

FILED

MAR 26 2013

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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation,

Plaintiff,

v.

CARDINAL BRANDS, INC., *et al.*,

Defendant.

Case No. CIV 1105699

**[PROPOSED] CONSENT JUDGMENT RE:
CARDINAL BRANDS HOLDING
COMPANY, INC.**

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 Cardinal Brands Holding Company, Inc. (“Defendant”) on the other hand, to settle certain claims asserted by CEH against Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Cardinal Brands, Inc., et al.*, Marin County Superior Court Case No. CIV 1105699 (the “Action”).

1.2. On August 24, 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 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 “Lead”) in

1 photo albums and scrapbooks (“Covered Products”).

2 1.3. On November 18, 2011, CEH filed the complaint against Defendant in the Action.

3 1.4. Defendant is a corporation that employs 10 or more persons, and that
4 manufactures, distributes and/or sells Covered Products in the State of California.

5 1.5. For purposes of this Consent Judgment only, CEH and Defendant (the “Parties”)
6 stipulate that this Court has jurisdiction over the allegations of violations contained in the
7 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
8 venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
9 Judgment as a full and final resolution of all claims which were or could have been raised in the
10 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
11 distributed, and/or sold by Defendant.

12 1.6. CEH and Defendant enter into this Consent Judgment as a full and final settlement
13 of all claims that were raised in the Complaint, or which could have been raised in the Complaint,
14 arising out of the facts or conduct related to Defendant alleged therein. By execution of this
15 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any facts or
16 conclusions of law including, but not limited to, any facts or conclusions of law suggesting or
17 demonstrating any violations of Proposition 65 or any other statutory, common law or equitable
18 requirements. Nothing in this Consent Judgment is or shall be construed as an admission by the
19 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
20 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
21 conclusion of law, issue of law, or violation of law. Defendant denies the material, factual and
22 legal allegations in CEH’s Complaint and expressly denies any wrong doing whatsoever.
23 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument or
24 defense the Parties may have in this or any other pending or future legal proceedings. This
25 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties
26 solely for purposes of settling, compromising, and resolving issues disputed in this action.

27 **2. INJUNCTIVE RELIEF**

28 2.1. **Reformulation of Covered Products.** As of the date of entry of this Consent

1 Judgment (the “Effective Date”), Defendant shall not manufacture, ship, sell or offer for sale any
2 Covered Product unless such Covered Product complies with the following Lead Limits:

3 2.1.1. “Paint or other Surface Coatings” as that term is defined in 16 C.F.R. §
4 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million (“ppm”).

5 2.1.2. All other materials: no more than .01 percent Lead by weight (100 ppm).

6 2.2. **Market Withdrawal of Covered Products.** On or before the Effective Date,
7 Defendant shall cease shipping the Generations Memory Album in Red, SKU No. 0-12722-
8 60335-3, Style No. GA60335, as identified in CEH’s pre-suit Notice of Violation to Defendant
9 (the “Recall Covered Products”), to stores and/or customers in California, and Defendant shall
10 withdraw the Recall Covered Products from the market in California, and, at a minimum, send
11 instructions to any of its stores and/or customers that offer the Recall Covered Products for sale in
12 California to cease offering such Recall Covered Products for sale and to either return all Recall
13 Covered Products to Defendant for destruction, or to directly destroy the Recall Covered
14 Products. Any destruction of the Recall Covered Products shall be in compliance with all
15 applicable laws. Defendant shall keep and make available to CEH for inspection and copying
16 records and correspondence regarding the market withdrawal and destruction of the Recall
17 Covered Products. If there is a dispute over the corrective action, the Parties shall meet and
18 confer before seeking any remedy in court.

19 2.3. **Products in the Stream of Commerce.** The obligations of Section 2.1 do not
20 apply to any of Defendant’s Products that have been manufactured, distributed, shipped, sold, or
21 that are otherwise in the stream of commerce prior to the Effective Date.

22 **3. ENFORCEMENT**

23 3.1. **Enforcement Procedures.** Prior to bringing any new action, motion, or order to
24 show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
25 provide the violating party thirty (30) days advanced written notice of the alleged violation. Said
26 written notice shall describe with particularity the circumstances surrounding the alleged
27 violation. The Parties shall meet and confer during such thirty (30) day period in an effort to try
28 to reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day

1 period, the Party seeking to enforce may, by new action, motion or order to show cause before the
2 Superior Court of Marin, seek to enforce the terms and conditions contained in this Consent
3 Judgment.

4 **4. PAYMENTS**

5 4.1. **Payments From Defendant.** Within seven (7) days of the entry of this Consent
6 Judgment, Defendant shall pay the total sum of \$50,000 as a settlement payment.

7 4.2. **Allocation of Payments.** The total settlement amount for Defendant shall be paid
8 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. 4.2.1 Defendant shall pay the sum of \$6,600 as a penalty pursuant to
12 Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
13 Health & Safety Code § 25249.12. The penalty check shall be made payable to the Center For
14 Environmental Health.

15 4.2.2. 4.2.2 Defendant shall pay the sum of \$9,900 as payment to CEH in lieu of
16 penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
17 11, § 3202(b). CEH will use such funds to continue its work educating and protecting people
18 from exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such
19 funds to monitor compliance with the reformulation requirements of this and other similar
20 Consent 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 website at
25 www.ceh.org/justicefund. The payment in lieu of penalty check shall be made payable to the
26 Center for Environmental Health.

27 4.2.3. Defendant shall pay the sum of \$33,500 as reimbursement of reasonable
28 attorneys' fees and costs. The attorneys' fees and cost reimbursement check shall be made

1 payable to the Lexington Law Group.

2 **5. MODIFICATION AND DISPUTE RESOLUTION**

3 5.1. **Modification.** This Consent Judgment may be modified from time to time by
4 express written agreement of the Parties, with the approval of the Court, or by an order of this
5 Court upon motion and in accordance with law.

6 5.2. **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
7 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
8 modify the Consent Judgment.

9 **6. CLAIMS COVERED AND RELEASE**

10 6.1. This Consent Judgment is a full, final, and binding resolution between CEH and
11 Defendant and Defendant's parents, shareholders, divisions, subdivisions, subsidiaries, partners,
12 sister companies and their successors and assigns ("Defendant Releasees"), and all to whom they
13 directly distribute or sell Covered Products including, but not limited to, distributors, wholesalers,
14 customers, retailers, franchisees, cooperative members, and licensees, including OfficeMax
15 Incorporated and OfficeMax North America, Inc. ("Downstream Defendant Releasees"), of any
16 violation of Proposition 65 or any other statutory or common law claims that have been or could
17 have been asserted in the public interest against Defendant, Defendant Releasees, and
18 Downstream Defendant Releasees, regarding the failure to warn about exposure to Lead arising in
19 connection with Covered Products manufactured, distributed, or sold by Defendant prior to the
20 Effective Date.

21 6.2. CEH, for itself and acting on behalf of the public interest pursuant to Health &
22 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
23 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
24 violation of Proposition 65 or any other statutory or common law claims that have been or could
25 have been asserted in the public interest regarding the failure to warn about exposure to Lead
26 arising in connection with Covered Products manufactured, distributed or sold by Defendant prior
27 to the Effective Date.

28 6.3. Compliance with the terms of this Consent Judgment by Defendant and the

1 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, the
2 Defendant Releasees and their Downstream Defendant Releasees with respect to any alleged
3 failure to warn about Lead in Covered Products manufactured, distributed or sold by Defendant
4 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, the
7 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 John Dames
11 Drinker Biddle & Reath LLP
12 191 N. Wacker Drive, Suite 3700 Chicago, IL 60606
13 John.Dames@dbr.com

14 7.1.2. **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
15 this Consent Judgment shall be:

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

21 7.2. Any Party may modify the person and address to whom the notice is to be sent by
22 sending the other Party notice by first class and electronic mail.

23 **8. COURT APPROVAL**

24 8.1. This Consent Judgment shall become effective on the Effective Date, provided
25 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
26 Defendant shall support approval of such Motion.

27 8.2. If this Consent Judgment is not entered by the Court, it shall be of no force or
28 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
purpose.

9. GOVERNING LAW AND CONSTRUCTION

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

1 California.

2 **10. ATTORNEYS' FEES**

3 10.1. A Party who unsuccessfully brings or contests an action arising out of this
4 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
5 costs unless the unsuccessful Party has acted with substantial justification. For purposes of this
6 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
7 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq*

8 10.2. Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
9 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
10 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
11 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
12 provision shall not be construed as altering any procedural or substantive requirements for
13 obtaining such an award.

14 10.3. Nothing in this Section 10 shall preclude a party from seeking an award of
15 sanctions pursuant to law.

16 **11. ENTIRE AGREEMENT**

17 11.1. This Consent Judgment contains the sole and entire agreement and understanding
18 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
19 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
20 and therein. There are no warranties, representations, or other agreements between the Parties
21 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
22 other than those specifically referred to in this Consent Judgment have been made by any Party
23 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
24 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
25 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
26 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
27 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
28 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent

1 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
2 whether or not similar, nor shall such waiver constitute a continuing waiver.

3 **12. RETENTION OF JURISDICTION**

4 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

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

7 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
9 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

11 14.1. Nothing in this Consent Judgment shall preclude CEH from resolving any claim
12 against another entity on terms that are different than those contained in this Consent Judgment.

13 **15. EXECUTION IN COUNTERPARTS**

14 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
15 means of facsimile, which taken together shall be deemed to constitute one document.

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1 **IT IS SO STIPULATED:**

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Dated: <u>1/7</u> , 2013	CENTER FOR ENVIRONMENTAL HEALTH <u>CHARLIE PIZARRO</u> Printed Name <u>ASSOCIATE DIRECTOR</u> Title
Dated: _____, 2013	CARDINAL BRANDS HOLDING CO., INC. Printed Name Title

**IT IS SO ORDERED, AJUDGED,
AND DECREED**

Dated: _____, 2013

JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

1 IT IS SO STIPULATED:

2 Dated: _____, 2013

CENTER FOR ENVIRONMENTAL HEALTH

3
4
5 Printed Name

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7 Title

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9 Dated: 1/8, 2013

CARDINAL BRANDS HOLDING CO., INC.

10 *Marybeth T. Gale*
11 *Marybeth T. Gale, VP. Ass. General Counsel*
12 Printed Name *Deceased in interest*
to Cardinal Brands

13 *Vice President, Ass. General Counsel*
14 Title

15 IT IS SO ORDERED, AJUDGED,
16 AND DECREED

17 Dated: 3-26, 2013

LYNN DURYEE

JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA