

1 WILLIAM VERICK, SBN 140972
KLAMATH ENVIRONMENTAL LAW
2 CENTER
FREDRIC EVENSON, SBN 198059
3 LAW OFFICE OF FREDRIC EVENSON
424 First Street Eureka, California 95501
4 Telephone: (707) 268-8900
Facsimile: (707) 268-8901
5
6 DAVID WILLIAMS, SBN 144479
BRIAN ACREE, SBN 202505
370 Grand Avenue, Suite 5
7 Oakland, CA 94610
Telephone: (510) 271-0826
8 Facsimile: (510) 271-0829
9 Attorneys for Plaintiff,
MATEEL ENVIRONMENTAL JUSTICE
10 FOUNDATION

**ENDORSED
FILED**
San Francisco County Superior Court

JUL 10 2012

CLERK OF THE COURT
BY: LESLEY FISCELLA
Deputy Clerk

11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF SAN FRANCISCO**
14 **(Unlimited Jurisdiction)**
15

16 MATEEL ENVIRONMENTAL JUSTICE
17 FOUNDATION,
18 Plaintiff,
19 v.
20 HONEYWELL, INC.; NORTHSHORE
POWER SYSTEMS, LLC; COSTCO
21 WHOLESALE CORPORATION; and SEARS
ROEBUCK AND CO.,
22 Defendants.

CASE NO. CGC-11-511550
[PROPOSED] CONSENT JUDGMENT AS
TO SEARS ROEBUCK AND CO.

23
24
25 1. **INTRODUCTION**

26 1.1 On or about February 17, 2011, plaintiff MATEEL ENVIRONMENTAL
27 JUSTICE FOUNDATION ("Mateel"), provided a 60-day notice of violation ("Notice") to the
28

1 California Attorney General, the District Attorneys of every county in California, the City
2 Attorneys of every California city with a population greater than 750,000, and to Defendant
3 SEARS ROEBUCK AND CO. ("Defendant"), alleging that Defendant, through sales in
4 California of devices (such as generators) powered by small gasoline engines ("small engine-
5 powered devices"), was violating Health & Safety Code section 25249.6. Plaintiff alleged that
6 the engines that power these products emit in their exhaust carbon monoxide, benzene, toluene,
7 benzo(a)pyrene, formaldehyde, acetaldehyde, 1,3 butadiene, benz(a)anthracene,
8 benzo(b)fluoranthene, benzo(k)fluoranthene, benzo(j)fluoranthene, chrysene and indeno[1,2,3-
9 cd] pyrene (collectively hereinafter "engine exhaust components"). These engine exhaust
10 components are all chemicals listed pursuant to Health & Saf. Code § 25249.8 as known to cause
11 cancer or reproductive toxicity. Plaintiff alleged that Defendant exposed Californians to engine
12 exhaust components without first providing those exposed with a clear and reasonable warning.
13 To the extent the aforementioned small engine-powered devices are sold by Defendant in
14 California, they are deemed Covered Products for purposes of this Consent Judgment.
15
16

17 1.2 On or about June 8, 2011, plaintiff Mateel, acting in the public interest pursuant to
18 Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties and Injunctive
19 Relief in San Francisco County Superior Court, Case No. 511550 ("Complaint") against
20 Defendant based on the allegations contained in the Notice.
21

22 1.3 For purposes of this Consent Judgment, Mateel and Defendant stipulate that this
23 Court has jurisdiction over the allegations of violations contained in the Complaint and personal
24 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
25 County of San Francisco and that this Court has jurisdiction to enter this Consent Judgment as a
26 full and final settlement and resolution of the allegations contained in the Complaint and of all
27 claims which were or could have been raised based on the facts alleged therein or arising
28

CONSENT JUDGMENT (SEARS)

Mateel v. Honeywell; Case No. 511550
sf-3131712

1 therefrom.

2
3 1.4 Mateel and Defendant enter into this Consent Judgment pursuant to a full and
4 final settlement of disputed claims between the parties for the purpose of avoiding prolonged
5 litigation. This Consent Judgment shall not constitute an admission with respect to any allegation
6 made in the Notice or the Complaint, each and every allegation of which Defendant denies, nor
7 may this Consent Judgment or compliance with it be used as evidence of any wrongdoing,
8 misconduct, culpability or liability on the part of the Defendant.
9

10 2. INJUNCTIVE RELIEF-CLEAR AND REASONABLE WARNINGS

11 2.1 Clear and reasonable warnings that the use of Covered Products potentially
12 exposes the user to chemicals known to the State of California to cause cancer, birth defects or
13 other reproductive harm, shall be provided under the circumstance, and in the manner provided
14 in this Consent Judgment. By July 30, 2012, clear and reasonable warnings for all existing and
15 future models of Covered Products shall be provided as described below.
16

17 A. Warnings in the Owner's Manual

18
19 A warning may be contained in the owner's manual provided with the Covered Product
20 by the manufacturer, either printed on the manual or on a sticker in the manual, under all of the
21 following conditions:

22 1. The warning shall be located in one of the following places in the owner's
23 manual: the outside of the front cover, the inside of the front cover, the first page other than the
24 cover and table of contents, or the outside of the back cover. Unless a different warning is
25 approved by the Attorney General, the warning shall be one of the warnings in Appendix A,
26 except that, at the option of the manufacturer, the reference to the State of California and
27
28

1 Proposition 65 may be omitted. The warning shall be of similar shape and a comparable print
2 size to the warnings in Appendix A. The word "Warning" must be in 19 point type. If the
3 words "California Proposition 65" are used in the heading, they must be in 11 or 12 point type
4 to emphasize the word "Warning." The words "California Proposition 65" may appear before
5 the word "Warning" or after the text of the warning. The remaining text must be in 11 or 12
6 point type.
7

8 2. The Covered Product contains a durable label or sticker directing the operator's
9 attention to the owner's manual;

10 3. The owner's manual is supplied by the manufacturer and intended by the
11 manufacturer to be provided with the Covered Product by the retailer to the initial
12 consumer/purchaser;
13

14 4. No statement concerning California Air Resources Board or Environmental
15 Protection Agency requirements for engine exhaust appears directly adjacent to, below, or above
16 the warning;

17 5. At least one other warning appears in the owner's manual; and

18
19 6. All or a substantial portion of assembly instructions, if any, are contained in the
20 owner's manual.

21 Provided, however, that if the owner's manual does not contain any assembly instructions
22 and all of the assembly instructions are contained in another document (other than a simple parts
23 list), then the warning in Appendix A shall be placed both in the owner's manual and the
24 assembly instructions at the locations specified in subparagraph A.1 above.
25

26 B. Warnings on the Product or Engine

27 Alternatively, for any Covered Product, Defendant may satisfy its obligations under
28 this Consent Judgment by providing warnings as specified in this subparagraph. A warning

1 may be provided by affixing a durable label containing a warning with the language
2 contained in Appendix A on the Covered Product or the Covered Product Engine in a
3 location that can be seen by the user of the Covered Product under normal circumstances of
4 operation.

5 2.2 Defendant shall provide warnings indicated above for Covered Products as
6 described below:
7

8 A. Warnings in Owner's Manuals or Assembly Instructions

9 If Defendant chooses to provide warnings in the owner's manual or assembly
10 instructions, as provided in subparagraph 2.1.A, Defendant shall provide such warnings with
11 the next regularly scheduled printing of the owner's manual, engine manual or assembly
12 instructions, or no later than one (1) year from the date of entry of this Consent Judgment,
13 whichever comes first.
14

15 B. Warnings on the Covered Products

16 In the event Defendant chooses to provide warnings on the Covered Products as
17 provided in subparagraph 2.1.C, such warnings shall be provided on all products
18 manufactured no later than one (1) year from the date of entry of this Consent Judgment.

19 2.3. The parties agree that the manufacture, distribution, sale, resale, and/or use of
20 Covered Products by Defendant, Defendant's suppliers, or those who are in their respective
21 chain of distribution (including licensors, licensees, wholesalers, brokers, resellers, dealers,
22 distributors, original equipment manufacturers, and retailers) does not violate Proposition 65 if
23 warnings are provided to consumers in compliance with this Consent Judgment. Provided,
24 however, that this paragraph shall not expand or diminish any duty to comply with any changes
25 made to Proposition 65 or its implementing regulations after the date of this Consent Judgment.
26

27 2.4. If Defendant has complied with the terms of subparagraph 2.2. of the Consent
28

1 hereto or, with respect to the injunctive relief provided for herein, by the California Attorney
2 General.

3
4 6. **MATTERS COVERED BY THIS CONSENT JUDGMENT**

5 6.1 As to alleged exposures to engine exhaust components from Covered Products,
6 this Consent Judgment provides a full release of liability on behalf of the Public Interest to
7 Defendant, (as well as its past, present and future parents, subsidiaries and affiliates, as well as
8 their customers, wholesalers, distributors, retailers, and any other person in the course of doing
9 business, and the successors and assigns of any of them, who may have used maintained
10 distributed or sold, or use, maintain, distribute, or sell Covered Products, including Husqvarna
11 Professional Products, Inc., its parents, subsidiaries and affiliates, as to those Covered Products it
12 supplied in the past or supplies in the future to Defendant (collectively, "Releasees"), as to all
13 claims and matters raised in the Notice of Violation. Notwithstanding any other provision of this
14 Consent Judgment, no claim or matter is released on behalf of the Public Interest unless that
15 claim or matter was raised in the Notice of Violation.

17 6.2 As to any claims, violations (except violations of this Consent Judgment), actions,
18 damages, costs, penalties or causes of action which may arise or have arisen after the original
19 date of entry of this consent judgment, compliance by Defendant with the terms of this Consent
20 Judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims
21 regarding exposure to engine exhaust components from Covered Products.

23 6.3 In furtherance of the foregoing, Plaintiff hereby waives any and all rights and
24 benefits which it now has, or in the future may have, conferred upon it with respect to the
25 Covered Products by virtue of the provisions of Section 1542 of the California Civil Code, which
26 provides as follows:
27
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1 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
3 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
4 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
5 THE DEBTOR."

6 Plaintiff understands and acknowledges that the significance and consequence of this
7 waiver of California Civil Code Section 1542 is that even if Plaintiff suffers future damages
8 arising out of or resulting from, or related directly or indirectly to, in whole or in part, the
9 Covered Products, they will not be able to make any claim for those damages against Releasees
10 or any other person in the course of doing business who may manufacture, use, maintain,
11 distribute, market or sell the Covered Products. Furthermore, Plaintiff acknowledges that it
12 intends these consequences for any such claims which may exist as of the date of this release but
13 which Plaintiff does not know exist, and which, if known, would materially affect its decision to
14 enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of
15 ignorance, oversight, error, negligence, or any other cause.

16 7. APPLICATION OF JUDGMENT

17 7.1 The obligations of this Consent Judgment shall apply to and be binding upon any
18 and all plaintiffs, acting in the public interest pursuant to Health and Safety Code section
19 25249.7(d) and Defendant and the successors or assigns of any of them.

20 8. MODIFICATION OF JUDGMENT

21 8.1 This Consent Judgment may be modified only upon written agreement of the
22 parties and upon entry of a modified Consent Judgment by the Court thereon, notice having been
23 provided to the Attorney General, or upon motion of any party as provided by law and upon
24 entry of a modified Consent Judgment by the Court.

25 9. NOTICE

26 9.1 When any Party is entitled to receive any notice or report under this
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1
2 Consent Judgment, the notice or report shall be sent by U.S. mail or overnight courier
3 service to:

4 (a) For Mateel: William Verick, Esq., Klamath Environmental Law Center, 424 First
5 Street, Eureka, California 95501; and

6 (b) For Defendant Sears Roebuck and Co.: Cary Mergele, Asscoate General Counsel,
7 Sears Holdings Management Corporation, 3333 Beverly Road, Hoffman Estates IL 60192-3322;
8 and,

9 (c) Michael Jacob Steel, Morrison & Foerster LLP, 425 Market Street, 31st Floor, San
10 Francisco, California 94105.

11 9.2 Any Party may modify the person and address to whom notice is to be sent by
12 sending each other Party notice in accordance with this Paragraph.
13

14 10. AUTHORITY TO STIPULATE

15 10.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
16 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
17 of the party represented and legally to bind that party.
18

19 11. RETENTION OF JURISDICTION

20 11.1 This Court shall retain jurisdiction over the matters covered herein and the
21 enforcement and/or application of this Consent Judgment.
22

23 12. ENTIRE AGREEMENT

24 12.1 This Consent Judgment contains the sole and entire, agreement and understanding
25 of the parties with respect to the entire subject matter hereof, and any and all prior discussions,
26 negotiations, commitments and understandings related hereto. No representations, oral or
27 otherwise, express or implied, other than those contained herein have been made by any party
28

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
2 deemed to exist or to bind any of the parties.

3
4 13. GOVERNING LAW

5 13.1 The validity, construction and performance of this Consent Judgment shall be governed by
6 the laws of the State of California.

7 14. COURT APPROVAL

8 14.1 If this Consent Judgment is not approved by the Court, or does not become
9 final either as the result of an appeal or for any other reason, it shall be of no force or effect,
10 and cannot be used in any proceeding for any purpose, and any payments made pursuant to
11 Sections 3.1 and 4.1 shall be promptly reimbursed to the payor(s).
12

13
14 **IT IS SO STIPULATED:**

15		
16		
17	Dated: 5/4/12	By: <u>[Signature]</u> Defendant Sears Roebuck and Co.
18		
19		
20	Dated:	By: _____ William Verick Mateel Environmental Justice Foundation
21		

22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23	Dated:	<u>see pg 11</u>
24		
25		Judge of the Superior Court
26		
27		
28		

1 deemed to exist or to bind any of the parties.

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4 the laws of the State of California.
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8 final either as the result of an appeal or for any other reason, it shall be of no force or effect,
9 and cannot be used in any proceeding for any purpose, and any payments made pursuant to
10 Sections 3.1 and 4.1 shall be promptly reimbursed to the payor(s).
11

12
13 **IT IS SO STIPULATED:**

14		
15		
16	Dated:	By: _____ Defendant Sears Roebuck and Co.
17		
18		
19	Dated: 5/15/12	By: <i>William Verick</i> William Verick Mateel Environmental Justice Foundation
20		

21 **IT IS SO ORDERED, ADJUDGED AND DECREED** HAROLD KAHN.

22	Dated:	_____
23		_____
24		Judge of the Superior Court

25 JUL 10 2012

APPENDIX A

**SAMPLE
WARNINGS IN THE MANUAL**



WARNING: The Engine Exhaust from this product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.



WARNING:



The engine exhaust from this product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.



WARNING

The engine exhaust from this product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm. 2296