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FILED

FEB 24 2012

**KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT**

By: K. Main, Deputy

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

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

Plaintiff,)

vs.)

FOWNES BROTHERS & CO.,)
INCORPORATED, *et al.*,)

Defendants.)

Case No. CIV-1103700

K.M.
~~PROPOSED~~ CONSENT JUDGMENT
AS TO FOWNES BROTHERS & CO.,
INCORPORATED

1. INTRODUCTION

1.1 This Consent Judgment is entered into by the Center For Environmental Health, a California non-profit corporation ("CEH") on the one hand, and Fownes Brothers & Co., Incorporated ("Defendant") on the other hand, to settle all claims asserted by CEH against Defendant in this action (the "Action").

1.2 On March 30, 2011, CEH provided a Notice of Violation of Proposition 65 ("NOV") to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Defendant regarding the presence of lead and lead compounds (collectively referred to herein as

1 “Lead”) in gloves (“Covered Products”).

2 1.3 On July 26, 2011, CEH initiated this Action on behalf of itself and in the
3 public interest under Cal. Health & Safety Code § 25249.7(d) by filing its Complaint. Defendant
4 denies all material allegations of the NOV and the Complaint and has asserted numerous
5 affirmative defenses.

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

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

15 1.6 CEH and Defendant enter into this Consent Judgment as a full and final
16 settlement of all claims that were raised in the Complaint, or which could have been raised in the
17 Complaint, arising out of the facts or conduct related to Defendant alleged therein. By executing
18 this Consent Judgment and agreeing to comply with its terms, the Parties do not admit, and
19 nothing in this Consent Judgment is or shall be construed as an admission by the Parties of, any
20 fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including,
21 but not limited to, any admission concerning any alleged violation of Proposition 65 or any other
22 statutory, common law or equitable requirements. Nothing in this Consent Judgment shall
23 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
24 any other pending or future legal proceedings. This Consent Judgment is the product of
25 negotiation and compromise and is accepted by the Parties solely for purposes of settling,
26 compromising, and resolving issues disputed in this Action.

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1 **2. INJUNCTIVE RELIEF**

2 2.1 **Reformulation of Covered Products.** As of the date of entry of this Consent
3 Judgment by the Court (the "Effective Date"), Defendant shall not manufacture, ship, sell or offer
4 for sale any Covered Product unless such Covered Product complies with the following Lead
5 Limits:

6 2.1.1 "Paint or other Surface Coatings" as that term is defined in 16 C.F.R.
7 § 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million ("ppm")).

8 2.1.2 Polyvinyl Chloride: no more than .02 percent Lead by weight (200 ppm).

9 2.1.3 All other materials: no more than .03 percent Lead by weight (300 ppm).

10 2.2 **Market Withdrawal of Covered Products.** On or before the Effective Date,
11 Defendant shall cease shipping the Fownes' Micro Fur Lined Leather Gloves in Chestnut, SKU
12 No. 0-98617-10803-5, Item No. 24926, Style No. 95559, as identified in CEH's NOV (the
13 "Recall Covered Products"), to stores and/or customers in California. Defendant also shall recall
14 the Recall Covered Products from retail stores in California, and, at a minimum, send instructions
15 to any of its stores that offer the Recall Covered Products for sale in California to cease offering
16 such Recall Covered Products for sale and to either return all Recall Covered Products to
17 Defendant for destruction, or to directly destroy the Recall Covered Products. Any destruction of
18 the Recall Covered Products shall be in compliance with all applicable laws. Defendant shall
19 keep for one (1) year after the Effective Date and make available to CEH for inspection and
20 copying records and correspondence regarding the recall and destruction of the Recall Covered
21 Products. If there is a dispute over the corrective action, the Parties shall meet and confer before
22 seeking any remedy in court.

23 **3. ENFORCEMENT**

24 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show
25 cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the
26 violating Party thirty (30) days advanced written notice of the alleged violation. The Parties shall
27 meet and confer during such thirty (30) day period in an effort to try to reach agreement on an
28 appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to

1 enforce may, by motion or order to show cause before this Court, seek to enforce the terms and
2 conditions contained in this Consent Judgment.

3 **4. PAYMENTS**

4 4.1 **Payments From Defendant.** Except for any amounts that may be due as a
5 result of an enforcement action brought under Section 3, within five (5) days of Notice of Entry
6 of this Consent Judgment, Defendant shall pay the total sum of \$30,000 as full and final
7 satisfaction of all potential civil penalties, payment in lieu of civil penalties, attorney's fees, and
8 costs.

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

13 4.2.1 Defendant shall pay the sum of \$3000 as a penalty pursuant to Health &
14 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health &
15 Safety Code § 25249.12. The penalty check shall be made payable to the Center For
16 Environmental Health.

17 4.2.2 Defendant shall pay the sum of \$8500 as payment to CEH in lieu of
18 penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
19 11, § 3202(b). CEH will use such funds to continue its work educating and protecting people
20 from exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such
21 funds to monitor compliance with the reformulation requirements of this and other similar
22 Consent Judgments and to purchase and test Covered Products to confirm compliance with such
23 reformulation requirements. In addition, as part of its *Community Environmental Action and*
24 *Justice Fund*, CEH will use four percent of such funds to award grants to grassroots
25 environmental justice groups working to educate and protect people from exposures to toxic
26 chemicals. The method of selection of such groups can be found at the CEH web site at
27 www.ceh.org/what-we-do/supporting-communities/the-justice-fund. The payment in lieu of
28 penalty check shall be made payable to the Center for Environmental Health.

1 4.2.3 Defendant shall pay the sum of \$18,500 as reimbursement of reasonable
2 attorneys' fees and costs. The attorneys' fees and cost reimbursement check shall be made
3 payable to the Lexington Law Group.

4 **5. MODIFICATION AND DISPUTE RESOLUTION**

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

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

11 **6. CLAIMS COVERED AND RELEASE**

12 6.1 This Consent Judgment is a full, final, and binding resolution between CEH,
13 on behalf of itself, the general public, and in the public interest, and Defendant and its officers,
14 directors, shareholders, parent companies, divisions, subdivisions, subsidiaries, sister companies,
15 employees, agents, franchisees, licensees, customers, distributors, wholesalers, retailers
16 (including, without limitation, Sears, Roebuck and Co.), and all other entities in the distribution
17 chain down to the consumer of any Covered Product, and the predecessors, successors and
18 assigns of any of them (collectively, "Released Parties"), of any alleged violation of Proposition
19 65 that has been or could have been asserted in the public interest against Defendant or the
20 Released Parties, regarding the failure to warn about exposure to Lead arising in connection with
21 Covered Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

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

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

5 **7. PROVISION OF NOTICE**

6 7.1 When any Party is entitled to receive any notice under this Consent Judgment,
7 the notice shall be sent by first class and electronic mail as follows:

8 7.1.1 **Notices to Defendant.** The person for Defendant to receive Notices
9 pursuant to this Consent Judgment shall be:

10 Thomas Donnelly
11 Jones Day
12 555 California Street, 26th Floor
13 San Francisco, CA 94104
14 tmdonnelly@jonesday.com

15 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
16 this Consent Judgment shall be:

17 Howard Hirsch
18 Lexington Law Group
19 503 Divisadero Street
20 San Francisco, CA 94117
21 hhirsch@lexlawgroup.com

22 7.2 Any Party may modify the person and address to whom the notice is to be sent
23 by sending the other Party notice by first class and electronic mail.

24 **8. COURT APPROVAL**

25 8.1 This Consent Judgment shall become effective on the Effective Date, provided
26 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
27 Defendants shall support approval of such Motion.

28 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
effect and shall not be introduced into evidence or otherwise used in any proceeding for any
purpose.

1 **9. GOVERNING LAW AND CONSTRUCTION**

2 9.1 The terms of this Consent Judgment shall be governed by and construed in
3 accordance with the laws of the State of California.

4 **10. ATTORNEYS' FEES**

5 10.1 A Party who unsuccessfully brings or contests an action arising out of this
6 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
7 costs unless the unsuccessful Party has acted with substantial justification. For purposes of this
8 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
9 Civil Discovery Act of 1986. *See, e.g.,* Code of Civil Procedure §§ 2019.030(c) and 2023.030(a).

10 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
11 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
12 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
13 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
14 provision shall not be construed as altering any procedural or substantive requirements for
15 obtaining such an award.

16 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
17 sanctions pursuant to law.

18 **11. ENTIRE AGREEMENT**

19 11.1 This Consent Judgment contains the sole and entire agreement and
20 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
21 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
22 merged herein and therein. There are no warranties, representations, or other agreements between
23 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
24 implied, other than those specifically referred to in this Consent Judgment have been made by any
25 Party hereto. No other agreements not specifically contained or referenced herein, oral or
26 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
27 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
28 any of the Parties hereto only to the extent that they are expressly incorporated herein. No

1 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
2 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
3 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
4 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

5 **12. RETENTION OF JURISDICTION**

6 12.1 This Court shall retain jurisdiction of this matter to implement, modify,
7 enforce or terminate this Consent Judgment.

8 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

9 13.1 Each signatory to this Consent Judgment certifies that he or she is fully
10 authorized by the Party he or she represents to stipulate to this Consent Judgment, to enter into
11 and execute the Consent Judgment on behalf of the Party represented, and legally to bind that
12 Party.

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

14 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any
15 claim against another entity on terms that are different than those contained in this Consent
16 Judgment.

17 **15. CONSTRUCTION OF CONSENT JUDGMENT, SEVERABILITY**

18 15.1 The terms and conditions of this Consent Judgment have been reviewed by the
19 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
20 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
21 construction of this Consent Judgment, the terms and conditions shall not be construed against
22 any Party.

23 15.2 In the event that any of the provisions of this Consent Judgment are held by a
24 court to be unenforceable, the validity of the enforceable provisions shall not be adversely
25 affected.


26 **16. APPLICATION OF CONSENT JUDGMENT**

27 16.1 This Consent Judgment shall apply to and be binding upon the Parties, and
28 their respective successors and assigns.

1 **17. EXECUTION IN COUNTERPARTS**

2 17.1 The stipulations to this Consent Judgment may be executed in counterparts
3 and by means of facsimile, which taken together shall be deemed to constitute one document.

4 **IT IS SO STIPULATED:**

5 Dated: <u>Oct 17</u> , 2011	6 CENTER FOR ENVIRONMENTAL HEALTH 7  8 _____ 9 Signature 10 <u>CHARLIE PIZANO</u> 11 _____ 12 Printed Name 13 <u>ASSOCIATE DIRECTOR</u> 14 _____ 15 Title
14 Dated: _____, 2011	15 FOWNES BROTHERS & CO., 16 INCORPORATED 17 _____ 18 Signature 19 _____ 20 Printed Name 21 _____ 22 Title


23 **IT IS SO ORDERED, ADJUDGED,**
24 **AND DECREED**

25 Dated: _____
26 **JUDGE OF THE SUPERIOR COURT OF THE**
27 **STATE OF CALIFORNIA**

1 17. EXECUTION IN COUNTERPARTS

2 17.1 The stipulations to this Consent Judgment may be executed in counterparts
3 and by means of facsimile, which taken together shall be deemed to constitute one document.

4 IT IS SO STIPULATED:

<p>5 Dated: _____, 2011</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <hr/> <p>Signature</p> <hr/> <p>Printed Name</p> <hr/> <p>Title</p>
<p>14 Dated: <u>October 14</u>, 2011</p>	<p>FOWNES BROTHERS & CO., INCORPORATED</p>  <hr/> <p>Signature</p> <hr/> <p><u>THOMAS E FAIVEE</u></p> <p>Printed Name</p> <hr/> <p><u>CHIEF FINANCIAL OFFICER</u></p> <p>Title</p>

23 IT IS SO ORDERED, ADJUDGED,
24 AND DECREED

25 Dated: **FEB 24 2012**

FAYE D'OPAL
JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA