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

11 ESTATE OF MARTHA ELVIRA
12 VELARDE,

13 Plaintiff,

14 vs.

15 ORBIT IRRIGATION PRODUCTS,
16 INC.,

17 Defendant.

Case No. RG15789620

[PROPOSED] CONSENT JUDGMENT

Judge: Victoria Kolakowski

Dept.: 23

Hearing Date: August 11, 2016

Hearing Time: 3:00 PM

Reservation #: R- 1745698

1 **1. Introduction**

2 1.1 On July 22, 2015, Martha Velarde (“Velarde”) served Orbit Irrigation Products,
3 Inc. (“Orbit”), Homer TLC, Inc. d/b/a The Home Depot (“Home Depot”), and various public
4 enforcement agencies with a document entitled “Notice of Violation of California Health &
5 Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided Orbit and such others,
6 including public enforcers, with notice that alleged that Orbit was in purported violation of
7 California Health & Safety Code § 25249.6 (“Proposition 65”) for failing to warn consumers and
8 customers that Orbit Flexible PVC Pipe, including but not limited to UPC No. 0 46878 37347 1
9 (the “Product”), exposed users in California to the chemicals Di(2-ethylhexyl) phthalate (DEHP)
10 and Diisononyl phthalate (DINP). No public enforcer has diligently prosecuted the allegations set
11 forth in the Notice.

12 1.2 On October 15, 2015, Velarde filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in the Alameda County Superior Court (the “Court”), Case No.
14 RG15789620, against Orbit (“Defendant”) alleging violations of Proposition 65 with respect to
15 the Product (the “Action”).

16 1.3 On December 11, 2015, Orbit answered the Complaint.

17 1.4 On May 12, 2016, the Estate of Martha Elvira Velarde (“Plaintiff”) was substituted
18 as Plaintiff in the Action.

19 1.5 Defendant and Home Depot are each a corporation that employs more than ten
20 persons under California Health and Safety Code §25249.6 and offered the Product for sale
21 within the State of California.

22 1.6 Plaintiff’s Complaint alleges, among other things, that Defendant sold the Product
23 in California and/or to California citizens, that the Product contains DEHP and DINP, and that the
24 resulting exposure violated provisions of Proposition 65, by knowingly and intentionally
25 exposing persons to chemicals known to the State of California to cause cancer, birth defects or
26 other reproductive harm, without first providing a clear and reasonable warning to such
27 individuals.

28 1.7 For purposes of this Consent Judgment only, the parties stipulate that this Court

1 has jurisdiction over the allegations of violations contained in the Complaint and personal
2 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
3 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
4 resolution of the allegations contained in the Complaint.

5 1.8 The parties enter into this Consent Judgment pursuant to a full settlement and
6 release of disputed claims between the parties as alleged in the Complaint for the purpose of
7 avoiding prolonged litigation. By execution of this Consent Judgment, Defendant does not admit
8 any violation of Proposition 65 and specifically deny that they committed any such violation.
9 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
10 issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
11 construed as an admission by Defendant of any fact, issue of law, or violation of law. Nothing in
12 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that
13 Defendant may have in any other future legal proceeding. However, this paragraph shall not
14 diminish or otherwise affect the obligations, responsibilities and duties of Defendant under this
15 Consent Judgment.

16 1.9 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
17 date that the Consent Judgment is entered by the Court.

18 **2. Injunctive Relief**

19 2.1 Commencing on the Effective Date, and continuing thereafter, Orbit shall only
20 ship, sell, or offer for sale in California, reformulated Product pursuant to Section 2.2 or Product
21 that is labeled with a clear and reasonable warning pursuant to Section 2.3. Orbit and its
22 downstream retailers, including Home Depot, shall have no obligation to label Product that
23 entered the stream of commerce prior to the Effective Date. For purposes of this Settlement
24 Agreement, a "Reformulated Product" is Product that is in compliance with the standard set forth
25 below in section 2.2.

26 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
27 1,000 parts per million ("ppm") of each of DEHP and DINP when analyzed pursuant to CPSC-
28 CH-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

1 2.3 Commencing on the Effective Date, Orbit shall, for all Product it sells or
2 distributes and which is intended for sale in California or which Orbit has reason to believe will
3 be shipped or sold in California and that is not a Reformulated Product, provide clear and
4 reasonable warnings as set forth in subsections 2.3(a) and (b) below. The warning shall be
5 prominently placed with such conspicuousness as compared with other words, statements,
6 designs, or devices as to render it likely to be read and understood by an ordinary individual
7 under customary conditions before purchase or use. Each warning shall be provided in a manner
8 such that the consumer or user understands to which specific Product the warning applies, so as to
9 minimize the risk of consumer confusion.

10 **(a) Retail Store Sales**

11 **(i) Product Labeling.** Orbit shall affix a warning to the packaging,
12 labeling or directly on each Product sold in retail outlets in California by Orbit or
13 any person selling the Product that states:

14 **PROPOSITION 65 WARNING:**

15 This product contains chemicals known to the State of California to cause cancer,
16 birth defects or other reproductive harm.

17 **(ii) Point of Sale Warnings.** Alternatively, Orbit may
18 provide warning signs in the form below to its customers in California with
19 instructions to post the warnings in close proximity to the point of display
20 of the Product. Such instruction sent to Orbit customers shall be sent by
21 certified mail, return receipt requested.

22 **PROPOSITION 65 WARNING:**

23 This product contains chemicals known to the State of California to cause cancer,
24 birth defects or other reproductive harm.

25 **(b) Mail Order Catalog Warning.** In the event that Orbit directly sells
26 Product via mail order catalog directly to consumers located in California after the Effective Date
27 that is not a Reformulated Product, Orbit shall provide a warning for such Product sold via mail
28 order catalog to such California residents. A warning that is given in a mail order catalog shall be
in the same type size or larger than the Product description text within the catalog. The following

1 warning shall be provided on the same page and in the same location as the display and/or
2 description of the Product:

3 **PROPOSITION 65 WARNING:**

4 This product contains chemicals known to the State of California to cause cancer,
5 birth defects or other reproductive harm.

6 Where it is impracticable to provide the warning on the same page and in the same location as the
7 display and/or description of the Product, Orbit may utilize a designated symbol to cross
8 reference the applicable warning and shall define the term “designated symbol” with the
9 following language on the inside of the front cover of the catalog or on the same page as any
10 order form for the Product:

11 **WARNING:** Certain products identified with this symbol ▼ and offered for sale
12 in this catalog contain chemicals known to the State of California to cause cancer,
13 birth defects or other reproductive harm.

14 The designated symbol must appear on the same page and in close proximity to the
15 display and/or description of the Product. On each page where the designated symbol appears,
16 Orbit must provide a header or footer directing the consumer to the warning language and
17 definition of the designated symbol.

18 **(c) Internet Sales Warning.** In the event that Orbit directly sells Product
19 via the internet directly to consumers located in California starting one year after the Effective
20 Date that is not a Reformulated Product, no later than one year of the effective date, Orbit shall
21 provide a warning for such Product sold via the internet to such California residents. A warning
22 that is given on the internet shall be in the same type size or larger than the Product description
23 text and shall be given in conjunction with the direct sale of the Product. The Web Page on which
24 the product is located will contain a hyperlink for “California Consumers.” The link will contain
25 the warning language as set forth below. The following warning shall be provided:

26 **PROPOSITION 65 WARNING:**

27 This product contains chemicals known to the State of California to cause cancer, birth
28 defects or other reproductive harm.

2.4 The warning requirements set forth in Section 2.3 shall not apply to any

1 Reformulated Product.

2 **3. Entry of Consent Judgment**

3 3.1 The parties hereby request that the Court promptly approve and enter this Consent
4 Judgment. Upon entry of this Consent Judgment, Plaintiff and Orbit waives their respective
5 rights to a hearing or trial on the allegations of the Complaint and Notice which are at issue in the
6 Action.

7 3.2 In the event that the California Attorney General objects or otherwise comments
8 on one or more provisions of this Consent Judgment, Plaintiff and Orbit agrees to take reasonable
9 steps to satisfy such concerns or objections.

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

11 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
12 Judgment is a final and binding resolution between Plaintiff, acting in its own behalf, and on
13 behalf of the public and in the public interest, and Orbit, Home Depot, and their parents,
14 subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees,
15 attorneys and each entity to whom Orbit and Home Depot directly or indirectly distribute or sell
16 the Product, including but not limited to, downstream distributors, wholesalers, customers,
17 retailers, franchisees, cooperative members and licensees (collectively, "Releasees"), and shall
18 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
19 its interests or the public interest shall be permitted to pursue and/or take any action with respect
20 to any violation of Proposition 65 that was alleged in the Complaint, or that could have been
21 brought pursuant to the Notice.

22 4.2 **Plaintiff's Release of Additional Claims.** As to Plaintiff for and in its
23 individual capacity only, this Consent Judgment shall have preclusive effect such that it shall not
24 be permitted to pursue and/or take any action with respect to any other statutory or common law
25 claim, to the fullest extent that any of the foregoing were or could have been asserted by it against
26 Orbit and Home Depot or the Releasees based on their alleged exposure of persons to DEHP and
27 DINP in the Product, or their alleged failure to provide a clear and reasonable warning of
28 exposure to such individuals or, as to alleged exposures to DEHP and DINP in the Product, any

1 other claim based on whole or in part on the facts alleged in the Complaint and the Notice,
2 whether or not based on actions committed by Orbit. As to alleged exposures to DEHP and DINP
3 in the Product, compliance with the terms of this Consent Judgment is deemed sufficient to
4 satisfy all obligations concerning, compliance by Orbit and Home Depot with the requirements of
5 Proposition 65 with respect to the Product, and any alleged resulting exposure.

6 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
7 alleged exposures to DEHP and DINP in the Product, Plaintiff acting in its individual capacity
8 waives all rights to institute any form of legal action, and releases all claims against Orbit, Home
9 Depot, and the Releasees, whether under Proposition 65 or otherwise, arising out of or resulting
10 from, or related directly or indirectly to, in whole or in part, the Product or the Action, including
11 but not limited to any exposure to, or failure to warn with respect to, DEHP and DINP in the
12 Product (referred to collectively in this Section as the “Claims”). In furtherance of the foregoing,
13 as to alleged exposures to DEHP and DINP in the Products, Plaintiff waives any and all rights
14 and benefits which it now has, or in the future may have, conferred upon it with respect to the
15 Claims by virtue of the provisions of § 1542 of the California Civil Code, which provides as
16 follows:

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

22 Plaintiff understands and acknowledges that the significance and consequence of this waiver of
23 California Civil Code § 1542 is that even if Plaintiff suffers future damages arising out of or
24 resulting from, or related directly or indirectly to, in whole or in part, the Product, including but
25 not limited to any exposure to, or failure to warn with respect to exposure to, DEHP and DINP in
26 the Products, Plaintiff will not be able to make any claim for those damages against Releasees.

27 **4.4 Orbit’s Release of Plaintiff.** Orbit, on behalf of itself, its past and current agents,
28 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against

1 Plaintiff, its attorneys, and other representatives for any and all actions taken or statements made
2 (or those that could have been taken or made) by Plaintiff and its attorneys and other
3 representatives, whether in the course of investigating claims or otherwise seeking enforcement of
4 Proposition 65 against Orbit in this matter.

5 **5. Enforcement of Judgment**

6 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
7 hereto. The parties may, by noticed motion or order to show cause before the Court, giving the
8 notice required by law, enforce the terms and conditions contained herein. In any proceeding
9 brought by either party to enforce this Consent Judgment, such party may seek whatever fines,
10 costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this
11 Consent Judgment.

12 **6. Modification of Judgment**

13 6.1 This Consent Judgment may be modified only by written agreement of the parties
14 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
15 provided by law and upon an entry of a modified Consent Judgment by the Court.

16 6.2 Should any court enter final judgment in a case brought by Plaintiff or the People
17 involving the Products that sets forth standards defining when Proposition 65 warnings will or
18 will not be required (“Alternative Standards”), or if the California Attorney General otherwise
19 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
20 intended for the purpose of soliciting further input or comments) of Alternative Standards
21 applicable to products that are of the same general type and function as the Products and
22 constructed from the same materials, Orbit shall be entitled to seek a modification of this Consent
23 Judgment on forty-five (45) days’ notice to Plaintiff so as to be able to utilize and rely on such
24 Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment. Plaintiff
25 shall not unreasonably contest any proposed application to effectuate such a modification
26 provided that the Products for which such a modification is sought are of the same general type
27 and function as those to which the Alternative Standards apply.

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1 **7. Settlement Payment**

2 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
3 any admission of liability therefore, Orbit shall make the following monetary payments:

4 7.1.1 Orbit shall pay a total of \$3,000.00 in civil penalties (the "Civil Penalty")
5 in accordance with this Section. The Civil Penalty will be allocated in accordance with California
6 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
7 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
8 funds remitted to Plaintiff. Each respective portion of the Civil Penalty shall be delivered to the
9 addresses listed in Section 2.1.3 below.

10 7.1.2 In addition to the Civil Penalty, Orbit shall pay \$32,000.00 to Brodsky &
11 Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff's attorneys' fees and
12 costs, including all investigation and laboratory costs and expert fees, incurred in the course of
13 serving the Notice and bringing the Action, and in enforcing Proposition 65, including without
14 limitation, preparation of the Notice letter and discussions with the California Attorney General.
15 Payment shall be made within seven (7) days of the Effective Date.

16 7.1.3 Within seven (7) days of the Effective Date, Orbit shall issue two separate
17 checks for the Civil Penalty amounts to (a) "OEHHA" in the amount of \$2,250.00; and (b)
18 "Brodsky & Smith, LLC in Trust for The Estate of Martha Velarde" in the amount of \$750.00.
19 Payment owed to Plaintiff pursuant to this Section shall be delivered to the following payment
20 address:

21 Evan J. Smith, Esq.
22 Brodsky & Smith, LLC
23 Two Bala Plaza, Suite 510
24 Bala Cynwyd, PA 19004

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

27 For United States Postal Service Delivery:

28 Mike Gyurics
 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment

1 P.O. Box 4010
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 1001 I Street
8 Sacramento, CA 95814

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

11 **8. Notices**

12 8.1 Any and all notices between the parties provided for or permitted under this
13 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
14 class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on
15 any party by the other party to the following addresses:

16 For Orbit:

17 Lee N. Smith, Esq.
18 Perkins, Mann & Everett Incorporated
19 7815 N. Palm Ave, Suite 200
20 Fresno, California 93711-5531
21 T: 559.447.5700

22 For Plaintiff:

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

28 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. Authority to Stipulate

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

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10. Counterparts

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

11. Retention of Jurisdiction

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

12. Service on the California Attorney General

12.1 Plaintiff 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.

13. Entire Agreement

13.1 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, commitments 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.

14. Governing Law and Construction

14.1 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 under California law.

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.

15.2 The Effective Date of this Consent Judgment shall be the date on which it is


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entered by the Court.

IT IS SO STIPULATED:

Dated: 6/24/16

Dated: _____

By: 
Hector Velarde on Behalf of the
Estate of Martha Elvira Velarde

By: _____
Orbit Irrigation Products, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court

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entered by the Court.

IT IS SO STIPULATED:

Dated: _____

Dated: 6-24-2016

By: _____
Hector Velarde on Behalf of the
Estate of Martha Elvira Velarde

By: 
Orbit Irrigation Products, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court