

1 LEXINGTON LAW GROUP, LLP
Mark N. Todzo, State Bar No. 168389
2 Eric S. Somers, State Bar No. 139050
Ryan D. Cabinte, State Bar No. 230792
3 1627 Irving Street
San Francisco, CA 94122
4 Telephone: (415) 759-4111
Facsimile: (415) 759-4112

5 Attorneys for Plaintiff
6 CENTER FOR ENVIRONMENTAL HEALTH

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10
11 CENTER FOR ENVIRONMENTAL HEALTH,)
12 a non-profit corporation,)

13 Plaintiff,)

14 v.)

15
16 ROSS STORES, INC., et al; and DEFENDANT)
DOES 1 through 200, inclusive,)

17 Defendants.)

18
19 And consolidated actions.)
20

Lead Case No. CGC-05-444522

**[PROPOSED] CONSENT JUDGMENT
RE: COOL GEAR INTERNATIONAL,
INC.**

1 **1. INTRODUCTION**

2 **1.1** On December 28, 2006, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed an amendment to its
4 complaint adding Cool Gear International, Inc. (“Defendant”) as a defendant to the San Francisco
5 County Superior Court case entitled *Center for Environmental Health v. Ross Stores, Inc. et al.*,
6 San Francisco County Superior Court Case Number CGC-06-444522 (the “CEH Action”), for
7 civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety Code
8 §25249.5 *et seq.* (“Proposition 65”).

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

13 **1.3** Beginning or about September 6, 2006, CEH served Defendant and the
14 appropriate public enforcement agencies with the requisite 60-day notice alleging that Defendant
15 was in violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that
16 Defendant exposes people who use or otherwise handle the Products to lead and/or lead
17 compounds (referred to interchangeably herein as “Lead”), chemicals known to the State of
18 California to cause cancer, birth defects and other reproductive harm, without first providing
19 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
20 toxicity of Lead. The notice and Complaint allege that Defendant’s conduct violates Health &
21 Safety Code §25249.6, the warning provision of Proposition 65. Defendant disputes such
22 allegations and asserts that all of its products are safe and comply with all applicable laws.

23 **1.4** Upon receipt of CEH’s Notice, Defendant took immediate measures to
24 address the allegations set forth therein and to investigate the substance of CEH’s allegations.

25 **1.5** For purposes of this Consent Judgment only, the parties stipulate that this
26 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
27 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
28 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent

1 Judgment as a full and final resolution of all claims which were or could have been raised in the
2 Complaint based on the facts alleged therein.

3 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of
4 certain disputed claims between the Parties as alleged in the Complaint. By executing this
5 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'
6 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
7 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
8 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
9 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
10 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
11 any other or future legal proceedings.

12 **2. COMPLIANCE - REFORMULATION**

13 **2.1 Level.** Within ninety days of entry of this Consent Judgment (the
14 "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell or cause to be
15 manufactured, distributed or sold, any Product that is comprised of any interior lining material or
16 PVC material used for the exterior of the Product that contains Lead in concentrations that
17 exceed 200 parts per million ("ppm") or in which the exterior surface-coating contains Lead
18 concentrations exceeding 600 ppm.

19 **2.2 Phase Out of PVC Lining.** Within six (6) months from the compliance
20 date, Defendant will begin to phase out the use of PVC lining in its lunchbox Products to be
21 replaced by a non-PVC product which is non-detectable for Lead. Defendant will complete its
22 phase out of Products containing PVC lining within twenty-four (24) months of the compliance
23 date ("Phase Out").

24 **2.3 Certification of level from suppliers.** Defendant shall issue
25 specifications to its suppliers requiring that the interior lining of the Products and exterior
26 surface-coating of the Products do not contain materials which contain Lead concentrations
27 exceeding 200 ppm and 600 ppm, respectively, and that the exterior of the Products do not
28 contain PVC material with Lead concentrations exceeding 200 ppm. Defendant shall obtain

1 written certification from its suppliers of the Products certifying that the interior lining does not
2 contain Lead concentrations exceeding 200 ppm, that the exterior surface-coating does not
3 contain Lead exceeding 600 ppm, and that the exterior of the Product does not contain PVC
4 material with Lead concentrations exceeding 200 ppm.

5 **2.4 Testing.** In order to ensure compliance with the requirements of Section
6 2.1, Defendant shall conduct (or cause to be conducted) testing to confirm that the interior lining
7 of the Products contains less than 200 ppm Lead, that the exterior surface-coating of the Products
8 contains less than 600 ppm Lead, and that the exterior of the Products do not contain PVC
9 material with Lead concentrations exceeding 200 ppm. All testing pursuant to this Section shall
10 be performed by an independent laboratory in accordance with EPA Method 3050B for the
11 interior lining and for any PVC material used in the exterior of the Product, and either EPA
12 Method 3050B or ASTM F-963 for the exterior surface coating (the "Test Protocol"). At the
13 request of CEH, the results of the testing performed pursuant to this Section shall be made
14 available to CEH.

15 **2.4.1 Testing Where Interior Lining Contains PVC.** For each of the
16 first two orders of Products purchased from Defendant's suppliers after the Compliance Date,
17 Defendant shall randomly select and test the greater of 0.1% (one-tenth of one percent) or two,
18 but in no case more than four, of the total Products purchased from each supplier of the Products
19 intended for sale in California. Following the first two orders, Defendant shall test the Products
20 in accordance with 2.4.2.

21 **2.4.2 Random Testing.** Testing pursuant to this Section 2 shall be
22 performed on randomly selected units in accordance with Defendant's usual testing practices.
23 Defendant's usual testing practices include testing as required by its various retailers. At a
24 minimum, during each calendar year, Defendant shall randomly select and test the greater of
25 0.1% (one-tenth of one percent) or two, but in no case more than four, of the total Products
26 purchased from each supplier of the Products intended for sale in California.

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2.4.3 Products that Exceed Stipulated Levels Pursuant to

Defendant's Testing. If the results of the testing required pursuant to Section 2.4 show levels of lead exceeding 200 ppm for the interior lining of a Product, 600 ppm for the exterior surface-coating of a Product, or 200 ppm for PVC material used for the exterior of a Product, Defendant shall: (1) refuse to accept all of the Products that were purchased under the particular purchase order; (2) send a notice to the supplier explaining that such Products do not comply with the suppliers' certification; and (3) apply the testing frequency set forth in 2.4 as though the next shipment from the supplier were the first one following the Compliance Date.

2.5 Confirmatory Testing by CEH. CEH intends to conduct periodic testing

of the Products. Any such testing will be conducted by CEH at an independent laboratory, in accordance with the Test Protocol. In the event that CEH's testing demonstrates Lead levels in excess of 200 ppm for the interior lining, 600 ppm for the exterior surface-coating, or 200 ppm for exterior PVC material of two or more Products, CEH shall inform Defendant of the test results, including information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30 days following such notice, provide CEH, at the address listed in Section 12, with the certification and testing information demonstrating its compliance with Sections 2.3 and 2.4 of this Consent Judgment. If Defendant fails to provide CEH with information demonstrating that it complied with Sections 2.3 and/or 2.4, Defendant shall be liable for stipulated payments in lieu of penalties for Products for which CEH produces tests demonstrating Lead levels exceeding 200 ppm for the interior lining, 600 ppm for exterior surface-coating, or 200 ppm for exterior PVC material, as set forth below. In addition, Defendant shall then apply the testing frequency set forth in 2.4 as though the next shipment from the supplier were the first one following the Compliance Date. The payments shall be made to CEH and used for the purposes described in Section 3.1.

2.5.1 Stipulated Payments In Lieu of Penalties. If stipulated

payments in lieu of penalties are warranted under section 2.5, the stipulated payment amount shall be as follows for each unit of Product for which CEH produces a test result with Lead levels exceeding 200 ppm for the lining or 600 ppm for exterior surfaces:

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

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

8 **2.5.2 Products in the stream of commerce.** Defendant's
9 Products that have been manufactured, shipped, sold, or that otherwise are in the stream of
10 commerce prior to the Compliance Date shall be released from any claims that were brought or
11 that could have been brought by CEH in its Complaint, as though they were Covered Claims
12 within the meaning of Section 7.1, below. As a result, the stipulated payments in section 2.5.1
13 above do not apply to these Products.

14 **3. SETTLEMENT PAYMENTS**

15 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
16 five thousand dollars (\$5,000) in lieu of any penalty pursuant to Health and Safety Code
17 §25249.7(b). CEH shall use such funds to continue its work protecting people from exposures to
18 toxic chemicals. As part of this work, CEH intends to conduct periodic testing of the Products as
19 set forth in section 2.4. The parties acknowledge that the payment in lieu of penalty provided for
20 in this section has been greatly reduced due to Defendant's prompt agreement to eliminate PVC
21 from the Products. The payment required under this section shall be made payable to CEH.

22 **3.2 Attorneys' Fees and Costs.** Ten thousand dollars (\$10,000) shall be paid
23 to CEH to reimburse CEH and its attorneys for their reasonable investigation fees and costs,
24 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to
25 Defendant' attention, litigating and negotiating a settlement in the public interest. The payment
26 required under this section shall be made payable to Lexington Law Group, LLP.

27 **3.3 Timing of payments.** The payments required under Sections 3.1 and 3.2
28 shall be made payable within 10 days of entry of judgment. All of the payments made pursuant

1 to this Section 3 shall be delivered to the Lexington Law Group, LLP at the address set forth in
2 section 12.1.

3 **4. MODIFICATION OF CONSENT JUDGMENT**

4 **4.1** This Consent Judgment may be modified by written agreement of
5 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

6 **4.2** CEH intends to enter into agreements with other entities that
7 manufacture, distribute and/or sell Products. Should Defendant determine that the provisions of
8 any such Consent Judgment with a similarly situated manufacturer or distributor of products are
9 less stringent, Defendant may request a modification of this Consent Judgment to conform with
10 the terms of the later entered Consent Judgment. Upon 30 days prior written notice of
11 Defendant's request for a modification, CEH shall inform Defendant whether it will agree to
12 such modification. If CEH does not agree, Defendant may move the Court for a modification
13 pursuant to this section.

14 **5. ENFORCEMENT OF CONSENT JUDGMENT**

15 **5.1** Either party may, by motion or application for an order to show cause,
16 enforce the terms and conditions contained in this Consent Judgment.

17 **6. APPLICATION OF CONSENT JUDGMENT**

18 **6.1** This Consent Judgment shall apply to and be binding upon the
19 parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any
20 of them.

21 **7. CLAIMS COVERED**

22 **7.1** This Consent Judgment is a full, final and binding resolution between
23 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
24 the Notice of Complaint against Defendant (including any claims that could be asserted in
25 connection with any of the Products covered by this Consent Judgment) or its parents,
26 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or customers
27 (collectively, "Defendant Releasees") based on failure to warn about alleged Proposition 65
28 exposures with respect to any Products manufactured, distributed or sold by Defendant

1 (“Covered Claims”) on or prior to the date of entry of this Consent Judgment. Compliance with
2 the terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of
3 Lead exposures from the Products.

4 7.2 Further, CEH hereby releases all retailers, distributors, and licensors of
5 Defendant’s products from any claims related to the Notice, the Complaint and this Judgment
6 and CEH agrees to dismiss any such claims that it has asserted or could assert against any
7 retailers, distributors or licensors of Defendant’s Products. If CEH has filed a complaint against
8 a retailer, distributor or licensor of Defendant’s Products, then CEH shall, within 10 days of entry
9 of this Consent Judgment file a dismissal, with prejudice, as to those claims relating to
10 Defendant’s Products. CEH shall provide Defendant with a conformed copy of the dismissal.
11 CEH further agrees to provide Defendant with a letter substantially similar to the one attached
12 hereto as Exhibit A, stating that it has released all of Defendant’s distributors, retailers and
13 licensors from any liability relating to sales of Products manufactured and/or sold by Defendant.
14 As to each of Defendant’s retailers, distributors or licensors which have not been served with a
15 60-day notice letter or a complaint by CEH, CEH agrees not to serve a 60-day notice on said
16 retailer, distributor, or licensor which includes within its scope, whether directly or indirectly,
17 any of Defendant’s products. For purposes of the release provided in this Section, the term
18 “retailer, distributor or licensor” shall include their respective related entities, predecessors,
19 successors, assigns, parents, subsidiaries, affiliates, officers, partners, directors, stockholders,
20 shareholders, attorneys, representatives, agents and employees, past, present and future.

21 **8. SEVERABILITY**

22 8.1 In the event that any of the provisions of this Consent Judgment are
23 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
24 adversely affected.

25 **9. SPECIFIC PERFORMANCE**

26 9.1 The parties expressly recognize that Defendant’s obligations
27 under this Consent Judgment are unique. In the event that any Defendant is found to be in breach
28 of this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the

1 parties agree that it would be extremely impracticable to measure the resulting damages and that
2 such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
3 available rights or remedies, may sue in equity for specific performance, and Defendant expressly
4 waive the defense that a remedy in damages will be adequate.

5 **10. GOVERNING LAW**

6 **10.1** The terms of this Consent Judgment shall be governed by the laws of
7 the State of California.

8 **11. RETENTION OF JURISDICTION**

9 **11.1** This Court shall retain jurisdiction of this matter to implement and
10 enforce the terms this Consent Judgment.

11 **11.2.** This Consent Judgment shall automatically terminate and be of no further
12 force, validity or effect as of August 1, 2011.

13 **12. PROVISION OF NOTICE**

14 **12.1** All notices required pursuant to this Consent Judgment and
15 correspondence shall be sent to the following:

16 For CEH:

17 Mark N. Todzo
18 Lexington Law Group, LLP
19 1627 Irving Street
20 San Francisco, CA 94122

21 For Defendant:

22 Donna J. Roth
23 Cool Gear International, Inc.
24 10 Cordage Park Circle
25 Plymouth, MA 02360
26 and
27 Russell N. Stein, Esquire
28 Ruberto, Israel & Weiner, P.C.
100 North Washington Street
Boston, MA 02114

13. COURT APPROVAL

1 13.1 CEH will comply with the settlement notice provisions of Health and
2 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

3 13.2 If this Consent Judgment is not approved by the Court, it shall be of no
4 further force and effect. If this Consent Judgment is appealed, with the exception of the
5 injunctive relief provisions in Section 2, above, which remain in effect during any appeal, it does
6 not become effective and has no force or effect until all issues on appeal are resolved.

7 **14. EXECUTION AND COUNTERPARTS**

8 14.1 The stipulations to this Consent Judgment may be executed in
9 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
10 document.

11 **15. AUTHORIZATION**

12 15.1 Each signatory to this Consent Judgment certifies that he or she is
13 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
14 enter 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 conditions of
16 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
17 and costs.

18 **AGREED TO:**

19 CENTER FOR ENVIRONMENTAL HEALTH

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

21 Dated: 11/16/07

24
25 COOL GEAR INTERNATIONAL, INC.

26 Dated: _____

27
28 _____
28 Printed Name

1 **13.1** CEH will comply with the settlement notice provisions of Health and
2 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

3 **13.2** If this Consent Judgment is not approved by the Court, it shall be of no
4 further force and effect. If this Consent Judgment is appealed, with the exception of the
5 injunctive relief provisions in Section 2, above, which remain in effect during any appeal, it does
6 not become effective and has no force or effect until all issues on appeal are resolved.

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14 enter 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 conditions of
16 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
17 and costs.

18 **AGREED TO:**

19 CENTER FOR ENVIRONMENTAL HEALTH

20
21
22 _____ Dated: _____
23 Michael Green, Executive Director
24 Center for Environmental Health

25 COOL GEAR INTERNATIONAL, INC.

26 

Dated: 1/5/06

27 Donna Roth
28 Printed Name

1 Exhibit A

2 (Release Letter)

3 [Lexington Law Group Letterhead]

4
5 Russell N. Stein, Esquire
6 Ruberto, Israel & Weiner, P.C.
7 100 North Washington Street
8 Boston, MA 02114

9 **Re: *Center for Environmental Health v. Ross Stores, Inc., et al.,***
10 **San Francisco County Superior Court Case Number CGC-05-444522**

11 Dear Mr. Stein:

12 Pursuant to Section 7.2 of the consent judgment ("Consent Judgment") entered into in the
13 above-referenced matter between the Center for Environmental Health ("CEH") and Cool Gear
14 International, Inc. ("Cool Gear"), CEH hereby confirms that it has released all of Cool Gear's
15 distributors, retailers, and licensors from any liability relating to sales of soft food and beverage
16 containers such as lunch boxes, water bottles, coolers, and similar products manufactured and/or
17 sold by Cool Gear ("Products") and from any claims related to the Products referenced in the 60-
18 day Notice or the Consent Judgment (collectively, "Claims") and any 60-day notices issued to
19 Cool Gear or any of its retailers, distributors or licensors. For purposes of the release contained
20 in the Consent Judgment and this letter, the term "retailers, distributors, and licensors" shall
21 include their respective related entities, predecessors, successors, assigns, parents, subsidiaries,
22 affiliates, officers, partners, directors, stockholders, shareholders, attorneys, representatives,
23 agents and employees, past, present and future.

24 This letter acts as a retraction and rescission of all 60-day notices related to Cool Gear's
25 Products in lieu of sending separate letters to each enforcement agency. If CEH has filed a
26 complaint against any retailer, distributor, or licensor of Cool Gear's Products, then CEH shall
27 within 10 days of the entry of the Consent Judgment file a dismissal, with prejudice, as to those
28 Claims relating to Cool Gear's Products.

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Mark N. Todzo, Esq. for
Center for Environmental Health

ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Cool Gear International, Inc. the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: _____

Judge, Superior Court of the State of California

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