

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

CENTER FOR ENVIRONMENTAL HEALTH, a non-profit corporation,)	Case No. CV 1104722
)	
Plaintiff,)	[PROPOSED] CONSENT JUDGMENT
)	AS TO BURNES HOME ACCENTS, LLC
vs.)	
)	
BURNES HOME ACCENTS, LLC; KOHL'S DEPARTMENT STORES, INC., <i>et al.</i> ,)	
)	
Defendant.)	

1. INTRODUCTION

1.1 This Consent Judgment is entered into by the Center For Environmental Health, a California non-profit corporation (“CEH”) and Burnes Home Accents, LLC (“Defendant”) to settle certain claims asserted by CEH against Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Burnes Home Accents, LLC, et al.*, Marin County Superior Court Case No. CV 1104722 (the “Action”).

1.2 On July 1, 2011, CEH provided a “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Defendant

1 regarding the presence of lead and lead compounds (collectively referred to herein as “Lead”) in
2 photo albums (“Covered Products”).

3 1.3 On September 22, 2011, CEH filed its complaint in the Action to name
4 Defendant as a party.

5 1.4 Defendant is a corporation that employs 10 or more persons, and that
6 manufactures, distributes and/or sells Covered Products in the State of California.

7 1.5 For purposes of this Consent Judgment only, CEH and Defendant (the
8 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
9 the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint,
10 that venue is proper in the County of Marin, and that this Court has jurisdiction to enter this
11 Consent Judgment as a full and final resolution of all claims which were or could have been
12 raised in the Complaint based on the facts alleged therein with respect to Covered Products
13 manufactured, distributed, and/or sold by Defendant.

14 1.6 CEH and Defendant enter into this Consent Judgment as a full and final
15 settlement of all claims that were raised in the Complaint, or which could have been raised in the
16 Complaint, arising out of the facts or conduct related to sales of Covered Products by Defendant
17 and their chain of distribution, including without limitation, defendant Kohl’s Department Stores,
18 Inc., alleged therein. By execution of this Consent Judgment and agreeing to comply with its
19 terms, the Parties do not admit any facts or conclusions of law including, but not limited to, any
20 facts or conclusions of law suggesting or demonstrating any violations of Proposition 65 or any
21 other statutory, common law or equitable requirements. Nothing in this Consent Judgment is or
22 shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or
23 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
24 admission by the Parties of any fact, conclusion of law, issue of law, or violation of law.
25 Defendant denies the material, factual and legal allegations in CEH’s Complaint and expressly
26 denies any wrong doing whatsoever. Nothing in this Consent Judgment shall prejudice, waive or
27 impair any right, remedy, argument or defense the Parties may have in this or any other pending
28 or future legal proceedings. This Consent Judgment is the product of negotiation and

1 compromise and is accepted by the Parties solely for purposes of settling, compromising, and
2 resolving issues disputed in this action.

3 **2. INJUNCTIVE RELIEF**

4 2.1 **Reformulation of Covered Products.** As of the date of entry of this Consent
5 Judgment (the “Effective Date”), Defendant shall not manufacture, ship, sell or offer for sale any
6 Covered Product that contains accessible component parts or that is made of any accessible
7 material, that is more than 0.01 percent (100 parts per million (“ppm”)) Lead by weight when
8 analyzed pursuant to Environmental Protection Agency (“EPA”) testing methodology 3050-B or
9 equivalent methods. The term “accessible” for purposes of this section means any part or
10 material that could be handled, touched or mouthed during normal or reasonably foreseeable use.

11 2.2 **Cessation of Sales of Covered Products.** On or before the Effective Date,
12 Defendant shall cease shipping the Burnes Home Accents Photo Album in Red, SKU No. 0-
13 13208-29172-9, as identified in CEH’s pre-suit Notice of Violation to Defendant (the “Noticed
14 Product”), to stores and/or customers in California, and Defendant hereby confirms that it has
15 undertaken best commercial efforts to ensure that the Noticed Product is no longer being sold by
16 Defendant or its chain of distribution in California.

17 **3. ENFORCEMENT**

18 3.1 **Enforcement Procedures.** Prior to bringing any motion or order to show
19 cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the
20 violating party thirty (30) days advanced written notice of the alleged violation. The Parties shall
21 meet and confer during such thirty (30) day period in an effort to try to reach agreement on an
22 appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to
23 enforce may, by new action, motion or order to show cause before the Superior Court of Marin,
24 seek to enforce the terms and conditions contained in this Consent Judgment. Should the Party
25 seeking to enforce prevail on any motion or application under this section, such Party shall be
26 entitled to recover its reasonable attorney’s fees and costs associated with such motion, order to
27 show cause or procedure from the other Party.

28 3.2 It is the intention of the Parties that the sale or offer of sale of a Noticed

1 Product which was: (i) returned to the retail store by a customer; (ii) inadvertently overlooked
2 when Noticed Products were removed from retail store shelves and inventory; or (iii) otherwise
3 inadvertent (“Inadvertent Sale”) shall not constitute a violation of this Consent Judgment.

4 **4. PAYMENTS**

5 4.1 **Payments From Defendant.** Within ten (10) days of the entry of this
6 Consent Judgment, Defendant shall pay the total sum of \$30,000 as a settlement payment.

7 4.2 **Allocation of Payments.** The total settlement amount for Defendant shall be
8 paid in three separate checks delivered to the offices of the Lexington Law Group (Attn: Howard
9 Hirsch), 503 Divisadero Street, San Francisco, California 94117, and made payable and allocated
10 as follows:

11 4.2.1 Defendant shall pay the sum of \$3,930 as a penalty pursuant to Health &
12 Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health &
13 Safety Code § 25249.12. The penalty check shall be made payable to the Center For
14 Environmental Health.

15 4.2.2 Defendant shall pay the sum of \$5,900 as payment to CEH in lieu of
16 penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
17 11, § 3202(b). CEH will use such funds to continue its work educating and protecting people
18 from exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such
19 funds to monitor compliance with the reformulation requirements of this and other similar
20 Consent Judgments and to purchase and test Covered Products to confirm compliance with such
21 reformulation requirements. In addition, as part of its *Community Environmental Action and*
22 *Justice Fund*, CEH will use four percent of such funds to award grants to grassroots
23 environmental justice groups working to educate and protect people from exposures to toxic
24 chemicals. The method of selection of such groups can be found at the CEH web site at
25 www.ceh.org/what-we-do/supporting-communities/the-justice-fund. The payment in lieu of
26 penalty check shall be made payable to the Center for Environmental Health.

27 4.2.3 Defendant shall pay the sum of \$20,170 as reimbursement of reasonable
28 attorneys’ fees and costs. The attorneys’ fees and cost reimbursement check shall be made

1 payable to the Lexington Law Group.

2 **5. MODIFICATION AND DISPUTE RESOLUTION**

3 5.1 **Modification.** This Consent Judgment may be modified from time to time by
4 express written agreement of the Parties, with the approval of the Court, or by an order of this
5 Court upon motion and in accordance with law.

6 5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent
7 Judgment shall attempt in good faith to meet and confer with the other Party prior to filing a
8 motion to modify the Consent Judgment.

9 **6. CLAIMS COVERED AND RELEASE**

10 6.1 This Consent Judgment is a full, final, and binding resolution between CEH,
11 on behalf of itself and the public interest, and Defendant and Defendant’s parents, shareholders,
12 divisions, subdivisions, subsidiaries, partners, sister companies and their successors and assigns
13 (“Defendant Releasees”), and all entities to whom they directly or indirectly distribute or sell
14 Covered Products including, but not limited to, distributors, wholesalers, customers, retailers,
15 specifically including but not limited to Kohl’s Department Stores, Inc., franchisees, cooperative
16 members, and licensees (“Downstream Defendant Releasees”), of any violation of Proposition 65
17 that has been or could have been asserted in the public interest against Defendant, Defendant
18 Releasees, and Downstream Defendant Releasees, regarding the failure to warn about exposure to
19 Lead arising in connection with Covered Products manufactured, distributed, or sold by
20 Defendant prior to the Effective Date.

21 6.2 CEH, for itself and acting on behalf of the public interest pursuant to Health &
22 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
23 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
24 violation of Proposition that has been or could have been asserted in the public interest regarding
25 the failure to warn about exposure to Lead arising in connection with Covered Products
26 manufactured, distributed or sold by Defendant prior to the Effective Date.

27 6.3 Compliance with the terms of this Consent Judgment by Defendant and the
28 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, the

1 Defendant Releasees and their Downstream Defendant Releasees with respect to any alleged
2 failure to warn about Lead in Covered Products manufactured, distributed or sold by Defendant
3 after the Effective Date.

4 **7. PROVISION OF NOTICE**

5 7.1 When any Party is entitled to receive any notice under this Consent Judgment,
6 the notice shall be sent by first class and electronic mail as follows:

7 7.1.1 **Notices to Defendant.** The person for Defendant to receive Notices
8 pursuant to this Consent Judgment shall be:

9 Clifton J. McFarland
10 Downey Brand LLP
621 Capitol Mall, 18th Floor
11 Sacramento, CA 95814
cmcfarland@DowneyBrand.com

12 Timothy K. Corley
13 Timothy K. Corley, P.C.
2815 Darby Drive
14 Post Office Box 1168
Florence, AL 35630
15 tim@timothycorley.com

16 7.1.2 **Notices to Plaintiff.** The person for CEH to receive Notices pursuant to
17 this Consent Judgment shall be:

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

21 7.2 Any Party may modify the person and address to whom the notice is to be sent
22 by sending the other Party notice by first class and electronic mail.

23 **8. COURT APPROVAL**

24 8.1 This Consent Judgment shall become effective on the Effective Date, provided
25 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
26 Defendant shall support approval of such Motion.

1 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
2 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
3 purpose.

4 **9. GOVERNING LAW AND CONSTRUCTION**

5 9.1 The terms of this Consent Judgment shall be governed by the laws of the State
6 of California.

7 **10. ENTIRE AGREEMENT**

8 10.1 This Consent Judgment contains the sole and entire agreement and
9 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
10 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
11 merged herein and therein. There are no warranties, representations, or other agreements between
12 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
13 implied, other than those specifically referred to in this Consent Judgment have been made by any
14 Party hereto. No other agreements not specifically contained or referenced herein, oral or
15 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
16 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
17 any of the Parties hereto only to the extent that they are expressly incorporated herein. No
18 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
19 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
20 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
21 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

22 **11. RETENTION OF JURISDICTION**

23 11.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **12. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

26 12.1 Each Party represents that the individual signing this Consent Judgment on its
27 behalf is fully authorized by the Party he or she represents to stipulate to this Consent Judgment
28 and to enter into and execute the Consent Judgment on behalf of the Party represented and legally

1 to bind that Party.

2 **13. NO EFFECT ON OTHER SETTLEMENTS**

3 13.1 Nothing in this Consent Judgment shall preclude CEH from resolving any
4 claim against another entity on terms that are different than those contained in this Consent
5 Judgment.

6 **14. EXECUTION IN COUNTERPARTS**

7 14.1 The stipulations to this Consent Judgment may be executed in counterparts
8 and by means of facsimile, which taken together shall be deemed to constitute one document.

9 **IT IS SO STIPULATED:**

10 Dated: March 15, 2012

CENTER FOR ENVIRONMENTAL HEALTH

11
12 
13 _____
Signature

14
15 CHARLIE PIZZARO
16 _____
Printed Name


17
18 ASSOCIATE DIRECTOR
19 _____
Title

20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: March 22, 2012

BURNES HOME ACCENTS, LLC


Signature

MICHAEL A. JENKINS
Printed Name

CFO
Title

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

Dated:

JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA