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6 CENTER FOR ENVIRONMENTAL
HEALTH

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA

9
10 CENTER FOR ENVIRONMENTAL HEALTH,

11 Plaintiff,

12 v.

13 COGHLANS, LTD., *et al*,

14 Defendants.
15

Case No. RG07355965

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1** On November 13, 2007, plaintiff the Center for Environmental Health (‘CEH’),
3 a non-profit corporation acting in the public interest, filed a complaint in Alameda County Superior
4 Court, entitled *Center for Environmental Health v. Coghlan’s, Ltd., et al.*, Alameda County Superior
5 Court Case Number RG07355965 (the ‘Complaint’), for civil penalties and injunctive relief pursuant to
6 the provisions of California Health & Safety Code §25249.5 *et seq.* (‘Proposition 65’). On March 11,
7 2008, CEH named Defendant Ziskin & Associates, LLC dba Rain Shield (‘Rain Shield’) as a
8 defendant in the Complaint.

9 **1.2** Rain Shield is a ‘person in the course of doing business’ under Proposition 65
10 and manufactures, distributes and/or sells rainwear (the ‘Products’) in the State of California. Rain
11 Shield and CEH are referred to collectively herein as the Parties.

12 **1.3** On or about December 6, 2007, CEH served Rain Shield and the appropriate
13 public enforcement agencies with the requisite 60-day notice alleging that Rain Shield is in violation
14 of Proposition 65. CEH’s notice and the Complaint allege that Rain Shield exposes individuals who
15 use or otherwise handle the Products to lead and/or lead compounds (referred to interchangeably
16 herein as ‘Lead’), chemicals known to the State of California to cause cancer, birth defects and other
17 reproductive harm, without first providing clear and reasonable warning to such persons regarding
18 the carcinogenicity and reproductive toxicity of Lead. The notice and Complaint allege that Rain
19 Shield’s conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

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

26 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of certain
27 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
28 Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties’ intent that

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

10 **2. COMPLIANCE - REFORMULATION**

11 **2.1 Lead Reformulation.** As of the date of entry of this Consent Judgment (the
12 ‘Compliance Date’), Rain Shield shall not manufacture, distribute, ship, or sell, or cause to be
13 manufactured, distributed, shipped, or sold, any Product that is comprised of any PVC material that
14 contains Lead in concentrations that exceed: (a) 30 parts per million (‘ppm’) in the fabric of the
15 Products; or (b) 200 ppm in any non-fabric components (*e.g.*, zippers, drawstrings, snaps, or buttons)
16 of the Products (collectively, the ‘Reformulation Standard’). Products that Rain Shield has
17 manufactured or caused to be manufactured prior to December 1, 2007 shall not be subject to the
18 provisions of Section 2, or the related provisions herein.

19 **2.2 Certification of level from suppliers.** Rain Shield shall obtain written
20 certification with corresponding test results from its suppliers of the Products certifying that the
21 Products meet the Reformulation Standard.

22 **2.3 Testing.** To promote compliance with Section 2.1, Rain Shield shall conduct
23 testing to confirm that the fabric of its Products meets the Reformulation Standard. Testing pursuant
24 to this section shall be conducted pursuant to the most current version of United States Environmental
25 Protection Agency Method 3050B. Rain Shield shall retain the results of all testing performed
26 pursuant to this section for a period of three years from the date of the test, and shall provide the
27 results to CEH upon written request mailed in accordance with Section 12. In addition to the testing
28 and certification identified in Section 2.2, and subject to Section 2.5 below, Rain Shield shall test the

1 fabric of at least two randomly selected Products from each shipment of Products received by Rain
2 Shield.

3 **2.3.1 Products that exceed Reformulation Standard pursuant to Rain Shield**

4 **Testing.** If the results of the testing required pursuant to Section 2.3 shows levels of Lead exceeding
5 the Reformulation Standard for a particular style of Product, Rain Shield shall return all of the style
6 of Product that was purchased under the particular purchase order to the supplier with a letter
7 explaining that such Products do not comply with the supplier's certification. Should the testing of a
8 particular style of Product purchased from a supplier demonstrate Lead levels exceeding the
9 Reformulation Standard more than once, Rain Shield shall cease purchasing Products from such
10 supplier for a period of at least five years.

11 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic testing of

12 the fabric of Products sold in California. Any such testing will be conducted pursuant to the EPA
13 Method 3050B at an independent laboratory. In the event that CEH's independent testing
14 demonstrates Lead levels in the fabric that exceed the Reformulation Standard for one or more
15 Products that are subject to Section 2.1, CEH shall submit the test results to Rain Shield, at the
16 address listed in section 12, and shall include information sufficient to allow Rain Shield to identify
17 the Product(s). Rain Shield shall, within 10 days following receipt of such notice, provide CEH, at
18 the address listed in section 12, with its supplier certification and testing information demonstrating
19 its compliance with sections 2.2 and 2.3 of this Consent Judgment, or that the Product is not subject
20 to Section 2.1. CEH shall agree to provide Rain Shield with split samples of any fabric suspected to
21 exceed the Reformulation Standard so that Rain Shield can conduct a separate analysis of the fabric
22 at its own expense. Pursuant to sections 2.4.1 and 2.4.2, Rain Shield shall be liable for stipulated
23 payments in lieu of penalties for Products subject to Section 2.1 for which testing confirms Lead
24 levels exceeding the Reformulation Standard. These payments shall be made to CEH and used for
25 the purposes described in section 3.1 and to pay for related attorneys' fees and costs. The stipulated
26 payments in lieu of penalties and other remedies provided for herein are in addition to any other
27 remedies available to enforce the terms of this Consent Judgment.

1 **2.4.1 Stipulated penalty assuming compliance with sections 2.2 and 2.3.**

2 Assuming Rain Shield provides CEH with information demonstrating that it complied with sections
3 2.2 and 2.3 for the Products from the purchase order as those with tests showing Lead levels
4 exceeding the Reformulation Standard, the stipulated penalty shall be as follows for each Occurrence:

5 First Occurrence: \$500
6 Second Occurrence: \$1,000
7 Third Occurrence: \$2,000
8 Thereafter: \$5,000

9 For purposes of this section and section 2.4.2: (a)“Occurrence”shall mean CEH’s submission of valid
10 test results demonstrating that a style of Product sold in California exceeds the Reformulation
11 Standard; and (b) submission of multiple noncompliant test results for the same style of Products
12 purchased from the same purchase order shall be considered a single Occurrence.

13 **2.4.2 Stipulated penalty assuming non-compliance with sections 2.2 and 2.3.**

14 Assuming Rain Shield fails to provide CEH with information demonstrating that it complied with
15 sections 2.2 and 2.3 for the Products from the same purchase order as those with tests showing Lead
16 levels exceeding the Reformulation Standard, the stipulated penalty shall be as follows for each
17 Occurrence:

18 First Occurrence: \$2,000
19 Second Occurrence: \$5,000
20 Third Occurrence: \$10,000
21 Thereafter: \$20,000

22 Notwithstanding the foregoing, the maximum, cumulative stipulated payment in lieu of penalty
23 amount in a calendar year under this section and section 2.4.2 shall be \$75,000.

24 **2.4.3 Recall of Products testing in excess of 600 ppm Lead.** Should CEH’s testing

25 demonstrate that a Product contains Lead levels in excess of 600 ppm in the fabric (‘Recall Product’),
26 Rain Shield shall send a recall letter to all distribution facilities and retail outlets in California that
27 have received the Recall Products informing them that they must send all Recall Products currently
28 for sale or intended for sale in California back to Rain Shield. Rain Shield agrees to determine the

1 appropriate scope of the recall under this Section and will, at a minimum, direct the distribution
2 facilities and retail outlets in California to return the style of Product in the same purchase order as
3 the Recall Product. Rain Shield agrees that it will not resell or redistribute such Recall Products in
4 California and shall certify to CEH that the Recall Products in California have been returned to Rain
5 Shield. Such certification shall indicate how many units of the Recall Products were returned via the
6 recall.

7 **2.5 Phase out of testing in event of continued compliance with Reformulation**

8 **Standard.** In the event that Rain Shield demonstrates continuous compliance with the Reformulation
9 Standard for a period of four consecutive years following the Compliance Date, Rain Shield shall
10 only be required to test the fabric of at least one randomly selected Product from each shipment of
11 Products received by Rain Shield. In the event that Rain Shield demonstrates continuous compliance
12 with the Reformulation Standard for a period of eight consecutive years following the Compliance
13 Date, the testing identified in Section 2.3 shall no longer be required. Rain Shield will continue to
14 obtain written certification with corresponding test results from its suppliers of the Products in
15 compliance with Section 2.2, and CEH shall still be entitled to enforce the Reformulation Standard in
16 accordance with Section 2.4. Furthermore, if Rain Shield begins purchasing the Products from a new
17 supplier, the testing identified in Section 2.3 shall be required for Products purchased from that
18 supplier, and the phase down of testing requirements under this Section 2.5 for that supplier shall be
19 measured from the date of Rain Shield's initial purchase order from that supplier.

20 **3. SETTLEMENT PAYMENTS**

21 **3.1** Within five days of the Compliance Date, Rain Shield shall pay a total of
22 \$33,000 as a settlement payment. This total shall be paid in two separate checks delivered to the
23 offices of the Lexington Law Group, LLP at the address set forth in section 12 below and made
24 payable and allocated as follows. Any failure by Rain Shield to comply with the payment terms
25 herein shall be subject to a stipulated late fee in the amount of \$100 for each day after the delivery
26 date the payment is received. The late fees required under this section shall be recoverable, together
27 with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to section 5 of this
28 Consent Judgment.

1 **3.1.1 Monetary Payment in Lieu of Penalty:** \$11,000 shall be paid to CEH in lieu
2 of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment shall be made by
3 check payable to Center for Environmental Health. CEH shall use such funds to continue its work
4 protecting people from exposures to toxic chemicals. As part of this work, CEH intends to conduct
5 periodic testing of the Products as set forth in section 2.4.

6 **3.1.2 Attorneys' Fees and Costs:** \$22,000 shall be used to reimburse CEH and its
7 attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred
8 as a result of investigating, bringing this matter to Rain Shields attention, litigating and negotiating a
9 settlement in the public interest. This payment shall be made by check payable to Lexington Law
10 Group, LLP.

11 **4. MODIFICATION OF CONSENT JUDGMENT**

12 **4.1** This Consent Judgment may be modified by written agreement of CEH and
13 Rain Shield, or upon motion of CEH or Rain Shield as provided by law.

14 **5. ENFORCEMENT OF CONSENT JUDGMENT**

15 **5.1** CEH may, by motion or application for an order to show cause before the
16 Superior Court of the County of Alameda, enforce the terms and conditions contained in this Consent
17 Judgment. Should CEH prevail on any motion or application under this section, CEH shall be
18 entitled to recover its reasonable attorneys' fees and costs associated with such motion or application.

19 **6. APPLICATION OF CONSENT JUDGMENT**

20 **6.1** This Consent Judgment shall apply to and be binding upon the Parties hereto,
21 their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

22 **7. RELEASE**

23 **7.1** Except as provided in this Consent Judgment, this Consent Judgment is a final
24 and binding resolution between the Plaintiff on the one hand, and Rain Shield on the other, satisfying
25 and releasing Rain Shield and its parents, subsidiaries, affiliates, predecessors (including without
26 limitation Rain Shield, Inc. and Ziskin & Associates, LLC), successors, partners, officers, directors,
27 employees, distributors, licensors, retailers, and customers (including without limitation, Jarden, Inc.
28 and Target Corporation) (collectively, 'Defendant's Releasees') from any and all, causes of action,

1 damages, costs, penalties or attorneys' fees and any other claims made or that could have been made
2 through the Complaint, including those based upon alleged violations of Proposition 65, that arise
3 from the absence of clear and reasonable warnings with respect to the presence of Lead in or on
4 Products manufactured, distributed, or sold by Rain Shield prior to the Compliance Date. The Parties
5 further agree and acknowledge that this Consent Judgment is a full, final and binding resolution of
6 any direct or derivative violations of Proposition 65 that have been or could have been asserted in the
7 Complaint against Rain Shield and Defendant's Releasees arising out of the acts alleged or that could
8 have been alleged in the Complaint for failure to provide clear and reasonable warnings of exposure
9 to or identification of Lead in Products manufactured, distributed, or sold by Rain Shield prior to the
10 Compliance Date. It is specifically understood and agreed that the Parties intend that Rain Shield's
11 compliance with the terms of this Consent Judgment resolves all issues and liability, now and in the
12 future (so long as Rain Shield complies with the terms of this Consent Judgment) concerning Rain
13 Shield's and Defendant's Releasees' compliance with the requirements of Proposition 65 as to Lead in
14 Products manufactured, distributed, or sold by Rain Shield after the Compliance Date. This release
15 does not limit or effect the obligations of any party created under this Consent Judgment.

16 **8. SEVERABILITY**

17 **8.1** In the event that any of the provisions of this Consent Judgment are held by a
18 court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

19 **9. SPECIFIC PERFORMANCE**

20 **9.1** The Parties expressly recognize that Rain Shield's obligations under this
21 Consent Judgment are unique. In the event that Rain Shield is found to be in breach of this Consent
22 Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree that it would
23 be 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 Rain Shield 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
3 of California.

4 **11. RETENTION OF JURISDICTION**

5 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce the
6 terms this Consent Judgment.

7 **12. PROVISION OF NOTICE**

8 **12.1** All notices required pursuant to this Consent Judgment and correspondence
9 shall be sent to the following:

10 For CEH:

11 Howard Hirsch
12 Lexington Law Group, LLP
13 1627 Irving Street
14 San Francisco, CA 94122

15 For Rain Shield:

16 Adam Ziskin
17 Ziskin & Associates, LLC
18 5110A Cedar Lake Road
19 Minneapolis, MN 55416

20 With a copy to:

21 William F. Tarantino
22 Morrison & Foerster LLP
23 425 Market Street, Suite 3500
24 San Francisco, California 94105

25 **13. COURT APPROVAL**

26 **13.1** If this Consent Judgment is not approved by the Court, it shall be of no further
27 force or effect. The Parties agree to support a Motion for Approval of this Consent Judgment.

28 **14. EXECUTION AND COUNTERPARTS**

14.1 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.

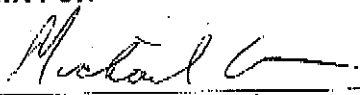
15. AUTHORIZATION

15.1 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

1 and execute the Consent Judgment on behalf of the party represented and legally bind that party. The
2 undersigned have read, understand and agree to all of the terms and conditions of this Consent
3 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.
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7 **AGREED TO:**

8 CENTER FOR ENVIRONMENTAL HEALTH

9 
10 _____
11 Michael Green, Executive Director
Center for Environmental Health

12 ZISKIN & ASSOCIATES, LLC dba RAIN SHIELD

13
14 _____
Signature

15 _____
16 Printed Name

17 _____
18 Title

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1 and execute the Consent Judgment on behalf of the party represented and legally bind that party. The
2 undersigned have read, understand and agree to all of the terms and conditions of this Consent
3 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.
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6

7 **AGREED TO:**

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

12 ZISKIN & ASSOCIATES, LLC dba RAIN SHIELD

13 _____
14 Signature *A.N. Ziskin*

15 _____
16 Printed Name *Adam Ziskin*

17 _____
18 Title *Owner*

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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

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