

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)			
	DEFENDANT(S) INVOLVED IN SETTLEMENT			
CASE INFO	COURT DOCKET NUMBER		COURT NAME	
	SHORT CASE NAME			
REPORT INFO	INJUNCTIVE RELIEF			
	PAYMENT: CIVIL PENALTY		PAYMENT: ATTORNEYS FEES	PAYMENT: OTHER
	WILL SETTLEMENT BE SUBMITTED TO COURT? <input 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 / /
	COPY OF SETTLEMENT MUST BE ATTACHED			
FILER INFO	NAME OF CONTACT			
	ORGANIZATION			TELEPHONE NUMBER ()
	ADDRESS			FAX NUMBER ()
	CITY	STATE	ZIP	E-MAIL ADDRESS

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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2 Shaun Markley (SBN 291785)
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3 San Diego, California 92101
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4 Fax: (619) 325-0496

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6 Kelsey McCarthy (SBN 305372)
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7 San Diego, California 92101
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8 Fax: (619) 615-2193

9 Attorneys for Plaintiff
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 TEKNOR APEX COMPANY, a Delaware
corporation, and DOES 1 through 100,
17 inclusive,

18 Defendant.

Case No. CGC 16-555270

[PROPOSED] CONSENT JUDGMENT
AS TO TEKNOR APEX COMPANY

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Arthur Zivkovic,
4 ("Zivkovic") on the one hand, and Teknor Apex Company ("Defendant") on the other hand, with
5 Zivkovic and Defendant individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 Zivkovic is an individual residing in California who seeks to promote awareness of
8 exposures to chemicals.

9 **1.3 Defendant**

10 Defendant employs ten or more persons 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
12 Code Section 25249.6 *et seq.* ("Proposition 65").

13 **1.4 General Allegations**

14 Zivkovic alleges that Defendant manufactures, imports, sells, or distributes for sale to
15 consumers in the State of California garden hoses containing phthalates including Di(2-
16 ethylhexyl)phthalate ("DEHP"); Di-isodecyl Phthalate ("DIDP"); Diisononyl Phthalate ("DINP")
17 ("the Chemicals") without first providing the clear and reasonable exposure warning required by
18 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the
19 State of California to cause cancer and birth defects and other reproductive harm. DIDP is listed
20 pursuant to Proposition 65 as a chemical that is known to the State of California to cause birth
21 defects and other reproductive harm. DINP is listed pursuant to Proposition 65 as a chemical that
22 is known to the State of California to cause cancer.

23 **1.5 Product Description**

24 The products covered by this Consent Judgment are garden hoses containing some or all
25 of the Chemicals that are manufactured and/or distributed for authorized sale to consumers in
26 California by Defendant, including, but not limited to:

27 Green Thumb Reinforced 3-Ply Vinyl Garden Hose 5/8" x 50' UPC # 305946

28 NeverKink 5/8" x 50' Premium Duty Hose UPC # 031724869253

1 NeverKink 5/8” x 25’ Heavy Duty Hose UPC # 031724860526

2 Apex 5/8” x 50’ Medium Duty Water Hose UPC # 031724853559

3 Green Thumb NeverKink Garden Hose 5/8” x 25’ UPC # 156212

4 (“Products”). The Products include Products sold in Defendant’s brand names (including those
5 set forth above) and Products Defendant manufactures and/or distributes for authorized sale in
6 California under private label arrangements entered into with retailers or others.¹

7 **1.6 Notices of Violation**

8 On or about August 10, 2016, Zivkovic served Defendant and certain requisite public
9 enforcement agencies with “60-Day Notices of Violation” (“Notices”), documents that informed
10 the recipients of Zivkovic’s allegation that Defendant violated Proposition 65 by failing to warn
11 its customers and consumers in California that the Products expose users to the Chemicals.

12 **1.7 Complaint**

13 After the 60-day notice period was exhausted without an authorized public prosecutor of
14 Proposition 65 having asserted such claims, Zivkovic filed the instant action against Defendant
15 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subjects
16 of the Notices.

17 **1.8 No Admission**

18 Defendant denies the material, factual, and legal allegations contained in the Notices and
19 maintains that all of the products it has manufactured, or distributed for authorized sale in
20 California, including the Products, have been, and are, in compliance with all laws, including
21 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
22 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
23 compliance with this Consent Judgment constitute or be construed as an admission by Defendant
24 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being
25
26

27 ¹ The latter include the Room Essentials Blue 50’ Light-Duty Garden Hose UPC # 490842000069 (“Room Essentials
28 Hose”) marketed by Target Brands, Inc. (“Target”), which was the subject of a 60-day notice that Zivkovic issued to
Target pursuant to Proposition 65 on or about November 4, 2016.

1 specifically denied by Defendant. This section shall not, however, diminish or otherwise affect
2 Defendant's obligations, responsibilities, and duties under this Consent Judgment.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in the City
6 and County of San Francisco, and that this Court has jurisdiction to enter and enforce the
7 provisions of this Consent Judgment.

8 **1.10 Effective Date**

9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
10 which Zivkovic serves notice on the Defendant and the Office of the California Attorney General
11 that the Court has approved and entered this Consent Judgment.

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

13 By no later than the Compliance Date, and continuing thereafter, Defendant shall only
14 manufacture and package for shipment to California, Products that meet the Reformulation
15 Standard set forth in Section 2.1 below ("Reformulated Products") or which meet the warning
16 requirements set forth in Section 2.2 below.²

17 **2.1 Reformulation Standard**

18 For purposes of this Consent Judgment, Reformulated Products are defined as Products
19 for which the accessible portions of their poly vinyl chloride ("PVC") components (i.e., those that
20 can be mouthed or touched by an ordinary consumer during reasonably foreseeable use) contain
21 no more than 1,000 parts per million (0.1%) each of any of the following chemicals: Di-n-butyl
22 Phthalate ("DBP"), DEHP, DIDP, DINP, Butyl benzyl phthalate ("BBP"), and Di-n-hexyl
23 Phthalate ("DnHP") ("Listed Phthalates"). For purposes of determining compliance with this
24 Consent Judgment, the content of Listed Phthalates shall be analyzed pursuant to EPA testing

25 _____
26 ² Given seasonal design, manufacturing, and shipping cycles associated with garden hoses, to allow for the orderly
27 implementation of the injunctive relief requirements set forth in this Consent Judgment, the "Compliance Date" shall
28 mean July 31, 2017, or six (6) months following the Effective Date, whichever arises earlier. Products manufactured
and packaged by Defendant prior to the Compliance Date are exempted from the requirements set forth in Sections
2.1 and 2.2 above and may be offered for sale in California and sold through by downstream distributors, dealers, and
retailers as is.

1 methodologies 3580A and 8270C or equivalent methodologies utilized by state or federal
2 agencies for the purpose of determining Listed Phthalate content in a solid substance.

3 **2.2 Product Warnings**

4 For all Products that contain a Listed Phthalate in an amount exceeding the Reformulation
5 Standard set forth in Section 2.1 above, and which are manufactured and packaged for shipment
6 to California following the Compliance Date, Defendant shall provide the following Proposition
7 65 warning:

8 **WARNING:** This product contains chemicals known to the State of California to
9 cause cancer, and birth defects or other reproductive harm.³

10 The above warning statement shall be placed on the Product's package in at least ten (10) point
11 font and either set within a box or separated from other warning text by at least one line so as to
12 be able to be read and understood by an ordinary individual prior to purchase or use.

13 **2.3 Required Certification and Potential Penalty for Delay in Compliance**

14 By no later than October 31, 2017, Defendant shall provide a certification to Zivkovic
15 confirming compliance with the injunctive relief provisions of this Consent Judgment in the
16 manner specified above. In the event that Defendant fails to provide Zivkovic with the required
17 certification, it shall, by no later than December 31, 2017, fully address any outstanding
18 compliance requirements or terminate further distribution to California of the product lines in
19 question and make an additional payment of \$15,000 to the Nicholas & Tomasevic, LLP Client
20 Trust Account, which shall be paid in a single lump sum. The full \$15,000 shall constitute a
21 penalty pursuant to California Health & Safety Code section 25249.7(b), such money to be
22 apportioned by Plaintiff in accordance with California Health & Safety Code Section 25249.12.

23 **3. STATUTORY PENALTY PAYMENTS**

24 **3.1 Civil Penalty** Defendant shall pay \$5,000 in civil penalties pursuant to California
25 Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty payment shall

26 _____
27 ³ Where only one Listed Phthalate exceeds the Reformulation Standard, Defendant may elect to have this warning
28 statement refer to the word "chemical" in the singular. To the extent Defendant needs to address a requirement of a
previous consent judgment, Defendant may also elect to include a reference to lead in the foregoing warning
statement.

1 be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with
2 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
3 (“OEHHA”) and the remaining 25% of the penalty remitted to Zivkovic. More specifically,
4 within ten (10) business days of the Effective Date, Defendant shall issue two separate checks
5 for the civil penalty payment to (a) “OEHHA” in the amount of \$3,750 and with the memo line
6 on the check indicating “Prop 65 Penalties—Zivkovic v. Teknor” (Defendant may reference
7 OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b) Nicholas &
8 Tomasevic LLP Trust Account” in the amount of \$1,250 (for which Zivkovic shall provide
9 Defendant a completed IRS Form W-9 with a tax identification number within two days
10 following the Effective Date, if not beforehand). These checks shall be delivered to the
11 addresses listed in Section 3.3 below.

12 **3.2 Payment Delivery**

13 (a) Payment to Zivkovic shall be delivered to the following address:

14 Craig Nicholas
15 Nicholas & Tomasevic
16 225 Broadway, 19th Floor
San Diego, CA 92101

17 (b) Payment to OEHHA shall be delivered to one of the following addresses:

18 For United States Postal Service Delivery:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
21 P.O. Box 4010
Sacramento, CA 95812-4010

22 Or

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
26 1001 I Street
Sacramento, CA 95814

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

2 Defendant shall pay Zivkovic \$45,000 for fees and costs incurred as a result of
3 investigating, bringing this matter to Defendant’s attention, and negotiating a settlement in the
4 public interest. Defendant shall make its checks payable to Nicholas & Tomasevic, LLP and shall
5 deliver payment to the address listed in Section 3(a) above within ten (10) business days of the
6 Effective Date. To facilitate timely payment, Zivkovic shall provide Defendant with a completed
7 IRS Form W-9 with Nicholas & Tomasevic’s tax identification number within two days
8 following the Effective Date if not beforehand.

9 **5. CLAIMS COVERED AND RELEASED**

10 **5.1 Zivkovic’s Public Release of Proposition 65 Claims**

11 Zivkovic, acting on his own behalf and in the public interest, releases Defendant, and its
12 affiliated entities, directors, officers, employees, and attorneys (“Defendant Releasees”), and each
13 entity to whom they directly or indirectly distribute or sell Products, including, but not limited to,
14 distributors, wholesalers, dealers, customers, retailers, franchisees, cooperative members,
15 licensors, and licensees (including, without limitation, Lowe’s Home Centers, LLC, True Value
16 Company, and The Home Depot) (“Downstream Defendant Releasees”), from all claims for
17 violations of Proposition 65 based on exposures to the Chemicals from Products manufactured
18 and packaged by Defendant prior to the Effective Date.⁴

19 **5.2 Zivkovic’s Private Releases of Claims**

20 Zivkovic, in his individual capacity only, also provides a release herein which shall be
21 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
22 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
23 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out
24 of alleged or actual exposures to any of the chemicals listed under Proposition 65 (including but
25 not limited to the Listed Phthalates) in the Products. In this regard, Zivkovic hereby
26

27 _____
28 ⁴ Following the Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance with Proposition 65 with respect to exposures to the Chemicals from the Products.

1 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
2 as follows:

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

7 **5.3 Defendant's Release of Zivkovic**

8 Defendant, on its own behalf and on behalf of its past and current agents, representatives,
9 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
10 Zivkovic and his attorneys and other representatives for any and all actions taken or statements
11 made (or those that could have been taken or made) by Zivkovic and his attorneys and other
12 representatives, whether in the course of investigating claims, otherwise seeking to enforce
13 Proposition 65 against Defendant in this matter, or with respect to the Products.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and
16 shall be null and void if, for any reason, it is not approved and entered by the Court within one
17 year after it has been fully executed by all Parties unless the Parties mutually agree to extend that
18 time period due to what they mutually agree are reasonably unforeseeable circumstances.

19 **7. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
21 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
22 be adversely affected.

23 **8. GOVERNING LAW**

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

3 9. **NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant
5 to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class
6 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
7 Party by the other Party to the following addresses:

8 For Defendant Teknor Apex Company:

9 Gilles F. Blanchette
10 Teknor Apex Company
11 505 N Central Avenue
12 Pawtucket, RI 02852

12 *With a copy to:*

13 Robert Falk
14 RFalk@mofocom
15 Morrison & Foerster LLP
16 425 Market Street, 32nd Floor
17 San Francisco, CA 94105

16 For Zivkovic:

17 Noam Glick
18 Glick Law Group
19 225 Broadway, Suite 2100
20 San Diego, CA 92101

20 *AND:*

21 Craig Nicholas
22 Nicholas & Tomasevic, LLP
23 225 Broadway, 19th Floor
24 San Diego, CA 92101

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

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **11. POST EXECUTION ACTIVITIES**

6 Zivkovic agrees to comply with the reporting form requirements referenced in Health &
7 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
8 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement
9 manifested in this Consent Judgment. In furtherance of obtaining such approval, Zivkovic shall
10 file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
11 execution by all Parties and assure that the Office of the California Attorney General is served
12 with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
13 hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such
14 motion has been filed.

15 **12. ENFORCEMENT**

16 Any Party may, after meeting and conferring, by motion or application for an order to
17 show cause before this Court, enforce the terms and conditions contained in this Consent
18 Judgment.

19 **13. MODIFICATION**

20 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
21 and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney
22 General, of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
23 application of any Party, which shall also be served on the Office of the California Attorney
24 General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment
25 by the Court. Any Party seeking to modify this Consent Judgment shall attempt in good faith to
26 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.
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14. AUTHORIZATION

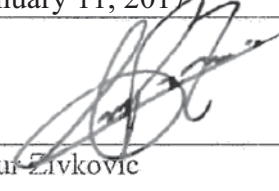
The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agreed to all of the terms and conditions of this Consent Judgment.

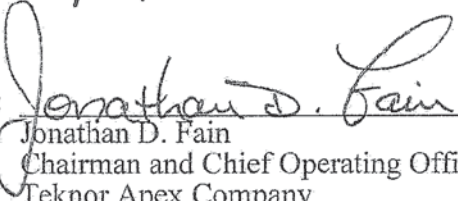
AGREED TO:

AGREED TO:

Date: January 11, 2017

Date: 1/12/17

By: 
Arthur Zivkovic

By: 
Jonathan D. Fain
Chairman and Chief Operating Officer
Teknor Apex Company

IT IS SO ORDERED:

Dated: _____

Judge of the Superior Court