

FILED

OCT 28 2011

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Fraguero, Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL HEALTH,
a non-profit corporation,

Plaintiff,

VS.

COSTCO WHOLESALE CORPORATION;
FOAM LABS, INC.; ONE UP INNOVATIONS,
INC.; and DOES 1 through 200, inclusive,

Defendants.

Case No. CIV-1102080

~~PROPOSED~~ CONSENT JUDGMENT
AS TO FOAM LABS, INC. AND ONE
UP INNOVATIONS, INC.

1. INTRODUCTION

1.1 This Consent Judgment is entered into by the Center For Environmental Health, a California non-profit corporation ("CEH") and Foam Labs, Inc. and One Up Innovations, Inc. ("Settling Defendants"), to settle certain claims asserted by CEH against Settling Defendants as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Foam Labs, Inc., et al.*, Marin County Superior Court Case No. CIV-1102080 (the "Action").

1.2 On February 4, 2011, CEH provided a "Notice of Violation of Proposition 65" to the California Attorney General, the District Attorneys of every county in California, the City

1 Attorneys of every California city with a population greater than 750,000, and to Settling
2 Defendants regarding the presence of lead and lead compounds (collectively, "Lead") in beanbag
3 chairs ("Covered Products") manufactured, distributed or sold by Settling Defendants.

4 1.3 On April 25, 2011, CEH filed the Action against Settling Defendants.

5 1.4 Each Settling Defendant is a corporation that employs 10 or more persons, and
6 which manufactures, distributes and/or sells Covered Products in the State of California.

7 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendants (the
8 "Parties") stipulate that this Court has jurisdiction over the allegations of violations contained in
9 the Complaint and personal jurisdiction over Settling Defendants as to the acts alleged in the
10 Complaint, that venue is proper in the County of Marin, and that this Court has jurisdiction to
11 enter this Consent Judgment as a full and final resolution of all claims which were or could have
12 been raised in the Complaint based on the facts alleged therein with respect to Covered Products
13 manufactured, distributed, and/or sold by Settling Defendants.

14 1.6 CEH and Settling Defendants enter into this Consent Judgment as a full and final
15 settlement of all claims that were raised in the Complaint, or which could have been raised in the
16 Complaint, arising out of the facts or conduct related to Settling Defendants and the sales of
17 Covered Products by Settling Defendants and their chain of distribution, including without
18 limitation, defendant Costco Wholesale Corporation, alleged therein. By execution of this
19 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any facts or
20 conclusions of law including, but not limited to, any facts or conclusions of law suggesting or
21 demonstrating any violations of Proposition 65 or any other statutory, common law or equitable
22 requirements relating to Lead in the Covered Products. Nothing in this Consent Judgment is or
23 shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or
24 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
25 admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Settling
26 Defendants deny the material, factual and legal allegations in CEH's Complaint and expressly
27 deny any wrong doing whatsoever. Nothing in this Consent Judgment shall prejudice, waive or
28 impair any right, remedy, argument or defense the Parties may have in this or any other pending or

1 future legal proceedings. This Consent Judgment is the product of negotiation and compromise
2 and is accepted by the Parties solely for purposes of settling, compromising, and resolving issues
3 disputed in this action.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of Covered Products.** After the date of entry of this Consent
6 Judgment (the "Effective Date"), Settling Defendants shall not manufacture, ship, sell or offer for
7 sale any Covered Product that contains accessible component parts or that is made of any
8 accessible material, that is more than 0.01 percent (100 parts per million ("ppm")) Lead by weight
9 when analyzed pursuant to Environmental Protection Agency ("EPA") testing methodology
10 3050 B or equivalent methods. The term "accessible" for purposes of this section means any part
11 or material that could be handled, touched or mouthed during normal and reasonably foreseeable
12 use.

13 **2.2 Cessation of Sales of Covered Products.** On or before the Effective Date,
14 Settling Defendants shall cease shipping the Jaxx Iconic Beanbag Chair in Orange, SKU No. 8-
15 45628-08032-0, which was identified in the 60-Day Notice of Violation sent by CEH to Settling
16 Defendants (the "Noticed Product"), to stores and/or customers in California, and Settling
17 Defendants hereby confirm that the Noticed Product is no longer being sold by Defendants or their
18 chain of distribution in California.

19 **3. ENFORCEMENT**

20 **3.1 Enforcement Procedures.** Prior to bringing any motion or order to show cause to
21 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the allegedly
22 breaching party twenty (20) days advanced written notice of the alleged violation. The Parties
23 shall meet and confer during such twenty (20) day period in an effort to try to reach agreement on
24 an appropriate cure for the alleged violation. After such twenty (20) day period, the Party seeking
25 to enforce may, by new action, motion or order to show cause before the Superior Court of Marin,
26 seek to enforce the terms and conditions contained in this Consent Judgment. Should the Party
27 seeking to enforce prevail on any motion or application under this section, such Party shall be
28 entitled to recover its reasonable attorneys' fees and costs associated with such motion, order to

1 show cause or procedure from the other Party.

2 **4. PAYMENTS**

3 4.1 **Payments From Settling Defendants.** Within twenty (20) days of the entry of this
4 Consent Judgment, Settling Defendants shall pay the total sum of \$22,500 as a settlement
5 payment. Any failure by Settling Defendants to comply with the payment terms herein shall be
6 subject to a stipulated late payment fee of \$100 per day, which amount shall be recoverable by
7 CEH, together with its reasonable attorneys' fees and costs, in an enforcement proceeding brought
8 pursuant to Section 3.

9 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendants shall
10 be paid in three separate checks delivered to the offices of the Lexington Law Group (Attn:
11 Howard Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and
12 allocated as follows:

13 4.2.1 Settling Defendants shall pay the sum of \$2,000 as a penalty pursuant to
14 Health & Safety Code §25249.7(b), such money to be apportioned by CEH in accordance with
15 Health & Safety Code §25249.12. The penalty check shall be made payable to the Center For
16 Environmental Health.

17 4.2.2 Settling Defendants shall pay the sum of \$6,500 as payment to CEH in
18 lieu of penalty pursuant to Health & Safety Code §25249.7(b), and California Code of
19 Regulations, Title 11, §3202(b). CEH will use such funds to continue its work educating and
20 protecting people from exposures to toxic chemicals, including heavy metals. CEH may also use a
21 portion of such funds to monitor compliance with the reformulation requirements of this and other
22 similar Consent Judgments. In addition, as part of its Community Environmental Action and
23 Justice Fund, CEH will use four percent of such funds to award grants to grassroots environmental
24 justice groups working to educate and protect people from exposures to toxic chemicals. The
25 method of selection of such groups can be found at the CEH web site at www.ceh.org/justicefund.
26 The payment in lieu of penalty check shall be made payable to the Center For Environmental
27 Health.

28 4.2.3 Settling Defendants shall pay the sum of \$14,000 as reimbursement of a

1 portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost
2 reimbursement check shall be made payable to the Lexington Law Group.

3 **5. MODIFICATION AND DISPUTE RESOLUTION**

4 5.1 **Modification.** This Consent Judgment may be modified from time to time by
5 express written agreement of the Parties, with the approval of the Court, or by an order of this
6 Court upon motion and in accordance with law.

7 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
8 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
9 modify the Consent Judgment.

10 **6. CLAIMS COVERED AND RELEASE**

11 6.1 This Consent Judgment is a full, final, and binding resolution between CEH and
12 Settling Defendants and Settling Defendants' parents, shareholders, divisions, subdivisions,
13 subsidiaries, partners, sister companies, and their successors and assigns ("Defendant Releasees"),
14 and all entities to whom they distribute or sell Covered Products including, but not limited to,
15 distributors, wholesalers, customers, retailers, specifically including but not limited to Costco
16 Wholesale Corporation, franchisees, cooperative members, and licensees ("Downstream
17 Defendant Releasees"), of any violation of Proposition 65 or any other statutory or common law
18 claims that have been or could have been asserted in the public interest against Settling
19 Defendants, Defendant Releasees, and Downstream Defendant Releasees, regarding the failure to
20 warn about exposure to Lead arising in connection with Covered Products manufactured,
21 distributed, or sold by Settling Defendants prior to the Effective Date.

22 6.2 CEH, for itself and acting on behalf of the public interest pursuant to Health &
23 Safety Code §25249.7(d), releases, waives, and forever discharges any and all claims against
24 Settling Defendants, Defendant Releasees, and Downstream Defendant Releasees arising from any
25 violation of Proposition 65 or any other statutory or common law claims that have been or could
26 have been asserted in the public interest regarding the failure to warn about exposure to Lead
27 arising in connection with Covered Products manufactured, distributed or sold by Settling
28 Defendants prior to the Effective Date.

1 6.3 Compliance with the terms of this Consent Judgment by Settling Defendants and
2 the Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendants,
3 the Defendant Releasees and their Downstream Defendant Releasees with respect to any alleged
4 failure to warn about Lead in Covered Products manufactured, distributed or sold by Settling
5 Defendants after the Effective Date.

6 **7. PROVISION OF NOTICE**

7 7.1 When any Party is entitled to receive any notice under this Consent Judgment, the
8 notice shall be sent by certified mail and electronic mail as follows:

9 7.1.1 **Notices to Settling Defendants.** The persons for Settling Defendants and
10 to receive Notices pursuant to this Consent Judgment shall be:

11 Renee D. Wasserman
12 Rogers Joseph O'Donnell
13 311 California Street, 10th Fl.
14 San Francisco, CA 94104
15 rwasserman@rjo.com

16 Jim Blanchard
17 One Up Innovations, Inc.
18 2745 Bankers Industrial Drive
19 Atlanta, GA 30360
20 jim.blanchard@oneupinnovations.com

21 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
22 this Consent Judgment shall be:

23 Howard Hirsch
24 Lexington Law Group
25 503 Divisadero Street
26 San Francisco, CA 94117
27 hhirsch@lexlawgroup.com

28 7.2 Any Party may modify the person and address to whom the notice is to be sent by
sending the other Party notice by electronic or certified mail.

8. COURT APPROVAL

8.1 This Consent Judgment shall become effective on the Effective Date, provided
however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and

1 Settling Defendants shall support approval of such Motion.

2 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
3 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

4 **9. GOVERNING LAW AND CONSTRUCTION**

5 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California.

7 **10. ENTIRE AGREEMENT**

8 10.1 This Consent Judgment contains the sole and entire agreement and understanding
9 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
10 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
11 and therein. There are no warranties, representations, or other agreements between the Parties
12 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
13 other than those specifically referred to in this Consent Judgment have been made by any Party
14 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
15 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
16 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
17 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
18 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
19 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
20 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
21 whether or not similar, nor shall such waiver constitute a continuing waiver.

22 **11. RETENTION OF JURISDICTION**

23 11.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **12. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

26 12.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
28 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

1 **13. NO EFFECT ON OTHER SETTLEMENTS**

2 13.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against an entity that is not Settling Defendants on terms that are different than those contained in
4 this Consent Judgment.

5 **14. EXECUTION IN COUNTERPARTS**

6 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
7 means of facsimile, which taken together shall be deemed to constitute one document.

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9 IT IS SO STIPULATED:

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Dated: 12 July, 2011

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CENTER FOR ENVIRONMENTAL HEALTH

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CHARLES PIZARRO

15

Printed Name

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ASSOCIATE DIRECTOR

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Title

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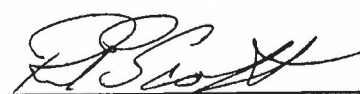
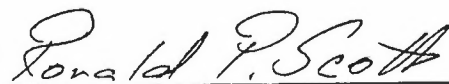
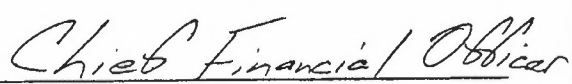
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Dated: <u>July 7</u> , 2011	FOAM LABS, INC. and ONE UP INNOVATIONS, INC.  <hr/>  Printed Name  Title
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**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: **OCT 28 2011**

FAYE D'OPAL
Judge of the Superior Court of the State of California