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FILED
ALAMEDA COUNTY

NOV 15 2016

CLERK OF THE SUPERIOR COURT

By *Kate Clarke*
Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,

vs.

BRIGGS MEDICAL SERVICE
COMPANY, THE HOME DEPOT, INC.,
and HOME DEPOT, U.S.A., INC.,
Defendants.

Case No. RG15784540

~~PROPOSED~~ CONSENT JUDGMENT

Judge: Stephen Pulido

Dept.: 16

Hearing Date: November 15, 2016

Hearing Time: 3:00 PM

Reservation #: R-1784711

NOV 15 2016

BY FAX

1 **1. Introduction**

2 1.1 On May 21, 2015, Anthony Ferreiro ("Ferreiro") served Briggs Medical Service
3 Company ("Briggs"), The Home Depot Inc., Home Depot U.S.A., Inc. (collectively, "Home
4 Depot"), and various public enforcement agencies with a document entitled "Notice of Violation
5 of California Health & Safety Code § 25249.6, *et seq.*" (the "May 21st Notice"). The May 21st
6 Notice provided Briggs and such others, including public enforcers, with notice that alleged that
7 Briggs was in violation of California Health & Safety Code § 25249.6 ("Proposition 65"), for
8 failing to warn consumers and customers that Health Smart Hand Held Shower hoses, Item No.
9 523-1583-1900HS, UPC No. 0 4129811583 0 ("Health Smart Shower Hoses") exposed users in
10 California to the chemical Diisononyl phthalate (DINP). No public enforcer has diligently
11 prosecuted the allegations set forth in the May 21st Notice.

12 1.2 On March 14, 2016, Ferreiro served Briggs, D-M-S Holdings, Inc. ("DMS"), CVS
13 Health Corporation, CVS Pharmacy, Inc. (collectively, "CVS") and various public enforcement
14 agencies with a document entitled "Notice of Violation of California Health & Safety Code §
15 25249.6, *et seq.*" (the "March 14th Notice"). The March 14th Notice provided Briggs Medical and
16 such others, including public enforcers, with notice that alleged that Briggs Medical was in
17 violation of Proposition 65 for failing to warn consumers and customers that No-Skid Bath Mats,
18 UPC No. 041298017400 ("Bath Mats") exposed users in California to the chemical Di(2-
19 ethylhexyl) phthalate (DEHP). No public enforcer has diligently prosecuted the allegations set
20 forth in the March 14th Notice.

21 1.3 On May 12, 2016, Ferreiro served Briggs, DMS, and various public enforcement
22 agencies with a document entitled "Notice of Violation of California Health & Safety Code §
23 25249.6, *et seq.*" (the "May 12th Notice"). The May 12th Notice provided Briggs, DMS and such
24 others, including public enforcers, with notice that alleged that Briggs was in violation of
25 Proposition 65 for failing to warn consumers and customers that walking canes, UPC No. 0
26 4129801301 3 ("Walking Canes") exposed users in California to the chemical DEHP. No public
27 enforcer has diligently prosecuted the allegations set forth in the May 12th Notice.

28 1.4 Ferreiro is sometimes referred to herein as "Plaintiff." Briggs and DMS are

1 collectively referred to herein as "Briggs Medical." Together, Plaintiff and Briggs Medical are
2 referred to herein as, the "Parties."

3 1.5 The May 21st Notice, the March 14th Notice, and the May 12th Notice are
4 collectively referred to as, the "Notice."

5 1.6 The Health Smart Shower Hoses, Bath Mats, and the Walking Canes are
6 collectively referred to herein as, the "Products."

7 1.7 On September 3, 2015, Ferreiro filed a Complaint for Civil Penalties and
8 Injunctive Relief ("Complaint") in Alameda County Superior Court, Case No. RG15784540,
9 against Briggs and Home Depot alleging violations of Proposition 65 (the "Action").

10 1.8 Briggs and DMS are each a corporation that employs more than ten persons under
11 California Health and Safety Code §25249.6 and offered the Products for sale within the State of
12 California.

13 1.9 Ferreiro's Complaint alleges, among other things, that Briggs sold the Health
14 Smart Shower Hoses in California and/or to California citizens, that the Health Smart Shower
15 Hoses contains DINP, and that the resulting exposure violated provisions of Proposition 65, by
16 knowingly and intentionally exposing persons to a chemical known to the State of California to
17 cause both cancer without first providing a clear and reasonable warning to such individuals.

18 1.10 For purposes of this Consent Judgment only, the Parties stipulate that this Court
19 has jurisdiction over the allegations of violations contained in the Complaint and personal
20 jurisdiction over Briggs as to the acts alleged in the Complaint, that venue is proper in the County
21 of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
22 the allegations contained in the Complaint.

23 1.11 The Parties enter into this Consent Judgment pursuant to a full settlement of
24 disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding
25 prolonged litigation. By execution of this Consent Judgment, Briggs Medical does not admit any
26 violation of Proposition 65 and specifically denies that it has committed any such violation.
27 Nothing in this Consent Judgment shall be construed as an admission by Briggs Medical of any
28 fact, issue of law or violation of law, nor shall compliance with the Consent Judgment constitute

1 or be construed as an admission by Briggs Medical of any fact, issue of law, or violation of law.
2 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense
3 that Briggs Medical may have in any other future legal proceeding. However, this paragraph
4 shall not diminish or otherwise affect the obligations, responsibilities and duties of Briggs
5 Medical under this Consent Judgment.

6 1.12 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
7 date that the Consent Judgment is entered by the Court.

8 **2. Injunctive Relief**

9 2.1 Commencing thirty (30) days after the Effective Date, and continuing thereafter,
10 Briggs Medical shall only ship, sell, or offer for sale in California, Reformulated Product pursuant
11 to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section
12 2.3. Briggs Medical and their downstream retailers shall have no obligation to label Products that
13 entered the stream of commerce prior to the Effective Date or within thirty (30) days after the
14 Effective Date. For purposes of this Settlement Agreement, a "Reformulated Product" is Product
15 that is in compliance with the standard set forth below in section 2.2.

16 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
17 1,000 parts per million ("ppm") of DEHP and DINP when analyzed pursuant to CPSC-CH-
18 C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

19 2.3 Commencing thirty (30) days after the Effective Date, Briggs Medical shall, for all
20 Products it sells or distributes and that is intended for sale in California and that is not a
21 Reformulated Product, provide clear and reasonable warnings as set forth in subsections 2.3(a)
22 and (b) below. The warning shall be prominently placed with such conspicuousness as compared
23 with other words, statements, designs, or devices as to render it likely to be read and understood
24 by an ordinary individual under customary conditions before purchase or use. Each warning shall
25 be provided in a manner such that the consumer or user understands to which specific Product the
26 warning applies, so as to minimize the risk of consumer confusion.

27 **(a) Retail Store Sales**

28 **(i) Product Labeling.** Briggs Medical shall affix a warning to the

packaging, labeling or directly on each Product sold in retail outlets in California by Briggs Medical or any person selling the Products that states:

(1) For Product Containing DEHP:

[PROPOSITION 65] WARNING:

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

The bracketed text may, but is not required to, be used.

(2) For Product Containing DINP:

[PROPOSITION 65] WARNING:

This product contains a chemical known to the State of California to cause cancer.

The bracketed text may, but is not required to, be used.

(ii) Point of Sale Warnings. Alternatively to the Product

Labeling set forth in Section 2.3(a)(i) above, Briggs Medical may provide warning signs in the form below to its customers in California with instructions to post the warning signs in close proximity to the point of display of the Product. Such instruction sent to Briggs Medical customers shall be sent by certified mail, return receipt requested.

[PROPOSITION 65] WARNING:

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

The bracketed text may, but is not required to, be used.

(b) Mail Order Catalog Warning. In the event that Briggs Medical directly sells Product via mail order catalog directly to consumers located in California after the Effective Date that is not a Reformulated Product, Briggs Medical shall provide a warning for such Product sold via mail order catalog to such California residents. A warning that is given in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product that states:

(1) For Product Containing DEHP:

1 **[PROPOSITION 65] WARNING:**

2 This product contains a chemical known to the State of California to cause cancer,
3 birth defects or other reproductive harm.

4 The bracketed text may, but is not required to, be used.

5 **(2) For Product Containing DINP:**

6 **[PROPOSITION 65] WARNING:**

7 This product contains a chemical known to the State of California to cause cancer.

8 The bracketed text may, but is not required to, be used.

9 The bracketed text may, but is not required to, be used. Where it is impracticable to provide the
10 warning on the same page and in the same location as the display and/or description of the
11 Product, Briggs Medical may utilize a designated symbol to cross reference the applicable
12 warning and shall define the term "designated symbol" with the following language on the inside
13 of the front cover of the catalog or on the same page as any order form for the Product:

14 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
15 ▼ and offered for sale in this catalog contain a chemical known to the State of
16 California to cause cancer, birth defects or other reproductive harm.

17 The bracketed text may, but is not required to, be used. The designated symbol must appear on
18 the same page and in close proximity to the display and/or description of the Product. On each
19 page where the designated symbol appears, Briggs must provide a header or footer directing the
20 consumer to the warning language and definition of the designated symbol.

21 **(c) Internet Sales Warning.** In the event that Briggs Medical sell
22 Products via the internet directly to consumers located in California after the Effective Date that
23 is not a Reformulated Product, Briggs Medical shall provide a warning for such Product sold via
24 the internet to such California residents. A warning that is given on the internet shall be in the
25 same type size or larger than the Product description text and shall be given in conjunction with
26 the direct sale of the Product. The warning shall appear either: (a) on the same web page on
27 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on
28 the same page as the price for the Product; or (d) on one or more web pages displayed to a

1 purchaser during the checkcut process. A warning shall be provided that states:

2 (1) **For Product Containing DEHP:**

3 **[PROPOSITION 65] WARNING:**

4 This product contains a chemical known to the State of California to cause cancer,
5 birth defects or other reproductive harm.

6 The bracketed text may, but is not required to, be used.

7 (2) **For Product Containing DINP:**

8 **[PROPOSITION 65] WARNING:**

9 This product contains a chemical known to the State of California to cause cancer.

10 The bracketed text may, but is not required to, be used.

11 2.4 Briggs may, but is not required, to use the alternative warning as set forth in this
12 Section 2.4 (the "Alternative Warning") on all Products if it has knowledge that the Products will
13 expose users to more than one chemical on identified on the Proposition 65 chemical list. Crown
14 Briggs shall affix the Alternative Warning to the packaging, labeling or directly on each Product
15 manufactured, distributed, and/or sold in California by Briggs, or any person selling the Product
16 that states:

17 **[PROPOSITION 65] WARNING:**

18 This product contains a chemical known to the State of California to cause cancer, birth
19 defects or other reproductive harm.

20 The bracketed text may, but is not required to, be used.

21 **3. Entry of Consent Judgment**

22 3.1 The Parties hereby request that the Court promptly enter this Consent Judgment.
23 Upon entry of this Consent Judgment, the Parties waive their respective rights to a hearing or trial
24 on the allegations of the Complaint and 60-Day Notice.

25 3.2 In the event that the Attorney General objects or otherwise comments on one or
26 more provisions of this Consent Judgment, the Parties agree to take reasonable steps to satisfy
27 such concerns or objections.
28

1 **4. Matters Covered By This Consent Judgment**

2 **4.1 Plaintiff's Public Release of Proposition 65 Claims.** This Consent
3 Judgment is a final and binding resolution between Ferreiro, acting on his own behalf, and on
4 behalf of the public and in the public interest, Briggs Medical, and shall have preclusive effect
5 such that no other person or entity, whether purporting to act in his, her, or its interests or the
6 public interest shall be permitted to pursue and/or take any action with respect to any violation of
7 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
8 Notice against Briggs Medical or its downstream retailers of the Product, including but not
9 limited to Home Depot and CVS ("Proposition 65 Claims"). As to alleged exposures to DEHP
10 and/or DINP in the Products, compliance with the terms of this Consent Judgment by Briggs
11 Medical is deemed sufficient to satisfy all obligations concerning compliance by Briggs Medical
12 and its downstream retailers, including but not limited to Home Depot and CVS, with the
13 requirements of Proposition 65 with respect to the Products.

14 **4.2 Plaintiff's Release of Additional Claims.** As to Ferreiro for and in his
15 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
16 be permitted to pursue and/or take any action with respect to any other statutory or common law
17 claim, to the fullest extent that any such claim was or could have been asserted by him against
18 Briggs Medical or any and all downstream retailers of the Products, including but not limited to
19 Home Depot and CVS, based on their exposure of Ferreiro to DEHP and/or DINP in the
20 Products, or their failure to provide a clear and reasonable warning of exposure to Ferreiro as well
21 as any other claim based in whole or in part on the facts alleged in the Complaint and the Notice,
22 whether based on actions committed by Briggs Medical or their downstream retailers of the
23 Products, including but not limited to CVS and Home Depot ("Phthalate Exposure Claims").

24 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
25 Ferreiro's public release of Proposition 65 Claims set forth in Section 4.1 ("Public Release") and
26 his individual release of Phthalate Exposure Claims set forth in Section 4.2 ("Individual
27 Release"), Ferreiro, acting on his own behalf and on behalf of the public with respect to the
28 Public Release and acting in his individual capacity with respect to the Individual Release, waives

1 all rights to institute any form of legal action, and releases all claims against Briggs Medical and
2 their downstream retailers (including Home Depot, CVS, their parents, subsidiaries, affiliates,
3 assigns, and acquiring entities of any of them, who may use, maintain, distribute or sell the
4 Products) for the Proposition 65 Claims and the Phthalate Exposure Claims (referred to
5 collectively in this Section as "Claims"). In furtherance of the foregoing, Ferreiro, acting on his
6 own behalf and on behalf of the public with respect to the Public Release and acting in his
7 individual capacity with respect to the Individual Release, waives any and all rights and benefits
8 which he now has, or in the future may have, conferred upon him with respect to the Claims by
9 virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

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

15 4.4 **Briggs Medical's Release of Plaintiff Ferreiro.** Briggs Medical behalf of
16 itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby
17 waives any and all claims against Ferreiro, his attorneys, and other representatives for any and all
18 actions taken or statements made (or those that could have been taken or made) by Ferreiro and
19 his attorneys and other representatives, whether in the course of investigating claims or otherwise
20 seeking enforcement of Proposition 65 against Briggs Medical in this matter.

21 **5. Enforcement of Judgment**

22 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
23 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
24 Alameda County, giving the notice required by law, enforce the terms and conditions contained
25 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
26 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
27 of Proposition 65 or this Consent Judgment.

28 **6. Modification of Judgment**

1 6.1 This Consent Judgment may be modified only by written agreement of the Parties
2 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
3 provided by law and upon an entry of a modified Consent Judgment by the Court.

4 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
5 involving the Products that sets forth standards defining when Proposition 65 warnings will or
6 will not be required ("Alternative Standards"), or if the California Attorney General's office
7 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
8 that is not intended for the purpose of soliciting further input or comments) of Alternative
9 Standards applicable to products that are of the same general type and function as the Products
10 and constructed from the same materials, Briggs Medical shall be entitled to seek a modification
11 of this Consent Judgment on sixty (60) days' notice to Ferreiro so as to be able to utilize and rely
12 on such Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment.
13 Ferreiro shall not unreasonably contest any proposed application to effectuate such a modification
14 provided that the Products for which such a modification is sought are of the same general type
15 and function as those to which the Alternative Standards apply.

16 **7. Settlement Payment**

17 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
18 any admission of liability therefore, Briggs shall make the following monetary payments:

19 7.1.1 **Initial Civil Penalty.** Within seven (7) business days of the Effective Date,
20 Briggs Medical shall pay a total of \$4,000.00 in civil penalties in accordance with this Section.
21 The Initial Civil Penalty payment will be allocated in accordance with California Health & Safety
22 Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of
23 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil
24 penalty remitted to Ferreiro. Within seven (7) business days of the Effective Date, Briggs
25 Medical shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the
26 amount of \$3,000.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of
27 \$1,000.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following.
28 payment address:

1 Evan J. Smith, Esquire
2 Brodsky & Smith, LLC
3 Two Bala Plaza, Suite 510
4 Bala Cynwyd, PA 19004

5 Payment owed to OEHHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
6 to OEHHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

7 For United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 P.O. Box 4010
12 Sacramento, CA 95812-4010

13 For Non-United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 1001 I Street
18 Sacramento, CA 95814

19 A copy of the check payable to OEHHHA shall be mailed to Brodsky & Smith, LLC at the
20 address set forth above as proof of payment to OEHHHA.

21 7.1.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, Briggs
22 Medical shall make a final civil penalty payment of \$4,000.00 on the same terms as set forth in
23 Section 7.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California Code of
24 Regulations, Section 3203(c), Ferreiro agrees that the Final Civil Penalty payment shall be
25 waived in its entirety if, on or before the Final Civil Penalty payment is due, an officer of Briggs
26 Medical provides Ferreiro with a signed declaration certifying that all Products it ships for sale or
27 distributes for sale in California as of the date of its certification are Reformulated Products or are
28 marked with the warnings required by this Consent Judgement (hereinafter "Labeled Product")
and that Briggs Medical will continue to offer only Reformulated Products or Labeled Products in
California in the future. The option to provide a declaration certifying its complete early
reformulation or labeling of the Products in lieu of making the Final Civil Penalty payment
otherwise required by this Section is a material term, and time is of the essence.

7.1.3 **Attorney Fees and Costs.** In addition to the payment above, Briggs

1 Medical shall pay \$36,000.00 to Brodsky & Smith, LLC ("Brodsky & Smith") as complete
2 reimbursement for Ferreiro's attorneys' fees and costs, including any investigation and laboratory
3 costs or expert fees, incurred in the course of bringing the Complaint and in enforcing Proposition
4 65, including without limitation, preparation of the 60-Day Notice letter and discussions with the
5 office of the Attorney General. Payment shall be made within seven (7) business days of the
6 Effective Date and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

7 **8. Notices**

8 8.1 Any and all notices between the Parties provided for or permitted under this
9 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
10 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
11 party by the other party to the following addresses:

12 For Briggs:

13 Rusty M. Selmont, Esq.
14 Ervin Cohen & Jessup LLP
15 9401 Wilshire Boulevard, Ninth Floor
Beverly Hills, CA 90212-2974

16 For Ferreiro:

17 Evan J. Smith
18 BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Suite 900
Beverly Hills, CA 90212

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

21 **9. Authority to Stipulate**

22 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
23 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
24 the party represented and legally to bind that party.

25 **10. Counterparts**

26 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
27 Parties and Home Depot hereto as if all said Parties executed the original hereof.

28 **11. Retention of Jurisdiction**

1 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
2 Judgment.

3 **12. Service on the Attorney General**

4 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both Parties and
5 Home Depot, on the California Attorney General on behalf of the Parties so that the Attorney
6 general may review this Consent Judgment prior to its submittal to the Court for Approval. No
7 sooner than forty-five (45) days after the Attorney General has received the aforementioned copy
8 of this Consent Judgment, and in the absence of any written objection by the Attorney General to
9 the terms of this Consent Judgment, the Parties may then submit it to the Court for Approval.

10 **13. Entire Agreement**

11 13.1 This Consent Judgment contains the sole and entire agreement and understanding
12 of the Parties and Home Depot with respect to the entire subject matter hereof, and any and all
13 discussions, negotiations, commitment and understandings related thereto. No representations,
14 oral or otherwise, express or implied, other than those contained herein have been made by any
15 party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
16 deemed to exist or to bind any of the Parties or Home Depot.

17 **14. Governing Law and Construction**

18 14.1 The validity, construction and performance of this Consent Judgment shall be
19 governed by the laws of the State of California, without reference to any conflicts of law
20 provisions of California law.

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: 9/29/16

Dated: 9/28/16

By: Anthony Ferreiro
Anthony Ferreiro

By: Briggs Medical Service Co. & D-M-S Holdings, Inc.
Briggs Medical Service Co. & D-M-S Holdings, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 11-15-2016

Stephen Pulido
Judge of Superior Court
Stephen Pulido