

ENDORSED
FILED
San Francisco County Superior Court

FEB 03 2009

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Deputy Clerk

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
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13 CENTER FOR ENVIRONMENTAL HEALTH,)
14 a non-profit corporation,)

15 Plaintiff,)

16 v.)

17 ZM INTERNATIONAL, INC. dba)
18 KIDORABLE and Defendant DOES 1 through)
200, inclusive,)

19)
20 Defendants.)
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Case No. CGC-08-478830

~~PROPOSED~~ [PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1** On August 19, 2008, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint in San
4 Francisco County Superior Court, entitled *Center for Environmental Health v. ZM International,*
5 *Inc.*, San Francisco County Superior Court Case Number CGC-08-478830 (the “Action”), for
6 civil penalties and injunctive relief pursuant to the provisions of California Health & Safety
7 Code §25249.5 *et seq.* (“Proposition 65”).

8 **1.2** Defendant ZM International, Inc. doing business as Kidorable
9 (“Kidorable”) is a “person in the course of doing business” under Proposition 65 and
10 manufactures, distributes and/or sells backpacks and rainwear (the “Products”) in the State of
11 California. Kidorable and CEH are referred to collectively herein as the Parties.

12 **1.3** On or about May 15, 2008, CEH served Kidorable and the appropriate
13 public enforcement agencies with the requisite 60-day notice that Kidorable is in violation of
14 Proposition 65. CEH’s notice and the Complaint in this Action allege that Kidorable exposes
15 individuals who use or otherwise handle the Products to lead and/or lead compounds (referred to
16 interchangeably herein as “Lead”), chemicals known to the State of California to cause cancer,
17 birth defects and other reproductive harm, without first providing clear and reasonable warning
18 to such persons regarding the carcinogenicity and reproductive toxicity of Lead. The notice and
19 Complaint allege that Kidorable’s conduct violates Health & Safety Code §25249.6, the warning
20 provision of Proposition 65.

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
22 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
23 personal jurisdiction over Kidorable as to the acts alleged in CEH’s Complaint, that venue is
24 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
25 Judgment as a full and final resolution of all claims which were or could have been raised in the
26 Complaint based on the facts alleged therein.

27 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
28 certain disputed claims between the Parties as alleged in the Complaint. By executing this

1 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties'
2 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
3 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
4 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
5 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
6 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
7 any other or future legal proceedings. This Consent Judgment is the product of negotiation and
8 compromise and is accepted by the parties, for purposes of settling, compromising and resolving
9 issues disputed in this action, including future compliance by Kidorable with Section 2 of this
10 Consent Judgment, and shall not be used for any other purpose, or in any other matter.

11 **2. COMPLIANCE - REFORMULATION**

12 **2.1 Lead Reformulation.** After February 1, 2009 (the "Compliance Date"),
13 Kidorable shall not manufacture, distribute, ship, or sell, or cause to be manufactured,
14 distributed, or sold, any Product that contains Lead in concentrations that exceed 30 parts per
15 million ("ppm") or is comprised of any material that contains Lead in concentrations that exceed
16 30 ppm.

17 **2.2 Suppliers.** Kidorable shall issue specifications to its suppliers requiring
18 that the Products do not contain material with lead concentrations exceeding 30 ppm. Kidorable
19 shall periodically send a representative to each of its supplier's manufacturing facilities to ensure
20 that such suppliers are complying with Kidorable's specifications.

21 **2.3 Pre-Market Testing.** On or before the Compliance Date, Kidorable shall
22 test each design of Product it is currently offering for sale to ensure that such Products contain
23 less than 30 ppm Lead. Such testing shall be conducted by an independent laboratory using a
24 total acid digest method such as United States Environmental Protection Agency Method 3050B
25 (the "Test Protocol"). Kidorable shall conduct such testing each time it offers a new design of
26 Product for sale or changes suppliers or ingredients with respect to an existing design of Product.
27 The results of all testing performed pursuant to this section shall be retained for a period of three
28 years from the date of the test and shall be made available to CEH upon request.

1 **2.4 Ongoing Testing.** In order to help ensure compliance with the
2 requirements of Section 2.1, Kidorable shall conduct testing to confirm that the Products contain
3 less than 30 ppm Lead. Testing pursuant to this section shall be conducted pursuant to the Test
4 Protocol. The results of all testing performed pursuant to this section shall retained for a period
5 of three years from the date of the test and shall be made available to CEH upon request. On a
6 quarterly basis, Kidorable shall test at least one randomly selected style of Product.

7 **2.4.1 Products that exceed 30 ppm pursuant to Kidorable**
8 **Testing.** If the results of the testing required pursuant to section 2.3 shows levels of lead
9 exceeding 30 ppm for a Product, Kidorable shall dispose of all of the Products that were
10 purchased under the particular purchase order in compliance with applicable law and notify the
11 supplier that such Products do not comply with the Kidorable's specifications.

12 **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing
13 of Products. Any such testing will be conducted pursuant to the Test Protocol at an independent
14 laboratory. In the event that CEH's testing demonstrates Lead levels in excess of 30 ppm for one
15 or more Products, CEH shall inform Kidorable of the violation(s), including information
16 sufficient to permit Kidorable to identify the Product(s). Kidorable shall, within 10 days
17 following such notice, provide CEH, at the address listed in section 12, with its supplier
18 specification and testing information demonstrating its compliance with sections 2.2, 2.3, and 2.4
19 of this Consent Judgment. Kidorable shall also be liable for stipulated payments in lieu of
20 penalties for Products sold in California for which CEH produces tests under this section
21 demonstrating Lead levels exceeding 30 ppm as set forth below. These payments shall be made
22 to CEH and used for the purposes described in section 4.1 and to pay for related attorneys' fees
23 and costs. The stipulated payments in lieu of penalties and other remedies provided for herein
24 are in addition to any other remedies available to enforce the terms of this Consent Judgment.

25 **2.5.1 Stipulated penalty assuming compliance with sections**
26 **2.2 and 2.3.** Assuming Kidorable provides CEH with information demonstrating that it
27 complied with sections 2.2, 2.3, and 2.4 for the Products purchased pursuant to the same
28 purchase order as those with tests showing Lead levels exceeding 30 ppm, the stipulated penalty

1 shall be as follows for each Occurrence:

2 First Occurrence: \$500

3 Second Occurrence: \$1,000

4 Third Occurrence: \$2,000

5 Thereafter: \$5,000

6 For purposes of this section and section 2.5.2: (a) "Occurrence" shall mean CEH's submission of
7 valid test results demonstrating lead levels exceeding 30 ppm in a Product sold in California; and
8 (b) submission of multiple noncompliant test results for Products purchased prior to the notice of
9 violation shall be considered a single Occurrence.

10 **2.5.2 Stipulated penalty assuming non-compliance with**

11 **sections 2.2 and 2.3.** Assuming Kidorable fails to provide CEH with information demonstrating
12 that it complied with sections 2.2, 2.3, and 2.4 for the Products purchased pursuant to the same
13 purchase order as those with tests showing Lead levels exceeding 30 ppm, the stipulated penalty
14 shall be as follows for each Occurrence:

15 First Occurrence: \$2,000

16 Second Occurrence: \$5,000

17 Third Occurrence: \$10,000

18 Thereafter: \$20,000

19 Notwithstanding the foregoing, the maximum, cumulative stipulated payment in lieu of penalty
20 amount in a calendar year under this section and section 2.5.1 shall be \$40,000.

21 **3. SETTLEMENT PAYMENTS**

22 **3.1** Within five days of entry of this Consent Judgment, Kidorable shall pay a
23 total of \$25,000 as a settlement payment. This total shall be paid in two separate checks
24 delivered to the offices of the Lexington Law Group, LLP at the address set forth in section 13
25 below and made payable and allocated as follows. Any failure by Kidorable to comply with the
26 payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each day
27 after the delivery date the payment is received. The late fees required under this section shall be
28 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought

1 pursuant to section 5 of this Consent Judgment.

2 **3.1.1 Monetary Payment in Lieu of Penalty:** \$8,250 shall be paid to
3 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment
4 shall be made by check payable to Center for Environmental Health. CEH shall use such funds
5 to continue its work protecting people from exposures to toxic chemicals. As part of this work,
6 CEH intends to conduct periodic testing of the Products as set forth in section 2.4.

7 **3.1.2 Attorneys' Fees and Costs:** \$16,750 shall be used to reimburse
8 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
9 other costs incurred as a result of investigating, bringing this matter to Kidorable's attention,
10 litigating and negotiating a settlement in the public interest. This payment shall be made by
11 check payable to Lexington Law Group, LLP.

12 **4. MODIFICATION OF CONSENT JUDGMENT**

13 **4.1** This Consent Judgment may be modified by written agreement of CEH
14 and Kidorable, or upon motion of CEH or Kidorable as provided by law.

15 **4.2** Should any other defendant obtain more favorable settlement terms, the
16 terms of this settlement may, on application of Kidorable, be modified to encompass such terms.
17 Any change or repeal in the law governing this matter, by legislation or regulating action, shall
18 constitute good cause for Kidorable to seek modification of the judgment

19 **5. ENFORCEMENT OF CONSENT JUDGMENT**

20 **5.1** CEH may, by motion or application for an order to show cause before the
21 Superior Court of the County of San Francisco, enforce the terms and conditions contained in
22 this Consent Judgment. Should CEH prevail on any motion or application under this section,
23 CEH shall be entitled to recover its reasonable attorneys' fees and costs associated with such
24 motion or application.

25 **6. APPLICATION OF CONSENT JUDGMENT**

26 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
27 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
28 them.

1 **7. RELEASE**

2 **7.1** This Consent Judgment is a full, final and binding resolution
3 between CEH and Kidorable of any violation of Proposition 65 that was or could have been
4 asserted in the Complaint against Kidorable or its parents, subsidiaries, affiliates, directors,
5 officers, employees, agents, attorneys, distributors, or customers based on failure to warn about
6 alleged exposure to Lead contained in the Products, with respect to any Products manufactured,
7 distributed or sold by Kidorable on or prior to the date of entry of this Consent Judgment. This
8 release does not limit or effect the obligations of any party created under this Consent Judgment.

9 **8. SEVERABILITY**

10 **8.1** In the event that any of the provisions of this Consent Judgment are held
11 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
12 affected.

13 **9. SPECIFIC PERFORMANCE**

14 **9.1** The Parties expressly recognize that Kidorable' obligations under this
15 Consent Judgment are unique. In the event that Kidorable is found to be in breach of this
16 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the parties agree
17 that it would be extremely impracticable to measure the resulting damages and that such breach
18 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
19 remedies, may sue in equity for specific performance, and Kidorable expressly waives the
20 defense that a remedy in damages will be adequate.

21 **10. GOVERNING LAW**

22 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
23 State of California.

24 **11. RETENTION OF JURISDICTION**

25 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
26 the terms this Consent Judgment.

27 **12. PROVISION OF NOTICE**

28 **12.1** All notices required pursuant to this Consent Judgment and

1 correspondence shall be sent to the following:

2 For CEH:

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

7 For Kidorable:

8 Peter J. Shakula
9 Wood Phillips
10 500 W. Madison, Suite 3800
11 Chicago, IL 60661-2562

12 **13. COURT APPROVAL**

13 **13.1** If this Consent Judgment is not approved by the Court, it shall be of no
14 further force or effect. The Parties agree to support a Motion for Approval of this Consent
15 Judgment.

16 **14. EXECUTION AND COUNTERPARTS**

17 **14.1** The stipulations to this Consent Judgment may be executed in
18 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
19 document.

20 **15. AUTHORIZATION**

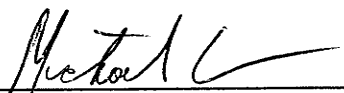
21 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully
22 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
23 into and execute the Consent Judgment on behalf of the party represented and legally bind that
24 party. The undersigned have read, understand and agree to all of the terms and conditions of this
25 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
26 costs.

1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH

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Michael Green, Executive Director
Center for Environmental Health

Dated: 12/12/08

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AGREED TO:

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8 ZM INTERNATIONAL, INC. DBA KIDORABLE

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Signature

Dated: _____

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Printed Name

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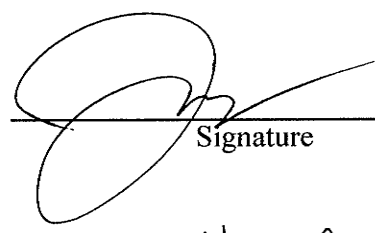
CENTER FOR ENVIRONMENTAL HEALTH

Michael Green, Executive Director
Center for Environmental Health

Dated: _____

AGREED TO:

ZM INTERNATIONAL, INC. DBA KIDORABLE



Signature

Dated: 12/5/08

Jonathan Domsky

Printed Name

President

Title

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between the Parties, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: FEB 03 2009

CHARLOTTE WALTER WOOLARD

Judge, Superior Court of the State of California

CHARLOTTE WALTER WOOLARD