

1 LEXINGTON LAW GROUP, LLP
2 Mark N. Todzo, State Bar No. 168389
3 Eric S. Somers, State Bar No. 139050
4 Lynne R. Saxton, State Bar No. 226210
5 1627 Irving Street
6 San Francisco, CA 94122
7 Telephone: (415) 759-4111
8 Facsimile: (415) 759-4112

9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

11 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
12 CITY AND COUNTY OF SAN FRANCISCO

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

15 Plaintiff,

16 v.

17 LISA FRANK, INC., and Defendant DOES 1
18 through 200, inclusive

19 Defendants.

Case No. CGC-447915

**[PROPOSED] CONSENT JUDGMENT
BETWEEN CENTER FOR
ENVIRONMENTAL HEALTH AND
DEFENDANT FASHION ACCESSORY
BAZAAR, LLC**

1 **1. INTRODUCTION**

2 **1.1** On May 11, 2006, plaintiff the Center for Environmental Health ("CEH"), a non-
3 profit corporation acting in the public interest, added Fashion Accessory Bazaar, LLC
4 ("Defendant") as a defendant to the case titled *Center for Environmental Health v. Lisa Frank, Inc.*
5 *et al.*, San Francisco County Superior Court Case Number CGC-447915 (the "CEH Action"),
6 requesting civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety
7 Code §25249.5 *et seq.* ("Proposition 65").

8 **1.2** Defendant is a corporation that employs 10 or more persons and manufactured,
9 distributed and/or sold soft food and beverage containers such as lunch boxes, water bottles, coolers
10 and similar products (the "Products") in the State of California. The term "Products" encompasses
11 only products designated for sale or distribution within the United States.

12 **1.3** On or about November 4, 2005, CEH served Defendant and public enforcement
13 agencies with the requisite 60-day notice alleging that Defendant was in violation of Proposition 65
14 ("Notice"). CEH's Notice and the Complaint in this Action allege that Defendant exposes
15 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
16 interchangeably herein as "Lead"), chemicals known to the State of California to cause cancer, birth
17 defects and other reproductive harm, without first providing clear and reasonable warning to such
18 persons regarding the carcinogenicity and reproductive toxicity of Lead. The Notice and Complaint
19 allege that Defendant's conduct violates Proposition 65, including Cal. Health & Safety Code
20 §25249.6. Defendant disputes such allegations and asserts that all its products are safe and comply
21 with all applicable laws, including Consumer Product Safety Commission and Federal Food and
22 Drug Administration standards.

23 **1.4** Upon receipt of CEH's Notice, Defendant took immediate measures to address the
24 allegations set forth therein and to investigate the substance of CEH's allegations.

25 **1.5** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over the subject matter of the violations alleged in CEH's Complaint and personal
27 jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is proper in the
28 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a

1 full and final resolution of all claims which were or could have been raised in the Complaint and
2 Notice based on the facts alleged therein.

3 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of certain
4 disputed claims between the Parties as alleged in the Notice and/or Complaint. By executing this
5 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties' intent
6 that nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
7 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent Judgment
8 constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of
9 law, or violation of law.

10 **2. COMPLIANCE - REFORMULATION**

11 **2.1 [RESERVED.]**

12 **2.2 Product reformulation.** Currently, in connection with the interior liner of the
13 Products, Defendant intends to use PEVA or a similar material which is PVC free and has a Lead
14 concentration which does not exceed 200 parts per million ("ppm"). Within one-hundred eighty
15 (180) days of entry of this Consent Judgment (the "Compliance Date") Defendant shall not
16 manufacture, distribute, ship, or sell or cause to be manufactured, distributed, shipped, or sold, any
17 Product in which the interior lining of the Product or exterior surface coating contains Lead
18 concentrations exceeding 200 ppm or 600 ppm, respectively, or with PVC material used for the
19 exterior of the Product with Lead concentrations exceeding 200 ppm.

20 **2.3 Product specifications and certifications.** Defendant shall issue specifications to
21 its suppliers requiring that the interior lining of the Products and exterior surface coating of the
22 Products do not contain materials which contain Lead concentrations exceeding 200 ppm and 600
23 ppm, respectively, and that the exterior of the Products must not contain PVC material with Lead
24 concentrations exceeding 200 ppm. Defendant shall obtain written certification from its suppliers
25 of the Products certifying that the interior lining does not contain Lead concentrations exceeding
26 200 ppm, that the exterior surface-coating does not contain Lead exceeding 600 ppm, and that the
27 exterior of the Product does not contain PVC material with Lead concentrations exceeding 200
28 ppm.

1 **2.4 Testing.** In order to ensure compliance with the requirements of Section 2.2.
2 Defendant shall conduct (or cause to be conducted) testing to confirm that the interior lining of the
3 Products contains less than 200 ppm Lead, that the exterior surface-coating of the Products contains
4 less than 600 ppm Lead, and that the exterior of the Products do not contain PVC material with
5 Lead concentrations exceeding 200 ppm. At all times that Defendant uses PVC for the interior
6 lining of its Products, testing shall be conducted in compliance with Section 2.4.1. At any time that
7 Defendant uses a material other than PVC for the interior lining of its Products, testing shall be
8 conducted in accordance with Section 2.4.2. All testing pursuant to this section shall be performed
9 by an independent laboratory in accordance with the test protocol set forth in Exhibits A and B,
10 attached. The results of all testing performed pursuant to this section 2 shall be made available to
11 both Parties on a confidential basis.

12 **2.4.1 Testing Where Interior Lining Contains PVC.** For each of the first two
13 orders of Products purchased from Defendant's suppliers after the Compliance Date, Defendant
14 shall randomly select and test the greater of 0.1% (one-tenth of one percent) or two, but in no case
15 more than four, of the total Products purchased from each supplier of the Products intended for sale
16 in California. Following the first two orders, Defendant shall test the Products in accordance with
17 2.4.2.

18 **2.4.2 Random Testing.** Testing pursuant to this section 2 shall be performed on
19 randomly selected units by an independent laboratory in accordance with the test protocol set forth
20 in Exhibits A and B, attached, and in accordance with Defendant's usual testing practices.
21 Defendant's usual testing practices include testing as required by its various retailers. At a
22 minimum, during each calendar year, Defendant shall randomly select and test the greater of 0.1%
23 (one-tenth of one percent) or two, but in no case more than four, of the total Products purchased
24 from each supplier of the Products intended for sale in California. At the request of CEH, the
25 results of all testing performed pursuant to this section shall be made available to CEH on a
26 confidential basis.

27 **2.5 Products that exceed stipulated levels pursuant to Defendant's Testing.** If the
28 results of the testing required pursuant to section 2.4 show levels of lead exceeding 200 ppm for the

1 interior lining of a Product, 600 ppm for the exterior surface-coating of a Product, or 200 ppm for
2 PVC material used for the exterior of a Product, Defendant shall: (1) refuse to accept all of the
3 Products that were purchased under the particular purchase order; (2) send a notice to the supplier
4 explaining that such Products do not comply with the supplier's certification; and (3) apply the
5 testing frequency set forth in 2.4 as though the next shipment from the supplier were the first one
6 following the Compliance Date.

7 **2.6 Confirmatory testing by CEH.** CEH intends to conduct periodic testing of the
8 Products. Any such testing will be conducted by CEH at an independent laboratory, in accordance
9 with the test protocol set forth in Exhibits A and B, attached. In the event that CEH's testing
10 demonstrates Lead levels in excess of 200 ppm for the interior lining, 600 ppm for the exterior
11 surface-coating, or 200 ppm for exterior PVC material of two or more Products, CEH shall inform
12 Defendant of the test results, including information sufficient to permit Defendant to identify the
13 Product(s). Defendant shall, within 20 days following such notice, provide CEH, at the address
14 listed in section 12, with its supplier certification and testing information demonstrating its
15 compliance with sections 2.3 and 2.4 of this Consent Judgment. If Defendant fails to provide CEH
16 with information demonstrating that it complied with sections 2.3 or 2.4 (as the case may be),
17 Defendant shall be liable for stipulated payments in lieu of penalties for Products for which CEH
18 produces tests demonstrating Lead levels exceeding 200 ppm for the interior lining, 600 ppm for
19 exterior surface-coating, or 200 ppm for exterior PVC material, as set forth below. In addition,
20 Defendant shall then apply the testing frequency set forth in 2.4 as though the next shipment from
21 the supplier were the first one following the Compliance Date. The payments shall be made to CEH
22 and used for the purposes described in section 3.1.

23 **2.6.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments in lieu of
24 penalties are warranted under section 2.6, the stipulated payment amount shall be as follows:
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1	First Occurrence:	\$1,250
2	Second Occurrence:	\$1,500
3	Third Occurrence:	\$1,750
4	Thereafter:	\$2,500

5 Notwithstanding the foregoing, the maximum stipulated payment amount in a calendar year.
6 regardless of the number of units of Defendant's Products tested by CEH with exceedances of the
7 Lead levels set forth in this Consent Judgment, shall be \$3,500.

8 **2.6.2 Products in the stream of commerce.** Defendant's Products that have been
9 manufactured, shipped, sold, or that otherwise are in the stream of commerce prior to the
10 Compliance Date shall be released from any claims that were brought or that could have been
11 brought by CEH in its Complaint, as though they were Covered Claims within the meaning of
12 Section 7, below.

13 **3. SETTLEMENT PAYMENTS**

14 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH fifteen
15 thousand dollars (\$15,000) in lieu of any penalty pursuant to Health and Safety Code §25249.7(b).
16 CEH shall use such funds to continue its work protecting people from exposures to toxic chemicals.
17 As part of this work, CEH intends to conduct periodic testing of the Products as set forth in section
18 2.6.

19 **3.2 Attorneys' Fees and Costs.** Thirty thousand dollars (\$30,000) shall be paid to The
20 Lexington Law Group to reimburse The Lexington Law Group and its attorneys for their reasonable
21 investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating,
22 bringing this matter to Defendant' attention, litigating and negotiating a settlement in the public
23 interest.

24 **3.3 Timing of payments.** All payments required under Sections 3.1 and 3.2, above,
25 shall be paid into a Lexington Law Group, LLP interest bearing Client Funds Account within five
26 (5) days after execution of this proposed Consent Judgment by the Parties. The payments
27 deposited, including interest, may not be withdrawn from the Client Funds Account or otherwise
28 utilized until after this Consent Judgment is final, including all appeals, if any.

1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** This Consent Judgment may be modified by written agreement of CEH and
3 Defendant, or upon motion of CEH or Defendant as provided by law.

4 **4.2** CEH intends to enter into agreements with other entities that manufacture, distribute
5 and/or sell Products. Should Defendant determine that the provisions of any such Consent
6 Judgment with a similarly situated manufacturer or distributor of products are less stringent.
7 Defendant may request a modification of this Consent Judgment to conform with the terms of the
8 later entered Consent Judgment. Upon 30 days prior written notice of Defendant's request for a
9 modification, CEH shall inform Defendant whether it will agree to such modification. If CEH does
10 not agree, Defendant may move the Court for a modification pursuant to this section.

11 **5. ENFORCEMENT OF CONSENT JUDGMENT**

12 **5.1** Either Party may, by motion or application for an order to show cause, enforce the
13 terms and conditions contained in this Consent Judgment. The prevailing Party on any motion or
14 application shall be entitled to its reasonable attorneys' fees and costs associated with such motion
15 or application.

16 **6. APPLICATION OF CONSENT JUDGMENT**

17 **6.1** This Consent Judgment shall apply to and be binding upon the Parties hereto,
18 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

19 **7. CLAIMS COVERED**

20 **7.1** This Consent Judgment is a full, final and binding resolution between CEH and
21 Defendant of any violation of Proposition 65 that was or could have been asserted in the Notice or
22 Complaint against Defendant (including any claims that could be asserted in connection with any of
23 the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates, directors,
24 officers, employees, agents, attorneys, distributors, or customers (collectively, "Defendant
25 Releasees") based on failure to warn about alleged Proposition 65 exposures with respect to any
26 Products manufactured, distributed or sold by Defendant ("Covered Claims") on or prior to the date
27 of entry of this Consent Judgment. Compliance with the terms of this Consent Judgment constitutes
28 compliance with Proposition 65 for purposes of Lead exposures from the Products.

1 7.2 Further. CEH hereby releases all retailers, distributors, and licensors of Defendant's
2 products from any claims related to the Notice, the Complaint and this Judgment and CEH agrees to
3 dismiss any such claims that it has asserted or could assert against any retailers, distributors, or
4 licensors of Defendant's Products. If CEH has filed a complaint against a retailer, distributor, or
5 licensor of Defendant's Products, then CEH shall within 10 days of entry of this Consent Judgment
6 file a dismissal, with prejudice, as to those claims relating to Defendant's Products. CEH shall
7 provide Defendant with a conformed copy of the dismissal. CEH further agrees to provide
8 Defendant with a letter substantially similar to the one attached hereto as Exhibit C, stating that it
9 has released all of Defendant's distributors, retailers, and licensors from any liability relating to
10 sales of Products manufactured and/or sold by Defendant. As to each of Defendant's retailers,
11 distributors, or licensors which have not been served with a 60-day notice letter or a complaint by
12 CEH, CEH agrees not to serve a 60-day notice on said retailer, distributor, or licensor which
13 includes within its scope, whether directly or indirectly, any of Defendant's products. For purposes
14 of the release provided in this Section, the term "retailer, distributor, or licensor" shall include their
15 respective related entities, predecessors, successors, assigns, parents, subsidiaries, affiliates,
16 officers, partners, directors, stockholders, shareholders, attorneys, representatives, agents and
17 employees, past, present and future.

18 **8. [RESERVED.]**

19 **9. SPECIFIC PERFORMANCE**

20 **9.1** The Parties expressly recognize that Defendant's obligations under this Consent
21 Judgment are unique. In the event that Defendant is found to be in breach of this Consent Judgment
22 for failure to comply with the provisions of Section 2 hereof, the Parties agree that it would be
23 extremely impracticable to measure the resulting damages and that such breach would cause
24 irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may
25 sue in equity for specific performance, and Defendant expressly waives the defense that a remedy in
26 damages will be adequate.

1 **10. GOVERNING LAW**

2 **10.1** The terms of this Consent Judgment shall be governed by the laws of the State of
3 California.

4 **11. CONSENT JUDGMENT TERMINATION AND RETENTION OF JURISDICTION**

5 **11.1** This Consent Judgment will automatically terminate and be of no further force.
6 validity or affect as of July 1, 2011.

7 **11.2** This Court shall retain jurisdiction of this matter to implement and enforce the terms
8 this Consent Judgment while it is in effect.

9 **12. PROVISION OF NOTICE.**

10 **12.1** All notices required pursuant to this Consent Judgment and correspondence shall be
11 sent to the following:

12 For CEH:

13 Mark N. Todzo
14 Lexington Law Group, LLP
15 1627 Irving Street
16 San Francisco, CA 94122

17 For Defendant:

18 Malcolm Weiss, Esq.
19 Jeffer, Mangels, Butler Marmaro, LLP
20 1900 Avenue of the Stars, 7th Floor
21 Los Angeles, CA 90067

22 **13. COURT APPROVAL**

23 **13.1** CEH will comply with the settlement notice provisions of Health and Safety Code
24 § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

25 **13.2** If this Consent Judgment is not approved by the Court, it shall be of no further force
26 or effect. If this Consent Judgment is appealed, with the exception of the injunctive relief
27 provisions in Section 2, above, which remain in effect during any appeal, it does not become
28 effective and has no force or effect until all issues on appeal are resolved.

1 **14. EXECUTION AND COUNTERPARTS**

2 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile, which taken together shall be deemed to constitute one document.

4 **15. AUTHORIZATION**

5 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute
7 the Consent Judgment on behalf of the Party represented and legally bind that Party. The
8 undersigned have read, understand and agree to all of the terms and conditions of this Consent
9 Judgment. Except as explicitly provided herein, each Party is to bear its own fees and costs.

10 **AGREED TO:**

11 **CENTER FOR ENVIRONMENTAL HEALTH**

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14 Dated: 5/25/06

15 Michael Green, Executive Director
16 Center for Environmental Health

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19 **FASHION ACCESSORY BAZAAR, LLC**

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21 Dated: _____

22 Steve Russo, President
23 Fashion Accessory Bazaar, LLC

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10 **AGREED TO:**

11 CENTER FOR ENVIRONMENTAL HEALTH

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Dated: _____

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Michael Green, Executive Director

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Center for Environmental Health

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FASHION ACCESSORY BAZAAR, LLC

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Dated: June 12, 2006

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Steve Russo, President

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Fashion Accessory Bazaar, LLC

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1 Exhibit A
2 (Test Methodology for Interior Lining and Exterior Material Containing PVC)

3 The following protocol, implementing EPA Method 3050B, shall be applied to the
4 interior lining material of a finished Product.

- 5 1. Cut 5 small, discreet portions of the material to be analyzed.
 - 6 2. Combine the portions into a composite sample weighing one (1) gram.
 - 7 3. Prepare the sample for analysis using acid digestion. Fully digest the sample
8 using repeated additions of concentrated nitric acid (HNO₃) and 30% hydrogen peroxide (H₂O₂)
9 while heating in a microwave. Reduce the resultant digestate in volume while heating with a
10 microwave and then diluted to a final volume of 100 mL.
 - 11 4. Analyze the sample for total Lead (Pb) content using Graphite Furnace
12 Atomic Absorption Spectrometry (GFAA) or Inductively Coupled Plasma Mass Spectrometry (ICP-
13 MS) using standard operating procedures.
 - 14 5. Lead content shall be expressed in parts per million (ppm).
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Exhibit B
(Exterior Surface-Coating Test Methodology)

The following protocol, implementing ASTM F-963, shall be applied to the exterior surface-coating of a finished Product.

1. Scrape off coating and grind it through a sieve, obtaining no less than 100 milligrams.
2. Mix the test portion prepared with 50 times its mass of aqueous solution of 0.07 mol/L hydrochloric acid at 37+- 2 Deg Celsius. Shake for 1 minute.
3. Check for PH, between 1.0 and 1.5. Adjust as required.
4. Without delay, separate the solids from the mixture by filtering with a pore size of 0.45um. If necessary centrifuge at 5000 g for no more than 10 minutes.
5. Analytical results as determined shall be adjusted by subtracting the analytical correction factor as is necessary to make statistical correction for interlaboratory error. The analytical correction factor for lead is 30%.

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Fashion Accessory Bazaar, LLC, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California