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23 COGHLAN'S, LTD.

24 SUPERIOR COURT OF THE STATE OF CALIFORNIA
25 COUNTY OF ALAMEDA

26 CENTER FOR ENVIRONMENTAL HEALTH,
27 a non-profit corporation,

28 Plaintiff,

v.

COGHLAN'S, LTD., and Defendant DOES 1
through 200, inclusive,

Defendant.

Case No. RG07-355965

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On November 13, 2007, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint in Alameda County
4 Superior Court, entitled *Center for Environmental Health v. Coghlan’s, Ltd.*, Alameda County
5 Superior Court Case Number RG07355965 (the “Action”), for civil penalties and injunctive relief
6 pursuant to the provisions of California Health & Safety Code § 25249.5 et seq. (“Proposition 65”).

7 1.2 Defendant Coghlan’s Ltd. (“Coghlan’s”) is a “person in the course of doing
8 business” under Proposition 65 and manufactures, distributes and/or sells rainwear (the “Products”)
9 in the State of California. Coghlan’s and CEH are referred to collectively herein as the Parties.

10 1.3 On or about August 14, 2007, CEH served Coghlan’s and the appropriate
11 public enforcement agencies with the requisite 60-day notice that Coghlan’s is in violation of
12 Proposition 65. CEH’s notice and the Complaint in this Action allege that Coghlan’s exposes
13 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
14 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer, birth
15 defects and other reproductive harm, without first providing clear and reasonable warning to such
16 persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and Complaint
17 allege that Coghlan’s conduct violates Health & Safety Code § 25249.6, the warning provision of
18 Proposition 65.

19 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this
20 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
21 personal jurisdiction over Coghlan’s as to the acts alleged in CEH’s Complaint, that venue is proper
22 in the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a full
23 and final resolution of all claims which were or could have been raised in the Complaint based on the
24 facts alleged therein.

25 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of certain
26 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
27 Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties’ intent that
28 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,

1 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent Judgment
2 constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law,
3 or violation of law. Nothing in this Consent Judgment shall prejudice, waive or impair any right,
4 remedy, argument or defense the Parties may have in this or any other or future legal proceedings.
5 This Consent Judgment is the product of negotiation and compromise and is accepted by the parties,
6 for purposes of settling, compromising and resolving issues disputed in this action, including future
7 compliance by Coghlan's with section 2 of this Consent Judgment, and shall not be used for any
8 other purpose, or in any other matter.

9 **2. COMPLIANCE OBLIGATIONS**

10 **2.1 Lead Reformulation.** After July 1, 2008 (the "Compliance Date"), Coghlan's
11 shall not manufacture, distribute, ship, or sell, or cause to be manufactured, distributed, or sold, any
12 Product that contains Lead in concentrations that exceed (a) 30 parts per million ("ppm") in the fabric
13 of the Product; or (b) 200 ppm in any non-fabric components (*e.g.*, zippers, drawstrings, snaps, or
14 buttons) of the Product (collectively, the "Reformulation Standard"). This reformulation requirement
15 shall not apply to any Products distributed prior to the Compliance Date.

16 **2.2 Certification of Level from Suppliers.** Coghlan's shall obtain written
17 certification with corresponding test results from its suppliers of the Products certifying that neither
18 the Products nor any materials of which the Products are comprised contain Lead in excess of the
19 Reformulation Standard.

20 **2.3 Testing.** In order to help ensure compliance with the requirements of
21 section 2.1 and 2.2, Coghlan's shall conduct testing to determine whether the fabric of its Products
22 contains less than 30 ppm Lead. Testing pursuant to this section shall be conducted pursuant to the
23 most current version of United States Environmental Protection Agency Method 3050B, or other
24 equivalent method. The results of all testing performed pursuant to this section shall be retained for a
25 period of three years from the date of the test and shall be made available to CEH upon request. On a
26 quarterly basis, Coghlan's shall test the fabric of at least two randomly selected Products from the
27 newly-delivered inventory of Products.

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1 **2.3.1 Products that exceed Reformulation Standard pursuant to**
2 **Coghlan's Testing.** If the results of the testing required pursuant to Section 2.3 shows levels of Lead
3 exceeding the Reformulation Standard for a particular style of Product, Coghlan's shall return all of
4 the style of Product that was purchased under the particular purchase order to the supplier with a
5 letter explaining that such Products do not comply with the supplier's certification. Should the
6 testing of a particular style of Product purchased from a supplier demonstrate Lead levels exceeding
7 the Reformulation Standard more than twice, Coghlan's shall cease purchasing Products from such
8 supplier.

9 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing of
10 the Products. Any such testing will be conducted pursuant to the EPA Method 3050B, or other
11 equivalent method, at an independent laboratory. In the event that CEH's testing demonstrates Lead
12 levels that exceed the Reformulation Standard, CEH shall submit the test results to Coghlan's, at the
13 address listed in section 12, and shall include information sufficient to permit Coghlan's to identify
14 the Product. Coghlan's shall, within 10 days following such notice, provide CEH, at the address
15 listed in section 13, with its supplier certification and testing information demonstrating its
16 compliance with sections 2.2 and 2.3 of this Consent Judgment. Coghlan's shall be liable for
17 stipulated payments in lieu of penalties for Products for which CEH produces tests demonstrating
18 Lead levels exceeding the Reformulation Standard as set forth in Section 2.4.1 and 2.4.2. These
19 payments shall be made to CEH and used for the purposes described in section 4.1 and to pay for
20 related attorneys' fees and costs. The stipulated payments in lieu of penalties and other remedies
21 provided for herein are in addition to any other remedies available to enforce the terms of this
22 Consent Judgment.

23 **2.4.1 Stipulated payments of lieu of penalties assuming compliance with**
24 **section 2.2 and 2.3.** Assuming Coghlan's provides CEH with information demonstrating that it
25 complied with sections 2.2 and 2.3 for the Products from the purchase order as those with tests
26 showing Lead levels exceeding the Reformulation Standard, the stipulated penalty shall be as follows
27 for each Occurrence:
28

1	First Occurrence:	\$500
2	Second Occurrence:	\$1,000
3	Third Occurrence:	\$2,000
4	Thereafter:	\$5,000

5 For purposes of this section and section 2.4.2: (a) "Occurrence" shall mean CEH's submission of
6 valid test results demonstrating that a style of Product sold in California exceeds the Reformulation
7 Standard; and (b) submission of multiple noncompliant test results for the same style of Products
8 purchased from the same purchase order shall be considered a single Occurrence.

9 **2.4.2 Stipulated payment in lieu of penalties assuming non-compliance**
10 **with sections 2.2 and 2.3.** Assuming Coghlan's fails to provide CEH with information
11 demonstrating that it complied with sections 2.2 and 2.3 for the Products from the same purchase
12 order as those with tests showing Lead levels exceeding the Reformulation Standard, the stipulated
13 penalty shall be as follows for each Occurrence:

14	First Occurrence:	\$1,000
15	Second Occurrence:	\$2,000
16	Third Occurrence:	\$4,000
17	Thereafter:	\$10,000

18 **2.5 Phase out of testing for continued compliance with Reformulation**

19 **Standard.** In the event that Coghlan's demonstrates continuous compliance with the Reformulation
20 Standard for a period of four consecutive years following the Compliance Date, Coghlan's shall only
21 be required to test the fabric of at least one randomly selected Product from each shipment of
22 Products received by Coghlan's. In the event that Coghlan's demonstrates continuous compliance
23 with the Reformulation Standard for a period of eight consecutive years following the Compliance
24 Date, the testing identified in Section 2.3 shall no longer be required. Coghlan's will continue to
25 obtain written certification with corresponding test results from its suppliers of the Products in
26 compliance with Section 2.2, and CEH shall still be entitled to enforce the Reformulation Standard in
27 accordance with Section 2.4. Furthermore, if Coghlan's begins purchasing the Products from a new
28 supplier, the testing identified in Section 2.3 shall be required for Products purchased from that

1 supplier, and the phase down of testing requirements under this Section 2.5 for that supplier shall be
2 measured from the date of Coghlan's initial purchase order from that supplier.

3 **3. SETTLEMENT PAYMENTS**

4 3.1 Within five days of entry of this Consent Judgment, Coghlan's shall pay a total of
5 \$26,000 as a settlement payment. This total shall be paid in two separate checks delivered to the
6 offices of the Lexington Law Group, LLP at the address set forth in section 13 below and made
7 payable and allocated as follows. Any failure by Coghlan's to comply with the payment terms herein
8 shall be subject to a stipulated late fee in the amount of \$100 for each day after the delivery date the
9 payment is received. The late fees required under this section shall be recoverable, together with
10 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to section 6 of this
11 Consent Judgment.

12 3.1.1 **Monetary Payment in Lieu of Penalty:** \$8,500 shall be paid to CEH
13 in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment shall be made
14 by check payable to Center for Environmental Health. CEH shall use such funds to continue its work
15 protecting people from exposures to toxic chemicals. As part of this work, CEH intends to conduct
16 periodic testing of the Products as set forth in section 2.4.

17 3.1.2 **Attorneys' Fees and Costs:** \$17,500 shall be used to reimburse CEH
18 and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs
19 incurred as a result of investigating, bringing this matter to Coghlan's attention, litigating and
20 negotiating a settlement in the public interest. This payment shall be made by check payable to
21 Lexington Law Group, LLP.

22 **4. MODIFICATION OF CONSENT JUDGMENT**

23 4.1 This Consent Judgment may be modified by written agreement of CEH and
24 Coghlan's, or upon motion of CEH or Coghlan's as provided by law.

25 **5. ENFORCEMENT OF CONSENT JUDGMENT**

26 5.1 CEH may, by motion or application for an order to show cause before the
27 Superior Court of the County of Alameda, enforce the terms and conditions contained in this Consent
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1 Judgment. Should CEH prevail on any motion or application under this section, CEH shall be
2 entitled to recover its reasonable attorneys' fees and costs associated with such motion or application.

3 **6. APPLICATION OF CONSENT JUDGMENT**

4 6.1 This Consent Judgment shall apply to and be binding upon the Parties hereto,
5 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

6 **7. RELEASE**

7 7.1 This Consent Judgment is a full, final, and binding resolution between CEH
8 and Coghlan's of any violation of Proposition 65 that was or could have been asserted in the
9 Complaint against Coghlan's or its parents, subsidiaries, affiliates, directors, officers, employees,
10 agents, attorneys, distributors, or customers based on failure to warn about alleged exposure to Lead
11 contained in the Products, with respect to any Products manufactured, distributed or sold by
12 Coghlan's on or prior to the date of entry of this Consent Judgment. This release does not limit or
13 effect the obligations of any party created under this Consent Judgment.

14 **8. SEVERABILITY**

15 8.1 In the event that any of the provisions of this Consent Judgment are held by a
16 court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

17 **9. SPECIFIC PERFORMANCE**

18 9.1 The Parties expressly recognize that Coghlan's' obligations under this Consent
19 Judgment are unique. In the event that Coghlan's is found to be in breach of this Consent Judgment
20 for failure to comply with the provisions of section 2 hereof, the parties agree that it would be
21 extremely impracticable to measure the resulting damages and that such breach would cause
22 irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may
23 sue in equity for specific performance, and Coghlan's expressly waives the defense that a remedy in
24 damages will be adequate.

25 **10. GOVERNING LAW**

26 10.1 The terms of this Consent Judgment shall be governed by the laws of the State
27 of California.

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1 **11. RETENTION OF JURISDICTION**

2 11.1 This Court shall retain jurisdiction of this matter to implement and enforce the
3 terms this Consent Judgment.

4 **12. PROVISION OF NOTICE**

5 12.1 All notices required pursuant to this Consent Judgment and correspondence
6 shall be sent to the following:

7 For CEH: Howard Hirsch
8 Lexington Law Group, LLP
9 1627 Irving Street
10 San Francisco, CA 94122

11 For Coghlan's: Rob Coghlan
12 COGHLAN'S LTD
13 121 Irene Street
14 Winnipeg, MB
15 Canada R3T 4C7

16 With a copy to:

17 William F. Tarantino
18 Morrison & Foerster LLP
19 425 Market Street
20 San Francisco, CA 94105-2482

21 **13. COURT APPROVAL**

22 13.1 If this Consent Judgment is not approved by the Court, it shall be of no further
23 force or effect. The Parties agree to support a Motion for Approval of this Consent Judgment.

24 **14. EXECUTION AND COUNTERPARTS**

25 14.1 The stipulations to this Consent Judgment may be executed in counterparts and
26 by means of facsimile, which taken together shall be deemed to constitute one document.

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1 **15. AUTHORIZATION**

2 15.1 Each signatory to this Consent Judgment certifies that he or she is fully
3 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into
4 and execute the Consent Judgment on behalf of the party represented and legally bind that party. The
5 undersigned have read, understand and agree to all of the terms and conditions of this Consent
6 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

7 AGREED TO:

8 CENTER FOR ENVIRONMENTAL HEALTH
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11 _____
12 Michael Green, Executive Director
13 Center for Environmental Health

14 COGHLAN'S, LTD.

15 _____
16 Signature

17 _____
18 Printed Name

19 _____
20 Title

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7 AGREED TO:

8 CENTER FOR ENVIRONMENTAL HEALTH
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10
11 Michael Green, Executive Director
12 Center for Environmental Health

13 COGHLAN'S, LTD.

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15 _____
16 Signature

17 ROB COGHLAN
18 Printed Name

19 VICE PRESIDENT
20 Title

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ORDER AND JUDGMENT

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

Dated: _____

Judge, Superior Court of the State of California