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Clifford Chanler, State Bar No. 135534
Christopher Tuttle, State Bar No. 264545
THE CHANLER GROUP
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ENDORSED
2016 OCT 13 A 9:25
Sharon Willesell
Court of the Superior Court
County of Santa Clara

Attorneys for Plaintiff
MARK MOORBERG

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,

Plaintiff,

v.

YONEX CORPORATION, *et al.*,

Defendants.

Case No. 115CV287636

**[PROPOSED] JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: October 13, 2016
Time: 9:00 a.m.
Dept. 3
Judge: Hon. William J. Elfving

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Plaintiff Mark Moorberg and Defendant Yonex Corporation, having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a consent judgment, and following this Court's issuance of an order approving their Proposition 65 settlement and Consent Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the terms of the settlement under Code of Civil Procedure section 664.6.

IT IS SO ORDERED.

OCT 13 2016

Dated: _____

William J. Elfving

JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

1 Cliff Chanler, State Bar No. 135534
2 Chris Tuttle, State Bar No. 264545
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 MARK MOORBERG

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF SANTA CLARA

13 UNLIMITED CIVIL JURISDICTION

14 MARK MOORBERG,

15 Plaintiff,

16 v.

17 YONEX CORPORATION; *et al.*,

18 Defendants.

Case No. 115CV287636

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

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CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark Moorberg
4 (“Moorberg”) and defendant Yonex Corporation (“Yonex”), with Moorberg and Yonex each
5 referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Moorberg is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Yonex employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moorberg alleges that Yonex manufactures, imports, sells and/or distributes for sale in
16 California, vinyl/PVC racquet cases containing di(2-ethylhexyl)phthalate (“DEHP”), and that it
17 does so without providing the health hazard warning that Moorberg alleges is required by
18 Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are racquets with vinyl/PVC cases
21 containing DEHP, including, but not limited to, the *Yonex Racquet Case, B5009, #04991188, UPC*
22 *#0 08235 03394 7* (collectively, “Products”).

23 **1.6 Notice of Violation**

24 On June 26, 2015, Moorberg served Yonex and the requisite public enforcement agencies
25 with a 60-Day Notice of Violation (“Notice”), alleging that Yonex violated Proposition 65 when it
26 failed to warn its customers and consumers in California that the Products expose users to DEHP.

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1 To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
2 prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On November 2, 2015, Moorberg commenced the instant action, naming Yonex, among
5 others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 Yonex denies the material, factual, and legal allegations contained in the Notice and
8 Complaint, and maintains that all of the products that it has sold or distributed for sale in California,
9 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
10 Judgment shall be construed as an admission by Yonex of any fact, finding, conclusion of law,
11 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
12 construed as an admission by Yonex of any fact, finding, conclusion of law, issue of law, or
13 violation of law. This Section shall not, however, diminish or otherwise affect Yonex's obligations,
14 responsibilities, and duties under this Consent Judgment.

15 **1.9 Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
17 jurisdiction over Yonex as to the allegations contained in the Complaint, that venue is proper in the
18 County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this
19 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
22 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

23 **2. INJUNCTIVE SETTLEMENT TERMS**

24 Commencing on ninety (90) days after the Effective Date, and continuing thereafter, Yonex
25 agrees to only manufacture, distribute, or purchase for sale in or into California: (a) "Reformulated
26 Products", or (b) Products that are sold with a clear and reasonable health hazard warning, pursuant
27 to Section 2.2 below.

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2.1 Commitment to Reformulate or Warn

For purposes of this Settlement Agreement, "Reformulated Products" shall mean Products containing no more than 1,000 parts per million (0.1%) DEHP in any accessible component (i.e., any component that may be touched during use) when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

2.2 Clear and Reasonable Warnings

Yonex agrees that as of ninety (90) days after the Effective Date, all Products it sells and/or distributes in California which do not qualify as Reformulated Products, will bear a clear and reasonable warning pursuant to this Section. Yonex further agrees that the warning will be prominently placed with such conspicuousness when compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed to the packaging, label, tag, or directly to a Product sold in California and containing one of the following statements:

WARNING: This product contains DEHP, a chemical known to the State of California to cause birth defects or other reproductive harm.

or

WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

3. MONETARY SETTLEMENT TERMS

3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the claims referred to in this Consent Judgment, Yonex shall pay \$13,600 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California

1 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
2 penalty remitted to Moorberg. Moorberg’s counsel shall be responsible for remitting Yonex’s
3 penalty payment(s) under this Consent Judgment to OEHHA.

4 **3.1.1 Initial Civil Penalty.**

5 Yonex shall make an initial civil penalty payment of \$ 4,600. Yonex shall provide its
6 payment in a single check made payable to “Mark Moorberg, Client Trust Account” to be delivered
7 to the address provided in Section 3.4, below.

8 **3.1.2 Final Civil Penalty.**

9 On October 17, 2016, Yonex shall make a final civil penalty payment of \$9,000. Pursuant
10 to title 11 California Code of Regulations, section 3203(c), Moorberg agrees that the final civil
11 penalty payment shall be waived in its entirety if, no later than October 3, 2016, an officer of
12 Yonex provides Moorberg with a signed declaration certifying that all of the Products it ships for
13 sale or distributes for sale in California as of the date of its declaration are Reformulated Products,
14 and that Yonex will continue to offer only Reformulated Products in California in the future. The
15 option to certify early reformulation in lieu of making the final civil penalty payment otherwise
16 required by this Section is a material term, and time is of the essence. To obtain a waiver of the
17 final civil penalty, Yonex must deliver its declaration certifying reformulation to Moorberg’s
18 counsel at the address provided in Section 3.4, below.

19 **3.2 Reimbursement of Attorneys’ Fees and Costs**

20 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
21 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
22 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
23 the other settlement terms had been finalized, Yonex expressed a desire to resolve Moorberg’s fees
24 and costs. The Parties then negotiated a resolution of the compensation due to Moorberg and his
25 counsel under general contract principles and the private attorney general doctrine codified at
26 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
27 execution of this agreement and the Court’s approval of the same, but exclusive of fees and costs

1 on appeal, if any, Yonex shall reimburse Moorberg and his counsel \$30,000. Yonex's payment
2 shall be delivered to the address in Section 3.4 in the form of a check payable to "The Chanler
3 Group". The reimbursement shall cover all fees and costs incurred by Moorberg investigating,
4 bringing this matter to Yonex's attention, litigating, and negotiating a settlement of the matter in
5 the public interest.

6 **3.3 Payment Timing; Payments Held In Trust**

7 With the exception of the final civil penalty payment required by Section 3.1.2, Yonex
8 shall deliver all payments required by this Consent Judgment to its counsel within ten (10)
9 business days of the date that this agreement is fully executed by the Parties. Yonex's counsel shall
10 confirm receipt of settlement funds in writing to Moorberg's counsel and, thereafter, hold the
11 amounts paid in trust until such time as the Court grants the motion for approval of the Parties'
12 settlement contemplated by Section 5. Within five (5) business days of the Effective Date,
13 Yonex's counsel shall deliver all settlement payments it has held in trust to Moorberg's counsel at
14 the address provided in Section 3.4. In the event the final civil penalty payment required by
15 Section 3.1.2 becomes due prior to the Effective Date, then Yonex shall deliver the final civil
16 penalty payment to its attorney to be held in trust until, and disbursed within five (5) business days
17 after, the Effective Date.

18 **3.4 Payment Address**

19 All payments required by this Consent Judgment shall be delivered to the following
20 address:

21 The Chanler Group
22 Attn: Proposition 65 Controller
23 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Moorberg's Release of Proposition 65 Claims**

26 Moorberg, acting on his own behalf and in the public interest, releases Yonex and their
27 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
28

1 and attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or sell the
2 Products including, but not limited to, their downstream distributors, wholesalers, customers,
3 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
4 any violations arising under Proposition 65 for unwarned exposures to DEHP from the Products
5 manufactured, imported, distributed or sold by Yonex prior to the Effective Date, as set forth in the
6 Notice, that has been or could have been asserted against Releasees and Downstream Releasees.
7 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 by
8 Yonex with respect to the alleged or actual failure to warn about exposures to DEHP from Products
9 manufactured, sold or distributed for sale by Yonex after the Effective Date.

10 **4.2 Moorberg’s Individual Release of Claims**

11 Moorberg, in his individual capacity only and *not* in his representative capacity, also
12 provides a release to Defendants, Releasees, and Downstream Releasees which shall be effective as
13 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
14 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of any
15 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
16 alleged or actual exposures to DEHP in Products manufactured, imported, distributed or sold by
17 Yonex before the Effective Date.

18 **4.3 Yonex’s Release of Moorberg**

19 Yonex, on its own behalf and on behalf of its past and current agents, representatives,
20 attorneys, successors and/or assignees, hereby waives any and all claims against Moorberg and his
21 attorneys and other representatives, for any and all actions taken or statements made (or those that
22 could have been taken or made) by Moorberg and his attorneys and other representatives in the
23 course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with
24 respect to the Products.

25 **4.4 Mutual Waiver of California Civil Code Section 1542**

26 The Parties each acknowledge she/it is familiar with Section 1542 of the Civil Code, which
27 provides as follows:
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2 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
3 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
4 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

5 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
6 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
7 rights and benefits which they may have under, or which may be conferred upon them by the
8 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
9 law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
10 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

11 **5. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and
13 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
14 after it has been fully executed by the Parties. Moorberg and Yonex agree to support the entry of
15 this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely
16 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
17 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
18 motion Moorberg shall draft and file and Yonex shall support, including by appearing at the hearing
19 if so requested. If any third-party objection to the motion is filed, Moorberg and Yonex agree to
20 work together to file a reply and appear at any hearing. This provision is a material component of
21 the Consent Judgment and shall be treated as such in the event of a breach.

22 **6. SEVERABILITY**

23 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
24 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
25 remaining provisions shall not be adversely affected.
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1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
4 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Yonex
5 may provide Moorberg with written notice of any asserted change in the law, and shall have no
6 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
7 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Yonex
8 from its obligation to comply with any pertinent state or federal law or regulation.

9 **8. NOTICE**

10 Unless specified herein, all correspondence and notice required by this Consent Judgment
11 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
12 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
13 following addresses:

14 To Yonex:

15
16 Denis H. Oyakawa, Esq.
17 Emily L. Wallerstein, Esq.
18 Squire Patton Boggs (US) LLP
19 555 S. Flower St., 31st Floor
20 Los Angeles, CA 90071-2300

To Moorberg:

Attn: Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

21 Any Party may, from time to time, specify in writing to the other Party a change of address
22 to which all notices and other communications shall be sent.

23 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

24 This Consent Judgment may be executed in counterparts and by facsimile or portable
25 document format (pdf) signature, each of which shall be deemed an original and, all of which, when
26 taken together, shall constitute one and the same document.
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1 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

2 Moorberg and his counsel agree to comply with the reporting form requirements referenced
3 in California Health and Safety Code section 25249.7(f).

4 **11. MODIFICATION**

5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
6 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
7 any party and the entry of a modified Consent Judgment by the Court thereon.

8 **12. ENTIRE AGREEMENT**

9 This Consent Judgment contains the sole and entire agreement and understanding of the
10 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
11 negotiations, commitments, and understandings related hereto. No representations, oral or
12 otherwise, express or implied, other than those contained herein have been made by any Party
13 hereto. No other agreements not specifically referenced herein, oral or otherwise, shall be deemed
14 to exist or to bind any of the Parties.

15 **13. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment on behalf of their
17 respective Parties and have read, understood, and agree to all of the terms and conditions of this
18 Consent Judgment.

19
20 **AGREED TO:**

21 _____
22 MARK MOORBERG

23 Dated: August 4, 2016

AGREED TO:

YONEX CORPORATION

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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18 Consent Judgment.

19
20 **AGREED TO:**

21 _____
22 MARK MOORBERG

23 Dated: _____

AGREED TO:

_____ 
YONEX CORPORATION

By: Chitose Renje
(Print Name)

Its: President & CEO
(Title)

Dated: 8/3/2016