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6 CENTER FOR ENVIRONMENTAL HEALTH

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

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.)

Lead Case No. CGC-05-444522

**[PROPOSED] CONSENT JUDGMENT
RE: ROMAR INTERNATIONAL
CORPORATION**

18
19 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)
20 Plaintiff,)
21 v.)

Case No. CGC-06-448597

22
23 ROMAR INTERNATIONAL CORPORATION,)
and Defendant DOES 1 through 200, inclusive,)
24
25 Defendants.)

26 And consolidated actions.
27
28

1 **1. INTRODUCTION**

2 **1.1** On January 17, 2006, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint in San Francisco
4 County Superior Court, entitled *Center for Environmental Health v. Romar International*
5 *Corporation, et al.*, San Francisco County Superior Court Case Number CGC-06-448597 (the
6 “CEH Action”), for civil penalties and injunctive relief pursuant to the provisions of Cal. Health
7 & Safety Code §25249.5 *et seq.* (“Proposition 65”).

8 **1.2** Defendant Romar International Corporation (“Defendant”) is a corporation
9 that employs 10 or more persons and manufactured, distributed and/or sold soft food and
10 beverage containers such as lunchboxes and coolers made of materials containing lead and/or
11 lead 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 October 13, 2005, 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.

22 **1.4** After receiving the 60-day notice, Defendant took steps to remedy the
23 violations alleged therein. Specifically, Defendant began using PEVA, a lead-free alternative to
24 the polyvinyl chloride (“PVC”) used in the Products and/or PVC with low lead. Defendant also
25 began testing the Products to ensure that the Products had lead levels below 200 parts per million
26 (“ppm”).

27 **1.5** For purposes of this Consent Judgment only, the parties stipulate that this
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1 Court has jurisdiction over the subject matter of the violations alleged in CEH's Complaint and
2 personal jurisdiction over Defendant as to the acts alleged in CEH's Complaint, that venue is
3 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
4 Judgment as a full and final resolution of all claims which were or could have been raised in the
5 Complaint based on the facts alleged therein.

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

15 **2. COMPLIANCE - REFORMULATION**

16 **2.1 Level.** Within ninety days of entry of this Consent Judgment (the
17 "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell, or cause to be
18 manufactured, distributed, or sold, any Product that is comprised of any interior lining material
19 that contains Lead in concentrations that exceed 200 parts per million ("ppm"). Defendant may
20 accomplish this by using PEVA as an alternative to the PVC previously used for the interior
21 lining.

22 **2.2 Certification of level from suppliers.** Defendant shall issue
23 specifications to its suppliers requiring that neither the Products nor any materials of which the
24 Products are comprised contain Lead concentrations exceeding 200 ppm. Defendant shall obtain
25 written certification with corresponding test results from its suppliers of the Products certifying
26 that neither the Products nor any materials of which the Products are comprised contain Lead
27 concentrations exceeding 200 ppm.

28 **2.3 Testing.** In order to help ensure compliance with the requirements of

1 Sections 2.1, Defendant shall conduct testing to confirm that the Products contain less than 200
2 ppm Lead. All testing pursuant to this section shall be performed on randomly selected units by
3 an independent laboratory in accordance with testing protocol attached hereto as Exhibit A (the
4 “Test Protocol”). At the request of CEH, the results of all testing performed pursuant to this
5 section shall be made available to CEH. The frequency and amount of testing required shall vary
6 depending upon whether Defendant is using PEVA or PVC for the interior lining as follows:

7 **2.3.1 Testing Frequency Where PEVA Is Used For the Lining.** For
8 Products that use PEVA for the interior lining, Defendant shall test at least 2 units of Product
9 from each of the first two shipments from each supplier following the Compliance Date.
10 Thereafter, no further testing of the interior lining will be required except as provided in Section
11 2.3.3 below.

12 **2.3.2 Testing Frequency Where PVC Is Used For the Lining.** For
13 Products that use PVC for the interior lining, Defendant shall test at least 5 units of Product from
14 each of the first two shipments from each supplier following the Compliance Date. For the
15 remainder of the shipments following the Compliance Date, Defendant shall test at least 2 units
16 per shipment.

17 **2.3.3 Products that exceed 200 ppm pursuant to Defendant’s**
18 **Testing.** If the results of the testing required pursuant to section 2.3 show levels of lead
19 exceeding 200 ppm for the lining of a Product or 600 ppm for the exterior of a Product,
20 Defendant shall refuse to accept all of the Products that were purchased under the particular
21 purchase order to the supplier with a letter explaining that such Products do not comply with the
22 supplier’s certification. Following a Product test exceeding 200 ppm (for the lining) or 600 ppm
23 (for the exterior), as the case may be, Defendant shall apply the testing frequency pursuant to
24 either Section 2.3.2 or 2.3.3, depending on the Product lining, for the next order purchased from
25 the supplier as if such purchase were the first shipment following the Compliance Date.

26 **2.4 Confirmatory testing by CEH.** CEH intends to conduct periodic
27 testing of the Products. Any such testing will be conducted by CEH at an independent
28 laboratory, in accordance with the Test Protocol. In the event that CEH’s testing demonstrates

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

17 **2.5.1 Stipulated Payments In Lieu of Penalties.** If stipulated
18 payments in lieu of penalties are warranted under section 2.5, the stipulated payment amount
19 shall be as follows for each unit of Product for which CEH produces a test result with Lead levels
20 exceeding 200 ppm for the lining or 600 ppm for exterior surfaces:

21	First Occurrence:	\$1,250
22	Second Occurrence:	\$1,500
23	Third Occurrence:	\$1,750
24	Thereafter:	\$2,500

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

28 **2.5.2 Products in the stream of commerce.** Defendant's

1 Products that have been manufactured, shipped, sold, or that otherwise are in the stream of
2 commerce prior to the Compliance Date shall be released from any claims that were brought or
3 that could have been brought by CEH in its Complaint, as though they were Covered Claims
4 within the meaning of Section 7.1, below.

5 **3. SETTLEMENT PAYMENTS**

6 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
7 ten thousand dollars (\$10,000) in lieu of any penalty pursuant to Health and Safety Code
8 §25249.7(b). CEH shall use such funds to continue its work protecting people from exposures to
9 toxic chemicals. As part of this work, CEH intends to conduct periodic testing of the Products as
10 set forth in section 2.4. The parties acknowledge that the payment in lieu of penalty provided for
11 in this section has been greatly reduced due to Defendant's prompt agreement to eliminate PVC
12 from the Products as well as share the technology (as set forth below) required to accomplish this
13 with its competitors.

14 **3.2 Attorneys' Fees and Costs.** Thirty thousand dollars (\$30,000) shall be paid
15 to CEH to reimburse CEH and its attorneys for their reasonable investigation fees and costs,
16 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to
17 Defendant' attention, litigating and negotiating a settlement in the public interest.

18 **3.3 Timing of payments.** The payments required under Sections 3.1 and 3.2
19 shall be made payable as follows: \$20,000 shall be due upon signing and \$20,000 shall be due
20 within 60-days of signature of this Consent Judgment. The first payment of \$20,000 shall be
21 divided into two checks, one for \$10,000 payable to Center for Environmental Health, and
22 another for \$10,000 made payable to Lexington Law Group, LLP. The second payment of
23 \$20,000 shall be made in a single check payable to Lexington Law Group, LLP. All of the
24 payments made pursuant to this Section shall be delivered to the Lexington Law Group, LLP at
25 the address set forth in section 12.1.

26 **4. MODIFICATION OF CONSENT JUDGMENT**

27 **4.1** This Consent Judgment may be modified by written agreement of
28 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.

1 4.2 CEH intends to enter into agreements with other entities that
2 manufacture, distribute and/or sell Products. Should Defendant determine that the provisions of
3 any such Consent Judgment with a similarly situated manufacturer or distributor of products are
4 less stringent, Defendant may request a modification of this Consent Judgment to conform with
5 the terms of the later entered Consent Judgment. Upon 30 days prior written notice of
6 Defendant's request for a modification, CEH shall inform Defendant whether it will agree to
7 such modification. If CEH does not agree, Defendant may move the Court for a modification
8 pursuant to this section. Following such motion, if the Court determines that CEH acted
9 unreasonably by not agreeing to the modification, Defendant shall be entitled to its attorneys'
10 fees and costs associated with such motion.

11 **5. ENFORCEMENT OF CONSENT JUDGMENT**

12 5.1 CEH may, by motion or application for an order to show cause
13 before the Superior Court of the County of San Francisco, enforce the terms and conditions
14 contained in this Consent Judgment. Should CEH prevail on any motion or application under
15 this section, CEH shall be entitled to its reasonable attorneys' fees and costs associated with such
16 motion or application.

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
23 between CEH and Defendant of any violation of Proposition 65 that was or could have been
24 asserted in the 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 exposure to Lead
28 contained in the Products, with respect to any Products manufactured, distributed or sold by

1 Defendant on or prior to the date of entry of this Consent Judgment. Compliance with the terms
2 of this Consent Judgment constitutes compliance with Proposition 65 for purposes of lead. This
3 release does not limit or effect the obligations of any party created under this Consent Judgment.
4 Further, CEH hereby releases all retailers or distributors of Defendant's products from any claims
5 related to this Judgment and CEH agrees to dismiss any such claims that it has asserted against
6 any retailers of Defendant's Products.

7 **8. SEVERABILITY**

8 **8.1** In the event that any of the provisions of this Consent Judgment are
9 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
10 adversely affected.

11 **9. SPECIFIC PERFORMANCE**

12 **9.1** The parties expressly recognize that Defendant's obligations
13 under this Consent Judgment are unique. In the event that any Defendant is found to be in breach
14 of this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the
15 parties agree that it would be extremely impracticable to measure the resulting damages and that
16 such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
17 available rights or remedies, may sue in equity for specific performance, and Defendant expressly
18 waive the defense that a remedy in damages will be adequate.

19 **10. GOVERNING LAW**

20 **10.1** The terms of this Consent Judgment shall be governed by the laws of
21 the State of California.

22 **11. RETENTION OF JURISDICTION**

23 **11.1** This Court shall retain jurisdiction of this matter to implement and
24 enforce the terms this Consent Judgment.

25 **12. PROVISION OF NOTICE**

26 **12.1** All notices required pursuant to this Consent Judgment and
27 correspondence shall be sent to the following:

28 For CEH:

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

For Defendant:

Robert Schachter, Esq.
Robinson Brog Leinwand Greene Genovese & Gluck, P.C.
1345 Avenue of the Americas
New York, New York 10105

13. COURT APPROVAL

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

14. EXECUTION AND COUNTERPARTS

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

15. AUTHORIZATION

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

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Michael Green, Executive Director
Center for Environmental Health

Dated: 10/9/06

1 ROMAR INTERNATIONAL CORPORATION

2  _____

Dated: 9/29/06

3 _____
4 David Steenberg
Printed Name

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Exhibit A

(Test Protocol)

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).

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ORDER AND JUDGMENT

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

Dated: _____

Judge, Superior Court of the State of California