

1 YEROUSHALMI & ASSOCIATES
2 Reuben Yeroushalmi (SBN 193981)
3 9100 Wilshire Boulevard, Suite 610E
4 Beverly Hills, California 90212
5 Telephone: 310) 623-1926
6 Facsimile: (310) 623-1930

7 Attorneys for Plaintiff
8 CONSUMER ADVOCACY GROUP, INC.

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 CONSUMER ADVOCACY GROUP,

12 Plaintiff,

13 v.

14 WINNER INTERNATIONAL, INC.

15 Defendants.

Case No. RG12623691

Assigned For All Purposes To The
Honorable

**SETTLEMENT PURSUANT TO C.C.P.
SECTION 664.6 [PROPOSED]**

16
17
18 The Parties have agreed to settle this lawsuit pursuant to C.C.P. Section 664.6 on the terms and
19 conditions noted hereinafter.

20
21 **1. INTRODUCTION**

22 1.1 This settlement is made pursuant to C.C.P. § 664.6. The court shall retain
23 jurisdiction over the parties to enforce the settlement until performance in full of the terms of the
24 settlement. Consumer Advocacy Group, Inc. (referred to as "CAG") acting on behalf of itself and
25 also in the interest of the public and defendant Winner International, Inc. (referred to as
26 "Winner") are each a Party. CAG and Winner (collectively CAG and Winner shall be referred to
27 as the "Parties") consent to the jurisdiction and venue of the Alameda County Superior Court.

1 1.2 Winner employs ten or more persons, are persons in the course of doing business
2 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
3 & Safety Code §§ 25249.6 et seq. (“Proposition 65”), and distribute and sell De-Vice™ Steering
4 Wheel Lock, 034-0714-2 (“Wheel Locks”) and The Bike Club™ “The Anti-Theft Device for
5 Bicycles!” “BC-00303” (“Clubs”). The listed chemical, DEHP, was added to 27 C.C.R. § 27001
6 on both January 1, 1988 and on October 24, 2003.

7 1.3 **Notices of Violation.**

8 1.3.1 On October 26, 2011, CAG served Winner and various public enforcement
9 agencies with a document entitled “60-Day Notice of Violation” (“October 19, 2011 Notice”) that
10 provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for
11 failing to warn individuals in California of exposures to DEHP contained in De-Vice™ Steering
12 Wheel Lock, 034-0714-2 sold by Winner. No public enforcer has commenced or diligently
13 prosecuted the allegations set forth in the October 19, 2011 Notice.

14 1.3.2 On November 9, 2011, CAG served Winner and various public enforcement
15 agencies with a document entitled “60-Day Notice of Violation” (“November 9, 2011 Notice”)
16 that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6
17 for failing to warn individuals in California of exposures to DEHP contained in The Bike Club™
18 “The Anti-Theft Device for Bicycles”, BC-00303 sold by Winner. No public enforcer has
19 commenced or diligently prosecuted the allegations set forth in the November 9, 2011 Notice.

20 1.4 **Complaint.**

21 On April 2, 2012, CAG filed a Complaint for civil penalties and injunctive relief
22 (“Complaint”) in Alameda County, Superior Court, Case No. RG12623691, against Winner. The
23 Complaint alleges, among other things, that Winner violated Proposition 65 by failing to give
24 clear and reasonable warnings of exposure to DEHP from De-Vice™ Steering Wheel Lock, 034-
25 0714-2 and The Bike Club™ “The Anti-Theft Device for Bicycles”, BC-00303.

26 1.5 **Consent to Jurisdiction**

27 For purposes of this 664.6 Settlement, the parties stipulate that this Court has jurisdiction
28 over the allegations of violations contained in the Complaint and personal jurisdiction over

1 Winner as to the acts alleged in the Complaint, that venue is proper in the County of Alameda and
2 that this Court has jurisdiction to enter this 664.6 Settlement as a full settlement and resolution of
3 the allegations contained in the Complaint and of all claims which were or could have been raised
4 by any person or entity based in whole or in part, directly or indirectly, on the facts alleged
5 therein or arising therefrom or related to.

6 1.6 **No Admission**

7 This 664.6 Settlement resolves claims that are denied and disputed. The parties enter into
8 this 664.6 Settlement pursuant to a full and final settlement of any and all claims between the
9 parties for the purpose of avoiding prolonged litigation. This 664.6 Settlement shall not
10 constitute an admission with respect to any material allegation of the Complaint, each and every
11 allegation of which Winner denies, nor may this 664.6 Settlement or compliance with it be used
12 as evidence of any wrongdoing, misconduct, culpability or liability on the part of Winner.

13 **2. DEFINITIONS**

14 2.1 “Accessible Component” means any component of a Covered Product that could
15 be touched by a person during reasonably foreseeable use.

16 2.1 “Covered Products” means (a) the De-Vice™ Steering Wheel Lock, 034-0714-2,
17 and The Bike Club™ “The Anti-Theft Device for Bicycles!” BC-00303.

18 2.2 “Effective Date” means the date that this 664.6 Settlement is entered by the Court.

19 2.3 “DEHP” means Di (2-ethylhexyl) phthalate, which is more specifically identified
20 as CAS No. 117-81-7.

21 2.4 “Notices” means the October 26, 2011 and November 9, 2011 notices.

22 **3. INJUNCTIVE RELIEF/REFORMULATION/CLEAR AND REASONABLE**
23 **WARNINGS.**

24 3.1 The Parties recognize that since March 2011 Winner has been placing Proposition
25 65 warning labels, consistent with 27 C.C.R., Article 6, on each of the Covered Products.

26 3.2 Winner, to the extent that it continues to distribute or sell the Covered Products
27 still in its possession as of the date of the approval of this 664.6 Settlement,, shall place
28 Proposition 65 warning labels on said items, as well as instructions directing downstream entities

1 not to sell the product in the geographical delineation of the State of California. Any Covered
2 Product manufactured after the date of approval of this 664.6 Settlement shall be reformulated to
3 contain less than 0.1% of DEHP.

4 **4. SETTLEMENT PAYMENT**

5 4.1 Within 14 business days of the Effective Date or receipt of Forms W-9 from CAG,
6 whichever is later, Winner shall pay a total of \$52,000 to CAG in full and complete settlement of
7 all monetary claims by CAG related to the Notices, as follows.

8 4.2 **Payment In Lieu of Civil Penalties:** Winner shall pay \$2,000 in lieu of civil
9 penalties to "Consumer Advocacy Group, Inc." CAG will use the payment for such projects and
10 purposes related to environmental protection, worker health and safety, or reduction of human
11 exposure to hazardous substances (including administrative and litigation costs arising from such
12 projects), as CAG may choose.

13 4.3 **Reimbursement of Attorneys Fees and Costs:** Winner shall pay \$48,000 to
14 "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs,
15 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
16 the approval of this 664.6 Settlement.

17 4.4 **Civil Penalty:** Winner shall issue two separate checks for a total amount of
18 \$2,000 as penalties pursuant to Health & Safety Code § 25249.12: (a) one check made payable to
19 the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the
20 amount of \$1,500, representing 75% of the total penalty; and (b) one check to Consumer
21 Advocacy Group, Inc. in the amount of \$500, representing 25% of the total penalty. Two
22 separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA,
23 P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$1,500. The second
24 1099 shall be issued in the amount of \$500 to CAG.

25 4.5 **Payments shall be delivered to:** Reuben Yeroushalmi, Yeroushalmi &
26 Associates, 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212.

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28

1 **5. MATTERS COVERED BY THIS 664.6 SETTLEMENT**

2 5.1 This 664.6 Settlement is a full, final, and binding resolution between CAG on
3 behalf of itself and in the public interest and Winner and its officers, directors, insurers,
4 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
5 companies and their successors and assigns (“Defendant Releasees”) and each of their suppliers,
6 manufacturers, customers, distributors, wholesalers, retailers, or any other person in the course of
7 doing business, and the successors and assigns of any of them, who may use, maintain,
8 manufacture, distribute or sell Covered Products (“Upstream & Downstream Defendant
9 Releasees”), for all claims for violations of Proposition 65 up through the Effective Date based on
10 exposure to DEHP from Covered Products. Winner’s, Defendant Releasees’ and Upstream &
11 Downstream Releasees’ compliance with this 664.6 Settlement shall constitute compliance with
12 Proposition 65 with respect to DEHP from the Covered Products as set forth herein. As used
13 hereinafter, Winner, Defendant Releasees, and Upstream & Downstream Defendant Releasees
14 may be referred to collectively as “The Releasees”.

15 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
16 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
17 indirectly, any form of legal action and releases all claims, including, without limitation, all
18 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
19 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
20 fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed or
21 contingent (collectively “Claims”), against the Releasees arising from any violation of
22 Proposition 65 or any other statutory or common law regarding the failure to warn about exposure
23 to DEHP in Covered Products. In furtherance of the foregoing, as to alleged exposures to
24 Covered Products, CAG hereby waives any and all rights and benefits which it now has, or in the
25 future may have, conferred upon it with respect to the Claims by virtue of the provisions of
26 section 1542 of the California Civil Code, which provides as follows:

27
28 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT**

1 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
2 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
3 DEBTOR.

4 CAG understands and acknowledges that the significance and consequence of this waiver of
5 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
6 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
7 including but not limited to any exposure to, or failure to warn with respect to exposure to, DEHP
8 from Covered Products, CAG will not be able to make any claim for those damages against
9 Winner, or the Released Entities. Furthermore, CAG acknowledges that it intends these
10 consequences for any such Claims as may exist as of the date of this release but which CAG does
11 not know exist, and which, if known, would materially affect their decision to enter into this
12 664.6 Settlement, regardless of whether their lack of knowledge is the result of ignorance,
13 oversight, error, negligence, or any other cause.

14 **6. ENFORCEMENT OF JUDGMENT**

15 6.1 The terms of this 664.6 Settlement shall be enforced exclusively by the parties
16 hereto. Subject to Section 6.2, the parties may, by noticed motion or order to show cause before
17 the Superior Court of California, Alameda County, giving the notice required by law, enforce the
18 terms and conditions contained herein. A Party may enforce any of the terms and conditions of
19 this 664.6 Settlement only after that Party first provides 30 days notice to the Party allegedly
20 failing to comply with the terms and conditions of this 664.6 Settlement and attempts to resolve
21 such Party's failure to comply in an open and good faith manner.

22 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
23 proceeding to enforce Section 3.1 of this 664.6 Settlement, CAG shall provide a Notice of
24 Violation ("NOV") to Winner. The NOV shall include for each Covered Product: the date(s) the
25 alleged violation(s) was observed and the location at which the Covered Product was offered for
26 sale, and shall be accompanied by all test data obtained by CAG regarding the Covered Product,
27 including an identification of the component(s) of the Covered Product that were tested.
28

1 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
2 alleged violation if, within 30 days of receiving such NOV, Winner serves a Notice of
3 Election (“NOE”) that meets one of the following conditions:

4 (a) The Covered Products were shipped by Winner for sale in
5 California before the Effective Date, or

6 (b) Since receiving the NOV Winner has taken corrective action by
7 either (i) requesting that its customers in California remove the Covered Products
8 identified in the NOV from sale in California and destroy or return the Covered Products
9 to Winner, or (ii) providing a clear and reasonable warning for the Covered Products
10 identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

11 6.2.2 **Contested NOV.** Winner may serve an NOE informing CAG of its
12 election to contest the NOV within 30 days of receiving the NOV.

13 (a) In its election, Winner may request that the sample(s) Covered
14 Products tested by CAG be subject to confirmatory testing at an EPA-accredited
15 laboratory.

16 (b) If the confirmatory testing establishes that the Covered Products do
17 not expose consumers to DEHP in excess of that level mandating a warning, CAG shall
18 take no further action regarding the alleged violation. If the testing does not establish
19 compliance with Section 3.1, Winner may withdraw its NOE to contest the violation and
20 may serve a new NOE pursuant to Section 6.2.1.

21 (c) If Winner does not withdraw an NOE to contest the NOV, the
22 Parties shall meet and confer for a period of no less than 30 days before CAG may seek an
23 order enforcing the terms of this 664.6 Settlement.

24 **7. ENTRY OF 664.6 SETTLEMENT**

25 7.1 CAG shall file a motion seeking approval of this 664.6 Settlement pursuant to
26 California Health & Safety Code § 25249.7(f). Upon entry of the 664.6 Settlement, CAG and
27 Winner waive their respective rights to a hearing or trial on the allegations of the Complaint.
28

1 7.2 If this 664.6 Settlement is not approved by the Court, (a) this 664.6 Settlement and
2 any and all prior agreements between the parties merged herein shall terminate and become null
3 and void, and the actions shall revert to the status that existed prior to the execution date of this
4 664.6 Settlement; (b) no term of this 664.6 Settlement or any draft thereof, or of the negotiation,
5 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
6 nor shall any such matter be admissible in evidence for any purpose in this Action, or in any other
7 proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms
8 of the 664.6 Settlement and to resubmit it for approval.

9 **8. MODIFICATION OF JUDGMENT**

10 8.1 This 664.6 Settlement may be modified only upon written agreement of the parties
11 and upon entry of a modified 664.6 Settlement by the Court thereon, or upon motion of any party
12 as provided by law and upon entry of a modified 664.6 Settlement by the Court.

13 8.2 Any Party seeking to modify this 664.6 Settlement shall attempt in good faith to
14 meet and confer with the other Party prior to filing a motion to modify the 664.6 Settlement.

15 **9. RETENTION OF JURISDICTION**

16 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
17 terms of this 664.6 Settlement.

18 **10. DUTIES LIMITED TO CALIFORNIA**

19 10.1 This 664.6 Settlement shall have no effect on Covered Products sold by Winner
20 outside the State of California.

21 **11. SERVICE ON THE ATTORNEY GENERAL**

22 11.1 CAG shall serve a copy of this 664.6 Settlement, signed by both parties, on the
23 California Attorney General so that the Attorney General may review this 664.6 Settlement prior
24 to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney
25 General has received the aforementioned copy of this 664.6 Settlement, and in the absence of any
26 written objection by the Attorney General to the terms of this 664.6 Settlement, the parties may
27 then submit it to the Court for approval.

28

1 **12. ATTORNEY FEES**

2 12.1 Except as specifically provided in Section 4, each Party shall bear its own costs
3 and attorney fees in connection with this action.

4 **13. ENTIRE AGREEMENT**

5 13.1 This 664.6 Settlement contains the sole and entire agreement and understanding of
6 the parties with respect to the entire subject matter hereof and any and all prior discussions,
7 negotiations, commitments and understandings related hereto. No representations, oral or
8 otherwise, express or implied, other than those contained herein have been made by any party
9 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
10 deemed to exist or to bind any of the parties.

11 **14. GOVERNING LAW**

12 14.1 The validity, construction and performance of this 664.6 Settlement shall be
13 governed by the laws of the State of California, without reference to any conflicts of law
14 provisions of California law.

15 14.2 The Parties, including their counsel, have participated in the preparation of this
16 664.6 Settlement and this 664.6 Settlement is the result of the joint efforts of the Parties. This
17 664.6 Settlement was subject to revision and modification by the Parties and has been accepted
18 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
19 ambiguity existing in this 664.6 Settlement shall not be interpreted against any Party as a result of
20 the manner of the preparation of this 664.6 Settlement. Each Party to this 664.6 Settlement agrees
21 that any statute or rule of construction providing that ambiguities are to be resolved against the
22 drafting Party should not be employed in the interpretation of this 664.6 Settlement and, in this
23 regard, the Parties hereby waive California Civil Code § 1654.

24 **15. EXECUTION AND COUNTERPARTS**

25 15.1 This 664.6 Settlement may be executed in counterparts and by means of facsimile
26 or portable document format (pdf), which taken together shall be deemed to constitute one
27 document.
28

1 **16. NOTICES**

2 16.1 Any notices under this 664.6 Settlement shall be by personal delivery of First
3 Class Mail.

4 **If to CAG:**
5 Reuben Yeroushalmi, Esq.
6 9100 Wilshire Boulevard, Suite 610E
7 Beverly Hills, CA 90212
8 (310) 623-1926

9 **If to Winner International, Inc.**
10 Winner International, Inc.
11 32 W. State Street
12 Sharon, PA 16146

13 **With a copy to:**
14 Thomas H. Clarke, Jr., Esq.
15 Ropers, Majeski, Kohn & Bentley PC
16 201 Spear Street, Suite 1000
17 San Francisco, CA 94105

18 **17. AUTHORITY TO STIPULATE**

19 17.1 Each signatory to this 664.6 Settlement certifies that he or she is fully authorized
20 by the party he or she represents to enter into this 664.6 Settlement and to execute it on behalf of
21 the party represented and legally to bind that party.

22 **AGREED TO:**
23 Date: 7-11, 2012

24 **AGREED TO:**
25 Date: _____, 2012

26 By: 
27 Plaintiff, CONSUMER ADVOCACY
28 GROUP, INC.

By: _____
Defendant, WINNER INTERNATIONAL, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT