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6 CENTER FOR ENVIRONMENTAL HEALTH

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN

10
11 CENTER FOR ENVIRONMENTAL HEALTH,)
12 a non-profit corporation,)
13 Plaintiff,)
14)
15 v.)
16)
17 FRANKLIN SPORTS, INC.; WILSON)
SPORTING GOODS CO.; and Defendant)
DOES 1 through 200, inclusive,)
18 Defendant.)
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Case No. CIV085383

**[PROPOSED] CONSENT JUDGMENT
RE: FRANKLIN SPORTS, INC.**

1 **1. INTRODUCTION**

2 **1.1** On January 31, 2008, plaintiff Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, served Franklin Sports, Inc.
4 (“Defendant”), and the appropriate public enforcement agencies with the requisite 60-Day
5 Notice of Violation (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 Franklin Sports, Inc., as defendant.

9 **1.3** Defendant is a corporation that employs 10 or more persons and
10 manufactured, distributed and/or sold toy sporting goods made of vinyl, including but not limited
11 to toy bats, balls and boxing gloves (the “Products”), in the State of California. The term
12 “Products” encompasses only products designated for sale and/or distribution within the United
13 States.

14 **1.4** CEH’s Notice and the Complaint in this action allege that Defendant
15 exposes people who use or otherwise handle the Products to lead and/or lead compounds
16 (collectively, “Lead”), chemicals known to the State of California to cause cancer, birth defects
17 and other reproductive harm, without first providing clear and reasonable warning to such
18 persons regarding the carcinogenicity and reproductive toxicity of Lead. The Notice and
19 Complaint allege that Defendant’s conduct violates Health & Safety Code § 25249.6, the
20 warning provision of Proposition 65. Defendant disputes such allegations and assert that all of
21 their Products are safe and comply with all applicable laws.

22 **1.5** For purposes of this Consent Judgment only, CEH and Franklin Sports,
23 Inc. (together, the “Parties”) stipulate that this Court has jurisdiction over the subject matter of
24 the violations alleged in CEH’s Complaint and personal jurisdiction over each of the Defendant
25 as to the acts alleged in CEH’s Complaint, that venue is proper in the County of Marin, and that
26 this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
27 claims which were or could have been raised in the Complaint based on the facts alleged therein.

28 **1.6** 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 Level.** After thirty days (30) following entry of this Consent Judgment
11 (the "Compliance Date"), Defendant shall not manufacture, distribute, ship, or sell or cause to be
12 manufactured, distributed or sold, any Product that is comprised of any material that contains
13 Lead in concentrations that exceed the following Reformulation Standard: (a) 200 parts per
14 million ("ppm"); and (b) within two years after the Compliance Date, 100 ppm if determined to
15 be feasible by the U.S. Consumer Product Safety Commission.

16 **2.2 Certification of Level From Suppliers.** Defendant shall issue
17 specifications to their suppliers requiring that any Product supplied to Defendant shall not
18 contain materials that contain Lead concentrations that exceed the Reformulation Standard.
19 Defendant shall obtain written certification from their suppliers of the Products certifying that
20 the Products supplied to Defendant do not contain materials that contain Lead in concentrations
21 exceeding the Reformulation Standard.

22 **2.3 Testing.** In order to ensure compliance with the requirements of Section
23 2.1, Defendant shall conduct (or cause to be conducted) testing to confirm that Products it
24 manufactures, distributes, ships, or sells or causes to be manufactured, distributed or sold, is not
25 comprised of any material that contains Lead in concentrations exceeding the Reformulation
26 Standard. All testing pursuant to this Section shall be performed by an independent laboratory in
27 accordance with EPA Method 3050B or test methods accepted by the U.S. Consumer Product
28 Safety Commission (the "Test Protocols"). The results of the testing performed pursuant to this

1 Section shall be made available to CEH upon request.

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 two, but in no case
5 more than four, of the total Products purchased from each supplier of the Products intended for
6 sale in California. Following the first two orders, during each calendar year, Defendant shall at a
7 minimum randomly select and test the greater of 0.1% (one-tenth of one percent) or two, but in
8 no case more than four, of the total Products purchased from each supplier of the Products
9 intended for sale in California.

10 **2.3.2 Products that Exceed Stipulated Levels Pursuant to**
11 **Defendant's Testing.** If the results of the testing required pursuant to Section 2.3 show levels of
12 Lead exceeding the Reformulation Standard, 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 Section 2.3.1 as though the next shipment from the
16 supplier were the first one following the Compliance Date.

17 **2.4 Confirmatory Testing by CEH.** CEH intends to conduct periodic testing
18 of the Products. Any such testing will be conducted by CEH at an independent laboratory, in
19 accordance with the Test Protocols. In the event that CEH's testing demonstrates Lead levels in
20 excess of the Reformulation Standard in violation of this Section, CEH shall inform Defendant
21 of the test results, including information sufficient to permit Defendant to identify the Product(s).
22 Defendant shall, within 30 days following such notice, provide CEH, at the address listed in
23 Section 12, with the certification and testing information demonstrating its compliance with
24 Sections 2.2 and 2.3 of this Consent Judgment. If Defendant fails to provide CEH with
25 information demonstrating that it complied with Sections 2.2 and/or 2.3, Defendant shall be
26 liable for stipulated payments in lieu of penalties for Products for which CEH produces tests
27 demonstrating Lead levels exceeding the Reformulation Standard, as set forth below. In
28 addition, Defendant shall then apply the testing frequency set forth in Section 2.3 as though the

1 next shipment from the supplier were the first one following the Compliance Date. The
2 payments shall be made to CEH and used for the purposes described in Section 3.1.

3 **2.4.1 Stipulated Payments In Lieu of Penalties.** If stipulated
4 payments in lieu of penalties are warranted under Section 2.4, the stipulated payment amount
5 shall be as follows for each unit of Product for which CEH produces a test result with Lead
6 levels exceeding the Reformulation Standard:

7 First Occurrence: \$1,250

8 Second Occurrence: \$1,500

9 Third Occurrence: \$1,750

10 Thereafter: \$2,500

11 Notwithstanding the foregoing, the maximum stipulated payment amount in a calendar year,
12 regardless of the number of units of Product tested by CEH in violation of the Lead levels set
13 forth in this Consent Judgment, shall be \$5,000.

14 **3. SETTLEMENT PAYMENTS**

15 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
16 \$8,500 in lieu of any penalty pursuant to Health and Safety Code § 25249.7(b). CEH shall use
17 such funds to continue its work protecting people from exposures to toxic chemicals. As part of
18 this work, CEH intends to conduct periodic testing of the Products as set forth in Section 2.4.
19 The payment required under this section shall be made payable to Center for Environmental
20 Health.

21 **3.2 Attorneys' Fees and Costs.** Defendant shall pay \$16,500 to reimburse
22 CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any
23 other costs incurred as a result of investigating, bringing this matter to Defendant's attention,
24 litigating and negotiating a settlement in the public interest. The payment required under this
25 section shall be made payable to Lexington Law Group, LLP.

26 **3.3 Timing of Payments.** The payments required under Sections 3.1 and 3.2
27 shall be made payable within 10 days of entry of the Consent Judgment. All of the payments
28 made pursuant to this Section 3 shall be delivered to the Lexington Law Group, LLP at the

1 address set forth in Section 12.1.

2 **4. MODIFICATION OF CONSENT JUDGMENT**

3 **4.1** This Consent Judgment may be modified by written agreement of the
4 Parties, or upon motion of CEH or either of the Defendant as provided by law.

5 **4.2** Should any court enter a final judgment in a case brought by CEH or the
6 People of the State of California involving sporting balls and bats that sets forth standards
7 defining when Proposition 65 warnings will or will not be required (“Alternative Standards”),
8 Defendant shall be entitled to seek a modification of this Consent Judgment on forty five (45)
9 days notice to CEH so as to be able to utilize and rely on such Alternative Standards in lieu of
10 those set forth in Section 2.1 of this Consent Judgment. CEH shall not unreasonably contest any
11 proposed application to effectuate such a modification.

12 **5. ENFORCEMENT OF CONSENT JUDGMENT**

13 **5.1** Either party may, by motion or application for an order to show cause,
14 enforce the terms and conditions contained in this Consent Judgment.

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**

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 Notice or Complaint against Defendant (including any claims that could be asserted in
23 connection with any of the Products covered by this Consent Judgment) or their parents,
24 subsidiaries, affiliates, directors, officers, employees, agents, attorneys, licensors, distributors, or
25 customers (collectively, “Defendant Releasees”) based on failure to warn about alleged
26 Proposition 65 exposures with respect to any Products manufactured, distributed or sold by
27 Defendant (“Covered Claims”) on or prior to the date of entry of this Consent Judgment.
28 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65

1 for purposes of Lead exposures from the Products.

2 **8. SEVERABILITY**

3 **8.1** In the event that any of the provisions of this Consent Judgment are held
4 by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely
5 affected.

6 **9. SPECIFIC PERFORMANCE**

7 **9.1** The Parties expressly recognize that Defendant's obligations under this
8 Consent Judgment are unique. In the event that Defendant is found to be in breach of this
9 Consent Judgment for failure to comply with the provisions of Section 2 hereof, the Parties agree
10 that it would be extremely impracticable to measure the resulting damages and that such breach
11 would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or
12 remedies, may sue in equity for specific performance, and Defendant expressly waive the
13 defense that a remedy in damages will be adequate.

14 **10. GOVERNING LAW**

15 **10.1** The terms of this Consent Judgment shall be governed by the laws of the
16 State of California.

17 **11. RETENTION OF JURISDICTION**

18 **11.1** This Court shall retain jurisdiction of this matter to implement and enforce
19 the terms this Consent Judgment.

20 **12. PROVISION OF NOTICE**

21 **12.1** All notices required pursuant to this Consent Judgment and
22 correspondence shall be sent to the following:

23 For CEH:

24 Mark N. Todzo
25 Lexington Law Group, LLP
26 1627 Irving Street
27 San Francisco, CA 94122
28

1 For Defendant :

2 Frederick Locker

3 Locker Greenberg & Brainin PC

4 420 Fifth Avenue

5 New York, NY 10018

6 **13. COURT APPROVAL**

7 **13.1** CEH will comply with the settlement notice provisions of Health and
8 Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

9 **13.2** If this Consent Judgment is not approved by the Court, it shall be of no
10 further force and effect. If this Consent Judgment is appealed, with the exception of the
11 injunctive relief provisions in Section 2, above, which remain in effect during any appeal, it does
12 not become effective and has no force or effect until all issues on appeal are resolved.

13 **14. EXECUTION AND COUNTERPARTS**

14 **14.1** The stipulations to this Consent Judgment may be executed in
15 counterparts and by means of facsimile, which taken together shall be deemed to constitute one
16 document.

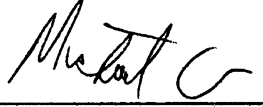
17 **15. AUTHORIZATION**

18 **15.1** Each signatory to this Consent Judgment certifies that he or she is
19 fully authorized by the party he or she represents to stipulate to this Consent Judgment and to
20 enter into and execute the Consent Judgment on behalf of the party represented and legally bind
21 that party. The undersigned have read, understand and agree to all of the terms and conditions of
22 this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees
23 and costs.

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AGREED TO:
CENTER FOR ENVIRONMENTAL HEALTH



Michael Green, Director

Dated: 6/8/09

FRANKLIN SPORTS, INC.

Dated: _____

[Name]

[Title]

1 **AGREED TO:**

2 CENTER FOR ENVIRONMENTAL HEALTH

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Dated: _____

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[Name]

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[Title]

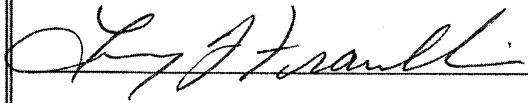
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11 FRANKLIN SPORTS, INC.

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Dated: 6/4/09

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LARRY J. FRANKLIN

[Name]

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PRESIDENT

[Title]

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ORDER AND JUDGMENT

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

Dated: _____

Judge, Superior Court of the State of California