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Evan Smith (Bar No. SBN 242352)
BRODSKY & SMITH, LLC.
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Tel: (877) 534-2590
Fax: (310) 247-0160

Attorneys for Plaintiff

~~RECEIVED~~
ALAMEDA COUNTY

~~MAY 29 2019~~

~~CLERK OF THE SUPERIOR COURT~~
By ~~ALICIA ESPINOZA~~

~~FILED~~
ALAMEDA COUNTY

JUL 19 2019

CLERK OF THE SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

Manalaker

Deputy

COUNTY OF ALAMEDA

DONNY MACIAS,
Plaintiff,
v.
FIRE LITERS, INC.,
Defendant.

Case No.: RG19010174
CONSENT JUDGMENT
Judge: Robert McGuiness
Dept.: 22
Hearing Date: July 19, 2019
Hearing Time: 10:00 AM
Reservation #: R-2080668

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Donny Macias
3 acting on behalf of the public interest (hereinafter “Macias”) and Fire Liters, Inc. (“Fire Liters” or
4 “Defendant”) with Macias and Defendant collectively referred to as the “Parties” and each of them
5 as a “Party.” Macias is an individual residing in California that seeks to promote awareness of
6 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Fire Liters is a Wisconsin S Corporation that is alleged
8 to be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq. Fire Liters manufactures, distributes, and/or sells Fire Liters lighter
10 blocks (“Lighters Cubes” or “Covered Products”).

11 **1.2 Allegations and Representations.** Macias alleges that Defendant has exposed
12 individuals to carbon monoxide as a consequence of its sales of Fire Liters lighter blocks without
13 providing clear and reasonable warnings under Proposition 65. Carbon monoxide is listed under
14 Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about March 8, 2018, Macias served Fire
16 Liters and various public enforcement agencies with documents entitled “60-Day Notice of
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
18 was in violation of Proposition 65 for failing to warn consumers and customers that Fire Liters
19 lighter blocks exposed users in California to carbon monoxide. No public enforcer has brought and
20 is diligently prosecuting the claims alleged in the Notices. On March 8, 2019, Macias filed a
21 complaint (the “Complaint”) in the matter.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
28

1 1.5 This Consent Judgment resolves claims that are denied and disputed. Defendant
2 denies the material allegations contained in the Notice and Complaint and maintains that it has not
3 violated Proposition 65. ~~The Parties enter into this Consent Judgment pursuant to a full and final~~
4 settlement of any and all claims between the Parties for the purpose of avoiding prolonged
5 litigation. Nothing in this Consent Judgment, nor compliance with its terms, shall be construed as
6 an admission by Defendant, or any of its respective officers, directors, shareholders, employees,
7 agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees,
8 distributors, wholesalers, or retailers, of any fact, finding, issue of law, conclusion of law, violation
9 of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any
10 alleged violation of Proposition 65 or any other material allegation of the Complaint, each and
11 every allegation of which Fire Liters denies, nor may this Consent Judgment, or compliance with
12 it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Fire
13 Liters. However, this Section shall not diminish or otherwise affect the obligations, responsibilities,
14 and duties of Defendant under this Consent Judgment.

15 **2. DEFINITIONS**

16 2.1 **Covered Products.** The term "Covered Products" means Fire Liters' lighter blocks
17 that are manufactured, distributed and/or offered for sale in California by Fire Liters or its
18 distributors.

19 2.2 **Effective Date.** The term "Effective Date" means the date that Defendant receives
20 notice that this Consent Judgment was entered as a Judgment of the Court.

21 **3. INJUNCTIVE RELIEF: WARNINGS**

22 Commencing as of the endorsement of this Judgment by the Parties, Covered Products
23 manufactured or shipped for sale into California shall include one of the following warning
24 statements, or a statement that is otherwise consistent with 27 CCR § 25603.

- 25 (a) A symbol consisting of a black exclamation point in a yellow equilateral triangle
26 with a bold black outline to the left of the word "warning" in bold all capital letters, followed
27 by the statement "This product can expose you to chemicals including combustion by-
28

1 products (including soot and carbon monoxide), which are known to the State of California
2 to cause cancer and birth defects or other reproductive harm. For more information, go to
3 www.P65Warnings.ca.gov"; or (b) a warning consisting of a symbol that is a black
4 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
5 word "warning" in bold all capital letters, followed by the statement "Reproductive Harm -
6 www.P65Warnings.ca.gov."¹

7 3.1 The warning provided pursuant to Section 0 shall be affixed to or printed on the
8 Covered Product's packaging or labeling, and shall be displayed with such conspicuousness, as
9 compared with other words, statements, or designs as to render it likely to be read and understood
10 by an ordinary individual under customary conditions of purchase or use. A warning may be
11 contained in the same section of the packaging, labeling, or instruction booklet that states other
12 safety warnings, if any, concerning the use of the product and shall be at least the same size as those
13 other safety warnings.

14 4. MONETARY TERMS

15 4.1 **Civil Penalty.** As a Civil Penalty pursuant to Health and Safety Code § 25249.7(b),
16 and in settlement of all claims contained in or referred to in the 60-day Notice, Complaint, and this
17 Consent Judgment, Fire Liters shall pay \$1,000.00 to be apportioned in accordance with California
18 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office
19 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the Civil
20 Penalty remitted to Macias, as provided by California Health & Safety Code § 25249.12(d).

21
22 4.1.1 Within ten (10) days of the Effective Date or by June 30, 2019, whichever is
23 later, Fire Liters shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in
24 the amount of \$750.00; and to (b) "Brodsky & Smith, LLC in Trust for Macias" in the amount of

25
26
27 ¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other
28 transmission format is being printed in color for purposes of other language, symbols or designs,
and is printed using the color yellow.

1 \$250.00. Payment owed to Macias pursuant to this Section shall be delivered to the following
2 payment address:

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

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

8 For United States Postal Service Delivery:

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

12 For Non-United States Postal Service Delivery:

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

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

18 4.2 **Attorneys' Fees.** In settlement of all claims that are alleged, or could have been
19 alleged in the Complaint concerning the Covered Products, Fire Liters shall pay \$14,000.00 to
20 Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Macias' attorneys'
21 fees and costs incurred as a result of investigating, bringing this matter to Fire Liters Products'
22 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
23 interest, pursuant to Code of Civil Procedure § 1021.5. Payment pursuant to this Section shall be
24 as follows: Within ten (10) days of the Effective Date or by June 30, 2019, whichever is later,
25 Fire Liters shall issue a check to "Brodsky & Smith, LLC" in the amount of \$6,500.00.
26 Thereafter, by or before December 1, 2019, Fire Liters shall issue a second check to "Brodsky &
27 Smith, LLC" in the amount of \$7,500.00. Pursuant to this Section, for all amounts that are not
28

1 received within ten (10) days of the date they are due, Fire Liters shall pay a late fee equal to
2 \$100/day to. Payment owed pursuant to this Section shall be delivered to the following payment
3 address:

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

8 **5. RELEASE OF ALL CLAIMS**

9 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
10 resolution between Macias acting on his own behalf, and on behalf of the public interest, and Fire
11 Liters and Defendant Releasees (as defined below). Macias, acting on his own behalf, and on behalf
12 of the public interest, forever releases and discharges Fire Liters and its past and present officers,
13 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
14 divisions, affiliates, suppliers, franchisees, licensees, licensors, customers, distributors,
15 wholesalers, retailers, partners, sister companies, and all entities from whom they obtain, and to
16 whom they directly or indirectly distribute or sell, Covered Products, and the predecessors,
17 successors, assigns, affiliates, parent companies and subsidiaries of any of them, including but not
18 limited to Ace Hardware Corporation, its parent, and all subsidiaries and affiliates, including
19 retailers, thereof and their respective employees, agents, and assigns ("Defendant Releasees") from
20 all claims and causes of action for any (1) violation of Proposition 65 (including but not limited to
21 the claims made in the Complaint) based on exposure to carbon monoxide from Covered Products
22 as set forth in the Notice, or (2) any other statutory or common law claim based on an alleged failure
23 to provide clear and reasonable warnings for exposure to carbon monoxide from the Covered
24 Products. The resolution is with respect to any Covered Products manufactured, distributed, or sold
25 by Fire Liters through and including the Effective Date. This Consent Judgment shall have
26 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its
27 interests or the public interest shall be permitted to pursue and/or take any action with respect to
28 any violation of Proposition 65 that was alleged in the Complaint or that could have been brought
pursuant to the Notice or the Complaint against Fire Liters or the Defendant Releasees, including

1 but not limited to ("Proposition 65 Claims"). As to actual or alleged exposures to carbon monoxide
2 from the Covered Products, compliance with the terms of this Consent Judgment resolves any issue
3 now and in the future concerning compliance by Fire Liters and the Defendant Releasees with the
4 requirements of Proposition 65 and constitutes compliance with Proposition 65 with regard to the
5 Covered Products.

6 5.2 In addition to the foregoing, Macias, on behalf of himself, his past and current
7 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
8 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
9 legal action and releases Fire Liters and Defendant Releasees from any and all manner of actions,
10 causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises,
11 liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever,
12 known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to any
13 alleged violations of Proposition 65 related to or arising from Covered Products manufactured,
14 distributed, or sold by Fire Liters or Defendant Releasees. It is possible that other claims not known
15 to the parties, arising out of facts alleged in the 60-Day Notice or the Complaint and relating to the
16 Covered Products will develop or be discovered. Macias on behalf of himself only, and Fire Liters
17 on behalf of itself only, acknowledge that this Consent Judgment is expressly intended to cover and
18 include all such claims up through and including Effective Date. With respect to the foregoing
19 waivers and releases in this paragraph, Macias hereby specifically waives any and all rights and
20 benefits which he now has, or in the future may have, conferred by virtue of the provisions of §
21 1542 of the California Civil Code, which provides as follows:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
23 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
24 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
25 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
26 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
27 DEBTOR OR RELEASED PARTY.

26 5.3 Fire Liters waives any and all claims against Macias, his attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been
28 taken or made) by Macias and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Defendant:

20 Lee N. Smith
21 Coleman & Horowitz, LLP
22 499 W. Shaw Ave., Ste. 116
Fresno, CA 93704

23 And

24 For Macias:

25 Evan Smith
26 Brodsky & Smith, LLC
27 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

6 **10. SERVICE ON THE ATTORNEY GENERAL**

7 10.1 Macias shall serve a copy of this Consent Judgment, signed by both parties, on the
8 California Attorney General on behalf of the Parties so that the Attorney General may review this
9 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty-five (45)
10 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
11 and in the absence of any written objection by the Attorney General to the terms of the Consent
12 Judgments, Macias will then submit it to the Court for approval.

13 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
14 **APPROVAL**

15 11.1 Macias agrees to comply with the requirements set forth in California Health &
16 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
17 Defendant agrees it shall support approval of such Motion. Upon entry of the Consent Judgment,
18 Fire Liters and Macias waive their respective rights to a hearing or trial on the allegations of the
19 Complaint.

20 11.2 This Consent Judgment shall not be effective until it is approved and entered by the
21 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
22 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
23 30 days, the case shall proceed on its normal course.

24 11.3 If the California Attorney General objects to any term in this Consent Judgment, the
25 Parties shall use their reasonable and diligent best efforts to resolve the concern in a timely manner,
26 and if possible prior to the hearing on the motion.

1 11.4 If the Court approves this Consent Judgment and is reversed or vacated by an
2 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
3 Judgment. ~~If the Parties do not jointly agree on a course of action to take, the case shall proceed on~~
4 its normal course on the trial court's calendar.

5 **12. ENFORCEMENT OF JUDGMENT**

6 12.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
7 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
8 Alameda County, giving the notice required by law, enforce the terms and conditions contained
9 herein.

10 12.2 Before filing a motion or order to show cause under Section 12.1, Macias shall
11 provide Fire Liters with at least thirty (30) days written notice of any alleged violations of the terms
12 and conditions contained in this Consent Judgment, and the parties shall meet and confer in good
13 faith in an effort to resolve any such alleged violations. As long as Fire Liters cures any such
14 alleged violations within the thirty (30) day period (or if any such violation cannot practicably be
15 cured within 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as
16 practicable) and Fire Liters provides proof to Plaintiff that the alleged violation(s) was the result of
17 good faith mistake or accident, then Fire Liters shall not be in violation of the Consent Judgment.
18 Fire Liters shall have the ability to avail itself of the benefits of this Section two (2) times per three-
19 year (3-year) period following the Effective Date.

20 **13. MODIFICATION**

21 13.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
23 If either party requests or initiates a modification, then it shall meet and confer with the other Party
24 in good faith before filing a motion with the Court seeking to modify it.

25 **14. ATTORNEY'S FEES**

26 14.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
27 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.
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14.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

15. RETENTION OF JURISDICTION

15.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

16. AUTHORIZATION

16.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certify that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: _____
By: _____
DONNY MACIAS

Date: May 6th, 2019
By: Patricia J. Landon
FIRE LITERS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____
Judge of Superior Court

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14.2 Nothing in this Section shall preclude a Party from seeking an award pursuant to law.

15. RETENTION OF JURISDICTION

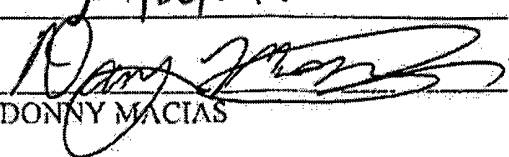
15.1 This Court shall retain jurisdiction of this matter to implement Consent Judgment.

16. AUTHORIZATION

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AGREED TO:

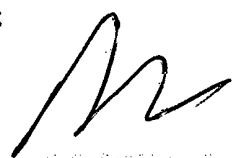
AGREED TO:

Date: July 28, 2019
By: 
DONNY MACIAS

Date: _____
By: _____
FIRE LITERS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 7/19/19


Judge of Superior Court

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

Case Number: RG19010174
Order After Hearing Re: of 07/19/2019

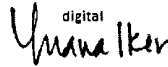
DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 07/19/2019.

Chad Finke Executive Officer / Clerk of the Superior Court

By



Deputy Clerk