

ENDORSED
FILED
San Francisco County Superior Court

SEP 05 2008

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

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5 San Francisco, CA 94122
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8 Attorneys for Plaintiff
9 CENTER FOR ENVIRONMENTAL HEALTH

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

13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)

15 Plaintiff,)

16 v.)

17 ACTION SPORTS IMAGE, LLC, et al.)

18 Defendants.)
19)

Case No. CGC-08-475980

~~PROPOSED~~ CONSENT JUDGMENT
RE: ACTION SPORTS IMAGE, LLC

20 **1. INTRODUCTION**

21 1.1 On June 4, 2008, plaintiff the Center for Environmental Health ("CEH"), a
22 nonprofit corporation acting in the public interest, filed a complaint ("the Complaint") in San
23 Francisco County Superior Court, entitled *Center for Environmental Health v. Action Sports*
24 *Image, LLC*, San Francisco County Superior Court Case Number CGC-08-475980 (the "CEH
25 Action"), for civil penalties and injunctive relief pursuant to the provisions of California Health &
26 Safety Code §25249.5 *et seq.* ("Proposition 65").

27 1.2 Defendant Action Sports Image, LLC ("Defendant") is a limited liability company
28 that employs 10 or more persons and distributes and/or sells soft food and beverage containers

1 such as lunchboxes and coolers made of materials containing lead and/or lead compounds (the
2 “Products”) in the State of California.

3 1.3 On or about December 6, 2007, CEH served Defendant and the appropriate public
4 enforcement agencies with the requisite 60-day notice that Defendant was allegedly in violation
5 of Proposition 65. CEH’s notice and the Complaint in this Action allege that Defendant exposes
6 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
7 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer,
8 birth defects and other reproductive harm, without first providing clear and reasonable warning to
9 such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and
10 Complaint allege that Defendant’s conduct violates Health & Safety Code §25249.6, the warning
11 provision of Proposition 65.

12 1.4 For purposes of this Consent Judgment only, the parties stipulate that this Court
13 has jurisdiction over the subject matter of the violations alleged in the Complaint and personal
14 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
15 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
16 full and final resolution of all claims which were or could have been raised in the Complaint
17 based on the facts alleged therein.

18 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of certain
19 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
20 Judgment, the Parties do not admit any facts or conclusions of law. It is the parties’ intent that
21 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
22 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
23 Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law,
24 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
25 impair any right, remedy, argument or defense the Parties may have in this or any other or future
26 legal proceedings.

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28

1 **2. COMPLIANCE - REFORMULATION**

2 2.1 **Level.** Defendant shall not distribute, ship, sell, or offer for sale, any Product
3 manufactured more than ninety days after entry of this Consent Judgment (the "Compliance
4 Date") in which the interior lining of the Product or any polyvinyl chloride ("PVC") material
5 contains Lead in concentrations that exceed 200 parts per million ("ppm") or in which the exterior
6 surface-coating contains Lead concentrations exceeding 600 ppm.

7 2.2 **Specification of Level to Suppliers.** Defendant shall issue specifications to its
8 suppliers requiring that the interior lining of the Products and exterior surface-coating of the
9 Products do not contain materials which contain Lead concentrations exceeding 200 ppm and 600
10 ppm, respectively, and that the exterior of the Products do not contain PVC material with Lead
11 concentrations exceeding 200 ppm.

12 2.3 **Availability of Test Data.** To the extent that Defendant is otherwise required by
13 law to perform lead testing on the Products, Defendant shall, upon request by CEH, provide the
14 results of such testing to CEH on a confidential basis.

15 **3. SETTLEMENT PAYMENTS**

16 3.1 **Monetary Payment in Lieu of Penalty:** \$5,000 shall be paid to CEH in lieu of
17 any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use such funds to
18 continue its work protecting people from exposures to toxic chemicals. As part of this work,
19 CEH intends to conduct periodic testing of the Products. The payment required under this section
20 shall be made payable to CEH.

21 3.2 **Attorneys' Fees and Costs:** \$10,000 shall be used to reimburse CEH and its
22 attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs
23 incurred as a result of investigating, bringing this matter to Defendant's attention, litigating and
24 negotiating a settlement in the public interest. The payment required under this section shall be
25 made payable to Lexington Law Group.

26 3.3 **Timing of payments.** The payments required under this section shall be delivered
27 to the address set forth in Section 11 below within 10 days of entry of this Consent Judgment by
28 the Court.

1 **4. ENFORCEMENT OF CONSENT JUDGMENT**

2 4.1 The Parties may, by motion or application for an order to show cause before the
3 Superior Court of the County of San Francisco, enforce the terms and conditions contained in this
4 Consent Judgment.

5 **5. MODIFICATION OF CONSENT JUDGMENT**

6 5.1 This Consent Judgment may be modified by written agreement of CEH and
7 Defendant, or upon motion of CEH or Defendant as provided by law. Any Party seeking to
8 modify this Consent Judgment shall attempt in good faith to meet and confer with all affected
9 Parties prior to filing a motion to modify the Consent Judgment.

10 5.2 **Alternative Reformulation Requirements.** If, with respect to Products, the
11 Attorney General of the State of California or Plaintiff permit any other reformulation standard by
12 way of settlement or compromise with any other person in the course of doing business, or any
13 other entity, or if another reformulation standard for Products is incorporated by way of final
14 judgment as to any other person in the course of doing business, or any other entity, then
15 Defendant is entitled to seek a modification to this Consent Judgment on the same terms as
16 provided in those settlements, compromises or judgments.

17 **6. APPLICATION OF CONSENT JUDGMENT**

18 6.1 This Consent Judgment shall apply to and be binding upon the parties hereto, their
19 divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

20 6.2 This Consent Judgment shall not apply to Products manufactured, distributed, or
21 sold by Defendant for use outside of California.

22 **7. CLAIMS COVERED**

23 7.1 This Consent Judgment is a full, final and binding resolution between CEH on the
24 one hand, and Defendant and its parent, shareholders, divisions, subdivisions, subsidiaries,
25 affiliates, and licensors and each of their successors and assigns (“Defendant Releasees”), and all
26 entities to whom they distribute or sell Products, including but not limited to distributors,
27 wholesalers, customers, retailers, franchisees, cooperative members, and licensees (“Downstream
28 Defendant Releasees”) on the other hand, of any violation of Proposition 65 or any other statutory

1 or common law claims that have been or could have been asserted in the public interest or on
2 behalf of the general public against Defendant, Defendant Releasees, and Downstream Defendant
3 Releasees based on failure to warn about exposure to Lead contained in the Products, or any
4 claim based on the facts or conduct alleged in the Complaint, or facts similar to those alleged,
5 whether based on actions committed by Defendant, Defendant Releasees, or Downstream
6 Defendant Releasees, with respect to any Products distributed, shipped, sold, or offered for sale
7 by Defendant on or prior to the Compliance Date. Compliance with the terms of this Consent
8 Judgment by Defendant and Defendant Releasees resolves any issue in the future concerning
9 compliance by Defendant, Defendant Releasees and Downstream Defendant Releasees regarding
10 failure to warn about exposure to Lead arising in connection with Products distributed, shipped,
11 sold, or offered for sale by Defendant after the date of entry of this Consent Judgment. This
12 Section does not limit or affect the obligations of any party created under this Consent Judgment.

13 7.2 CEH, for itself and acting on behalf of the public interest pursuant to Health and
14 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
15 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
16 violation of Proposition 65 or any other statutory or common law claims that have been or could
17 have been asserted in the public interest or on behalf of the general public regarding the failure to
18 warn about exposure to Lead arising in connection with Products distributed, shipped, sold, or
19 offered for sale by Defendant prior to or after the date of entry of this Consent Judgment, or any
20 claim based on the facts or conduct alleged in the Complaint, or facts similar to those alleged.

21 **8. ENTIRE AGREEMENT**

22 8.1 This Consent Judgment contains the sole and entire agreement and understanding
23 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
25 and therein. There are no warranties, representations, or other agreements between the Parties
26 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
27 other than those specifically referred to in this Consent Judgment have been made by any Party
28 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,

1 shall be deemed to exist or to bind any of the Parties hereto. No supplementation, modification,
2 waiver, or termination of this Consent Judgment shall be binding unless executed in writing by
3 the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall
4 be deemed or shall constitute a waiver of any of the other provisions hereof whether or not
5 similar, nor shall such waiver constitute a continuing waiver.

6 **9. GOVERNING LAW**

7 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California.

9 9.2 The Parties, including their counsel, have participated in the preparation of this
10 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
11 Consent Judgment was subject to revision and modification by the Parties and has been accepted
12 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
13 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
14 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
15 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
16 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
17 this regard, the Parties hereby waive California Civil Code section 1654.

18 **10. RETENTION OF JURISDICTION**

19 10.1 This Court shall retain jurisdiction of this matter to implement and enforce the
20 terms this Consent Judgment.

21 **11. PROVISION OF NOTICE**

22 11.1 All notices required pursuant to this Consent Judgment and correspondence shall
23 be sent to the following:

24 For CEH:

25 Mark N. Todzo
26 Lexington Law Group, LLP
27 1627 Irving Street
28 San Francisco, CA 94122

1 For Defendant:

2 J. Thomas Warlick IV
3 General Counsel & Vice President of Business Affairs
4 Motorsports Authentics
5 6301 Performance Drive
6 Concord, North Carolina 28027
7 Tel: (704) 454-4098
8 Fax: (704) 454-4028

9 With a copy to:

10 Jeffrey B. Margulies, Esq.
11 Fulbright & Jaworski L.L.P.
12 555 South Flower Street, 41st Floor
13 Los Angeles, CA 90071
14 Tel: (213) 892-9286
15 Fax: (213) 892-9494

16 **12. COURT APPROVAL**

17 12.1 If this Consent Judgment is not approved by the Court, it shall be of no further
18 force or effect, and shall not be introduced into evidence or otherwise used in any proceeding for
19 any purpose.

20 **13. ATTORNEY'S FEES**

21 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
22 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
23 unless the unsuccessful party has acted with substantial justification. For purposes of this
24 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
25 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

26 13.2 Notwithstanding Section 13.1, a party who prevails in an enforcement action
27 brought pursuant to Section 4.1 may seek an award of attorney's fees pursuant to Code of Civil
28 Procedure § 1021.5 against a party that acted with substantial justification. The party seeking
such an award shall bear the burden of meeting all of the elements of § 1021.5, and this provision
shall not be construed as altering any procedural or substantive requirements for obtaining such
an award.

1 13.3 Nothing in this Section 13 shall preclude a Party from seeking an award of
2 sanctions pursuant to law.

3 **14. EXECUTION AND COUNTERPARTS**

4 14.1 The stipulations to this Consent Judgment may be executed in counterparts and by
5 means of facsimile, which taken together shall be deemed to constitute one document.

6 **15. AUTHORIZATION**

7 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the party he or she represents to stipulate to this Consent Judgment and to enter into and
9 execute the Consent Judgment on behalf of the party represented and legally bind that party. The
10 undersigned have read, understand and agree to all of the terms and conditions of this Consent
11 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

12 **AGREED TO:**

13
14 Dated: July 11, 2008

CENTER FOR ENVIRONMENTAL HEALTH

15
16 By 
17 Michael Green, Executive Director
18 Center for Environmental Health

19 Dated: July _____, 2008

ACTION SPORTS IMAGE, LLC.

20
21 By

22
23 IT IS SO ORDERED, ADJUDGED AND DECREED, this ___ day of _____, 2008.

24
25 _____
26 Judge of the Superior Court

1 13.3 Nothing in this Section 13 shall preclude a Party from seeking an award of
2 sanctions pursuant to law.

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10 undersigned have read, understand and agree to all of the terms and conditions of this Consent
11 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

12 **AGREED TO:**

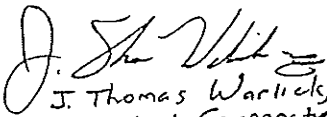
13
14 Dated: July ____, 2008

CENTER FOR ENVIRONMENTAL HEALTH

15
16
17 By
18 Michael Green, Executive Director
Center for Environmental Health

19 Dated: July 11, 2008

ACTION SPORTS IMAGE, LLC.

20
21 By 
22 J. Thomas Warlick, IV, General
Counsel + Corporate Secretary

23 IT IS SO ORDERED, ADJUDGED AND DECREED, this 5 day of Sept, 2008.

24 **PATRICK J. MAHONEY**

25 Judge of the Superior Court

26 **PATRICK J. MAHONEY**

27
28