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ENDORSED  
FILED  
ALAMEDA COUNTY

MAY 01 2018

CLERK OF THE SUPERIOR COURT  
By LYNETTE RUSHING  
Deputy

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

CENTER FOR ENVIRONMENTAL HEALTH,

Plaintiff,

v.

DEL TACO RESTAURANTS, INC., et al.,

Defendants.

Case No. RG-16-834949

**PROPOSED** CONSENT  
JUDGMENT AS TO SOUTHWEST  
AIRLINES CO.

1     **1.     INTRODUCTION**

2             1.1.     The Parties to this Consent Judgment are the Center for Environmental Health, a  
3     California non-profit corporation (“CEH”), and Southwest Airlines Co. (“Southwest”). The  
4     Parties enter into this Consent Judgment to settle certain claims asserted by CEH in the public  
5     interest against Southwest as set forth in the operative complaint (“Complaint”) in the above-  
6     captioned matter. In particular, the CEH has alleged that the thermal paper Southwest uses for  
7     transactional documentation provided to its California customers (“Thermal Paper”) contains  
8     bisphenol A, a chemical listed by the State of California as known to cause birth defects or other  
9     reproductive harm (“BPA”).

10            1.2.     On November 9, 2016, CEH provided a 60-day Notice of Violation under  
11     Proposition 65 to Southwest, the California Attorney General, the District Attorneys of every  
12     county in California and the City Attorneys of every California city with a population greater than  
13     750,000, alleging that Southwest violated California Health & Safety Code Section 25249.5 *et*  
14     *seq.* (“Proposition 65”) by exposing persons to BPA from Thermal Paper without first providing  
15     a clear and reasonable Proposition 65 warning.

16            1.3.     Southwest is a person in the course of doing business under Proposition 65.

17            1.4.     On October 13, 2016, CEH filed the Complaint in the above-captioned matter. On  
18     November 2, 2016, CEH filed the First Amended Complaint in the above-captioned matter. On  
19     February 10, 2017, CEH amended the operative Complaint in the above-captioned matter to name  
20     Southwest as a defendant.

21            1.5.     Although the CEH alleges that Southwest violated Proposition 65 by providing  
22     Thermal Paper containing BPA to California consumers or has done so in the past, Southwest  
23     denies such allegations.

24            1.6.     For purposes of this Consent Judgment only, the Parties stipulate that this Court  
25     has jurisdiction over the allegations of violations contained in the Complaint and personal  
26     jurisdiction over Southwest as to the acts alleged in the Complaint, that venue is proper in the  
27     County of Alameda, and that this Court has jurisdiction to enter and enforce this Consent

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1 Judgment as a full and final resolution of all claims which were or could have been raised in the  
2 Complaint based on the facts alleged therein with respect to Thermal Paper.

3 1.7. Nothing in this Consent Judgment is or shall be construed as an admission by the  
4 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with  
5 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,  
6 conclusion of law, issue of law or violation of law. Nothing in this Consent Judgment shall  
7 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any  
8 other pending or future legal proceedings. This Consent Judgment is the product of negotiation  
9 and compromise and is accepted by the Parties solely for purposes of settling, compromising and  
10 resolving issues disputed in this Action.

## 11 **2. INJUNCTIVE RELIEF**

12 2.1 **Specification Compliance Date.** The date of entry of this Consent Judgment is  
13 referred to as the "Effective Date." To the extent it has not already done so, no more than thirty  
14 (30) days after the Effective Date, and before Southwest purchases any Thermal Paper that it will  
15 use in California, it shall instruct each supplier of such Thermal Paper (a "Thermal Paper  
16 Supplier") that the Thermal Paper supplied to Southwest must be BPA free. If in the future  
17 Southwest purchases Thermal Paper that Southwest will use in California from a Thermal Paper  
18 Supplier that it has not previously provided with instructions to provide BPA free Thermal Paper,  
19 Southwest shall provide such instructions to said Thermal Paper Supplier prior to placing an  
20 initial order for Thermal Paper. One year after the Effective Date, Southwest shall serve CEH  
21 with a written certification stating that it has complied in good faith with its obligations under this  
22 Section 2.1.

23 2.2 **Purchase and Use Restriction.** After the Effective Date, Southwest shall not  
24 purchase or provide to any customer or consumer in California any Thermal Paper that contains  
25 BPA that was intentionally added to the Thermal Paper in the manufacturing process. Thermal  
26 Paper that contains less than twenty (20) parts per million BPA by weight (the "Reformulation  
27 Level") is deemed to contain no intentionally added BPA, such concentration to be determined by  
28

1 use of a test performed by an accredited laboratory using inductively coupled plasma mass  
2 spectrometry (ICP-MS) equipment.

3       **2.3 Additional Efforts to Reduce Use of Thermal Paper.** Southwest further agrees  
4 to continue to use best efforts to reduce the use of all Thermal Paper in California that contains  
5 bisphenols. These efforts shall include but not be limited to efforts to use Thermal Paper that is  
6 bisphenol free, expand the use of smartphone based applications that do not involve the use of  
7 Thermal Paper such as the Southwest iOS and Android applications, and to implement software  
8 that only prints Thermal Paper transactional receipts for drinks or other charges on request. On  
9 the one year anniversary of the Effective Date, Southwest shall serve CEH with a written  
10 certification stating that it has complied in good faith with its obligations under this Section 2.3  
11 and providing a brief explanation of its compliance actions.

### 12       **3. ENFORCEMENT**

13       **3.1 Enforcement Procedures.** Prior to bringing any motion or order to show cause to  
14 enforce the terms of this Consent Judgment, a Party seeking to enforce this Consent Judgment  
15 shall provide the violating party thirty (30) days advanced written notice of the alleged violation.  
16 The Parties shall meet and confer during such thirty (30) day period in an effort to try to reach  
17 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the  
18 Party seeking to enforce may, by new action, motion, or order to show cause before the Superior  
19 Court of Alameda, seek to enforce Proposition 65 or the terms and conditions contained in this  
20 Consent Judgment.

### 21       **4. PAYMENTS**

22       **4.1 Payments by Southwest.** On or before seven (7) days after the entry of this  
23 Consent Judgment, Southwest shall pay the total sum of \$45,000 as a settlement payment  
24 (“Settlement Payment”) as further set forth in this Section.

25       **4.2 Allocation of Payments.** The total Settlement Payment shall be paid in five (5)  
26 separate checks in the amounts specified below and delivered as set forth below. Any failure by  
27 Southwest to comply with the payment terms herein shall be subject to a stipulated late fee to be

1 paid by Southwest in the amount of \$100 for each day the full payment is not received after the  
2 applicable payment due date set forth in Section 4.1. The late fees required under this Section  
3 shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding  
4 brought pursuant to Section 3 of this Consent Judgment. The Settlement Payment paid by  
5 Southwest shall be allocated as set forth below between the following categories and made  
6 payable as follows:

7           4.2.1 Southwest shall pay \$5,500 as a civil penalty ("Civil Penalty") pursuant to  
8 Health & Safety Code §25249.7(b). The Civil Penalty payment shall be apportioned in  
9 accordance with Health & Safety Code §25249.12 (25% to CEH and 75% to the State of  
10 California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly,  
11 Southwest shall pay the OEHHA portion of the Civil Penalty payment for \$4,125 by check made  
12 payable to OEHHA and associated with taxpayer identification number 68-0284486. This  
13 payment shall be delivered as follows:

14                           For United States Postal Service Delivery:  
15                           Attn: Mike Gyurics  
16                           Fiscal Operations Branch Chief  
17                           Office of Environmental Health Hazard Assessment  
18                           P.O. Box 4010, MS #19B  
19                           Sacramento, CA 95812-4010

20                           For Non-United States Postal Service Delivery:  
21                           Attn: Mike Gyurics  
22                           Fiscal Operations Branch Chief  
23                           Office of Environmental Health Hazard Assessment  
24                           1001 I Street, MS #19B  
25                           Sacramento, CA 95814

26 Southwest shall pay the CEH portion of the Civil Penalty payment for \$1,375 by check made  
27 payable to the Center for Environmental Health and associated with taxpayer identification  
28 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero  
Street, San Francisco, CA 94117.

          4.2.2 Southwest shall pay \$4,100 as an Additional Settlement Payment ("ASP")  
to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations,

1 Title 11, § 3204. CEH intends to place these funds in CEH's Toxics in Food Fund and use them  
2 to support CEH programs and activities that seek to educate the public about BPA and other toxic  
3 chemicals in food, to work with the food industry and agriculture interests to reduce exposure to  
4 BPA and other toxic chemicals in food, and to thereby reduce the public health impacts and risks  
5 of exposure to BPA and other toxic chemicals in food sold in California. CEH shall obtain and  
6 maintain adequate records to document that ASPs are spent on these activities and CEH agrees to  
7 provide such documentation to the Attorney General within thirty days of any request from the  
8 Attorney General. The payments pursuant to this Section shall be made payable to the Center for  
9 Environmental Health and associated with taxpayer identification number 94-3251981. These  
10 payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA  
11 94117.

12 4.2.3 Southwest shall pay \$35,400 as a reimbursement of a portion of CEH's  
13 reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement shall be made  
14 in two separate checks as follows: (a) \$30,600 payable to the Lexington Law Group and  
15 associated with taxpayer identification number 94-3317175; and (b) \$4,800 payable to the Center  
16 For Environmental Health and associated with taxpayer identification number 94-3251981. Both  
17 of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San  
18 Francisco, CA 94117.

19 4.2.4 To summarize, Southwest shall deliver checks made out to the payees and  
20 in the amounts set forth below:

21

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$4,125	OEHHA per Section 4.2.1
Center For Environmental Health	Penalty	\$1,375	LLG
Center For Environmental Health	ASP	\$4,100	LLG
Lexington Law Group	Fees and Costs	\$30,600	LLG
Center For Environmental Health	Fees and Costs	\$4,800	LLG

1     **5.     MODIFICATION OF CONSENT JUDGMENT**

2             **5.1     Modification.** This Consent Judgment may be modified from time to time by  
3     express written agreement of the Parties, with the approval of the Court, or by an order of this  
4     Court upon motion and in accordance with law.

5             **5.2     Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment  
6     shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to  
7     modify the Consent Judgment.

8     **6.     CLAIMS COVERED AND RELEASE**

9             **6.1**     This Consent Judgment is a full, final and binding resolution between CEH on  
10    behalf of itself and the public interest and Southwest and its parents, subsidiaries, affiliated  
11    entities that are under common ownership, directors, officers, employees, agents, shareholders,  
12    successors, assigns, and attorneys (“Defendant Releasees”), and all entities to which Southwest  
13    directly or indirectly distributes or sells Thermal Paper, including but not limited to distributors,  
14    wholesalers, customers, retailers, franchisees, licensors and licensees (“Downstream Defendant  
15    Releasees”), of any violation of Proposition 65 based on failure to warn about alleged exposure to  
16    BPA contained in Thermal Paper that was sold, distributed, offered for sale or otherwise provided  
17    to employees or customers in California by Southwest prior to the Effective Date.

18            **6.2**     CEH acting on its own behalf and in the public interest releases Southwest,  
19    Defendant Releasees and Downstream Defendant Releasees from all claims for violations of  
20    Proposition 65 up through the Effective Date based on exposure to BPA from Thermal Paper as  
21    set forth in the 60-Day Notice of Violation served on Southwest by CEH.

22            **6.3**     CEH, for itself, its agents, successors and assigns, further releases, waives, and  
23    forever discharges any and all claims against Southwest, Defendant Releasees, and Downstream  
24    Defendant Releasees arising from any violation of Proposition 65 or any other statutory or  
25    common law claims that have been or could have been asserted by CEH individually or in the  
26    public interest regarding the failure to warn about exposure to BPA arising in connection with  
27    Thermal Paper sold or provided by Southwest in California prior to the Effective Date.

1           6.4     Provided that Southwest complies in full with its obligations under Section 4  
2 hereof, compliance with the terms of this Consent Judgment by Southwest shall constitute  
3 compliance with Proposition 65 by Southwest, its Defendant Releasees and its Downstream  
4 Defendant Releasees with respect to any failure to warn about alleged exposure to BPA contained  
5 in Thermal Paper that was sold, distributed, offered for sale or otherwise provided to employees  
6 or customers by Southwest in California after the Effective Date.

7       **7.     PROVISION OF NOTICE**

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

10                   Eric S. Somers  
11                   Lexington Law Group  
12                   503 Divisadero Street  
13                   San Francisco, CA 94117  
14                   esomers@lexlawgroup.com

15           7.2     When Southwest is entitled to receive any notice under this Consent Judgment, the  
16 notice shall be sent by first class and electronic mail to:

17                   Kerrie Forbes  
18                   General Counsel Department  
19                   2702 Love Field Drive, HDQ-4GC  
20                   Dallas, Texas 75235-1611  
21                   Kerrie.Forbes@wnco.com

22           7.3     Any Party may modify the person and address to whom the notice is to be sent by  
23 sending the other Party written notice by first class and electronic mail.

24       **8.     COURT APPROVAL**

25           8.1     This Consent Judgment shall become effective as a contract upon the date signed  
26 by CEH and Southwest, whichever is later, provided however, that CEH shall also prepare and  
27 file a Motion for Approval of this Consent Judgment and Southwest shall support approval of  
28 such Motion.

          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 the laws of the State of  
3     California.

4     **10.    ATTORNEYS' FEES**

5             10.1    A Party who unsuccessfully brings or contests an action arising out of this Consent  
6     Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs  
7     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, Code of Civil Procedure §§ 2016.010, *et seq.*

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

1 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,  
2 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in  
3 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent  
4 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof  
5 whether or not similar, nor shall such waiver constitute a continuing waiver.

6 **12. RETENTION OF JURISDICTION**

7 12.1 This Court shall retain jurisdiction of this matter to implement or modify the  
8 Consent Judgment.

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

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

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

14 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim  
15 against an entity that is not Southwest on terms that are different than those contained in this  
16 Consent Judgment.

17 **15. EXECUTION IN COUNTERPARTS**

18 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by  
19 means of facsimile or portable document format (pdf), which taken together shall be deemed to  
20 constitute one document.

21  
22 **IT IS SO STIPULATED:**

23 **CENTER FOR ENVIRONMENTAL**  
24 **HEALTH**

25   
26 \_\_\_\_\_  
27 Charlie Pizarro  
28 Associate Director

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SOUTHWEST AIRLINES CO.

Kerrie V. Forbes  
Kerrie Forbes  
Associate General Counsel

IT IS SO ORDERED:

**BRAD SELIGMAN**

Dated: 5/1/18

Judge of the Superior Court of California