

COPY



FILED  
ALAMEDA COUNTY

APR 13 2016

CLERK OF THE SUPERIOR COURT  
By [Signature] Deputy

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

8 Attorneys for Plaintiffs  
9 EMA BELL AND GABRIEL ESPINOZA

10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF ALAMEDA

12 EMA BELL, et al.,

13 Plaintiffs,

14 vs.

15 HARBOR FREIGHT TOOLS USA, INC.,

16 Defendant.

Case No. RG15786402

~~PROPOSED~~ CONSENT JUDGMENT

Date: April 5, 2016  
Time: 9:00 AM  
Dept.: 19  
Judge: Julia Spain

APR 13 2016

BY FAX

[PROPOSED] CONSENT JUDGMENT

1           **1.     Introduction**

2           1.1     On July 9, 2015, Ema Bell (“Bell”) served Harbor Freight Tools USA, Inc.  
3 (“Harbor Freight” or “Defendant”), and various public enforcement agencies with a 60-Day  
4 Notice of Violation of California Health & Safety Code §25249.5, *et seq.*, letter (the “60-Day  
5 Notice”) that alleged that Harbor Freight, through its sales in California of items such as  
6 industrial tools, supplies, and safety products, was knowingly and intentionally exposing persons  
7 to phthalates without first providing clear and reasonable warnings to those persons as required  
8 by the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code §  
9 25249.5, *et seq.* (“Proposition 65”).

10          1.2     On July 9, 2015, Gabriel Espinosa (“Espinosa”) served Harbor Freight, and  
11 various public enforcement agencies with a 60-Day Notice of Violation of California Health &  
12 Safety Code §25249.5, *et seq.*, letter (the “60-Day Notice”) that alleged that Harbor Freight,  
13 through its sales in California of items such as industrial tools, supplies, and safety products, was  
14 knowingly and intentionally exposing persons to phthalates without first providing clear and  
15 reasonable warnings to those persons as required by Proposition 65.

16          1.3     On September 18, 2015, Bell and Espinosa (“Plaintiffs”) jointly filed a Complaint  
17 for Civil Penalties and Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case  
18 No. RG15786402, against Harbor Freight for alleged violations Proposition 65.

19          1.4     Harbor Freight is a corporation that employs more than ten persons and offers  
20 various home improvement, industrial, and other types of tools, supplies, and accessories to its  
21 customers, including but not limited to power tools, air tools, hand tools, welding tools,  
22 automotive tools and accessories, industrial tools and other products and accessories intended for  
23 sale within the State of California.

24          1.5     The Complaint alleges, among other things, that Defendant has sold the products  
25 containing DEHP identified in the Complaint (the “Products”), and that the resulting exposures  
26 violated provisions of Proposition 65 by knowingly and intentionally exposing persons to a  
27 chemical known to the State of California to cause both cancer and reproductive toxicity, without  
28 first providing a clear and reasonable warning to such individuals.

1           1.6     For purposes of this Consent Judgment only, Plaintiffs and Defendant (the  
2 "Parties") stipulate that this Court has jurisdiction over the allegations of violations contained in  
3 the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint,  
4 that venue is proper in the county of Alameda, and that this Court has jurisdiction to enter this  
5 Consent Judgment as a resolution of the allegations contained in the Complaint.

6           1.7     The Parties enter into this Consent Judgment pursuant to a full settlement of  
7 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding  
8 prolonged litigation. By execution of this Consent Judgment, Defendant does not admit any  
9 violation of Proposition 65 and specifically denies that it has committed any such violation.  
10 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,  
11 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be  
12 construed as an admission by Defendant of any fact, issue of law, or violation of law. Nothing in  
13 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that  
14 Defendant may have in any other future legal proceeding. However, this paragraph shall not  
15 diminish or otherwise affect the obligations, responsibilities and duties of Defendant under this  
16 Consent Judgment.

17           2.       Settlement Payment

18           2.1     In settlement of all the claims referred to in this Consent Judgment, and without  
19 any admission of liability therefore, Defendant shall make the following monetary payments:

20           2.1.1    Defendant shall pay a total of \$3,000.00 in civil penalties in accordance with this  
21 Section. The civil penalty payment will be allocated in accordance with California Health &  
22 Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds (\$2,250.00) remitted to the  
23 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining  
24 25% (\$750.00) of the civil penalty remitted to the Plaintiffs. Of the amount remitted to the  
25 Plaintiffs, 66.6% (\$500.00) shall be remitted to Plaintiff Espinosa and 33.3% (\$250.00) shall be  
26 remitted to Plaintiff Bell. Each penalty payment shall be delivered to the addresses listed in  
27 Section 2.1.5 and 2.1.6 below.

28

1           2.1.2 In addition to the payment above, Defendant shall pay \$22,000.00 to Brodsky &  
2 Smith, LLC (“Brodsky Smith”) as complete reimbursement for Plaintiffs’ attorneys’ fees and  
3 costs, including any investigation and laboratory costs or expert fees, in bringing the Complaint,  
4 and in enforcing Proposition 65, including without limitation, preparation of the 60-Day Notice  
5 letters and discussions with the office of the Attorney General. Payment shall be made within  
6 fifteen (15) days after entry of Judgment.

7           2.1.3 Within fifteen (15) days after entry of Judgment, Defendant Harbor Freight shall  
8 issue checks for the initial civil penalty payment as follows: Defendant Harbor Freight shall issue  
9 three checks to the following three entities (a) "OEHHA" in the amount of \$2,250.00; (b)  
10 "Brodsky & Smith, LLC Trust Account" in the amount of \$750.00 which Brodsky & Smith will  
11 hold in trust for Bell and Espinosa until distribution; and (c) “Brodsky & Smith, LLC” in the  
12 amount of \$22,000.00.

13           2.1.4 Final Civil Penalty. On December 1, 2016, Defendant shall make a final civil  
14 penalty payment of \$11,000.00. Pursuant to title 11 California Code of Regulations, section  
15 3203(c), Plaintiffs agree that the final civil penalty payment shall be waived in its entirety if, no  
16 later than November 15, 2016, an officer of Defendant provides Plaintiff with a signed  
17 declaration certifying that all of the Products (as defined by this Decree) it ships for sale or  
18 distributes for sale in California as of the date of its certification are Reformulated Products or are  
19 marked with the warnings required by this Consent Decree (hereinafter “Labeled Product”) and  
20 that Defendant will continue to offer only Reformulated Products or Labeled Products in  
21 California in the future. The option to provide a declaration certifying its complete early  
22 reformulation or labeling of the Products in lieu of making the final civil penalty payment  
23 otherwise required by this Section is a material term, and time is of the essence.

24           2.1.5 Payment owed to Espinosa, Bell and Brodsky & Smith, LLC pursuant to this  
25 Section shall be delivered to the following payment address:

26                           Evan J. Smith, Esquire  
27                           Brodsky & Smith, LLC  
28                           Two Bala Plaza, Suite 510

1 Bala Cynwyd, PA 19004

2 2.1.6 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be  
3 delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following addresses:

4 For United States Postal Service Delivery:

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

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics  
11 Fiscal Operations Branch Chief  
12 Office of Environmental Health Hazard Assessment  
13 1001 I Street  
14 Sacramento, CA 95814

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

15 2.1.7 In the event that the Attorney General objects or otherwise comments on one or  
16 more provisions of this Consent Judgment, the Parties agree to take reasonable steps to satisfy  
17 such concerns or objections.

18 3. Matters Covered By This Consent Judgment

19 3.1 This Consent Judgment is a full, final, and binding resolution between Plaintiffs  
20 and Defendant and each of its past and present parents, affiliates, subsidiaries, divisions,  
21 predecessors, successors, and assigns, and each of their respective owners, officers, directors,  
22 board members, trustees, shareholders, managers, members, employees, agents, insurers,  
23 attorneys, auditors, accountants, experts, stockholders, representatives, partners, and any other  
24 persons acting on their behalf ("Released Parties") concerning or in any way relating to the claims  
25 that have been or could have been asserted against Defendant and/or the Released Parties up  
26 through the date on which this Consent Judgment is entered, provided that such claims are based  
27 on or relate to the facts alleged in the operative complaint in the Action.  
28

1           3.2    Plaintiffs, acting on their own behalf and in the public interest pursuant to Health  
2 & Safety Code § 25249.7(d), release, waive, and forever discharge any and all claims against  
3 Defendant and/or the Released Parties arising from any violation of Proposition 65 or any other  
4 statutory or common law claims that have been or could have been asserted in the public interest  
5 regarding the failure to warn about exposure to the Products prior to the date on which this  
6 Consent Judgment is entered.

7           3.3    As to alleged exposures to the Products, Plaintiffs waive all rights to institute any  
8 form of legal action, and releases all claims against Defendant and/or the Released Parties  
9 whether under Proposition 65 or otherwise, arising out of or resulting from, or related directly or  
10 indirectly to, in whole or in part, the Products, including but not limited to any exposure to, or  
11 failure to warn with respect to, the Products (referred to collectively in this Section as the  
12 “Claims”). In furtherance of the foregoing, as to alleged exposures to the Products, Plaintiffs  
13 waive any and all rights and benefits which they now have, or in the future may have, conferred  
14 upon them with respect to the Claims by virtue of the provisions of § 1542 of the California Civil  
15 Code, which provides as follows:

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

20 Plaintiffs understand and acknowledge that the significance and consequence of this waiver of  
21 California Civil Code § 1542 is that even if Plaintiffs suffer future damages arising out of or  
22 resulting from, or related directly or indirectly to, in whole or in part, the Products, including but  
23 not limited to any exposure to, or failure to warn with respect to exposure to the Products,  
24 Plaintiffs will not be able to make any claim for those damages against Defendant.

25           4.    Enforcement of Judgment

26           The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto.  
27 The Parties may, by noticed motion, before the Superior Court of Alameda County, enforce the  
28

1 terms and conditions contained herein. In any proceeding brought by either party to enforce this  
2 Consent Judgment, such party may seek whatever fines, costs, penalties or remedies as may be  
3 provided by law for any violation of Proposition 65 or this Consent Judgment.

4 **5. Modification of Judgment**

5 5.1 This Consent Judgment may be modified only by written agreement of the Parties  
6 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as  
7 provided by law and upon an entry of a modified Consent Judgment by the Court.

8 5.2 Should any court enter final judgment in a case brought by Plaintiffs or the People  
9 involving the Products that sets forth standards defining when Proposition 65 warnings will or  
10 will not be required ("Alternative Standards"), or if the California Attorney General's office  
11 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General  
12 that is not intended for the purpose of soliciting further input or comments) of Alternative  
13 Standards applicable to the products that are of the same general type and function as the Products  
14 and constructed from the same materials, Defendant shall be entitled to seek a modification of this  
15 Consent Judgment on forty-five (45) days' notice to Plaintiffs so as to be able to utilize and rely  
16 on such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.  
17 Plaintiffs shall not unreasonably contest any proposed application to effectuate such a  
18 modification provided that the Products for which such a modification is sought are of the same  
19 general type and function as those to which the Alternative Standards apply.

20 **6. Injunctive Relief**

21 6.1 No later than 90 days from entry of judgment, Defendant shall provide, (i) "clear  
22 and reasonable" warning(s) as defined below in paragraph 6.1.1 on the following products  
23 identified in the Complaint: (1) *Industrial Ear Muffs, UPC# 7 92363 43768 4, Noise Reduction*  
24 *rating: 23 dB, ANSI, Large high-impact plastic ear cups, Soft PVC ear cushions;* (2) *2 Piece*  
25 *Welding Goggles Set, UPC# 7 92363 35711 1, SKU 35711, Brand: Chicago Electric Welding,*  
26 *Certification: ANSI, Color: Green;* and (3) *PVC Air Hose, Central Pneumatic, 300 PSI, 25 Ft x*  
27 *3/8, Color: Orange;* or (ii) shall reformulate those products consistent with Section 6.2 of this  
28 Consent Judgment.

1           6.1.1 The warning may be provided through a label affixed to the packaging or labeling  
2 of, or directly to the Products, which states: "WARNING: This product contains di (2-ethylhexyl)  
3 phthalate (DEHP), a chemical known to the State of California to cause cancer and birth defects  
4 or other reproductive harm. (California Health & Safety Code § 25249.5, et seq.)". This warning  
5 shall be deemed to comply with Proposition 65.

6           6.2 "Reformulated Products" are defined as those products containing less than or  
7 equal to 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to U.S. Consumer  
8 Product Safety Commission Test Method Standard Operating Procedure for Determination of  
9 Phthalates CPSC-CH-C1001-09.3.

10           7.    Notices

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

15 For Harbor Freight:

16                           Tammy Stafford  
17                           Senior Counsel, Litigation and Risk  
18                           Harbor Freight Tools  
19                           26541 Agoura Road  
20                           Calabasas, CA 91302  
21                           Email: TStafford@harborfreight.com

22                           Peter Hsiao  
23                           E-mail: PHsiao@mofocom  
24                           Navi Dhillon  
25                           E-mail: NDhillon@mofocom  
26                           Morrison & Foerster LLP  
27                           425 Market St.  
28                           San Francisco, CA 94105

For Espinosa:

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

For Bell:

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

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

7 **8. Authority to Stipulate**

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

11 **9. Counterparts**

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

14 **10. Retention of Jurisdiction**

15 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

16 **11. Service on the Attorney General**

17 Bell and/or Espinosa shall serve a copy of this Consent Judgment, signed by both parties,  
18 on the California Attorney General on behalf of the parties so that the Attorney general may  
19 review this Consent Judgment prior to its submittal to the Court for Approval. No sooner than  
20 forty-five (45) days after the Attorney General has received the aforementioned copy of this  
21 Consent Judgment, and in the absence of any written objection by the Attorney General to the  
22 terms of this Consent Judgment, the parties may then submit it to the Court for Approval.

23 **12. Entire Agreement**

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**13. Governing Law and Construction**

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

**14. Court Approval**

14.1 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.

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

**IT IS SO STIPULATED:**

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

By:   
Emma Bell

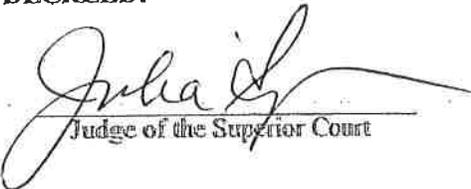
By:   
Gabriel Espinosa

Dated: 4/6/16

By:   
HARBOR FREIGHT TOOLS USA, INC.

**IT IS SO ORDERED, ADJUDGED AND DECREED:**

Dated: April 13, 2016

  
Judge of the Superior Court