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17
18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SAN FRANCISCO
20 (Unlimited Jurisdiction)

21 MATEEL ENVIRONMENTAL JUSTICE
22 FOUNDATION,

No. 456750

23 PLAINTIFF,

[PROPOSED] CONSENT JUDGMENT AS
TO IMUSA SA.

24 V.

25 COST PLUS, INC., et al.,

26 DEFENDANTS.

27 1. INTRODUCTION

28 1.1 On or about July 27, 2006, plaintiff MATEEL ENVIRONMENTAL JUSTICE

1 FOUNDATION ("Mateel"), provided a 60-day notice of violation ("Notice") to the California
2 Attorney General, the District Attorneys of every county in California, the City Attorneys of
3 every California city with a population greater than 750,000, and defendants Cost Plus, Inc. and
4 Sears Roebuck & Company ("Defendants"), alleging that Defendants, through sales in
5 California of certain aluminum cookware, were violating Health & Safety Code section 25249.6.
6 On January 31, 2007, plaintiff sent a supplemental 60-day Notice to Defendants, as well as to
7 IMUSA, SA, ("IMUSA") alleging that Defendants and IMUSA, through sales in California of
8 certain aluminum cookware, including but not limited to dutch ovens and tortilla presses
9 marketed by IMUSA (hereinafter "aluminum cookware"), were in violation of Health & Safety
10 Code section 25249.6. On April 11, 2007, plaintiff sent a fourth 60-day Notice to Wal-Mart
11 Stores, Inc., for alleged sales of IMUSA aluminum cookware in its California stores. To the
12 extent the aforementioned aluminum cookware is manufactured, distributed, or sold by IMUSA,
13 or its distributors, retailers, or customers, or retailers or customers of IMUSA's distributors, in
14 California, it is deemed Covered Products for purposes of this Consent Judgment.

15 1.2 On or about October 6, 2006, plaintiff Mateel, acting in the public interest
16 pursuant to Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties and
17 Injunctive Relief in San Francisco County Superior Court, Case No. 456750 ("Complaint")
18 against Defendants based on the allegations contained in the Notices

19 1.3 For purposes of this Consent Judgment, the Mateel and Defendants stipulate that
20 this Court has jurisdiction over the allegations of violations contained in the Complaint and
21 personal jurisdiction over Defendants as to the acts alleged in the Complaint, that venue is proper
22 in the County of San Francisco and that this Court has jurisdiction to enter this Consent
23 Judgment as a full and final settlement and resolution of the allegations contained in the
24 Complaint and of all claims which were or could have been raised based on the facts alleged
25 therein or arising therefrom.

26 1.4 For purposes of this Consent Judgment, IMUSA submits to this Court's
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1 jurisdiction solely for the purpose of enforcing this judgment and its terms in resolving the
2 allegations of violations contained in the Complaint and as to the acts alleged in the Complaint.
3 IMUSA admits to this Court's jurisdiction to enter this Consent Judgment. IMUSA submits to
4 the jurisdiction of the Court for purposes of enforcing this settlement agreement, and for no other
5 purpose.

6 1.5 Mateel and IMUSA enter into this Consent Judgment pursuant to a full and final
7 settlement of disputed claims between the parties for the purpose of avoiding prolonged
8 litigation. This Consent Judgment shall not constitute an admission with respect to any
9 allegation made in the Notice or the Complaint, each and every allegation of which Defendants
10 and IMUSA deny, nor may this Consent Judgment or compliance with it be used as evidence of
11 any wrongdoing, misconduct, culpability, or liability on the part of Defendants or IMUSA,
12 individually or jointly.

13 1.6. IMUSA agrees to be bound by the terms of this Consent Judgment in its entirety, in
14 return for which (1) the complaints against Defendants Cost Plus, Inc. and Sears are dismissed
15 without prejudice, and (2) this judgment is a full and final settlement and resolution of the
16 allegations contained in the Complaint and of all claims which were or could have been raised
17 based on the facts alleged therein or arising therefrom, with regard to any and all alleged
18 violations of Health & Safety Code section 25249.6 for sales in California by IMUSA or any
19 IMUSA affiliates, parent or subsidiary corporations, divisions, successors, officers, directors,
20 assigns, distributors, retailers, and/or customers.

21 1.7 IMUSA agrees that plaintiff will file with the clerk coincidentally with the filing of
22 this Consent Judgment a Request For Dismissal of the cases against Defendants Sears and Cost
23 Plus, Inc.

24 1.8 Defendants Sears and Cost Plus, Inc. as well as Wal-Mart Stores, Inc., are not
25 subject to any of the remaining terms of this Consent Judgment, except as to the releases in
26 section 7.

1 2. INJUNCTIVE RELIEF-REFORMULATION

2 2.0 Injunctive Relief: Warning Standards

3 2.1. Warnings shall be provided for aluminum cookware based on tests conducted
4 using the Standard Test Method for Lead and Cadmium Extracted from Glazed Ceramic
5 Surfaces, Designation: C 738 – 94 (Reapproved 2006), provided that the apparatus to be used to
6 perform the analysis shall have adequate sensitivity as defined in paragraph 3.3 (“Lead Leaching
7 Test”). Warnings shall be provided for all articles in any Family of cookware for which the
8 results of the Lead Leaching Test exceeds the levels set forth in section 2.3, when tested in
9 accordance with the provisions described in section 3 below. A “Family” of aluminum
10 cookware consists of any group of articles used to cook or prepare food, typically sold and
11 marketed under one or more brand or trade names, which is designed to perform the same
12 function, such as to boil, simmer or roast food, or to press tortillas, imported by IMUSA for sale
13 in the U.S. For example, a Family of tortilla presses might consist of tortilla presses of varying
14 sizes and finishes, sold by various distributors (both retail and wholesale), all of which would be
15 considered a single Family. A Family may consist of all products made from the same alloy of
16 aluminum in the same process as defined in paragraph 3.3 F. .

17 2.3. Warnings shall be provided for any Family of aluminum cookware for which the
18 mean of the Lead Leaching Test results for at least six randomly selected units of the “worst
19 case” article of cookware as defined in Paragraph 3.3.A shipped for sale in California, exceeds 6
20 parts per billion, as determined pursuant to Section 3 of this Consent Judgment.

21 3. Injunctive Relief: Testing Program

22 3.1. IMUSA shall engage in the following program of testing of Families of aluminum
23 cookware (“Testing Program”), to determine whether warnings are required. Where IMUSA has
24 complied with and properly applied all provisions of the Testing Program, and the test results
25 establish that under Paragraph 2.2 the Family of aluminum cookware does not require a warning,
26 then no warning shall be required for that Family of aluminum cookware, notwithstanding any
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1 contrary test result obtained by any person on any article of any of the IMUSA cookware,
2 regardless of the date of manufacture.

3 3.2. As part of the Testing Program, IMUSA shall maintain the following
4 records, or require by contract that any laboratory conducting testing shall maintain the following
5 records and will provide them to Plaintiff upon request:

6 A. Records kept in the normal course of business showing the maintenance and
7 calibration of equipment used to conduct the Testing Program;

8 B. Individual test results of all tests conducted as part of the Testing Program;
9 provided that IMUSA shall not be required to maintain the above records for any test for more
10 than two years after that test was conducted.

11 3.3. The Testing Program shall consist of conducting the Lead Leaching Test defined
12 in Paragraph 2.1, using equipment and methods which establish a detection limit of 6 parts per
13 billion or lower for each article tested when tested in accordance with the method specified in
14 paragraph 2.1. At least annually beginning January 1, 2008, unless otherwise provided, IMUSA
15 shall test each Family of its cookware currently being manufactured that may be sold in
16 California in accordance with the following procedures:

17 A. IMUSA shall test, at a minimum, the "worst case" article of each Family of
18 aluminum cookware. The "worst case" article of any Family is the article that is shipped for sale
19 in California at the time of testing that generates the highest lead concentration result on the Lead
20 Leaching Test. Where a change in an article lowers the result of the Lead Leaching Test, or the
21 change in another Family article increases that article's result of the Lead Leaching Test, such
22 that the original worst case is no longer the highest result among all articles in the Family, then it
23 is no longer the worst case article, and the new "worst case" article must be used for testing. If
24 the Plaintiff or the Attorney General believes that IMUSA has not selected the "worst case"
25 article of any Family, as evidenced by a Lead Leaching Test result on any article that exceeds the
26 IMUSA's Lead Leaching Test result for the "worst case" article it has selected, then IMUSA
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1 shall submit the basis for its determination of the "worst case" article, including any test results,
2 and shall test the article for which the Plaintiff or the Attorney General has obtained a higher test
3 result. Testing of an exemplar of every stock keeping unit ("SKU") shall be an approved method
4 of identifying the "worst case" article.

5 B. If, prior to executing the Consent Judgment, IMUSA has conducted tests on
6 articles other than the "worst case" article and the mean of the Lead Leaching Test Results of
7 these articles exceeds the warning level, then the results of these tests may be used to determine
8 whether a warning is required, provided that all of the other requirements of Paragraph 3.3 have
9 been satisfied.

10 C. All test articles shall be randomly selected using any generally accepted random
11 sampling method such as International Standards Organization 2589-1 (1989), any random
12 method generally accepted by the National Institute for Standards and Technology, or any
13 authoritative text on statistical sampling.

14 D. The number of articles tested shall be at least six articles for each Family of
15 aluminum cookware, and the mean of at least six tested articles shall be calculated.

16 E. No warnings shall be required if the mean of the results of the tested articles is less
17 than six (6) parts per billion (ppb) by weight.

18 F. The lot, batch, or other group from which any articles to be tested are drawn must
19 be representative of the entire population of articles of the Family of aluminum cookware in
20 question manufactured in the calendar year or since the date of the last test. In order to
21 accomplish this, IMUSA must show that its manufacturing process for a particular Family of
22 aluminum cookware in the Testing Program did not change during the calendar year or since the
23 last test. A manufacturing process change will be deemed to have occurred if there is a material
24 change in: the type of components that make up the aluminum alloy, the suppliers of the
25 components that make up the aluminum alloy, or any other factor that substantially affects Lead
26 Leaching Test results on manufactured articles. If there is such a change, IMUSA shall retest the
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1 product in accordance with the Testing Program to determine whether warnings are required.

2 3.4. Any records required to be maintained by Paragraph 3.2 shall be made
3 available to the Plaintiff or the Attorney General for inspection within the State of California
4 upon 60 days written notice. Such records shall not be made available to the public unless
5 required by the California Public Records Act or other laws, except as part of presenting such
6 records to a court as part of any proceeding. If a request for such records under the California
7 Public Records Act or other law is made, the Attorney General shall respond to the request in the
8 manner he determines is required by law. The Attorney General shall immediately notify
9 Plaintiff and IMUSA of the receipt of any such request, and shall provide written notice 10 days
10 prior to releasing any records pursuant to such a request.

11 4. MONETARY RELIEF

12 4.1 Within six months after entry of this Consent Judgment by the Court, IMUSA
13 shall contribute seventy-five thousand dollars (\$75,000) to the Ecological Rights Foundation.
14 Within one year after entry of the Consent Judgment by the Court, IMUSA shall contribute
15 seventy-five thousand dollars (\$75,000) to Californians for Alternatives to Toxics. Both groups
16 are California non-profit organizations that advocate for workers' and consumers' safety and for
17 awareness and reduction of toxic exposures. The foregoing settlement payments shall be mailed
18 to the attention of William Verick, Klamath Environmental Law Center, 424 First Street, Eureka,
19 California 95501, who shall provide them to the respective organizations within fifteen (15) days
20 of receipt.

21 5. ATTORNEYS' FEES

22 5.1 Within ten (10) days after entry of this Consent Judgment, IMUSA shall pay one
23 hundred fifty thousand dollars (\$150,000) to the Klamath Environmental Law Center to cover
24 plaintiffs' attorneys' fees and costs. The above payment shall be paid by check drawn on funds
25 from the attorney-client trust account of Keller & Heckman LLP and shall be mailed to the
26 attention of William Verick, Klamath Environmental Law Center, 424 First Street, Eureka,
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1 California 95501.

2 5.2 Except as specifically provided in this Consent Judgment, plaintiff and
3 Defendants shall bear their own costs and attorneys' fees.

4 6. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES

5 6.1 The terms of this Consent Judgment are enforceable by and among the parties
6 hereto, by IMUSA with respect to the releases offered in this Consent Judgment, or, with respect
7 to the injunctive relief provided for herein, by the California Attorney General.

8 7. MATTERS COVERED BY THIS CONSENT JUDGMENT

9 7.1 This Consent Judgment is a full, final and binding resolution between the Plaintiff
10 acting on behalf of itself and, (as to those matters referenced in the Notice Letters) in the public
11 interest pursuant to Health and Safety Code section 25249.7(d), and Defendants, Wal-Mart
12 Stores, Inc., and IMUSA concerning any violation of Proposition 65 regarding any claims made
13 or which could have been made in the Notice and/or the Complaint, or any other statutory or
14 common law claim that could have been asserted against Defendants, Wal-Mart Stores, Inc.,
15 IMUSA and/or their affiliates, parent or subsidiary corporations, divisions, successors, officers,
16 directors, assigns, distributors, retailers, and/or customers, or retailers or customers of IMUSA's
17 distributors, for failure to provide clear, reasonable, and lawful warnings of exposure to lead
18 contained in or otherwise associated with Covered Products manufactured, sold or distributed by,
19 for, or on behalf of, IMUSA. Compliance by IMUSA with the terms of this Consent Judgment
20 resolves any issue, now and in the future, concerning compliance by Defendants, IMUSA and/or
21 their affiliates, parent or subsidiary corporations, divisions, successors, officers, directors,
22 assigns, distributors, retailers, and/or customers, or retailers or customers of IMUSA's
23 distributors, with the requirements of Proposition 65 with respect to lead contained in or
24 otherwise associated with Covered Products.

25 7.2 As to any claims, violations (except violations of this Consent Judgment), actions,
26 damages, costs, penalties or causes of action which may arise or have arisen after the original
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1 date of entry of this consent judgment, compliance by IMUSA with the terms of this consent
2 judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims
3 regarding exposure to lead in Covered Products.

4 7.3 In furtherance of the foregoing, Plaintiff hereby waives any and all rights and
5 benefits which it now has, or in the future may have, conferred upon it with respect to the
6 Covered Products by virtue of the provisions of Section 1542 of the California Civil Code,
7 which provides as follows:

8 “A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
10 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
11 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
12 THE DEBTOR.”

13 Plaintiff understands and acknowledges that the significance and consequence of this waiver of
14 California Civil Code Section 1542 is that even if Plaintiff suffers future damages arising out
15 of or resulting from, or related directly or indirectly to, in whole or in part, the Covered
16 Products, they will not be able to make any claim for those damages or penalties against
17 Defendants, or Wal-Mart Stores, Inc., or IMUSA, or their parents, subsidiaries or affiliates,
18 or any of its customers, distributors, wholesalers, retailers, or retailers or customers of
19 IMUSA’s distributors, or any other person in the course of doing business who may
20 manufacture, use, maintain, distribute, market or sell the Covered Products. Furthermore,
21 Plaintiff acknowledges that it intends these consequences for any such claims which may exist
22 as of the date of this release but which Plaintiff does not know exist, and which, if known,
23 would materially affect its decision to enter into this Consent Judgment, regardless of whether
24 its lack of knowledge is the result of ignorance, oversight, error, negligence, or any other
25 cause.

26
27 8. APPLICATION OF JUDGMENT

1 8.1 The obligations of this Consent Judgment shall apply to and be binding upon any
2 and all plaintiffs, acting in the public interest pursuant to Health and Safety Code section
3 25249.7(d) and the successors or assigns of any of them.

4 9. MODIFICATION OF JUDGMENT

5 9.1 This Consent Judgment may be modified only upon written agreement of Plaintiff
6 and IMUSA and upon entry of a modified Consent Judgment by the Court thereon, or upon
7 motion of any party as provided by law and upon entry of a modified Consent Judgment by the
8 Court.

9 10. NOTICE

10 10.1 When any Party is entitled to receive any notice or report under this Consent
11 Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to:

12 (a) For Mateel: William Verick, Esq., Klamath Environmental Law Center,
13 424 First Street, Eureka, California 95501; and

14 (b) For: IMUSA; David G. Sarvadi, Esq., Keller and Heckman LLP, 1001 G
15 Street N.W., Washington, DC 20001, with a copy to: Mr. Manual
16 Gaunard, President, IMUSA USA LLC, dba The Gaunard Group, 6000
17 N.W. 97 Avenue, Unit 26, Doral, Florida 33178.

18 10.2 Any Party or IMUSA may modify the person and address to whom notice is to be
19 sent by sending each other Party notice in accordance with this Paragraph.

20 11. AUTHORITY TO STIPULATE

21 11.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
22 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
23 of the party represented and legally to bind that party.

24 12. RETENTION OF JURISDICTION

25 12.1 This Court shall retain jurisdiction over the matters covered herein and the
26 enforcement and/or application of this Consent Judgment.

1 13. ENTIRE AGREEMENT

2 13.1 This Consent Judgment contains the sole and entire, agreement and understanding
3 of the parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
7 deemed to exist or to bind any of the parties.

8 14. GOVERNING LAW

9 14.1 The validity, construction, and performance of this Consent Judgment shall be
10 governed by the laws of the State of California.

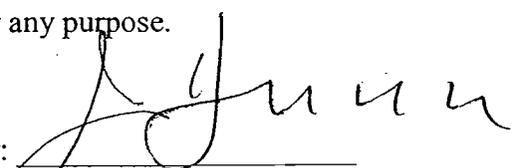
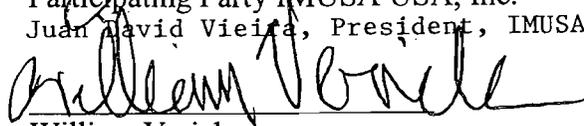
11 15. COURT APPROVAL

12 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
13 effect, and cannot be used in any proceeding for any purpose.

14 IT IS SO STIPULATED:

15 DATED: 7/25/07

17 DATED: 7/19/07

By: 
Participating Party IMUSA USA, Inc.
Juan David Vieira, President, IMUSA-S.A.

William Verick
Mateel Environmental Justice Foundation

21 IT IS SO ORDERED, ADJUDGED AND DECREED:

23 Dated: _____

24 JUDGE OF THE SUPERIOR COURT