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FILED

FEB 17 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.

BARNES & NOBLE, INC., *et al.*,

Defendants.

Case No. CIV-1103790

Kan

**[PROPOSED] CONSENT JUDGMENT
AS TO BLUE SKY THE COLOR OF
IMAGINATION, LLC AND BLUE SKY
DISTRIBUTION**

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 Blue Sky The Color of Imagination, LLC, a California limited liability company, and Blue Sky Distribution (collectively, “Blue Sky”) on the other hand, to settle certain claims asserted by CEH against Blue Sky as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Barnes & Noble, Inc., et al.*, Marin County Superior Court Case No. CIV-1103790 (the “Action”).

1 1.2 On May 9, 2011, CEH provided a “Notice of Violation of Proposition 65” to
2 the California Attorney General, the District Attorneys of every county in California, the City
3 Attorneys of every California city with a population greater than 750,000, and to Blue Sky
4 regarding the presence of lead and lead compounds (collectively referred to herein as “Lead”) in
5 journals and planners (“Covered Products”).

6 1.3 On July 29, 2011, CEH filed the complaint against Blue Sky in the Action (the
7 “Complaint”).

8 1.4 For purposes of this Consent Judgment only, CEH and Blue Sky (the
9 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
10 the Complaint and personal jurisdiction over Blue Sky as to the acts alleged in the Complaint, that
11 venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
12 Judgment as a full and final resolution of all claims which were or could have been raised in the
13 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
14 distributed, and/or sold by Blue Sky.

15 1.5 CEH and Blue Sky 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 Blue Sky alleged therein and the sales of
18 Covered Products by Blue Sky and their chain of distribution, including without limitation, Target
19 Corporation. By execution of this Consent Judgment and agreeing to comply with its terms, the
20 Parties do not admit any facts or conclusions of law including, but not limited to, any facts or
21 conclusions of law suggesting or demonstrating any violations of Proposition 65 or any other
22 statutory, common law or equitable requirements. Nothing in this Consent Judgment is or shall
23 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. Blue
26 Sky denies the material, factual and legal allegations in CEH’s Complaint and expressly denies
27 any wrong doing whatsoever. Nothing in this Consent Judgment shall prejudice, waive or impair
28 any right, remedy, argument or defense the Parties may have in this or any other pending or future

1 legal proceedings. This Consent Judgment is the product of negotiation and compromise and is
2 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.** As of the date of entry of this Consent
6 Judgment (the “Effective Date”), Blue Sky shall not manufacture, ship, sell or offer for sale any
7 Covered Product unless such Covered Product complies with the following Lead Limits:

8 2.1.1 “Paint or other Surface Coatings” as that term is defined in 16 C.F.R.
9 § 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million (“ppm”)).

10 2.1.2 All other materials: no more than .01 percent Lead by weight (100 ppm).

11 2.2 **Market Withdrawal of Covered Products.** On or before the Effective Date,
12 Blue Sky shall cease shipping the Blue Sky Notes Book in Milano Green Kensington Strap, SKU
13 No. 8-47037-11238-8, Item No. 11238, DPCI No. 081-01-1921, as identified in CEH’s pre-suit
14 Notice of Violation to Blue Sky (the “Recall Covered Products”), to stores and/or customers in
15 California, and Blue Sky shall withdraw the Recall Covered Products from the market in
16 California, and, at a minimum, send instructions to any of their stores and/or customers that offer
17 the Recall Covered Products for sale in California to cease offering such Recall Covered Products
18 for sale and to either return all Recall Covered Products to Blue Sky for destruction, or to directly
19 destroy the Recall Covered Products. Any destruction of the Recall Covered Products shall be in
20 compliance with all applicable laws. Blue Sky shall keep and make available to CEH for
21 inspection and copying reasonable records and correspondence regarding the market withdrawal
22 and destruction of the Recall Covered Products. If there is a dispute over the corrective action,
23 the Parties shall meet and confer before seeking any remedy in court

24 **3. ENFORCEMENT**

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

1 appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to
2 enforce may, by new action, motion or order to show cause before the Superior Court of Marin,
3 seek to enforce the terms and conditions contained in this Consent Judgment.

4 **4. PAYMENTS**

5 4.1 **Payments From Blue Sky.** Within ten (10) days of the entry of this Consent
6 Judgment, Blue Sky shall pay the total sum of \$32,500 as a settlement payment.

7 4.2 **Allocation of Payments.** The total settlement amount for Blue Sky shall be
8 paid in three separate checks delivered to the offices of the Lexington Law Group (Attn: Howard
9 Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and allocated
10 as follows:

11 4.2.1 Blue Sky shall pay the sum of \$3,000 as a penalty pursuant to Health &
12 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health &
13 Safety Code § 25249.12. The penalty check shall be made payable to the Center For
14 Environmental Health.

15 4.2.2 Blue Sky shall pay the sum of \$9,000 as payment to CEH in lieu of penalty
16 pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11,
17 § 3202(b). CEH will use such funds to continue its work educating and protecting people from
18 exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such funds
19 to monitor compliance with the reformulation requirements of this and other similar Consent
20 Judgments and to purchase and test Covered Products to confirm compliance with such
21 reformulation requirements. In addition, as part of its *Community Environmental Action and*
22 *Justice Fund*, CEH will use four percent of such funds to award grants to grassroots
23 environmental justice groups working to educate and protect people from exposures to toxic
24 chemicals. The method of selection of such groups can be found at the CEH web site at
25 www.ceh.org/what-we-do/supporting-communities/the-justice-fund. The payment in lieu of
26 penalty check shall be made payable to the Center for Environmental Health.

1 4.2.3 Blue Sky shall pay the sum of \$20,500 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 and Blue Sky and Blue Sky's parents, shareholders, divisions, subdivisions, subsidiaries, partners,
14 sister companies and their successors and assigns ("Defendant Releasees"), and all to whom they
15 distribute or sell Covered Products including, but not limited to, distributors, wholesalers,
16 customers, retailers, specifically including but not limited to Target Corporation, franchisees,
17 cooperative members, and licensees ("Downstream Defendant Releasees"), of any violation of
18 Proposition 65 or any other statutory or common law claims that have been or could have been
19 asserted in the public interest against Blue Sky, Defendant Releasees, and Downstream Defendant
20 Releasees, regarding the failure to warn about exposure to Lead arising in connection with
21 Covered Products manufactured, distributed, or sold by 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 Blue Sky, Defendant Releasees, and Downstream Defendant Releasees arising from any violation
25 of Proposition 65 or any other statutory or common law claims that have been or could have been
26 asserted in the public interest regarding the failure to warn about exposure to Lead arising in
27 connection with Covered Products manufactured, distributed or sold by Blue Sky prior to the
28 Effective Date.

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

6 **7. PROVISION OF NOTICE**

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

9 7.1.1 **Notices to Blue Sky.** The persons for Blue Sky to receive Notices
10 pursuant to this Consent Judgment shall be:

11 Brian T. Stephens
12 Stephens & Kray
13 5000 Birch Street, Suite 410
14 Newport Beach, CA 92660
15 bstephens@sklaw.net

16 Mark Vidovich, Manager
17 Blue Sky the Color of Imagination, LLC
18 15991 Red Hill Avenue, Suite 101
19 Tustin, CA 92780
20 markv@blueskyimg.com

21 James E. Freeman, Manager
22 Blue Sky the Color of Imagination, LLC
23 15991 Red Hill Avenue, Suite 101
24 Tustin, CA 92780
25 jimf@blueskyimg.com

26 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
27 this Consent Judgment shall be:

28 Howard Hirsch
29 Lexington Law Group
30 503 Divisadero Street
31 San Francisco, CA 94117
32 hhirsch@lexlawgroup.com

33 7.2 Any Party may modify the person and address to whom the notice is to be sent
34 by sending the other Party notice by first class and electronic mail.

1 **8. COURT APPROVAL**

2 8.1 This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Blue Sky shall support approval of such Motion.

5 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose.

8 **9. GOVERNING LAW AND CONSTRUCTION**

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

11 **10. ATTORNEYS' FEES**

12 10.1 A Party who unsuccessfully brings or contests an action arising out of this
13 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
14 costs unless the unsuccessful Party has acted with substantial justification. For purposes of this
15 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
16 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

17 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
18 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
19 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
20 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
21 provision shall not be construed as altering any procedural or substantive requirements for
22 obtaining such an award.

23 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of
24 sanctions pursuant to law.

25 **11. ENTIRE AGREEMENT**

26 11.1 This Consent Judgment contains the sole and entire agreement and
27 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
28 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby

1 merged herein and therein. There are no warranties, representations, or other agreements between
2 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
3 implied, other than those specifically referred to in this Consent Judgment have been made by any
4 Party hereto. No other agreements not specifically contained or referenced herein, oral or
5 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
6 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
7 any of the Parties hereto only to the extent that they are expressly incorporated herein. No
8 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
9 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
10 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
11 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

12 **12. RETENTION OF JURISDICTION**

13 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
14 Consent Judgment.

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

16 13.1 Each signatory to this Consent Judgment certifies that he or she is fully
17 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
18 and execute the Consent Judgment on behalf of the Party represented and legally to bind that
19 Party.

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


21 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any
22 claim against another entity on terms that are different than those contained in this Consent
23 Judgment.

24 **15. EXECUTION IN COUNTERPARTS**

25 15.1 The stipulations to this Consent Judgment may be executed in counterparts
26 and by means of facsimile, which taken together shall be deemed to constitute one document.
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IT IS SO STIPULATED:

Dated: <u>10/21</u> , 2011	CENTER FOR ENVIRONMENTAL HEALTH  <u>CONCHITA PIZANO</u> Printed Name <u>ASSOCIATE DIRECTOR</u> Title
Dated: _____, 2011	BLUE SKY THE COLOR OF IMAGINATION, LLC and BLUE SKY DISTRIBUTION By: <u>James E. Freeman</u> Manager & Authorized Agent

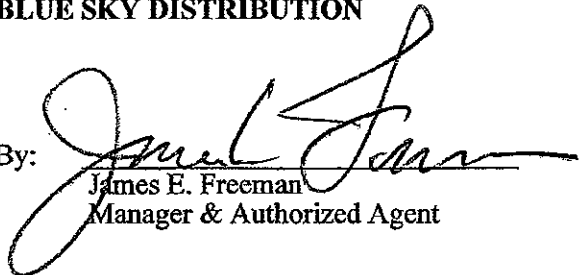
IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: _____

JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

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IT IS SO STIPULATED:

<p>Dated: _____, 2011</p>	<p>CENTER FOR ENVIRONMENTAL HEALTH</p> <hr/> <p>Printed Name</p> <hr/> <p>Title</p>
<p>Dated: <u>10/17/11</u>, 2011</p>	<p>BLUE SKY THE COLOR OF IMAGINATION, LLC and BLUE SKY DISTRIBUTION</p> <p>By: </p> <p>James E. Freeman Manager & Authorized Agent</p>

IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: FEB 17 2012

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