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6 CENTER FOR ENVIRONMENTAL HEALTH

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN
11

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

13)
14 Plaintiff,)

15 v.)

16 SAKAR INTERNATIONAL, INC.; TOYS "R")
US, INC.; and DOES 1 through 200, inclusive,)

17 Defendants.)
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Case No. CIV 10-03909

**[PROPOSED] CONSENT JUDGMENT
AS TO SAKAR INTERNATIONAL,
INC.**

1 **1. INTRODUCTION**

2 **1.1** On July 27, 2010, Plaintiff the Center for Environmental Health (“CEH”),
3 a non-profit corporation acting in the public interest, filed a complaint entitled *Center for*
4 *Environmental Health v. Sakar International, Inc., et al.*, Marin County Superior Court Case
5 Number CIV 10-03909, for civil penalties and injunctive relief pursuant to the provisions of Cal.
6 Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”) and naming Sakar International, Inc.
7 (“Defendant”) as a defendant.

8 **1.2** Defendant is a corporation that employs ten or more persons and
9 manufactured, distributed and/or sold The Biggest Loser Fitness Kit in the State of California.
10 The scope and applicability of this Consent Judgment shall extend and apply only to The Biggest
11 Loser Fitness Kit (the “Products”).

12 **1.3** On or about April 20, 2010, CEH served Defendant and the appropriate
13 public enforcement agencies with the requisite 60-day Notice (the “Notice”) alleging that
14 Defendant was in violation of Proposition 65. CEH’s Notice and the Complaint in the CEH
15 Action allege that Defendant exposes people who use or otherwise handle the Products to lead
16 and lead compounds (collectively referred to herein as “Lead”), chemicals known to the State of
17 California to cause cancer, birth defects and other reproductive harm, without first providing
18 clear and reasonable warning to such persons regarding the carcinogenicity and reproductive
19 toxicity of Lead. The Notice and Complaint allege that Defendant’s conduct violates Health &
20 Safety Code § 25249.6, the warning provision of Proposition 65. Defendant disputes such
21 allegations and asserts that all of its Products comply with all applicable laws.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this
23 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
24 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
25 proper in the County of Marin, and that this Court has jurisdiction to enter this Consent
26 Judgment as a full and final resolution of all claims which were or could have been raised in the
27 Complaint based on the facts alleged therein.

28 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of

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

9 **2. COMPLIANCE - REFORMULATION**

10 **2.1 Initial Reformulation Standard.** As of April 1, 2011 (the "Compliance
11 Date"), Defendant shall not manufacture, purchase, distribute, ship, or sell, or cause to be
12 manufactured, distributed, shipped or sold, any Product in California that contains any
13 component or is made of any material that is more than 300 parts per million ("ppm") Lead.

14 **2.1.1. Additional Reformulation Standard.** By August 14, 2011 (the
15 "Additional Reformulation Date"), Defendant shall attempt to meet the Additional
16 Reformulation Standard. For purposes of this Consent Judgment, a Product is in compliance
17 with the "Additional Reformulation Standard" if it contains any component or is made of any
18 material that is no more than 100 ppm Lead. If Defendant is able to meet the Additional
19 Reformulation Standard, following the Additional Reformulation Date, Defendant: (a) shall not
20 manufacture, purchase, distribute, ship, or sell, or cause to be manufactured, distributed, shipped
21 or sold, any Product in California that contains any component or is made of any material that is
22 more than 100 ppm Lead; (b) must comply with Sections 2.2 and 2.3 to ensure compliance with
23 this Section 2.1.1; and (c) may waive the second installment of the payment in lieu of penalty set
24 forth in Section 3.3.2 below. Prior to the Additional Reformulation Date, Defendant shall notify
25 CEH in writing whether or not Defendant has achieved the Additional Reformulation Standard.

26 **2.2 Certification From Suppliers.** Defendant shall issue specifications to its
27 suppliers requiring that the Products comply with the Lead content requirements of Section 2.1.
28 Defendant shall obtain written certifications from its suppliers of the Products certifying that the

1 Products comply with the Lead content requirements of Section 2.1.

2 **2.3 Defendant’s Testing.** In order to ensure compliance with the Lead
3 content requirements of Section 2.1, Defendant shall cause to be conducted testing to confirm
4 that the Products do not exceed the reformulation standards identified in Section 2.1. Testing
5 shall be conducted in compliance with Section 2.1. All testing pursuant to this section shall be
6 performed by an independent laboratory in accordance with testing protocol EPA 3050B (the
7 “Test Protocol”). At the request of CEH, the results of the testing performed pursuant to this
8 section shall be made available to CEH on a confidential basis.

9 **2.3.1 Testing Frequency.** For each of the first two orders of Products
10 purchased from each of Defendant’s suppliers after the Compliance Date, Defendant shall
11 randomly select and test four Products purchased from each supplier of the Products intended for
12 sale in California. Following the testing of the first two orders as described above, Defendant
13 shall, for each subsequent order, randomly select and test two Products purchased in that
14 calendar year for sale in California from each supplier of the Products.

15 **2.3.2 Products That Contain Lead Pursuant to Defendant’s Testing.**
16 If the results of the testing required pursuant to Section 2.3 demonstrates Lead levels in excess of
17 the requirements of Section 2.1 in a Product, Defendant shall: (1) refuse to accept all of the
18 Products that were purchased under the particular purchase order; (2) send a notice to the
19 supplier explaining that such Products do not comply with the suppliers’ certification; and (3)
20 apply the testing frequency set forth in 2.3.1 as though the next shipment from the supplier were
21 the first one following the Compliance Date.

22 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
23 testing of the Products. Any such testing shall be conducted by CEH at an independent
24 laboratory, in accordance with the Test Protocol identified in Section 2.3 above. In the event
25 that CEH’s testing demonstrates Lead levels in excess of the requirements of Section 2.1
26 subsequent to the Compliance Date, CEH shall inform Defendant of the test results, including
27 information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30
28 days following such notice, provide CEH, at the address listed in Section 10, with the

1 certification and testing information demonstrating its compliance with Sections 2.2 and 2.3 of
2 this Consent Judgment. If Defendant fails to provide CEH with information demonstrating that
3 it complied with Sections 2.2 and/or 2.3, Defendant shall be liable for stipulated payments in lieu
4 of penalties for Products for which CEH produces tests demonstrating the presence of Lead in
5 the Products. The payments shall be made to CEH and used for the purposes described in
6 Section 3.1.

7 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
8 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount
9 shall be as follows for each unit of Product for which CEH produces a test result showing that
10 Defendant sold a Product that exceeds the Lead content requirements of Section 2.1 after the
11 Compliance Date:

12	First Occurrence:	\$500
13	Second Occurrence:	\$750
14	Third Occurrence:	\$1,000
15	Thereafter:	\$2,500

16 **2.4.2 Good Faith Independent Laboratory Test Result Conducted by**
17 **Defendant as to Any Supplier Showing Compliance With Section 2.1 Deemed Compliant**
18 **and Shall Exempt Defendant From Stipulated Payments in Lieu of Penalties.** If Defendant
19 relies on a laboratory test result conducted in accordance with the Test Protocol by an
20 independent laboratory that CEH has approved (note: CEH has approved the Bureau Veritas
21 laboratory test report submitted by Defendant earlier in this matter, and may approve other
22 lab(s)) conducted as to Products showing that such Products comply with the Lead content
23 requirements of Section 2.1 herein from any supplier, and provides a copy of such independent
24 laboratory test to CEH within 30 days of notice or request from CEH, such laboratory test result
25 shall be deemed good faith compliance and shall exempt Defendant from stipulated payments in
26 lieu of penalties or any other liability to CEH.

27 **3. SETTLEMENT PAYMENTS**

28 **3.1 Payments From Defendant.** All of the payments made pursuant to this

1 Section 3 shall be delivered to the offices of the Lexington Law Group at the address set forth in
2 Section 10 below, and shall be made payable and allocated pursuant to this Section 3.

3 **3.2 Civil Penalty.** Defendant shall pay \$1,500 as a civil penalty pursuant to
4 Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with
5 Health & Safety Code § 25249.12. The penalty check shall be made payable to the Center For
6 Environmental Health and shall be due within 10 days of entry of the Consent Judgment.

7 **3.3 Monetary Payment in Lieu of Civil Penalty.** Defendant shall pay to
8 CEH \$9,000 in lieu of penalty pursuant to Health & Safety Code § 25249.7(b). CEH shall use
9 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
10 this work, CEH intends to conduct periodic testing of the Products as set forth in Section 2.4. In
11 addition, as part of its Community Environmental Action and Justice Fund, CEH will use four
12 percent of such funds to award grants to grassroots environmental justice groups working to
13 educate and protect people from exposures to toxic chemicals. The method of selection of such
14 groups can be found at the CEH web site at www.ceh.org/justicefund. The payment in lieu of
15 penalty check shall be made payable to the Center For Environmental Health. This payment
16 shall be due in two installments as set forth below:

17 **3.3.1 First Installment of Payment in Lieu of Penalty.** The first
18 installment of \$6,000 shall be due within 10 days of entry of this Consent Judgment.

19 **3.3.2 Second Installment of Payment in Lieu of Penalty.** The second
20 installment of \$3,000 shall be due within 10 days of the Additional Reformulation Date.
21 However, should Defendant achieve the Additional Reformulation Standard by August 14, 2011,
22 this payment will be waived.

23 **3.4 Attorneys' Fees and Costs.** Defendant shall pay \$12,000 to reimburse
24 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
25 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,
26 litigating and negotiating a settlement in the public interest. The attorneys' fees and cost
27 reimbursement check shall be made payable to the Lexington Law Group and shall be due within
28 10 days of entry of the Consent Judgment.

1 **4. MODIFICATION OF CONSENT JUDGMENT**

2 **4.1** This Consent Judgment may be modified by written agreement of CEH
3 and Defendant, or upon motion of CEH or Defendant as provided by law.

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 **5.1 Enforcement Procedures.** Prior to bringing any motion or order to show
6 cause to enforce the terms of this Consent Judgment, a Party seeking to enforce shall provide the
7 violating party thirty (30) days advanced written notice of the alleged violation. The Parties
8 shall meet and confer during such thirty (30) day period in an effort to try to reach agreement on
9 an appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking
10 to enforce may, by new action, motion or order to show cause before the Superior Court of
11 Marin, seek to enforce the terms and conditions contained in this Consent Judgment. Should the
12 Party seeking to enforce prevail on any motion or application under this section, such Party shall
13 be entitled to recover its reasonable attorneys’ fees and costs associated with such motion or
14 order to show cause from the non-moving Party.

15 **6. APPLICATION OF CONSENT JUDGMENT**

16 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
17 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
18 them.

19 **7. CLAIMS COVERED AND RELEASE OF CLAIMS**

20 **7.1** This Consent Judgment is a full, final and binding resolution between
21 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
22 the Complaint against Defendant (including any claims that could be asserted in connection with
23 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,
24 directors, officers, employees, agents, attorneys, distributors, customers or retailers (collectively,
25 “Defendant Releasees”) based on failure to warn about alleged exposures to Lead resulting from
26 any Products manufactured, distributed or sold by Defendant (“Covered Claims”) on or prior to
27 the date of entry of this Consent Judgment. CEH, its directors, officers, employees and attorneys
28 hereby release all Covered Claims against Defendant Releasees. Compliance with the terms of

1 this Consent Judgment constitutes compliance with Proposition 65 for purposes of Lead
2 exposures from the Products.

3 **8. GOVERNING LAW**

4 **8.1** The terms of this Consent Judgment shall be governed by the laws of the
5 State of California.

6 **9. RETENTION OF JURISDICTION**

7 **9.1** This Court shall retain jurisdiction of this matter to implement and enforce
8 the terms this Consent Judgment.

9 **10. PROVISION OF NOTICE**

10 **10.1** All notices required pursuant to this Consent Judgment and
11 correspondence shall be sent to the following:

12 For CEH:

13 Lisa Burger
14 Lexington Law Group
15 1627 Irving Street
San Francisco, CA 94122

16 For Defendant:

17 James C. Tuttle
18 Law Offices of James C. Tuttle
82 Wall Street, Suite 1105
19 New York, NY 10005

20 **11. ATTORNEYS' FEES**

21 **11.1** A Party who unsuccessfully brings or contests an action arising out of this
22 Consent Judgment shall be required to pay the prevailing Party's reasonable attorneys' fees and
23 costs unless the unsuccessful Party has acted with substantial justification. For purposes of this
24 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
25 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016.010, *et seq.*

26 **11.2** Notwithstanding Section 11.1, a Party who prevails in a contested
27 enforcement action brought pursuant to Section 5.1 may seek an award of attorneys' fees
28 pursuant to Code of Civil Procedure § 1021.5 against a Party that acted with substantial

1 justification. The Party seeking such an award shall bear the burden of meeting all of the
2 elements of § 1021.5, and this provision shall not be construed as altering any procedural or
3 substantive requirements for obtaining such an award.

4 **11.3** Nothing in this Section 11 shall preclude a Party from seeking an award of
5 sanctions pursuant to law.

6 **12. COURT APPROVAL**

7 **12.1** CEH will comply with the settlement notice provisions of Health & Safety
8 Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003 by preparing and
9 filing a motion for approval of this Consent Judgment and Defendant shall support approval of
10 such motion.

11 **13. COUNTERPARTS**

12 **13.1** The stipulations to this Consent Judgment may be executed in
13 counterparts.

14 **14. AUTHORIZATION**

15 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully
16 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
17 into and execute the Consent Judgment on behalf of the party represented and legally bind that
18 party. The undersigned have read, understand and agree to all of the terms and conditions of this
19 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
20 costs.

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1 **AGREED TO:**

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3 **CENTER FOR ENVIRONMENTAL HEALTH**

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CHARLIE PIZZANO

8

[Name]

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ASSOCIATE DIRECTOR

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[Title]

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13 **SAKAR INTERNATIONAL, INC.**

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1 AGREED TO:

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3 CENTER FOR ENVIRONMENTAL HEALTH

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13 SAKAR INTERNATIONAL, INC.

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JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Sakar International, Inc., the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: _____

Judge, Superior Court of the State of California