

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Ferreiro	Plaintiff/Petitioner(s)
VS.	
Onguard Industries, LLC	Defendant/Respondent(s)
(Abbreviated Title)	

No. RG16807064

Minutes

Department 24

Honorable Frank Roesch, Judge


Cause called for Motion: May 17, 2016.

Plaintiff Anthony Ferreiro's Motion to Approve Proposition 65 Settlement and Consent Judgment is GRANTED. The court will sign the proposed order and consent judgment submitted with the motion.

Minutes of 05/17/2016

Entered on 05/17/2016

Chad Finke Executive Officer / Clerk of the Superior Court

By  Deputy Clerk



1 Evan J. Smith, Esquire (SBN 242352)
 2 Ryan P. Cardona, Esquire (SBN 302113)
 3 BRODSKY & SMITH, LLC
 4 9595 Wilshire Blvd., Ste. 900
 5 Beverly Hills, CA 90212
 Telephone: (877) 534-2590
 Facsimile: (310) 247-0160
 Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

MAY 17 2016

CLERK OF THE SUPERIOR COURT
 By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
 11 Plaintiff,
 12 vs.
 13 ONGUARD INDUSTRIES, LLC,
 14 Defendant.

CASE NO.: RG16807064

CONSENT JUDGMENT

Judge: Frank Roesch
 Dept.: 24
 Hearing Date: May 17, 2016
 Hearing Time: 3:45 PM
 Reservation #: R-1726211

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1 **1. Introduction**

2 1.1 On May 21, 2015, Anthony Ferreiro (“Ferreiro”) served Onguard Industries, LLC
3 (“Onguard Industries”), MSC Industrial Direct Co., Inc., MSC Industrial Supply Co. (Mass.) Inc.,
4 MSC Services Corp. (collectively, “MSC”), and various public enforcement agencies with a
5 document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*”
6 (the “Notice”). The Notice provided Onguard Industries and such others, including public
7 enforcers, with notice that alleged that Onguard Industries was in violation of California Health &
8 Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers that PVC
9 Slicker Over Boots, including Yellow PVC Slicker Over Boot(s), UPC No. 7 9107911103 1 and
10 similar products, including without limitation the products listed on Exhibit A hereto (the
11 “Products”) exposed users in California to the chemical Di(2-ethylhexyl) phthalate (DEHP). No
12 public enforcer has diligently prosecuted the allegations set forth in the Notice.

13 1.2 On March 10, 2016, Ferreiro filed a Complaint for Civil Penalties and Injunctive
14 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16807064 against
15 Onguard Industries alleging violations of Proposition 65.

16 1.3 Onguard Industries and MSC offered the Product for sale to residents of the State
17 of California.

18 1.4 Ferreiro’s Complaint alleges, among other things, that Onguard Industries sold the
19 Product in California and/or to California citizens, that the Product contains DEHP, and that the
20 resulting exposure violated provisions of Proposition 65, by knowingly and intentionally
21 exposing persons to a chemical known to the State of California to cause both cancer and
22 reproductive toxicity without first providing a clear and reasonable warning to such individuals.

23 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
24 has jurisdiction over the allegations of violations contained in the Complaint and personal
25 jurisdiction over Onguard Industries as to the acts alleged in the Complaint, that venue is proper
26 in the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
27 resolution of the allegations contained in the Complaint.

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1 1.6 The parties enter into this Consent Judgment pursuant to a full settlement of
2 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
3 prolonged litigation. By execution of this Consent Judgment, Onguard Industries and MSC deny
4 the material factual and legal allegations contained in the Notice. Nothing in this Consent
5 Judgment shall be construed as an admission by Onguard Industries or MSC of any fact, finding,
6 issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or
7 be construed as an admission by Onguard Industries or MSC of any fact, finding, conclusion,
8 issue of law or violation of law, such being specifically denied by Onguard Industries and MSC.
9 However, this section shall not diminish or otherwise affect the obligations, responsibilities and
10 duties under this Consent Judgment. Notwithstanding the allegations in the Notice, Onguard
11 Industries maintains that it has not knowingly manufactured, or caused to be manufactured, any
12 Product for sale in California which is in violation of Proposition 65.

13 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
14 date that the Consent Judgment is entered by the Court.

15 **2. Injunctive Relief**

16 2.1 Onguard Industries shall only ship, sell, or offer for sale in California
17 "Reformulated Products" or Products that are labeled with a clear and reasonable warning
18 pursuant to Section 2.2. "Reformulated Product" shall mean Product that contains less than or
19 equal to 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to U.S. Environmental
20 Protection Agency testing methodologies 3580A and 8270C.

21 2.2 Commencing on the Effective Date, Onguard Industries shall, for all Products it
22 sells or distributes and which are intended for sale in California that is not a Reformulated
23 Product, or which Onguard Industries has reason to believe will be shipped or sold in California,
24 provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b) below. The
25 warning shall be prominently placed with such conspicuousness as compared with other words,
26 statements, designs, or devices as to render it likely to be read and understood by an ordinary
27 individual under customary conditions before purchase or use. Warnings provided in accordance

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1 with this Consent Judgment shall be deemed reasonable and in compliance with the warning
2 requirements of Proposition 65.

3 **(a) Retail Store Sales**

4 **(i) Product Labeling.** Onguard Industries shall affix a warning to
5 the packaging, labeling or directly on the Product sold in retail outlets in California
6 by Onguard Industries or any person selling the Product that states:

7 **[PROPOSITION 65] WARNING:**

8 This product contains a chemical known to the State of California to cause cancer
and reproductive toxicity.

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

10 **(ii) Point of Sale Warnings.** Alternatively, Onguard

11 Industries may provide warning signs in the form below to its customers in
12 California with instructions to post the warnings in close proximity to the
13 point of display of the Product. Such instruction sent to Onguard
14 Industries customers shall be sent by certified mail, return receipt
15 requested.

16 **[PROPOSITION 65] WARNING:**

17 This product contains a chemical known to the State of California to cause cancer
18 and reproductive toxicity.

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

20 **(b) Mail Order Catalog Warning.** In the event that Onguard Industries

21 directly sells Product via mail order catalog directly to consumers located in California after the
22 Effective Date that is not a Reformulated Product, Onguard Industries shall provide a warning for
23 such Product sold via mail order catalog to such California residents. A warning that is given in a
24 mail order catalog shall be in the same type size or larger than the Product description text within
25 the catalog. The following warning shall be provided on the same page and in the same location
26 as the display and/or description of the Product:

27 **[PROPOSITION 65] WARNING:**

28 This product contains a chemical known to the State of California to cause cancer
and reproductive toxicity.

1 Where it is impracticable to provide the warning on the same page and in the same
2 location as the display and/or description of the Product, Onguard Industries may utilize a
3 designated symbol to cross reference the applicable warning and shall define the term "designated
4 symbol" with the following language on the inside of the front cover of the catalog or on the same
5 page as any order form for the Product:
6

7 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
8 ▼ and offered for sale in this catalog contain a chemical known to the State of
 California to cause cancer and reproductive toxicity.

9 The designated symbol must appear on the same page and in close proximity to the
10 display and/or description of the Product. On each page where the designated symbol appears,
11 Onguard Industries must provide a header or footer directing the consumer to the warning
12 language and definition of the designated symbol.

13 **(c) Internet Sales Warning.** In the event that Onguard Industries directly
14 sells Product via the internet directly to consumers located in California after the Effective Date
15 that is not a Reformulated Product, Onguard Industries shall provide a warning for such Product
16 sold via the internet to such California residents. A warning that is given on the internet shall be
17 in the same type size or larger than the Product description text and shall be given in conjunction
18 with the direct sale of the Product. The warning shall appear either: (a) on the same web page on
19 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on
20 the same page as the price for the Product; or (d) on one or more web pages displayed to a
21 purchaser during the checkout process. The following warning shall be provided:

22 **[PROPOSITION 65] WARNING:**
23 This product contains a chemical known to the State of California to cause cancer and
24 reproductive toxicity.

25 2.4 The warning requirements set forth in Section 2.2 shall not apply to any
26 Reformulated Product.

27 2.5 Grace Period for Existing Inventory of Products

28 Onguard Industries will implement the warnings provided for herein by including such

1 warnings on all products manufactured after the Effective Date. However, Onguard Industries
2 may exhaust its current inventory of Products manufactured prior to the Effective Date without
3 providing such warnings, and shall not be in violation of this Consent Judgment for doing so.

4 **3. Entry of Consent Judgment**

5 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
6 Upon entry of this Consent Judgment, Ferreiro and Onguard Industries waive their respective
7 rights to a hearing or trial on the allegations of the Ferreiro Complaint and 60-Day Notice.

8 3.2 In the event that the Attorney General objects or otherwise comments on one or
9 more provisions of this Consent Judgment, Ferreiro and Onguard Industries agree to take
10 reasonable steps to satisfy such concerns or objections.

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

12 4.1 This Consent Judgment is a final and binding resolution between Plaintiff Ferreiro,
13 acting on his own behalf, and on behalf of the public and in the public interest, and Defendant
14 Onguard Industries (including its parents, subsidiaries or affiliates, and assigns of any of them,
15 who may use, maintain, distribute or sell the Products), or MSC (including its parents,
16 subsidiaries or affiliates, and assigns of any of them, who may use, maintain, distribute or sell the
17 Products) (collectively, "Releasees"), and shall have preclusive effect such that no other person or
18 entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
19 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged
20 in the Complaint, or that could have been brought pursuant to the Notice. As to Plaintiff Ferreiro
21 for and in his individual capacity only, this Consent Judgment shall have preclusive effect such
22 that he shall not be permitted to pursue and/or take any action with respect to any other statutory
23 or common law claim, to the fullest extent that any of the foregoing were or could have been
24 asserted by him against Releasees based on their exposure of persons to DEHP in the Products,
25 or their failure to provide a clear and reasonable warning of exposure to such individuals, or as to
26 alleged exposures to DEHP in the Products, any other claim based on whole or in part on the facts
27 alleged in the Complaint and the Notice, whether based on actions committed by Releasees. As
28 to alleged exposures to DEHP in the Products, compliance with the terms of this Consent

1 Judgment is deemed sufficient to satisfy all obligations concerning, compliance by Releasees with
2 the requirements of Proposition 65 with respect to the Products, and any alleged resulting
3 exposure.

4 4.2 As to alleged exposures to DEHP in the Products, Ferreiro acting in his individual
5 capacity waives all rights to institute any form of legal action, and releases all claims against
6 Releasees whether under Proposition 65 or otherwise, arising out of or resulting from, or related
7 directly or indirectly to, in whole or in part, Products, including but not limited to any exposure
8 to, or failure to warn with respect to, Products (referred to collectively in this Section as the
9 "Claims"). In furtherance of the foregoing, as to alleged exposures to Products, Ferreiro waives
10 any and all rights and benefits which he now has, or in the future may have, conferred upon him
11 with respect to the Claims by virtue of the provisions of § 1542 of the California Civil Code,
12 which provides as follows:

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

18 Ferreiro understands and acknowledges that the significance and consequence of this waiver of
19 California Civil Code § 1542 is that even if Ferreiro suffers future damages arising out of or
20 resulting from, or related directly or indirectly to, in whole or in part, Product, including but not
21 limited to any exposure to, or failure to warn with respect to exposure to, Product, Ferreiro will
22 not be able to make any claim for those damages against Releasees.

23 5. Enforcement of Judgment

24 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
25 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
26 Alameda County, giving the notice required by law, enforce the terms and conditions contained
27 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party

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1 may seek whatever fines, costs, penalties or remedies as may be provided by law for any
2 violation of Proposition 65 or this Consent Judgment.

3 **6. Modification of Judgment**

4 6.1 This Consent Judgment may be modified only by written agreement of the parties
5 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
6 provided by law and upon an entry of a modified Consent Judgment by the Court.

7 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
8 involving the Products that sets forth standards defining when Proposition 65 warnings will or
9 will not be required ("Alternative Standards"), or if the California Attorney General's office
10 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
11 that is not intended for the purpose of soliciting further input or comments) of Alternative
12 Standards applicable to the products that are of the same general type and function as the Products
13 and constructed from the same materials, Onguard Industries shall be entitled to seek a
14 modification of this Consent Judgment on forty-five (45) days' notice to Ferreiro so as to be able
15 to utilize and rely on such Alternative Standards in lieu of those set forth in Section 2 of this
16 Consent Judgment. Ferreiro shall not unreasonably contest any proposed application to effectuate
17 such a modification provided that Products for which such a modification is sought are of the
18 same general type and function as those to which the Alternative Standards apply.

19 **7. Settlement Payment**

20 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
21 any admission of liability therefore, Onguard Industries shall make the following monetary
22 payments:

23 7.1.1 Onguard Industries shall pay a total of \$5,000.00 in civil penalties in
24 accordance with this Section. The civil penalty payment will be allocated in accordance with
25 California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the
26 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
27 25% of the civil penalty remitted to Ferreiro. Each penalty payment shall be delivered to the
28 addresses listed in Section 2.1.3 below.

1 7.1.2 In addition to the payment above, Onguard Industries shall pay \$42,500.00
2 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's
3 attorneys' fees and costs, including any investigation and laboratory costs or expert fees, incurred
4 in the course of bringing the Ferreiro action, and in enforcing Proposition 65, including without
5 limitation, preparation of the 60-Day Notice letter and discussions with the office of the Attorney
6 General. Payment shall be made within seven (7) days of the Effective Date.

7 7.1.3 Within seven (7) days of the Effective Date, Onguard Industries shall issue
8 two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of
9 \$3,750.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$1,250.00.
10 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
11 address:

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

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

14 For United States Postal Service Delivery:

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

20 For Non-United States Postal Service Delivery:

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

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

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1 **8. Notices**

2 8.1 Any and all notices between the parties provided for or permitted under this
3 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
4 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
5 party by the other party to the following addresses:

6 For Onguard Industries:

7 Adam J. Thurston
8 Drinker Biddle & Reath LLP
9 1800 Century Park East, Ste. 1500
 Los Angeles, CA 90067
 T: 310.203.4039

10 For Ferreiro:

11 Evan J. Smith
12 BRODSKY & SMITH, LLC
13 9595 Wilshire Blvd., Suite 900
 Beverly Hills, CA 90212
 T: 877.354.2590

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

16 **9. Authority to Stipulate**

17 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
18 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
19 the party represented and legally to bind that party.

20 **10. Counterparts**

21 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
22 parties hereto as if all said parties executed the original hereof.

23 **11. Retention of Jurisdiction**

24 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
25 Judgment.

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

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1 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
2 California Attorney General on behalf of the parties so that the Attorney general may review this
3 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
4 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
5 and in the absence of any written objection by the Attorney General to the terms of this Consent
6 Judgment, the parties may then submit it to the Court for Approval.

7 **13. Entire Agreement**

8 13.1 This Consent Judgment contains the sole and entire agreement and understanding
9 of the parties with respect to the entire subject matter hereof, and any and all discussions,
10 negotiations, commitment and understandings related thereto. No representations, oral or
11 otherwise, express or implied, other than those contained herein have been made by any party
12 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
13 to exist or to bind any of the parties.

14 **14. Governing Law and Construction**

15 14.1 The validity, construction and performance of this Consent Judgment shall be
16 governed by the laws of the State of California, without reference to any conflicts of law
17 provisions of California law.

18 **15. Court Approval**

19 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
20 effect, and cannot be used in any proceeding for any purpose.

21 15.2 The Effective Date of this Consent Judgment shall be the date on which it is
22 entered by the Court.

23 **IT IS SO STIPULATED:**

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25 Dated: March 31, 2016

Dated: 3/30/16

26
27 By: Anthony Ferreiro
28 Anthony Ferreiro

By: [Signature]
Onguard Industries

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IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 5/17/2016

Frank Hoese
Judge of Superior Court