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County of San Francisco

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MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO
(Unlimited Jurisdiction)

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

Case No. 468856

Plaintiff,

V.

(R) [PROPOSED] CONSENT JUDGMENT AS
TO NUOVA SIMONELLI SPA

BRIEL-INDUSTRIA DE
ELECTRODOMESTICOS SA, et al.

Defendants.

1. INTRODUCTION

1.1 On or about June 27, 2007, plaintiff MATEEL ENVIRONMENTAL JUSTICE FOUNDATION ("Mateel"), provided a 60-day notice of violation ("Notice") 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 Nuova Simonelli SPA ("Nuova Simonelli" or "Defendant"), alleging that Defendant, through sales in California of espresso machines, was violating Health & Safety Code section 25249.6.

1.2 On or about November 5, 2007, Plaintiff Mateel, acting in the public interest pursuant to Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties and Injunctive Relief in San Francisco Superior Court, Case No. 468856 ("Complaint") against Defendant based on the allegations contained in the Notice.

1.3 For purposes of this Consent Judgment, the parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a full and final settlement and resolution of the allegations contained in the Complaint and of all claims which were or could have been raised based on the facts alleged therein or arising therefrom.

1.4 Mateel and Defendant enter into this Consent Judgment pursuant to a full and final settlement of disputed claims between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not constitute an admission with respect to any allegation made in the Notice or the Complaint, each and every allegation of which Defendant denies, nor may this Consent Judgment or compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Defendant.

2. INJUNCTIVE RELIEF-REFORMULATION

2.0 Injunctive Relief

2.1 Within one hundred eighty (180) days of entry of this Consent Judgment (“Effective Date”), Defendant may not ship for sale in California any Covered Products unless Defendant either 1.) provides warnings in the manner specified in paragraph 2.2 below; or 2.) the Covered Products shipped for sale in California meet the Reformulation Standard set forth in paragraphs 2.3 through 2.6 below.

2.2 Warnings Defendant may provide a warning affixed to the packaging or labeling of each unit of the Covered Products. The warning shall state:

WARNING: Consuming beverages that have been prepared in this espresso machine will expose you to lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

The text of this warning must be in 12 point type or larger. The word “WARNING” must be capitalized and be in bold. The warning must either be on the front or top of the packaging of the Covered Product. If after the Effective Date, Defendant ships Covered Products to a retailer or distributor outside of California that neither provide the warnings specified in this paragraph nor meet the Reformulation Standard specified in paragraphs 2.3 through 2.6 below (“Non-Conforming Covered Products”), and if the retailer or distributor then offers those Non-Conforming Covered Products for sale in California, then as to those Non-Conforming Covered Products, that retailer or distributor, and their customers, are not released pursuant to Sections 6 and 7 below.

2.3. Reformulation Standard After the Effective Date, Defendant may ship models of Covered Products for sale in California that do not bear the warning specified in paragraph 2.2 above, provided the model of Covered Products has been tested pursuant to the protocol described in paragraph 2.4 and has been determined not to leach more than five (5) micrograms

of lead per liter (“5 µg/L”) into the water used to test the Covered Products.

2.4 Defendant shall engage in the following program of testing Covered Products (“Testing Program”), to determine whether warnings are required:

- a) For all tests of all Covered Products, the Exposure Water to be used shall be de-ionized water.
- b) For those Covered Products that are intended to be plumbed to an external water source: pressurize the Exposure Water storage vessel to 50 ± 5.0 pounds per square inch (“psi”) (350 ± 35 kPa) using nitrogen gas. Collect a 125 ml control sample from the distribution system. Then connect the beverage unit to the Exposure Water storage vessel using only stainless steel valves and fittings and polytetrafluoroethylene (PTFE) tubing.
- c) While operating the beverage unit in accordance with manufacturer’s instructions, purge the unit with a volume of Exposure Water equal to between 1.0 and 1.5 times the total volumetric capacity of the unit, or the volume of purge water recommended in the operator’s instructions for the particular Covered Product, whichever amount is less. If there are multiple beverage outlets (e.g. dispensing spouts) ensure that approximately equal volumes of Exposure Water are purged from each outlet. Discard the purged water.
- d) With the Exposure Water in contact with all surfaces having contact with beverages under normal idle operating conditions, maintain static conditions for 24 ± 1 hour. Operate the equipment (including any heating operations) as intended without dispensing any water. No ingredients or product are to be added during the exposure period.
- e) After step “d”, and while operating the particular Covered Product in

accordance with the manufacturer's instructions, draw a 250 ml sample of Exposure Water from the dispensing spout or spouts of the particular Covered Product . If there are multiple beverage outlets (e.g. dispensing spouts) ensure that approximately equal volumes of water are drawn from each outlet. Sample should be dispensed into a clean PTFE or polyethylene container with an air-tight lid containing HNO₃ as a preservative.

- f) Repeat steps "d" and "e" two additional times such that there is a composite volume comprised of 3 samples taken at 24 hour intervals.
- g) Analyze each Exposure Water sample and the control sample for the concentration of lead using equipment and a method of analysis which establish a detection limit of five (5) micrograms of lead per liter ("5 µg/L") or lower for each particular Covered Product tested.
- h) Calculate the average lead concentrations of the three samples that were analyzed pursuant to step "g" to determine the test results for the beverage unit in question.
- i) All Covered Products tested shall be randomly selected using any generally accepted random sampling method such as International Standards Organization 2589-1 (1989), any random method generally accepted by the National Institute for Standards and Technology, or any authoritative text on statistical sampling.
- j) The lot, batch, or other group from which any model of Covered Products tested are drawn must be representative of the entire population of articles of the model of the particular Covered Product in question manufactured in the calendar year or since the date of the last test. In order to

accomplish this, Defendant must show that its manufacturing process for the particular model of Covered Product in the Testing Program did not change during the calendar year or since the last test. A manufacturing process change will be deemed to have occurred if there is a material change in: the type of components that make up any alloys used in the plumbing of the model of the particular Covered Product, the suppliers of the components that make up the components of the alloys, or any other factor that substantially affects lead leaching test results on a model of the particular Covered Product .

- k) The number of Covered Products tested shall be at least six beverage units for each model of the Covered Product, and the mean of at least six tested beverage units shall be calculated.
- l) After the Effective Date, unless Defendant provides the warning specified in paragraph 2.2 above, Defendant may not ship for sale in California any model of Covered Products unless the mean of at least six tested beverage units calculated according to subparagraph k), above, is $\leq 5 \mu\text{g/L}$.

2.5 As part of the Testing Program, Defendant shall maintain the following records, or require by contract that any laboratory conducting testing shall maintain the following records and will provide them to Plaintiff upon request:

A. Records kept in the normal course of business showing the maintenance and calibration of equipment used to conduct the Testing Program;

B. Individual test results of all tests conducted as part of the Testing Program, provided that Defendant shall not be required to maintain the above records for any test for more than two years after that test was conducted.

2.6. Any records required to be maintained in by Paragraph 2.5 shall be made

available to the Plaintiff or the Attorney General for inspection within the State of California upon 60 days written notice. Such records shall not be made available to the public unless required by the California Public Records Act or other laws, except as part of presenting such records to a court as part of any proceeding.

3. MONETARY RELIEF

3.1 Within ten (10) days after entry of this Consent Judgment by the Court, Nuova Simonelli shall pay thirty five thousand dollars (\$35,000) to the Klamath Environmental Law Center, which will within one week forward those funds to KPFA Radio, a California non-profit organization. These funds are to be used by KPFA Radio to inform the California public about exposure to toxic chemicals. The foregoing settlement payment shall be mailed to the attention of William Verick, Klamath Environmental Law Center, 424 First Street, Eureka, California 95501, who shall provide them to the respective organizations within fifteen (15) days of receipt.

4. ATTORNEYS' FEES

4.1 Within ten (10) days after entry of this Consent Judgment, Nuova Simonelli shall pay forty thousand dollars (\$40,000) to the Klamath Environmental Law Center to cover Plaintiff's attorneys' fees and costs. This payment shall be mailed to the attention of William Verick, Klamath Environmental Law Center, 424 First Street, Eureka, California 95501.

4.2 Except as specifically provided in this Consent Judgment, Plaintiff and Defendant shall bear their own costs and attorneys' fees.

5. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES

5.1 The terms of this Consent Judgment are enforceable by and among the parties hereto, by Defendant Nuova Simonelli with respect to the releases offered in this Consent Judgment, or, with respect to the injunctive relief provided for herein, by the California Attorney General.

6. MATTERS COVERED BY THIS CONSENT JUDGMENT

6.1 This Consent Judgment is a full, final and binding resolution between the Plaintiff acting on behalf of itself and, (as to those matters referenced in the Notice Letters) in the public interest pursuant to Health and Safety Code section 25249.7(d), and Defendant Nuova Simonelli concerning any violation of Proposition 65 regarding any claims made or which could have been made in the Notices and/or the Complaint, or any other statutory or common law claim that could have been asserted against Defendant, and/or its affiliates, parent or subsidiary corporations, divisions, successors, officers, directors, assigns, distributors (including, but not limited to Nuova Distribution U.S.A. L.L.C.), retailers, and/or customers for failure to provide clear, reasonable, and lawful warnings of exposure to lead contained in or otherwise associated with Covered Products manufactured, sold or distributed by, for, or on behalf of, Nuova Simonelli. Compliance by Nuova Simonelli with the terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance by Defendant Nuova Simonelli and/or its affiliates, parent or subsidiary corporations, divisions, successors, officers, directors, assigns, distributors (including, but not limited to Nuova Distribution U.S.A. L.L.C), retailers, and/or customers with the requirements of Proposition 65 with respect to lead contained in or otherwise associated with Covered Products.

6.2 As to any claims, violations (except violations of this Consent Judgment), actions, damages, costs, penalties or causes of action which may arise or have arisen after the original date of entry of this consent judgment, compliance by Nuova Simonelli with the terms of this consent judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims regarding exposure to lead in Covered Products.

6.3 In furtherance of the foregoing, Plaintiff hereby waives any and all rights and benefits which it now has, or in the future may have, conferred upon it with respect to the Covered Products by virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.”

Plaintiff understands and acknowledges that the significance and consequence of this waiver of California Civil Code Section 1542 is that even if Plaintiff suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered Products, Plaintiff will not be able to make any claim for those damages against Defendant Nuova Simonelli, or its parents, subsidiaries or affiliates, or any of its customers, distributors (including, but not limited to Nuova Distribution U.S.A., L.L.C.), wholesalers, retailers or any other person in the course of doing business who may manufacture, use, maintain, distribute, market or sell the Covered Products. Furthermore, Plaintiff acknowledges that it intends these consequences for any such claims which may exist as of the date of this release but which Plaintiff does not know exist, and which, if known, would materially affect its decision to enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

6.4 This Consent Judgment extends to and applies to all Covered Products, which shall mean, and includes wherever this term is used in this Consent Judgment, all units and all models of espresso machines manufactured or marketed by Defendant that contain brass parts or components.

7. APPLICATION OF JUDGMENT

7.1 The obligations of this Consent Judgment shall apply to and be binding upon any and all Plaintiffs, acting in the public interest pursuant to Health and Safety Code section 25249.7(d) and the successors or assigns of any of them.

8. MODIFICATION OF JUDGMENT

8.1 This Consent Judgment may be modified only upon written agreement of the parties and Nuova Simonelli and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as provided by law and upon entry of a modified Consent Judgment by the Court.

9. NOTICE

9.1 When any Party is entitled to receive any notice or report under this Consent Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to:

- (a) For Mateel: William Verick, Esq., Klamath Environmental Law Center,
- (b) For: Nuova Simonelli: Mark Lee, Brownlie, Evans, Wolf & Lee, 230 E. Champion Street, Bellingham, WA 98225. .

9.2 Any Party may modify the person and address to whom notice is to be sent by sending each other Party notice in accordance with this Paragraph.

10. AUTHORITY TO STIPULATE

10.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

11. RETENTION OF JURISDICTION

11.1 This Court shall retain jurisdiction over the matters covered herein and the enforcement and/or application of this Consent Judgment.

12. ENTIRE AGREEMENT

12.1 This Consent Judgment contains the sole and entire, agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or

otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

13. GOVERNING LAW

13.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California.

14. COURT APPROVAL

14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

DATED:

By: *Octavia Nauda*
Defendant Nuova Simonelli SPA

DATED:

William Verick
William Verick
Mateel Environmental Justice Foundation

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: **OCT 31 2008**

PATRICK J. MAHONEY, J.
JUDGE OF THE SUPERIOR COURT