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4 Attorneys for Plaintiff, Evelyn Wimberley

5
6 SUPERIOR COURT OF THE STATE OF CALIFORNIA

7 COUNTY OF SAN DIEGO

8 EVELYN WIMBERLEY,

9 Plaintiff,

10 v.

11 CHAMPRO SPORTS, a Division of Wilson Hunt
12 International, LTD;
SPORTS CHALET, INC.
13 And DOES 1-25

14 Defendants.

Case No:

UNLIMITED JURISDICTION

**STIPULATION RE ENTRY OF
CONSENT JUDGMENT AS TO
CHAMPRO SPORTS**

Complaint Filed: October __, 2014

Judge:

Dept.

17 **1. INTRODUCTION**

18 **1.1 The Parties**

19 This Stipulation and [Proposed] Order Re Consent Judgment (“Consent Judgment”) is
20 hereby entered into by and between Evelyn Wimberley acting on behalf of the public interest
21 (hereinafter “Wimberley”) and Champro Sports, a Division of Wilson Hunt International, LTD,
22 (hereinafter “Champro”), with Wimberley and Champro collectively referred to as the “Parties”
23 and each of them as a “Party.” Wimberley is an individual residing in California who seeks to
24 promote awareness of exposures to toxic chemicals and improve human health by reducing or
25 eliminating hazardous substances contained in consumer products. Champro employs ten or
26 more persons and is a person in the course of doing business for purposes of Proposition 65, Cal.
27 Health & Safety Code §§ 25249.6 et seq.

1 **1.3 DEFINITIONS**

2 **Complaint.** The term “Complaint” shall have the meaning given in Section **Error! Reference**
3 **source not found.**4.

4 **Covered Product.** The term “Covered Product” means Champro Metal Whistles.

5 **Effective Date.** The term “Effective Date” shall mean the date this Consent Judgment is entered
6 as a Judgment of the Court.

7 **Execution Date.** The term “Execution Date” shall mean the date this Consent Judgment is signed
8 by all parties in Clause 12 below.

9 **Listed Chemicals:** The term “Listed Chemicals” shall mean lead and lead compounds.

10 **Notice.** The term “Notice” shall have the meaning given in Section **Error! Reference source**
11 **not found.**5.

12 **Releasees.** The terms “Defendant Releasees” and “Downstream Defendant Releasees” shall have
13 the meanings given in Section **Error! Reference source not found.**5.4.

14 **1.4 Product Description**

15 The products that are covered by this Consent Judgment are defined as metal whistles
16 containing lead which are manufactured for and distributed by Champro and sold through any
17 means including but not limited to retail sales or internet sales, by SC and other retailers in
18 California whether as standalone items like UPC 752044116413 or as parts of sets containing
19 other products in addition to whistles. All such whistles shall be referred to herein as the
20 “Covered Products.”

21 **1.5 Notices of Violation/Complaint**

22 On or about June 23, 2014, Wimberley served Champro, SC, and all public enforcement
23 agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of
24 California with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided
25 Champro, SC, and such public enforcers with notice that alleged that Champro and SC were in
26 alleged violation of Proposition 65 for failing to warn consumers and customers that the Covered
27 Products exposed users in California to lead. No public enforcer diligently prosecuted the claims
28 threatened in the Notice within sixty days plus service time relative to the provision of the Notice

1 to them by Wimberley, such that Wimberley filed a complaint in the matter as captioned above on
2 October ___, 2014 (“Complaint”).

3 **1.6 Stipulation as to Jurisdiction/No Admission**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Champro as to the allegations contained in the Complaint filed in this matter,
6 that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve,
7 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
8 of all claims which were or could have been raised in the Complaint based on the facts alleged
9 therein and/or in the Notices.

10 Champro denies the material allegations contained in Wimberley’s Notice and Complaint
11 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
12 construed as an admission by Champro of any fact, finding, issue of law, or violation of law; nor
13 shall compliance with this Consent Judgment constitute or be construed as an admission by
14 Champro of any fact, finding, conclusion, issue of law, or violation of law, such being
15 specifically denied by Champro. However, this section shall not diminish or otherwise affect the
16 obligations, responsibilities, and duties of Champro under this Consent Judgment.

17 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

18 In a case alleging failure to warn, a settlement that provides for the giving of a clear and
19 reasonable warning, where there had been no warning provided prior to the 60-day notice, for an
20 exposure that appears to require a warning, is presumed to confer a significant benefit on the
21 public. If there is no evidence of an exposure for which a warning plausibly is required; there is
22 no public benefit, even if a warning is given. If the relief consists of minor or technical changes in
23 the language, appearance, or location of a warning in a manner that is not likely to significantly
24 increase its visibility or effectiveness in communicating the warning to the exposed persons, there
25 is no significant public benefit. Where a settlement sets forth a standard or formula for when a
26 given product requires a warning, supporting evidence should show that at least some of the
27 products in controversy in the action either are, or at some time were, above the warning level, or
28 the existence of the standard or formula itself may not establish the existence of a public benefit.

1 Cal.Code Regs., Title 11 § 3201(2) (b) (1).

2 **2.1 Reformulation Option.** The Covered Products shall be deemed to comply with
3 Proposition 65 with regard to lead and be exempt from any Proposition 65 warning requirements
4 for lead if components of the Covered Products from which exposures to lead may arise,
5 including solder used in the Covered Products, meet the following criteria: (a) alloys from which
6 the components are made shall have no lead as an intentionally-added constituent; and, regardless
7 of intent, (b) the alloy from which the components are made and solder used in the Covered
8 Products shall have a lead content by weight of no more than 0.01% (100 parts per million, or
9 “100 ppm”) which complies with the strictest standard for lead in children’s items as established
10 by the US Consumer Product Safety Commission, See 16 CFR Part 1500.90, and significantly
11 reduces the lead content in the Covered Products, which Wimberley contends were in excess of
12 0.1% lead. The Covered Products are not childrens’ products under either Federal or California
13 law.

14 Champro may comply with the above requirements by relying on information obtained
15 from its suppliers, provided such reliance is in good faith. Obtaining test results showing that the
16 lead content is no more than 0.01%, using a method of sufficient sensitivity to establish a limit of
17 quantification (as distinguished from detection) of less than 100 ppm shall be deemed to establish
18 good faith reliance, provided that Champro does not receive later test results indicating that lead
19 at, or in excess of, 100 ppm has been detected in a component of or solder used in the Covered
20 Products. Champro shall make such test results available to Wimberley upon reasonable request
21 should it exercise this reformulation option.

22 **2.2 Warning Option.**

23 Pursuant to California Code of Regulations, title 27, § 25603.2 (a), a Proposition 65
24 warning message must include the following language for consumer products that contain a
25 chemical known to the state to cause reproductive toxicity: “WARNING: This product contains a
26 chemical known to the State of California to cause birth defects or other reproductive harm.”

27 The Parties hereto agree that Covered Products that do not meet the specifications set
28 forth in Section 2.1 above shall be accompanied by a warning in compliance with § 25603.2, as

1 described above. The warning requirements shall apply only to: (1) Covered Products that
2 Champro manufactures or causes to be manufactured after the Effective Date; and (2) Covered
3 Products manufactured, distributed, marketed, sold or shipped for sale or use inside the State of
4 California after the Effective Date. Warnings required hereunder 2.2 shall be provided on the
5 Covered Products within ten (10) days of Effective Date.

6 Where utilized as an alternative to meeting the criteria set forth in Section 2.1, Champro
7 shall provide the warning language set forth with the unit package of the Covered Products. Such
8 warning shall be prominently affixed to or printed on each Product's label or package or, if not
9 the label or package of each Product, then displayed on box, bin, or shelf from which the Product
10 is offered for sale in California within ten (10) days of the Effective Date. If printed on the label
11 itself, the warning shall be contained in the same size font and same section that states other
12 safety warnings, if any, concerning the use of the Product. If no other warnings are present then
13 printed in a conspicuous location and in same size font as other printed words such to be noticed
14 by the normal user of the product. Champro may continue to utilize, on an ongoing basis, unit
15 packaging containing substantively the same Proposition 65 warnings as those set forth in herein,
16 but only to the extent such packaging materials have already been printed within ninety days
17 following the Execution Date. Champro shall provide Wimberley with information sufficient to
18 establish the date labeling was changed to be in compliance with this consent judgment.

19 The Parties also recognize that the requirements set forth in sections 2.2 above are not the
20 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
21 and that they may or may not be appropriate in other circumstances.

22 If Proposition 65 warnings for lead or lead compounds should no longer be required,
23 Champro shall have no further warning obligations pursuant to this Consent Judgment. Except as
24 provided in Section 2.1 above, in the event that Champro ceases to implement or modifies the
25 warnings required under this Consent Judgment (because of a change in the law or otherwise),
26 Champro shall provide written notice to Wimberley (through counsel) of its intent to do so, and of
27 the basis for its intent, no less than thirty (30) days in advance.

1 **3. PAYMENTS PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)**

2 With regard to all claims that have been raised or which could be raised with respect to
3 failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products, Champro
4 shall pay a civil penalty of \$1,000.00 pursuant to Health and Safety Code section 25249.7(c), to be
5 apportioned in accordance with California Health & Safety Code § 25192, with 75% of these
6 funds remitted to the State of California’s Office of Environmental Health Hazard Assessment
7 and the remaining 25% of the penalty remitted to Wimberley, as provided by California Health &
8 Safety Code § 25249.12(d) and the instructions directly below.

9 Champro shall issue two separate checks for the penalty payment: (a) one check made
10 payable to “OEHHA” (tax identification number: 68-0284486) in an amount representing 75% of
11 the total penalty (i.e., \$750.00); and (b) one check in an amount representing 25% of the total
12 penalty (i.e., \$250.00) made payable directly to Wimberley. Champro shall mail via Federal
13 Express overnight delivery these payments within five (5) days following the Execution Date, to
14 the following address and shall provide copies of tracking numbers to Wimberley’s counsel at
15 that time as well:

16 Evelyn Wimberley
17 C/O Law Offices of Stephen Ure, PC
18 11622 El Camino Real, Suite 100, San Diego, CA 92130

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

20 The parties reached an accord on the compensation due to Wimberley and her counsel
21 under the private attorney general doctrine and principles of contract law. Under these legal
22 principles, Champro shall reimburse Wimberley’s counsel for fees and costs, incurred as a result
23 of investigating, bringing this matter to Champro’s attention, and negotiating a settlement in the
24 public interest. Such fees are proper and reasonable under the private attorney general doctrine.
25 Champro shall pay Wimberley’s counsel pursuant to Code of Civil Procedure section 1021.5,
26 \$31,500.00 for all attorneys’ fees, expert and investigation fees, and related costs associated with
27 this matter and the Notice. Champro shall mail via Federal Express overnight delivery this
28 payment within twenty-one (21) days following the Execution Date to the “Law Offices of

1 Stephen Ure, PC,” (tax identification number 42-1641673). The Law Offices of Stephen Ure, PC
2 will provide Champro with tax identification information. Other than the payment required
3 hereunder, each side is to bear its own attorneys’ fees and costs.

4 **5. RELEASE OF ALL CLAIMS**

5 **5.1 Release of Champro and Downstream Customers**

6 Wimberley, on behalf of herself and in the public interest, releases Champro and each of
7 its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but
8 not limited to, SC), franchisees, dealers, customers, owners, purchasers, users, parent companies,
9 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
10 shareholders, agents, and employees, and sister and parent entities (collectively “Releasees”)
11 from all claims for violations of Proposition 65 up through the Effective Date based on exposure
12 to lead from the Covered Products as set forth in her Notice of Violation. Compliance with the
13 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
14 exposures to lead from the Covered Products.

15 In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents,
16 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
17 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
18 action and releases any other Claims that she could make against Champro or its Releasees
19 arising up to the Effective Date with respect to violations of Proposition 65 based upon the
20 Covered Products. With respect to the foregoing waivers and releases in this paragraph,
21 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
22 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
23 Code, which provides as follows:

24
25 A GENERAL RELEASE DOES NOT EXTEND TO
26 CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR
27 SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
28 EXECUTING THE RELEASE, WHICH IF KNOWN BY
HIM MUST HAVE MATERIALLY AFFECTED HIS
SETTLEMENT WITH THE DEBTOR.

1 **5.2 Champro's Release of Wimberley**

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

7 **5.3** Within ten (10) days of the Execution Date, Wimberley shall file with the Court a
8 request for dismissal of the Complaint as to SC without prejudice.

9 **6. SEVERABILITY AND MERGER**

10 If, subsequent to the execution of this Consent Judgment, any of the provisions of this document
11 are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall
12 not be adversely affected.

13 This Consent Judgment contains the sole and entire agreement of the Parties and any and
14 all prior negotiations and understandings related hereto shall be deemed to have been merged
15 within it. No representations or terms of agreement other than those contained herein exist or
16 have been made by any Party with respect to the other Party or the subject matter hereof.

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California and apply within the State of California. Compliance with the terms of this Consent
20 Judgment resolves any issue, now or in the future, with the requirements of Proposition 65 with
21 respect to alleged exposures to lead arising from the Covered Products. In the event that
22 Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as
23 to the Covered Products, then Champro shall provide written notice to Wimberley of any asserted
24 change in the law, and shall have no further obligations pursuant to this Consent Judgment with
25 respect to, and to the extent that, the Covered Products are so affected.

26 **8. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant
28 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,

1 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
2 other party at the following addresses:

3 For Champro:

4 Elizabeth V. McNulty
5 ARCHER NORRIS, PC
6 4695 MacArthur Court, Suite 350
7 Newport Beach, CA 92660-8816

7 and

8 For Wimberley:

9 Stephen Ure
10 Law Offices of Stephen Ure, PC.
11 11622 El Camino Real, Suite 100
12 San Diego, California 92130

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 This Consent Judgment may be executed in counterparts and by facsimile, each of which
16 shall be deemed an original, and all of which, when taken together, shall constitute one and the
17 same document.

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

19 Wimberley agrees to comply with the requirements set forth in California Health & Safety
20 Code §25249.7(f) and to promptly bring a motion for approval of this Consent Judgment.

21 Champro agrees to cooperate with Wimberley and support Wimberley's motion for approval of
22 this Consent Judgment.

23 In the event the Court does not grant Wimberley's motion for approval of or enter this
24 Consent Judgment within eighteen months after it has been fully executed by the parties, the
25 parties shall meet and confer as to (and jointly agree on) whether to modify the language or
26 appeal the ruling. If the parties do not jointly agree on a course of action to take, then the case
27 shall proceed in its normal course on the trial court's calendar and Wimberley's counsel shall
28

1 refund Champro the payment provided pursuant paragraph 4 in full within thirty (30) days of
2 Champro providing written notice thereof.

3 **11. MODIFICATION**

4 This Consent Judgment may be modified only by further stipulation of the Parties and the
5 approval of the Court or upon the granting of a motion brought to the Court by either Party.

6 **12. RETENTION OF JURISDICTION**

7 This Court shall retain jurisdiction of this matter to implement, modify and enforce this Consent
8 Judgment.

9 **13. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood and agree to all of the terms and conditions of this
12 document.

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15 **APPROVED AS TO FORM:**

16 *October 20,*
Dated: 2014

17
18 By: *Elizabeth V. McNulty*
Elizabeth McNulty
Attorney for Defendant,
CHAMPRO SPORTS, INC.
AND SPORT CHALET, INC.

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22 Dated: , 2014

LAW OFFICES OF STEPHEN URE, PC

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24 By: _____
Stephen Ure, Esq.
Attorneys for Plaintiff,
EVELYN WIMBERLEY

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IT IS HEREBY SO STIPULATED:

AGREED TO:

AGREED TO:

Date: _____

Date: October 16, 2014

By: _____
EVELYN WIMBERLEY

By: Megan Hunt
CHAMPRO SPORTS

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1.2 Allegations and Representations

Wimberley alleges that Champro has offered for sale in the State of California and that Champro’s customer, Sport Chalet, Inc. (“SC”) among others, have sold in California, whistles containing lead, and that such sales have not been accompanied by Proposition 65 warnings. Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer and birth defects or other reproductive harm. Wimberley has cited UPC 752044116413 as a specific example of the Champro Brass Whistles that are the subject of her allegations. For purposes of this Consent Judgment only, Champro represents that: 1) UPC 752044116413 is marketed as a brass whistle item manufactured for and distributed to SC by Champro; 2) other metal whistles with different UPC numbers were distributed by Champro and 3) Champro had no reason to believe that the item contained lead until receiving Wimberley’s 60-Day Notice.

Wimberley represents that her independent testing confirmed by two independent laboratories that lead was present and accessible in amounts that would expose users to lead in excess of the allowable safe harbor number for lead, 0.5 ug/day for reproductive toxicity and for carcinogens 15 ug/day oral, as established by California Office of Environmental Health Hazard Assessment. See <http://www.oehha.ca.gov/prop65/pdf/2012StatusReportJune.pdf>

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15 **APPROVED AS TO FORM:**

16 *October 20,* Dated: 2014

17
18 By: *Elizabeth McNulty*
19 Elizabeth McNulty

20 Attorney for Defendant,
21 CHAMPRO SPORTS, INC.
22 AND SPORT CHALET, INC.

23 LAW OFFICES OF STEPHEN URE, PC

24
25 Dated: , 2014
26 *10/20/*

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By:

Stephen Ure, Esq.
Attorneys for Plaintiff,
EVELYN WIMBERLEY