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CENTER FOR ENVIRONMENTAL HEALTH

FILED
MAY - 4 2009
KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

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9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF MARIN

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

Case No. CIV085383

12)
13 Plaintiff,)

14 v.)


~~PROPOSED~~ CONSENT JUDGMENT
RE: WILSON SPORTING GOODS CO.

15 FRANKLIN SPORTS, INC.; WILSON)
SPORTING GOODS CO.; and Defendant)
16 DOES 1 through 200, inclusive,)

17 Defendants.)
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1 **1. INTRODUCTION**

2 **1.1** On January 11, 2008, plaintiff Center for Environmental Health (“CEH”),
3 a non-profit corporation acting in the public interest, served Wilson Sporting Goods Co.
4 (“Defendant”), and the appropriate public enforcement agencies with the requisite 60-Day Notice
5 (the “Notice”) alleging that Defendant was in violation of Proposition 65.

6 **1.2** On November 3, 2008, CEH filed a complaint in the above-captioned
7 action, for civil penalties and injunctive relief pursuant to the provisions of Cal. Health & Safety
8 Code §25249.5, et seq. (“Proposition 65”) naming Wilson Sporting Goods Co. as defendant.

9 **1.3** Defendant is a corporation that employs ten or more persons.

10 **1.4** Defendant manufactured, distributed and/or sold volleyballs that are made
11 of or contain components that are made of vinyl (a “Product” or the “Products”) in the State of
12 California.

13 **1.5** CEH’s Notice and Complaint allege that Defendant exposes people who
14 use or otherwise handle the Products to lead and/or lead compounds (collectively, “Lead”),
15 chemicals known to the State of California to cause cancer, birth defects and other reproductive
16 harm, without first providing clear and reasonable warning to such persons regarding the
17 carcinogenicity and reproductive toxicity of Lead. The Notice and Complaint allege that
18 Defendant’s conduct violates Health & Safety Code §25249.6, the warning provision of
19 Proposition 65. Defendant disputes and denies the allegations of the Notice and Complaint.

20 **1.6** For purposes of this Consent Judgment only, CEH and Wilson Sporting
21 Goods Co. (together, the “Parties”) stipulate that this Court has jurisdiction over the subject
22 matter of the violations alleged in CEH’s Complaint and personal jurisdiction over the Defendant
23 as to the acts alleged in CEH’s Complaint, that venue is proper in the County of Marin, and that
24 this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein.

26 **1.7** The Parties enter into this Consent Judgment pursuant to a settlement of
27 certain disputed claims between the Parties as alleged in the Complaint. By executing this
28 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties’

1 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
2 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
3 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
4 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
5 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
6 any other or future legal proceedings.

7 **2. COMPLIANCE - REFORMULATION AND TESTING**

8 **2.1 Lead Level.** As of April 15, 2009 (the "Compliance Date"), Defendant
9 shall not manufacture, distribute, ship, or sell in the State of California any Product that contains
10 Lead in concentrations that exceed 200 parts per million ("ppm"), unless such Product contains
11 the following Warning Statement on the Product or its packaging:

12 **WARNING: This product contains lead, a chemical known to the State of**
13 **California to cause cancer, birth defects and other**
14 **reproductive harm. Wash hands thoroughly after using this**
15 **product.**

16 The Warning Statement shall be prominently placed on the front of the outside of the packaging
17 or directly on the Product, and shall be displayed in a separate outlined box that contains no other
18 language. The Warning Statement must be formatted and displayed with such conspicuousness,
19 as compared with other words, statements, designs, or devices, as to render it likely to be read
20 and understood by an ordinary individual under customary conditions of purchase or use. The
21 Warning Statement shall not be preceded, followed, or surrounded by words, symbols, or other
22 matter that reduces its conspicuousness or that introduces, modifies, qualifies, or explains the
23 required text, such as "legal notice required by law." The parties agree that the sample label
24 attached hereto as Exhibit A satisfies this requirement. The Warning Statement shall not be
25 applied to Products that contain Lead in concentrations of 200 ppm or less.

26 **2.2 Confirmation of Level From Suppliers.** Defendant shall notify its
27 suppliers of the Products supplied for distribution, shipment or sale by Defendant in the State of
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1 California that such Products shall not contain Lead in concentrations exceeding 200 ppm.
2 Defendant shall obtain written confirmation from suppliers of the Products supplied for
3 distribution, shipment or sale by Defendant in the State of California on at least an annual basis
4 (during the years in which testing is required under Section 2.3.1) stating that such Products do
5 not contain Lead in concentrations exceeding 200 ppm.

6 **2.3 Testing.** In order to ensure compliance with the requirements of Section
7 2.1, Defendant shall conduct testing to confirm that Products it manufactures, distributes or sells
8 in the State of California do not contain Lead in concentrations that exceed 200 ppm. All testing
9 pursuant to this Section shall be performed by an independent laboratory in accordance with
10 EPA Method 3050B (the "Test Protocol"). The results of the testing performed pursuant to this
11 Section shall be made available to CEH upon request.

12 **2.3.1 Testing Frequency.** For each of the first two orders of Products
13 purchased from each of Defendant's suppliers after the Compliance Date, Defendant shall
14 randomly select and test four representative Products purchased from each supplier of the
15 Products. Following the first two orders, during each calendar year, Defendant shall at a
16 minimum randomly select and test two other representative Products of the Products purchased
17 from each supplier of the Products. Testing under this Section 2.3 shall continue until such time
18 as Defendant has produced three consecutive years of test data demonstrating compliance with
19 the 200 ppm reformulation standard. Defendant shall provide written notice to CEH when it has
20 completed the testing requirement hereunder.

21 **2.3.2 Products that Exceed Stipulated Levels Pursuant to**
22 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show levels of
23 lead exceeding 200 ppm, Defendant shall: (1) ensure that all of the Products that were purchased
24 under the particular purchase, when sold in the State of California, contain the Warning
25 Statement set forth in Section 2.1; and (2) restart the testing requirement by applying the testing
26 frequency set forth in 2.3.1 as though the next shipment from the supplier were the first one
27 following the Compliance Date.

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1 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing
2 of the Products. In the event that CEH's testing demonstrates Lead levels in excess of 200 ppm
3 in violation of this Section 2, CEH may enforce this agreement pursuant to Section 5.

4 **3. SETTLEMENT PAYMENTS**

5 **3.1** Within five days of entry of this Consent Judgment, Defendant shall pay a
6 total of \$60,000 as a settlement payment. This total shall be paid in two separate checks
7 delivered to the offices of the Lexington Law Group, LLP at the address set forth in section 12.1
8 below and made payable and allocated as follows.

9 **3.1.1 Monetary Payment in Lieu of Penalty:** \$20,000 shall be paid to
10 CEH in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). This payment
11 shall be made by check payable to Center for Environmental Health. CEH shall use such funds
12 to continue its work protecting people from exposures to toxic chemicals. As part of this work,
13 CEH may conduct periodic testing of the Products as set forth in section 2.4.

14 **3.1.2 Attorneys' Fees and Costs:** \$40,000 shall be used to reimburse
15 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
16 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,
17 litigating and negotiating a settlement in the public interest. This payment shall be made by
18 check payable to Lexington Law Group.

19 **4. MODIFICATION OF CONSENT JUDGMENT; CHANGE IN LAW**

20 **4.1** This Consent Judgment may be modified by written agreement of the
21 Parties, or upon motion of CEH or Defendant as provided by law.

22 **4.2** Upon any change in federal or state law that affects in any way a Party's
23 obligations hereunder, whether by final court decision, legislative action, regulatory action or
24 otherwise, a Party may file a motion to amend this Consent Judgment as provided by law.

25 **5. ENFORCEMENT OF CONSENT JUDGMENT**

26 **5.1** Either party may, by motion or application for an order to show cause,
27 enforce the terms and conditions contained in this Consent Judgment. The prevailing party on
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1 any motion or application under this Section shall be entitled to recover its reasonable
2 investigation fees and costs, attorneys' fees, and any other costs associated with such motion or
3 application from the other party.

4 **6. APPLICATION OF CONSENT JUDGMENT**

5 **6.1** This Consent Judgment shall apply to and be binding upon the Parties
6 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of
7 them.

8 **7. CLAIMS COVERED**

9 **7.1** This Consent Judgment is a full, final and binding resolution between
10 CEH and Defendant of any violation of Proposition 65 that was or could have been asserted in
11 the 60-Day Notice or Complaint against Defendant (including any claims that could be asserted
12 in connection with any of the Products covered by this Consent Judgment) or their parents,
13 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, licensors, distributors, or
14 customers (collectively, "Defendant Releasees") based on the failure to warn about alleged
15 Proposition 65 exposures to Lead with respect to any Products manufactured, distributed or sold
16 by Defendant ("Covered Claims") on or prior to the date of entry of this Consent Judgment. All
17 Covered Claims regarding the Products are hereby released and discharged. Compliance with
18 the terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of
19 Lead exposures from the Products in the future.

20 **8. SEVERABILITY**

21 **8.1** In the event that any of the provisions of this Consent Judgment are held
22 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
23 affected.

24 **9. SPECIFIC PERFORMANCE**

25 **9.1** The parties expressly recognize that Defendant's obligations under this
26 Consent Judgment are unique. In the event that Defendant is found to be in breach of this
27 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the Parties agree
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1 that it would be extremely impracticable to measure the resulting damages and that such breach
2 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
3 remedies, may sue in equity for specific performance, and Defendant expressly waives the
4 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 the
7 State of California.

8 **11. RETENTION OF JURISDICTION**

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

11 **12. PROVISION OF NOTICE**

12 **12.1** All notices required pursuant to this Consent Judgment and
13 correspondence shall be sent to the following:

14 For CEH:

Eric S. Somers
Lexington Law Group, LLP
1627 Irving Street
San Francisco, CA 94122

17 For Defendant:

Michael R. Levinson
Seyfarth Shaw LLP
Suite 2400
131 South Dearborn Street
Chicago, IL 60603

20 **13. COURT APPROVAL**

21 **13.1** CEH will comply with the settlement notice provisions of Health and
22 Safety Code §25249.7(f) and Title 11 of the California Code of Regulations §3003. CEH will
23 prepare a Motion for Approval of this Consent Judgment. Defendant shall support approval of
24 this Consent Judgment by the Court.

25 **13.2** If this Consent Judgment is not approved by the Court, it shall be of no
26 further force and effect. If this Consent Judgment is appealed, with the exception of the
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1 injunctive relief provisions in Section 2, above, which remain in effect during any appeal, it does
2 not become effective and has no force or effect until all issues on appeal are resolved.

3 **14. EXECUTION AND COUNTERPARTS**

4 **14.1** The stipulations to this Consent Judgment may be executed in counterparts
5 and by means of facsimile, which taken together shall be deemed to constitute one document.

6 **15. AUTHORIZATION**

7 **15.1** Each signatory to this Consent Judgment certifies that he or she is fully
8 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
9 into and execute the Consent Judgment on behalf of the party represented and legally bind that
10 party. The undersigned have read, understand and agree to all of the terms and conditions of this
11 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
12 costs.

13 **AGREED TO:**

14 CENTER FOR ENVIRONMENTAL HEALTH

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Charlie Pizarro, Associate Director
Center for Environmental Health

Dated: _____

3/4/09

WILSON SPORTING GOODS CO.

Dated: _____

[Printed Name]

[Title]

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10 party. The undersigned have read, understand and agree to all of the terms and conditions of this
11 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
12 costs.

13 **AGREED TO:**

14 CENTER FOR ENVIRONMENTAL HEALTH

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16 _____
17 Charlie Pizarro, Associate Director
18 Center for Environmental Health

Dated: _____

19 WILSON SPORTING GOODS CO.

20 _____
21 *Doug Guenther*
22 _____

Dated: 4-MAR-09

23 DOUG GUENTHER
24 [Printed Name]

25 _____
26 V.P. OF R+D
27 [Title]

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ORDER AND JUDGMENT

Based upon the stipulated Consent Judgment between CEH and Wilson Sporting Goods Co., the settlement is approved and the clerk is hereby directed to enter judgment in accordance with the terms herein.

Dated: **MAY - 4 2009**

JOHN A. SUTRO, JR.
Judge, Superior Court of the State of California

EXHIBIT A

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WARNING
This product contains lead,
a chemical known to the
State of California to cause
cancer, birth defects and
other reproductive harm.
Wash hands thoroughly
after using this product.