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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,

11 Plaintiff,

12 v.

13 THE HOME DEPOT INC., AND DOES 1-25
14 INCLUSIVE,

15 Defendants,
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Case No. 37-2016-00011411-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT THE HOME DEPOT,
INC.**

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 The Home
4 Depot, Inc. (hereinafter “Home Depot”), with Wimberley and Home Depot 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. Home
8 Depot employs ten or more persons and is a person in the course of doing business for purposes
9 of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

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

16 **1.3 Notices of Violation/Complaint.** On or about June 30, 2015, Wimberley served
17 Home Depot and various public enforcement agencies with a document entitled "60-Day Notice
18 of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Home
19 Depot was in violation of Proposition 65 for failing to warn consumers and customers that the
20 outdoor chiminea exposed users in California to carbon monoxide and soot. No public enforcer
21 diligently prosecuted the claims threatened in the Notice within sixty days plus service time
22 relative to the provision of the Notice to them by Wimberley, such that Wimberley filed a
23 complaint in the matter as captioned above on April 8, 2016 (“Complaint”).

24 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
25 has jurisdiction over Home Depot 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 Home Depot 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 Home Depot 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 Home Depot of any fact, finding, conclusion, issue of law, or violation of law,
8 such being specifically denied by Home Depot. However, this section shall not diminish or
9 otherwise affect the obligations, responsibilities, and duties of Home Depot 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 Products.** The term "Covered Product" means outdoor chimineas,
14 including but not limited to Fleur di Lis 37" Clay Chiminea UPC: 816404010527. The items
15 identified on Exhibit "A" to this Consent Judgment are included within the scope of the term
16 "Covered Products."

17 2.3

18 2.4 **Effective Date.** The term "Effective Date" shall mean the date this Consent
19 Judgment is entered as a Judgment of the Court.

20 2.5 **Listed Chemicals:** The term "Listed Chemicals" shall mean carbon monoxide and
21 soot.

22 2.6 **Notice.** The term "Notice" shall have the meaning given in Section 1.3.

23 2.7 **Releasees.** The terms "Defendant Releasees" and "Downstream Defendant
24 Releasees" shall have the meanings given in Section 5.1.

25 2.8 **Execution Date.** The term "Execution Date" shall mean the date this Consent
26 Judgment is signed by the parties
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1 **3. INJUNCTIVE RELIEF: WARNINGS**

2 3.1 Commencing on the Effective Date, Home Depot shall not sell, offer for sale, or
3 ship for sale in California any Covered Product, unless the Covered Product is accompanied by
4 the following warning: "WARNING: Fuels used in wood or charcoal burning appliances, and the
5 products of combustion of such fuels, contain chemicals known to the State of California to cause
6 cancer and birth defects or other reproductive harm."

7 3.2 The warning provided pursuant to Section 3.1 shall be prominently affixed to or
8 printed on the packaging, labeling, or instruction booklet and displayed with such
9 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
10 read and understood by an ordinary individual under customary conditions of purchase or use. A
11 warning may be contained in the same section of the packaging, labeling, or instruction booklet
12 that states other safety warnings, if any, concerning the use of the product and shall be at least the
13 same font size as those other safety warnings.

14 **4. MONETARY TERMS**

15 4.1 **Civil Penalty.** Home Depot shall pay a civil penalty of \$1,000.00 pursuant to
16 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
17 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's
18 Office of Environmental Health Hazard Assessment and the remaining 25% of the penalty
19 remitted to Wimberley, as provided by California Health & Safety Code § 25249.12(d).

20 4.2 **Attorney Fees.** Home Depot agrees to pay and will not oppose an application
21 made by Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs
22 incurred as a result of investigating, bringing this matter to Home Depot's attention, litigating and
23 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
24 of Civil Procedure section 1021.5, in an amount not to exceed \$36,000.00 Other than the
25 payment required hereunder, each side is to bear its own attorneys' fees and costs.
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1 4.3 Home Depot shall mail or wire Wimberley's counsel the total sum of \$37,000.00
2 representing the civil penalty and attorney fees in Sections 4.1 and 4.2 within ten days following
3 the Effective date.

4 **5. RELEASE OF ALL CLAIMS**

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

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

3
4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
5 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
6 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
7 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
8 THE DEBTOR.

9
10 5.3 Home Depot waives any and all claims against Wimberley, her attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
13 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
14 matter, and/or with respect to Covered Products.

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16 **6. INTEGRATION**

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18 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
19 any and all prior negotiations and understandings related hereto shall be deemed to have been
20 merged within it. No representations or terms of agreement other than those contained herein
21 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

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23 **7. GOVERNING LAW**

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25 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California and apply within the State of California. In the event that Proposition 65 is repealed or
27 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
28 Home Depot shall provide written notice to Wimberley 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, Covered Products are so affected.

8. NOTICES

8.1 Unless specified herein, all correspondence and notices required to be provided
pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)

1 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
2 party by the other party at the following addresses:

3 For Home Depot:

4 Brian Mandigo
5 Merchandise Manager
6 Home Depot, Inc.
7 2455 Paces Ferry Road,
8 Atlanta, Georgia, 30339
9 With a copy to:
Candace Rodriquez
The Home Depot, Inc.
2455 Paces Ferry Road NW
Atlanta, GA 30339

10 and

11 Jeffrey Margulies
12 Norton Rose Fulbright US LLP
13 555 South Flower St.
Forty First Floor
Los Angeles, CA 90071

14 and

15 For Wimberley:

16 Stephen Ure
17 Law Offices of Stephen Ure, PC.
18 11622 El Camino Real, Suite 100
San Diego, California 92130

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

21 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

22 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
23 which shall be deemed an original, and all of which, when taken together, shall constitute one and
24 the same document.

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

3 10.1 Wimberley agrees to comply with the requirements set forth in California Health
4 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
5 Judgment and Home Depot agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by
7 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
8 within twelve months after it has been fully executed by the Parties. In such case, the Parties
9 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
10 the case shall proceed on its normal course.

11 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
12 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
13 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
14 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
15 trial court, and the case shall proceed on its normal course on the trial court's calendar.

16 **11. MODIFICATION**

17 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
18 and the approval of the Court or upon the granting of a motion brought to the Court by either
19 Party.

20 **12. ATTORNEY'S FEES**

21 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
22 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
23 unless the unsuccessful party has acted with substantial justification. For purposes of this
24 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
25 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

1 **13. RETENTION OF JURISDICTION**

2 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

4 **14. AUTHORIZATION**

5 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
6 their respective Parties and have read, understood and agree to all of the terms and conditions of
7 this document and certifies that he or she is fully authorized by the Party he or she represents to
8 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
9 Except as explicitly provided herein each Party is to bear its own fees and costs.

2
3 AGREED TO:

4 Date : January 17, 2017

5
6 By: 

7 On Behalf of Evelyn Wimberley
8 Stephen Ure,
Law Offices of Stephen Ure, PC

AGREED TO:

Date: _____, 2017

By: _____

On Behalf of The Home Depot Inc.
Jeffrey Margulies,
Norton Rose Fulbright US LLP

9
10 **IT IS HEREBY SO STIPULATED:**

11 **AGREED TO:**

AGREED TO:

12 Date: 1/17/17

Date: _____

13 By: 

By: _____

14 EVELYN WIMBERLEY

THE HOME DEPOT, INC.

1 **APPROVED AS TO FORM:**

2	3	4	5	6	7	8
AGREED TO:			AGREED TO:			
Date : _____, 2017			Date: <u>January 17</u> , 2017			
By: _____			By: <u>Jeffrey Margulies</u>			
On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC			On Behalf of The Home Depot Inc. Jeffrey Margulies, Norton Rose Fulbright US LLP			

9 **IT IS HEREBY SO STIPULATED:**

10 **AGREED TO:**

11 **AGREED TO:**

12 Date: _____

12 Date: 1/12/17

13 By: _____

13 By: [Signature]

14 EVELYN WIMBERLEY

14 THE HOME DEPOT, INC.

EXHIBIT A

SKU Number	SKU Name	SUPPLIER
249435	KD CLAY CHIMINEA WITH IRON STAND	HACIENDA SAN CARLOS
475401	KD CLAY CHIMINEA	HACIENDA SAN CARLOS
924707	CAST IRON CHIMINEA	BARWELL LTD
1000047948	CLAY CHIMINEA FISH SHAPE	HACIENDA SAN CARLOS
1000047962	KD CLAY CHIMINEA WITH IRON STAND	HACIENDA SAN CARLOS
1000047963	KD CLAY CHIMINEAS WITH IRON STAND	HACIENDA SAN CARLOS
1000058805	LARIMER 12IN DEEP BOWL FIRE PIT	GHP
1000065694	CAST IRON CHIMINEA	ZHEJIANG YAYI METAL MANU
1000114816	SONOMA GAS PATIO HEATER	D AND H DISTRIBUTING COMPANY
1000389098	SUN CUTOUT FIRE PIT	
1000389099	ROUND STAINLESS STEEL FIRE PIT	DEWAN AND SONS
1000620133	35 IN. FOLDING SCREEN FIRE PIT STORA	ASIA DIRECT INC
1001028374	CROSSFIRE FIRE PIT W/ COOKING GRATE	LANDMANN USA
1001308377	CLAY CHIMINEA RUSTIC	HACIENDA SAN CARLOS
1001308404	CLAY CHIMINEA MAYA	HACIENDA SAN CARLOS
1001308408	CLAY CHIMINEA TIKI	HACIENDA SAN CARLOS
1001802023	37" CLAY CHIMINEA WITH SCROLL DESIGN	HACIENDA SAN CARLOS
1001802037	37" CLAY CHIMINEA WITH ROPE DESIGN	HACIENDA SAN CARLOS
1001814396	55.5" OUTDOOR CAST IRON CHIMINEA	ZHEJIANG YAYI METAL MANU