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ENDORSED
FILED
ALAMEDA COUNTY

JUN 18 2018

CLERK OF THE SUPERIOR COURT

By PAM WILLIAMS
Deputy

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

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

DS SERVICES OF AMERICA, INC., *et al.*,

Defendants.

Case No. RG 16-834958

~~PROPOSED~~ CONSENT
JUDGMENT AS TO DS SERVICES
OF AMERICA, INC.

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health (“CEH”), a California non-profit corporation, and DS Services of America, Inc., a Delaware corporation (“Settling Defendant”). CEH and Settling Defendant are referred to herein individually as a “Party” and together as the “Parties.”

1.2 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers refillable water bottles made of polycarbonate plastic (“Covered Products”) that are used to deliver bottled water sold, filled by, or offered for sale by Settling Defendant in the State of California.

1 1.3 Settling Defendant is a corporation that manufactures, distributes, fills, sells or
2 offers for sale in the State of California drinking water that is packaged in Covered Products.

3 1.4 On June 27, 2016, CEH provided a 60-day Notice of Violation of Proposition 65
4 to the California Attorney General, the District Attorneys of every county in California, the City
5 Attorneys of every California city with a population greater than 750,000 and to Settling
6 Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to
7 bisphenol A (“BPA”) contained in drinking water that is sold in Covered Products without first
8 providing a clear and reasonable Proposition 65 warning.

9 1.5 On October 13, 2016, CEH filed the Complaint against Settling Defendant in the
10 above-referenced Court.

11 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
12 has jurisdiction over the allegations of violations contained in the Complaint and personal
13 jurisdiction over Settling Defendant as to the acts alleged in the Complaint, that venue is proper
14 in the County of Alameda and that this Court has jurisdiction to enter and enforce this Consent
15 Judgment as a full and final resolution of all claims which were or could have been raised in the
16 Complaint based on the facts alleged therein with respect to Covered Products manufactured,
17 distributed or sold by Settling Defendant.

18 1.7 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. Nothing in this Consent Judgment shall
22 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
23 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
24 and compromise and is accepted by the Parties solely for purposes of settling, compromising and
25 resolving issues disputed in this Action.

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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Stamping and Removal of Covered Products.** As soon as practicable, using
3 best efforts, but no later than the first day of the first month that is at least 60 days after the entry
4 of this Consent Judgment (the “Stamping Program Date”), Settling Defendant shall implement a
5 polycarbonate bottle stamping and removal program (the “Program”). Under the Program,
6 Settling Defendant will ensure that each newly manufactured Covered Product used by Settling
7 Defendant to deliver or sell drinking water in California after the Stamping Program Date is
8 stamped with the year of the bottle’s manufacture in a manner that ensures the stamp will be
9 visible during the usable life of the bottle. Each such stamp will be in a location that is plainly
10 visible to Settling Defendant’s employees assigned to inspect bottles on the filling line at Settling
11 Defendant’s facilities that distribute the Covered Products for use in California (“Inspectors”).
12 Beginning on January 1, 2023 (the “Removal Program Date”), upon inspection, Settling
13 Defendant will ensure that its Inspectors remove from the active inventory of bottles, through a
14 periodic review occurring at least once every three months, each bottle that is stamped with a
15 manufacture date that is five (5) or more years in the past. (Any bottles not bearing a
16 manufacture date will be removed from the active inventory of bottles only based on “visible
17 signs of wear,” as set forth below.)

18 **2.2 Removing Additional Covered Products from Inventory.** CEH believes that
19 polycarbonate bottles leach more BPA as the bottles wear, age and undergo additional wash
20 cycles. Settling Defendant has agreed to undertake the following steps to remove older bottles
21 that have been in use for the longest period of time and undergone the most wash cycles from the
22 active inventory of Covered Products:

23 **2.2.1** On or before the Stamping Program Date, Settling Defendant will update
24 the inspection protocols used by its Inspectors to add “visible signs of wear” to the criteria for the
25 removal of polycarbonate bottles (whether or not they bear a date stamp) from the active
26 inventory of bottles.

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1 2.2.2 Settling Defendant shall provide instruction and training to each
2 Inspector on what “visible signs of wear” are and how to determine if a bottle exhibits such signs
3 and should be removed from inventory.

4 2.2.3 Settling Defendant’s employees shall perform periodic visual inspections
5 that shall include looking for visible wear and cracks, prominent date and or identity stamps or
6 labeling that are easily read on the bottle-filling line, or other indications of bottle age as well as
7 using knowledge of the origin or time certain bottles were acquired in an effort to ensure that the
8 oldest bottles that have undergone the most wash cycles are removed from circulation first.

9 2.2.4 On or before the first day of the month following the Stamping Program
10 Date, Settling Defendant shall determine, from its available records, its average rate of removing
11 bottles from the active inventory of bottles intended for use in California, which will be the sum
12 of all bottles removed in calendar year 2017 (the “Baseline”). Beginning on the Stamping
13 Program Date, Settling Defendant’s Inspectors will, in the ordinary course, remove from the
14 active inventory of bottles additional bottles beyond the Baseline, as set forth below, and will
15 continue to do so as set forth below. Settling Defendant must meet the following numerical
16 standards for each calendar year until the Removal Program Date:

17 2018: Increase the number of removed bottles over Baseline by 1%.

18 2019: Increase the number of removed bottles over Baseline by 2%.

19 2020: Increase the number of removed bottles over Baseline by 3%.

20 2021: Increase the number of removed bottles over Baseline by 4%.

21 2022: Increase the number of removed bottles over Baseline by 5%.

22 2.3 **Monitoring and Documentation.** Settling Defendant shall monitor the rate at
23 which bottles are removed and prepare an annual report on the number of removed bottles each
24 calendar year on the following February 1, with the final report due on February 1, 2024. Settling
25 Defendant shall retain such reports until December 31, 2024 and promptly send such reports to
26 CEH within thirty (30) days of completion.

1 2.4 **Acquisition of New Bottled Water Businesses in California.** At any point in the
2 future, should Defendant acquire, in whole or in part, other than by mere financial investment, a
3 business selling bottled water in 3-gallon or larger polycarbonate bottles in California, then
4 Defendant will incorporate those bottles into its inventory of bottles, but without including any
5 bottles that are can be determined to be more than five years old based on prominent date and or
6 identity stamps or labeling that are easily read on the bottle filling line, and Defendant will
7 implement the procedures set forth in Paragraphs 2.1 and 2.2, above; provided that the Stamping
8 Program Date with respect to the Covered Products of such acquired business shall be January 1
9 of the year following the date the acquisition closes, and the Removal Program Date with respect
10 to the Covered Products of such acquired business shall be five years after the Stamping Program
11 Date; and further provided that the requirements of Paragraph 2.3 shall not apply to such Covered
12 Products.

13 **3. ENFORCEMENT**

14 3.1 **Enforcement Procedures.** Prior to bringing any motion or request for order to
15 show cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall
16 provide the violating party thirty (30) days’ advance written notice of the alleged violation. The
17 Parties shall meet and confer during such thirty (30) day period, exchanging any relevant
18 information, in an effort to try to reach agreement on an appropriate cure for the alleged violation
19 absent Court intervention. After such thirty (30) day period, the Party seeking to enforce may, by
20 new action, motion, or request before the Superior Court of Alameda County, seek to enforce the
21 terms and conditions contained in this Consent Judgment.

22 **4. PAYMENTS**

23 4.1 **Payments by Settling Defendant.** On or before five (5) days after the entry of
24 this Consent Judgment, Settling Defendant shall pay the total sum of \$191,127 as a settlement
25 payment as further set forth in this Section.

26 4.2 **Allocation of Payments.** The total settlement amount for Settling Defendant shall
27 be paid in five (5) separate checks in the amounts specified below and delivered as set forth
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1 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
2 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
3 day the full payment is not received after the applicable payment due date set forth in Section 4.1.
4 The late fees required under this Section shall be recoverable, together with reasonable attorneys'
5 fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent Judgment. The
6 funds paid by Settling Defendant shall be allocated as set forth below between the following
7 categories and made payable as follows:

8 4.2.1 Settling Defendant shall pay \$24,800 as a civil penalty pursuant to Health
9 & Safety Code §25249.7(b). The civil penalty payment shall be apportioned in accordance with
10 Health & Safety Code §25249.12 (25% to CEH and 75% to the State of California's Office of
11 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of
12 the civil penalty payment for \$18,600 shall be paid by check made payable to OEHHA and
13 associated with taxpayer identification number 68-0284486. This payment shall be delivered as
14 follows:

15 For United States Postal Service Delivery:

16 Attn: Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010, MS #19B
20 Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

22 Attn: Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 1001 I Street, MS #19B
26 Sacramento, CA 95814

27 The CEH portion of the civil penalty payment for \$6,200 shall be paid by check made
28 payable to the Center for Environmental Health and associated with taxpayer identification
number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
Street, San Francisco, CA 94117.

1	Center For Environmental Health	ASP	\$18,600	LLG
2	Lexington Law Group	Fee	\$126,000	LLG
3	Center For Environmental Health	Fee	\$21,727	LLG

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5 **5. MODIFICATION AND DISPUTE RESOLUTION**

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

9 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
10 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
11 modify the Consent Judgment. The Parties agree that possible future developments that may, but
12 do not necessarily, warrant modification of this Consent Judgment include the Office of
13 Environmental Health Hazard Assessment’s adoption of a “safe harbor” Maximum Allowable
14 Daily Level for BPA exposure via ingestion.

15 **6. CLAIMS COVERED AND RELEASE**

16 6.1 Provided that Settling Defendant complies in full with its obligations under
17 Section 4 hereof, this Consent Judgment is a full, final and binding resolution between CEH on
18 behalf of itself and the public interest and Settling Defendant and its parents, subsidiaries,
19 affiliated entities that are under common ownership, directors, officers, employees, agents,
20 shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities to
21 which Settling Defendant distributes or sells Covered Products, such as distributors, wholesalers,
22 customers, retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”) of
23 any violation of Proposition 65 based on failure to warn about alleged exposure to BPA contained
24 in the Covered Products that were sold, distributed, used, or offered for sale by Settling
25 Defendant prior to the Effective Date (the “Released Products”).

26 6.2 Provided that Settling Defendant complies in full with its obligations under
27 Section 4 hereof, CEH, for itself, its agents, successors and assigns, releases, waives and forever

1 discharges any and all claims against Settling Defendant, Defendant Releasees and Downstream
2 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
3 common law claims that have been or could have been asserted by CEH individually or in the
4 public interest regarding the failure to warn about exposure to BPA arising in connection with the
5 Released Products.

6 6.3 Provided that Settling Defendant complies in full with its obligations under
7 Section 4 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and
8 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
9 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
10 warn about BPA in Covered Products manufactured, distributed or sold by Settling Defendant
11 after the Effective Date.

12 **7. PROVISION OF NOTICE**

13 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the
14 notice shall be sent by first class and electronic mail to:

15 Eric S. Somers
16 Lexington Law Group
17 503 Divisadero Street
18 San Francisco, CA 94117
19 esomers@lexlawgroup.com

20 7.2 When Settling Defendant is entitled to receive any notice under this Consent
21 Judgment, the notice shall be sent by first class and electronic mail to:

22 Trenton H. Norris
23 Arnold & Porter Kaye Scholer LLP
24 Three Embarcadero Center, 10th Floor
25 San Francisco, CA 94111
26 Trent.Norris@apks.com

27 Any Party may modify the person and/or address to whom the notice is to be sent by sending the
28 other Party notice by first class and electronic mail.

1 **8. COURT APPROVAL**

2 8.1 This Consent Judgment shall become effective upon the date signed by CEH and
3 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a
4 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of
5 such Motion.

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

9 **9. GOVERNING LAW AND CONSTRUCTION**

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

12 **10. ATTORNEYS' FEES**

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

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

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

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1 **11. ENTIRE AGREEMENT**

2 11.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments or understandings related thereto, if any, are hereby merged herein
5 and therein. There are no warranties, representations or other agreements between the Parties
6 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
7 other than those specifically referred to in this Consent Judgment have been made by any Party
8 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
9 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
10 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
11 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
12 modification, waiver or termination of this Consent Judgment shall be binding unless executed in
13 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
14 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
15 whether or not similar, nor shall such waiver constitute a continuing waiver.

16 **12. RETENTION OF JURISDICTION**

17 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
18 Consent Judgment.

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

20 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
21 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
22 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

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

24 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
25 against an entity that is not Settling Defendant on terms that are different than those contained in
26 this Consent Judgment.

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IT IS SO STIPULATED:

Dated: 15 FEB 2018

**CENTER FOR ENVIRONMENTAL
HEALTH**



Signature

CHARLIE PIZZANO

Printed Name

ASSOCIATE DIRECTOR

Title

Dated: _____, 2018

DS SERVICES OF AMERICA, INC.

Signature

Printed Name

Title

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IT IS SO STIPULATED:

Dated: _____, 2018

**CENTER FOR ENVIRONMENTAL
HEALTH**


Signature

Printed Name

Title

Dated: February 9, 2018

DS SERVICES OF AMERICA, INC.



Signature

Thomas J. Harrington
Printed Name

CEO
Title