State of California - Department of Justice - Attorney General's Office - Proposition 65 Enforcement Reporting

Attention: Prop 65 Coordinator, 1515 Clay Street, Suite 2000, Oakland, CA 94612

FORM JUS 1501
(03-01)

PRIVATE ENFORCEMENT FILING - Health and Safety Code section 25249.7(e) and (f)

REPORT OF SETTLEMENT

Please print or type required information

☒ Original Filing ☐ Supplemental Filing ☐ Corrected Filing

PARTIES TO THE ACTION

PLAINTIFF(S)

Arthur Zivkovic

DEFENDANT(S) INVOLVED IN SETTLEMENT

Insight 2 Design, Inc.
Wal-Mart Stores, Inc.
Bushnell Corporation

CASE INFO

COURT DOCKET NUMBER	COURT NAME
CGC-16-549880	San Francisco Superior Court

SHORT CASE NAME

Zivkovic v. Wal-Mart Stores, Inc. and Insight 2 Design, Inc.

REPORT INFO

INJUNCTIVE RELIEF

Placement of a clear and reasonable warning label on covered products

PAYMENT: CIVIL PENALTY	PAYMENT: ATTORNEYS FEES	PAYMENT: OTHER
$5,000	$35,000	

WILL SETTLEMENT BE SUBMITTED TO COURT?	IF YES, AFTER ENTRY OF JUDGMENT BY COURT, REPORT OF ENTRY OF JUDGMENT MUST BE SUBMITTED TO ATTORNEY GENERAL	DATE SETTLEMENT SIGNED
☒ Yes ☐ No		06/30/2016

COPY OF SETTLEMENT MUST BE ATTACHED

For Internal Use Only

FILER INFO

NAME OF CONTACT

Craig Nicholas

ORGANIZATION	TELEPHONE NUMBER
Nicholas & Tomasevic, LLP	((619)) 325-0492
ADDRESS	FAX NUMBER
225 Broadway, 19th Floor	((619)) 325-0496

CITY	STATE	ZIP	E-MAIL ADDRESS
San Diego	CA	92101-5014	cnicholas@nicholaslaw.org

FILING INSTRUCTIONS: This form can be completed online and printed. If electronic filing is not available, mail the completed form with a copy of the settlement to the attention of the Prop 65 Coordinator at the address shown above. If you need additional space to complete this form please use an attachment.

NICHOLAS & TOMASEVIC, LLP
Craig M. Nicholas (SBN 178444)
Alex M. Tomasevic (SBN 245598)
Lacy Wells (SBN 306496)
225 Broadway, Ste. 1900
San Diego, California 92101
Telephone: (619) 325-0492
Facsimile: (619) 325-0496
Email: cnicholas@nicholaslaw.org
Email: atomasevic@nicholaslaw.org
Email: lwells@nicholaslaw.org

GLICK LAW GROUP, LLP
Noam Glick (SBN 251582)
225 Broadway, Ste. 2100
San Diego, CA 92101
Telephone: (619) 382-3400
Facsimile: (619) 615-2193
Email: noam@glicklawgroup.com

Attorneys for Plaintiff
Arthur Zivkovic

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

ARTHUR ZIVKOVIC, Plaintiff, v. WAL-MART STORES, INC., a Delaware corporation; BUSHNELL CORPORATION; INSIGHT 2 DESIGN, INC.; and DOES 1 through 150, Inclusive, Defendants.	Case No. CGC-16-549880 **STIPULATED CONSENT JUDGMENT; [PROPOSED] ORDER** *California Health & Safety Code § 25249.5 et seq.* Date: [Date] Time: [Time] Dept: [Dept.] Judge: [Judge] Complaint Filed: January 15, 2016 Trial Date: None Set

1. INTRODUCTION

1.1 The First Amended Complaint ("FAC") in the above-titled Action arises out of the alleged violations of California's Safe Drinking Water and Toxic Enforcement Act of 1986,

California Health & Safety Code § 25249.5, *et seq.* (hereinafter "Prop 65") regarding certain tents alleged to contain Tris (1,3-Dichloro-2-propyl phosphate) ("Tris" or "TDCPP"), hereinafter referred to as "Covered Product(s)," including, but not limited to: Bushnell 2 Person Dome Tent, item Number/SKU BSN-754548, and Ozark Trail 2 Person 7 X 7 Dome Tent, item Number/SKU 8-17247-01124-9.

1.2 Arthur Zivkovic ("Plaintiff") is a citizen of the State of California with an interest in protecting the environment, improving human health and the health of ecosystems, and supporting environmentally sound practices, which includes promoting awareness of exposure to toxic chemicals and reducing exposure to hazardous substances found in consumer products.

1.3 The Defendants in the FAC are Wal-Mart Stores, Inc., Insight 2 Design, Inc. ("I2D"), and Bushnell Corporation (collectively, the "Named Defendants"). While the FAC names Doe defendants, no "Doe" parties have been served by Plaintiff and will not be served by Plaintiff in this matter.

1.4 Collectively, Plaintiff and I2D are hereinafter referred to as "the Parties," and individually as "the Party."

1.5 On or about July 23, 2015 and August 21, 2015, pursuant to California Health and Safety Code Section 25249.7 (d)(1), Plaintiff served documents entitled "Proposition 65 Notice of Violation" ("the Notices") alleging that Named Defendants were in violation of Prop 65 as to the Covered Products. The Notices were served on Named Defendants, the California Attorney General, the District Attorneys of every County in the State of California, and the City Attorneys for every City in the State of California with a population greater than 750,000.

1.6 The Notices allege that Named Defendants manufacture, distribute, and/or sell in California Covered Products that expose consumers to the chemical Tris, applied as a flame retardant, a chemical listed under Prop 65 as a chemical known to the State of California to cause cancer, with ordinary use and without the requisite warnings, or have done so in the past, and that their conduct violates the warning provision of Prop 65, Health & Safety Code § 25249.6.

1.7 On or about January 13, 2016, after more than sixty (60) days passed since service of the Notice and no designated governmental agency filed a complaint, Plaintiff filed a Complaint

and subsequently filed the FAC against Named Defendants with regard to the alleged violations as to the Covered Products.[1] The Complaint and FAC are based on the allegations in the Notice(s) and seek injunctive relief and civil penalties.

1.8 The Parties enter into this Consent Judgment in order to settle, compromise, and resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of the Parties, or by any of the other Named Defendants, or any of the Released Parties (as hereinafter defined in Section 9.1) or by any of their respective representative officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, licensors, distributors, manufacturers, retailers of manufacturers, wholesalers, marketplace hosts, other retailers, or any of them, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any alleged violation of Prop 65 or other law. Except as expressly set forth herein, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any other future legal proceeding unrelated to these proceedings. However, nothing in this Section shall affect the enforceability of this Consent Judgment.

1.9 The "Effective Date" of this Consent Judgment shall be the date that this Consent Judgment is entered by the Court.

2. JURISDICTION AND VENUE

2.1 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the subject matter of this Action and has personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

3. INJUNCTIVE RELIEF-PRODUCT LABELING AND WARNING

3.1 No later than 30 days after the Effective Date, to the extent that I2D has not already done so, I2D shall not ship or deliver for sale or distribution in California Covered Products that

[1] Plaintiff filed the Complaint on January 13, 2016, and thereafter filed the FAC on January 15, 2016.

contain or have applied as a flame retardant TDCPP and/or TDCPP compounds, unless such Covered Products are shipped or delivered with a clear and reasonable warning, as described in Sections 3.2-3.4.

3.2 Each warning required by Section 3.1 shall be prominently affixed to or printed upon the label or packaging of the Covered Product so as to be clearly conspicuous, as compared with other statements or designs on the label or packaging as to render it likely to be read and understood by an ordinary purchaser of the product. If the warning is displayed on the product's label, it shall be at least the same size as the largest of any other health or safety warnings on the product and the word "WARNING" shall be in all capital letters and in bold print. For any products sold via a website, the warning shall appear either (a) on the checkout page on the website for California customers relating to any of the Covered Products being sold, or (b) on the product information page related to a Covered Product on that website.

3.3 For those Covered Products that are subject to the warning requirements of Section 3.1, the following language, or something in substantially similar form, shall be applied to each unit of the Covered Products in the manner described in Section 3.2:

3.4 **"WARNING.** This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm."

4. SETTLEMENT PAYMENT

4.1 Defendants shall make a total payment of $40,000.00 which shall be in full and final satisfaction of all potential civil penalties, payment in lieu of civil penalties, and attorneys' fees and costs. The payments shall be made in full one week following the Effective Date. The payment will be made to counsel for Plaintiff, Nicholas & Tomesevic, LLP, 225 Broadway, 19th Floor, San Diego, CA 92101.

4.2 $5,000.00 shall be payable as civil penalties pursuant to California Health and Safety Code Section 25249.7(b)(1).

4.3 $35,000.00 shall be payable to Nicholas & Tomesevic, LLP, 225 Broadway, 19th Floor, San Diego, CA 92101 as reimbursement of Plaintiff's attorneys' fees and costs.

5. ENFORCEMENT OF CONSENT JUDGMENT

5.1 Plaintiff may, by motion or application for an order to show cause before the Superior Court of San Francisco County, enforce the terms and conditions contained in this Consent Judgment. Prior to bringing any motion or application to enforce the requirements in Section 3, Plaintiff shall provide Named Defendants with a Notice of Violation and a copy of any documents which purportedly support Plaintiff's Notice of Violation. The Parties shall then meet and confer regarding the basis for Plaintiff's anticipated motion or application in an attempt to resolve it informally, including providing Named Defendants ninety (90) days to cure any alleged violation. Should such attempt at informal resolution fail, Plaintiff may file his enforcement motion or application. The prevailing party on any motion to enforce this Consent Judgment may be entitled to its reasonable attorneys' fees and costs incurred as a result of such motion or application. It is understood that this Consent Judgment may only be enforced by the Parties.

6. MODIFICATION OF CONSENT JUDGMENT

6.1 This Consent Judgment may be modified only by: (1) written agreement and stipulation of the Parties and (2) upon entry of a modified Consent Judgment by the Court.

7. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT

7.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate this consent judgment.

7.2 The Parties may enforce the terms and conditions contained in this Consent Judgment, by motion or application for an order to show cause filed with this Court.

8. APPLICATION OF CONSENT JUDGMENT

8.1 The Consent Judgment shall apply to, be binding upon the Parties and benefit the Parties, the other Named Defendants, and the other Released Parties (as defined hereinafter in Section 9.1) and their respective representative officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, licensors, distributors, manufacturers, retailers of manufacturers, wholesalers, marketplace hosts, other retailers, predecessors, successors, assigns, and each of them.

8.2 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts by the Parties.

8.3 This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by the Parties and their counsel.

8.4 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment.

9. BINDING EFFECT, CLAIMS COVERED AND RELEASED

9.1 This Consent Judgment is a full, final and binding resolution between Plaintiff, on behalf of himself and in the public interest, and I2D, of any state or federal law regarding the alleged presence of TDCPP or other chemical in or on the Covered Products, including the violation of Prop 65 or its implementing regulations, including, but not limited to the failure to provide Prop 65 warnings for exposure to TDCPP or any other chemical from the handling or use of the Covered Products and fully resolves all known and unknown claims that have been or could have been asserted in this action up to and including the Effective Date for failure to provide Prop 65 warnings for the Covered Products. Plaintiff, on behalf of himself and the public interest, hereby releases and discharges Doe Defendants, Named Defendants and their respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, licensors, customers, distributors, retailers of manufacturers, wholesalers, manufacturers, marketplace hosts (including, but not limited to, Walmart.com USA LLC), retailers (including, but not limited to, Wal-Mart Stores, Inc. and its affiliates and subsidiaries), and any other upstream and downstream entities directly or indirectly in the distribution chain of any Covered Products, and the predecessors, successors, and assigns of any of them, and each of them, (collectively "Released Parties"), from any and all claims, actions, causes of action, suits, demand, liabilities, damages, penalties, fees, costs, and expenses asserted, or that could have been asserted, as to any alleged violation of Prop 65 arising from the failure to provide Prop 65 warnings on the Covered Products regarding TDCPP.

9.2 Plaintiff, on behalf of himself and in the public interest, hereby releases and discharges the Released Parties from all known and unknown claims, causes of action, suits, damages, penalties, liabilities, injunctive relief, declaratory relief, attorneys' fees, costs, and expenses arising from or related to the claims asserted or that could have been asserted, under state or federal law, regarding the presence of TDCPP in or on the Covered Products or the facts alleged in the Notices and/or the FAC, including, without limitation, any and all claims concerning exposure to any person to TDCPP or any other chemical in or on the Covered Products.

9.3 The Parties further waive and release any and all claims they may have against each other for all actions or statements made or undertaken in the course of seeking or opposing enforcement of Prop 65 in connection to the Notices or Complaint up through and including the Effective Date, provided, however, that nothing in Section 9 shall affect or limit any Party's right to seek to enforce the terms of this Consent Judgment.

9.4 Unknown Claims. It is possible that other claims not now known to the Parties arising out of the facts alleged in the Notice or the Complaint and relating to TDCPP in or on the Covered Products that were manufactured before the Effective Date will develop or be discovered. The Parties acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including against the Released Parties and all rights of action therefor. Plaintiff for himself and the public interest he represents, waives Section 1542 of 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 or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."**

9.5 The Parties each release and waive any right or benefit it has or may have under Section 1542 of California Civil Code or any similar provision under the statutory or non-statutory law of any other jurisdiction to the full extent that it may lawfully waive all such rights and benefits pertaining to the claims in this Consent Judgment. The Parties acknowledge that each may subsequently discover facts in addition to, or different from, those that it believes to be true with respect to the claims released herein. The Parties agree that this Consent Judgment and the releases

contained herein shall be and remain effective in all respects notwithstanding the discovery of such additional or different facts.

9.6 Compliance with the terms of this Consent Judgment shall be deemed to constitute compliance with respect to exposures from TDCPP or other chemical from the Covered Products as set forth in the Notices, the Complaint, and the FAC.

10. CONSTRUCTION AND SEVERABILITY

10.1 The terms and conditions of this Consent Judgment have been reviewed by the respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully discuss the terms and conditions with its counsel. In any subsequent interpretation or construction of this Consent Judgment, the terms and conditions shall not be construed against any party.

10.2 In the event that any of the provisions of this Consent Judgment is held by a court to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected. The terms and conditions of this Consent Judgment shall be governed by and construed in accordance with the laws of the State of California. In the event that Prop 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products and/or TDCPP, then I2D shall provide written notice to Plaintiff of any asserted change in the law, and I2D and the Released Parties shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Products are so affected.

11. PROVISIONS OF NOTICE

11.1 All notices required to either Party pursuant to this Consent Judgment shall be in writing and set to the following agents listed below by: (1) first-class, registered mail; (2) certified mail; (3) overnight courier with delivery confirmation, or (4) personal delivery to the following:

11.2 Notice to Defendant Insight 2 Design, Inc.:

I2D, Inc.
Attn: Nick Vaughn
9142 West 135th Street
Overland Park, KS 66221

With a Copy on behalf of I2D to:
Procopio, Cory, Hargreaves & Savitch,

Attn: Hazel Ocampo & John Lormon,
525 B. Street Suite 2200, San Diego, CA 92101
hazel.ocampo@procopio.com
john.lormon@procopio.com

11.3 Notice to Defendant Walmart Stores Inc.:

Wal-Mart Stores, Inc.
Wal-Mart Legal Department
Attn: Matthew Burgess
702 S.W. 8th St.
Bentonville, AR 72716-0215

With a copy on behalf of Wal-Mart Stores, Inc. to:

Bartko Zankel Bunzel & Miller
Attn: Michael D. Abraham, Esq. & Kerry L. Duffy, Esq.
One Embarcadero Center, Suite 800
San Francisco, CA 94111
kduffy@BZBM.com

11.4 Notice to Defendant Bushnell Corporation:

Jeff Ehrich
Associate General Counsel
Vista Outdoor Inc.
1 Vista Way | Anoka, MN 55303

With a Copy on behalf of Bushnell Corporation to:
Procopio, Cory, Hargreaves & Savitch,
Attn: Hazel Ocampo & John Lormon,
525 B. Street Suite 2200, San Diego, CA 92101
hazel.ocampo@procopio.com
john.lormon@procopio.com

11.5 Notice to Plaintiff

Craig Nicholas, Esq.
Nicholas & Tomasevic, LLP
225 Broadway, Ste. 1900
San Diego, CA 92101
CNicholas@nicholaslaw.org

Noam Glick, Esq.
Glick Law Group, P.C.
225 Broadway, Ste. 2100
San Diego, CA 92101
noam@glicklawgroup.com

12. COURT APPROVAL

12.1 Upon execution of this Consent Judgment by the Parties, Plaintiff shall notice a Motion for Court Approval. The Parties shall use their best efforts to support entry of this Consent Judgment.

12.2 If the California Attorney General objects to any term in this Consent Judgment, the Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to the hearing on this motion.

12.3 If the Stipulated Consent Judgment is not approved by the Court despite the Parties' best efforts, it shall be null and void and have no force or effect.

13. ENTIRE AGREEMENT, AUTHORIZATION

13.1 This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein.

13.2 No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent judgment have been made by any Party hereto.

13.3 No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby and entry of modified Consent Judgment by the Court.

13.4 No waiver of any provision of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof, whether similar or not, nor shall such waiver constitute a continuing waiver.

14. EXECUTION AND COUNTERPARTS

14.1 This Consent Judgment may be executed in counterparts, which taken together shall be deemed to constitute one document. A portable document format ("PDF") signature shall be construed as valid as the original signature.

15. COURT APPROVAL

15.1 This Consent Judgment has come before this Court upon the request of the Parties. The Parties request the Court to fully review this Consent Judgment and, being fully informed regarding the matters which are subject of this action, to:

(a) Find that the terms and provisions of this Consent Judgment represent a good faith settlement of all matters raised by the allegations of the Complaint, that the matter has been diligently prosecuted. and that the public interest is served by such settlement; and

(b) Make the findings pursuant to California Health and Safety Code section 25249.7 (f) (4), and approve the Settlement and this Consent Judgment.

IT IS SO STIPULATED:

For PLAINTIFF:

By: ARTHUR ŽIVKOVIĆ Dated 06·30·16

Its: _____

For DEFENDANT: INSIGHT 2 DESIGN, INC.

By: NICK VAUGHN Dated 6/30/16

Its: _____

APPROVED AS TO FORM:

DATED: July 1, , 2016

By: Noam Glick, Esq.

DATED: June 30, 2016

By: Hazel Ocampo, Esq.

JUDGMENT

Based upon the Parties' Stipulation, and good cause appearing, this Consent Judgment is approved and Judgment is hereby entered according to its terms.

Dated: _____, 2016

_____
Judge of the Superior Court