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

10 EMA BELL, et al.,

11 Plaintiffs,

12 vs.

13 HARBOR FREIGHT TOOLS USA, INC.,

14 Defendant.

CASE NO.: RG15786402

[PROPOSED] CONSENT JUDGEMENT

Date: April 5, 2016

Time: 9:00 AM

Dept.: 19

Judge: Julia Spain

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1 **1. Introduction**

2 1.1 On July 9, 2015, Ema Bell (“Bell”) served Harbor Freight Tools USA, Inc.
3 (“Harbor Freight” or “Defendant”), and various public enforcement agencies with a 60-Day
4 Notice of Violation of California Health & Safety Code §25249.5, *et seq.*, letter (the “60-Day
5 Notice”) that alleged that Harbor Freight, through its sales in California of items such as
6 industrial tools, supplies, and safety products, was knowingly and intentionally exposing persons
7 to phthalates without first providing clear and reasonable warnings to those persons as required
8 by the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code §
9 25249.5, *et seq.* (“Proposition 65”).

10 1.2 On July 9, 2015, Gabriel Espinosa (“Espinosa”) served Harbor Freight, and
11 various public enforcement agencies with a 60-Day Notice of Violation of California Health &
12 Safety Code §25249.5, *et seq.*, letter (the “60-Day Notice”) that alleged that Harbor Freight,
13 through its sales in California of items such as industrial tools, supplies, and safety products, was
14 knowingly and intentionally exposing persons to phthalates without first providing clear and
15 reasonable warnings to those persons as required by Proposition 65.

16 1.3 On September 18, 2015, Bell and Espinosa (“Plaintiffs”) jointly filed a Complaint
17 for Civil Penalties and Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case
18 No. RG15786402, against Harbor Freight for alleged violations Proposition 65.

19 1.4 Harbor Freight is a corporation that employs more than ten persons and offers
20 various home improvement, industrial, and other types of tools, supplies, and accessories to its
21 customers, including but not limited to power tools, air tools, hand tools, welding tools,
22 automotive tools and accessories, industrial tools and other products and accessories intended for
23 sale within the State of California.

24 1.5 The Complaint alleges, among other things, that Defendant has sold the products
25 containing DEHP identified in the Complaint (the “Products”), and that the resulting exposures
26 violated provisions of Proposition 65 by knowingly and intentionally exposing persons to a
27 chemical known to the State of California to cause both cancer and reproductive toxicity, without
28 first providing a clear and reasonable warning to such individuals.

1 1.6 For purposes of this Consent Judgment only, Plaintiffs and Defendant (the
2 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
3 the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint,
4 that venue is proper in the county of Alameda, and that this Court has jurisdiction to enter this
5 Consent Judgment as a resolution of the allegations contained in the Complaint.

6 1.7 The Parties enter into this Consent Judgment pursuant to a full settlement of
7 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
8 prolonged litigation. By execution of this Consent Judgment, Defendant does not admit any
9 violation of Proposition 65 and specifically denies that it has committed any such violation.
10 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
11 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
12 construed as an admission by Defendant of any fact, issue of law, or violation of law. Nothing in
13 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that
14 Defendant may have in any other future legal proceeding. However, this paragraph shall not
15 diminish or otherwise affect the obligations, responsibilities and duties of Defendant under this
16 Consent Judgment.

17 2. Settlement Payment

18 2.1 In settlement of all the claims referred to in this Consent Judgment, and without
19 any admission of liability therefore, Defendant shall make the following monetary payments:

20 2.1.1 Defendant shall pay a total of \$3,000.00 in civil penalties in accordance
21 with this Section. The civil penalty payment will be allocated in accordance with California
22 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds (\$2,250.00) remitted to
23 the California Office of Environmental Health Hazard Assessment ("OEHHA") and the
24 remaining 25% (\$750.00) of the civil penalty remitted to the Plaintiffs. Of the amount remitted to
25 the Plaintiffs, 66.6% (\$500.00) shall be remitted to Plaintiff Espinosa and 33.3% (\$250.00) shall
26 be remitted to Plaintiff Bell. Each penalty payment shall be delivered to the addresses listed in
27 Section 2.1.4 and 2.1.5 below.

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

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

9 2.1.6 In the event that the Attorney General objects or otherwise comments on
10 one or more provisions of this Consent Judgment, the Parties agree to take reasonable steps to
11 satisfy such concerns or objections.

12 **3. Matters Covered By This Consent Judgment**

13 3.1 This Consent Judgment is a full, final, and binding resolution between Plaintiffs
14 and Defendant and each of its past and present parents, affiliates, subsidiaries, divisions,
15 predecessors, successors, and assigns, and each of their respective owners, officers, directors,
16 board members, trustees, shareholders, managers, members, employees, agents, insurers,
17 attorneys, auditors, accountants, experts, stockholders, representatives, partners, and any other
18 persons acting on their behalf ("Released Parties") concerning or in any way relating to the claims
19 that have been or could have been asserted against Defendant and/or the Released Parties up
20 through the date on which this Consent Judgment is entered, provided that such claims are based
21 on or relate to the facts alleged in the operative complaint in the Action.

22 3.2 Plaintiffs, acting on their own behalf and in the public interest pursuant to Health
23 & Safety Code § 25249.7(d), release, waive, and forever discharge any and all claims against
24 Defendant and/or the Released Parties arising from any violation of Proposition 65 or any other
25 statutory or common law claims that have been or could have been asserted in the public interest
26 regarding the failure to warn about exposure to the Products prior to the date on which this
27 Consent Judgment is entered.

28 3.3 As to alleged exposures to the Products, Plaintiffs waive all rights to institute any
form of legal action, and releases all claims against Defendant and/or the Released Parties

1 whether under Proposition 65 or otherwise, arising out of or resulting from, or related directly or
2 indirectly to, in whole or in part, the Products, including but not limited to any exposure to, or
3 failure to warn with respect to, the Products (referred to collectively in this Section as the
4 "Claims"). In furtherance of the foregoing, as to alleged exposures to the Products, Plaintiffs
5 waive any and all rights and benefits which they now have, or in the future may have, conferred
6 upon them with respect to the Claims by virtue of the provisions of § 1542 of the California Civil
7 Code, which provides as follows:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
9 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
10 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE
11 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE
12 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
13 DEBTOR.

12 Plaintiffs understand and acknowledge that the significance and consequence of this waiver of
13 California Civil Code § 1542 is that even if Plaintiffs suffer future damages arising out of or
14 resulting from, or related directly or indirectly to, in whole or in part, the Products, including but
15 not limited to any exposure to, or failure to warn with respect to exposure to the Products,
16 Plaintiffs will not be able to make any claim for those damages against Defendant.

17 **4. Enforcement of Judgment**

18 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto.
19 The Parties may, by noticed motion, before the Superior Court of Alameda County, enforce the
20 terms and conditions contained herein. In any proceeding brought by either party to enforce this
21 Consent Judgment, such party may seek whatever fines, costs, penalties or remedies as may be
22 provided by law for any violation of Proposition 65 or this Consent Judgment.

23 **5. Modification of Judgment**

24 5.1 This Consent Judgment may be modified only by written agreement of the Parties
25 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
26 provided by law and upon an entry of a modified Consent Judgment by the Court.
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1 5.2 Should any court enter final judgment in a case brought by Plaintiffs or the People
2 involving the Products that sets forth standards defining when Proposition 65 warnings will or
3 will not be required (“Alternative Standards”), or if the California Attorney General’s office
4 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
5 that is not intended for the purpose of soliciting further input or comments) of Alternative
6 Standards applicable to the products that are of the same general type and function as the Products
7 and constructed from the same materials, Defendant shall be entitled to seek a modification of this
8 Consent Judgment on forty-five (45) days’ notice to Plaintiffs so as to be able to utilize and rely
9 on such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
10 Plaintiffs shall not unreasonably contest any proposed application to effectuate such a
11 modification provided that the Products for which such a modification is sought are of the same
12 general type and function as those to which the Alternative Standards apply.

13 **6. Injunctive Relief**

14 6.1 No later than 180 days from entry of judgment, Defendant shall provide, (i) “clear
15 and reasonable” warning(s) as defined below in paragraph 6.1.1 on the following products
16 identified in the Complaint: (1) *Industrial Ear Muffs, UPC# 7 92363 43768 4, Noise Reduction*
17 *rating: 23 dB, ANSI, Large high-impact plastic ear cups, Soft PVC ear cushions;* (2) *2 Piece*
18 *Welding Goggles Set, UPC# 7 92363 35711 1, SKU 35711, Brand: Chicago Electric Welding,*
19 *Certification: ANSI, Color: Green;* and (3) *PVC Air Hose, Central Pneumatic, 300 PSI, 25 Ft x*
20 *3/8, Color: Orange;* or (ii) shall reformulate those products consistent with Section 6.2 of this
21 Consent Judgment.

22 6.1.1 The warning may be provided through a label affixed to the packaging or
23 labeling of, or directly to the Products, which states: “WARNING: This product contains di (2-
24 ethylhexyl) phthalate (DEHP), a chemical known to the State of California to cause cancer and
25 birth defects or other reproductive harm. (California Health & Safety Code § 25249.5, et seq.)”.
26 This warning shall be deemed to comply with Proposition 65.

27 6.2 “Reformulated Products” are defined as those products containing less than or
28 equal to 1,000 parts per million (“ppm”) of DEHP when analyzed pursuant to U.S. Consumer

1 Product Safety Commission Test Method Standard Operating Procedure for Determination of
2 Phthalates CPSC-CH-C1001-09.3.

3 7. **Notices**

4 Any and all notices between the Parties provided for or permitted under this Agreement,
5 or by law, shall be in writing and personally delivered or sent by: (i) first-class (registered or
6 certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the
7 other party to the following addresses:

8 For Harbor Freight:

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10 Tammy Stafford
11 Senior Counsel, Litigation and Risk
12 Harbor Freight Tools
13 26541 Agoura Road
14 Calabasas, CA 91302
15 Email: TStafford@harborfreight.com

16 Peter Hsiao
17 E-mail: PHsiao@mofocom
18 Navi Dhillon
19 E-mail: NDhillon@mofocom
20 Morrison & Foerster LLP
21 425 Market St.
22 San Francisco, CA 94105

23 For Espinosa:

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

28 For Bell:

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

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.

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8. Authority to Stipulate

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

9. Counterparts

This Stipulation may be signed in counterparts and shall be binding upon the parties hereto as if all said parties executed the original hereof.

10. Retention of Jurisdiction

This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

11. Service on the Attorney General

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

12. Entire Agreement

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

13. Governing Law and Construction

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

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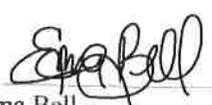
14. Court Approval

14.1 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.

14.2 The Effective Date of this Consent Judgment shall be the date on which it is entered by the Court.

IT IS SO STIPULATED:

Dated: _____ Dated: _____

By:  By: _____
Ema Bell Gabriel Espinosa

Dated: _____

By: 
HARBOR FREIGHT TOOLS USA, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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13. Governing Law and Construction

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

14. Court Approval

14.1 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.

14.2 The Effective Date of this Consent Judgment shall be the date on which it is entered by the Court.

IT IS SO STIPULATED:

Dated: _____

Dated: _____

By: _____
Erna Bell

By: 

Gabriel Espinosa

Dated: _____

By: _____
HARBOR FREIGHT TOOLS USA, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court