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6 CENTER FOR ENVIRONMENTAL HEALTH

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10

11
12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 v.)

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28)
BABY BOOM CONSUMER PRODUCTS,)
INC.; BETESH GROUP HOLDING)
CORPORATION; DOLLY, INC.;)
EASTSPORT, INC.; THE FIRST YEARS,)
INC.; INFANTINO, LLC; KALENCOM)
CORPORATION; LEARNING CURVE)
BRANDS, INC.; RC2 BRANDS, INC.; STEP2)
COMPANY, LLC; WILLIAM CARTER)
COMPANY; and Defendant DOES 1 through)
200, inclusive,)

Defendants.)
_____)

Case No. CV-083678

**[PROPOSED] CONSENT JUDGMENT
RE: THE KALENCOM
CORPORATION**

1 **1. INTRODUCTION**

2 **1.1** On July 29, 2008, Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint in Marin County Superior
4 Court entitled *Center for Environmental Health v. Baby Boom Consumer Products, Inc., et al.*,
5 Marin County Superior Court Case Number CV-08-83678 (the “Action”), for civil penalties and
6 injunctive relief pursuant to the provisions of Cal. Health & Safety Code § 25249.5, *et seq.*
7 (“Proposition 65”). On April 21, 2009, CEH filed the operative First Amended Complaint
8 naming The Kalencom Corporation (“Defendant”) as a defendant in the Action.

9 **1.2** Defendant is a corporation that employs 10 or more persons and that
10 manufactures, distributes and/or sells infant accessory bags, including but not limited to bags for
11 baby bottles, pacifiers, diaper bags, and stroller bags (the “Products”) in California.

12 **1.3** On May 15, 2008 and October 3, 2008, CEH served Defendant and the
13 appropriate public enforcement agencies with a 60-day notice (the “Notice”) alleging that
14 Defendant is in violation of Proposition 65. CEH’s Notice and the complaint in this Action
15 allege that Defendant distributes and/or sells the Products made of material that contain lead
16 and/or lead compounds (referred to interchangeably herein as “Lead”), chemicals known to the
17 State of California to cause cancer and birth defects or other reproductive toxicity, without first
18 providing clear and reasonable warning to such persons regarding the carcinogenicity and
19 reproductive toxicity of Lead. The Notice and the Complaint allege that Defendant’s conduct
20 violates Health & Safety Code § 25249.6, the warning provision of Proposition 65.

21 **1.4** The Parties enter into this Consent Judgment for the purpose of avoiding
22 prolonged and costly litigation regarding Products manufactured, distributed and/or sold by
23 Defendant. By executing this Consent Judgment, the Parties do not admit any facts or
24 conclusions of law. It is the Parties’ intent that nothing in this Consent Judgment shall be
25 construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation
26 of law, nor shall compliance with the Consent Judgment constitute or be construed as an
27 admission by the Parties of any fact, conclusion of law, issue of law, or violation of law.
28 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument

1 or defense the Parties may have in this or any other or future legal proceedings.

2 **1.5** For purposes of this Consent Judgment only, the Parties stipulate that this
3 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
4 personal jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is
5 proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
6 Judgment as a full and final resolution of all claims which were or could have been raised in the
7 Complaint based on the facts alleged therein.

8 **2. COMPLIANCE - REFORMULATION**

9 **2.1 Level.** As of the date of entry of this Consent Judgment (the "Compliance
10 Date"), Defendant shall not manufacture, distribute, ship, or sell, or cause to be manufactured,
11 distributed, or sold, any Product that is comprised of any material with Lead concentrations
12 exceeding 300 parts per million ("ppm") using the Test Protocol defined in Paragraph 2.3 below.
13 Unless the federal Consumer Product Safety Commission in the future determines that a standard
14 of 100 ppm is not technically feasible for the Products or similar types of products, Defendant
15 shall not manufacture, distribute, ship, or sell, or cause to be manufactured, distributed, or sold,
16 any Product that is comprised of any material with Lead concentrations exceeding 100 ppm as of
17 August 14, 2011 or, if later, as of the date by which the Consumer Product Safety Commission
18 requires compliance with a standard of 100 ppm for the Products or similar types of Products.
19 The reformulation requirements established by this Section 2.1 shall be hereinafter referred to
20 collectively as the "Reformulation Standard."

21 **2.2 Certification of Level from Suppliers.** Defendant shall obtain written
22 certification with corresponding test results from its suppliers of the Products certifying that the
23 Products do not contain Lead concentrations exceeding the Reformulation Standard. Such
24 supplier certifications and test results shall be obtained annually for three successive years. If
25 Defendant begins purchasing Products from a new supplier, certifications and test results shall be
26 obtained annually from that supplier for three consecutive years after the Defendant's initial
27 purchase order from that supplier.

28 **2.3 Testing.** In order to help ensure compliance with the requirements of

1 Section 2.1, Defendant shall conduct or cause to be conducted testing to confirm that the
2 Products do not Lead concentrations exceeding the Reformulation Standard. All testing pursuant
3 to this section shall be performed on randomly selected units either: (a) in accordance with
4 testing protocol EPA 3050B by an independent laboratory, or (b) by an x-ray fluorescence
5 (“XRF”) device by an individual trained and certified to operate the device; provided, however,
6 that if the results of the XRF testing reveal Lead concentrations greater than 200 ppm but less
7 than the applicable Reformulation Standard, Defendant shall have the randomly selected unit
8 tested in accordance with testing protocol EPA 3050B by an independent laboratory. The results
9 of any such subsequent laboratory tests shall control over any conflicting XRF results. These
10 test methods are collectively referred to herein as the “Test Protocol.” At the request of CEH,
11 the results of all testing performed pursuant to this section shall be made available to CEH. The
12 frequency and amount of testing required shall be as follows:

13 **2.3.1 Random Testing.** Testing pursuant to this Section 2.3 shall be
14 performed on randomly selected units in accordance with Defendant’s usual testing practices. At
15 a minimum, Defendant shall test at least 5 units of Product from each of the first two shipments
16 from each supplier following the Compliance Date. For the remainder of the shipments
17 following the Compliance Date, Defendant shall test at least 2 units per shipment.

18 **2.3.2 Products that Exceed Stipulated Levels Pursuant to**
19 **Defendant’s Testing.** If the results of the testing required pursuant to Section 2.3 show levels of
20 lead exceeding the Reformulation Standard, Defendant shall: (1) refuse to accept all of the
21 Products that were purchased under the particular purchase order; (2) send a notice to the
22 supplier explaining that such Products do not comply with the supplier’s certification; and (3)
23 apply the testing frequency pursuant to Section 2.3.1 for the next order purchased from the
24 supplier as if such purchase were the first shipment following the Compliance Date.

25 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing
26 of the Products. Any such testing will be conducted by CEH in accordance with the Test
27 Protocol. In the event that CEH’s testing demonstrates Lead levels exceeding the Reformulation
28 Standard for one or more Products: (i) CEH shall inform Defendant of the test results, including

1 information sufficient to permit Defendant to identify the Product(s); and (ii) CEH shall provide
2 to Defendant any and all remnants or remainder of the tested Product(s) to allow testing of those
3 items by Defendant. Defendant shall, within 20 working days following such notice, provide
4 CEH, at the address listed in Section 12, with either: (a) information sufficient to demonstrate
5 that the Products in question were manufactured by Defendant prior to the Compliance Date; or
6 (b) its supplier certification and testing information demonstrating its compliance with Sections
7 2.2 and 2.3 of this Consent Judgment. If the Product in question was manufactured by
8 Defendant prior to the Compliance Date, Defendant will have no further obligations under this
9 section. Otherwise, Defendant shall then have the opportunity to conduct its own independent
10 testing of the Product(s) to confirm or deny CEH's tests. If Defendant's independent testing
11 indicates the Product(s) comply with the Reformulation Standard, CEH and Defendant will send
12 the remnants or remainder of the Product(s) to a third, independent laboratory for testing and the
13 results of this third test (the "Third Test") will control whether the Product(s) comply with the
14 Reformulation Standard. If the Third Test indicates the Product(s) comply with the
15 Reformulation Standard, no further action shall be taken as to the Product(s) tested. If
16 Defendant's independent testing confirms CEH's test results or the Third Test confirms CEH's
17 test results and Defendant fails to provide CEH with information demonstrating that it complied
18 with Sections 2.2 and 2.3 for the particular lot(s) of Product(s) at issue, Defendant shall also be
19 liable for stipulated payments in lieu of penalties for Products for which CEH produces tests
20 demonstrating Lead levels exceeding the Reformulation Standard as set forth below. These
21 payments shall be made to CEH and used for the purposes described in Section 3.1.2. In
22 addition, Defendant shall then apply the testing frequency set forth in Section 2.3.1 for the next
23 two orders of Products from the supplier(s) of the Products at issue as if such orders were the
24 first ones following the Compliance Date.

25 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
26 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount
27 shall be as follows:

28 First Occurrence: \$1,250

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

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

7 **2.4.2 Products in the stream of commerce.** Defendant's Products that
8 have been manufactured, shipped, sold, or that otherwise are in the stream of commerce prior to
9 the Compliance Date shall be released from any claims that were brought or that could have been
10 brought by CEH in its Complaint, as though they were Covered Claims within the meaning of
11 Section 7.1, below.

12 **3. SETTLEMENT PAYMENTS**

13 **3.1** Within five days of entry of this Consent Judgment, Defendant shall pay a
14 total of \$24,750 as a settlement payment. This total shall be paid in three separate checks
15 delivered to the offices of the Lexington Law Group at the address set forth in section 12 below
16 and made payable and allocated as follows. Any failure by Defendant to comply with the
17 payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each day
18 after the delivery date the payment is received. The late fees required under this section shall be
19 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought
20 pursuant to section 5 of this Consent Judgment.

21 **3.1.1 Penalty:** The sum of \$1,000 in penalties pursuant to Health and
22 Safety Code § 25249.7(b). This payment shall be made by check payable to Center for
23 Environmental Health. CEH shall apportion the penalties in accordance with Health and Safety
24 Code § 25249.12.

25 **3.1.2 Monetary Payment in Lieu of Penalty:** The sum of \$7,750 shall
26 be paid to CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This
27 payment shall be made by check payable to Center for Environmental Health. CEH shall use
28 such funds to continue its work protecting people from exposures to toxic chemicals. As part of

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

2 **3.1.3 Attorneys' Fees and Costs:** The sum of \$16,000 shall be used to
3 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,
4 and any other costs incurred as a result of investigating, bringing this matter to Defendant's
5 attention, litigating and negotiating a settlement in the public interest. This payment shall be
6 made by check payable to Lexington Law Group.

7 **4. MODIFICATION OF CONSENT JUDGMENT**

8 **4.1** This Consent Judgment may be modified by written agreement of the
9 Parties, or upon motion of CEH or Defendant as provided by law.

10 **4.2** CEH intends to enter into agreements with other entities that manufacture,
11 distribute and/or sell Products. Should Defendant determine that the provisions of any such
12 agreement with a similarly situated manufacturer or distributor of Products are less stringent,
13 Defendant may obtain a modification of this Consent Judgment to conform with the terms of the
14 later signed agreement.

15 **5. ENFORCEMENT OF CONSENT JUDGMENT**

16 **5.1** The Parties agree that the any action based on violation of this Consent
17 Judgment shall be brought in the Superior Court of California in Marin County. For purposes of
18 this Consent Judgment, notwithstanding Section 1.4 above, the Parties agree that the Superior
19 Court of California in Marin County has subject matter jurisdiction over any disputes arising
20 from this Consent Judgment and personal jurisdiction over each of the Parties, and that venue is
21 proper in the County of San Francisco. Should CEH prevail on any action to enforce the terms
22 of this Consent Judgment it shall be entitled to reasonable attorneys' fees and costs associated
23 with such enforcement.

24 **6. APPLICATION OF CONSENT JUDGMENT**

25 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
26 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
27 them.
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1 **7. CLAIMS COVERED**

2 **7.1** This Consent Judgment is a full, final and binding resolution between
3 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
4 the Notice or Complaint against Defendant (including any claims that could be asserted in
5 connection with any of the Products covered by this Consent Judgment) or its parents,
6 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or
7 customers (collectively, “Defendant Releasees”) based on failure to warn about alleged
8 Proposition 65 exposures with respect to any Products manufactured, distributed or sold by
9 Defendant (“Covered Claims”) on or prior to the date of entry of this Consent Judgment.
10 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
11 for purposes of Lead exposures from the Products.

12 **8. SEVERABILITY**

13 **8.1** In the event that any of the provisions of this Consent Judgment are held
14 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
15 affected.

16 **9. SPECIFIC PERFORMANCE**

17 **9.1** The Parties expressly recognize that Defendant’s obligations under this
18 Consent Judgment are unique. In the event that any Defendant is found to be in breach of this
19 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the Parties agree
20 that it would be extremely impracticable to measure the resulting damages and that such breach
21 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
22 remedies, may sue in equity for specific performance, and Defendant expressly waive the
23 defense that a remedy in damages will be adequate.

24 **10. GOVERNING LAW**

25 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
26 State of California.

27 **11. RETENTION OF JURISDICTION**

28 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce

1 the terms this Consent Judgment.

2 **12. PROVISION OF NOTICE**

3 **12.1** All notices required pursuant to this Consent Judgment and
4 correspondence shall be sent to the following:

5 For CEH:

6 Howard Hirsch
7 Lexington Law Group
8 1627 Irving Street
9 San Francisco, CA 94122

10 For Defendant:

11 Colin Pearce
12 Duane Morris LLP
13 One Market, Spear Tower, Suite 2000
14 San Francisco, CA 94105-1104

15 **13. EXECUTION AND COUNTERPARTS**

16 **13.1** The stipulations to this Consent Judgment may be executed in
17 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
18 document.

19 **14. AUTHORIZATION**

20 **14.1** Each signatory to this Consent Judgment certifies that he or she is
21 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
22 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
23 that party. The undersigned have read, understand and agree to all of the terms and conditions of
24 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
25 and costs.

26 **AGREED TO:**

27 CENTER FOR ENVIRONMENTAL HEALTH

28 

Charlie Pizarro, Associate Director
Center for Environmental Health

Dated: 3/9/10

1 THE KALENCOM CORPORATION

2

Jeno Kalozzi

3

Dated: March 9, 2010

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Jeno Kalozzi

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[Name]

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President

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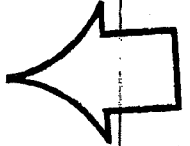
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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and The Kalencom Corporation, the settlement is approved and the clerk is hereby instructed to enter judgment in accordance with its terms.

Dated: _____

Judge, Superior Court of the State of California