



FILED
ALAMEDA COUNTY

JAN 30 2009

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

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Clifford A. Chanler, State Bar No. 135534
David S. Lavine, State Bar No. 166744
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Berkeley, CA 94710-2565
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Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, Ph.D., P.E.,
Plaintiff,

v.

ALMAR SALES CO., INC.; NATIONAL
STORES, INC.; FACTORY 2-U; and DOES
1 through 150, inclusive,
Defendants.

Case No. RG07350981

[Original Case No. RG08396862]

~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF STIPULATION AND
ORDER RE: CONSENT JUDGMENT

Date: January 30, 2009

Time: 11:00 a.m.

Dept.: 20

Judge: Hon. Robert Freedman

Reservation No.: R892812

~~PROPOSED~~ JUDGMENT

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In the above-entitled action, Plaintiff ANTHONY E. HELD, Ph.D., P.E. and Defendant ALMAR SALES CO., INC., having agreed through their respective counsel that judgment be entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a Stipulation and [Proposed] Order Re: Consent Judgment entered into by the parties, and following issuance of an order approving this Proposition 65 settlement agreement and entering the Stipulation and Order Re: Consent Judgment on January 30, 2009.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil Procedure §664.6, judgment is entered in accordance with the terms of the Stipulation and Order Re: Consent Judgment attached hereto as **Exhibit 1** and lodged concurrently herewith.

IT IS SO ORDERED.

Dated: Jan 31 2009



JUDGE OF THE SUPERIOR COURT

1 Clifford A. Chanler (State Bar No. 135534)
Christopher M. Martin (State Bar No. 186021)
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5 Attorneys for Plaintiff
6 ANTHONY E. HELD, Ph.D., P.E.

7 Robert E. White (State Bar No. 78567)
LAW OFFICES OF ROBERT E. WHITE
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9 Telephone: (415) 788-6151
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10 Attorneys for Defendant
11 ALMAR SALES CO., INC.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA

15 ANTHONY E. HELD, Ph.D., P.E.,

16 Plaintiff,

17 vs.

18 ALMAR SALES CO., INC.; NATIONAL
STORES, INC.; FACTORY 2-U; and DOES
19 1 through 150, inclusive,

20 Defendants.

21 AND CONSOLIDATED ACTIONS
22

Case No. RG-07-350981

[Original Case No. RG-08-396862]

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

Health & Safety Code § 25249.6

28 12/1/2008 8:56 AM

1 **I. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Almar Sales Co., Inc.**

3 This Consent Judgment is entered into by and between Plaintiff Anthony E. Held, Ph.D.,
4 P.E. ("Dr. Held" or "Plaintiff") and Defendant Almar Sales Co., Inc. ("Almar" or "Defendant"),
5 with Plaintiff and Defendant collectively referred to as the "Parties."

6 **1.2 Plaintiff**

7 Dr. Held represents that he is an individual residing in the State of California who seeks to
8 promote awareness of exposure to toxic chemicals and improve human health by reducing or
9 eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Almar employs 10 or more persons and thus is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
13 & Safety Code § 25249.6 *et seq.* (Proposition 65).

14 **1.4 General Allegations**

15 Dr. Held alleges that Almar has manufactured, distributed and/or sold vinyl children's
16 bath animal figures, including but not limited to (1) *Suave Kids 7 Piece Bath Set*, #SVK9500W (0
17 24576 74658 2) and (2) watches, including but not limited to *Expressions Musical Watch*, #EXW
18 1413 (#0 24576 70209 0), containing di(2-ethylhexyl)phthalate ("DEHP") without the requisite
19 health hazard warnings. DEHP is a phthalate that is listed as a reproductive and developmental
20 toxicant pursuant to Health & Safety Code §25249.8 ("Proposition 65") and is referred to
21 hereinafter as "the Listed Chemical." Almar denies all of Dr. Held's allegations against it, and
22 contends that it is not violating any aspect of Proposition 65 with respect to its products.

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are (1) vinyl children's bath
25 animal figures, including but not limited to *Suave Kids 7 Piece Bath Set*, #SVK9500W (0 24576
26 74658 2) and (2) watches, including but not limited to *Expressions Musical Watch*, #EXW 1413
27 (#0 24576 70209 0). All vinyl children's bath animal figures and watches containing the Listed
28 Chemical and manufactured and/or sold by Almar are referred to hereinafter as the "Covered

1 Products.”

2 **1.6 Notice of Violation**

3 On April 22, 2008, and June 5, 2008, Dr. Held served Almar and various public
4 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notices”) that
5 provided Almar and public enforcers with notice of alleged violations of Health & Safety Code §
6 25249.6 for failing to warn consumers that the Covered Products that Almar manufactured,
7 distributed and/or sold exposed users in California to DEHP. No public enforcer, to the parties’
8 knowledge, has diligently prosecuted the allegations set forth in the Notices.

9 **1.7 Complaint**

10 On July 7, 2008, Dr. Held, who represents that he was and is acting in the interest of the
11 general public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court in
12 and for the County of Alameda against Almar Sales Co., Inc., National Stores, Inc., Factory 2-U,
13 and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6 based on the
14 alleged exposures to DEHP contained in vinyl children’s bath animal figures (such as the *Suave*.
15 *Kids 7 Piece Bath Set*) manufactured, distributed and/or sold by Almar. The case number for the
16 action is RG08396862 (“Alameda Action”), but was consolidated into another action whose case
17 number is RG07350981. A First Amended Complaint was filed in the consolidated action on
18 August 18, 2008, and a Second Amended Complaint was filed in the consolidated action on
19 October 20, 2008.

20 **1.8 No Admission**

21 Almar denies the material, factual and legal allegations contained in Dr. Held's Notices
22 and the Complaint in the Alameda Action, and maintains that all Covered Products that they have
23 manufactured, distributed and/or sold in California have been and are in compliance with all
24 applicable laws, statutes and regulations. Nothing in this Consent Judgment shall be construed as
25 an admission by Almar of any fact, finding, issue of law, or violation of law, nor shall
26 compliance with this Consent Judgment constitute or be construed as an admission by Almar of
27 any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
28 Almar. However, this Section shall not diminish or otherwise affect Almar's obligations,

1 responsibilities, and duties under this Consent Judgment.

2 **1.9 Consent to Jurisdiction**

3 For purposes of this Consent Judgment only, the parties stipulate that this Court has
4 jurisdiction over Almar as to the allegations contained in the Complaint, that venue is proper in
5 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
6 this Consent Judgment.

7 **1.10 Effective Date**

8 For purposes of this Consent Judgment, the term "Effective Date" shall mean November
9 30, 2008.

10 **II. INJUNCTIVE RELIEF: REFORMULATION IN LIEU OF WARNINGS**

11 **2.1 Reformulation Commitments and Schedule**

12 As of the Effective Date, Almar shall only ship Covered Products for sale in California
13 that are Phthalate Free. For purposes of this section "Phthalate Free" Covered Products shall
14 mean Covered Products containing less than or equal to 0.1% DEHP, which is 1,000 parts per
15 million ("ppm") of the Listed Chemical when analyzed pursuant to: Environmental Protection
16 Agency ("EPA") testing methodologies 3580 and 8270, or other comparable methodologies
17 recognized and accepted by one or more federal and/or state agencies, including the Consumer
18 Product Safety Commission, to determine whether the respective levels have been exceeded in its
19 Products. Products that are Phthalate Free shall be referred to herein as "Reformulated Products."

20 Almar represents that, as a direct result of the Notices issued on April 22, 2008, and
21 June 5, 2008, it not only confirmed that the *Suave Kids 7 Piece Bath Set*, #SVK9500W (0
22 24576 74658 2) and the *Expressions Musical Watch*, #EXW1413 (#0 24576 70209 0) were no
23 longer being sold by its customers, but also also elected to discontinue using DEHP in any of
24 its products in the future.

25 **III. MONETARY PAYMENTS**

26 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

27 In settlement of all claims related to the Covered Products and Listed Chemical referred to
28 in the Alameda Action and this Consent Judgment pursuant to Health & Safety Code §

1 25249.7(b), Almar shall pay \$5,000 in civil penalties.

2 Civil penalties are to be apportioned in accordance with California Health & Safety Code
3 § 25192, with 75% of these funds remitted to the State of California's Office of Environmental
4 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to
5 Anthony Held as provided by California Health & Safety Code §25249.12(d). Almar shall issue
6 two separate checks for the penalty payment: (a) one check made payable to "Hirst & Chanler
7 LLP in Trust for OEHHA" in the amount of \$3,750, representing 75% of the total penalty; and
8 (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of \$1,250,
9 representing 25% of the total penalty. Two separate 1099s shall be issued for the above
10 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)
11 Anthony Held, whose information shall be provided five calendar days before the payment is due.

12 Payment shall be delivered to Dr. Held's counsel on or before December 18, 2008, at the
13 following address:

14 Hirst & Chanler LLP
15 Attn: Proposition 65 Coordinator
16 Capitol Mall Complex
17 455 Capitol Mall, Suite 6052560 Ninth Street
18 Sacramento, CA 95814

19 **IV. REIMBURSEMENT OF FEES AND COSTS**

20 **4.1 Attorney Fees and Costs**

21 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
22 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
23 this fee issue to be resolved after the material terms of the agreement had been settled. Almar
24 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
25 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
26 due to Dr. Held and his counsel under general contract principles and the private attorney general
27 doctrine codified at California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed
28 through the mutual execution of this agreement. Almar shall reimburse Dr. Held and his counsel
a total of \$25,000 for fees and costs incurred as a result of investigating, bringing this matter to
Almar's attention, and litigating and negotiating a settlement in the public interest. Almar shall

1 issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check payable to
2 "Hirst & Chanler LLP" and shall be delivered on or before December 18, 2008, to the following
3 address:

4 Hirst & Chanler LLP
5 Attn: Proposition 65 Coordinator
6 Capitol Mall Complex
7 455 Capitol Mall, Suite 605
8 Sacramento, CA 95814

9 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval**

10 Pursuant to C.C.P. §§ 1021 and 1021.5, the Parties agree that Almar will reimburse Dr.
11 Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
12 this settlement agreement in the trial court and all other required tasks performed after the Parties'
13 execution of the Consent Judgment, in an amount not to exceed \$5,750. Such additional fees and
14 costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are
15 not limited to, drafting and filing of the motion to approve papers, fulfilling the reporting
16 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party
17 objections, issuing any notice of entry of the Consent Judgment, corresponding with opposing
18 counsel and appearing before the Court related to the approval process.

19 Reimbursement of such additional fees and costs shall be due within ten days after receipt
20 of a billing statement from Dr. Held ("Additional Fee Claim") after the trial court has approved
21 the settlement. Payment of the Additional Fee Claim shall be made to "Hirst & Chanler LLP,"
22 and the payment shall be delivered at the following address:

23 Hirst & Chanler LLP
24 Attn: Proposition 65 Coordinator
25 Capitol Mall Complex
26 455 Capitol Mall, Suite 605
27 Sacramento, CA 95814

28 Almar has the right to object to such reimbursement and may submit the resolution of this
issue to the American Arbitration Association (AAA) in Northern California to determine the
reasonableness of the additional fees and costs sought, provided that such notice of objection or
decision to arbitrate is received by Dr. Held by the end of the ten calendar days. If an arbitration
notice is not filed with AAA in a timely manner, Dr. Held may file a motion with the Court

1 pursuant to both C.C.P. § 1021.5 and this settlement agreement to recover additional attorney fees
2 and costs incurred as set forth in this paragraph. In the event Almar submits the matter to
3 arbitration, Dr. Held may seek, pursuant to C.C.P. §1021.5, reasonable attorney fees and costs
4 incurred for the arbitration, the prevailing party shall be entitled to reasonable attorneys' fees and
5 costs.

6 **V. CLAIMS COVERED AND RELEASE**

7 **5.1 Dr. Held's Release of Almar, and its Chain of Distribution**

8 In further consideration of the promises and agreements herein contained, the injunctive
9 relief commitments set forth in Section 2.1, and for the payments to be made pursuant to Sections
10 3 and 4, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys,
11 successors, and/or assignees, and as to both (1) vinyl children's bath animal figures, and (2)
12 watches only, in the interest of the general public, hereby waives all rights to institute or
13 participate in, directly or indirectly, any form of legal action and releases all claims, including,
14 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
15 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
16 investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or
17 unknown, fixed or contingent (collectively "Claims"), against Almar and each of its downstream
18 distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, without limitation
19 National Stores, Inc., and Factory 2-U, Food Maxx, and any other retailer in its chain of
20 distribution in California), franchisees, dealers, customers, owners, purchasers, users, parent
21 companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,
22 representatives, shareholders, agents, and employees, and sister and parent entities (collectively
23 "Releasees") that arise under Proposition 65, as such claims relate to the Releasees' alleged
24 failure to warn about exposures to the Listed Chemical contained in the Covered Products.
25 Pursuant to this release and the consideration therefore, Dr. Held shall execute and cause to be
26 filed a Request for Dismissal of National Stores, Inc., and Factory 2-U from the Alameda Action
27 without prejudice, only as to *Suave Kids 7 Piece Bath Set, #SVK9500W (#0 24576 74658 2)*
28 manufactured, distributed, or sold by Almar, National Stores, Inc., and Factory 2-U, as alleged in

1 the Second Amended Complaint, within 10 days after this Consent Judgment is approved by the
2 Court pursuant to section VI below.

3 Dr. Held in his individual capacity and *not* his representative capacity hereby releases all
4 claims which he now has or may have in the future against Almar, irrespective of the subject
5 matter, of all character, kind and nature, whether said claims are known or unknown or are
6 suspected or unsuspected and Dr. Held expressly waives any and all rights and benefits which he
7 now has, or in the future may have, under California Civil Code Section 1542, which provides as
8 follows:

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

13 The parties further understand and agree that this release shall not extend upstream to any
14 entities that manufactured the Products or any component parts thereof, or any distributors or
15 suppliers who sold the Products or any component parts thereof to Almar.

16 **5.2 Almar's Release of Dr. Held**

17 Almar waives any and all claims against Dr. Held, his attorneys, and other representatives
18 for any and all actions taken or statements made (or those that could have been taken or made) by
19 Dr. Held and his attorneys and other representatives, whether in the course of investigating claims
20 or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with
21 respect to the Covered Products.

22 **VI. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and
24 shall be null and void and cannot be used in any proceeding for any purpose if, for any reason, it
25 is not approved and entered by the Court within six months after it has been fully executed by all
26 parties, in which event, or in the event of an appellate reversal, any monies that have been
27 provided to Dr. Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be
28 refunded in full within fifteen (15) days after receiving written notice from Almar that the six
months period has expired or an appellate reversal has become final. Dr. Held agrees to file his
motion to approve within sixty days of the Effective Date and to request a hearing date on such

1 motion within 90 days of the date he files such motion.

2 **VII. SEVERABILITY**

3 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
4 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
5 provisions remaining shall not be adversely affected so long as the material terms of this Consent
6 Judgment and its general intent are not vitiated.

7 **VIII. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of
9 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
10 inapplicable by reason of law generally, or as to the Listed Chemical and/or the Covered
11 Products, then Almar shall have no further obligations pursuant to this Consent Judgment with
12 respect to, and to the extent that, the Covered Products are so affected.

13 **IX. NOTICES**

14 Unless specified herein, all correspondence and notices required to be provided pursuant
15 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
16 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
17 other party at the following addresses:

18 To Almar:

19 Harry Ashkenazie, CEO
20 Almar Sales Co., Inc.
21 31 West 34th Street, 8th Floor
New York, NY 10001

22 With a copy to:

23 Robert E. White, Esq.
24 LAW OFFICES OF ROBERT E. WHITE
177 Post Street, Suite 890
San Francisco, CA 94108

25 To Dr. Held:

26 HIRST & CHANLER LLP
27 Attn: Proposition 65 Coordinator
2560 Ninth Street, Suite 214
28 Berkeley, CA 94710

1 Any party, from time to time, may specify in writing to the other party a change of
2 address to which all notices and other communications shall be sent.

3 **X. COUNTERPARTS, FACSIMILE SIGNATURES**

4 This Consent Judgment may be executed in counterparts, by facsimile, or by Adobe
5 Portable Document Format (“pdf”), each of which shall be deemed an original, and all of which,
6 when taken together, shall constitute one and the same documents.

7 **XI. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

8 Dr. Held agrees to comply with the reporting form requirements referenced in California
9 Health & Safety Code § 25249.7(f).

10 **XII. ADDITIONAL POST EXECUTION ACTIVITIES**

11 The parties acknowledge that pursuant to Health & Safety Code §25249.7, a noticed
12 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
13 obtaining such approval, Held, Almar and their respective counsel agree to mutually employ their
14 best efforts to support the entry of this agreement as a Consent Judgment, obtain approval of the
15 Consent Judgment by the Court in a timely manner and defend any appellate review of the
16 Court’s approval.

17 **XIII. MODIFICATION**

18 This Consent Judgment may be modified only: (1) by written agreement of the parties
19 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
20 motion of Almar and entry of a modified Consent Judgment by the Court. The Attorney General
21 shall be served with notice of any proposed modification to this Consent Judgment at least fifteen
22 (15) days in advance of its consideration by the Court. Dr. Held shall be entitled to seek his
23 reasonable fees and costs incurred in the modification process under C.C.P. § 1021.5 if Almar
24 seeks to modify the terms of this Consent Judgment, to the extent provided by law.

25 **XIV. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective parties and have read, understood, and agree to all of the terms and conditions of this
28 Consent Judgment.

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AGREED TO:

AGREED TO:

Date: **APPROVED**
By Anthony E Held at 9:36 am, 12/1/08

Date: _____
ALMAR SALES CO., INC. Defendant

By: Anthony E Held
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: _____
RAYMOND ASHKENAZIE, CEO

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Date: _____
HIRST & CHANLER LLP

Date: _____
LAW OFFICES OF ROBERT E. WHITE

By: _____
Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

By: _____
Robert E. White
Attorneys for Defendants
ALMAR SALES CO., INC.

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AGREED TO:

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Date: _____

ALMAR SALES CO., INC. Defendant

By: _____
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: _____
RAYMOND ASHKENAZIE, CEO

APPROVED AS TO FORM:

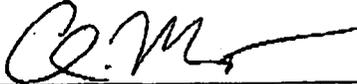
APPROVED AS TO FORM:

Date: 11/26/08

Date: _____

HIRST & CHANLER LLP

LAW OFFICES OF ROBERT E. WHITE

By: 
Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

By: _____
Robert E. White
Attorneys for Defendants
ALMAR SALES CO., INC.

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AGREED TO:

Date: _____

By: _____
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

AGREED TO:

Date: November 26, 2008
ALMAR SALES CO., INC. Defendant

By: [Signature]
RAYMOND ASHKENAZIE, CEO
HARRY

APPROVED AS TO FORM:

Date: _____

HIRST & CHANLER LLP

By: _____
Christopher M. Martin
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

APPROVED AS TO FORM:

Date: November 26, 2008

LAW OFFICES OF ROBERT E. WHITE

By: [Signature]
Robert E. White
Attorneys for Defendants
ALMAR SALES CO., INC.