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FILED
Superior Court of California
County of Los Angeles
06/26/2020
Sherri R. Carter, Executive Officer / Clerk of Court
By: M. Tran Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CONSUMER PROTECTION GROUP, LLC, IN THE PUBLIC INTEREST,

PLAINTIFF,

V.

HOME DEPOT U.S.A. INC., a Delaware Corporation

DEFENDANT.

CASE NO. 19STCV30445

[~~PROPOSED~~] CONSENT JUDGMENT

Health & Safety Code § 25249.5 *et seq.*

Dept. 24

Judge: Hon. Judge Patricia D. Nieto

Complaint filed: August 27, 2019

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Plaintiff Consumer Protection Group, LLC ("CPG") acting on behalf of itself and in the interest of the public, and Defendant Home Depot U.S.A. Inc. ("Defendant" and "Home Depot"), with each referred to as a "Party" and collectively referred to as "Parties."

1.2 Defendant and Products

Defendant is a Delaware corporation that is qualified to and does conduct business in California and employs ten (10) or more persons. CPG alleges that Defendant manufactured, caused to be manufactured, sold, or distributed an Everbilt PVC coated canvas drop cloth (referred to hereinafter as "Covered Products"). For purposes of this Consent Judgment, Defendant is

deemed a person in the course of doing business in California and subject to the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"). The Covered Products are limited only to those sold or supplied by Defendant.

1.3 Listed Chemical.

Di (2-ethylhexyl) Phthalate ("DEHP"), also known as Diethyl Hexyl Phthalate has been listed by the State of California as a chemical known to cause cancer and birth defects or other reproductive harm.

1.4 Notice of Violation.

On November 13, 2018 CPG served Defendant and various public enforcement agencies with a document titled "60-Day Notice of Violation" (AG 2018-02058) that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP contained in the Covered Products sold by Defendant ("Notice"). No public enforcer has commenced or diligently prosecuted the allegations set forth in the Notice.

1.5 Complaint.

On August 27, 2019 CPG filed a Complaint for civil penalties and injunctive relief ("Complaint") in the above-captioned action. The Complaint alleges, among other things, that Defendant violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP from the Covered Products.

1.6 Consent to Jurisdiction.

For purposes of this Consent Judgment, the Parties stipulate that this Court has jurisdiction over the allegations of violations contained in the Notice and Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the County of Los Angeles and that this Court has jurisdiction to enter this Consent Judgment as a full and final settlement and resolution of the allegations contained in the Complaint and of all claims which were or could have been raised by any person or entity based in whole or in part, directly or indirectly, on the facts alleged therein or arising therefrom or related thereto.

1.7 No Admission.

This Consent Judgment resolves claims that are denied and disputed. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an admission by the Parties of any material allegation of the Notice or the Complaint, any fact, conclusion of law, issue of law or violation of law, including without limitation, any admission concerning any alleged violation of Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission by the Parties, or give rise to any inference, of any fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by Defendant, their officers, directors, employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding, except as expressly provided in this Consent Judgment.

1.8 The "Effective Date" is the date that this Consent Judgment is approved and entered by the Court.

2. INJUNCTIVE RELIEF

2.1 Within 90 days of the Effective Date, Defendant shall cease selling, offering for sale in California, or distributing for sale in California, any Covered Products unless they contain no more than 0.1% DEHP by weight or contain a warning as described in Section 2.2.

2.2 For any Covered Products that require a warning pursuant to Section 2.1, Defendant shall place a Proposition 65 compliant warning on the packaging. Any warning provided pursuant to this section shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. The following warnings are deemed to comply with Proposition 65:

⚠ **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

or

⚠ **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

The warning shall be accompanied by a symbol consisting of a black exclamation point in a yellow equilateral triangle with a black outline. Where the label, labeling, package, shelf tag or sign for the Products is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word "**WARNING**." The warning shall be provided directly on each Product or its label, labeling, package, shelf tag or sign with such conspicuousness as compared with other words, statements or designs as to render it likely to be seen, read and understood by an ordinary individual under customary conditions of purchase. However, if Defendant opts to use the Short-Form Warning, said warning must be provided on each Product or its label or package.

If Defendant sell the Covered Products that that require a warning pursuant to Section 2.1 via an internet website to customers located in California, the warning requirements of this section shall be satisfied in accordance with applicable regulations.

3. SETTLEMENT PAYMENT

3.1 Payment and Due Date.

Within ten (10) business days of the Effective Date, Defendant shall pay a total of sixty thousand dollars ($60,000.00) in full and complete settlement of all monetary claims by CPG related to the Notice and Complaint as to Defendant, as follows:

3.1.1 Civil Penalty: Defendant agrees to pay twelve thousand dollars ($12,000.00) as penalties pursuant to Health & Safety Code § 25249.12:

Counsel for CPG shall be responsible to issue a check made payable to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") in the amount of nine thousand dollars ($9,000.00) representing 75% of the total penalty and another check to CPG in the amount of three thousand dollars ($3,000.00) representing 25% of the total penalty; and

3.1.2 Additional Settlement Payment: Defendant shall issue one check for nine thousand dollars ($9,000.00) to "Consumer Protection Group, Inc." pursuant to Health & Safety Code § 25249.7 (b) and California Code of Regulations, Title 11 § 3203 (d). CPG will use this portion of the this Additional Settlement Payment as follows, eighty five percent (85%) for fees of investigation, purchasing and testing for Proposition 65 listed chemicals in various products, and for expert fees for evaluating exposures through various mediums, including but not limited to consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and retaining experts who assist with the scientific analysis necessary for those files in litigation and to offset the costs of future litigation enforcing Proposition 65 but excluding attorney fees; fifteen percent (15%) for administrative costs incurred during investigation and litigation to reduce the public's exposure to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be responsible for such exposures and attempting to persuade those persons and/or entities to reformulate their products or the source of exposure to completely eliminate or lower the level of Proposition 65 listed chemicals including but not limited to costs of documentation and tracking of products investigated, storage of products, website enhancement and maintenance, computer and software maintenance, investigative equipment, CPG's member's time for work done on investigations, office supplies, mailing supplies and postage.

3.1.3 Reimbursement of Attorneys' Fees and Costs: Defendant shall pay thirty nine thousand dollars ($39,000.00) to Blackstone Law, APC as complete reimbursement for any and all reasonable investigation fees and costs, attorneys' fees, expert fees, report costs, and any and all other costs and expenses incurred as a result of investigating, bringing this matter to the Defendant' attention, litigating, negotiating a settlement in the public interest, and seeking and obtaining court approval of this Consent Judgment.

3.2 All payments referenced in paragraphs 3.1.1, 3.1.2, and 3.1.3 above, shall be made payable to Blackstone Law, APC IOLTA and delivered to: Jonathan M. Genish, Blackstone Law, APC, 8383 Wilshire Blvd., Suite 745, Beverly Hills, CA 90211.

4. MATTERS COVERED BY THIS CONSENT JUDGMENT

4.1 This Consent Judgment is a full, final, and binding resolution between CPG, on behalf of itself and in the public interest, on the one hand, and (i) Defendant and its officers, directors, attorneys, agents, insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister companies, and their successors and assigns (collectively referred to as "Defendant Releasees"); (ii) all entities to which Defendant Releasees directly or indirectly has distributed or sold the Covered Products, including, but not limited to, downstream distributors, suppliers, wholesalers, customers, retailers (iii) and the successors and assigns of any of them (the released entities listed in (i) through (iv) of this Section 4.1 are collectively referred to as "Released Parties") for all claims for violations of Proposition 65 for alleged exposures to DEHP from Covered Products manufactured, distributed, or sold by Defendant on or before the Effective Date. Defendant's compliance with this Consent Judgment shall constitute compliance by any Released Parties with Proposition 65 with respect to DEHP in the Covered Products manufactured, distributed, or sold after the Effective Date. Nothing in this Section affects CPG's right to commence or prosecute an action under Proposition 65 against any person other than the Released Parties.

4.2 CPG on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees (collectively, the "CPG Releasors"), hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against the Released Parties arising from any violation of Proposition 65 or any other statutory or common law regarding alleged exposures to, or the failure to warn about alleged exposures to, DEHP from the Covered Products. It is possible that Claims not known to the Parties arising out of the facts alleged in the Notice or the Complaint and relating to the Covered Products will develop or be discovered. CPG, on behalf of itself and the CPG Releasors, acknowledges that this Consent Judgment is expressly intended to

cover and include all such Claims. CPG has full knowledge of the contents of California Civil Code §1542. CPG, on behalf of itself and the CPG Releasors, acknowledges that the Claims released in this Section 4 may include unknown Claims, and nevertheless waives California Civil Code §1542 as to any such unknown Claims. California Civil Code §1542 reads as follows:

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

CPG understands and acknowledges that the significance and consequence of this waiver of California Civil Code §1542.

5. ENFORCEMENT OF JUDGMENT

5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of California, Los Angeles County, enforce the terms and conditions contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment only after that Party first provides 10 days' notice to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment, and attempts to resolve such Party's failure to comply in an open and good faith manner.

5.2 Notice of Violation. Prior to bringing any motion, order to show cause, or other proceeding to enforce the terms of this Consent Judgment, CPG shall provide a Notice of Violation ("NOV") to the Defendant. The NOV shall include for each of the Covered Products: the date(s) the alleged violation(s) was observed and the location at which the Covered Products were offered for sale, and shall be accompanied by all test data obtained by CPG regarding the Covered Products, including an identification of the component(s) of the Covered Products that were tested.

5.2.1 Non-Contested NOV. CPG shall take no further action of any kind regarding the alleged violation if, within 60 days of receiving such NOV, the Defendant serves a Notice of Election ("NOE") not to contest the NOV that meets one of the following conditions:

(a) A statement that the Covered Product was manufactured, shipped, or sold by the Defendant for sale in California within 90 days after the Effective Date; or

(b) A statement that since receiving the NOV the Defendant has taken corrective action by either: (i) taking all steps necessary to bring the sale of the product into compliance under the terms of this Consent Judgment; or (ii) requesting that its stores in California, as applicable, remove the Covered Product identified in the NOV from sale in California and destroy or return the Covered Product to the Defendant or vendor, as applicable; or (iii) refute the information provided in the NOV.

5.2.2 Contested NOV. Defendant may serve a Notice of Election ("NOE") informing CPG of its election to contest the NOV within 60 days of receiving the NOV.

(a) In its election, the Defendant may request that the sample(s) of Covered Product tested by CPG be subject to confirmatory testing at an EPA-accredited laboratory.

(b) If the confirmatory testing establishes that the Covered Products do not contain DEHP in excess of the level allowed in Section 2.1, above, CPG shall take no further action regarding the alleged violation. If the testing does not establish compliance with Section 2.1, above, the Defendant may withdraw its NOE to contest the violation and may serve a new NOE pursuant to Section 5.2.1.

(c) If the Defendant does not withdraw a NOE to contest the NOV, the Parties shall meet and confer for a period of no less than 30 days before CPG may seek an order enforcing the terms of this Consent Judgment.

5.3 In any proceeding brought by either Party to enforce this Consent Judgment, the prevailing Party shall be entitled to recover its reasonable attorney's fees and costs.

6. ENTRY OF CONSENT JUDGMENT

6.1 CPG shall file a motion seeking approval of this Consent Judgment pursuant to California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CPG and Defendant waive their respective rights to a hearing or trial on the allegations of the First Cause of Action of the Complaint.

6.2 If this Consent Judgment is not approved in full by the Court: (a) this Consent Judgment and any and all prior agreements between the Parties merged herein shall terminate and become null and void, and the actions shall revert to the status that existed prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

7. MODIFICATION OF JUDGMENT

7.1 This Consent Judgment may be modified only upon written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

7.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

7.3 Within fifteen (15) business days of the Effective Date, CPG shall file a request for dismissal without prejudice of Defendant with respect to the First Cause of Action in the Complaint.

8. RETENTION OF JURISDICTION

8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms of this Consent Judgment under Code of Civil Procedure § 664.6.

9. SERVICE ON THE ATTORNEY GENERAL

9.1 CPG shall serve a copy of this Consent Judgment, signed by both Parties, on the California Attorney General so that the Attorney General may review this Consent Judgment prior to its submittal to the Court for approval. No sooner than forty-five (45) days after the Attorney General has received the aforementioned copy of this Consent Judgment, and in the absence of any written objection by the Attorney General to the terms of this Consent Judgment, the Parties may then submit it to the Court for approval.

10. ATTORNEY FEES

10.1 Except as specifically provided in Section 3.1.3, each Party shall bear its own costs and attorney fees in connection with this action.

11. ENTIRE AGREEMENT

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

12. GOVERNING LAW

12.1 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.

12.2 The terms of this Consent Judgment shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or are no longer required as a result of any such repeal or preemption, or rendered inapplicable by reason of law generally as to the Covered Products, then any Defendant subject to this Consent Judgment may provide written notice to CPG of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve a Defendant from any obligation to comply with any pertinent state or federal law or regulation.

12.3 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or

ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

13. EXECUTION AND COUNTERPARTS

13.1 This Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document and have the same force and effect as original signatures.

14. NOTICES

14.1 Any notices under this Consent Judgment shall be by personal delivery or First-Class Mail.

If to CPG:

Jonathan M. Genish
Blackstone Law, APC
8383 Wilshire Blvd., Suite 745
Beverly Hills, CA 90211

If to Home Depot:

General Counsel
Home Depot U.S.A., Inc.
2455 Paces Ferry Road, N.W.
Atlanta, GA 30339

With copy to:

Jeff Margulies
Norton Rose Fulbright US LLP
555 South Flower Street, Forty-First Floor
Los Angeles, CA 90071

15. AUTHORITY TO STIPULATE

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

AGREED TO:

Date: 01/08/2020

By: _____
Consumer Protection Group, LLC

AGREED TO:

Date: 12-23-19

By: _____
Home Depot U.S.A., Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 06/26/2020

Patricia D. Nieto / Judge

Judge of the Superior Court
Hon. Patricia D. Nieto