

FILED
San Francisco County Superior Court

MAR 20 2020

CLERK OF THE COURT

BY:  Deputy Clerk

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

GABRIEL ESPINOZA,
Plaintiff,

v.

HARBOR FREIGHT TOOLS USA, INC.,
Defendant.

Case No.: CGC-20-582133

CONSENT JUDGMENT

Dept.: 302
Hearing Date: March 18, 2020
Hearing Time: 9:30 AM
Reservation #: 01240318-10

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Gabriel Espinoza, acting on behalf of the public interest (hereinafter "Espinoza"), and Harbor Freight Tools USA, Inc., ("Harbor Freight" or "Defendant") with Espinoza and Defendant collectively referred to as the "Parties" and each of them as a "Party." Espinoza is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Harbor Freight is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Espinoza alleges that Defendant has exposed individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of (a) Pittsburgh Gauge Booster Cables (and carry case), UPC #792363633765, and (b) Exterior Car Duster, UPC #792363604376 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about November 28, 2018, Espinoza served Harbor Freight, and various public enforcement agencies with documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of automotive accessories, including the Pittsburgh Gauge Booster Cables (and carry case) and (b) the Exterior Car Duster, exposes users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On January 9, 2020, Espinoza filed a complaint (the "Complaint") in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution

1 of all claims which were or could have been raised in the Complaint based on the facts alleged
2 therein and/or in the Notice.

3 1.5 Defendant denies the material allegations contained in the Notice and Complaint
4 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
5 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
6 shall compliance with this Consent Judgment constitute or be construed as an admission by
7 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
8 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
9 responsibilities, and duties of Defendant under this Consent Judgment.

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term "Covered Products" means automotive accessories,
12 including the (a) Pittsburgh Gauge Booster Cables (and carry case) and the (b) Exterior Car Duster,
13 that are manufactured, distributed and/or offered for sale in California by Harbor Freight.

14 2.2 **Effective Date.** The term "Effective Date" means the date Harbor Freight's counsel
15 receives notice that this Consent Judgment is entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 **Reformulation of Covered Products.** No later than three months after the date this
18 Consent Judgment is issued by the Court, and continuing thereafter, Covered Products that Harbor
19 Freight directly manufactures, imports, distributes, sells, or offers for sale in California shall either:
20 (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
21 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
22 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
23 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
24 Product.

25 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
26 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP when
27 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
28

8270C, or other methodology utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance.

3.3 **Clear and Reasonable Warning.** No later than three months after the date this Consent Judgment is issued by the Court, and continuing thereafter, a clear and reasonable exposure warning as set forth in §§ 3.3 and 3.4 of this Consent Judgment must be provided for all Covered Products that Defendant manufacturers, imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream of commerce prior to three months after the date this Consent Judgment is issued by the Court. The warning shall consist of either the **Warning** or **Alternative Warning** described in § 3.3 subsection (a) or subsection (b), respectively:

(a) **Warning.** The "Warning" shall consist of the statement:

⚠ 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

(b) **Alternative Warning:** Harbor Freight may, but is not required to, use the alternative short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

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

3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Covered Product does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the Covered Product's packaging or labeling, or on a placard, shelf tag, sign or displayed on an electronic device or during an automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet

1 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at
2 least the same size as those other safety warnings.

3 If Harbor Freight sells Covered Products via an internet website to customers located in
4 California, the warning requirements of this section shall be satisfied if the foregoing warning
5 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
6 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
7 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
8 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
9 to, or immediately following the display, description, price, or checkout listing of the Covered
10 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
11 associates it with the product(s) to which the warning applies.

12 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning regulations approved or adopted by the State of
15 California's Office of Environmental Health Hazard Assessment ("OEHHA"), or by any other State
16 of California agency authorized to issue regulations approving or adopting warnings for the
17 implementation of Proposition 65, or by statutes adopted by the California State Legislature or by
18 the California voters after the Effective Date.

19 **4. MONETARY TERMS**

20 4.1 **Civil Penalty.** Harbor Freight shall pay \$5,000.00 as a Civil Penalty pursuant to
21 Health and Safety Code § 25249.7(b), to be apportioned in accordance with California Health &
22 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
23 Civil Penalty remitted to Espinoza, as provided by California Health & Safety Code § 25249.12(d).

24 4.1.1 Within ten (10) days of the Effective Date, Harbor Freight shall issue two
25 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,750.00; and
26 to (b) "Brodsky & Smith, LLC in Trust for Espinoza" in the amount of \$1,250.00. Payment owed
27 to Espinoza pursuant to this Section shall be delivered to the following payment address:
28

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 address
20 set forth above as proof of payment to OEHHHA.

21 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Harbor Freight shall
22 pay \$36,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
23 Espinoza's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
24 Harbor Freight's attention, litigating, negotiating, and obtaining judicial approval of a settlement
25 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

26 **5. RELEASE OF ALL CLAIMS**

27 5.1 This Consent Judgment is a full, final, and binding resolution between Espinoza
28 acting on his own behalf, and on behalf of the public interest, and Harbor Freight, and its parents,
shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees

1 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
2 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
3 Notice, with respect to any Covered Products manufactured, distributed, or sold by Harbor Freight
4 prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other
5 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
6 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
7 alleged in the Complaint, or that could have been brought pursuant to the Notice against Harbor
8 Freight and/or the Downstream Releasees of the Covered Products ("Proposition 65 Claims").
9 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
10 with regard to the Covered Products.

11 5.2 In addition to the foregoing, Espinoza, on behalf of himself, his past and current
12 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
13 capacity, hereby releases Defendant Releasees and Downstream Releasees from all claims that he
14 has asserted or could have asserted against said Releasees arising out of Proposition 65. Espinoza
15 acting on behalf of himself, his past and current agents, representatives, attorneys, and successors
16 and/or assignees, and not in his representative capacity further waives all rights to institute or
17 participate in, directly or indirectly, any form of legal action and releases Harbor Freight, Defendant
18 Releasees, and Downstream Releasees from any and all manner of actions, causes of action, claims,
19 demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages,
20 charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown,
21 in law or equity, fixed or contingent, now or in the future, with respect to any alleged violations of
22 Proposition 65 related to or arising from Covered Products manufactured, distributed, or sold by
23 Harbor Freight, Defendant Releasees or Downstream Releasees. With respect to the foregoing
24 waivers and releases in this paragraph, Espinoza hereby specifically waives any and all rights and
25 benefits which he now has, or in the future may have, conferred by virtue of the provisions of §
26 1542 of the California Civil Code, which provides as follows:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
28 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

1 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
2 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
3 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
4 DEBTOR OR RELEASED PARTY.

5 5.3 Harbor Freight waives any and all claims against Espinoza, his attorneys and other
6 representatives, for any and all actions taken or statements made (or those that could have been
7 taken or made) by Espinoza and his attorneys and other representatives, whether in the course of
8 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
9 and/or with respect to the Covered Products.

10 **6. INTEGRATION**

11 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
12 any and all prior negotiations and understandings related hereto shall be deemed to have been
13 merged within it. No representations or terms of agreement other than those contained herein exist
14 or have been made by any Party with respect to the other Party or the subject matter hereof.

15 **7. GOVERNING LAW**

16 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California. In the event that Proposition 65 is repealed or
18 is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
19 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
20 to the extent that, the Covered Products are so affected.

21 **8. NOTICES**

22 8.1 Unless specified herein, all correspondence and notices required to be provided
23 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
24 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
25 by the other party at the following addresses:

26 For Defendant:

27 Bruce Nye
28 Scali Rasmussen
1901 Harrison Street, 14th Floor
Oakland, CA 94612

And

1 For Espinoza:

2 Evan Smith
3 Brodsky & Smith, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

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

14 10.1 Espinoza agrees to comply with the requirements set forth in California Health &
15 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
16 Defendant agrees it shall support approval of such Motion.

17 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
18 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
19 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
20 days, the case shall proceed on its normal course.

21 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
22 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
23 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
24 its normal course on the trial court's calendar.

25 **11. MODIFICATION**

26 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
27 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
28

1 **12. ATTORNEY'S FEES**

2 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

4 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
5 pursuant to law.

6 **13. RETENTION OF JURISDICTION**

7 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
8 Consent Judgment.

9 **14. AUTHORIZATION**

10 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood and agree to all of the terms and conditions of this
12 document and certify that he or she is fully authorized by the Party he or she represents to execute
13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
14 explicitly provided herein each Party is to bear its own fees and costs.

15 **AGREED TO:**

AGREED TO:

16 Date: 1/20/2020

Date: _____

17 By: [Signature]

18 By: _____

19 GABRIEL ESPINOSA

20 HARBOR FREIGHT TOOLS USA, INC.

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

22 Dated: _____

23 _____
24 Judge of Superior Court

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14 explicitly provided herein each Party is to bear its own fees and costs.

15 **AGREED TO:**

AGREED TO:

16 Date: _____

Date: 1/21/2020

17 By: _____
18 GABRIEL ESPINOSA

19 By: Jimmy Stafford
20 HARBOR FREIGHT TOOLS USA, INC.

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

22 Dated: Mar. 18, 2020

23 Ethan P. Schulman
24 Judge of Superior Court

25 **ETHAN P. SCHULMAN**