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CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
San Francisco County Superior Court

OCT 16 2008

GORDON PARK-LI, Clerk
BY: FELICIA M. GREEN
Deputy Clerk

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

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

13 Plaintiff,)

14 v.)

16 ROSS STORES, INC., et al,)

17 Defendants.)

18 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

19 Plaintiff,)

20 v.)

22 ROMAR INTERNATIONAL CORPORATION,)
et al,)

23 Defendants.)

24 And consolidated actions.)
25

Lead Case No. CGC-05-444522

~~PROPOSED~~ CONSENT JUDGMENT
SETTING ASIDE DEFAULT
JUDGMENT RE: TA CREATIONS,
INC.

Case No. CGC-06-448597

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1. INTRODUCTION

1.1 On July 18, 2006, plaintiff the Center for Environmental Health (“CEH”), a non-profit corporation acting in the public interest, amended its complaint in the action entitled *Center for Environmental Health v. Ross Stores, Inc. et al.*, San Francisco County Superior Court Case Number CGC-05-444522 (the “CEH Action”), for civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety Code §25249.5 *et seq.* (“Proposition 65”). Hereinafter, the Complaint and Amended Complaint shall be referred to collectively as the “Complaint.”

1.2 Defendant TA Creations, Inc. (“Defendant”) is a corporation that employs 10 or more persons and manufactured, distributed and/or sold soft food and beverage containers such as lunchboxes and coolers made of materials containing lead and/or lead compounds (the “Products”) in the State of California.

1.3 Beginning or about April 24, 2006, CEH served Defendant and the appropriate public enforcement agencies with the requisite 60-day notice alleging that Defendant was in violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that Defendant exposes people who use or otherwise handle the Products to lead and/or lead compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer, birth defects and other reproductive harm, without first providing clear and reasonable warning to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and Complaint allege that Defendant’s conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

1.4 Defendant failed to respond to CEH’s complaint, and the Court eventually entered Defendant’s default on March 9, 2007. Following a prove-up hearing, the Court entered judgment against Defendant on May 20, 2008.

1.5 Following entry of the default judgment, Defendant contacted CEH through counsel and requested that CEH stipulate to set aside the default entered March 9, 2007 and the default judgment on the grounds that Defendant’s prior counsel had provided it with unsound legal advice. This Consent Judgment is intended, in part, to set aside the default

1 entered on March 9, 2007 and the default judgment entered on May 20, 2008 and to release any
2 abstracts and/or liens on Defendant's property to allow the Court to enter this Consent Judgment.

3 **1.6** For purposes of this Consent Judgment only, the parties stipulate that this
4 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
5 personal jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is
6 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
7 Judgment as a full and final resolution of all claims which were or could have been raised in the
8 Complaint based on the facts alleged therein.

9 **1.7** The Parties enter into this Consent Judgment pursuant to a settlement of
10 certain disputed claims between the Parties as alleged in the Complaint. By executing this
11 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'
12 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
13 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
14 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
15 conclusion of law, issue of law, or violation of law.

16 **2. SETTING ASIDE DEFAULT AND DEFAULT JUDGMENT**

17 **2.1** The default entered March 9, 2007 and the default judgment entered on
18 May 20, 2008 are hereby set aside in order to vest the Court with jurisdiction to enter this
19 Consent Judgment. Any abstracts or liens on Defendant's property that were issued as a result of
20 the default judgment shall be released upon entry of this Consent Judgment and payment of the
21 amounts set forth in section 4 below.

22 **3 COMPLIANCE - REFORMULATION**

23 **3.1 Level.** Within thirty days of entry of this Consent Judgment (the
24 "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell, or cause to be
25 manufactured, distributed, or sold, any Product that is comprised of any material that contains
26 Lead in concentrations that exceed 200 parts per million ("ppm").

27 **3.2 Certification of level from suppliers.** Defendant shall issue
28 specifications to its suppliers requiring that neither the Products nor any materials of which the

1 Products are comprised contain Lead concentrations exceeding 200 ppm. Defendant shall
2 obtain written certification with corresponding test results from its suppliers of the Products
3 certifying that neither the Products nor any materials of which the Products are comprised
4 contain Lead concentrations exceeding 200 ppm.

5 **3.3 Testing.** In order to help ensure compliance with the requirements of
6 Sections 3.1, Defendant shall conduct testing to confirm that the Products contain less than 200
7 ppm Lead. All testing pursuant to this section shall be performed on randomly selected units by
8 an independent laboratory in accordance with testing protocol attached hereto as Exhibit A (the
9 “Test Protocol”). At the request of CEH, the results of all testing performed pursuant to this
10 section shall be made available to CEH. The frequency and amount of testing required shall vary
11 as follows:

12 **3.3.1 First two shipments following Compliance Date.** For
13 each of the first two shipments of Products purchased from Defendant’s suppliers after the
14 Compliance Date, Defendant shall test a representative sample of units from each supplier of the
15 Products. For purposes of this section 3.3.1, a representative sample means at least 5 units per
16 shipment.

17 **3.3.2 Remainder of shipments following Compliance Date.**
18 For the remainder of the shipments following the Compliance Date, Defendant shall test a
19 representative sample of units from each shipment of the Products. For purposes of this section
20 2.4.2, a representative sample means at least 2 units per shipment.

21 **3.3.3 Products that exceed 200 ppm pursuant to Defendant’s**
22 **Testing.** If the results of the testing required pursuant to section 3.3 show levels of lead
23 exceeding 200 ppm for a Product, Defendant shall refuse to accept all of the Products that were
24 purchased under the particular purchase order to the supplier with a letter explaining that such
25 Products do not comply with the supplier’s certification. Following a Product test exceeding 200
26 ppm, Defendant shall apply the definition of representative sample set forth in section 3.3.1,
27 above, in determining the number of units to be tested for the two shipments following the
28 Product test exceeding 200 ppm.

1 **3.4 Confirmatory testing by CEH.** CEH intends to conduct periodic
2 testing of the Products. Any such testing will be conducted by CEH at an independent
3 laboratory, in accordance with the Test Protocol. In the event that CEH's testing demonstrates
4 Lead levels in excess of 200 ppm for one or more Products, CEH shall inform Defendant of the
5 test results, including information sufficient to permit Defendant to identify the Product(s).
6 Defendant shall, within 20 days following such notice, provide CEH, at the address listed in
7 section 11, with its supplier certification and testing information demonstrating its compliance
8 with sections 3.2 and 3.3 of this Consent Judgment. Defendant shall then have the opportunity
9 to conduct its own independent testing of the Products from the same lot to confirm or deny
10 CEH's tests. If Defendant's independent testing confirms CEH's test results, Defendant shall
11 apply the definition of representative sample set forth in section 3.3.1, above, in determining the
12 number of units to be tested for the two shipments following the Product test exceeding 200 ppm
13 from that supplier. In addition, if Defendant's independent testing verifies CEH's test results
14 and Defendant fails to provide CEH with information demonstrating that it complied with
15 sections 3.2 and 3.3 for the particular shipment(s) at issue, Defendant shall be liable for
16 stipulated payments in lieu of penalties for Products for which CEH produces tests
17 demonstrating Lead levels exceeding 200 ppm as set forth below. These payments shall be made
18 to CEH and used for the purposes described in section 4.1.

19 **3.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
20 payments in lieu of penalties are warranted under section 3.4, the stipulated payment amount
21 shall be as follows for each unit of Product for which CEH produces a test result with Lead
22 levels exceeding 200 ppm:

23	First Occurrence:	\$1,250
24	Second Occurrence:	\$1,500
25	Third Occurrence:	\$1,750
26	Thereafter:	\$2,500

27 Notwithstanding the foregoing, the maximum stipulated payment amount in a calendar year,
28 regardless of the number of units of Product tested by CEH with exceedances of the Lead levels

1 set forth in this Consent Judgment, shall be \$10,000.

2 **3.5 Products in the stream of commerce.** Defendant's Products that have
3 been manufactured, shipped, sold, or that otherwise are in the stream of commerce prior to the
4 Compliance Date shall be released from any claims that were brought or that could have been
5 brought by CEH in its Complaint, as though they were Covered Claims within the meaning of
6 Section 8.1, below.

7 **4 SETTLEMENT PAYMENTS**

8 **4.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
9 \$41,250 in lieu of any penalty pursuant to Health and Safety Code §25249.7(b). CEH shall use
10 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
11 this work, CEH intends to conduct periodic testing of the Products as set forth in section 3.4.
12 This amount shall be made by separate check payable to the Center for Environmental Health.

13 **4.2 Attorneys' Fees and Costs.** \$83,750 shall be paid to CEH to reimburse
14 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
15 other costs incurred as a result of investigating, bringing this matter to Defendant' attention,
16 litigating and negotiating a settlement in the public interest. This amount shall be made by
17 separate check payable to the Lexington Law Group.

18 **4.3 Timing of payments.** The payments required under Sections 4.1 and 4.2,
19 above, shall be delivered to the address set forth in section 13 below within 5 days of entry of
20 this Consent Judgment by the Court.

21 **5. MODIFICATION OF CONSENT JUDGMENT**

22 **5.1** This Consent Judgment may be modified by written agreement of
23 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

24 **6. ENFORCEMENT OF CONSENT JUDGMENT**

25 **6.1** CEH may, by motion or application for an order to show cause
26 before the Superior Court of the County of San Francisco, enforce the terms and conditions
27 contained in this Consent Judgment. Should CEH prevail on any motion or application under
28 this section, CEH shall be entitled to its reasonable attorneys' fees and costs associated with such

1 motion or application.

2 **7. APPLICATION OF CONSENT JUDGMENT**

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

6 **8. CLAIMS COVERED**

7 **8.1** This Consent Judgment is a full, final and binding resolution
8 between CEH and Defendant of any violation of Proposition 65 that was or could have been
9 asserted in the Complaint against Defendant (including any claims that could be asserted in
10 connection with any of the Products covered by this Consent Judgment) or its parents,
11 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, retailers, distributors, or
12 customers (collectively, "Defendant Releasees") based on failure to warn about alleged exposure
13 to Lead contained in the Products, with respect to any Products manufactured, distributed or sold
14 by Defendant on or prior to the date of entry of this Consent Judgment. Compliance with the
15 terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of lead
16 exposures from the Products. This release does not limit or effect the obligations of any party
17 created under this Consent Judgment. Further, CEH hereby releases all retailers or distributors
18 of Defendant's products from any claims related to this Judgment and CEH agrees to dismiss any
19 such claims that it has asserted against any retailers and distributors of Defendant's Products.

20 **9. SEVERABILITY**

21 **9.1** In the event that any of the provisions of this Consent Judgment are
22 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
23 adversely affected.

24 **10. SPECIFIC PERFORMANCE**

25 **10.1** The parties expressly recognize that Defendant's obligations
26 under this Consent Judgment are unique. In the event that any Defendant is found to be in
27 breach of this Consent Judgment for failure to comply with the provisions of Section 3 hereof,
28 the parties agree that it would be extremely impracticable to measure the resulting damages and

1 that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
2 available rights or remedies, may sue in equity for specific performance, and Defendant
3 expressly waive the defense that a remedy in damages will be adequate.

4 **11. GOVERNING LAW**

5 **11.1** The terms of this Consent Judgment shall be governed by the laws of
6 the State of California.

7 **12. RETENTION OF JURISDICTION**

8 **12.1** This Court shall retain jurisdiction of this matter to implement and
9 enforce the terms this Consent Judgment.

10 **13. PROVISION OF NOTICE**

11 **13.1** All notices required pursuant to this Consent Judgment and
12 correspondence shall be sent to the following:

13 For CEH:

14 Mark N. Todzo
15 Lexington Law Group, LLP
16 1627 Irving Street
17 San Francisco, CA 94122

18 For Defendant:

19 Gary A. Wexler
20 Reish Luftman Reicher & Cohen
21 11755 Wishire Blvd., 10th Floor
22 Los Angeles, CA 90025-1539

23 **14. COURT APPROVAL**

24 **14.1** If this Consent Judgment is not approved by the Court, it shall be of
25 no further force or effect.

26 **15. EXECUTION AND COUNTERPARTS**

27 **15.1** The stipulations to this Consent Judgment may be executed in
28 counterparts and by means of facsimile, which taken together shall be deemed to constitute one

1 document.

2 16. AUTHORIZATION

3 16.1 Each signatory to this Consent Judgment certifies that he or she is
4 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
5 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
6 that party. The undersigned have read, understand and agree to all of the terms and conditions of
7 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
8 and costs.

9 AGREED TO:

10 CENTER FOR ENVIRONMENTAL HEALTH

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12 
13 _____
14 Michael Green, Executive Director
Center for Environmental Health

Dated: 8/11/08

15
16 TA CREATIONS, INC.

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18 _____
19
20 _____
Printed Name

Dated: _____

1 document.

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8 and costs.

9 **AGREED TO:**

10 CENTER FOR ENVIRONMENTAL HEALTH


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13 _____
14 Michael Green, Executive Director
Center for Environmental Health

Dated: _____

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16 TA CREATIONS, INC.

17 _____
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19 _____
20 Juliet Chen, President
Printed Name

Dated: 8/1/2008

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Exhibit A

(Test Protocol)

The following protocol shall be applied separately to the interior and exterior material of a finished Product.

1. Cut 5 small, discreet portions of the material to be analyzed.
2. Combine the portions into a composite sample.
3. Prepare the sample for analysis using microwave digestion. Microwave digestion protocols from the following two methods may be used provided that the samples are completely digested:
 - a. AOAC Official Method 999.10 (Lead, Cadmium, Zinc, Copper, and Iron in Foods)
 - b. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave Digestion for Lead in Paint Chips (and other matrices)
4. Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic Absorption Spectrophotometry (GFAAS) or Inductively Coupled Plasma Mass Spectrometry (ICP-MS) using standard operating procedures.
5. Lead content shall be expressed in parts per million (ppm).

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and T-A Creations, Inc., the Clerk is directed to set aside the default and default judgment and to enter judgment in accordance with the terms of the settlement.

Dated: 10-16-08

RS **RICHARD A. KRAMER** JK
Judge, Superior Court of the State of California