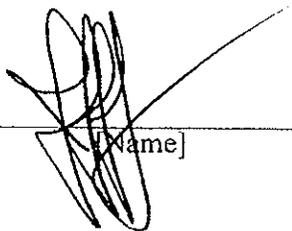
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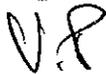
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AGREED TO:
CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

J&B IMPORTERS, INC.



[Name]


[Title]

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JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Defendant J&B Importers, Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: MAR 22 2011

LYNN DURYEE
Judge, Superior Court of the State of California