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6 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH

**ENDORSED
FILED**
San Francisco County Superior Court

APR 23 2009

GORDON PARK-LI, Clerk
BY: ERICKA LARNAUTI
Deputy Clerk

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

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12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 Plaintiff,)
14 v.)
15)
16 ACME UNITED CORPORATION; ADENNA)
INC.; BECTON, DICKINSON & COMPANY;)
17 BETTY DAIN CREATIONS, INC.;)
DURASAFE INC.; IMPACT PRODUCTS,)
18 LLC; INVACARE CORPORATION;)
MICROFLEX CORPORATION; SHELBY)
19 GROUP INTERNATIONAL DBA MCR)
SAFETY; UNITED STATIONERS SUPPLY)
20 CO.; and Defendant DOES 1 through 200,)
inclusive,)
21)
22 Defendants.)

Case No. CGC-08-482792

**[PROPOSED] CONSENT JUDGMENT
RE: INVACARE CORPORATION**

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1 **1. INTRODUCTION**

2 **1.1** On December 9, 2008, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint entitled *Center*
4 *for Environmental Health v. Acme United Corp., et al.*, San Francisco Superior Court Case No.
5 CGC-08-482792 (the “CEH Action”), for civil penalties and injunctive relief pursuant to the
6 provisions of Cal. Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”), naming Invacare
7 Corporation as a defendant.

8 **1.2** Invacare Corporation (“Defendant”) is a corporation that employs 10 or
9 more persons and manufactured, distributed and/or sold vinyl gloves (the “Products”) in the
10 State of California.

11 **1.3** On or about August 26, 2008, CEH served Defendant and the appropriate
12 public enforcement agencies with the requisite 60-day Notice (the “Notice”) alleging that
13 Defendant was in violation of Proposition 65. CEH’s Notice and the Complaint in the CEH
14 Action allege that Defendant exposes people who use or otherwise handle the Products to di(2-
15 ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause cancer,
16 birth defects and other reproductive harm, without first providing clear and reasonable warning
17 to such persons regarding the carcinogenicity and reproductive toxicity of DEHP. The Notice
18 and Complaint allege that Defendant’s conduct violates Health & Safety Code § 25249.6, the
19 warning provision of Proposition 65. Defendant disputes such allegations and asserts that all of
20 its products are safe and comply with all applicable laws.

21 **1.4** For purposes of this Consent Judgment only, the parties stipulate that this
22 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
23 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is
24 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
25 Judgment as a full and final resolution of all claims which were or could have been raised in the
26 Complaint based on the facts alleged therein.

27 **1.5** The Parties enter into this Consent Judgment pursuant to a settlement of
28 certain disputed claims between the Parties as alleged in the Complaint. By executing this

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

8 **2. COMPLIANCE - REFORMULATION**

9 **2.1 Reformulation Standard – Removal of DEHP.** After 60-days following
10 the entry of this Consent Judgment (the “Compliance Date”), Defendant shall not manufacture,
11 distribute, ship, or sell, or cause to be manufactured, distributed or sold, any Product that
12 contains in excess of trace amounts of DEHP. For purposes of this Consent Judgment only, “in
13 excess of trace amounts” is more than 200 parts per million (“ppm”). In reformulating the
14 Products to remove DEHP, Defendant may not use butyl benzyl phthalate (“BBP”), di-n-hexyl
15 phthalate (“DnHP”), di-n-butyl phthalate (“DBP”) or di-isodecyl phthalate (“DIDP”) in excess of
16 trace amounts. DEHP, BBP, DnHP, DBP and DIDP are together referred to herein as “Listed
17 Phthalates.”

18 **2.2 Certification From Suppliers.** Defendant shall issue specifications to its
19 suppliers requiring that the Products shall not contain DEHP or any other Listed Phthalate in
20 excess of trace amounts. Defendant shall obtain written certification from its suppliers of the
21 Products certifying that the Products do not contain DEHP.

22 **2.3 Defendant’s Testing.** In order to ensure compliance with the
23 requirements of Section 2.1, Defendant shall cause to be conducted testing to confirm that the
24 Products do not contain in excess of trace amounts of DEHP. Testing shall be conducted in
25 compliance with Section 2.1. All testing pursuant to this section shall be performed by an
26 independent laboratory in accordance with both of the following test protocols: (1) EPA
27 SW8270C; and (2) EPA SW3580A (together referred to as the “Test Protocols”). At the request
28 of CEH, the results of the testing performed pursuant to this section shall be made available to

1 CEH on a confidential basis.

2 **2.3.1 Testing Frequency.** For each of the first two orders of Products
3 purchased from each of Defendant's suppliers after the Compliance Date, Defendant shall
4 randomly select and test the greater of 0.1% (one-tenth of one percent) or eight, but in no case
5 more than ten, of the total Products purchased from each supplier of the Products intended for
6 sale in California. Following the testing of the first two orders as described above, Defendant
7 shall, for each subsequent order, randomly select and test the greater of 0.05% (one-twentieth of
8 one percent) or four, but in no case more than five, of the total Products purchased in that
9 calendar year for sale in California from each supplier of the Products.

10 **2.3.2 Products That Contain Listed Phthalates Pursuant to**
11 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show Listed
12 Phthalates in excess of trace amounts in a Product, Defendant shall: (1) refuse to accept all of the
13 Products that were purchased under the particular purchase order; (2) send a notice to the
14 supplier explaining that such Products do not comply with the suppliers' certification; and (3)
15 apply the testing frequency set forth in 2.3.1 as though the next shipment from the supplier were
16 the first one following the Compliance Date.

17 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
18 testing of the Products. Any such testing shall be conducted by CEH at an independent
19 laboratory, in accordance with both of the Test Protocols. In the event that CEH's testing
20 demonstrates that the Products contain Listed Phthalates in excess of trace amounts subsequent
21 to the Compliance Date, CEH shall inform Defendant of the test results, including information
22 sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30 days
23 following such notice, provide CEH, at the address listed in Section 11, with the certification and
24 testing information demonstrating its compliance with Sections 2.2 and 2.3 of this Consent
25 Judgment. If Defendant fails to provide CEH with information demonstrating that it complied
26 with Sections 2.2 and/or 2.3, Defendant shall be liable for stipulated payments in lieu of
27 penalties for Products for which CEH produces tests demonstrating the presence of Listed
28 Phthalates in the Products. The payments shall be made to CEH and used for the purposes

1 described in Section 3.1.

2 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
3 payments in lieu of penalties are warranted under section 2.4, the stipulated payment amount
4 shall be as follows for each unit of Product for which CEH produces a test result showing that
5 Defendant sold a Product containing Listed Phthalates after the Compliance Date:

6	First Occurrence:	\$500
7	Second Occurrence:	\$750
8	Third Occurrence:	\$1,000
9	Thereafter:	\$2,500

10 **3. SETTLEMENT PAYMENTS**

11 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
12 \$10,000 in lieu of any civil penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall
13 use such funds to continue its work protecting people from exposures to toxic chemicals. As
14 part of this work, CEH intends to conduct periodic testing of the Products as set forth in Section
15 2.4. The payment required under this section shall be made payable to CEH.

16 **3.2 Attorneys' Fees and Costs.** Defendant shall pay \$20,000 to reimburse
17 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
18 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,
19 litigating and negotiating a settlement in the public interest. The payment required under this
20 section shall be made payable to Lexington Law Group, LLP.

21 **3.3 Delivery of payments.** All payments made pursuant to this Section 3
22 shall be delivered to the Lexington Law Group, LLP at the address set forth in Section 11.1 and
23 shall be delivered within 10 days of entry of this Consent Judgment.

24 **4. MODIFICATION OF CONSENT JUDGMENT**

25 **4.1** This Consent Judgment may be modified by written agreement of CEH
26 and Defendant, or upon motion of CEH or Defendant as provided by law.

27 **5. ENFORCEMENT OF CONSENT JUDGMENT**

28 **5.1** CEH may, by motion or application for an order to show cause, enforce

1 the terms and conditions contained in this Consent Judgment. Should CEH prevail on any such
2 motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with
3 enforcing the Consent Judgment.

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 AND RELEASE OF CLAIMS**

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 Complaint against Defendant (including any claims that could be asserted in connection with
12 any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates,
13 directors, officers, employees, agents, attorneys, distributors, customers or retailers (collectively,
14 "Defendant Releasees") based on failure to warn about alleged exposures to DEHP resulting
15 from any Products manufactured, distributed or sold by Defendant ("Covered Claims") on or
16 prior to the date of entry of this Consent Judgment. CEH, its directors, officers, employees and
17 attorneys hereby release all Covered Claims against Defendant Releasees. Compliance with the
18 terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of
19 DEHP exposures from the Products.

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. GOVERNING LAW**

25 **9.1** The terms of this Consent Judgment shall be governed by the laws of the
26 State of California.

27 **10. RETENTION OF JURISDICTION**

28 **10.1** This Court shall retain jurisdiction of this matter to implement and enforce

1 the terms this Consent Judgment.

2 **11. PROVISION OF NOTICE**

3 **11.1** All notices required pursuant to this Consent Judgment and
4 correspondence shall be sent to the following:

5 For CEH:

6 Mark N. Todzo
7 Lexington Law Group, LLP
8 1627 Irving Street
9 San Francisco, CA 94122

10 For Defendant:

11 Jeffrey Embelton
12 Mansour, Gavin, Gerlack & Manos Co., L.P.A.
13 55 Public Square, Suite 2150
14 Cleveland, Ohio 44113-1994

15 **12. COURT APPROVAL**

16 **12.1** CEH will comply with the settlement notice provisions of Health and
17 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

18 **13. EXECUTION AND COUNTERPARTS**

19 **13.1** The stipulations to this Consent Judgment may be executed in
20 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
21 document.

22 **14. AUTHORIZATION**

23 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully
24 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter
25 into and execute the Consent Judgment on behalf of the party represented and legally bind that
26 party. The undersigned have read, understand and agree to all of the terms and conditions of this
27 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and
28 costs.

1 **AGREED TO:**


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3 **CENTER FOR ENVIRONMENTAL HEALTH**

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Dated: 2/20/09

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Michael Green, Executive Director
Center for Environmental Health

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CHARLIE PIZARLO, ASSOCIATE

9 **INVACARE CORPORATION**

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Dated: _____

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[Name]

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[Title]

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1 AGREED TO:

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3 CENTER FOR ENVIRONMENTAL HEALTH

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7 Michael Green, Executive Director
8 Center for Environmental Health

Dated: _____

9 INVACARE CORPORATION

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Anthony C. LaPlaca

Dated: Feb 20, 2009

Anthony C. LaPlaca
[Name]

Senior Vice President + General Counsel
[Title]

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~~ORDER AND~~ JUDGMENT

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

Dated: APR 23 2009

CHARLOTTE WALTER WOOLARD
Judge, Superior Court of the State of California