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MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

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

16
17 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

Case No. 470688

18 PLAINTIFF,

19 V.

[PROPOSED] CONSENT JUDGMENT

20 ASCASO FACTORY, SL

21 DEFENDANT.
22 _____ /

23
24 1. INTRODUCTION

25 1.1 On or about June 27, 2007, plaintiff MATEEL ENVIRONMENTAL JUSTICE
26 FOUNDATION ("Mateel"), provided a 60-day notice of violation ("Notice") to the California
27 Attorney General, the District Attorneys of every county in California, the City Attorneys of

1 every California city with a population greater than 750,000, and Ascaso Factory, SL ("Ascaso"
2 or "Defendant"), alleging that Defendant, through sales in California of espresso machines
3 ("Covered Products"), was violating Health & Safety Code section 25249.6.

4 1.2 On or about January 3, 2008, Plaintiff Mateel, acting in the public interest
5 pursuant to Health and Safety Code section 25249.7(d), filed a Complaint for Civil Penalties and
6 Injunctive Relief in San Francisco Superior Court, Case No. 470688 ("Complaint") against
7 Defendant based on the allegations contained in the Notice.

8 1.3 For purposes of this Consent Judgment, the parties stipulate that this Court has
9 jurisdiction over the allegations of violations contained in the Complaint and personal
10 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
11 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
12 full and final settlement and resolution of the allegations contained in the Complaint and of all
13 claims which were or could have been raised based on the facts alleged therein or arising
14 therefrom.

15 1.4 Mateel and Defendant enter into this Consent Judgment pursuant to a full and
16 final settlement of disputed claims between the parties for the purpose of avoiding prolonged
17 litigation. This Consent Judgment shall not constitute an admission with respect to any
18 allegation made in the Notice or the Complaint, each and every allegation of which Defendant
19 denies, nor may this Consent Judgment or compliance with it be used as evidence of any
20 wrongdoing, misconduct, culpability or liability on the part of Defendant.

21 2. INJUNCTIVE RELIEF-REFORMULATION

22 2.0 Injunctive Relief

23 2.1 Within ninety (90) days of the days of the date of entry of this Consent Judgment
24 ("Effective Date"), Defendant may not ship for sale in California any Covered Products unless
25 Defendant either 1.) provides warnings in the manner specified in paragraph 2.2 below; or 2.) the
26 Covered Products shipped for sale in California meet the Reformulation Standard set forth in
27 paragraphs 2.3 through 2.6 below.

1 2.2 Warnings Defendant may provide a warning affixed to the packaging or labeling
2 of each unit of the Covered Product. The warning shall state:

3 **WARNING:** Consuming beverages that have been prepared in this
4 espresso machine will expose you to lead, a chemical known to the
5 State of California to cause birth defects and other reproductive
6 harm.

7 The text of this warning must be in 12 point type or larger. The word “WARNING” must be
8 capitalized and be in bold. The warning must either be on the front or top of the packaging of the
9 Covered Product. If after the Effective Date, Defendant ships Covered Products to a retailer or
10 distributor outside of California that neither provide the warnings specified in this paragraph nor
11 meet the Reformulation Standard specified in paragraphs 2.3 through 2.6 below (“Non-
12 Conforming Covered Products”), and if the retailer or distributor then offers those Non-
13 Conforming Covered Products for sale in California, then as to those Non-Conforming Covered
14 Products, that retailer or distributor, and none of their customers, are released pursuant to
15 Sections 6 and 7 below.

16 2.3. Reformulation Standard After the Effective Date, Defendant may ship models
17 of Covered Products for sale in California that do not bear the warning specified in paragraph 2.2
18 above, provided the model of Covered Product has been tested pursuant to the protocol described
19 in paragraph 2.4 and has been determined not to leach more than five (5) micrograms of lead per
20 liter (“5 µg/L”) into the water used to test the machines.

21 2.4 Defendant shall engage in the following program of testing espresso machines
22 (“Testing Program”), to determine whether warnings are required:

- 23 a) For all tests of all espresso machines, the Exposure Water to be used shall
24 be de-ionized water.
25 b) For those machines that are intended to be plumbed to an external water
26 source: pressurize the Exposure Water storage vessel to 50 ± 5.0 pounds
27 per square inch (“psi”) (350 ± 35 kPa) using nitrogen gas. Collect a 125
28 mL control sample from the distribution system. Then connect the

1 beverage unit to the Exposure Water storage vessel using only stainless
2 steel valves and fittings and polytetrafluoroethylene (PTFE) tubing.

- 3 c) While operating the beverage unit in accordance with manufacturer's
4 instructions, purge the unit with a volume of Exposure Water equal to
5 between 1.0 and 1.5 times the total volumetric capacity of the unit, or the
6 volume of purge water recommended in the operator's instructions for the
7 machine, whichever amount is less. If there are multiple beverage outlets
8 (e.g. dispensing spouts) ensure that approximately equal volumes of
9 Exposure Water are purged from each outlet. Discard the purged water.
- 10 d) With the Exposure Water in contact with all surfaces having contact with
11 beverages under normal idle operating conditions, maintain static
12 conditions for 24 ± 1 hour. Operate the equipment (including any heating
13 operations) as intended without dispensing any water. No ingredients or
14 product are to be added during the exposure period.
- 15 e) After step "d", and while operating the espresso machine in accordance
16 with the manufacturer's instructions, draw a 250 mL sample of Exposure
17 Water from the dispensing spout or spouts of the machine. If there are
18 multiple beverage outlets (e.g. dispensing spouts) ensure that
19 approximately equal volumes of water are drawn from each outlet.
20 Sample should be dispensed into a clean PTFE or polyethylene container
21 with an air-tight lid containing HNO₃ as a preservative.
- 22 f) Repeat steps "d" and "e" two additional times such that there is a
23 composite volume comprised of 3 samples taken at 24 hour intervals.
- 24 g) Analyze each Exposure Water sample and the control sample for the
25 concentration of lead using equipment and a method of analysis which
26 establish a detection limit of five (5) micrograms of lead per liter ("5
27 $\mu\text{g/L}$ ") or lower for each espresso machine tested.

- 1 h) Calculate the average lead concentrations of the three samples that were
2 analyzed pursuant to step “g” to determine the test results for the beverage
3 unit in question.
- 4 i) All espresso machines tested shall be randomly selected using any
5 generally accepted random sampling method such as International
6 Standards Organization 2589-1 (1989), any random method generally
7 accepted by the National Institute for Standards and Technology, or any
8 authoritative text on statistical sampling.
- 9 j) The lot, batch, or other group from which any model of espresso machines
10 tested are drawn must be representative of the entire population of articles
11 of the model of espresso machine in question manufactured in the calendar
12 year or since the date of the last test. In order to accomplish this,
13 Defendant must show that its manufacturing process for the particular
14 model of espresso machine in the Testing Program did not change during
15 the calendar year or since the last test. A manufacturing process will be
16 deemed to have occurred if there is a material change in: the type of
17 components that make up any alloys used in the plumbing of the model of
18 espresso machine, the suppliers of the components that make up the
19 components of the alloys, or any other factor that substantially affects lead
20 leaching test results on a model of espresso machine.
- 21 k) The number of espresso machines tested shall be at least six beverage units
22 for each model of espresso machine, and the mean of at least six tested
23 beverage units shall be calculated.
- 24 l) After the Effective Date, unless Defendant provides the warning specified
25 in paragraph 2.2 above, Defendant may not ship for sale in California any
26 model of espresso machine unless the mean of at least six tested beverage
27 units calculated according to subparagraph k), above, is $\leq 5 \mu\text{g/L}$.

1 2.5 As part of the Testing Program, Defendant shall maintain the following records,
2 or require by contract that any laboratory conducting testing shall maintain the following records
3 and will provide them to Plaintiff upon request:

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

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

9 2.6. Any records required to be maintained in by Paragraph 2.5 shall be made
10 available to the Plaintiff or the Attorney General for inspection within the State of California
11 upon 60 days written notice. Such records shall not be made available to the public unless
12 required by the California Public Records Act or other laws, except as part of presenting such
13 records to a court as part of any proceeding.

14 3. MONETARY RELIEF

15 3.1 Within ten (10) days after entry of this Consent Judgment by the Court, Ascaso
16 shall pay ten thousand dollars (\$10,000) each to the Ecological Rights Foundation and to
17 Californians for Alternatives to Toxics. Both groups are California non-profit organizations that
18 advocate for workers' and consumers' safety and for awareness and reduction of toxic exposures.
19 In addition, Defendant shall pay a civil penalty of \$15,000. This civil penalty shall be paid as
20 follows: Defendant shall make one check in the amount of \$11,250 payable to the "Office of the
21 California Attorney General." Defendant shall make another check in the amount of \$3,750
22 payable to the Mateel Environmental Justice Foundation ("Mateel"), which shall represent
23 Mateel's share of civil penalties as provided in Cal Health & Safety Code § 25192(a)(2). The
24 foregoing settlement payments shall be mailed to the attention of William Verick, Klamath
25 Environmental Law Center, 424 First Street, Eureka, California 95501, who shall provide them
26 to the respective organizations within fifteen (15) days of receipt.

1 4. ATTORNEYS' FEES

2 4.1 Within ten (10) days after entry of this Consent Judgment, Ascaso shall pay forty
3 thousand dollars (\$40,000) to the Klamath Environmental Law Center to cover Plaintiff's
4 attorneys' fees and costs. This payment shall be mailed to the attention of William Verick,
5 Klamath Environmental Law Center, 424 First Street, Eureka, California 95501.

6 4.2 Except as specifically provided in this Consent Judgment, Plaintiff and Defendant
7 shall bear their own costs and attorneys' fees.

8 5. ENFORCEMENT OF JUDGMENT/STIPULATED REMEDIES

9 5.1 The terms of this Consent Judgment are enforceable by and among the parties
10 hereto, by Defendant Ascaso with respect to the releases offered in this Consent Judgment, or,
11 with respect to the injunctive relief provided for herein, by the California Attorney General.

12 6. MATTERS COVERED BY THIS CONSENT JUDGMENT

13 6.1 This Consent Judgment is a full, final and binding resolution between the Plaintiff
14 acting on behalf of itself and, (as to those matters referenced in the Notice Letters) in the public
15 interest pursuant to Health and Safety Code section 25249.7(d), and Defendant Ascaso
16 concerning any violation of Proposition 65 regarding any claims made or which could have been
17 made in the Notice and/or the Complaint, or any other statutory or common law claim that could
18 have been asserted against Defendant, and/or its affiliates, parent or subsidiary corporations,
19 divisions, successors, officers, directors, assigns, distributors, retailers, and/or customers for
20 failure to provide clear, reasonable, and lawful warnings of exposure to lead contained in or
21 otherwise associated with Covered Products manufactured, sold or distributed by, for, or on
22 behalf of, Ascaso. Compliance by Ascaso with the terms of this Consent Judgment resolves any
23 issue, now and in the future, concerning compliance by Defendant Ascaso and/or its affiliates,
24 parent or subsidiary corporations, divisions, successors, officers, directors, assigns, distributors,
25 retailers, and/or customers with the requirements of Proposition 65 with respect to lead contained
26 in or otherwise associated with Covered Products.

1 6.2 As to any claims, violations (except violations of this Consent Judgment), actions,
2 damages, costs, penalties or causes of action which may arise or have arisen after the original
3 date of entry of this consent judgment, compliance by Ascaso with the terms of this consent
4 judgment shall be deemed to be full and complete compliance with Proposition 65 as to claims
5 regarding exposure to lead in Covered Products.

6 6.3 In furtherance of the foregoing, Plaintiff hereby waives any and all rights and
7 benefits which it now has, or in the future may have, conferred upon it with respect to the
8 Covered Products by virtue of the provisions of Section 1542 of the California Civil Code, which
9 provides as follows:

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

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

1 7. APPLICATION OF JUDGMENT

2 7.1 The obligations of this Consent Judgment shall apply to and be binding upon any
3 and all Plaintiffs, acting in the public interest pursuant to Health and Safety Code section
4 25249.7(d) and the successors or assigns of any of them.

5 8. MODIFICATION OF JUDGMENT

6 8.1 This Consent Judgment may be modified only upon written agreement of the
7 parties and Ascaso and upon entry of a modified Consent Judgment by the Court thereon, or
8 upon motion of any party as provided by law and upon entry of a modified Consent Judgment by
9 the Court.

10 9. NOTICE

11 9.1 When any Party is entitled to receive any notice or report under this Consent
12 Judgment, the notice or report shall be sent by U.S. mail or overnight courier service to:

13 (a) For Mateel: William Verick, Esq., Klamath Environmental Law Center,
14 424 First Street, Eureka, California 95501; and

15 (b) For: Ascaso: Jose Luis Ascaso, Energia 39-41, 08940 Cornellà –
16 Barcelona, Spain

17 9.2 Any Party may modify the person and address to whom notice is to be sent by
18 sending each other Party notice in accordance with this Paragraph.

19 10. AUTHORITY TO STIPULATE

20 10.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
21 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
22 of the party represented and legally to bind that party.

23 11. RETENTION OF JURISDICTION

24 11.1 This Court shall retain jurisdiction over the matters covered herein and the
25 enforcement and/or application of this Consent Judgment.

1 12. ENTIRE AGREEMENT

2 12.1 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 13. GOVERNING LAW

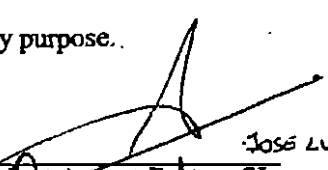
9 13.1 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California.

11 14. COURT APPROVAL

12 14.1 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:

By:  JOSE LUIS ASCASO
Defendant Ascaso Factory SL

16
17 DATED: 12-27-07



William Verick
Mateel Environmental Justice Foundation

18
19
20 IT IS SO ORDERED, ADJUDGED AND DECREED:

21
22 Dated:

JUDGE OF THE SUPERIOR COURT