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6 CENTER FOR ENVIRONMENTAL HEALTH

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CENTER FOR ENVIRONMENTAL HEALTH, a
non-profit corporation,

Plaintiff,

v.

A.D. SUTTON & SONS, INC.; ACCESSORY
NETWORK GROUP, INC.; E.S. ORIGINALS,
INC.; GLOBAL DESIGNS CONCEPTS, INC.;
LEGENT INTERNATIONAL LTD.; and
Defendant DOES 1 through 200, inclusive,

Defendants.

Case No. CGC-08-476552

**[PROPOSED] CONSENT JUDGMENT RE:
E.S. ORIGINALS, INC.**

1 **1. INTRODUCTION**

2 **1.1** On June 19, 2008, plaintiff the Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in San Francisco County
4 Superior Court, entitled *Center for Environmental Health v. A.D. Sutton & Sons, Inc., et al.*, San
5 Francisco County Superior Court Case Number CGC-08-476552 (the “CEH Action”), for civil
6 penalties and injunctive relief pursuant to the provisions of California Health & Safety Code
7 §25249.5 et seq. (“Proposition 65”).

8 **1.2** Defendant E.S. Originals, Inc. (“Defendant”) is an entity that employs 10 or
9 more persons and manufactured, distributed and/or sold (directly or indirectly) backpacks (the
10 “Products”) in the State of California.

11 **1.3** On or about November 12, 2007, CEH served Defendant and public
12 enforcement agencies with the requisite 60-day notice alleging that Defendant was in violation of
13 Proposition 65 (the “Notice”). CEH’s Notice and the Complaint in this Action allege that
14 Defendant exposes people who use or otherwise handle the Products to lead and/or lead compounds
15 (referred to interchangeably herein as “Lead”), chemicals known to the State of California to cause
16 cancer, birth defects and other reproductive harm, without first providing clear and reasonable
17 warning to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The
18 Notice and Complaint allege that Defendant’s conduct violates Proposition 65, including Cal.
19 Health & Safety Code §25249.6. Defendant disputes such allegations and asserts that all of its
20 Products are safe and comply with all applicable laws, including Consumer Product Safety
21 Commission and Federal Food and Drug Administration standards.

22 **1.4** Upon receipt of CEH’s Notice, Defendant took immediate measures to
23 address the allegations set forth therein and to investigate the substance of CEH’s allegations.

24 **1.5** For purposes of this Consent Judgment only, the Parties stipulate that this
25 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
26 personal jurisdiction over Settling Defendant as to the acts alleged in CEH’s Complaint, that venue
27 is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
28 Judgment as a full and final resolution of all claims which were or could have been raised in the

1 Complaint and Notice based on the facts alleged therein.

2 1.6 The Parties enter into this Consent Judgment pursuant to a settlement of
3 certain disputed claims between the Parties as alleged in the Notice and/or Complaint. By
4 executing this Consent Judgment, the Parties do not admit any facts or conclusions of law. Nothing
5 in this Consent Judgment is or shall be construed as an admission by the Parties of any fact,
6 conclusion of law, issue of law or violation of law, nor shall any act or omission related to this
7 Consent Judgment constitute or be construed as an admission of any fact, conclusion of law, issue
8 of law, or violation of law.

9 **2. COMPLIANCE – REFORMULATION**

10 2.1 Level. After one hundred eighty (180) days of entry of this Consent
11 Judgment (the “Compliance Date”), Defendant shall not manufacture, distribute, ship, or sell, or
12 cause to be manufactured, distributed, or sold:

13 A) any Product that is comprised of any fabric with Lead concentrations exceeding 200 parts
14 per million (“ppm”) or for which the exterior surface coating contains Lead
15 concentrations exceeding 600 ppm, and

16 B) in addition to A above, for any Children’s Product as defined in the Consumer Products
17 Safety Improvement Act of 2008 (the “Act”) with lead concentrations exceeding any
18 more stringent levels required by the Act, as may from time to time be modified.

19 These standards are individually and collectively referred to herein as the “Reformulation
20 Standard”. The Reformulation Standard shall only apply to materials that are accessible
21 (“Materials”) and not to those materials that are not accessible through reasonably foreseeable use
22 and abuse (“Non-Accessible Materials”). Consequently, the Reformulation Standard excludes Non-
23 Accessible Materials.

24 2.2 Certification of level from suppliers. As of the Compliance Date,
25 Defendant shall obtain written certification from its suppliers certifying that the Products do not
26 contain Lead concentrations exceeding the Reformulation Standard. Such supplier certifications
27 shall be obtained annually for three successive years. If Defendant begins purchasing Products
28 from a new supplier, certifications shall be obtained annually from that supplier for three

1 consecutive years after the Settling Defendant's initial purchase order from that supplier.

2 **2.3 Testing.** In order to ensure compliance with the requirements of Section 2.1,
3 each Settling Defendant shall conduct (or cause to be conducted) testing to confirm that the
4 Products do not contain Lead concentrations exceeding the Reformulation Standard. All testing
5 pursuant to this Section shall be performed by an independent laboratory in accordance with either
6 EPA Method 3050B for Defendantric or ASTM F963 for exterior surface coatings (the "Test
7 Protocol"). The results of all testing performed pursuant to this Section 2 shall be made available to
8 CEH on a confidential basis, upon request.

9 **2.3.1 Random Testing.** Testing pursuant to this Section 2 shall be
10 performed on randomly selected units in accordance with Defendant's usual testing practices.
11 Defendant's usual testing practices include testing as required by their various retailers. At a
12 minimum, during each calendar year, Defendant shall randomly select and test the greater of 0.1%
13 (one-tenth of one percent) or two, but in no case more than four, of the total Products purchased
14 from each supplier of the Products intended for sale in California.

15 **2.3.2 Products that exceed stipulated levels pursuant to Defendant's**
16 **Testing.** If the results of the testing required pursuant to Section 2.3 show levels of lead exceeding
17 the Reformulation Standard, the Settling Defendant shall: (1) refuse to accept all of the Products
18 that were purchased under the particular purchase order; (2) send a notice to the supplier explaining
19 that such Products do not comply with the supplier's certification; and (3) for the next two orders of
20 Products intended for sale in California that are purchased from that supplier, randomly select and
21 test the greater of 0.1% (one-tenth of one percent) or two, but in no case more than four, of the total
22 Products purchased in each purchase order. Following those two orders, the Settling Defendant
23 shall apply the testing frequency set forth in Section 2.3.1.

24 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic testing of
25 the Products. Any such testing will be conducted by CEH at an independent laboratory, in
26 accordance with the Test Protocol. In the event that CEH's testing in accord with the Test Protocol
27 demonstrates Lead levels in excess of the Reformulation Standard for two or more Products, CEH
28 shall inform the Settling Defendant at issue of the test results, including information sufficient to

1 permit the Settling Defendant to identify the Product(s). Within thirty (30) days following such
2 notice, the Settling Defendant shall provide CEH, at the address listed in Section 12, with the
3 certification and testing information demonstrating its compliance with Sections 2.2 and 2.3 of this
4 Consent Judgment. If the Settling Defendant fails to provide CEH with certification and testing
5 information demonstrating that it complied with Sections 2.2 and/or 2.3, the Settling Defendant
6 shall be liable for stipulated payments in lieu of penalties for Products for which CEH produces
7 tests demonstrating Lead levels exceeding the Reformulation Standard, as set forth below. In
8 addition, the Settling Defendant shall then apply the testing frequency set forth in Section 2.3.2 for
9 the next two orders of Products from the supplier(s) of the Products at issue. The payments shall be
10 made to CEH and used for the purposes described in Section 4.1.

11 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments in
12 lieu of penalties are warranted under Section 2.4, the stipulated payment amount shall be as follows:

13	First Occurrence:	\$1,250
14	Second Occurrence:	\$1,500
15	Third Occurrence:	\$1,750
16	Thereafter:	\$2,500

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

20 **2.4.2 Products in the stream of commerce.** Defendant's Products that
21 have been manufactured, shipped, sold, or that are otherwise in the stream of commerce prior to the
22 Compliance Date shall be released from any claims that were brought or that could have been
23 brought by CEH in its Complaint, as though they were Covered Claims within the meaning of
24 Section 8, below.

25 **3. SETTLEMENT PAYMENTS**

26 **3.1. Monetary Payment in Lieu of Penalty:** Defendant shall pay to CEH \$8,000
27 in lieu of any penalty pursuant to Health and Safety Code §25249.7(b). CEH shall use such funds
28 to continue its work protecting people from exposures to toxic chemicals. As part of this work,

1 CEH intends to conduct periodic testing of the Products as set forth in section 2.4.

2 **3.2 Attorneys' Fees and Costs:** Defendant shall pay \$17,000 to reimburse CEH
3 and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other
4 costs incurred as a result of investigating, bringing this matter to Defendant' attention, litigating and
5 negotiating a settlement in the public interest. The payment required under this section shall be
6 made payable to the Lexington Law Group, LLP.

7 **3.3 Timing of payments.** All payments required under Sections 3.1 and 3.2
8 above, shall be delivered to the Lexington Law Group at the address set forth in section 12 below
9 within ten (10) days after this Consent Judgment is entered by the Court unless the Consent
10 Judgment is entered over an objection filed with the Court in advance of the hearing on Court
11 approval of the Consent Judgment. Should the Court enter the Consent Judgment over such an
12 objection, the payments required under Sections 3.1 and 3.2 shall be due within 5 days after the
13 judgment becomes final, including any appeal. However, should the parties revise the Consent
14 Judgment prior to its entry by the Court in response to an objection such that the objection is
15 withdrawn prior to entry of the Consent Judgment, the timing of the payments shall be due as if no
16 objection had been filed.

17 **4. MODIFICATION OF CONSENT JUDGMENT**

18 **4.1** This Consent Judgment may be modified by written agreement of CEH and
19 Settling Defendant, or upon motion of CEH or Settling Defendant as provided by law.

20 **4.2** CEH intends to enter into agreements with other entities that manufacture,
21 distribute and/or sell Products. Should Settling Defendant determine that the provisions of any such
22 Consent Judgment with a similarly situated manufacturer or distributor of Products are less
23 stringent, Settling Defendant may request a modification of this Consent Judgment to conform with
24 the terms of the later entered Consent Judgment. Upon 30 days prior written notice of a Settling
25 Defendant's request for a modification, CEH shall inform the Settling Defendant whether it will
26 agree to such modification. If CEH does not agree, the Settling Defendant may move the Court for
27 a modification pursuant to this Section.

28 **4.3** In the event that new legislation relating to lead content of the Products is

1 enacted on either the federal or California state level, either party may seek a modification to
2 conform the requirements of this Consent Judgment to such new requirements, provided that such
3 requirements are either: (a) at least as restrictive as those set forth herein; or (b) completely
4 preemptive of Proposition 65 as adjudged by final order of an appellate court. Should either party
5 reasonably determine that a modification pursuant to this section is warranted, such party shall
6 request a modification from the non-requesting party. Upon 30 days prior written notice of a
7 request for a modification, the non-requesting party shall inform the requesting party whether it will
8 agree to such modification. If the non-requesting party does not agree, the requesting party may
9 move the Court for a modification pursuant to this Section.

10 **5. ENFORCEMENT OF CONSENT JUDGMENT**

11 **5.1** CEH or Defendant may, by motion or application for an order to show cause,
12 enforce the terms and conditions contained in this Consent Judgment. The prevailing Party on any
13 motion or application shall be entitled to its reasonable investigation fees and costs, attorneys' fees,
14 and any other costs associated with such motion or application.

15 **6. APPLICATION OF CONSENT JUDGMENT**

16 **6.1** This Consent Judgment shall apply to and be binding upon the Parties hereto,
17 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

18 **7. CLAIMS COVERED**

19 **7.1** This Consent Judgment is a full, final and binding resolution between CEH
20 and Settling Defendant of any violation of Proposition 65 that was or could have been asserted in
21 the Notice or Complaint against Defendant (including any claims that could be asserted in
22 connection with any of the Products covered by this Consent Judgment) or its parents, subsidiaries,
23 affiliates, directors, officers, employees, agents, attorneys, manufacturers, licensors distributors,
24 retailers, or customers (collectively, "Defendant Releasees") based on failure to warn about alleged
25 Proposition 65 exposures, with respect to any Products manufactured, distributed or sold by
26 Defendant ("Covered Claims") on or prior to the Compliance Date. Compliance with the terms of
27 this Consent Judgment constitutes compliance with Proposition 65 for purposes of Lead exposures
28 from the Products.

1 **7.2** CEH hereby releases all manufacturers, retailers, distributors, and licensors
2 of Defendant's Products from any claims related to the Notice, the Complaint and this Judgment
3 and CEH agrees to dismiss any such claims that it has asserted or could assert against any
4 manufacturers, retailers, distributors, or licensors of Defendant's Products. As to each of
5 Defendant's manufacturers, retailers, distributors, or licensors which have not been served with a
6 60-day Notice letter or a complaint by CEH, CEH agrees not to serve a 60-day notice on said
7 manufacturers, retailer, distributor, or licensor which includes within its scope, whether directly or
8 indirectly, any of Defendant's Products provided that such Products are in compliance with the
9 terms of this Consent Judgment. For purposes of the release provided in this Section, the term
10 "manufacturer, retailer, distributor, or licensor" shall include their respective related entities,
11 predecessors, successors, assigns, parents, subsidiaries, affiliates, officers, partners, directors,
12 stockholders, shareholders, attorneys, representatives, agents and employees, past, present and
13 future.

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. GOVERNING LAW**

18 **9.1** The terms of this Consent Judgment shall be governed by the laws of the State of
19 California.

20 **10. CONSENT JUDGMENT TERMINATION AND RETENTION OF**
21 **JURISDICTION**

22 **10.1** This Consent Judgment will automatically terminate and be of no further
23 force, validity or affect as of August 1, 2013.

24 **10.2** This Court shall retain jurisdiction of this matter to implement and enforce
25 the terms this Consent Judgment, while it is in effect.

26 **11. PROVISION OF NOTICE**

27 **11.1** All notices required pursuant to this Consent Judgment and correspondence
28 shall be sent to the following:

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For CEH:

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

For Defendant:

Malcolm Weiss, Esq.
Hunton & Williams LLP
550 South Hope, 20th Floor
Los Angeles, CA 90071

12. COURT APPROVAL

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

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

13. EXECUTION AND COUNTERPARTS

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

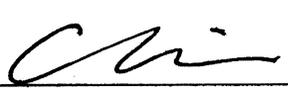
14. AUTHORIZATION

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

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro, Associate Director
Center for Environmental Health

Dated: 2/23/09

E.S. ORIGINALS, INC.

Dated: _____

Printed Name

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro, Associate Director
Center for Environmental Health

Dated: _____

E.S. ORIGINALS, INC.

Eddie Esses

Dated: 2/17/09

EDDIE ESSES - PRES
Printed Name

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and E.S. Originals, Inc., the settlement is approved and the clerk is hereby directed to enter the Consent Judgment in accordance with the terms herein.

Dated: _____ Judge, Superior Court of the State of California