

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

Original Filing Supplemental Filing Corrected Filing

Please print or type required information

PARTIES TO THE ACTION	PLAINTIFF(S) Arthur Zivkovic, an individual			
	DEFENDANT(S) INVOLVED IN SETTLEMENT Flexon Industries Corporation, A New Jersey corporation			
CASE INFO	COURT DOCKET NUMBER CGC-16-556136		COURT NAME San Francisco Superior Court	
	SHORT CASE NAME Zivkovic v. Flexon Industries Corporation			
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 01 / 17 / 2017	
	COPY OF SETTLEMENT MUST BE ATTACHED			
FILER INFO	NAME OF CONTACT Cassandra Inzunza			
	ORGANIZATION Glick Law Group, P.C.		TELEPHONE NUMBER ((619)) 382-3400	
	ADDRESS 225 Broadway, Suite 2100		FAX NUMBER ((619)) 615-2193	
	CITY San Diego	STATE ZIP CA 92101-5014	E-MAIL ADDRESS cassie@glicklawgroup.com	

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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9 Attorneys for Plaintiff

Arthur Zivkovic

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 FLEXON INDUSTRIES CORPORATION, a
New Jersey corporation, and DOES 1 through
17 100, inclusive,

18 Defendant.

Case No. CGC 16-556136

[PROPOSED] CONSENT JUDGMENT
AS TO FLEXON INDUSTRIES
CORPORATION

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 Flexon Industries (“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 and Di-n-butyl Phthalate (“DBP”) (“the Chemicals”) without first providing the clear and
18 reasonable exposure warning required by Proposition 65. DEHP is listed pursuant to
19 Proposition 65 as a chemical that is known to the State of California to cause cancer and birth
20 defects and other reproductive harm. DIDP is listed pursuant to Proposition 65 as a chemical that
21 is known to the State of California to cause birth defects and other reproductive harm. DINP is
22 listed pursuant to Proposition 65 as a chemical that is known to the State of California to cause
23 cancer. DBP is listed pursuant to Proposition 65 as a chemical that is known to the State of
24 California to cause birth defects and other reproductive harm.

25 **1.5 Product Description**

26 The products covered by this Consent Judgment are garden hoses containing some or all
27 of the Chemicals that are manufactured and/or distributed for authorized sale to consumers in
28 California by Defendant, including, but not limited to the Flexon 5/8” x 50’ Light Duty Garden

1 Hose UPC # 044882666053 (“Products”). The Products include Products sold in Defendant’s
2 brand names (including those set forth above) and Products Defendant manufactures and/or
3 distributes for authorized sale in California under private label arrangements entered into with
4 retailers or others.

5 **1.6 Notice of Violation**

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

10 **1.7 Complaint**

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

15 **1.8 No Admission**

16 Defendant denies the material, factual, and legal allegations contained in the Notice and
17 maintains that all of the products it has manufactured, or distributed for authorized sale in
18 California, including the Products, have been, and are, in compliance with all laws, including
19 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
20 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
21 compliance with this Consent Judgment constitute or be construed as an admission by Defendant
22 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being
23 specifically denied by Defendant. This section shall not, however, diminish or otherwise affect
24 Defendant’s obligations, responsibilities, and duties under this Consent Judgment.

25 **1.9 Consent to Jurisdiction**

26 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in the City
28 and County of San Francisco, and that this Court has jurisdiction to enter and enforce the

1 provisions of this Consent Judgment.

2 **1.10 Effective Date**

3 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on
4 which Zivkovic serves notice on the Defendant and the Office of the California Attorney General
5 that the Court has approved and entered this Consent Judgement.

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

7 By no later than the Compliance Date, and continuing thereafter, Defendant shall only
8 manufacture and package for shipment to California, Products that meet the Reformulation
9 Standard set forth in Section 2.1 below (“Reformulated Products”) or which meet the warning
10 requirements set forth in Section 2.2 below.¹

11 **2.1 Reformulation Standard**

12 For purposes of this Consent Judgment, Reformulated Products are defined as Products
13 for which the accessible portions of their poly vinyl chloride (“PVC”) components (i.e., those that
14 can be mouthed or touched by an ordinary consumer during reasonably foreseeable use) contain
15 no more than 1,000 parts per million (0.1%) each of any of the following chemicals: DEHP,
16 DIDP, DBP, DINP, BBP, and DnHP (“Listed Phthalates”). For purposes of determining
17 compliance with this Consent Judgment, the content of Listed Phthalates shall be analyzed
18 pursuant to EPA testing methodologies 3580A and 8270C or equivalent methodologies utilized
19 by state or federal agencies for the purpose of determining Listed Phthalate content in a solid
20 substance.

21 **2.2 Product Warnings**

22 For all Products that contain a Listed Phthalate in an amount exceeding the Reformulation
23 Standard set forth in Section 2.1 above, and which are manufactured and packaged for shipment

24 _____
25 ¹ Given seasonal design, manufacturing, and shipping cycles associated with garden
26 hoses, to allow for the orderly implementation of the injunctive relief requirements set forth in
27 this Consent Judgment, the “Compliance Date” shall mean July 31, 2017, or six (6) months
28 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 to California following the Compliance Date, Defendant shall provide the following Proposition
2 65 warning:

3 **WARNING:** This product contains chemicals known to the State of California to
4 cause cancer, and birth defects or other reproductive harm.²

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

8 **2.3 Required Certification and Potential Penalty for Delay in Compliance**

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

18 **3. STATUTORY PENALTY PAYMENTS**

19 **3.1 Initial Civil Penalty** Defendant shall pay \$5,000 in civil penalties pursuant to
20 California Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty
21 payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(1)
22 and (d), with 75% of the funds remitted to the California Office of Environmental Health
23 Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Zivkovic.
24 More specifically, within ten (10) business days of the Effective Date, Defendant shall issue two
25

26 ² Where only one Listed Phthalate exceeds the Reformulation Standard, Defendant may
27 elect to have this warning statement refer to the word "chemical" in the singular. To the extent
28 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 separate checks for the civil penalty payment to (a) “OEHHA” in the amount of \$3,750 and with
2 the memo line on the check indicating “Prop 65 Penalties—Zivkovic v. Flexon” (Defendant
3 may reference OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b)
4 Nicholas & Tomasevic LLP Trust Account” in the amount of \$1,250 (for which Zivkovic shall
5 provide Defendant a completed IRS Form W-9 with a tax identification number within two days
6 following the Effective Date, if not beforehand). These checks shall be delivered to the
7 addresses listed in Section 3.3 below.

8 **3.2 Payment Delivery**

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

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

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

15 For United States Postal Service Delivery:

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

21 Or

22 For Non-United States Postal Service Delivery:

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

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

 Defendant shall pay Zivkovic \$45,000 for fees and costs incurred as a result of
investigating, bringing this matter to Defendant’s attention, and negotiating a settlement in the
public interest. Defendant shall make its checks payable to Nicholas & Tomasevic, LLP and shall
deliver payment to the address listed in Section 3(a) above within ten (10) business days of the
Effective Date. To facilitate timely payment, Zivkovic shall provide Defendant with a completed

1 IRS Form W-9 with Nicholas & Tomasevic’s tax identification number within two days
2 following the Effective Date if not beforehand.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1 Zivkovic’s Public Release of Proposition 65 Claims**

5 Zivkovic, acting on his own behalf and in the public interest, releases Defendant, and its
6 affiliated entities, directors, officers, employees, and attorneys (“Defendant Releasees”), and each
7 entity to whom they directly or indirectly distribute or sell Products, including, but not limited to,
8 distributors, wholesalers, dealers, customers, retailers, franchisees, cooperative members,
9 licensors, and licensees (including, without limitation, Lowe’s Home Centers, LLC) (collectively,
10 “Downstream Defendant Releasees”), from all claims for violations of Proposition 65 based on
11 exposures to the Chemicals from Products manufactured and packaged by Defendant prior to the
12 Effective Date.³

13 **5.2 Zivkovic’s Private Releases of Claims**

14 Zivkovic, in his individual capacity only, also provides a release herein which shall be
15 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
16 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
17 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out
18 of alleged or actual exposures to any of the chemicals listed under Proposition 65 (including but
19 not limited to the Listed Phthalates) in the Products. In this regard, Zivkovic hereby
20 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides
21 as follows:

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

26 _____
27 ³ Following the Effective Date, compliance with the terms of this Consent Judgment shall
28 be deemed compliance with Proposition 65 with respect to exposures to the Chemicals from the
Products.

1 **5.3 Defendant’s Release of Zivkovic**

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

8 **6. COURT APPROVAL**

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

13 **7. SEVERABILITY**

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

17 **8. 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. In the event that Proposition 65 is repealed or
20 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
21 Defendant may provide written notice to Zivkovic of any asserted change in the law and have no
22 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
23 Products are so affected.

24 **9. NOTICES**

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

1 For Defendant Flexon:

2 Warren Swindlehurst
3 Flexon Industries
4 One Flexon Plaza
5 Newark, NJ 07114

6 *With a copy to:*

7 Robert Falk
8 RFalk@mofo.com
9 Morrison & Foerster LLP
425 Market Street, 32nd Floor
San Francisco, CA 94105

10 For Zivkovic:

11 Noam Glick
12 Glick Law Group
225 Broadway, Suite 2100
San Diego, CA 92101

13 *AND:*

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

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

18 10. **COUNTERPARTS; FACSIMILE SIGNATURES**

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

22 11. **POST EXECUTION ACTIVITIES**

23 Zivkovic agrees to comply with the reporting form requirements referenced in Health &
24 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
25 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement
26 manifested in this Consent Judgment. In furtherance of obtaining such approval, Zivkovic shall
27 file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
28 execution by all Parties and assure that the Office of the California Attorney General is served

1 with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
2 hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such
3 motion has been filed.

4 12. **ENFORCEMENT**

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

8 13. **MODIFICATION**

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

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1 **14. AUTHORIZATION**

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

5
6 **AGREED TO:**

7 Date: January 11, 2017

8
9 By: _____

10 Arthur Zirkovic

6 **AGREED TO:**

7 Date: 1/17/17

8
9 By: _____

10 Warren Swindlehurst
11 Chief Operating Officer
12 Flexon Industries

13 **IT IS SO ORDERED:**

14
15 Dated: _____

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28 _____
Judge of the Superior Court