

ENDORSED
FILED
San Francisco County Superior Court

SEP 21 2006

GORDON PARK-LI, Clerk
BY: MARJORIE SCHWARTZ-SCOTT
Deputy Clerk

1 LEXINGTON LAW GROUP, LLP
2 Mark N. Todzo, State Bar No. 168389
3 Eric S. Somers, State Bar No. 139050
4 Lynné R. Saxton, State Bar No. 226210
5 1627 Irving Street
6 San Francisco, CA 94122
7 Telephone: (415) 759-4111
8 Facsimile: (415) 759-4112

9 Attorneys for Plaintiff
10 CENTER FOR ENVIRONMENTAL HEALTH

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
13 UNLIMITED JURISDICTION

14 CENTER FOR ENVIRONMENTAL HEALTH,
15 a non-profit corporation,

16 Plaintiff,

17 v.

18 ROSS STORES, INC.; BIG LOTS, INC.; TOYS
19 "R" US, INC.; TOYSRUS.COM, LLC.;
20 WALGREEN COMPANY; and Defendant
21 DOES 1 through 200, inclusive,

22 Defendants.

23 CENTER FOR ENVIRONMENTAL HEALTH,
24 a non-profit corporation,,

25 Plaintiff,

26 v.

27 BIG DOGS USA, INC., and Defendant DOES 1
28 through 200, inclusive,,

Defendant.

AND CONSOLIDATED ACTIONS

Case No. CGC 05-444522

(Consolidated with Case Nos. 05-445712,
05-447187, 05-447915, 05-444523, 06-
448593, 06-448597 and 06-448596)

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 On January 17, 2006, plaintiff the Center for Environmental Health (“CEH”), a
3 non-profit corporation acting in the public interest, filed a complaint (“the Complaint”) in San
4 Francisco County Superior Court, entitled *Center for Environmental Health v. Big Dogs USA,*
5 *Inc., et al.*, San Francisco County Superior Court Case Number CGC-06-448596 (the “CEH
6 Action”), for civil penalties and injunctive relief pursuant to the provisions of California Health &
7 Safety Code §25249.5 *et seq.* (“Proposition 65”).

8 1.2 Defendant Big Dog USA, Inc. (erroneously sued and served herein as Big Dogs
9 USA, Inc.) (“Defendant”) is a corporation that employs 10 or more persons and distributes and/or
10 sells soft food and beverage containers such as lunchboxes and coolers made of materials
11 containing lead and/or lead compounds (the “Products”) in the State of California.

12 1.3 On or about October 13, 2005, CEH served Defendant and the appropriate public
13 enforcement agencies with the requisite 60-day notice that Defendant was allegedly in violation
14 of Proposition 65. CEH’s notice and the Complaint in this Action allege that Defendant exposes
15 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
16 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer,
17 birth defects and other reproductive harm, without first providing clear and reasonable warning to
18 such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and
19 Complaint allege that Defendant’s conduct violates Health & Safety Code §25249.6, the warning
20 provision of Proposition 65.

21 1.4 For purposes of this Consent Judgment only, the parties stipulate that this Court
22 has jurisdiction over the subject matter of the violations alleged in the Complaint and personal
23 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
24 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
25 full and final resolution of all claims which were or could have been raised in the Complaint
26 based on the facts alleged therein.

27 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of certain
28 disputed claims between the Parties as alleged in the Complaint. By executing this Consent

1 Judgment, the Parties do not admit any facts or conclusions of law. It is the parties' intent that
2 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
3 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
4 Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law,
5 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
6 impair any right, remedy, argument or defense the Parties may have in this or any other or future
7 legal proceedings.

8 **2. COMPLIANCE - REFORMULATION**

9 2.1 **Level.** Defendant shall not distribute, ship, sell, or offer for sale, any Product
10 manufactured more than ninety days after entry of this Consent Judgment (the "Compliance
11 Date") in which the interior lining of the Product or exterior surface coating contains Lead
12 concentrations exceeding 200 parts per million ("ppm") or 600 ppm, respectively, or with PVC
13 material used for the exterior of the Product with Lead concentrations exceeding 200 ppm.

14 2.2 **Specifications and Testing.** Defendant shall issue specifications to its suppliers
15 requiring that the interior lining of the Products and exterior surface coating of the Products do
16 not contain materials which contain Lead concentrations exceeding 200 ppm and 600 ppm,
17 respectively, and that the exterior of the Products must not contain PVC material with Lead
18 concentrations exceeding 200 ppm. In addition, for Products ordered within the first three years
19 following the Compliance Date, Defendant shall help insure compliance with Section 2.1 by
20 testing the Products pursuant to Section 2.2.1. For Products ordered more than three years
21 following the Compliance Date, Defendant may comply with either Section 2.2.1 or Section
22 2.2.2.

23 2.2.1 **Compliance Option A.** Defendant shall have an independent laboratory
24 test the Products pursuant to the testing protocol attached hereto as Exhibits A and B (the "Test
25 Protocol").

26 2.2.2 **Compliance Option B.** Defendant shall obtain written certification from
27 its suppliers of the Products with corresponding test results, tested pursuant to the Test Protocol.
28

1 2.2.3 **Minimum Number of Products Tested.** Testing pursuant to Section 2.2.1
2 or by Defendant's suppliers for any certification pursuant to Section 2.2.2 shall be performed on a
3 minimum of two samples of each design for each purchase order of that design.

4 **3. SETTLEMENT PAYMENTS**

5 3.1 **Monetary Payment in Lieu of Penalty:** \$6,000.00 shall be paid to CEH in lieu
6 of any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use such funds to
7 continue its work protecting people from exposures to toxic chemicals. As part of this work,
8 CEH intends to conduct periodic testing of the Products.

9 3.2 **Attorneys' Fees and Costs:** \$18,000.00 shall be used to reimburse CEH and its
10 attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs
11 incurred as a result of investigating, bringing this matter to Defendant's attention, litigating and
12 negotiating a settlement in the public interest.

13 3.3 **Timing of payments.** The payments required under this section shall be delivered
14 to the address set forth in Section 11 below within 10 days of entry of this Consent Judgment by
15 the Court. Any failure by Defendant to comply with the payment terms herein shall be subject to
16 a stipulated late fee in the amount of \$50 for each day after the delivery date the payment is
17 received. The late fees required under this section shall be recoverable, together with reasonable
18 attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this Consent
19 Judgment.

20 **4. ENFORCEMENT OF CONSENT JUDGMENT**

21 4.1 **General Enforcement Provisions.** The Parties may, by motion or application for
22 an order to show cause before the Superior Court of the County of San Francisco, enforce the
23 terms and conditions contained in this Consent Judgment, subject to the following:

24 4.2 **Exclusive Enforcement of Section 2.**

25 4.2.1 Subject to Section 4.2.2, any action to enforce the terms of Section 2 of this
26 Consent Judgment shall be brought exclusively pursuant to Section 4.3.

27 4.2.2 Notwithstanding Section 4.2.1, if, on more than three occurrences in any
28 12-month period, Defendant has either (i) not contested a Notice of Violation, and/or (ii) after

1 contest is found to have violated the provisions of Section 2.2 then, at CEH's option, CEH may
2 seek whatever fines, costs, penalties, or remedies are provided by law for failure to comply with
3 the Consent Judgment.

4 **4.3 Enforcement of Material Violation.**

5 **4.3.1 Notice of Violation.** In the event that, at any time following the
6 Compliance Date, CEH identifies one or more Products that CEH believes in good faith do not
7 comply with Section 2.1 of this Consent Judgment, CEH may issue a Notice of Violation
8 pursuant to this Section.

9 **4.3.2 Service of Notice of Violation and Supporting Documentation.**

10 (a) The Notice of Violation shall be served on Defendant within 45
11 days of the date the alleged violation(s) was or were observed.

12 (b) The Notice of Violation shall, at a minimum, set forth for each
13 Product: (a) the date(s) the alleged violation(s) was observed, (b) the location at which the
14 Covered Product was offered for sale, (c) a description of the Covered Product giving rise to the
15 alleged violation, and (d) all test data obtained by CEH regarding the Covered Product and
16 supporting documentation sufficient for validation of the test results, including all laboratory
17 reports, quality assurance reports and quality control reports associated with testing of the
18 Covered Products. Such Notice of Violation shall be based upon test data that meets the criteria
19 of the Test Protocol. Wipe, swipe, and swab testing are not sufficient to support a Notice of
20 Violation.

21 (c) CEH shall promptly make available for inspection and/or copying
22 upon request all supporting documentation related to the testing of the Covered Products and
23 associated quality control samples, including chain of custody records, all laboratory logbook
24 entries for laboratory receiving, sample preparation, and instrumental analysis, and all printouts
25 from all analytical instruments relating to the testing of Covered Product samples and any and all
26 calibration, quality assurance, and quality control tests performed or relied upon in conjunction
27 with the testing of the Covered Products, obtained by or available to CEH that pertains to the
28

1 Covered Product's alleged noncompliance with Section 2 and, if available, any exemplars of
2 Covered Products tested.

3 **4.3.3 Notice of Election of Response.** No more than 30 days after receiving a
4 Notice of Violation, Defendant shall provide written notice to CEH whether it elects to contest
5 the allegations contained in a Notice of Violation ("Notice of Election").

6 (a) If a Notice of Violation is contested, the Notice of Election shall
7 include all then-available documentary evidence regarding the alleged violation, including all test
8 data, if any. Defendant shall promptly make available for inspection and/or copying upon request
9 all supporting documentation as described in Section 4.3.2(c). If Defendant or CEH later acquires
10 additional test or other data regarding the alleged violation, it shall notify the other party and
11 promptly provide all such data or information to the party. Any test data used to rebut a Notice of
12 Violation shall meet the criteria of the Test Protocol.

13 (b) If a Notice of Violation is not contested, the Notice of Election shall
14 include a description of Defendant's corrective action pursuant to Section 4.3.6. It shall also
15 include any stipulated penalty payment required by Section 4.3.7.

16 **4.3.4 Meet and Confer.** If a Notice of Violation is contested, CEH and
17 Defendant shall meet and confer for a period of no less than 15 days to attempt to resolve the
18 dispute. If, more than 15 days after service of the Notice of Election, no informal resolution of a
19 Notice of Violation results, CEH may by motion or order to show cause before the Superior Court
20 of San Francisco, seek to enforce the terms and conditions contained in this Consent Judgment.
21 No enforcement action may be filed within the 15-day meet and confer period. In any such
22 proceeding, CEH may seek whatever fines, costs, penalties, or remedies are provided by law for
23 failure to comply with the Consent Judgment. Within 30 days of serving a Notice of Election
24 contesting a Notice of Violation, and if no enforcement action has been filed, Defendant may
25 withdraw the original Notice of Election contesting the Notice of Violation and serve a new
26 Notice of Election conceding the violation.

1 4.3.5 **Non-Contested Matters.** If Defendant elects not to contest the allegations
2 in a Notice of Violation, it shall undertake corrective action pursuant to Section 4.3.6 and shall
3 pay any contributions required by Section 4.3.7.

4 4.3.6 **Corrective Action in Non-Contested Matters.** If Defendant elects not to
5 contest the allegation, it shall include in its Notice of Election a detailed description of corrective
6 action that it has undertaken or proposes to undertake to remove the Product(s) identified in the
7 Notice of Violation for sale in California. Corrective action must include instructions to
8 Defendant's stores and/or its customers that offer the Product(s) for sale to consumers to cease
9 offering the Product(s) identified in the Notice of Violation for sale in California as soon as
10 practicable. Defendant shall make available to CEH for inspection and/or copying records and
11 correspondence evidencing the corrective action. If there is a dispute over the corrective action,
12 the Parties shall meet and confer pursuant to Section 4.4 before seeking any remedy in court.

13 4.3.7 **Stipulated Penalties in Non-Contested Matters.**

14 (a) **Stipulated Penalties for Noncompliance with Testing or**
15 **Certification Requirements.** For each Notice of Violation that is not contested by Defendant,
16 and for which Defendant has not complied with Section 2.2, Defendant shall pay stipulated
17 penalties pursuant to Health & Safety Code § 25249.7(b), as follows:

18 First Occurrence: \$1,250
19 Second Occurrence: \$1,500
20 Third Occurrence: \$1,750
21 Thereafter: \$2,500

22 (b) **Limitations on Liability.**

23 **Maximum Liability in a Calendar Year.** The liability of
24 Defendant if it elects not to contest a Notice of Violation shall be limited to the stipulated
25 penalties required by Section 4.3.7(a), which shall not exceed \$5,000 in a calendar year,
26 regardless of the number of units of Product tested by CEH with exceedances of the Lead levels
27 set forth in this Consent Judgment.
28

1 6.2 This Consent Judgment shall not apply to Products manufactured, distributed, or
2 sold by Defendant for use outside of California.

3 **7. CLAIMS COVERED**

4 7.1 This Consent Judgment is a full, final and binding resolution between CEH on the
5 one hand, and Defendant and its parent, shareholders, divisions, subdivisions, subsidiaries, and
6 their successors and assigns ("Defendant Releasees"), and all entities to whom they distribute or
7 sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
8 franchisees, cooperative members, and licensees ("Downstream Defendant Releasees") on the
9 other hand, of any violation of Proposition 65 or any other statutory or common law claims that
10 have been or could have been asserted in the public interest or on behalf of the general public
11 against Defendant, Defendant Releasees, and Downstream Defendant Releasees based on failure
12 to warn about exposure to Lead contained in the Products, or any claim based on the facts or
13 conduct alleged in the Complaint, or facts similar to those alleged, whether based on actions
14 committed by Defendant, Defendant Releasees, or Downstream Defendant Releasees, with
15 respect to any Products distributed, shipped, sold, or offered for sale by Defendant on or prior to
16 the Compliance Date. Compliance with the terms of this Consent Judgment by Defendant and
17 Defendant Releasees resolves any issue in the future concerning compliance by Defendant,
18 Defendant Releasees and Downstream Defendant Releasees regarding failure to warn about
19 exposure to Lead arising in connection with Covered Products distributed, shipped, sold, or
20 offered for sale by Defendant after the date of entry of this Consent Judgment. This Section does
21 not limit or affect the obligations of any party created under this Consent Judgment.

22 7.2 CEH, for itself and acting on behalf of the public interest pursuant to Health and
23 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
24 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
25 violation of Proposition 65 or any other statutory or common law claims that have been or could
26 have been asserted in the public interest or on behalf of the general public regarding the failure to
27 warn about exposure to Lead arising in connection with Products distributed, shipped, sold, or
28

1 offered for sale by Defendant prior to or after the date of entry of this Consent Judgment, or any
2 claim based on the facts or conduct alleged in the Complaint, or facts similar to those alleged.

3 **8. ENTIRE AGREEMENT**

4 8.1 This Consent Judgment contains the sole and entire agreement and understanding
5 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
6 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
7 and therein. There are no warranties, representations, or other agreements between the Parties
8 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
9 other than those specifically referred to in this Consent Judgment have been made by any Party
10 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
11 shall be deemed to exist or to bind any of the Parties hereto. No supplementation, modification,
12 waiver, or termination of this Consent Judgment shall be binding unless executed in writing by
13 the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall
14 be deemed or shall constitute a waiver of any of the other provisions hereof whether or not
15 similar, nor shall such waiver constitute a continuing waiver.

16 **9. GOVERNING LAW**

17 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
18 California.

19 9.2 The Parties, including their counsel, have participated in the preparation of this
20 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
21 Consent Judgment was subject to revision and modification by the Parties and has been accepted
22 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
23 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
24 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
25 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
26 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
27 this regard, the Parties hereby waive California Civil Code section 1654.

28

1 **10. TERMINATION AND RETENTION OF JURISDICTION**

2 10.1 This provisions of Section 2 of this Consent Judgment shall automatically
3 terminate and be of no further force, validity or effect as of July 1, 2011.

4 10.2 This Court shall retain jurisdiction of this matter to implement and enforce the
5 terms this Consent Judgment.

6
7 **11. PROVISION OF NOTICE**

8 11.1 All notices required pursuant to this Consent Judgment and correspondence shall
9 be sent to the following:

10 For CEH:

11 Mark N. Todzo
12 Lexington Law Group, LLP
13 1627 Irving Street
 San Francisco, CA 94122

14 For Defendant:

15 General Counsel
16 Big Dog USA, Inc.
17 121 Gray Avenue
 Santa Barbara, CA 93101

18 With a copy to:

19 Jeffrey Margulies, Esq.
20 Fulbright & Jaworski, LLP
21 555 South Flower Street, 41st Floor
 Los Angeles, CA 90071

22 **12. COURT APPROVAL**

23 12.1 If this Consent Judgment is not approved by the Court, it shall be of no further
24 force or effect, and shall not be introduced into evidence or otherwise used in any proceeding for
25 any purpose.

26 **13. ATTORNEY'S FEES**

27 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
28 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs

1 unless the unsuccessful party has acted with substantial justification. For purposes of this
2 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
3 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

4 13.2 Notwithstanding Section 13.1, a party who prevails in an enforcement action
5 brought pursuant to Section 4 may seek an award of attorney's fees pursuant to Code of Civil
6 Procedure § 1021.5 against a party that acted with substantial justification. The party seeking
7 such an award shall bear the burden of meeting all of the elements of § 1021.5, and this provision
8 shall not be construed as altering any procedural or substantive requirements for obtaining such
9 an award.

10 13.3 Nothing in this Section 13 shall preclude a Party from seeking an award of
11 sanctions pursuant to law.

12 **14. EXECUTION AND COUNTERPARTS**

13 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
14 means of facsimile, which taken together shall be deemed to constitute one document.

15 **15. AUTHORIZATION**

16 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the party he or she represents to stipulate to this Consent Judgment and to enter into and
18 execute the Consent Judgment on behalf of the party represented and legally bind that party. The
19 undersigned have read, understand and agree to all of the terms and conditions of this Consent
20 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

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

AGREED TO:

Dated: July 20 ¹⁶ 2006

CENTER FOR ENVIRONMENTAL HEALTH

By Michael Green
Michael Green, Executive Director
Center for Environmental Health
BIG DOG USA, INC.

Dated: July _____, 2006

By _____

IT IS SO ORDERED, ADJUDGED AND DECREED, this 21 day of Sept, 2006.

RONALD E. QUIDACHAY
Judge of the Superior Court
RONALD E. QUIDACHAY

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

AGREED TO:

Dated: July _____, 2006

CENTER FOR ENVIRONMENTAL HEALTH

By _____
Michael Green, Executive Director
Center for Environmental Health
BIG DOG USA, INC.

Dated: July 28, 2006

By Anthony Wall
Executive Vice President

IT IS SO ORDERED, ADJUDGED AND DECREED, this _____ day of _____, 2006.

RONALD E. QUIDACHAY
Judge of the Superior Court

RONALD E. QUIDACHAY

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

EXHIBIT A

**TEST METHODOLOGY FOR INTERIOR LINING AND EXTERIOR MATERIAL
CONTAINING PVC**

The following protocol, implementing EPA Method 3050B, shall be applied to the interior lining material and exterior material containing PVC of a finished Product.

1. Cut 5 small, discreet portions of the material to be analyzed.
2. Combine the portions into a composite sample weighing one (1) gram.
3. Prepare the sample for analysis using acid digestion. Fully digest the sample using repeated additions of concentrated nitric acid (HNO₃) and 30% hydrogen peroxide (H₂O₂) while heating in a microwave. Reduce the resultant digestate in volume while heating with a microwave and then diluted to a final volume of 100 mL.
4. Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic Absorption Spectrometry (GFAA) or Inductively Coupled Plasma Mass Spectrometry (ICPMS) using standard operating procedures.
5. Lead content shall be expressed in parts per million (ppm).

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

EXHIBIT B

(EXTERIOR SURFACE-COATING TEST METHODOLOGY)

The following protocol, implementing ASTM F-963, shall be applied to the exterior surface-coating of a finished Product.

1. Scrape off coating and grind it through a sieve, obtaining no less than 100 milligrams.
2. Mix the test portion prepared with 50 times its mass of aqueous solution of 0.07 mol/L hydrochloric acid at 37+- 2 Deg Celsius. Shake for 1 minute.
3. Check for PH, between 1.0 and 1.5. Adjust as required.
4. Without delay, separate the solids from the mixture by filtering with a pore size of 0.45um. If necessary centrifuge at 5000 g for no more than 10 minutes.
5. Analytical results as determined shall be adjusted by subtracting the analytical correction factor as is necessary to make statistical correction for interlaboratory error. The analytical correction factor for lead is 30%