

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 ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)	Case No. RG 16-834958
)	
Plaintiff,)	[PROPOSED] CONSENT JUDGMENT
)	AS TO DAIOHS U.S.A., INC.
v.)	
)	
DS SERVICES OF AMERICA, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	
)	

1. INTRODUCTION

1.1 The Parties to this Consent Judgment are the Center For Environmental Health (“CEH”), a California non-profit corporation, and Daiohs U.S.A., Inc., a California corporation (“Settling Defendant”). CEH and Settling Defendant are referred to herein individually as a “Party” and together as the “Parties.”

1.2 CEH and Settling Defendant (the “Parties”) enter into this Consent Judgment to settle certain claims asserted by CEH against Settling Defendant as set forth in the operative

1 complaint (“Complaint”) in the above-captioned matter. This Consent Judgment covers water
2 bottles made of polycarbonate plastic (“Covered Products”) that are sold or offered for sale by
3 Settling Defendant in the State of California. CEH alleges that the Covered Products leach
4 bisphenol A (“BPA”) into drinking water.

5 1.3 Settling Defendant is a corporation that manufactures, distributes, sells or offers for
6 sale in the State of California drinking water that is packaged in Covered Products.

7 1.4 On September 30, 2016, CEH provided a 60-day Notice of Violation of Proposition
8 65 to the California Attorney General, the District Attorneys of every county in California, the
9 City Attorneys of every California city with a population greater than 750,000 and to Settling
10 Defendant, alleging that Settling Defendant violated Proposition 65 by exposing persons to BPA
11 contained in drinking water that is packaged in Covered Products without first providing a clear
12 and reasonable Proposition 65 warning.

13 1.5 On October 13, 2016, CEH filed the Complaint in the above-referenced matter. On
14 February 10, 2017, CEH amended the Complaint in the above-captioned matter to add Settling
15 Defendant as a named defendant.

16 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
17 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
18 over Settling Defendant as to the acts alleged in the Complaint, that venue is proper in the County
19 of Alameda and that this Court has jurisdiction to enter and enforce this Consent Judgment as a
20 full and final resolution of all claims which were or could have been raised in the Complaint
21 based on the facts alleged therein with respect to Covered Products manufactured, distributed or
22 sold by Settling Defendant.

23 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by the
24 Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
25 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
26 conclusion of law, issue of law or violation of law. Nothing in this Consent Judgment shall
27 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in any
28

1 other pending or future legal proceedings. This Consent Judgment is the product of negotiation
2 and compromise and is accepted by the Parties solely for purposes of settling, compromising and
3 resolving issues disputed in this Action.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Reformulation of Covered Products.** As of May 1, 2017, Settling Defendant
6 represents that it held an inventory of approximately [40,000] Covered Products for use in
7 delivering drinking water to consumers in California (the “Inventory”). On or before the date of
8 approval of this Consent Judgment by the Court (the “Effective Date”), Settling Defendant shall
9 implement a polycarbonate bottle retirement program (the “Retirement Program”). Under the
10 Retirement Program, Settling Defendant will not purchase, lease or place into its Inventory any
11 new polycarbonate bottles for use in the sale and delivery of drinking water in California. In
12 addition, Settling Defendant will retire its entire Inventory of polycarbonate water bottles by
13 either replacing Covered Products with water bottles made from polyethylene terephthalate
14 (“PET”) or another material that is not made of polycarbonate and does not contain BPA, or
15 ceasing use of Covered Products. Under the Retirement Program, Settling Defendant shall retire
16 the following number of Covered Products from circulation as follows:

17 A minimum of 5,490 shall be retired by December 31, 2017.

18 A minimum of 14,900 shall be retired by December 31, 2018.

19 A minimum of 24,310 shall be retired by December 31, 2019.

20 A minimum of 33,720 shall be retired by December 31, 2020.

21 Settling Defendant shall complete the Retirement Program no later than August 31, 2021. After
22 that, Settling Defendant shall not sell or deliver or otherwise provide any bottled water in
23 Covered Products. Should Settling Defendant enter into a transaction such as the sale of part of
24 its business or the acquisition of another business, which results in an increase or decrease in the
25 number of Covered Products in its Inventory, Settling Defendant may adjust the schedule above
26 on a pro-rated basis, such that all Covered Products will be retired by August 31, 2021. In such
27

28

1 case, Settling Defendant shall notify CEH of the change to its Inventory and the related pro-rata
2 adjustment to the retirement schedule.

3 **2.2 Visual Inspection.** CEH believes that polycarbonate bottles leach as the bottles
4 age and undergo additional wash cycles. Accordingly, in determining which polycarbonate
5 bottles to remove from circulation first under the Retirement Program, Settling Defendant shall
6 use best efforts to first remove older bottles that have been in use for the longest period of time
7 and undergone the most wash cycles. Under the Retirement Program, Settling Defendant shall
8 periodically perform a visual inspection of all bottles in inventory in order to identify the oldest
9 bottles that have been washed the most times for priority removal. The visual inspection shall
10 include looking for visible wear and cracks, date or other identity stamps or labelling that would
11 indicate bottle age as well as using knowledge of the origin or time certain bottles were acquired
12 in an effort to ensure that the oldest bottles that have undergone the most wash cycles are
13 removed from circulation first.

14 **2.3 Documentation.** Settling Defendant shall keep records and documentation
15 sufficient to establish its compliance with the requirements of the Retirement Program, including
16 but not limited to documentation regarding the purchase of new non-polycarbonate bottles, the
17 periodic removal from circulation of polycarbonate bottles and the visual inspections to identify
18 bottles to be replaced. Settling Defendant shall retain such records for a period of five years after
19 the Effective Date and promptly make such records and documentation available to CEH upon
20 written request.

21 **3. ENFORCEMENT**

22 **3.1 Enforcement Procedures.** Prior to bringing any motion or order to show cause to
23 enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the violating
24 party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and
25 confer during such thirty (30) day period, exchanging any relevant information, in an effort to try
26 to reach agreement on an appropriate cure for the alleged violation absent Court intervention.
27 After such thirty (30) day period, the Party seeking to enforce may, by , motion or order to show
28

1 cause before the Superior Court of Alameda County, seek to enforce the terms and conditions
2 contained in this Consent Judgment.

3 **4. PAYMENTS**

4 **4.1 Payments by Settling Defendant.** On or before five (5) days after the Effective
5 Date, Settling Defendant shall pay the total sum of \$60,000 as a settlement payment as further set
6 forth in this Section.

7 **4.2 Allocation of Payments.** The total settlement amount for Settling Defendant shall
8 be paid in five (5) separate checks in the amounts specified below and delivered as set forth
9 below. Any failure by Settling Defendant to comply with the payment terms herein shall be
10 subject to a stipulated late fee to be paid by Settling Defendant in the amount of \$100 for each
11 day the full payment is not received after the applicable payment due date set forth in Section 4.1.
12 The late fees required under this Section shall be recoverable, together with reasonable attorneys'
13 fees, in an enforcement proceeding brought pursuant to Section 3 of this Consent Judgment. The
14 funds paid by Settling Defendant shall be allocated as set forth below between the following
15 categories and made payable as follows:

16 **4.2.1** Settling Defendant shall pay \$8,016 as a civil penalty pursuant to Health &
17 Safety Code §25249.7(b). The civil penalty payment shall be apportioned in accordance with
18 Health & Safety Code §25249.12 (25% to CEH and 75% to the State of California's Office of
19 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of
20 the civil penalty payment for \$6,012 shall be paid by check made payable to OEHHA and
21 associated with taxpayer identification number 68-0284486. This payment shall be delivered as
22 follows:

23 For United States Postal Service Delivery:
24 Attn: Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010, MS #19B
28 Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:
2 Attn: Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street, MS #19B
6 Sacramento, CA 95814

7 The CEH portion of the civil penalty payment for \$2,004 shall be paid by check made
8 payable to the Center for Environmental Health and associated with taxpayer identification
9 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
10 Street, San Francisco, CA 94117.

11 4.2.2 Settling Defendant shall pay an Additional Settlement Payment (“ASP”) to
12 CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
13 11, § 3204 in the amount of \$6,012. CEH intends to place these funds in CEH’s Toxics in Food
14 Fund and use them to support CEH programs and activities that seek to educate the public about
15 BPA and other toxic chemicals in food, to work with the food industry and agriculture interests to
16 reduce exposure to BPA and other toxic chemicals in food, and to thereby reduce the public
17 health impacts and risks of exposure to BPA and other toxic chemicals in food sold in California.
18 CEH shall obtain and maintain adequate records to document that ASPs are spent on these
19 activities and CEH agrees to provide such documentation to the Attorney General within thirty
20 days of any request from the Attorney General. The payments pursuant to this Section shall be
21 paid by check made payable to the Center for Environmental Health and associated with taxpayer
22 identification number 94-3251981. These payments shall be delivered to Lexington Law Group,
23 503 Divisadero Street, San Francisco, CA 94117.

24 4.2.3 Settling Defendant shall pay \$45,972 as a reimbursement of a portion of
25 CEH’s reasonable attorneys’ fees and costs. This amount shall be divided into two checks: (1) a
26 check in the amount of \$38,908 shall be made payable to the Lexington Law Group and
27 associated with taxpayer identification number 94-3317175; and (2) a check in the amount of
28 \$7,064 shall be made payable to the Center for Environmental Health and associated with
taxpayer identification number 94-3251981. These payments shall be delivered to the Lexington
Law Group, 503 Divisadero Street, San Francisco, CA 94117.

1 **5. MODIFICATION AND DISPUTE RESOLUTION**

2 5.1 This Consent Judgment may be modified by written agreement of CEH and Settling
3 Defendant, after noticed motion, and upon entry of a modified consent judgment by the Court
4 thereon, or upon motion of CEH or Settling Defendant as provided herein or as otherwise
5 provided by law, and upon entry of a modified consent judgment by the Court. Grounds for
6 modification may include any that are permitted by law, including but not limited to a change in
7 Proposition 65 or its implementing regulations or preemption or lack of preemption of
8 Proposition 65 or its implementing regulations by federal law or regulation. Before filing an
9 application with the Court for a modification to this Consent Judgment, the Party seeking the
10 modification shall meet and confer with the other Party to determine whether the other Party will
11 consent to the proposed modification. If a proposed modification is agreed upon, then Settling
12 Defendant and CEH will present the modification to the Court by means of a motion for
13 stipulated modification to the Consent Judgment. Otherwise, the Party seeking the modification
14 shall bear the burden of establishing that the modification is appropriate. Notice of motions for
15 modification of this Consent Judgment shall be provided to the California Attorney General.

16 **6. CLAIMS COVERED AND RELEASE**

17 6.1 Provided that Settling Defendant complies in full with its obligations under Section
18 4 hereof, this Consent Judgment is a full, final and binding resolution between CEH on behalf of
19 itself and the public interest and Settling Defendant and its parents, subsidiaries, affiliated entities
20 that are under common ownership, directors, officers, employees, agents, shareholders,
21 successors, assigns, and attorneys (“Defendant Releasees”), and all entities to which Settling
22 Defendant distributes or sells Covered Products, such as distributors, wholesalers, customers,
23 retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”), of any
24 violation of Proposition 65 based on failure to warn about alleged exposure to BPA contained in
25 the Covered Products that were sold, distributed, used, or offered for sale by Settling Defendant
26 prior to the Effective Date (the “Released Products”).

27 6.2 Provided that Settling Defendant complies in full with its obligations under Section
28

1 4 hereof, CEH, for itself, its agents, successors and assigns, releases, waives and forever
2 discharges any and all claims against Settling Defendant, Defendant Releasees and Downstream
3 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
4 common law claims that have been or could have been asserted by CEH individually or in the
5 public interest regarding the failure to warn about exposure to BPA arising in connection with the
6 Released Products.

7 6.3 Provided that Settling Defendant complies in full with its obligations under Section
8 4 hereof, compliance with the terms of this Consent Judgment by Settling Defendant and
9 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant,
10 Defendant Releasees and Downstream Defendant Releasees with respect to any alleged failure to
11 warn about BPA in Covered Products manufactured, distributed or sold by Settling Defendant
12 after the Effective Date.

13 **7. PROVISION OF NOTICE**

14 7.1 When CEH is entitled to receive any notice under this Consent Judgment, the notice
15 shall be sent by first class and electronic mail to:

16 Eric S. Somers
17 Lexington Law Group
18 503 Divisadero Street
19 San Francisco, CA 94117
20 esomers@lexlawgroup.com

21 7.2 When Settling Defendant is entitled to receive any notice under this Consent
22 Judgment, the notice shall be sent by first class and electronic mail to:

23 Lori Bien
24 Legal Counsel
25 Daiohs U.S.A., Inc.
26 1 S. 660 Midwest Road, Suite 120 Oakbrook Terrace, IL 60181
27 l.bien@firstchoiceservices.com

28 Any Party may modify the person and/or address to whom the notice is to be sent by sending the
other Party notice by first class and electronic mail.

1 **8. COURT APPROVAL**

2 8.1 This Consent Judgment shall become effective upon the date signed by CEH and
3 Settling Defendant, whichever is later, provided however, that CEH shall prepare and file a
4 Motion for Approval of this Consent Judgment and Settling Defendant shall support approval of
5 such Motion.

6 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or effect
7 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

8 **9. GOVERNING LAW AND CONSTRUCTION**

9 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California.

11 **10. ATTORNEYS' FEES**

12 10.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
13 Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and costs
14 unless the unsuccessful Party has acted with substantial justification. For purposes of this
15 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
16 Civil Discovery Act of 1986, Code of Civil Procedure §§2016.010, *et seq.*

17 10.2 Notwithstanding Section 10.1, a Party who prevails in a contested enforcement
18 action brought pursuant to Section 3 may seek an award of attorneys' fees pursuant to Code of
19 Civil Procedure §1021.5 against a Party that acted with substantial justification. The Party
20 seeking such an award shall bear the burden of meeting all of the elements of §1021.5, and this
21 provision shall not be construed as altering any procedural or substantive requirements for
22 obtaining such an award.

23 10.3 Nothing in this Section 10 shall preclude a party from seeking an award of sanctions
24 pursuant to law.

25 **11. ENTIRE AGREEMENT**

26 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
27 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,

28

1 negotiations, commitments or understandings related thereto, if any, are hereby merged herein
2 and therein. There are no warranties, representations or other agreements between the Parties
3 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
4 other than those specifically referred to in this Consent Judgment have been made by any Party
5 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
6 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
7 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
8 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
9 modification, waiver or termination of this Consent Judgment shall be binding unless executed in
10 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
11 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
12 whether or not similar, nor shall such waiver constitute a continuing waiver.

13 **12. RETENTION OF JURISDICTION**

14 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment.

16 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

17 13.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
18 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
19 execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

20 **14. NO EFFECT ON OTHER SETTLEMENTS**

21 14.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
22 against an entity that is not Settling Defendant on terms that are different than those contained in
23 this Consent Judgment.

24
25
26
27
28

1 **15. EXECUTION IN COUNTERPARTS**

2 15.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile or portable document format (pdf), which taken together shall be deemed to
4 constitute one document.

5

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

8

9

Dated: _____

Judge of the Superior Court

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25


26

27

28

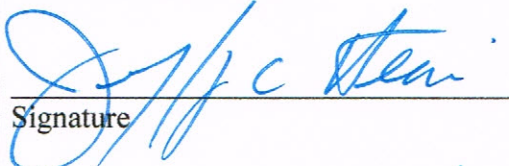
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

Dated: <u>22 May</u> 2017	CENTER FOR ENVIRONMENTAL HEALTH  _____ Signature <u>CHARLIE PIZZANO</u> _____ Printed Name <u>ASSOCIATE DIRECTOR</u> _____ Title
Dated: _____, 2017	DAIOHS U.S.A., INC. _____ Signature _____ Printed Name _____ Title

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

IT IS SO STIPULATED:

Dated: _____, 2017	CENTER FOR ENVIRONMENTAL HEALTH _____ Signature _____ Printed Name _____ Title
Dated: <u>MAY 19</u> , 2017	DAIOHS U.S.A., INC.  _____ Signature <u>Jeffrey C. HEIN</u> _____ Printed Name <u>Director of Finance / Treasurer</u> _____ Title