

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Evelyn Wimberley and Flexon Industries Corporation

This Settlement Agreement is entered into by and between Evelyn Wimberley (hereinafter “Wimberley”) and Flexon Industries Corporation, (hereinafter “Flexon”), with Wimberley and Flexon collectively referred to as the “Parties.” Wimberley is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Flexon employs ten or more persons and is a person in the course of doing business for purposes of Proposition 65.

1.2 General Allegations

Wimberley alleges that Target Corporation (“Target”) has sold in the State of California garden hoses with brass coupling containing lead and that such sales have not included the issuance of warnings pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”). Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive harm. Wimberley has cited “Room Essentials” garden hoses sold by Target in California as an example of the garden hoses that are the subject of her allegations.

Flexon alleges and represents that: 1) Room Essentials garden hoses are manufactured for and distributed to Target by Flexon, 2) Flexon is a subsidiary of U.S. Wire and Cable Corporation, and 3) Flexon is subject to and, except as specified below, has faithfully complied

with the Consent Judgment it entered into with the Center for Environmental Health (“CEH”) in 2004, a copy of which is attached hereto as Exhibit A (“Consent Judgment”).

Flexon further represents and warrants that 1) for the 2010 gardening season, it agreed with Target to put the Proposition 65 warning the Consent Judgment requires on the packaging of Room Essentials garden hoses that were to be shipped to Target's California distribution center and not put it on the packaging of Room Essentials hoses to be shipped to Target for sale in other states (as is allowed under Section 10 of the Consent Judgment, 2) to achieve this result, instead of incorporating the Proposition 65 warning into the permanent artwork on its product packaging (as it does for its own products and those private labeled for other retailers), Flexon instead implemented the Consent Judgment-required warning on the Room Essentials hoses designated for shipment to Target's California distribution center by means of applying an adhesive sticker containing the required warning to those packages, 3) upon learning that there was an issue about some Room Essentials hose packages allegedly not containing the Proposition 65 warning when sold by Target in California, Flexon investigated the situation and tracked the issue down to an apparent omission by its night shift to apply the warning stickers during a production/packaging run comprising a portion of a single truckload of Room Essential hoses designated for shipment to Target's California distribution center, and 4) on a worst case assumption basis, Flexon believes that the maximum number of Room Essential garden hoses shipped to Target for sale in California which did not contain the required Proposition 65 warning was 2,200.

1.3 Product Description

The products that are covered by this Settlement Agreement are defined as follows:
Room Essentials garden hoses with brass couplings containing lead manufactured and distributed by Flexon and sold by Target in California. All such items shall be referred to herein as the “Products.”

1.4 Notices of Violation

On or about June 22, 2010, Wimberley served Target and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided Target and such public enforcers with notice that alleged that Target was in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set forth in the Notice. On or about July 22, 2010, the Mateel Environmental Justice Foundation (“Mateel”) served Target and U.S. Wire and Cable Corporation with a document entitled “60-Day Notice of Violation” (the “Mateel notice”) that provided Target, Flexon (through U.S. Wire and Cable Corporation) and such public enforcers with notice that alleged that Target and U.S. Wire and Cable Corporation were in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set forth in the Notice. Mateel has, through counsel, informed Flexon that in light of the Consent Judgment and Wimberley’s Notice, Mateel will not proceed with a Proposition 65 enforcement action concerning the Products based on Mateel’s notice.

1.5 No Admission

Flexon denies the material factual and legal allegations contained in Wimberley's Notice and maintains that all products that it has sold and distributed in California, including the Products, have been and are in compliance with Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Flexon of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Flexon of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Flexon. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Flexon under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Settlement Agreement is fully executed.

2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

Flexon shall immediately re-double its efforts to comply with the reformulation and warning obligations applicable to it and the Products under the Consent Judgment as set forth in Exhibit A. In addition, Flexon shall ensure that Proposition 65 warnings are issued for the Products in the future by incorporating such warnings into the permanent artwork used for their packaging and not by means of continued reliance on the application of Proposition 65 warning stickers to them so as to avoid the potential for human error.

3. PAYMENT IN LIEU OF PENALTIES PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)

In settlement of all claims that have been threatened or could be raised with respect to

failure to warn pursuant to Proposition 65 with regard to lead in the Products, Flexon shall pay \$300.00 to Susan G. Komen for the Cure, a 501(c)(3) non-profit organization dedicated to the fight against breast cancer (federal tax identification number 75-1835298). Flexon shall mail this payment within thirty days following the Effective Date, to the following address, providing a copy of its check and transmittal letter to Wimberley:

Susan G. Komen for the Cure
5005 L.B.J. Freeway, Suite 250
Dallas, TX 75244

4. REIMBURSEMENT OF FEES AND COSTS

The parties reached an accord on the compensation due to Wimberley and her counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Flexon shall reimburse Wimberley's counsel for fees and costs, incurred as a result of investigating, bringing this matter to Flexon's attention, and negotiating a settlement in the public interest. Flexon shall pay Wimberley's counsel \$13,700.00 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. Flexon shall make the check payable to the "Law Offices of Stephen Ure, PC" (tax identification number 42-1641673) and mail it within seven days following the Effective Date to the following address:

Law Offices of Stephen Ure, PC.
1518 Sixth Avenue
San Diego, California 92101

5. RELEASE OF ALL CLAIMS

5.1 Release of Flexon and Downstream Customers

In further consideration of the promises and agreements herein contained, and for the

payments to be made pursuant to Sections 3 and 4 above, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Flexon and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not limited to, Target Corporation), franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This release is limited to those claims that arise under Proposition 65, as such claims relate to Flexon's alleged failure to warn about exposures to or identification of lead contained in the Products.

In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases any other Claims that she could make against Flexon or its Releasees arising up to the Effective Date. With respect to the foregoing waivers and releases in this paragraph, Wimberley hereby specifically waives any and all rights and benefits which she now

has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

5.2 Flexon's Release of Wimberley

Flexon waives any and all claims against Wimberley, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Wimberley and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Flexon shall provide written notice to Wimberley of any asserted change in the law, and shall

have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

8. NOTICES

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

For Flexon:

David Rauch
Flexon Industries Corporation
366 Frelinghuysen Avenue
Newark, New Jersey 07114

With a copy to:

Robert Falk, Esq.
Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105

And

For Wimberley:

Stephen Ure
Law Offices of Stephen Ure, PC.
1518 Sixth Avenue
San Diego, California 92101

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Wimberley agrees to comply with the reporting form requirements referenced in California Health & Safety Code §25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

| AGREED TO: | AGREED TO: |
|--|--|
| Date: <u>9-20-10</u> | Date: _____ |
| By: <u></u> Evelyn Wimberley | By: _____ Flexon Industries Corporation |

9. **COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Wimberley agrees to comply with the reporting form requirements referenced in California Health & Safety Code §25249.7(f).

11. **MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

| | |
|-------------------------------|---|
| AGREED TO: | AGREED TO: |
| Date: _____ | Date: <u>9/21/10</u> |
| By: _____ Evelyn Wimberley | By:  Flexon Industries Corporation |