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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
9

10 ANTHONY FERRIERO,

11 Plaintiff,

12 vs.

13 TRICAM INDUSTRIES, INC.,

14 Defendant.
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Case No.: RG15789604

[PROPOSED] CONSENT JUDGMENT

Judge: Sandra Bean

Dept.: 521

Hearing Date: April 20, 2016

Hearing Time: 2:30 PM

Reservation #: R-1715711
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1 **1. Introduction**

2 1.1 On May 21, 2015, Anthony Ferreiro (“Ferreiro”) served Tricam Industries, Inc.
3 (“Tricam”), Wal-Mart Stores, Inc. (“Wal-Mart”), and various public enforcement agencies with a
4 document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*”
5 (the “Notice”). The Notice provided Tricam and such others, including public enforcers, with
6 notice that alleged that Tricam was in purported violation of California Health & Safety Code §
7 25249.6 (“Proposition 65”) for failing to warn consumers and customers that Weatherguard
8 Extreme Duty Tarp, UPC No. 7 22571009526 (the “Product”), potentially exposed users in
9 California to the chemical Di(2-ethylhexyl) phthalate (DEHP). No public enforcer has diligently
10 prosecuted the allegations set forth in the Notice.

11 1.2 On October 15, 2015, Ferreiro filed a Complaint for Civil Penalties and Injunctive
12 Relief (“Complaint”) in the Alameda County court (the “Court”), Case No. RG15789604, against
13 Tricam and Wal-Mart, alleging violations of Proposition 65 with respect to the Product (the
14 “Action”).

15 1.3 Tricam is a corporation that employs more than ten persons under California
16 Health and Safety Code §25249.6 and allegedly offered the Product for sale within the State of
17 California.

18 1.4 Ferreiro’s Complaint alleges, among other things, that Tricam sold the Product in
19 California and/or to California citizens, that the Product contains DEHP, and that the resulting
20 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
21 to a chemical known to the State of California to cause cancer and reproductive toxicity, without
22 first providing a clear and reasonable warning to such individuals.

23 1.5. On February 5, 2016, defendant Wal-Mart was dismissed from the litigation.

24 1.6. For purposes of this Consent Judgment only, the parties stipulate that this Court
25 has jurisdiction over the allegations of violations contained in the Complaint and personal
26 jurisdiction over Tricam as to the acts alleged in the Complaint, that venue is proper in the
27 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
28 resolution of the allegations contained in the Complaint.

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2 17. The parties enter into this Consent Judgment pursuant to a full settlement and
3 release of disputed claims between the parties as alleged in the Complaint for the purpose of
4 avoiding prolonged litigation. By execution of this Consent Judgment, Tricam does not admit
5 any violation of Proposition 65 and specifically denies that it has committed any such violation.
6 Nothing in this Consent Judgment shall be construed as an admission by Tricam of any fact, issue
7 of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
8 construed as an admission by Tricam of any fact, issue of law, or violation of law. Nothing in
9 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Tricam
10 may have in any other future legal proceeding. However, this paragraph shall not diminish or
11 otherwise affect the obligations, responsibilities and duties of Tricam under this Consent
12 Judgment.

13 1.8 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
14 date this Consent Judgment is entered by the Court.

15 **2. Injunctive Relief**

16 By this Consent Judgment the parties agree that Tricam may choose to comply with the
17 injunctive relief provisions in 2.1 to 2.2 below regarding reformulated products OR provide a
18 Proposition 65 warning with respect to the Products in 2.3 to 2.4 below.

19 2.1 Commencing on the Effective Date, and continuing thereafter, Tricam shall only
20 ship, sell, or offer for sale in California, reformulated Products pursuant to Section 2.2 or Products
21 that are labeled with a clear and reasonable warning pursuant to Section 2.3. For purposes of this
22 Settlement Agreement, "Reformulated Products" are Products that meet the standard set forth in
23 Section 2.2 below.

24 2.2 "Reformulated Products" shall mean Products that contains less than or equal to
25 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to U.S. Environmental
26 Protection Agency testing methodologies 3580A and 8270C.

27 2.3 Commencing on the Effective Date, Tricam shall provide a clear and reasonable
28 Proposition 65 warning for any Product that it ships, sells, or offers to ship or sell in California

1 that are not Reformulated Products. Tricam shall provide the warning affixed to the packaging or
2 labeling with the following statement:

3 **WARNING: This product contains a chemical known to the State of California to**
4 **cause cancer, and birth defects or other reproductive harm.**

5 The warning shall be prominently placed with such conspicuousness as compared with
6 other words, statements, designs, or devices as to render it likely to be read and understood by an
7 ordinary individual under customary conditions before purchase or use. Each warning shall be
8 provided in a manner such that the consumer or user is reasonably likely to understand to which
9 specific Product the warning applies. Tricam may, but is not required, to use the plural
10 "chemicals" in the above warning statement if it has knowledge that the products will expose
11 users to other chemicals.

12 In the event that the Office of Environmental Health Hazard Assessment promulgates one
13 or more regulations requiring or permitting warning text and/or methods of transmission different
14 than those set forth above, Tricam shall be entitled to use, at its discretion, such other warning
15 text and/or method of transmission without being deemed in breach of this Consent Judgment.

16 **3. Entry of Consent Judgment**

17 3.1 The parties hereby request that the Court promptly approve and enter this Consent
18 Judgment. Upon entry of this Consent Judgment, Ferreiro and Tricam waive their respective
19 rights to a hearing or trial on the allegations of the Complaint and Notice which are at issue in the
20 Action.

21 3.2 In the event that the California Attorney General objects or otherwise comments
22 on one or more provisions of this Consent Judgment, Ferreiro and Tricam agree to take
23 reasonable steps to satisfy such concerns or objections.

24 **4. Matters Covered By This Consent Judgment**

25 4.1 This Consent Judgment is a final and binding resolution between Ferreiro, acting
26 on his own behalf, and on behalf of the public and in the public interest, and Tricam, and shall
27 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
28 its interests or the public interest shall be permitted to pursue and/or take any action with respect

1 to any violation of Proposition 65 that was alleged in the Complaint, or that could have been
2 brought pursuant to the Notice. As to Plaintiff Ferreiro for and in his individual capacity only,
3 this Consent Judgment shall have preclusive effect such that he shall not be permitted to pursue
4 and/or take any action with respect to any other statutory or common law claim, to the fullest
5 extent that any of the foregoing were or could have been asserted by him against Tricam or Wal-
6 Mart based on their alleged exposure of persons to DEHP in the Products, or their alleged failure
7 to provide a clear and reasonable warning of exposure to such individuals or, as to alleged
8 exposures to DEHP in the Products, any other claim based on whole or in part on the facts alleged
9 in the Complaint and the Notice, whether or not based on actions committed by Tricam or Wal-
10 Mart. Compliance with the terms with this Consent Judgment shall be deemed to be compliance
11 by Tricam and Wal-Mart with the warning requirement of Proposition 65 for exposures to DEHP
12 from the Products.

13 4.2 As to alleged exposures to the DEHP in the Products, Ferreiro acting in his
14 individual capacity waives all rights to institute any form of legal action, and releases all claims
15 against Tricam, Wal-Mart and each entity to whom Tricam or Wal-Mart directly or indirectly has
16 distributed or sold the Products, including but not limited to, downstream distributors,
17 wholesalers, customers, retailers (including but not limited to Wal-Mart Stores, Inc. and its
18 affiliates and subsidiaries), Wal-Mart (including their respective parents, subsidiaries or affiliates,
19 and assigns of any of them, who may use, maintain, distribute or sell the Product) (collectively,
20 "Releasees"), whether under Proposition 65 or otherwise, arising out of or resulting from, or
21 related directly or indirectly to, in whole or in part, the Product or the Action, including but not
22 limited to any exposure to, or failure to warn with respect to, the Product (referred to collectively
23 in this Section as the "Claims"). In furtherance of the foregoing, as to alleged exposures to the
24 Product, Ferreiro waives any and all rights and benefits which he now has, or in the future may
25 have, conferred upon him with respect to the Claims by virtue of the provisions of § 1542 of the
26 California Civil Code, which provides as follows:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
28 CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT

1 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
2 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
3 DEBTOR.

4 Ferreiro understands and acknowledges that the significance and consequence of this
5 waiver of California Civil Code § 1542 is that even if Ferreiro suffers future damages arising out
6 of or resulting from, or related directly or indirectly to, in whole or in part, the Products, including
7 but not limited to any exposure to, or failure to warn with respect to exposure to, the Products,
8 Ferreiro will not be able to make any claim for those damages against Releasees.

9 With respect to this Section 1542 waiver, each of the parties hereto acknowledges that
10 he/it has consulted with legal counsel regarding the implications of Section 1542 and a waiver
11 thereof.

12 **5. Enforcement of Judgment**

13 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
14 hereto. The parties may, by noticed motion or order to show cause before the Court, giving the
15 notice required by law, enforce the terms and conditions contained herein. In any proceeding
16 brought by either party to enforce this Consent Judgment, such party may seek whatever fines,
17 costs, penalties or remedies as may be provided by law for any violation of this Consent
18 Judgment.

19 **6. Modification of Judgment**

20 6.1 This Consent Judgment may be modified only by written agreement of the parties
21 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
22 provided by law and upon an entry of a modified Consent Judgment by the Court.

23 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
24 involving the Product that sets forth standards defining when Proposition 65 warnings will or will
25 not be required ("Alternative Standards"), or if the California Attorney General otherwise
26 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
27 intended for the purpose of soliciting further input or comments) of Alternative Standards
28 applicable to products that are of the same general type and function as the Product and

1 constructed from the same materials, Tricam shall be entitled to seek a modification of this
2 Consent Judgment on forty-five (45) days' notice to Ferreiro so as to be able to utilize and rely on
3 such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
4 Ferreiro shall not unreasonably contest any proposed application to effectuate such a modification
5 provided that the Product for which such a modification is sought are of the same general type
6 and function as those to which the Alternative Standards apply.

7 **7. Settlement Payment**

8 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
9 any admission of liability therefore, Tricam shall make the following monetary payments:

10 7.1.1 Tricam shall pay a total of \$1,500.00 in civil penalties (the "Civil Penalty")
11 in accordance with this Section. The Civil Penalty will be allocated in accordance with California
12 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
13 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
14 funds remitted to Ferreiro. Each respective portion of the Civil Penalty shall be delivered to the
15 addresses listed in Section 7.1.3 below.

16 7.1.2 In addition to the Civil Penalty, Tricam shall pay \$13,500.00 to Brodsky &
17 Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's attorneys' fees and
18 costs, including all investigation and laboratory costs and expert fees, incurred in the course of
19 serving the Notice and bringing the Action, and in enforcing Proposition 65, including without
20 limitation, preparation of the Notice letter and discussions with the California Attorney General.
21 Payment shall be made within fifteen (15) days of the Effective Date.

22 7.1.3 Within fifteen (15) days of the Effective Date, Tricam shall issue two
23 separate checks for the Civil Penalty amounts to (a) "OEHHA" in the amount of \$1,125.00; and
24 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$375.00. Payment to Ferreiro
25 pursuant to this Section shall be delivered to the following payment address:

26 Evan J. Smith, Esq.
27 Brodsky & Smith, LLC
28 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

3 For United States Postal Service Delivery:

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

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

13 **8. Notices**

14 8.1 Any and all notices between the parties provided for or permitted under this
15 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
16 class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on
17 any party by the other party to the following addresses:

18 For Tricam:

19 Kurt A. Dreiboldz
20 Kneafsey & Friend LLP
21 800 Wilshire Blvd., Suite 710
22 Los Angeles, CA 90017
23 T: 213.892.1200

22 For Ferreiro:

23 Evan J. Smith.
24 BRODSKY & SMITH, LLC
25 Two Bala Plaza, Suite 510
26 Bala Cynwyd, PA 19004
27 T: 877.354.2590

26 Any party, from time to time, may specify in writing to the other party a change of address to
27 which all notices and other communications shall be sent.
28

1 **9. Authority to Stipulate**

2 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
4 the party represented and legally to bind that party.

5 **10. Counterparts**

6 10.1 This Consent Judgment may be signed in counterparts and shall be binding upon
7 the parties hereto as if all said parties executed the original hereof.

8 **11. Retention of Jurisdiction**

9 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
10 Judgment under Code of Civil Procedure section 664.6.

11 **12. Service on the California Attorney General**

12 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
13 California Attorney General on behalf of the parties so that the Attorney General may review this
14 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
15 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
16 and in the absence of any written objection by the Attorney General to the terms of this Consent
17 Judgment, the parties may then submit it to the Court for Approval.

18 **13. Entire Agreement**

19 13.1 This Consent Judgment contains the sole and entire agreement and understanding
20 of the parties with respect to the entire subject matter hereof, and any and all discussions,
21 negotiations, commitments and understandings related thereto. No representations, oral or
22 otherwise, express or implied, other than those contained herein have been made by any party
23 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
24 to exist or to bind any of the parties.

25 **14. Governing Law and Construction**

26 14.1 The validity, construction and performance of this Consent Judgment shall be
27 governed by the laws of the State of California, without reference to any conflicts of law
28 provisions under California law.

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

16. Intent and Purpose

16.1 This Consent Judgment and the information embraced herein are intended solely for the purpose of: (1) a full settlement and release of disputed claims between the parties as alleged in the Complaint; (2) avoiding prolonged litigation; and (3) obtaining court approval of this Consent Judgment. Except as specifically set forth above, this Consent Judgment may not be used or disseminated for any other purpose, including, but not limited to, advertising, soliciting or referring business, posting on social media, press releases and the like.

IT IS SO STIPULATED:

Dated: March 31, 2016 Dated: _____

By: Anthony Ferrero By: _____
Anthony Ferrero Tricam Industries, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____
Judge of the Superior Court

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IT IS SO STIPULATED:

Dated: _____

Dated: 3-30-16

By: _____
Anthony Ferreiro

By: 
Tricam Industries, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court