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6 CENTER FOR ENVIRONMENTAL HEALTH

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

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13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)

15 Plaintiff,

16 v.

17 BABY UNIVERSE, INC.; BUY BUY BABY,
18 INC.; and Defendant DOES 1 through 200,
19 inclusive,)

20 Defendants.)

Case No. CGC-06-448559

**[PROPOSED] CONSENT JUDGMENT
RE DEFENDANT BABYAGE.COM,
INC.**

1 **1. INTRODUCTION**

2 **1.1** On January 17, 2006, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint in San Francisco
4 County Superior Court, entitled *Center for Environmental Health v. Baby Universe, Inc., et al.*,
5 San Francisco County Superior Court Case Number CGC-06-448559 (the “CEH Action”), for
6 civil penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5 *et seq.* (“Proposition 65”).

8 **1.2** On July 18, 2006, CEH filed an amendment to the CEH Action to add
9 BabyAge.com, Inc. (“Defendant”) as a defendant. Defendant is alleged in the Complaint to be a
10 corporation that employs 10 or more persons and to have manufactured, distributed and/or sold
11 soft food and beverage containers manufactured by J.L. Childress, Inc. made of materials
12 containing lead and/or lead compounds (the “Products”) in the State of California. CEH and
13 Defendant are together referred to herein as the “Parties.”

14 **1.3** On or about April 24, 2006, CEH served Defendant and the appropriate
15 public enforcement agencies with the requisite 60-day notice that Defendant was in violation of
16 Proposition 65. CEH’s notice and the Complaint in this Action allege that Defendant exposes
17 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
18 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer,
19 birth defects and other reproductive harm, without first providing clear and reasonable warning
20 to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and
21 Complaint allege that Defendant’s conduct violates Health & Safety Code §25249.6, the warning
22 provision of Proposition 65.

23 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
24 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
25 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
26 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
27 Judgment as a full and final resolution of all claims which were or could have been raised in the
28 Complaint based on the facts alleged therein.

1 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
2 certain disputed claims between the Parties as alleged in the Complaint. By executing this
3 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'
4 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
5 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
6 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
7 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
8 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
9 any other or future legal proceedings.

10 **2. COMPLIANCE**

11 **2.1 Level.** Within ninety days of entry of this Consent Judgment (the
12 "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell, or cause to be
13 manufactured, distributed, or sold, any Product that contains Lead concentrations exceeding 200
14 parts per million ("ppm") in or on the interior lining of the Products or in any polyvinyl chloride
15 ("PVC") used on the exterior of the Products; and that the exterior surface coatings of the
16 Products may not contain Lead concentrations exceeding 600 ppm Lead.

17 **2.2 Issuance of Product Specifications to Supplier.** In order to help ensure
18 compliance with section 2.1, Defendant shall, within 30 days of entry of this Consent Judgment,
19 issue specifications to its supplier of the Products stating that the interior lining and any PVC
20 used on the exterior of the Products may not contain Lead concentrations exceeding 200 ppm;
21 and that the exterior surface coatings of the Products may not contain Lead concentrations
22 exceeding 600 ppm.

23 **2.3 Certification of Level By Supplier.** Defendant shall obtain written
24 certification from their supplier of the Products that such Products are in compliance with the
25 Product specifications for all orders of the Products received sixty days or more following entry
26 of the Consent Judgment.

27 **2.4 Testing.** In order to help ensure compliance with the requirements of
28 Section 2.1, for any single order of an individual Product that exceeds 5000 units purchased by

1 Defendant after the Compliance Date, Defendant shall conduct testing on randomly selected units
2 of the Products in an amount equal to 0.1% (but not to exceed a total of 4 units). All of the
3 testing pursuant to this section shall be conducted at an independent laboratory in accordance
4 with the test protocol attached hereto as Exhibit A (the "Test Protocol").

5 **2.4.1 Products that exceed the Level.** If the results of the
6 testing required pursuant to section 2.3 shows levels of lead exceeding 200 ppm for the interior
7 lining or any PVC used on the exterior of a Product, or 600 ppm for the exterior surface coating
8 of a Product, Defendant shall return all of the Products that were purchased under the particular
9 purchase order to the supplier with a letter explaining that such Products do not comply with the
10 supplier's certification. Should the testing of Products purchased from a particular supplier
11 demonstrate Lead levels exceeding those set forth in Section 2.1 more than twice in a twelve
12 month period, Defendant shall stop purchasing Products from such supplier.

13 **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
14 of the Products. Any such testing will be conducted pursuant to the Test Protocol at an
15 independent laboratory. In the event that CEH's testing demonstrates Lead levels in excess of
16 200 ppm for the interior lining or exterior PVC of one or more Products, or 600 ppm for the
17 exterior surface coating of one or more of the Products, CEH shall inform Defendant of the
18 violation(s), including information sufficient to permit Defendant to identify the Product(s).
19 Defendant shall, within 10 days following such notice, demonstrate compliance with sections 2.2
20 and 2.3 of this Consent Judgment by providing CEH, at the address listed in section 12, with a
21 copies of the specification issued to, and certification received from its supplier of the Product
22 that tested above the level(s) set in this Consent Judgment. If the Defendant fails to provide CEH
23 with the information demonstrating its compliance with sections 2.2 and 2.3 for the Product(s)
24 purchased from the same supplier as those with tests showing Lead levels exceeding the levels
25 set forth in this Consent Judgment, the Defendant shall be liable for stipulated penalties. The
26 stipulated penalty shall be as follows for each unit of Product for which CEH produces a test
27 result with Lead levels exceeding the levels set in this Consent Judgment for which Defendant
28 has not complied with sections 2.2 – 2.4:

1 First Occurrence: \$1,250
2 Second Occurrence: \$1,500
3 Third Occurrence: \$1,750
4 Thereafter: \$2,500

5 **2.6 Inapplicability To Settling Suppliers.** This section 2 of the Consent
6 Judgment shall not apply to Products sold by Defendant that are manufactured, distributed and/or
7 sold by any other entity that has signed or signs a Consent Judgment with CEH regarding the
8 Products.

9 **3. INTERIM RELIEF**

10 **3.1** Defendant represents that it immediately stopped selling the Products upon
11 receipt of CEH's 60-day notice. Defendant shall not resume sale of the Products until such
12 Products comply with the requirements of Section 2 of this Consent Judgment.

13 **4. SETTLEMENT PAYMENTS**

14 **4.1 Monetary Payment in Lieu of Penalty:** \$3,500 shall be made payable to
15 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use
16 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
17 this work, CEH intends to conduct periodic testing of the Products as set forth in section 2.4.

18 **4.2 Attorneys' Fees and Costs:** \$10,000 shall be made payable to Lexington
19 Law Group, LLP ("LLG") and will be used to reimburse CEH and its attorneys for their
20 reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of
21 investigating, bringing this matter to Defendant's attention, litigating and negotiating a settlement
22 in the public interest.

23 **4.3 Timing of payments.** The payments required under this section shall be
24 made in two installments. The first installment of \$6,750 is due on or before March 1, 2007.
25 The first installment will include the entire payment due under section 4.1 made payable to CEH,
26 and \$3,250 of the payment required under section 4.2 made payable to LLG. The second
27 payment of \$6,750 is due on or before May 1, 2007 and shall be made payable to LLG. All
28 payments required herein shall be delivered to the address set forth in section 13 below. Any

1 failure by Defendant to comply with the payment terms herein shall be subject to a stipulated late
2 fee in the amount of \$50 for each day after the delivery date the payment is received. The late
3 fees required under this section shall be recoverable, together with reasonable attorneys' fees, in
4 an enforcement proceeding brought pursuant to section 6 of this Consent Judgment.

5 **5. MODIFICATION OF CONSENT JUDGMENT**

6 **5.1** This Consent Judgment may be modified by written agreement of CEH
7 and Defendant, or upon motion of CEH or Defendant as provided by law.

8 **5.2** CEH intends to enter into agreements with other entities that distribute
9 and/or sell Products. Should Defendant determine that the provisions of any such Consent
10 Judgment with a similarly situated distributor or seller of Products are less stringent, Defendant
11 may request a modification of this Consent Judgment to conform with the terms of the later
12 entered Consent Judgment. Upon 30 days prior written notice of Defendant's request for a
13 modification, CEH shall inform Defendant whether it will agree to such modification. If CEH
14 does not agree, Defendant may move the Court for a modification pursuant to this section.

15 **6. ENFORCEMENT OF CONSENT JUDGMENT**

16 **6.1** CEH may, by motion or application for an order to show cause before the
17 Superior Court of the County of San Francisco, enforce the terms and conditions contained in
18 this Consent Judgment. Should CEH prevail on any motion or application under this section,
19 CEH shall be entitled to its reasonable attorneys' fees and costs associated with such motion or
20 application.

21 **7. APPLICATION OF CONSENT JUDGMENT**

22 **7.1** This Consent Judgment shall apply to and be binding upon the parties
23 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
24 them.

25 **8. CLAIMS COVERED**

26 **8.1** This Consent Judgment is a full, final and binding resolution
27 between CEH and Defendant of any violation of Proposition 65 that was or could have been
28 asserted in the Complaint against Defendant (including any claims that could be asserted in

1 connection with any of the Products covered by this Consent Judgment) or its parents,
2 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or customers
3 (collectively, "Defendant Releasees") based on failure to warn about alleged exposure to Lead
4 contained in the Products, with respect to any Products manufactured, distributed or sold by
5 Defendant on or prior to the date of entry of this Consent Judgment. Compliance with the terms
6 of this Consent Judgment constitutes compliance with Proposition 65 for purposes of lead
7 exposures resulting from the Products.

8 **9. SEVERABILITY**

9 **9.1** In the event that any of the provisions of this Consent Judgment are held
10 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
11 affected.

12 **10. SPECIFIC PERFORMANCE**

13 **10.1** The parties expressly recognize that Defendant's obligations under this
14 Consent Judgment are unique. In the event that any Settling Defendant is found to be in breach
15 of this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the
16 parties agree that it would be extremely impracticable to measure the resulting damages and that
17 such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
18 available rights or remedies, may sue in equity for specific performance, and Defendant expressly
19 waives the defense that a remedy in damages will be adequate.

20 **11. GOVERNING LAW**

21 **11.1** The terms of this Consent Judgment shall be governed by the laws of the
22 State of California.

23 **12. RETENTION OF JURISDICTION**

24 **12.1** This Court shall retain jurisdiction of this matter to implement and enforce
25 the terms this Consent Judgment.

26 **13. PROVISION OF NOTICE**

27 **13.1** All notices required pursuant to this Consent Judgment and
28 correspondence shall be sent to the following:

1 For CEH:

2 Mark N. Todzo, Esq.
3 Lexington Law Group, LLP
4 1627 Irving Street
5 San Francisco, CA 94122

6 For Defendant:

7 James J. Scanlon, Esq.
8 Rosenn, Jenkins & Greenwald, LLP
9 15 South Franklin Street
10 Wilkes-Barre, PA 18711

11 **14. COURT APPROVAL**

12 **14.1** If this Consent Judgment is not approved by the Court, it shall be of no
13 further force or effect.

14 **15. EXECUTION AND COUNTERPARTS**

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

17 **16. AUTHORIZATION**

18 **16.1** Each signatory to this Consent Judgment certifies that he or she is fully
19 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
20 into and execute the Consent Judgment on behalf of the party represented and legally bind that
21 party. The undersigned have read, understand and agree to all of the terms and conditions of this
22 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
23 costs.

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Dated: 2/4/07

Michael Green, Executive Director
Center for Environmental Health

BABYAGE.COM, INC.

Dated: _____

Printed Name

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Dated: _____

Michael Green, Executive Director
Center for Environmental Health

BABYAGE.COM, INC.



Dated: 2/5/2007

JACK KIEFER

Printed Name

Exhibit A

(Test Methodology)

The following protocol shall be applied separately to the interior and exterior material of a finished Product.

1. Cut 5 small, discreet portions of the material to be analyzed.
2. Combine the portions into a composite sample.
3. Prepare the sample for analysis using microwave digestion. Microwave digestion protocols from the following two methods may be used provided that the samples are completely digested:
 - a. AOAC Official Method 999.10 (Lead, Cadmium, Zinc, Copper, and Iron in Foods)
 - b. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave Digestion for Lead in Paint Chips (and other matrices)
4. Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic Absorption Spectrophotometry (GFAAS) or Inductively Coupled Plasma Mass Spectrometry (ICP-MS) using standard operating procedures.
5. Lead content shall be expressed in parts per million (ppm).

ORDER AND JUDGMENT

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Based upon the stipulated Consent Judgment between CEH and Baby Universe, Inc., the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California