

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

LEXINGTON LAW GROUP, LLP  
Mark N. Todzo (State Bar No. 168389)  
Eric S. Somers (State Bar No. 139050)  
Lynne R. Saxton (State Bar No. 226210)  
1627 Irving Street  
San Francisco, California 94122  
Telephone: 415.759.4111  
Facsimile: 415.759.4112

CHRIS AMANTEA (State Bar No. 147339)  
McDERMOTT WILL & EMERY LLP  
2049 Century Park East  
34th Floor  
Los Angeles, CA 90067-3208  
Telephone: 310.277.4110  
Facsimile: 310.277.4730

Attorney for Defendant Ingear Corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

CENTER FOR ENVIRONMENTAL  
HEALTH, a non-profit corporation,  
  
Plaintiff,  
  
v.  
  
INGEAR CORPORATION, and  
Defendant DOES 1 through 200,  
inclusive,  
  
Defendants.

CASE NO. 05-444524  
[PROPOSED] CONSENT JUDGMENT

1     **1. INTRODUCTION**

2           **1.1**     On August 31, 2005, 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. InGear*  
5     *Corporation, et al.*, San Francisco County Superior Court Case Number 05-444524 (the  
6     “CEH Action”), for civil penalties and injunctive relief pursuant to the provisions of Cal.  
7     Health & Safety Code §25249.5 *et seq.* (“Proposition 65”).

8           **1.2**     Defendant InGear Corporation (“Defendant”) is a corporation that employs  
9     10 or more persons and manufactured, distributed and/or sold soft food and beverage  
10    containers such as lunchboxes and coolers made of materials containing lead and/or lead  
11    compounds (the “Products”) in the State of California. The term “Products” encompasses  
12    only products designated for sale or distribution within the United States.

13          **1.3**     Beginning or about June 9, 2005, CEH served Defendant and the  
14    appropriate public enforcement agencies with the requisite 60-day notice alleging that  
15    Defendant was in violation of Proposition 65. CEH’s notice and the Complaint in this  
16    Action allege that Defendant exposes people who use or otherwise handle the Products to  
17    lead and/or lead compounds (referred to interchangeably herein as “Lead”), chemicals  
18    known to the State of California to cause cancer, birth defects and other reproductive  
19    harm, without first providing clear and reasonable warning to such persons regarding the  
20    carcinogenicity and reproductive toxicity of Lead. The notice and Complaint allege that  
21    Defendant’s conduct violates Health & Safety Code §25249.6, the warning provision of  
22    Proposition 65.

23          **1.4**     Upon receipt of CEH’s 60-day notice, Defendant took immediate measures  
24    to address the allegations set forth therein. These efforts include the research and  
25    development of Products made without poly vinyl chloride (“PVC”).

26          **1.5**     For purposes of this Consent Judgment only, the parties stipulate that this  
27    Court has jurisdiction over the subject matter of the violations alleged in CEH’s  
28    Complaint and personal jurisdiction over Defendant as to the acts alleged in CEH’s

1 Complaint, that venue is proper in the County of San Francisco, and that this Court has  
2 jurisdiction to enter this Consent Judgment as a full and final resolution of all claims  
3 which were or could have been raised in the Complaint based on the facts alleged therein.

4 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of  
5 certain disputed claims between the Parties as alleged in the Complaint. By executing this  
6 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the  
7 parties' intent that nothing in this Consent Judgment shall be construed as an admission by  
8 the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall  
9 compliance with the Consent Judgment constitute or be construed as an admission by the  
10 Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this  
11 Consent Judgment shall prejudice, waive or impair any right, remedy, argument or  
12 defense the Parties may have in this or any other or future legal proceedings.

13 **2. COMPLIANCE - REFORMULATION**

14 **2.1 Level.** Within ninety days of entry of this Consent Judgment (the  
15 "Compliance Date"), Settling Defendants shall not manufacture, distribute, ship, or sell, or  
16 cause to be manufactured, distributed, or sold, any Product that is comprised of any  
17 interior lining material that contains Lead in concentrations that exceed 200 parts per  
18 million ("ppm").

19 **2.2 Phase-out of PVC lining.** Within six months from the Compliance Date,  
20 Defendant will begin to phase-out the use of PVC lining in its Products to be replaced by  
21 Techlon™, which is non-detectable for lead (at a detection limit of 50 ppm) and is 100%  
22 PVC-free. Defendant will complete its phase-out of Products containing PVC lining  
23 within 24 months of the Compliance Date ("Phase-out").

24 **2.3 Certification of level from suppliers.** Defendant shall issue specifications  
25 to its suppliers requiring that neither the Products nor any materials of which the Products  
26 are comprised contain Lead concentrations exceeding 200 ppm. Defendant shall obtain  
27 written certification with corresponding test results from its suppliers of the Products  
28 certifying that neither the Products nor any materials of which the Products are comprised

1 contain Lead concentrations exceeding 200 ppm. Notwithstanding the foregoing, after the  
2 Phase-Out is completed, Defendant shall not be required to obtain any written certification  
3 (or test results) from its suppliers with respect to the lead content of the interior of the  
4 Products.

5 **2.4 Testing.** In order to help ensure compliance with the requirements of  
6 Sections 2.1, until the Phase-out is completed, Defendant shall conduct testing to confirm  
7 that the Products contain less than 200 ppm Lead. All testing pursuant to this section shall  
8 be performed on randomly selected units by an independent laboratory in accordance with  
9 Defendant's usual independent testing practices. At the request of CEH, the results of all  
10 testing performed pursuant to this section shall be made available to CEH. The frequency  
11 and amount of testing required shall vary as follows:

12 **2.4.1 First two shipments following Compliance Date.** For each of the  
13 first two shipments of Products purchased from Defendant's suppliers after the  
14 Compliance Date, Defendant shall test a representative sample of units from each  
15 supplier of the Products. For purposes of this section 2.4.1, a representative sample means  
16 at least 5 units per shipment. For purposes of this Agreement, a shipment is any order that  
17 contains 5,000 pieces or more, in which the lining of the Products is made from the same  
18 lot of raw materials.

19 **2.4.2 Remainder of shipments following Compliance Date until Phase-**  
20 **out is completed.** For the remainder of the shipments following the Compliance Date and  
21 until the Phase-out is completed, Defendant shall test a representative sample of units  
22 from each shipment of the Products. For purposes of this section 2.4.2, a representative  
23 sample means at least 2 units per shipment.

24 **2.4.3 Products that exceed 200 ppm pursuant to Defendant's Testing.**  
25 If the results of the testing required pursuant to section 2.3 show levels of lead exceeding  
26 200 ppm for the lining of a Product or 600 ppm for the exterior of a Product, Defendant  
27 shall refuse to accept all of the Products that were purchased under the particular  
28 purchase order to the supplier with a letter explaining that such Products do not comply

1 with the supplier's certification. Following a Product test exceeding 200 ppm (for the  
2 lining) or 600 ppm (for the exterior), as the case may be, Defendant shall apply the  
3 definition of representative sample set forth in section 2.4.1, above, in determining the  
4 number of units to be tested for the two shipments following the Product test exceeding  
5 200 ppm or 600 ppm, as the case may be.

6       **2.5 Confirmatory testing by CEH.** CEH intends to conduct periodic testing of  
7 the Products. Any such testing will be conducted by CEH at an independent laboratory, in  
8 accordance with the test protocol set forth in Exhibit A, attached. In the event that CEH's  
9 testing demonstrates Lead levels in excess of 200 ppm for one or more Products, CEH  
10 shall inform Defendant of the test results, including information sufficient to permit  
11 Defendant to identify the Product(s). Defendant shall, within 20 days following such  
12 notice, provide CEH, at the address listed in section 13, with its supplier certification and  
13 testing information demonstrating its compliance with sections 2.3 and 2.4 of this Consent  
14 Judgment. Defendant shall then have the opportunity to conduct its own independent  
15 testing of the Products from the same lot to confirm or deny CEH's tests. If Defendant's  
16 independent testing confirms CEH's test results, Defendant shall apply the definition of  
17 representative sample set forth in section 2.4.1, above, in determining the number of units  
18 to be tested for the two shipments following the Product test exceeding 200 ppm from that  
19 supplier. In addition, if Defendant's independent testing verifies CEH's test results and  
20 Defendant fails to provide CEH with information demonstrating that it complied with  
21 sections 2.3 or 2.4 (as the case may be) for the particular shipment(s) at issue, Defendant  
22 shall also be liable for stipulated payments in lieu of penalties for Products for which CEH  
23 produces tests demonstrating Lead levels exceeding 200 ppm for the lining or 600 ppm for  
24 exterior surfaces as set forth below. These payments shall be made to CEH and used for  
25 the purposes described in section 4.1.

26       **2.5.1 Stipulated Payments In Lieu of Penalties.** If stipulated payments  
27 in lieu of penalties are warranted under section 2.5, the stipulated payment amount shall  
28

1 be as follows for each unit of Product for which CEH produces a test result with Lead  
2 levels exceeding 200 ppm for the lining or 600 ppm for exterior surfaces:

3	First Occurrence:	\$1,250
4	Second Occurrence:	\$1,500
5	Third Occurrence:	\$1,750
6	Thereafter:	\$2,500

7 Notwithstanding the foregoing, the maximum stipulated payment amount in a  
8 calendar year, regardless of the number of units of Product tested by CEH with  
9 exceedances of the Lead levels set forth in this Consent Judgment, shall be \$5,000.

10 **2.6 Products in the stream of commerce.** Defendant's Products that have  
11 been manufactured, shipped, sold, or that otherwise are in the stream of commerce prior to  
12 the Compliance Date shall be released from any claims that were brought or that could  
13 have been brought by CEH in its Complaint, as though they were Covered Claims within  
14 the meaning of Section 7.1, below.

15 **3. SETTLEMENT PAYMENTS**

16 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH Ten  
17 thousand dollars (\$10,000) in lieu of any penalty pursuant to Health and Safety Code  
18 §25249.7(b). CEH shall use such funds to continue its work protecting people from  
19 exposures to toxic chemicals. As part of this work, CEH intends to conduct periodic  
20 testing of the Products as set forth in section 2.4. The parties acknowledge that the  
21 payment in lieu of penalty provided for in this section has been greatly reduced due to  
22 Defendant's prompt agreement to eliminate PVC from the Products as well as share the  
23 technology (as set forth below) required to accomplish this with its competitors.

24 **3.2 Attorneys' Fees and Costs.** Forty thousand dollars (\$40,000) shall be paid  
25 to CEH to reimburse CEH and its attorneys for their reasonable investigation fees and  
26 costs, attorneys' fees, and any other costs incurred as a result of investigating, bringing  
27 this matter to Defendant' attention, litigating and negotiating a settlement in the public  
28 interest.

1           **3.3           Timing of payments.** The payments required under Sections 3.1 and  
2 3.2, above, shall be delivered to the address set forth in section 13 below within 10 days of  
3 entry of this Consent Judgment by the Court.

4           **3.4           Technology Sharing.** Defendant agrees that, upon request by a  
5 manufacturer or distributor of soft food and beverage containers, it will make available to  
6 that manufacturer or distributor technical information related to Defendant's use of non-  
7 PVC lining in its Products.

8           **3.5           Donation to CEH.** After entry of this Consent Judgment, Defendant shall  
9 make a total of four annual donations to CEH in the amount of \$5,000 each. The first  
10 donation shall be payable on or before December 31, 2006, with subsequent donations to  
11 be payable on or before December 31st of each of the succeeding three years. The  
12 donations shall be used by CEH to fund projects to protect people from exposures to toxic  
13 chemicals. In no event shall the donations be used by CEH to pay attorneys fees or costs.  
14 Upon request, CEH shall provide to Defendant an accounting of how the donations were  
15 used by CEH.

16           **3.6           Recommendation by CEH.** CEH agrees and acknowledges that it will  
17 recommend on its website, in print and broadcast media, and otherwise when asked, the  
18 use of PVC-free soft food and beverage containers containing Techlon™, such as the  
19 Products manufactured by InGear.

20 **4.           MODIFICATION OF CONSENT JUDGMENT**

21           **4.1** This Consent Judgment may be modified by written agreement of CEH and  
22 Defendant, or upon motion of CEH or Settling Defendant as provided by law.

23           **4.2** CEH intends to enter into agreements with other entities that manufacture,  
24 distribute and/or sell Products. CEH will provide Defendant with a copy of any Consent  
25 Judgment involving soft food and beverage containers to which CEH is a party. Should  
26 Defendant determine that the provisions of any such Consent Judgment with a similarly  
27 situated manufacturer or distributor of products are less stringent, Defendant may request  
28 a modification of this Consent Judgment to conform with the terms of the later entered

1 Consent Judgment. Upon 30 days prior written notice of Defendant’s request for a  
2 modification, CEH shall inform Defendant whether it will agree to such modification. If  
3 CEH does not agree, Defendant may move the Court for a modification pursuant to this  
4 section.

5 **5. ENFORCEMENT OF CONSENT JUDGMENT**

6 **5.1** CEH may, by motion or application for an order to show cause before the  
7 Superior Court of the County of San Francisco, enforce the terms and conditions  
8 contained in this Consent Judgment. Should CEH prevail on any motion or application  
9 under this section, CEH shall be entitled to its reasonable attorneys’ fees and costs  
10 associated with such motion or application.

11 **6. APPLICATION OF CONSENT JUDGMENT**

12 **6.1** This Consent Judgment shall apply to and be binding upon the parties  
13 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any  
14 of them.

15 **7. CLAIMS COVERED**

16 **7.1** This Consent Judgment is a full, final and binding resolution between CEH  
17 and Defendant of any violation of Proposition 65 that was or could have been asserted in  
18 the Complaint against Defendant (including any claims that could be asserted in  
19 connection with any of the Products covered by this Consent Judgment) or its parents,  
20 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or  
21 customers (collectively, “Defendant Releasees”) based on failure to warn about alleged  
22 exposure to Lead contained in the Products, with respect to any Products manufactured,  
23 distributed or sold by Defendant on or prior to the date of entry of this Consent Judgment.  
24 Compliance with the terms of this Consent Judgment constitutes compliance with  
25 Proposition 65 for purposes of lead. This release does not limit or effect the obligations of  
26 any party created under this Consent Judgment. Further, CEH hereby releases all retailers  
27 or distributors of Defendant’s products from any claims related to this Judgment and CEH  
28 agrees to dismiss any such claims that it has asserted against any retailers of Defendant’s



1 Products. If CEH has filed a complaint against a retailer or distributor of Defendant's  
2 Products, then CEH shall within 10 days of entry of this Consent Judgment file a  
3 dismissal, with prejudice, as to those claims relating to Defendant's Products. CEH shall  
4 provide Defendant with a conformed copy of the dismissal. If CEH has served a 60-day  
5 Notice letter on any retailer or distributor of Defendant's Products, but not yet filed a  
6 complaint, then, within 10 days of entry of this Consent Judgment, CEH shall withdraw  
7 the notice letter as to Defendant's Products by writing a certified letter to such retailer or  
8 distributor. A copy of such letter shall be served on Defendant and each and every person  
9 that received a copy of CEH's 60-Day notice letter. For purposes of the release provided  
10 in this Section 7.1, the term "retailer or distributor" shall include their respective related  
11 entities, predecessors, successors, assigns, parents, subsidiaries, affiliates, officers,  
12 partners, directors, stockholders, shareholders, attorneys, representatives, agents and  
13 employees, past, present and future.

## 14 **8. SEVERABILITY**

15 **8.1** In the event that any of the provisions of this Consent Judgment are held by  
16 a court to be unenforceable, the validity of the enforceable provisions shall not be  
17 adversely affected.

## 18 **9. SPECIFIC PERFORMANCE**

19 **9.1** The parties expressly recognize that Settling Defendants' obligations under  
20 this Consent Judgment are unique. In the event that any Settling Defendant is found to be  
21 in breach of this Consent Judgment for failure to comply with the provisions of Section 2  
22 hereof, the parties agree that it would be extremely impracticable to measure the resulting  
23 damages and that such breach would cause irreparable damage. Accordingly, CEH, in  
24 addition to any other available rights or remedies, may sue in equity for specific  
25 performance, and Settling Defendants expressly waive the defense that a remedy in  
26 damages will be adequate.

## 27 **10. GOVERNING LAW**

1           **10.1** The terms of this Consent Judgment shall be governed by the laws of the  
2 State of California.

3           **11. RETENTION OF JURISDICTION**

4           **11.1** This Court shall retain jurisdiction of this matter to implement and enforce  
5 the terms this Consent Judgment.

6           **12. PROVISION OF NOTICE**

7           **12.1** All notices required pursuant to this Consent Judgment and correspondence  
8 shall be sent to the following:

9           For CEH:

10                   Mark N. Todzo  
11                   Lexington Law Group, LLP  
12                   1627 Irving Street  
13                   San Francisco, CA 94122

13           For Defendant:

14                   Chris M. Amantea, Esq.  
15                   McDermott Will & Emery  
16                   2049 Century Park East, Suite 3400  
17                   Los Angeles, CA 90067-3208

17           **13. COURT APPROVAL**

18           **13.1** If this Consent Judgment is not approved by the Court, it shall be of no  
19 further force or effect.

20           **14. EXECUTION AND COUNTERPARTS**

21           **14.1** The stipulations to this Consent Judgment may be executed in counterparts  
22 and by means of facsimile, which taken together shall be deemed to constitute one  
23 document.

24           **15. AUTHORIZATION**

25           **15.1** Each signatory to this Consent Judgment certifies that he or she is fully  
26 authorized by the party he or she represents to stipulate to this Consent Judgment and to  
27 enter into and execute the Consent Judgment on behalf of the party represented and  
28 legally bind that party. The undersigned have read, understand and agree to all of the

1 terms and conditions of this Consent Judgment. Except as explicitly provided herein,  
2 each party is to bear its own fees and costs.

3 AGREED TO:

4

5 CENTER FOR ENVIRONMENTAL HEALTH

Dated: 12/20/05

6

7 By: 

Michael Green, Executive Director  
Center for Environmental Health

9

10 INGEAR CORPORATION

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

11

12 By: \_\_\_\_\_

Larry Gutkin  
Its: CEO

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 terms and conditions of this Consent Judgment. Except as explicitly provided herein,  
2 each party is to bear its own fees and costs.

3 AGREED TO:

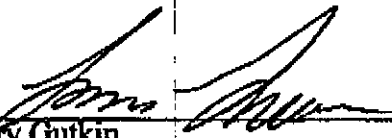
4

5 CENTER FOR ENVIRONMENTAL HEALTH Dated: \_\_\_\_\_

6

7 By: \_\_\_\_\_  
8 Michael Green, Executive Director  
9 Center for Environmental Health

10 INGEAR CORPORATION Dated: 12/27/05

11  
12 By:  \_\_\_\_\_  
13 Larry Gutkin  
14 Its: CEO

MCDERMOTT WILL & EMERY LLP  
ATTORNEYS AT LAW  
LOS ANGELES

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 InGear Corporation, the settlement is approved and judgment is hereby entered according to the terms herein.

Dated:

Judge, Superior Court of the State of California

MCDERMOTT WILL & EMERY LLP  
ATTORNEYS AT LAW  
LOS ANGELES

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

## **Exhibit A**

### **(Test Methodology)**

The following protocol shall be applied separately to the interior and exterior material of a finished Product.

1. Cut 5 small, discreet portions of the material to be analyzed.
2. Combine the portions into a composite sample.
3. Prepare the sample for analysis using microwave digestion. Microwave digestion protocols from the following two methods may be used provided that the samples are completely digested:
  - a. AOAC Official Method 999.10 (Lead, Cadmium, Zinc, Copper, and Iron in Foods)
  - b. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave Digestion for Lead in Paint Chips (and other matrices)
4. Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic Absorption Spectrophotometry (GFAAS) or Inductively Coupled Plasma Mass Spectrometry (ICP-MS) using standard operating procedures.
5. Lead content shall be expressed in parts per million (ppm).