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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN

CENTER FOR ENVIRONMENTAL HEALTH, a non-profit corporation,)	Case No. CIV-1102577
)	
Plaintiff,)	[PROPOSED] CONSENT JUDGMENT
)	AS TO 99¢ ONLY STORES
v.)	
)	
99¢ ONLY STORES; BEST BUY CO., INC.;)	
BEST BUY STORES, L.P.; GEOFFREY, LLC;)	
MOMENTUM BRANDS, INC.; TOYS “R” US,)	
INC.; and DOES 1 through 200, inclusive,)	
)	
Defendants.)	
)	
)	
)	

1. INTRODUCTION

1.1 This Consent Judgment is entered into by the Center For Environmental Health, a California non-profit corporation (“CEH”), and 99¢ Only Stores on its own behalf and dba Momentum Brands (“Settling Defendant”), to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. 99¢ Only Stores, et al.*, Marin County Superior Court Case No. CIV-1102577 (the “Action”).

1.2 On March 2, 2011, CEH provided a “Notice of Violation of Proposition 65” to the

1 California Attorney General, the District Attorneys of every county in California, the City
2 Attorneys of every California city with a population greater than 750,000, and to Settling
3 Defendant regarding the presence of lead and lead compounds (collectively, “Lead”) in reusable
4 shopping bags (“Covered Products”) manufactured, distributed and/or sold by Settling Defendant.

5 1.3 On May 20, 2011, CEH filed the Action against Settling Defendant.

6 1.4 Settling Defendant is a corporation that employs 10 or more persons, and that
7 manufactures, distributes and/or sells Covered Products in the State of California.

8 1.5 For purposes of this Consent Judgment only, CEH and Settling Defendant (the
9 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
10 the Complaint and personal jurisdiction over Settling Defendant as to the acts alleged in the
11 Complaint, that venue is proper in the County of Marin, and that this Court has jurisdiction to
12 enter this Consent Judgment as a full and final resolution of all claims which were or could have
13 been raised in the Complaint based on the facts alleged therein with respect to Covered Products
14 manufactured, distributed, and/or sold by Settling Defendant.

15 1.6 CEH and Settling Defendant enter into this Consent Judgment as a full and final
16 settlement of all claims that were raised in the Complaint, or which could have been raised in the
17 Complaint, arising out of the facts or conduct related to Settling Defendant alleged therein. By
18 execution of this Consent Judgment and agreeing to comply with its terms, the Parties do not
19 admit any facts or conclusions of law including, but not limited to, any facts or conclusions of law
20 suggesting or demonstrating any violations of Proposition 65 or any other statutory, common law
21 or equitable requirements relating to Lead in the Covered Products. Nothing in this Consent
22 Judgment is or shall be construed as an admission by the Parties of any fact, conclusion of law,
23 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
24 construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation
25 of law. Settling Defendant denies the material, factual and legal allegations in CEH’s Complaint
26 and expressly denies any wrong doing whatsoever. Nothing in this Consent Judgment shall
27 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
28 any other pending or future legal proceedings except as to the claims for Covered Products settled

1 herein. This Consent Judgment is the product of negotiation and compromise and is accepted by
2 the Parties solely for purposes of settling, compromising, and resolving issues disputed in this
3 action.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of Covered Products.** After the date of entry of this Consent
6 Judgment (the “Effective Date”), Settling Defendant shall not manufacture, ship, sell or offer for
7 sale any Covered Product unless such Covered Product complies with the following Lead Limits:

8 2.1.1 “Paint or other Surface Coatings” as defined in 16 C.F.R. § 1303.2(b): no
9 more than 0.009 percent Lead by weight (90 parts per million (“ppm”).

10 2.1.2 Polyvinyl Chloride: no more than .02 percent Lead by weight (200 ppm).

11 2.1.3 All other materials: no more than .03 percent Lead by weight (300 ppm).

12 **2.2 Market Withdrawal of Covered Products.** On or before the Effective Date,
13 Settling Defendant shall cease shipping the Christmas Tree Reusable Bag, SKU No. 8-76416-
14 07639-3, as identified in CEH’s pre-suit Notice of Violation to Settling Defendant (the “Recall
15 Covered Products”), to stores and/or customers in California, and Settling Defendant shall
16 withdraw the Recall Covered Products from the market in California, and, at a minimum, send
17 instructions to any of its stores and/or customers that offer the Recall Covered Products for sale in
18 California to cease offering such Recall Covered Products for sale and to either return all Recall
19 Covered Products to Settling Defendant for destruction, or to directly destroy the Recall Covered
20 Products. Any destruction of the Recall Covered Products shall be in compliance with all
21 applicable laws. Settling Defendant shall keep and make available to CEH for inspection and
22 copying records and correspondence regarding the market withdrawal and destruction of the
23 Recall Covered Products. If there is a dispute over the corrective action, the Parties shall meet and
24 confer before seeking any remedy in court

25 **2.3 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing of the
26 Covered Products. Any such testing shall be conducted by an independent laboratory in
27 accordance with CPSIA Test Method CPSC-CH-E1002-08.1, or such other equivalent acid digest
28 methodology (the “Test Protocol”). In the event that CEH’s testing demonstrates Lead levels in

1 excess of the requirements of Section 2.1 subsequent to the Effective Date, CEH shall serve a
2 written notice on Settling Defendant informing it of the alleged violation(s). The notice shall
3 include information sufficient to permit Settling Defendant to identify the Covered Product(s) and
4 the location at which such Covered Product was sold. CEH shall also provide Settling Defendant
5 with a copy of its laboratory test results demonstrating Lead levels in excess of the requirements
6 of Section 2.1. Settling Defendant shall, within 30 days following receipt of such notice, provide
7 CEH, at the address listed in Section 8, with a detailed plan of correction to address the alleged
8 violation(s). If there is a dispute over Settling Defendant's proposed corrective action, the Parties
9 shall meet and confer in accordance with Section 4.1 prior to bringing any enforcement action
10 under that section seeking to enforce the terms and conditions of Section 2.1.

11 **3. PAYMENTS**

12 **3.1 Payments From Settling Defendant.** Within ten (10) business days of the entry
13 of this Consent Judgment, Settling Defendant shall pay the total sum of \$47,000 as a settlement
14 payment. Any failure by Settling Defendant to comply with the payment terms herein shall be
15 subject to a stipulated late payment fee of \$100 per day, which amount shall be recoverable by
16 CEH, together with its reasonable attorneys' fees and costs, in an enforcement proceeding brought
17 pursuant to Section 3.

18 **3.2 Allocation of Payments.** The total settlement amount for Settling Defendant shall
19 be paid in three separate checks delivered to the offices of the Lexington Law Group (Attn:
20 Howard Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and
21 allocated as follows:

22 **3.2.1** Settling Defendant shall pay the sum of \$6,100 as a penalty pursuant to
23 Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
24 Health & Safety Code § 25249.12. The penalty check shall be made payable to the Center For
25 Environmental Health.

26 **3.2.2** Settling Defendant shall pay the sum of \$9,500 as payment to CEH in lieu
27 of penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations,
28 Title 11, § 3202(b). CEH will use such funds to continue its work educating and protecting people

1 from exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such
2 funds to monitor compliance with the reformulation requirements of this and other similar Consent
3 Judgments. In addition, as part of its *Community Environmental Action and Justice Fund*, CEH
4 will use four percent of such funds to award grants to grassroots environmental justice groups
5 working to educate and protect people from exposures to toxic chemicals. The method of
6 selection of such groups can be found at the CEH web site at www.ceh.org/justicefund. The
7 payment in lieu of penalty check shall be made payable to the Center For Environmental Health.

8 3.2.3 Settling Defendant shall pay the sum of \$31,400 as reimbursement of a
9 portion of CEH's reasonable attorneys' fees and costs. The attorneys' fees and cost
10 reimbursement check shall be made payable to the Lexington Law Group.

11 **4. ENFORCEMENT**

12 4.1 **Enforcement Procedures.** Prior to bringing any motion or order to show cause to
13 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
14 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
15 confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate
16 cure for the alleged violation; provided however, that for any alleged violations of Section 2.1, the
17 written notice and corrective action plan requirements set forth in Section 2.3 shall apply and the
18 thirty (30) day period to meet and confer shall commence when Plaintiff receives a corrective
19 action plan from Settling Defendant. After such thirty (30) day period, the Party seeking to
20 enforce may, by motion or order to show cause before the Superior Court of Marin, seek to
21 enforce the terms and conditions contained in this Consent Judgment. A motion or order to show
22 cause seeking to enforce the terms and conditions contained in this Consent Judgment shall be
23 CEH's sole remedy for seeking any further relief regarding the alleged presence of Lead in any
24 Covered Product manufactured distributed and/or sold by Settling Defendant after the Effective
25 Date.

26 **5. MODIFICATION AND DISPUTE RESOLUTION**

27 5.1 **Modification.** This Consent Judgment may be modified from time to time by
28 express written agreement of the Parties, with the approval of the Court, or by an order of this

1 Court upon motion and in accordance with law.

2 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
3 shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
4 modify the Consent Judgment.

5 **6. APPLICATION OF CONSENT JUDGMENT**

6 6.1 This Consent Judgment shall apply to and be binding upon the Parties hereto, their
7 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

8 **7. CLAIMS COVERED AND RELEASE**

9 7.1 This Consent Judgment is a full, final, and binding resolution between CEH and
10 Settling Defendant and Settling Defendant’s parents, shareholders, divisions, subdivisions,
11 subsidiaries, partners, sister companies and their successors and assigns (“Defendant Releases”),
12 and all entities to whom they distribute or sell Covered Products including, but not limited to,
13 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
14 (“Downstream Defendant Releases”), of any violation of Proposition 65 or any other statutory or
15 common law claims that have been or could have been asserted in the public interest against
16 Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees, regarding the
17 failure to warn about exposure to Lead arising in connection with Covered Products manufactured,
18 distributed, or sold by Settling Defendant prior to the Effective Date. Compliance with the terms
19 of this Consent Judgment by Settling Defendant and the Defendant Releasees shall constitute
20 compliance with Proposition 65 by Settling Defendant, the Defendant Releasees and their
21 Downstream Defendant Releasees with respect to any alleged failure to warn about Lead in
22 Covered Products manufactured, distributed or sold by Settling Defendant after the Effective Date.

23 **8. PROVISION OF NOTICE**

24 8.1 When any Party is entitled to receive any notice under this Consent Judgment, the
25 notice shall be sent by certified mail and electronic mail as follows:

26 8.1.1 **Notices to Settling Defendant.** The person for Settling Defendant to
27 receive Notices pursuant to this Consent Judgment shall be:
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Patrick J. Cafferty, Jr.
Munger, Tolles & Olson LLP
560 Mission Street
San Francisco, CA 94105
Patrick.Cafferty@mto.com

8.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to this Consent Judgment shall be:

Howard Hirsch
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
hhirsch@lexlawgroup.com

8.2 Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice by electronic or certified mail.

9. COURT APPROVAL

9.1 CEH will comply with the settlement notice provisions of Health & Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003 by preparing and filing a motion for approval of this Consent Judgment and Settling Defendants shall support approval of such motion.

9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

10. RETENTION OF JURISDICTION

10.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

11. ATTORNEYS' FEES

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

1 11.2 Notwithstanding Section 11.1, a Party who prevails in a contested enforcement
2 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
3 Civil Procedure § 1021.5 against a Party that acted with substantial justification. The Party
4 seeking such an award shall bear the burden of meeting all of the elements of § 1021.5, and this
5 provision shall not be construed as altering any procedural or substantive requirements for
6 obtaining such an award.

7 **12. SEVERABILITY**

8 12.1 In the event that any of the provisions of this Consent Judgment are held by a court
9 to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

10 **13. ENTIRE AGREEMENT**

11 13.1 This Consent Judgment contains the sole and entire agreement and understanding
12 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
13 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
14 and therein. There are no warranties, representations, or other agreements between the Parties
15 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
16 other than those specifically referred to in this Consent Judgment have been made by any Party
17 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
18 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
19 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
20 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
21 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
22 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
23 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
24 whether or not similar, nor shall such waiver constitute a continuing waiver.

25 **14. GOVERNING LAW AND CONSTRUCTION**

26 14.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California.

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1 **15. NO EFFECT ON OTHER SETTLEMENTS**

2 15.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
3 against an entity that is not Settling Defendant on terms that are different than those contained in
4 this Consent Judgment.

5 **16. EXECUTION IN COUNTERPARTS**


6 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
7 means of facsimile, which taken together shall be deemed to constitute one document.

8 **17. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

9 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
10 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
11 execute the Consent Judgment on behalf of the Party represented and legally bind that Party. The
12 undersigned have read, understand and agree to all of the terms and conditions of this Consent
13 Judgment. Except as explicitly provided herein, each Party is to bear its own fees and costs.
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15 **IT IS SO STIPULATED:**

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Dated: February <u>8</u> , 2012	CENTER FOR ENVIRONMENTAL HEALTH  _____ Chariz Pizarro _____ Printed Name Associate Director _____ Title
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Dated: February 3, 2012

**99¢ ONLY STORES, individually
and dba MOMENTUM BRANDS**



Michael W. Botterman
Printed Name

Vice President - GWP
Title

**IT IS SO ORDERED, ADJUDGED,
AND DECREED**

Dated: _____

Judge of the Superior Court of the State of California