

FILED
San Francisco County Superior Court

SEP 12 2017

CLERK OF THE COURT

BY: Julia Sheen
Deputy Clerk

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12 Arthur Zivkovic

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

16 ARTHUR ZIVKOVIC, an individual,

17 Plaintiff,

18 v.

19 METROPOLITAN VACUUM CLEANER
20 COMPANY, a New Jersey corporation,
21 and DOES 1 through 100, inclusive,

22 Defendant.

Case No.: CGC 17-557831

~~PROPOSED~~ JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT

Reservation No.: 05260726-02

Date: July 26, 2017

Time: 9:30 a.m.

Dept.: 302

Judge: Hon. Harold E. Kahn

Case Filed: March 29, 2017

Trial Date: None Set

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~~PROPOSED~~ JUDGMENT PURSUANT TO PROP 65 SETTLEMENT AND CONSENT JUDGMENT

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Plaintiff Arthur Zivkovic and Defendant Metropolitan Vacuum Cleaner Company agreed through their respective counsel to enter judgment pursuant to the terms of their settlement in the form of a stipulated judgment ("Consent Judgment"). This Court issued an Order approving the Proposition 65 Settlement and Consent Judgment on 9/12/17.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, pursuant to Health and Safety Code section 25249.7(f), subdivision (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 A**. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure section 664.6.

IT IS SO ORDERED.

Dated: 9/12/17



JUDGE OF THE SUPERIOR COURT
HAROLD KAHN

EXHIBIT A

1 **NICHOLAS & TOMASEVIC, LLP**
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15 Attorneys for Plaintiff
16 Arthur Zivkovic

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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19 ARTHUR ZIVKOVIC, an individual,

20 Plaintiff,

21 v.

22 METROPOLITAN VACUUM CLEANER
23 COMPANY, INC., a New Jersey
24 corporation, and DOES 1 through 100,
25 inclusive,

26 Defendant.

Case No. CGC 17-557831

[PROPOSED] CONSENT JUDGMENT
AS TO METROPOLITAN VACUUM
CLEANER COMPANY, INC.

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Arthur Zivkovic,
4 ("Zivkovic") on the one hand, and Metropolitan Vacuum Cleaner Company, Inc., otherwise known
5 as Metrovac ("Defendant") on the other hand, with Zivkovic and Defendant individually referred
6 to as a "Party" and collectively as the "Parties."

7 **1.2 Plaintiff**

8 Zivkovic is an individual residing in California who seeks to promote awareness of
9 exposures to chemicals.

10 **1.3 Defendant**

11 Defendant 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, Health and Safety Code
13 section 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Zivkovic alleges that Defendant manufactures, imports, sells, or distributes for sale to
16 consumers in the State of California hoses containing phthalates including Di(2-
17 ethylhexyl)phthalate ("DEHP"); di-isodecyl phthalate ("DIDP"); and Diisononyl Phthalate
18 ("DINP"); ("the Chemicals") without first providing the clear and reasonable exposure warning
19 required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known
20 to the State of California to cause cancer and birth defects and other reproductive harm. DIDP is
21 listed pursuant to Proposition 65 as a chemical that is known to the State of California to cause
22 birth defects and other reproductive harm. DINP is listed pursuant to Proposition 65 as a chemical
23 that is known to the State of California to cause cancer.

24 **1.5 Product Description**

25 The products covered by this Consent Judgment are hoses containing some or all of the
26 Chemicals that are manufactured and/or distributed for authorized sale to consumers in California
27 by Defendant, including, but not limited to, the Metro Air Force PVC Standard Flexible Hose, 6
28 ft., Black Item Model # P101-276, ASIN B003WGUMTI ("Products"). The Products include

1 Products sold in Defendant's brand names (including those set forth above) and Products Defendant
2 manufactures and/or distributes for authorized sale in California under private label arrangements
3 entered into with retailers or others.

4 **1.6 Notice of Violation**

5 On or about December 7, 2016, Zivkovic served Defendant and certain requisite public
6 enforcement agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed
7 the recipients of Zivkovic's allegation that Defendant violated Proposition 65 by failing to warn its
8 customers and consumers in California that the Products expose users to the Chemicals.

9 **1.7 Complaint**

10 After the 60-day notice period was exhausted without an authorized public prosecutor of
11 Proposition 65 having asserted such claims, Zivkovic filed the instant action against Defendant
12 ("Complaint") for the alleged violations of Health and Safety Code section 25249.6 that are the
13 subject of the Notice.

14 **1.8 No Admission**

15 Defendant denies the material, factual, and legal allegations contained in the Notice and
16 maintains that all of the products it has manufactured, or distributed for authorized sale in
17 California, including the Products, have been, and are, in compliance with all laws, including
18 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant
19 of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with
20 this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding,
21 conclusion of law, issue of law, or violation of law, the same being specifically denied by
22 Defendant. This section shall not, however, diminish or otherwise affect Defendant's obligations,
23 responsibilities, and duties under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in the City
27 and County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions
28 of this Consent Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on
3 which Zivkovic serves notice on the Defendant and the Office of the California Attorney General
4 that the Court has approved and entered this Consent Judgment.

5 **2. INJUNCTIVE RELIEF; REFORMULATION AND WARNINGS**

6 By no later than the Effective Date, and continuing thereafter, Defendant shall provide clear and
7 reasonable warnings for all Products as set forth in subsections 1.5 for all products that do not
8 currently have warnings and that do not qualify as reformulated products. Each warning shall be
9 prominently placed with such conspicuousness as compared with other words, statements,
10 designs, or devices as to render it likely to be read and understood by an ordinary individual
11 under customary conditions before purchase or use. Each warning shall be provided in a manner
12 such that the consumer or user understands to which *specific* Product the warning applies, so as to
13 minimize the risk of consumer confusion.

14 **(a) Retail Store Sales.**

15 **(i) Product Labeling.** Defendant shall affix a warning to the packaging,
16 labeling, or directly on each Product packaging provided for sale in retail outlets in California that
17 states:

18 “Warning: This product contains one or more chemicals known to the State of California
19 to cause cancer , birth defects or other reproductive harm.”

20 On or before June 30, 2018, Defendant shall provide labeling that states as follows:

21
22 **⚠ WARNING:** This product can expose you to chemicals including DEHP, DINP, and /or DIDP
23 which are known to the State of California to cause cancer and birth defects or
24 other reproductive harm. . For more information go
25 to www.P65Warnings.ca.gov/product.

26 **(ii) Point-of-Sale Warnings.** Alternatively, Defendant may provide warning
27 signs in the form below to its customers in California with instructions to post the warnings in
28 close proximity to the point of display of the Products. Such instruction sent to Defendant
customers shall be sent by certified mail, return receipt requested.

1 "Warning: This product contains one or more chemicals known to the State of
2 California to cause cancer , birth defects or other reproductive harm."

3 On or before June 30, 2018, the labels shall state:

4 **⚠** **WARNING:** This product can expose you to chemicals including DEHP, DINP,
5 and /or DIDP which are known to the State of California to cause cancer and
6 birth defects or other reproductive harm. . For more information go
7 to www.P65Warnings.ca.gov/product.

8 **(b) Internet Website Warning.** A warning shall be given in conjunction with
9 the sale of the Products via the internet by Defendant, which warning shall appear either: (a) on
10 the same web page on which a Product is displayed; (b) on the same web page as the order form
11 for a Product; (c) on the same page as the price for any Product; or (d) on one or more web pages
12 displayed to a purchaser during the checkout process. The following warning statement shall be
13 used and shall appear in any of the above instances adjacent to or immediately following the
14 display, description, or price of the Product for which it is given in the same type size or larger
15 than the Product description text:

16 "Warning: This product contains one or more chemicals known to the State of
17 California to cause cancer , birth defects or other reproductive harm."

18 Alternatively, the designated symbol may appear adjacent to or immediately following the
19 display, description, or price of the Product for which a warning is being given, provided that the
20 following warning statement also appears elsewhere on the same web page, as follows:

21 Warning: This product contains chemicals known to the State of California to cause cancer and/or
22 reproductive harm."

23 On or before June 30, 2018, the Warning shall be changed to state:


24 **⚠** **WARNING:** This product can expose you to chemicals including DEHP, DINP, and /or DIDP
25 which are known to the State of California to cause cancer and birth defects or other reproductive harm. .
26 For more information go to www.P65Warnings.ca.gov/product.

27 **c. Distributors:**

1 Defendant shall inform its distributors of the labeling requirement for any product being
2 sold in or sent to California. They will advise the Distributors that each product, as defined in
3 Section 1.5, shall be labeled as follows:

4 "Warning: This product contains one or more chemicals known to the State of California to cause
5 cancer, birth defects or other reproductive harm."

6 On or before June 30, 2018, Defendant will advise the Distributors that the Warning shall
7 be changed to state:

8  **WARNING:** This product can expose you to chemicals including DEHP, DINP, and /or
9 DIDP which are known to the State of California to cause cancer and birth defects or other
10 reproductive harm. .

11
12 **3. STATUTORY PENALTY PAYMENTS**

13 3.1 **Initial Civil Penalty** Defendant shall pay \$4,000 in civil penalties pursuant to
14 California Health and Safety Code section 25249.7(b) in accordance with this section. This
15 penalty payment shall be allocated in accordance with California Health & Safety Code sections
16 25249.12(c)(l) and (d), with 75% of the funds remitted to the California Office of Environmental
17 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to
18 Zivkovic. More specifically, within ten (10) business days of the Effective Date, Defendant shall
19 issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$3,000
20 and with the memo line on the check indicating "Prop 65 Penalties—Zivkovic v. Metropolitan
21 Vacuum Cleaner Co." (Defendant may reference OEHHA's Tax Identification Number of 68-
22 0284486 for this check); and (b) Nicholas & Tomasevic LLP Trust Account" in the amount of
23 \$1,000 (for which Zivkovic shall provide Defendant a completed IRS Form W-9 with a tax
24 identification number within two days following the Effective Date, if not beforehand). These
25 checks shall be delivered to the addresses listed in Section 3.3 below.

26 **3.2 Payment Delivery**

27 (a) Payment to Zivkovic shall be delivered to the following address:

28 Craig Nicholas

1 Nicholas & Tomasevic
2 225 Broadway, 19th Floor
3 San Diego, CA 92101

4 (b) Payment to the OEHHA shall be delivered to one of the following addresses:

5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

11 Or

12 For Non-United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 1001 I Street
17 Sacramento, CA 95814

18 **4. REIMBURSEMENT OF FEES AND COSTS**

19 Defendant shall pay Zivkovic \$31,000 for fees and costs incurred as a result of investigating,
20 bringing this matter to Defendant's attention, and negotiating a settlement in the public interest.
21 Defendant shall make its checks payable to Nicholas & Tomasevic, LLP and shall deliver payment
22 to the address listed in Section 3(a) above within ten (10) business days of the Effective Date. To
23 facilitate timely payment, Zivkovic shall provide Defendant with a completed IRS Form W-9 with
24 Nicholas & Tomasevic's tax identification number within two days following the Effective Date if
25 not beforehand.

26 **5. CLAIMS COVERED AND RELEASED**

27 **5.1 Zivkovic's Public Release of Proposition 65 Claims**

28 Zivkovic, acting on his own behalf and in the public interest, releases Defendant, and its
affiliated entities, directors, officers, employees, and attorneys ("Defendant Releasees"), and each
entity to whom they directly or indirectly distribute or sell Products, including, but not limited to,
distributors, wholesalers, dealers, customers, retailers, franchisees, cooperative members, licensors,
and licensees (including, without limitation, Amazon.com, Inc.) (collectively, "Downstream

1 Defendant Releasees”), from all claims for violations of Proposition 65 based on exposures to the
2 Chemicals from Products manufactured and packaged by Defendant prior to the Effective Date.¹

3 **5.2 Zivkovic’s Private Releases of Claims**

4 Zivkovic, in his individual capacity only, also provides a release herein which shall be
5 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
6 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
7 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out
8 of alleged or actual exposures to any of the chemicals listed under Proposition 65 (including but
9 not limited to the Listed Phthalates) in the Products. In this regard, Zivkovic hereby acknowledges
10 that he is familiar with and waives the provisions of Section 1542 of the California Civil Code,
11 which provides as follows:

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

16 **5.3 Defendant’s Release of Zivkovic**

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

23 **6. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void if, for any reason, it is not approved and entered by the Court within one year

26 _____
27 ¹ Following the Effective Date, compliance with the terms of this Consent Judgment shall
28 be deemed compliance with Proposition 65 with respect to exposures to the Chemicals from the
Products.

1 after it has been fully executed by all Parties unless the Parties mutually agree to extend that time
2 period due to what they mutually agree are reasonably unforeseeable circumstances.

3 7. **SEVERABILITY**

4 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
5 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
6 be adversely affected.

7 8. **GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of California
9 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
10 rendered inapplicable by reason of law generally, or as to the Products, then Defendant may provide
11 written notice to Zivkovic of any asserted change in the law and have no further obligations
12 pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are so
13 affected.

14 9. **NOTICES**

15 Unless specified herein, all correspondence and notices required to be provided pursuant to
16 this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class
17 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
18 Party by the other Party to the following addresses:

19 For Defendant Metropolitan Vacuum Cleaner Company:

20 Kenneth Stern
21 Metropolitan Vacuum Cleaner Co.
22 5 Raritan Road
23 Oakland, NJ 07436

24 *With a copy to:*

25 Barbara Adams
26 badams@adamsnye.com
27 Adams Nye Becht LLP
28 222 Kearny St., 7th Floor
San Francisco, CA 94108

1 For Zivkovic:

2 Noam Glick
3 Glick Law Group, P.C.
4 225 Broadway, Suite 2100
5 San Diego, CA 92101

6 *AND:*

7 Craig Nicholas
8 Nicholas & Tomasevic, LLP
9 225 Broadway, 19th Floor
10 San Diego, CA 92101

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

13 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile or portable
15 document format (PDF) signature, each of which shall be deemed an original, and all of which,
16 when taken together, shall constitute one and the same document.

17 **11. POST EXECUTION ACTIVITIES**

18 Zivkovic agrees to comply with the reporting form requirements referenced in Health and
19 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and
20 Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the
21 settlement manifested in this Consent Judgment. In furtherance of obtaining such approval,
22 Zivkovic shall file and serve a noticed motion for approval of this Consent Judgment within sixty
23 (60) days of its execution by all Parties and assure that the Office of the California Attorney General
24 is served with said motion and all supporting papers at least forty-five (45) days prior to the
25 scheduled hearing thereon. Defendant agrees to support the entry of this Consent Judgment once
26 such motion has been filed.

27 **12. ENFORCEMENT**

28 Any Party may, after meeting and conferring, by motion or application for an order to show
cause before this Court, enforce the terms and conditions contained in this Consent Judgment.

13. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and

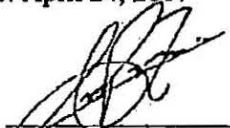
1 upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney General,
2 of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application
3 of any Party, which shall also be served on the Office of the California Attorney General with at
4 least twenty-one (21) days' notice, and the entry of a modified consent judgment by the Court. Any
5 Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with
6 all affected Parties prior to filing a motion to modify the Consent Judgment.

7 **14. AUTHORIZATION**

8 The undersigned are authorized to execute this Consent Judgment on behalf of their
9 respective Parties and have read, understood and agreed to all of the terms and conditions of this
10 Consent Judgment.

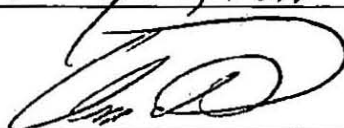
11
12 **AGREED TO:**

13 Date: April 24, 2017

14
15 By: 
16 Arthur Zivkovic

AGREED TO:

13 Date: May 2, 2017

14
15 By: 
16 Ken Stern
17 Vice President - National Sales
18 Metropolitan Vacuum Cleaner Company

19 **IT IS SO ORDERED:**

20
21 Dated: _____
22 _____
23 _____
24 _____
25 _____
26 _____
27 _____
28 _____
Judge of the Superior Court