

FILED

JUL 14 2020

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: J. Berg, Deputy

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Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 HARBOR FREIGHT TOOLS USA, INC.,

15 Defendant.

Case No.: CIV1904482

16 **CONSENT JUDGMENT**

Judge: Stephen P. Freccero

Courtroom: A

Hearing Time: 1:30 PM

Hearing Date:

JUL 14 2020

1 **1. INTRODUCTION**

2
3 **1.1 The Parties.** This Consent Judgment is entered into by and between Anthony
4 Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and c. (“Harbor Freight” or
5 “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties” and each of them
6 as a “Party.” Ferreiro is an individual residing in California that seeks to promote awareness of
7 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
8 substances contained in consumer products. Harbor Freight is alleged to be a person in the course
9 of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of valves, including the Central
12 Pneumatic blasting deadman valve, UPC #7 92363 60491 8, without providing a clear and
13 reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a
14 chemical known to the State of California to cause cancer and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about July 17, 2019, Ferreiro served Harbor
16 Freight, 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 violated Proposition 65 for failing to warn consumers and customers that the valves expose users
19 in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims
20 alleged in the Notice. On December 6, 2019, Ferreiro filed a complaint (the “Complaint”) in the
21 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 Marin, and that this Court has jurisdiction to approve, enter, and
25 oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims
26 which were, or could have been raised in the Complaint based on the facts alleged therein and/or
27 in the Notice.
28

1 1.5 Defendant denies the material allegations contained in the Notice and Complaint
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
6 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means valves and nozzles,
10 including the Central Pneumatic blasting deadman valve UPC #7 92363 60491 8, that are
11 manufactured, distributed and/or offered for sale in California by Harbor Freight.

12 2.2 **Effective Date.** The term "Effective Date" means the date Harbor Freight's counsel
13 receives notice that this Consent Judgment is entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 **Reformulation of Covered Products.** No later than three months after the date this
16 Consent Judgment is issued by the Court, and continuing thereafter, Covered Products that Harbor
17 Freight directly manufactures, imports, distributes, sells, or offers for sale in California shall either:
18 (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
19 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
20 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
21 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
22 Product.

23 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP when
25 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
26 8270C or other methodology utilized by federal or state government agencies for the purpose of
27 determining the phthalate content in a solid substance.
28

1 3.3 **Clear and Reasonable Warning.** No later than three months after the date this
2 Consent Judgment is issued by the Court, and continuing thereafter, a clear and reasonable exposure
3 warning as set forth in §§ 3.3 and 3.4 of this Consent Judgement must be provided for all Covered
4 Products that Defendant manufacturers, imports, distributes, sells, or offers for sale in California
5 that is not a Reformulated Product. There shall be no obligation for Defendant to provide a warning
6 for Covered Products that enter the stream of commerce prior to three months after the date this
7 Consent Judgment is issued by the Court. The warning shall consist of either the **Warning** or
8 **Alternative Warning** described in § 3.3 subsection (a) or subsection (b), respectively:

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

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

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

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

16 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
17 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to
18 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral
19 triangle with a black outline, except that if the sign or label for the Covered Product does not use
20 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
21 than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the
22 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or displayed on an
23 electronic device or during an automatic process, providing that the warning is displayed with such
24 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
25 read and understood by an ordinary individual under customary conditions of purchase or use. A
26 warning may be contained in the same section of the packaging, labeling, or instruction booklet
27 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at
28 least the same size as those other safety warnings.

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

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning regulations approved or adopted by the State of
13 California's Office of Environmental Health Hazard Assessment ("OEHHA"), or by any other State
14 of California agency authorized to issue regulations approving or adopting warnings as
15 implementation of Proposition 65, or by statutes adopted by the California State Legislature or by
16 the California voters after the Effective Date.

17 4. **MONETARY TERMS**

18 4.1 **Civil Penalty.** Harbor Freight shall pay \$3,000.00 as a Civil Penalty pursuant to
19 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
20 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
21 the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
22 § 25249.12(d).

23 4.1.1 Within ten (10) days of the Effective Date, Harbor Freight shall issue two
24 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2250.00; and to
25 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$750.00. Payment owed to
26 Ferreiro pursuant to this Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith, LLC

Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

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

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

5. **RELEASE OF ALL CLAIMS**

5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro 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 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for

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

10 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
11 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
12 capacity, hereby releases Defendant Releasees and Downstream Releasees from all claims that he
13 has asserted or could have asserted against said Releasees arising out of Proposition 65. Ferreiro
14 acting on behalf of himself, his past and current agents, representatives, attorneys, and successors
15 and/or assignees, and not in his representative capacity further waives all rights to institute or
16 participate in, directly or indirectly, any form of legal action and releases Harbor Freight, Defendant
17 Releasees, and Downstream Releasees from any and all manner of actions, causes of action, claims,
18 demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages,
19 charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown,
20 in law or equity, fixed or contingent, now or in the future, with respect to any alleged violations of
21 Proposition 65 related to or arising from Covered Products manufactured, distributed, or sold by
22 Harbor Freight, Defendant Releasees or Downstream Releasees. With respect to the foregoing
23 waivers and releases in this paragraph, Ferreiro hereby specifically waives any and all rights and
24 benefits which he now has, or in the future may have, conferred by virtue of the provisions of §
25 1542 of the California Civil Code, which provides as follows:

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
27 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
28 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE

1 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
2 DEBTOR OR RELEASED PARTY.

3 5.3 Harbor Freight waives any and all claims against Ferreiro, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
7 and/or with respect to Covered Products.

8 **6. INTEGRATION**

9 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
10 any and all prior negotiations and understandings related hereto shall be deemed to have been
11 merged within it. No representations or terms of agreement other than those contained herein exist
12 or have been made by any Party with respect to the other Party or the subject matter hereof.

13 **7. GOVERNING LAW**

14 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California and apply within the State of California. In the event that Proposition 65 is repealed or
16 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
17 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, Covered Products are so affected.

19 **8. NOTICES**

20 8.1 Unless specified herein, all correspondence and notices required to be provided
21 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
22 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
23 by the other party at the following addresses:

24 For Defendant:

25 Bruce Nye
26 Scali Rasmussen
1901 Harrison Street, 14th Floor
Oakland, CA 94612

27 And

28 For Ferreiro:

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

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 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

8 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
9 which shall be deemed an original, and all of which, when taken together, shall constitute one and
10 the same document.

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

12 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
13 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
14 Defendant agrees it shall support approval of such Motion.

15 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
16 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
17 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
18 30 days, the case shall proceed on its normal course.

19 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
20 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
21 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
22 its normal course on the trial court's calendar.

23 **11. MODIFICATION**

24 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
25 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

26 **12. ATTORNEY'S FEES**

27 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
28 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 **14. AUTHORIZATION**

7 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certify that he or she is fully authorized by the Party he or she represents to execute
10 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
11 explicitly provided herein each Party is to bear its own fees and costs.

12
13 **AGREED TO:**

AGREED TO:

14
15 Date:

3/16/2020

Date:

1/21/2020

16 By:

Anthony Ferreiro
ANTHONY FERREIRO

By:

Jimmy Stojan
HARBOR FREIGHT TOOLS USA, INC.

17
18
19 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

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21 Dated:

JULY 14, 2020

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Judge of Superior Court