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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,

11 Plaintiff,

12 v.

13 W.M. BARR AND COMPANY, THE HOME
DEPOT AND DOES 1 THROUGH 25
14 INCLUSIVE,

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Case No. **37-2013-00072024-CU-PO-CTL**

Assigned For All Purposes To The
Honorable Ronald S. Prager

**CONSENT JUDGMENT AS TO
DEFENDANT W.M. BARR AND
COMPANY, INC.**

Complaint Filed: May 3, 2012

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Evelyn
3 Wimberley acting on behalf of the public interest (hereinafter “Wimberley”) and W.M. Barr and
4 Company, Inc., (hereinafter “W.M. Barr”), with Wimberley and W.M. Barr collectively referred
5 to as the “Parties” and each of them as a “Party.” Wimberley is an individual residing in
6 California who seeks to promote awareness of exposures to toxic chemicals and improve human
7 health by reducing or eliminating hazardous substances contained in consumer products. W.M.
8 Barr employs ten or more persons and is a person in the course of doing business for purposes of
9 Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Wimberley alleges that W.M. Barr has offered
11 for sale in the State of California and has sold in California, heater fuel that exposes individuals to
12 carbon monoxide and soot, and that such sales have not been accompanied by Proposition 65
13 warnings. Soot is listed under Proposition 65 as a chemical known to the State of California to
14 cause cancer and carbon monoxide is listed under Proposition 65 as a chemical known to the
15 State of California to cause birth defects or other reproductive harm.

16 1.3 **Notices of Violation/Complaint.** On or about March 1, 2013, Wimberley served
17 W.M. Barr, and various public enforcement agencies with a document entitled "60-Day Notice of
18 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that W.M. Barr
19 was in violation of Proposition 65 for failing to warn consumers and customers that the heater
20 fuel exposed users in California to carbon monoxide and soot. No public enforcer diligently
21 prosecuted the claims threatened in the Notice within sixty days plus service time relative to the
22 provision of the Notice to them by Wimberley, such that Wimberley filed a complaint in the
23 matter as captioned above on October 21, 2013 (“Complaint”).

24 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
25 has jurisdiction over W.M. Barr as to the allegations contained in the complaint filed in this
26 matter, that venue is proper in the County of San Diego, and that this Court has jurisdiction to
27 approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding
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1 resolution of all claims which were or could have been raised in the Complaint based on the facts
2 alleged therein and/or in the Notices.

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

11 **2. DEFINITIONS**

12 2.1 **Complaint.** The term "Complaint" shall have the meaning given in Section 1.3.

13 2.2 **Covered Product.** The term "Covered Product" means kerosene heater fuel.

14 2.3 **Effective Date.** The term "Effective Date" shall mean the date this Consent
15 Judgment is entered as a Judgment of the Court.

16 2.4 **Listed Chemicals:** The term "Listed Chemicals" shall mean carbon monoxide and
17 soots.

18 2.5 **Notice.** The term "Notice" shall have the meaning given in Section 1.3.

19 2.6 **Releasees.** The terms "Defendant Releasees" and "Downstream Defendant
20 Releasees" shall have the meanings given in Section 5.1.

21 **3. INJUNCTIVE RELIEF: WARNINGS**

22 3.1 Commencing 60 days after the Effective Date, W.M. Barr shall not sell, offer for
23 sale, or ship for sale in California any Covered Product, unless the Covered Product is
24 accompanied by the following warning: "Warning: This fuel, and byproducts or combustion of
25 this fuel, contains chemicals known to the State of California to cause cancer and birth defects or
26 other reproductive harm."
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1 3.2 The warning provided pursuant to Section 3.1 shall be prominently displayed on
2 the Covered Product with such conspicuousness, as compared with other words, statements, or
3 designs as to render it likely to be read and understood by an ordinary individual prior to sale.
4 The warning shall be contained in the same section that states other safety warnings concerning
5 the use of the product and shall be at least the same size as those other safety warnings.

6 **4. MONETARY TERMS**

7 4.1 **Civil Penalty.** W.M. Barr shall pay a civil penalty of \$1,000 pursuant to Health
8 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
9 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
10 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
11 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

12 4.2 **Attorney Fees.** W.M. Barr agrees to pay and will not oppose an application made
13 by Wimberley’s counsel for an award of attorney fees, inclusive of all expenses and costs
14 incurred as a result of investigating, bringing this matter to W.M. Barr’s attention, litigating and
15 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
16 of Civil Procedure section 1021.5, in an amount not to exceed \$24,000. Other than the payment
17 required hereunder, each side is to bear its own attorneys’ fees and costs.

18 4.3 W.M. Barr shall wire Wimberley’s counsel the total sum of \$25,000, representing
19 the civil penalty and attorney fees in Sections 4.1 and 4.2 within ten days following receipt of a
20 fully-executed copy of this Consent Judgment and wire instruction information from Wimberley’s
21 counsel.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This consent judgment is a full, final, and binding resolution between Wimberley
24 acting in the public interest, and W.M. Barr and its parents, shareholders, divisions, subdivisions,
25 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
26 (“Defendant Releasees”), and all entities from whom they obtain and to whom they directly or
27 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
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1 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
2 cooperative members, including but not limited to The Home Depot and its subsidiaries and
3 affiliates (“Downstream Defendant Releasees”), of all claims for violations of Proposition 65
4 based on exposure to Listed Chemicals from Covered Products as set forth in the Notice, with
5 respect to any Covered Products manufactured, distributed, or sold by W.M. Barr prior to the
6 Effective Date. Compliance with the terms of this consent judgment constitutes compliance with
7 Proposition 65 with regard to the Covered Products.

8 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
9 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
10 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action and releases any W.M. Barr, Defendant Releasees, and Downstream Defendant
12 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
13 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
14 expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity,
15 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
16 related to or arising from Covered Products manufactured distributed or sold by W.M. Barr or
17 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
18 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
19 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
20 Code, which provides as follows:

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

25 5.3 W.M. Barr waives any and all claims against Wimberley, her attorneys and other
26 representatives, for any and all actions taken or statements made (or those that could have been
27 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
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1 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
2 matter, 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
7 exist 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 W.M. Barr shall provide written notice to Wimberley of any asserted change in the law, and shall
13 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
14 that, Covered Products are so affected.

15 **8. NOTICES**

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

20 For W.M. Barr:

21 Michael S. Cooley
22 Vice President and General Counsel
23 W.M. Barr and Company, Inc.
24 6750 Lenox Center Court, Suite 200
25 Memphis, TN 38115

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With a copy to:

Jeffrey Margulies
Fulbright & Jaworski L.L.P.
555 South Flower St.
Forty First Floor
Los Angeles, CA 90071

and

For Wimberley:

Stephen Ure
Law Offices of Stephen Ure, PC.
1518 Sixth Avenue
San Diego, California 92101

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

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

10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within twelve months after it has been fully executed by the Parties. In such case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30-days, any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed on its normal course.

1 10.3 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
3 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
4 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
5 trial court, and the case shall proceed on its normal course on the trial court's calendar.

6 **11. MODIFICATION**

7 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
8 and the approval of the Court or upon the granting of a motion brought to the Court by either
9 Party.

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
13 unless the unsuccessful party has acted with substantial justification. For purposes of this
14 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
15 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
23 their respective Parties and have read, understood and agree to all of the terms and conditions of
24 this document and certifies that he or she is fully authorized by the Party he or she represents to
25 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
26 Except as explicitly provided herein each Party is to bear its own fees and costs.
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APPROVED AS TO FORM:

AGREED TO: Date : _____, 2014 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2014 By: _____ On Behalf of W.M. Barr and Company, Inc. Jeffrey Margulies, Fulbright & Jaworski LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____
EVELYN WIMBERLEY

By: _____
W.M. BARR AND COMPANY, INC.