

1 LEXINGTON LAW GROUP, LLP  
2 Mark N. Todzo, State Bar No. 168389  
3 Eric S. Somers, State Bar No. 139050  
4 Howard Hirsch, State Bar No. 213209  
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

ENDORSED  
FILED  
San Francisco County Superior Court

JUL 08 2009

GORDON PARK-LI, Clerk  
BY: \_\_\_\_\_  
Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 CITY AND COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION

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

15 Plaintiffs,

16 v.

17 ACTION SPORTS IMAGE, LLC, et al.,

18 Defendants.

) Case No.: CGC-08-475980

) ~~PROPOSED~~ CONSENT JUDGMENT  
) RE: NEELY MANUFACTURING II, LLC.

19  
20 **1. INTRODUCTION**

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

27 **1.2** Defendant Neely Manufacturing II, LLC (“Defendant”) is a limited  
28 liability company that employs 10 or more persons and manufactured, distributed and/or sold

1 soft food and beverage containers such as lunchboxes and/or coolers made of material  
2 containing lead and/or lead compounds (the "Products") in the State of California.

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

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

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

27           **1.6**     This settlement has been reached in this amount and at this time in part  
28 because of economic factors relating to this defendant, including the recent necessity that it

1 lay off more than 10% of its work force.

2 **2. COMPLIANCE – REFORMULATION**

3 **2.1 Level.** Defendant shall not distribute, ship, sell, or offer for sale, any  
4 Products manufactured more than ninety (90) days after the entry of this Consent Judgment  
5 (the “Compliance Date”) in which the interior lining of the Products contains Lead in  
6 concentrations that exceed 200 parts per million (“ppm”) or in which the exterior surface-  
7 coating contains Lead concentrations exceeding 600 ppm. To the extent applicable,  
8 Defendant shall comply with any more stringent Lead requirements established by the  
9 Consumer Products Safety Improvement Act of 2008.

10 **2.2 Specification of Level to Supplier.** Defendant shall issue  
11 specifications to its suppliers requiring that neither the Products nor any materials of which  
12 the Products are comprised contain Lead in concentrations exceeding those set forth in  
13 section 2.1. For Products for which Defendant is the importer of record, Defendant shall  
14 obtain written certification with corresponding test results certifying that neither the Products  
15 nor any materials of which the Products are comprised contain Lead in concentrations  
16 exceeding those set forth in section 2.1.

17 **2.3 Confirmatory testing by CEH.** CEH intends to conduct periodic  
18 testing of the Products. Any such testing will be conducted by an independent laboratory in  
19 accordance with the testing protocol attached hereto as Exhibit A (the “Test Protocol”). In  
20 the event that CEH’s testing demonstrates Lead levels in excess of those set forth in section  
21 2.1, CEH shall provide Defendant with a copy of the test results and information sufficient to  
22 permit Defendant to identify the Product(s). Defendant shall, within 20 days following such  
23 notice, provide CEH, at the address listed in section 11, with its supplier specification and,  
24 for Products for which Defendant is the importer of record, its certification and testing  
25 information, demonstrating its compliance with section 2.2 of this Consent Judgment.

26 **3. SETTLEMENT PAYMENTS**

27 **3.1 Monetary Payment in Lieu of Penalty:** \$1000 shall be paid  
28 to CEH in lieu of any penalty pursuant of Health and Safety Code section 25249.7(b). CEH

1 shall use such funds to continue its work protecting people from exposures to toxic  
2 chemicals. As part of this work, CEH intends to conduct periodic testing of the Products.  
3 The payment required under this section shall be made payable to CEH.

4 **3.2 Attorneys' Fees and Costs:** \$6,000 shall be used to reimburse CEH  
5 and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any  
6 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,  
7 litigating and negotiating a settlement in the public interest. The payment required under this  
8 section shall be made payable to Lexington Law Group.

9 **3.3 Timing of Payments:** The payments required under this section shall  
10 be delivered to the address set forth in Section 11 below within 10 days of entry of this  
11 Consent Judgment by the Court.

12 **4. ENFORCEMENT OF CONSENT JUDGMENT**

13 **4.1** The Parties may, by motion or application for an order to show cause  
14 before the Superior Court of the County of San Francisco, enforce the terms and conditions  
15 contained in this Consent Judgment.

16 **5. MODIFICATION OF CONSENT JUDGMENT**

17 **5.1** This Consent Judgment may be modified by written agreement of  
18 CEH and Defendant, or upon motion of CEH or Defendant as provided by law. Any Party  
19 seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with  
20 all affected Parties prior to filing a motion to modify the Consent Judgment.

21 **5.2 Alternative Reformulation Requirements.** If, with respect to  
22 Products, the Attorney General of the State of California or Plaintiff permit any other  
23 reformulation standard by way of settlement or compromise with any other person in the  
24 course of doing business, or any other entity, or if another reformulation standard for  
25 Products is incorporated by way of final judgment as to any other person in the course of  
26 doing business, or any other entity, then Defendant is entitled to seek modification to this  
27 Consent Judgment on the same terms as provided in those settlements, compromises or  
28 judgments.

1           **6. APPLICATION OF CONSENT JUDGMENT**

2           **6.1**     This Consent Judgment shall apply to and be binding upon the Parties  
3 hereto, their division, subdivisions and subsidiaries, and the successors or assigns of any of  
4 them.

5           **6.2**     This Consent Judgment shall not apply to any Products manufactured,  
6 distributed, or sold by Defendant for use outside of California.

7           **7. CLAIMS COVERED**

8           **7.1**     This Consent Judgment is a full, final and binding resolution between  
9 CEH on the one hand, and Defendant and its parent, shareholders, division, subdivisions,  
10 subsidiaries, affiliates, and licensors and each of their successors and assigns (“Defendant  
11 Releasees”), and all entities to whom they distribute or sell Products, including but not  
12 limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members,  
13 and licensees (“Downstream Defendant Releasees”) on the other hand, of any violation of  
14 Proposition 65 or any other statutory or common law claims that have been or could have  
15 been asserted in the public interest or on behalf of the general public against Defendant,  
16 Defendant Releasees, and Downstream Defendant Releasees, with respect to any Products  
17 distributed, shipped, sold, or offered for sale by Defendant on or prior to the Compliance  
18 Date. Compliance with the terms of this Consent Judgment by Defendant and Defendant  
19 Releasees resolves any issues in the future concerning compliance by Defendant, Defendant  
20 Releasees and Downstream Defendant Releasees regarding failure to warn about exposure to  
21 Lead arising in connection with Products distributed, shipped, sold, or offered for sale by  
22 Defendant after the date of entry of this Consent Judgment. This Section does not limit or  
23 affect the obligations of any Party created under this Consent Judgment.

24           **7.2**     CEH, for itself and acting on behalf of the public interest pursuant to  
25 Health and Safety Code section 25249.7(d), releases, waives, and forever discharges any and  
26 all claims against Defendant, Defendant Releasees, and Downstream Defendant Releasees  
27 arising from any violation of Proposition 65 or any other statutory or common law claims  
28 that have been or could have been asserted in the public interest or on behalf of the general

1 public regarding the failure to warn about exposure to Lead arising in connection with  
2 Products distributed, shipped, sold, or offered for sale by Defendant prior to the date of entry  
3 of this Consent Judgment, or any claim based on the facts or conduct alleged in the  
4 Complaint, or facts similar to those alleged.

5 **8. ENTIRE AGREEMENT**

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

19 **9. GOVERNING LAW**

20 **9.1** The terms of this Consent Judgment shall be governed by the laws of  
21 the State of California.

22 **10. RETENTION OF JURISDICTION**

23 **10.1** This Court shall retain jurisdiction of this matter to implement and  
24 enforce the terms of this Consent Judgment.

25 **11. PROVISION OF NOTICE**

26 **11.1** All notices required pursuant to this Consent Judgment and  
27 correspondence shall be sent to the following:  
28

1 For CEH:

2 Howard Hirsch  
3 Lexington Law Group, LLP  
4 1627 Irving Street  
5 San Francisco, CA 94122

6 For Defendant:

7 Mike Watson  
8 President, Neely Manufacturing  
9 2178 Highway 2  
10 Corydon, Iowa 50060

11 With a copy to:

12 James Sinunu  
13 Sinunu Bruni, LLP  
14 333 Pine St., Suite 400  
15 San Francisco, CA 94104

16 **12. COURT APPROVAL**

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

20 **13. ATTORNEY'S FEES**

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

27 **13.2** Notwithstanding Section 13.1, a party who prevails in an enforcement  
28 action brought pursuant to Section 4.1 may seek an award of attorney's fees pursuant to Code  
of Civil Procedure section 1021.5 against a Party that acted without substantial justification.  
The Party seeking such an award shall bear the burden of meeting all of the elements of  
section 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  
2 award of sanctions pursuant to law.

3           **14. SEVERABILITY**

4           **14.1** In the event that any of the provisions of this Consent Judgment are  
5 held by a court to be unenforceable, the validity of the enforceable provisions shall not be  
6 adversely affected.

7           **15. EXECUTION AND COUNTERPARTS**

8           **15.1** The stipulation to this Consent Judgment may be executed in  
9 counterparts and by means of facsimile, which taken together shall be deemed to constitute  
10 one document.

11           **16. AUTHORIZATION**

12           **16.1** Each signatory to this Consent Judgment certifies that he or she is fully  
13 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter  
14 into and execute the Consent Judgment on behalf of the Party represented and legally bind  
15 that Party. The undersigned have read, understand and agree to all of the terms and  
16 conditions of this Consent Judgment. Except as explicitly provided herein, each Party is to  
17 bear its own fees and costs.

18 **AGREED TO:**

19 CENTER FOR ENVIRONMENTAL HEALTH

20   
21 \_\_\_\_\_  
22 Michael Green, Executive Director  
23 Center for Environmental Health

Dated: 5/12/09

24 NEELY MANUFACTURING II, LLC

25  
26  
27 \_\_\_\_\_  
28 Mike Watson, President  
Neely Manufacturing

Dated: \_\_\_\_\_

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

3                   **14. SEVERABILITY**

4                   14.1 In the event that any of the provisions of this Consent Judgment are  
5 held by a court to be unenforceable, the validity of the enforceable provisions shall not be  
6 adversely affected.

7                   **15. EXECUTION AND COUNTERPARTS**

8                   15.1 The stipulation to this Consent Judgment may be executed in  
9 counterparts and by means of facsimile, which taken together shall be deemed to constitute  
10 one document.

11                   **16. AUTHORIZATION**

12                   16.1 Each signatory to this Consent Judgment certifies that he or she is fully  
13 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter  
14 into and execute the Consent Judgment on behalf of the Party represented and legally bind  
15 that Party. The undersigned have read, understand and agree to all of the terms and  
16 conditions of this Consent Judgment. Except as explicitly provided herein, each Party is to  
17 bear its own fees and costs.

18 **AGREED TO:**

19 CENTER FOR ENVIRONMENTAL HEALTH

21 Dated: \_\_\_\_\_

22 \_\_\_\_\_  
23 Michael Green, Executive Director  
Center for Environmental Health

24 NEELY MANUFACTURING II, LLC

25   
26 \_\_\_\_\_

27 Dated: 5-12-09

28 Mike Watson, President  
Neely Manufacturing

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

**ORDER AND JUDGMENT**

Based upon the stipulated Consent Judgment between CEH and Neely Manufacturing II, LLC, the settlement is approved and judgment is hereby entered according to the terms herein.

**JUL 08 2009**

Dated: \_\_\_\_\_

**HAROLD KAHN**

\_\_\_\_\_  
Judge, Superior Court of the State of California