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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 COUNTY OF SAN DIEGO

8 EVELYN WIMBERLEY,

9 Plaintiff,

10 v.

11 The Sports Authority; TSA Stores, Inc

12 And DOES 1-25

13 Defendants.

Case No: 37-2014-00041238-CU-NP-CTL

UNLIMITED JURISDICTION

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

Complaint Filed: December 5, 2014

Judge: Eddie C. Sturgeon

Dept.: C-67

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18 **1. INTRODUCTION**

19 **1.1 The Parties**

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

28 **1.2 Allegations and Representations**

1 Wimberley alleges that TSA has offered for sale in the State of California and that TSA's
2 Sports Authority retail stores have sold in California, brass whistles containing lead, and that such
3 sales have not been accompanied by Proposition 65 warnings. Lead is listed under Proposition
4 65 as a chemical known to the State of California to cause cancer and birth defects or other
5 reproductive harm. Wimberley has cited SA Gear Brass Whistles UPC 803700029650 as a
6 specific example of the TSA Brass Whistles that are the subject of her allegations. For purposes
7 of this Consent Judgment only, TSA represents that: 1) UPC 803700 029650 is marketed as a
8 brass whistle item manufactured for TSA and sold by Sports Authority in California; and 2) TSA
9 had no reason to believe that the item contained lead until receiving Wimberley's 60-Day Notice.

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

15 1.3 Definitions

16 1.3.1 Complaint. The term "Complaint" shall have the meaning given in Section
17 1.4.

18 1.3.2 Covered Product. The term "Covered Product" means SA Gear Brass
19 Whistles.

20 1.3.3 Effective Date. The term "Effective Date" shall mean the date this Consent
21 Judgment is entered as a Judgment of the Court.

22 1.3.4 Execution Date. The term "Execution Date" shall mean the date this Consent
23 Judgment is signed by all parties in Clause 12 below.

24 1.3.5 Listed Chemicals. The term "Listed Chemicals" means lead and lead
25 compounds.

26 1.3.6 The term "Notice" shall have the meaning given in Section 1.4.
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2 1.3.7 The terms “Defendant Releasees” and “Downstream Defendant Releasees”
3 shall have the meanings given in Section 5.1.

4 **1.4 Product Description**

5 The products that are covered by this Consent Judgment are defined as brass whistles
6 containing lead which are manufactured for TSA and distributed by TSA and sold through any
7 means including but not limited to retail sales or internet sales, by Sports Authority and other
8 retailers in California whether as standalone items like UPC 803700 029650 or as parts of sets
9 containing other products in addition to whistles. All such whistles shall be referred to herein as
10 the “Covered Products.”

11 **1.5 Notices of Violation/Complaint**

12 On or about June 23, 2014, Wimberley served TSA and all public enforcement agencies
13 eligible to initiate Proposition 65 actions on behalf of the People of the State of California with
14 a document entitled “60-Day Notice of Violation” (the “Notice”) that provided TSA and such
15 public enforcers with notice that alleged that TSA was in violation of Proposition 65 for failing to
16 warn consumers and customers that the Covered Products exposed users in California to lead. No
17 public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus
18 service time relative to the provision of the Notice to them by Wimberley, such that Wimberley
19 filed a complaint in the matter as captioned above on December 5, 2015 (“Complaint”).

20 **1.4 Stipulation as to Jurisdiction/No Admission**

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

27 TSA denies the material allegations contained in Wimberley’s Notice and Complaint
28 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be

1 construed as an admission by TSA of any fact, finding, issue of law, or violation of law, nor shall
2 compliance with this Consent Judgment constitute or be construed as an admission by TSA of any
3 fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by TSA.
4 However, this section shall not diminish or otherwise affect the obligations, responsibilities, and
5 duties of TSA under this Consent Judgment.

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

7 **2.1** In a case alleging failure to warn, a settlement that provides for the giving of a
8 clear and reasonable warning, where there had been no warning provided prior to the 60-day
9 notice, for an exposure that appears to require a warning, is presumed to confer a significant
10 benefit on the public. If there is no evidence of an exposure for which a warning plausibly is
11 required; there is no public benefit, even if a warning is given. If the relief consists of minor or
12 technical changes in the language, appearance, or location of a warning in a manner that is not
13 likely to significantly increase its visibility or effectiveness in communicating the warning to the
14 exposed persons, there is no significant public benefit. Where a settlement sets forth a standard
15 or formula for when a given product requires a warning, supporting evidence should show that at
16 least some of the products in controversy in the action either are, or at some time were, above the
17 warning level, or the existence of the standard or formula itself may not establish the existence of
18 a public benefit. Cal.Code Regs., Title 11 § 3201(2) (b) (1).

19 **2.2 Reformulation Option.** Commencing on the Effective Date, all
20 components used to manufacture Covered Products that TSA sells or offers for sale in California
21 the Covered Products shall be deemed to comply with Proposition 65 with regard to lead
22 and be exempt from any Proposition 65 warning requirements for lead if components of
23 the Covered Products from which exposures to lead may arise, including solder used in
24 the Covered Products, meet the following criteria: (a) alloys from which the components
25 are made shall have no lead as an intentionally-added constituent; and, regardless of
26 intent, (b) the alloy from which the components are made and solder used in the Covered
27 Products shall have a lead content by weight of no more than 0.01% (100 parts per
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1 million, or “100 ppm”) which complies with the strictest standard for lead in children’s
2 items as established by the US Consumer Product Safety Commission, See 16 CFR Part
3 1500.90, and significantly reduces the lead content in the Covered Products, which
4 Wimberley contends were in excess of 0.1% lead. The Covered Products are not
5 childrens’ products under either Federal or California law.

6 2.1 TSA may comply with the above requirements by relying on information obtained
7 from its suppliers, provided such reliance is in good faith. Obtaining test results showing that the
8 lead content is no more than 0.01%, using a method of sufficient sensitivity to establish a limit of
9 quantification (as distinguished from detection) of less than 100 ppm shall be deemed to establish
10 good faith reliance, provided that TSA does not receive later test results indicating that lead at,
11 or in excess of, 100 ppm has been detected in a component of or solder used in the Covered
12 Products. TSA shall make such test results available to Wimberley upon reasonable request
13 should it exercise this reformulation option.

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

15 3.1 With regard to all claims that have been raised or which could be raised with respect
16 to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products, TSA
17 shall pay a civil penalty of \$1000.00 pursuant to Health and Safety Code section 25249.7(c), to
18 be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these
19 funds remitted to the State of California’s Office of Environmental Health Hazard Assessment
20 and the remaining 25% of the penalty remitted to Wimberley, as provided by California Health &
21 Safety Code § 25249.12(d) and the instructions directly below.

22 3.2 TSA shall issue two separate checks or wire transfers for the penalty payment: (a)
23 one check made payable to “OEHHA” (tax identification number: 68-0284486) in an amount
24 representing 75% of the total penalty (i.e., \$750.00); and (b) one check in an amount representing
25 25% of the total penalty (i.e., \$250.00) made payable directly to Wimberley. TSA shall wire
26 these payments to Wimberley’s counsel within five (5) days following the Execution Date
27 and receipt of information for W-9 forms for Wimberley, whichever is later. The Law Offices
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1 of Stephen Ure, PC will provide TSA with wire and mail instruction and tax identification
2 information.

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

4 The parties reached an accord on the compensation due to Wimberley and her counsel
5 under the private attorney general doctrine and principles of contract law. Under these legal
6 principles, TSA shall reimburse Wimberley's counsel for fees and costs, incurred as a result of
7 investigating, bringing this matter to TSA's attention, and negotiating a settlement in the public
8 interest. Such fees are proper and reasonable under the private attorney general doctrine. TSA
9 shall pay Wimberley's counsel pursuant to Code of Civil Procedure section 1021.5, \$31,500.00
10 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter
11 and the Notice. TSA shall wire this payment within five (5) days following the Execution
12 Date and receipt of W-9 form information for Law Offices of Stephen Ure, PC, whichever is
13 later, to the "Trust Account Law Offices of Stephen Ure, PC," (tax identification number 42-
14 1641673). The Law Offices of Stephen Ure, PC will provide TSA with wire instruction and tax
15 identification information. Other than the payment required hereunder, each side is to bear its
16 own attorneys' fees and costs.

17 **5. RELEASE OF ALL CLAIMS**

18 5.1 Release of TSA and Downstream Customers

19 Wimberley, on behalf of herself and in the public interest, releases TSA and its
20 downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, franchisees,
21 dealers, customers, owners, purchasers, users, parents, affiliates, subsidiaries, and their respective
22 officers, directors, attorneys, representatives, shareholders, agents, and employees, and their
23 respective sister and parent entities, successors, and assigns (collectively "Releasees") from all
24 claims for violations of Proposition 65 up through the Effective Date based on exposure to lead
25 from the Covered Products as set forth in her Notice of Violation. Compliance with the terms of
26 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
27 lead from the Covered Products.
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1 In addition to the foregoing, Wimberley, on behalf of herself, her past and current agents,
2 representatives, attorneys, and successors and/or assignees, and not in her representative capacity,
3 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
4 action and releases any other Claims that she could make against TSA or its Releasees arising
5 up to the Effective Date with respect to violations of Proposition 65 based upon the Covered
6 Products. With respect to the foregoing waivers and releases in this paragraph, Wimberley
7 hereby specifically waives any and all rights and benefits which she now has, or in the future may
8 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
9 provides as follows:

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

14 5.2 TSA's Release of Wimberley

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

20 **6. SEVERABILITY AND MERGER**

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

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

28 **7. GOVERNING LAW**

1 The terms of this Consent Judgment shall be governed by the laws of the State of
2 California and apply within the State of California. In the event that Proposition 65 is repealed or
3 is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
4 TSA shall provide written notice to Wimberley of any asserted change in the law, and shall have
5 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
6 the Covered Products are so affected.

7 **8. NOTICES**

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

12 For TSA:

13 TSA Stores, Inc
14 1050 W Hampden Avenue
15 Englewood, CO 80110
16 ATTN: Legal Department
16 CC: Risk Management Department

17 With a copy to:

18 Jeffrey Margulies
19 Norton Rose Fulbright US LLP
20 555 South Flower St.
20 Forty First Floor
20 Los Angeles, CA 90071

21 and

22 For Wimberley:

23 Stephen Ure
24 Law Offices of Stephen Ure, PC.
24 11622 El Camino Real, Suite 100
25 San Diego, California 92130

26 Any party, from time to time, may specify in writing to the other party a change of address to
27 which all notices and other communications shall be sent.
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9. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment 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 requirements set forth in California Health & Safety Code §25249.7(f) and to promptly bring a motion for approval of this Consent Judgment. TSA agrees to cooperate with Wimberley and support Wimberley's motion for approval of this Consent Judgment.

In the event the Court does not grant Wimberley's motion for approval of or enter this Consent Judgment within eighteen months after it has been fully executed by the parties, the parties shall meet and confer as to whether to modify the language or appeal the ruling. If the parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the trial court's calendar and Wimberley's counsel shall refund TSA the payment provided pursuant paragraph 4 in full within thirty (30) days of TSA providing written notice thereof.

11. MODIFICATION

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

12. RETENTION OF JURISDICTION

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

13. AUTHORIZATION

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

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APPROVED AS TO FORM:

Dated: March __, 2015

NORTON ROSE FULBRIGHT US LLP

By: _____
Jeffrey Margulies
Attorney for Defendant,
TSA STORES, INC.

Dated: March __, 2015

LAW OFFICES OF STEPHEN URE, PC

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

IT IS HEREBY SO STIPULATED:

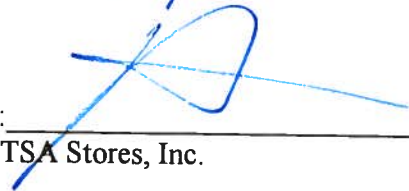
AGREED TO:

AGREED TO:

Date: _____

Date: 3/24/15

By: _____
EVELYN WIMBERLEY

By: _____

TSA Stores, Inc.