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6 CENTER FOR ENVIRONMENTAL HEALTH

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

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

13 Plaintiff,

14 v.

15 CUSTOM ACCESSORIES, INC.; J&B
16 IMPORTERS, INC.; and Defendant DOES 1
through 200, inclusive,

17 Defendants.
18

Case No. CV1005572

**[PROPOSED] CONSENT JUDGMENT
AS TO CUSTOM ACCESSORIES,
INC.**

1 **1. INTRODUCTION**

2 **1.1** On October 20, 2010, Plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint entitled *Center*
4 *for Environmental Health v. Custom Accessories, Inc., et al.*, Marin County Superior Court Case
5 Number CV1005572, for civil penalties and injunctive relief pursuant to the provisions of Cal.
6 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) and naming Custom Accessories, Inc.
7 (“Defendant”) as a defendant.

8 **1.2** Defendant is a corporation that employs ten or more persons and has
9 distributed and/or sold air pumps in the State of California (the “Products”).

10 **1.3** On or about May 27, 2010, CEH served Defendant and the appropriate
11 public enforcement agencies with the requisite 60-day Notice (the “Notice”) alleging that
12 Defendant was in violation of Proposition 65. CEH’s Notice and the Complaint in the CEH
13 Action allege that Defendant exposes people who use or otherwise handle the Products to lead
14 and lead compounds (collectively referred to herein as “Lead”), chemicals known to the State of
15 California to cause cancer, birth defects and other reproductive harm, without first providing clear
16 and reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of
17 Lead. The Notice and Complaint allege that Defendant’s conduct violates Health & Safety Code
18 § 25249.6, the warning provision of Proposition 65. Defendant disputes such allegations and
19 asserts that all of its Products comply with all applicable laws.

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 Defendant as to the acts alleged in CEH’s Complaint, that venue is
23 proper in the County of Marin, and that this Court has jurisdiction to enter this Consent Judgment
24 as a full and final resolution of all claims which were or could have been raised in the Complaint
25 based on the facts alleged therein.

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

1 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
2 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
3 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
4 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
5 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
6 any other or future legal proceedings.

7 **2. COMPLIANCE - REFORMULATION**

8 **2.1 Reformulation Standard.** Upon entry of this Consent Judgment (the
9 “Compliance Date”), Defendant shall not distribute, sell, or cause to be sold, any Products in the
10 United States that contain any Paint or Surface Coating that contains more than 90 parts per
11 million (“ppm”) of Lead. For purposes of this Consent Judgment, “Paint or Surface Coating”
12 shall carry the same meaning as “Paint or other similar surface coating” under 16 C.F.R. §
13 1303.2(b)(1) (“Paint and other similar surface-coating materials means a fluid, semifluid, or other
14 material, with or without a suspension of finely divided coloring matter, which changes to a solid
15 film when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other
16 surface. This term does not include printing inks or those materials which actually become a part
17 of the substrate, such as the pigment in a plastic article, or those materials which are actually
18 bonded to the substrate, such as by electroplating or ceramic glazing”) and includes only those
19 Paint or Surface Coatings that can be touched by a person during normal and reasonably
20 foreseeable use.

21 **2.2 Certification From Suppliers.** Prior to the Compliance Date, Defendant
22 shall issue specifications to its suppliers requiring that the Products shall not contain any Paint or
23 Surface Coating that is more than 90 ppm Lead. By the Compliance Date, Defendant shall also
24 obtain written certification from its suppliers of the Products certifying that the Products do not
25 contain any Paint or Surface Coating that is more than 90 ppm Lead.

26 **2.3 Defendant’s Testing.** In order to assure compliance with the requirements
27 of Section 2.1, Defendant shall cause to be conducted testing to confirm that the Products do not
28 contain any Paint or Surface Coating that has more than 90 ppm Lead. This testing may be

1 performed by Defendant or an independent laboratory using a method of sufficient sensitivity to
2 detect Lead at or above 90 ppm, including but not limited to XRF scanning.

3 **2.3.1 Testing Frequency.** For each of the first two orders of Products
4 purchased from each of Defendant's suppliers after the Compliance Date, Defendant shall
5 randomly select and test at least three of the total Products purchased from each supplier.
6 Following the testing of the first two orders as described above, Defendant shall, for at least an
7 additional two years, annually randomly select and test at least two of the total Products
8 purchased from each supplier of the Products.

9 **2.3.2 Products That Contain Lead Pursuant to Defendant's Testing.**
10 If the results of the testing required pursuant to Section 2.3 show any Product containing any
11 Paint or Surface Coating that has more than 90 ppm Lead, Defendant shall: (1) refuse to accept all
12 of the Products that were purchased under the same purchase order as the Product that exceeded
13 90 ppm Lead; (2) send a notice to the supplier explaining that such Products do not comply with
14 Defendant's specifications and the suppliers' certification; and (3) apply the testing frequency set
15 forth in 2.3.1 as though the next shipment from the supplier were the first one following the
16 Compliance Date.

17 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
18 testing of the Products. Any such testing shall be conducted in accordance with Section 2.3
19 above. In the event that CEH's testing demonstrates that any Product distributed or sold by
20 Defendant in California subsequent to the Compliance Date contains any Paint or Surface Coating
21 that has more than 90 ppm Lead, CEH shall inform Defendant of the test results, including
22 information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30
23 days following such notice, provide CEH, at the address listed in Section 10, with the certification
24 and testing information demonstrating its compliance with Sections 2.2 and 2.3 of this Consent
25 Judgment. If Defendant fails to provide CEH with information demonstrating that it complied
26 with Sections 2.2 and/or 2.3, Defendant shall be liable for stipulated payments in lieu of penalties
27 for Products for which CEH produces tests demonstrating the presence of Lead above 90 ppm in
28

1 any Paint or Surface Coating in the Products. The payments shall be made to CEH and used for
2 the purposes described in Section 3.1.

3 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments
4 in lieu of penalties are warranted under Section 2.4, the stipulated payment amount shall be as
5 follows for each unit of Product for which CEH produces a test result showing that Defendant
6 sold a Product in California after the Compliance Date containing any Paint or Surface Coating
7 that has more than 90 ppm Lead:

8 First Occurrence:	\$500
9 Second Occurrence:	\$750
10 Third Occurrence:	\$1,000
11 Thereafter:	\$2,500

12 **3. SETTLEMENT PAYMENTS**

13 **3.1 Payments From Defendant.** Within thirty (30) days of entry of this
14 Consent Judgment, Defendant shall pay the total sum of \$30,000 as a settlement payment.

15 **3.2 Allocation of Payments.** The total settlement amount for Defendant shall
16 be paid in three separate checks delivered to the offices of the Lexington Law Group at the
17 address set forth in Section 10 below, and made payable and allocated as follows:

18 **3.2.1 Civil Penalty.** Defendant shall pay \$3,000 as a civil penalty
19 pursuant to Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in
20 accordance with Health & Safety Code § 25249.12. The penalty check shall be made payable to
21 the Center For Environmental Health.

22 **3.2.2 Monetary Payment in Lieu of Civil Penalty.** Defendant shall pay
23 to CEH \$8,250 in lieu of penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall
24 use such funds to continue its work protecting people from exposures to toxic chemicals. As part
25 of this work, CEH intends to conduct periodic testing of the Products as set forth in Section 2.4.
26 In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
27 percent of such funds to award grants to grassroots environmental justice groups working to
28 educate and protect people from exposures to toxic chemicals. The method of selection of such

1 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment in lieu of
2 penalty check shall be made payable to the Center For Environmental Health.

3 **3.2.3 Attorneys' Fees and Costs.** Defendant shall pay \$18,750 to
4 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,
5 and any other costs incurred as a result of investigating, bringing this matter to Defendant's
6 attention, litigating and negotiating a settlement in the public interest. The attorneys' fees and
7 cost reimbursement check shall be made payable to the Lexington Law Group.

8 **4. ENTIRE AGREEMENT**

9 **4.1** This Consent Judgment contains the sole and entire agreement and
10 understanding of CEH and Defendant with respect to the entire subject matter hereof, and any and
11 all prior discussions, negotiations, commitments, and understandings related hereto. No
12 representations, oral or otherwise, express or implied, other than those contained herein have been
13 made by CEH or Defendant. No other agreements not specifically referred to herein, oral or
14 otherwise, shall be deemed to exist or bind CEH or Defendant.

15 **5. MODIFICATION OF CONSENT JUDGMENT**

16 **5.1** This Consent Judgment may only be modified by written agreement of
17 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

18 **6. ENFORCEMENT OF CONSENT JUDGMENT**

19 **6.1 Enforcement Procedures.** Prior to bringing any motion or order to show
20 cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the
21 violating party thirty (30) days advanced written notice of the alleged violation. The Parties shall
22 meet and confer during such thirty (30) day period in an effort to try to reach agreement on an
23 appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to
24 enforce may, by motion or order to show cause before the Superior Court of Marin, seek to
25 enforce the terms and conditions contained in this Consent Judgment. Should the Party seeking
26 to enforce prevail on any motion or application under this section, such Party shall be entitled to
27 seek to recover its reasonable attorneys' fees and costs associated with such motion or order to
28 show cause from the non-moving Party.

1 **7. APPLICATION OF CONSENT JUDGMENT**

2 **7.1** This Consent Judgment shall apply to and be binding upon the Parties
3 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
4 them.

5 **8. CLAIMS COVERED AND RELEASE OF CLAIMS**

6 **8.1** This Consent Judgment is a full, final and binding resolution between
7 CEH, on behalf of itself and acting in the public interest pursuant to Proposition 65, and
8 Defendant of any violation of Proposition 65 that was or could have been asserted in the
9 Complaint against Defendant (including any claims that could be asserted in connection with any
10 of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates, directors,
11 officers, employees, agents, attorneys, distributors, customers, retailers, representatives,
12 shareholders, or assigns (collectively, "Defendant Releasees") based on failure to warn about
13 alleged exposures to Lead resulting from any Products distributed or sold by Defendant
14 ("Covered Claims") on or prior to the date of entry of this Consent Judgment. CEH, its directors,
15 officers, employees and attorneys hereby release all Covered Claims against Defendant
16 Releasees. Compliance with the terms of this Consent Judgment constitutes compliance with
17 Proposition 65 for purposes of Lead exposures from the Products.

18 **9. GOVERNING LAW**

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

21 **10. RETENTION OF JURISDICTION**

22 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce
23 the terms this Consent Judgment.

24 **11. PROVISION OF NOTICE**

25 **11.1** All notices required pursuant to this Consent Judgment and correspondence
26 shall be sent to the following:
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1 For CEH:

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

4 For Defendant:

5 Andrea L. Tozer
6 Morrison & Foerster LLP
555 West Fifth Street, Suite 3500
Los Angeles, CA 90013-1024

7 **12. ATTORNEYS' FEES**

8 **12.1** A Party who unsuccessfully brings or contests an action arising out of this
9 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
10 costs unless the unsuccessful Party has acted with substantial justification. For purposes of this
11 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
12 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, et seq.

13 **12.2** Notwithstanding Section 12.1, a Party who prevails in a contested
14 enforcement action brought pursuant to Section 6.1 may seek an award of attorneys' fees pursuant
15 to Code of Civil Procedure § 1021.5 against a Party that acted with substantial justification. The
16 Party seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and
17 this provision shall not be construed as altering any procedural or substantive requirements for
18 obtaining such an award.

19 **12.3** Nothing in this Section 12 shall preclude a Party from seeking an award of
20 sanctions pursuant to law.

21 **13. COURT APPROVAL**

22 **13.1** CEH will comply with the settlement notice provisions of Health and
23 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003 by preparing
24 and filing a motion for approval of this Consent Judgment and Defendant shall support approval
25 of such motion.

26 **14. COUNTERPARTS**

27 **14.1** The stipulations to this Consent Judgment may be executed in counterparts.
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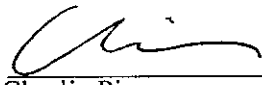
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15. AUTHORIZATION

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 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.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

 10/29/10
Charlie Pizarro
Associate Director

CUSTOM ACCESSORIES, INC.

[Name]

[Title]

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

CUSTOM ACCESSORIES, INC.



[Name]
Edward Matthew, M.D.

Executive Director
[Title]

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JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Custom Accessories, Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: _____

Judge, Superior Court of the State of California