

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, an individual			
	DEFENDANT(S) INVOLVED IN SETTLEMENT PLEWS, INC. d/b/a PLEWS & EDELMANN, a Delaware corporation			
CASE INFO	COURT DOCKET NUMBER CGC-16-555986		COURT NAME San Francisco Superior Court	
	SHORT CASE NAME Zivkovic v. Plews, Inc.			
REPORT INFO	INJUNCTIVE RELIEF Placement of a clear and reasonable warning label on covered products			
	PAYMENT: CIVIL PENALTY \$5,000.00		PAYMENT: ATTORNEYS FEES \$45,000	PAYMENT: OTHER
	WILL SETTLEMENT BE SUBMITTED TO COURT? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	IF YES, AFTER ENTRY OF JUDGMENT BY COURT, REPORT OF ENTRY OF JUDGMENT MUST BE SUBMITTED TO ATTORNEY GENERAL		DATE SETTLEMENT SIGNED 12 / 13 / 2016
	COPY OF SETTLEMENT MUST BE ATTACHED			
FILER INFO	NAME OF CONTACT Shaun A. Markley, Esq.			
	ORGANIZATION Nicholas & Tomasevic, LLP		TELEPHONE NUMBER ((619)) 325-0492	
	ADDRESS 225 Broadway, 19th Floor		FAX NUMBER ((619)) 325-0496	
	CITY San Diego	STATE CA	ZIP 92101-5014	E-MAIL ADDRESS smarkley@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.

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Attorneys for Plaintiff

9 Arthur Zivkovic

10
11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

13 ARTHUR ZIVKOVIC, an individual

14 Plaintiff,

15 v.

16 PLEWS, INC. d/b/a PLEWS & EDELMANN,
a Delaware corporation

17 Defendant.

Case No. CGC-16-555986

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Arthur Zivkovic (“Zivkovic”) and
4 Plews, Inc. doing business as Plews & Edlmann (“P&E”) (collectively the “Parties”).

5 **1.2 Plaintiff**

6 Zivkovic is an individual residing in California and acting in the interest of the general public.
7 He seeks to promote awareness of exposures to toxic chemicals and to improve human health by
8 reducing or eliminating hazardous substances contained in consumer products.

9 **1.3 Defendant**

10 P&E employs ten or more individuals and is a “person in the course of doing business” for
11 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
12 section 25249.6 *et seq.* (“Proposition 65”).

13 **1.4 General Allegations**

14 Zivkovic alleges that P&E manufactures, imports, sells, and distributes for sale in California
15 the Amflo Day Glow Orange PVC Air Hose that contains di(2-ethylhexyl) phthalate (“DEHP”) and
16 Diisononyl phthalate (“DINP”). Zivkovic further alleges that P&E does so without providing a
17 sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to
18 Proposition 65, DEHP is listed as a chemical known to cause birth defects or other reproductive harm
19 as well as cancer. DINP is listed as a chemical known to cause cancer.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment “Products” are defined as Amflo 25’ Day Glow
22 Orange PVC Air Hoses containing DEHP and/or DINP that are manufactured, imported, sold, or
23 distributed for sale in California by P&E.

24 **1.6 Notices of Violation**

25 On August 10, 2016, Zivkovic served P&E, True Value Company, the California Attorney
26 General, and all other required public enforcement agencies with a 60-Day Notice of Violation
27 (“Notice”). The Notice alleged that P&E violated Proposition 65 by failing to sufficiently warn
28

1 consumers in California of the health hazards associated with exposures to DEHP and DINP
2 contained in the Products.

3 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
4 violations alleged in the Notices.

5 **1.7 Complaint**

6 On 12/19/2016, Zivkovic filed a Complaint against P&E for the alleged violations of
7 Health and Safety Code section 25249.6 that are the subject of the Notice (“Complaint”).

8 **1.8 No Admission**

9 P&E denies the material, factual, and legal allegations in the Notices and Complaint, and
10 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
11 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
12 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
13 law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
14 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
15 not, however, diminish or otherwise affect P&E’s obligations, responsibilities, and duties under this
16 Consent Judgment.

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
19 Court has jurisdiction over P&E as to the allegations in the Complaint, that venue is proper in the
20 County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
21 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
24 the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

25 **2. INJUNCTIVE RELIEF: RELABELED PRODUCTS**

26 Commencing on the Effective Date and continuing thereafter, P&E agrees to only
27 manufacture, import, sell, and/or distribute Relabeled Products in California. “Relabeled Products”
28 are Products containing a sufficient warning label as set forth in Proposition 65 and related

1 Regulations. With new Regulations set to take effect in 2018, P&E will after the Effective Date have
2 the option, without limitation, to use the language set forth in the current Regulations¹ or the
3 language set forth in the 2018 Regulations.²

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Settlement Amount**

6 P&E shall pay fifty thousand dollars (\$50,000) in settlement and total satisfaction of all the
7 claims referred to in the Notice, Complaint, and this Consent Judgment. This includes civil penalties
8 in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety Code section
9 25249.7(b) and attorney's fees and costs in the amount of forty-five thousand dollars (\$45,000)
10 pursuant to Code of Civil Procedure section 1021.5.

11 The portion of the settlement attributable to civil penalties shall be allocated according to
12 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
13 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
14 the remaining twenty-five percent (25%) of the penalty paid to Zivkovic.

15 The portion of the settlement attributable to attorney's fees and costs shall be paid to
16 Zivkovic's counsel. Zivkovic is entitled to all attorney's fees and costs incurred by him in this action,
17 including but not limited to investigating, bringing this matter to P&E's attention, as well as litigating
18 and negotiating a settlement in the public interest.

19 P&E shall provide its payment in one check payable to Nicholas & Tomasevic, LLP.
20 Zivkovic's counsel shall be responsible for delivering OEHHA's and Zivkovic's portions of the
21 penalty paid under this Consent Judgment.

22
23 ¹ 27 CCR § 25603.2 [Repealed Operative August 30, 2018]: "WARNING: This product may
24 contain a chemical known to the State of California to cause cancer or birth defects or other
reproductive harm."

25 ² 27 CCR § 25603 [Operative August 30, 2018]: "WARNING: This product can expose you
26 to chemicals, including DINP (PVC hose part), which is known to the State of California to cause
27 cancer; DEHP (PVC hose part), which is known to the State of California to cause cancer, birth
28 defects or other reproductive harm; and lead (brass parts), which is known to the State of California
to cause birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov."

1 **3.2 Payment Timing; Payments Held in Trust**

2 All payments due under this Consent Judgment shall be held in trust until the Court approves
3 the Parties' settlement. Within fifteen (15) days of the Parties' mutual execution of this agreement,
4 the \$50,000 settlement amount shall be remitted to P&E's counsel to hold in trust until the Effective
5 Date. P&E's counsel shall provide Zivkovic's counsel with written confirmation following its
6 receipt of these funds. Thereafter, within five days of the Effective Date, P&E's counsel shall
7 deliver the settlement payments to Zivkovic's counsel.

8 **3.3 Payment Address**

9 Following the Effective Date, all payments required by this Consent Judgment shall be
10 delivered to:

11 Nicholas & Tomasevic, LLP
12 225 Broadway, 19th Floor
13 San Diego, CA 92101

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Zivkovic's Public Release of Proposition 65 Claims**

16 For any claim or violation arising under Proposition 65 alleging a failure to warn about
17 exposures to DEHP and DINP from Products manufactured, imported, sold, or distributed by P&E
18 prior to the Effective Date, Zivkovic, acting on his own behalf and in the public interest, releases
19 P&E of any and all liability. This includes P&E's parents, subsidiaries, affiliated entities under
20 common ownership, its directors, officers, employees, and attorneys ("Releasees). Compliance
21 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
22 the alleged or actual failure to warn about exposures to DEHP and DINP from Products
23 manufactured, imported, sold, or distributed by P&E after the Effective Date.

24 **4.2 Zivkovic's Individual Release of Claims**

25 Zivkovic, in his individual capacity, also provides a release to P&E and Releasees, which
26 shall be effective as a full and final accord and satisfaction and as a bar to all actions, causes of
27 action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands
28 by Zivkovic of any nature, character or kind, whether known or unknown, suspected or unsuspected,

1 arising out of alleged or actual exposures to DEHP and DINP in Products manufactured, imported,
2 sold, or distributed by P&E before the Effective Date.

3 **4.3 P&E's Release of Zivkovic**

4 P&E, on its own behalf, and on behalf of its past and current agents, representatives,
5 attorneys, successors, and assignees, hereby waives any and all claims against Zivkovic and his
6 attorneys and other representatives, for any and all actions taken or statements made by Zivkovic
7 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
8 seeking to enforce Proposition 65 against it, or with respect to the Products.

9 **4.4 Mutual Waiver of California Civil Code Section 1542**

10 The Parties each acknowledge each is familiar with Section 1542 of the Civil Code,
11 which provides as follows:

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

16 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
17 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
18 rights and benefits which they may have under, or which may be conferred upon them by the
19 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
20 law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
21 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

22 **5. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and shall
24 be null and void if it is not approved and entered by the Court within one year after it has been fully
25 executed by the Parties, or by such additional time as the Parties may agree to in writing.

1 **6. SEVERABILITY**

2 Subsequent to the Court’s approval and entry of this Consent Judgment, if any provision is
3 held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely
4 affected.

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of California
7 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
8 rendered inapplicable for reason, including but not limited to changes in the law, then P&E may
9 provide written notice to Zivkovic of any asserted change, and shall have no further injunctive
10 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
11 so affected.

12 **8. NOTICE**

13 Unless specified herein, all correspondence and notice required by this Consent Judgment
14 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
15 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

16 For P&E:

17 Brett Mueller, President
18 Plews & Edlmann
19 1550 Franklin Grove Road
20 Dixon, IL 61021

For Zivkovic:

 Nicholas & Tomasevic, LLP
 225 Broadway, 19th Floor
 San Diego, CA 92101

21 cc: Stephen T. Holzer, Esq.
22 Lewitt, Hackman, et al.
23 16633 Ventura Blvd., 11th Floor
24 Encino, CA 91436

25 Any Party may, from time to time, specify in writing to the other, a change of address to which all
26 notices and other communications shall be sent.
27
28

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **10. POST EXECUTION ACTIVITIES**

6 Zivkovic agrees to comply with the reporting form requirements referenced in Health and
7 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
8 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
9 which motion Zivkovic shall draft and file. In furtherance of obtaining such approval, the Parties
10 agree to mutually employ their best efforts, including those of their counsel, to support the entry of
11 this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.
12 For purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
13 approval, responding to any objection that any third-party may make, and appearing at the hearing
14 before the Court if so requested.

15 **11. MODIFICATION**

16 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
17 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
18 of any Party, and the entry of a modified consent judgment thereon by the Court.

19 **12. AUTHORIZATION**

20 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
21 have read, understand, and agree to all of the terms and conditions contained herein.

22 **AGREED TO:**

23
24 Date: December 13, 2016

25
26 By: 
27 ARTHUR ZIVKOVIC

AGREED TO:

23
24 Date: December 13, 2016

25
26 By: 
27 Brett Mueller [print name]
28 PLEWS & EDELMANN