

APR 29 2013

ALAN CARLSON, Clerk of the Court

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17 Attorneys for Defendant
18 BETTY LOU'S, INC.

19 SUPERIOR COURT OF CALIFORNIA
20 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

21 ENVIRONMENTAL RESEARCH
22 CENTER, a California non-profit
23 corporation,

24 Plaintiffs,

25 vs.

26 BETTY LOU'S, INC. and DOES 1-50,
27 Inclusive,

28 Defendants,

) Case No.: 30-2012-00621474-CU-MC-CJC

) ~~[PROPOSED]~~ STIPULATED CONSENT
) JUDGMENT; ~~[PROPOSED]~~ ORDER

) [Health & Safety Code § 25249.5, et seq.]

) ACTION FILED: December 31, 2012
) TRIAL DATE: None Set

1 **1. INTRODUCTION**

2 1.1 On December **31**, 2012, Plaintiff Environmental Research Center ("ERC"), a non-
3 profit corporation, as a private enforcer and in the public interest, initiated this action by filing its
4 Complaint for civil penalties and injunctive relief pursuant to the provisions of California Health
5 & Safety Code section 25249.5, *et seq.* ("Proposition 65") against Defendant Betty Lou's, Inc.
6 ("Betty Lou's"). ERC alleges that certain products ("Covered Products") manufactured,
7 distributed and sold by Betty Lou's contain lead, a chemical listed under Proposition 65 as a
8 carcinogen and reproductive toxin, and require a Proposition 65 warning. The Covered Products
9 are listed by name in Exhibit A to this Consent Judgment. ERC and Betty Lou's shall sometimes
10 be referred to individually as a "Party" or collectively as the "Parties."

11 1.2 ERC is a California non-profit corporation dedicated to, among other causes,
12 helping safeguard the public from health hazards by bringing about a reduction in the use and
13 misuse of hazardous and toxic chemicals, facilitating a safe environment for consumers and
14 employees and encouraging corporate responsibility. ERC has diligently prosecuted this matter
15 and is settling this case in the public interest.

16 1.3 Betty Lou's employs ten or more persons. Betty Lou's manufactures, distributes
17 and sells the Covered Products.

18 1.4 The Complaint is based on allegations contained in the Notices of Violation dated
19 October 21, 2011 and August 24, 2012 served on the California Attorney General, other public
20 enforcers, and Betty Lou's by ERC. A true and correct copies of the Notices of Violation are
21 attached hereto as Exhibit B. No public enforcer has filed suit against Betty Lou's with regard to
22 the Covered Products or the alleged violations.

23 1.5 ERC's Notices of Violation and the Complaint in this action allege that Betty Lou's
24 exposes persons in California to lead without first providing clear and reasonable warnings, in
25 violation of California Health & Safety Code section 25249.6. Betty Lou's denies all material
26 allegations of the Notices of Violation and the Complaint, has asserted numerous affirmative
27 defenses, and specifically denies that the Covered Products require a Proposition 65 warning or
28 otherwise cause harm to any person.

1 1.6 The Parties have entered into this Consent Judgment in order to settle, compromise
2 and resolve disputed claims and thus avoid prolonged and costly litigation. Nothing in this
3 Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission
4 by any of the Parties, or by any of their respective officers, directors, shareholders, employees,
5 agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees,
6 distributors, wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law,
7 fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged
8 violation of Proposition 65 nor shall this Consent Judgment be offered or admitted as evidence in
9 any administrative or judicial proceeding or litigation in any court, agency, or forum, except in an
10 action seeking to enforce the terms of this Consent Judgment or for purposes of issue or claim
11 preclusion or any other similar defense.

12 1.7 Except as expressly set forth herein, nothing in this Consent Judgment shall
13 prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any
14 other or future legal proceeding unrelated to these proceedings.

15 1.8 The Effective Date of this Consent Judgment shall be the date on which it is
16 entered as a judgment by this Court.

17 **2. JURISDICTION AND VENUE**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
20 over Betty Lou's as to the acts alleged in the Complaint, that venue is proper in the County of
21 Orange, and that this Court has jurisdiction to enter this Consent Judgment as a full and final
22 resolution of all claims which were or could have been asserted in this action based on the facts
23 alleged in the Notices of Violation or the Complaint. This Consent Judgment shall have no
24 application to or effect on Covered Products or other products manufactured, distributed or sold by
25 or on behalf of Betty Lou's to consumers outside of the state of California.

26 **3. INJUNCTIVE RELIEF**

27 3.1 On and after the Effective Date, Betty Lou's shall be permanently enjoined from
28 manufacturing for sale in California, distributing into California, or directly selling to a

1 consumer in California any Covered Product for which the serving size on the label contains
2 more than 0.5 micrograms of lead, unless such Covered Product complies with the warning
3 requirement set forth in Section 3.2 below. "Distributing into California" means to directly ship
4 a Covered Product into California for sale in California or to sell a Covered Product to a
5 distributor that Betty Lou's knows will sell the Covered Product in California. This injunction
6 shall not apply to products which Betty Lou's puts into the stream of commerce before the
7 Effective Date.

8 3.2 Clear and Reasonable Warnings. For those Covered Products that are subject to the
9 warning requirement of Section 3.1, Betty Lou's shall provide one of the following warnings as
10 specified below:

11 **[California Residents Proposition 65] WARNING [(California Proposition**
12 **65):** This product contains [lead,] [a] chemical[s] known to the State of
California to cause [cancer and] birth defects or other reproductive harm.

13 **[California Residents Proposition 65] WARNING [(California Proposition**
14 **65):** This product contains [lead,] [a] substance[s] known to the State of
California to cause [cancer and] birth defects or other reproductive harm.

15 The text in brackets in the warning above is optional, except that the term "cancer" must be
16 included only if the maximum dose recommended on the label contains more than 15 micrograms
17 of lead.

18 3.3 Testing.

19 (a) Once a year, on or before the anniversary of the entry of the Consent Judgment,
20 Betty Lou's shall test three (3) randomly selected samples of each Covered Product (in the form
21 intended for sale to the end-user) for lead content. This testing requirement does not apply to a
22 Covered Product for which Betty Lou's has provided the warning specified in Section 3.2 since
23 the Effective Date or during the preceding year.

24 (b) Testing for lead shall be performed using Inductively Coupled Plasma-Mass
25 Spectrometry ("ICP-MS") and closed-vessel, microwave-assisted digestion employing high-purity
26 reagents or any other testing method subsequently agreed upon in writing by the Parties.

27 (c) All testing pursuant to this Consent Judgment shall be performed by a laboratory
28 certified by the California Environmental Laboratory Accreditation Program or a laboratory that is

1 registered with the United States Food & Drug Administration.

2 (d) Betty Lou's shall retain all test results and documentation for a period of four years
3 from the date of the test. Upon written request by ERC, Betty Lou's shall provide copies of the
4 test results to ERC within 10 business days of the request.

5 (e) Betty Lou's shall test the Covered Products for a minimum of three (3) years. If
6 tests conducted pursuant to this Consent Judgment demonstrate that no warning is required for a
7 Covered Product during each of three (3) consecutive years, then the testing requirements of this
8 Section 3.3 are no longer required as to that Covered Product. However, if after the three (3) year
9 period Betty Lou's changes ingredient suppliers for any of the Covered Products and/or
10 reformulates any of the Covered Products, Betty Lou's shall test that Covered Product at least
11 once after such change is made.

12 (f) If Betty Lou's discontinues production of any Covered Product or ceases to
13 distribute any Covered Product into California, the testing obligation for such Covered Product
14 ends on the last date Betty Lou's ships Covered Product directly to California.

15 **4. SETTLEMENT PAYMENT**

16 4.1 In full and final satisfaction of all potential civil penalties, payment in lieu of civil
17 penalties, attorney's fees, and costs, Betty Lou's shall make a total payment of \$40,000.00,
18 payable to the Environmental Research Center (ERC). The payment will be sent to the
19 Environmental Research Center at 3111 Camino Del Rio North, Suite 400, San Diego, CA 92108..

20 4.2 ERC shall be responsible for allocating and sending the payments to the other
21 recipients as follows:

22 (a) \$4,260.00 as civil penalties pursuant to California Health & Safety Code section
23 25249.7(b)(1). Of this amount, \$3,195.00 shall be payable to OEHHA, and \$1,065.00 shall be
24 payable to ERC. Cal. Health & Safety Code §§ 25249.12(c)(1) & (d). ERC shall forward the civil
25 penalty payment to OEHHA, and send a copy of the transmittal letter to counsel for Betty Lou's.

26 (b) \$12,772.50 in lieu of further civil penalties, payable to ERC, for activities such as
27 (1), researching and testing consumer products that may contain Proposition 65 listed chemicals;
28 (2) awarding grants to California non-profit foundations/entities dedicated to public health; (3)

1 funding the ERC Eco Scholarship Fund for high school students in California interested in
2 pursuing an education in the field of environmental sciences; (4) funding ERC's Voluntary
3 Compliance Program to work with companies not subject to Proposition 65 to reformulate their
4 products to reduce potential consumer exposures; (5) funding ERC's RxY Program to assist
5 various medical personnel to provide testing assistance to independent distributors of various
6 products; (6) funding ERC's Got Lead? Program to assist consumers in testing products for lead;
7 (7) post-settlement monitoring of past consent judgments; and (8) the continued enforcement of
8 Proposition 65.

9 (c) \$19,467.50 payable to ERC, as reimbursement to ERC for reasonable investigation
10 costs associated with the enforcement of Proposition 65 and other costs incurred as a result of
11 investigating, bringing this matter to Betty Lou's attention, litigating and negotiating this
12 settlement in the public interest.

13 (d) \$3,500 payable to William Wraith at Wraith Law as reimbursement of ERC's
14 attorney's fees.

15

16 **5. MODIFICATION OF CONSENT JUDGMENT**

17 This Consent Judgment after its entry by the Court may be modified upon written
18 agreement of the Parties, followed by the entry of a modified Consent Judgment by the Court
19 thereon.

20 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT**
21 **JUDGMENT**

22 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate
23 this Consent Judgment.

24 6.2 Only after it complies with Section 10 below, any Party may, by motion or
25 application for an order to show cause filed with this Court, enforce the terms and conditions
26 contained in this Consent Judgment. The prevailing party may request that the Court award its
27 reasonable attorneys' fees and costs associated with such motion or application.

28 **7. APPLICATION OF CONSENT JUDGMENT**

1 This Consent Judgment shall apply to, be binding upon and benefit the Parties, and their
2 respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries,
3 divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, retailers, and all
4 other entities in the distribution chain of any Covered Product, the predecessors, successors and
5 assigns of any of them, and the general public.

6 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

7 8.1 This Consent Judgment is a full, final, and binding resolution between ERC, on
8 behalf of itself and in the public interest, and Betty Lou's, of any alleged violations of Proposition
9 65 or its implementing regulations, and fully and finally resolves all claims that have been or
10 could have been asserted in this action against Betty Lou's for failure to provide Proposition 65
11 warnings for the Covered Products regarding lead. ERC acting on its own behalf and in the public
12 interest hereby releases and discharges Betty Lou's and its respective officers, directors,
13 shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers,
14 franchisees, licensees, distributors, wholesalers, retailers, and all other entities in the distribution
15 chain of any Covered Product, and the predecessors, successors and assigns of any of them
16 (collectively, "Released Parties"), from all claims for violations of Proposition 65 up through the
17 Effective Date based on exposure to lead from the Covered Products as set forth in the Notice of
18 Violation and the Complaint.

19 8.2 ERC, on behalf of itself only, hereby releases and discharges the Released Parties
20 from any and all known and unknown past, present, and future rights, claims, causes of action,
21 suits, damages, penalties, liabilities, injunctive relief, declaratory relief, and attorneys' fees, costs,
22 and expenses arising from or related to the claims asserted, or that could have been asserted, under
23 state or federal law, regarding the presence of lead in the Covered Products or the facts alleged in
24 the Notices of Violation or the Complaint, including without limitation any and all claims
25 concerning exposure of any person to lead in the Covered Products.

26 8.3 Compliance with the terms of this Consent Judgment shall constitute compliance
27 by the Released Parties with Proposition 65 with respect to alleged exposures to lead contained in
28 the Covered Products.

1 8.4 Unknown Claims. It is possible that other injuries, damages, liability, or claims not
2 now known to the Parties arising out of the facts alleged in the Notices of Violation or the
3 Complaint and relating to the Covered Products will develop or be discovered. ERC, on behalf of
4 itself only, acknowledges that this Consent Judgment is expressly intended to cover and include all
5 such injuries, damages, liability, and claims, including all rights of action therefor. ERC has full
6 knowledge of the contents of California Civil Code section 1542. ERC, on behalf of itself only,
7 acknowledges that the claims released in Sections 8.1 and 8.2 above may include unknown claims,
8 and nevertheless waives California Civil Code section 1542 as to any such unknown claims.
9 California Civil Code section 1542 reads as follows:

10 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH**
11 **THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS**
12 **OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,**
13 **WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY**
14 **AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.”**

15 ERC, on behalf of itself only, acknowledges and understands the significance and consequences
16 of this specific waiver of California Civil Code section 1542.

17 8.5 It is the intention of the Parties to this release that, upon entry of this Consent
18 Judgment by the Court, this Consent Judgment shall be effective as a full and final accord and
19 satisfaction and release of every released claim up to and including the date of entry of the
20 Consent Judgment.

21 8.6 ERC, on the one hand, and Betty Lou’s, on the other hand, release and waive all
22 claims they may have against each other for any statements or actions made or undertaken by
23 them in connection with the Notices of Violation or this action.

24 **9. CONSTRUCTION OF CONSENT JUDGMENT, SEVERABILITY**

25 9.1 The terms and conditions of this Consent Judgment have been reviewed by the
26 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to
27 fully discuss the terms and conditions with its counsel. In any subsequent interpretation or
28 construction of this Consent Judgment, the terms and conditions shall not be construed against any
Party.

1 9.2 In the event that any of the provisions of this Consent Judgment are held by a court
2 to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

3 **10. NOTICE AND CURE**

4 10.1 No motion to enforce this Consent Judgment or application to show cause may be
5 filed by ERC, unless ERC notifies Betty Lou's of the specific acts alleged to breach this Consent
6 Judgment at least thirty (30) days before filing and serving any such motion or application. Any
7 notice to Betty Lou's must contain (1) the name of the product; (2) the lead content of the product,
8 with a copy of the analytical results and description of the testing methodology; (3) specific dates
9 when the product was sold in California; (4) the store or other place at which the product was
10 purchased; and (5) any other evidence or other support for the allegations in the notice.

11 10.2 Within thirty (30) days of receiving the notice described in Section 10.1, Betty
12 Lou's shall either (1) withdraw the product from sale in California, (2) provide the warning
13 described in Section 3.2 for the product, or (3) refute the information provided under Section 10.1.
14 Should the Parties be unable to resolve the dispute, any Party may seek relief under Section 6 of
15 this Consent Judgment.

16 **11. GOVERNING LAW**

17 The terms and conditions of this Consent Judgment shall be governed by and construed in
18 accordance with the laws of the State of California. In the event that Proposition 65 is repealed,
19 preempted or is otherwise rendered inapplicable, in whole or in part, by reason of law generally, or
20 as to the Covered Products, Betty Lou's may provide written notice to ERC of any asserted change
21 in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to,
22 and to the extent that, the Covered Products are so affected.

23 **12. PROVISION OF NOTICE**

24 All notices required by this Consent Judgment shall be sent by first-class, registered, or
25 certified mail, or overnight delivery, to the following:

26 **For Environmental Research Center:**
27 Chris Heptinstall, Executive Director
28 Environmental Research Center
3111 Camino Del Rio North, Suite 400

1 San Diego, CA 92108

2

3 **For Betty Lou's:**

4 Margaret Carew Toledo
5 Mennemeier, Glassman & Stroud LLP
6 980 9th Street, Suite 1700
7 Sacramento, CA 95814

8 Betty Lou Carrier
9 President
10 Betty Lou's, Inc.
11 P.O. Box 537
12 McMinnville, OR 97128

13 **13. COURT APPROVAL**

14 13.1 If this Consent Judgment is not approved by the Court, it shall be void and have no
15 force or effect.

16 13.2 ERC shall comply with the reporting requirements of California Health & Safety
17 Code section 25249.7(f) and with Title 11 of the California Code Regulations, section 3003.

18 **14. EXECUTION AND COUNTERPARTS**

19 This Consent Judgment may be executed in counterparts, which taken together shall be
20 deemed to constitute one document. A facsimile or pdf signature shall be construed as valid as the
21 original signature.

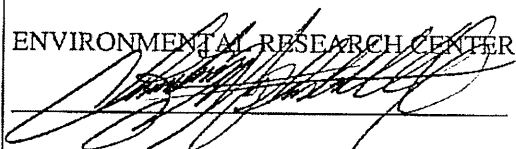
22 **15. ENTIRE AGREEMENT, AUTHORIZATION**

23 15.1 This Consent Judgment contains the sole and entire agreement and understanding
24 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
25 negotiations, commitments and understandings related hereto. No representations, oral or
26 otherwise, express or implied, other than those contained herein have been made by any Party. No
27 other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or
28 to bind any of the Parties.

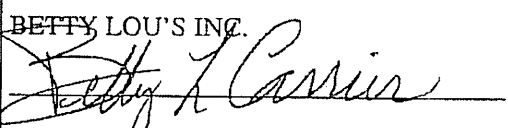
15.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
by the Party he or she represents to stipulate to the terms and conditions of this Consent Judgment,
to enter into and execute this Consent Judgment on behalf of the Party represented, and legally to

1 bind that Party to this Consent Judgment. The undersigned have read, understand and agree to all
2 of the terms and conditions of this Consent Judgment. Except as explicitly provided herein, each
3 Party shall bear its own fees and costs.

4 **IT IS SO STIPULATED:**

5
6 ENVIRONMENTAL RESEARCH CENTER
7 
8 Chris Heptinstall, Executive Director

Dated: 1/8/2013

9
10 BETTY LOU'S INC.
11 
12 Betty Lou Carrier, President

Dated: 1-7-2013

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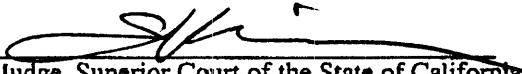
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ORDER AND JUDGMENT

Based upon the Parties' stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: April 29, 2013


Judge, Superior Court of the State of California
SHEILA RECIO
TEMPORARY JUDGE

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EXHIBIT A

1. Betty Lou's Nut Butter Balls Spirulina Ginseng
2. Betty Lou's North Shore Smackers Chocolate Spirulina Patties