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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 THE HOME DEPOT, Inc., et al.

14 Defendants,

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Case No. 37-2016-00038137-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT ESCOGO, LLC**

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 Escogo, LLC
4 (hereinafter “Escogo”), with Wimberley and Escogo collectively referred to as the “Parties” and
5 each of them as a “Party.” Wimberley is an individual residing in California who seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Escogo employs ten or more
8 persons and is a person in the course of doing business for purposes of Proposition 65, Cal.
9 Health & Safety Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Wimberley alleges that Escogo has offered for
11 sale in the State of California and has sold in California, charcoal starter fluid that exposes
12 individuals to carbon monoxide and soot, and that such sales have not been accompanied by
13 Proposition 65 warnings. Carbon monoxide and soot are listed under Proposition 65 as chemicals
14 known to the State of California to cause birth defects or other reproductive harm.

15 **1.3 Notices of Violation/Complaint.** On or about March 30, 2016, Wimberley served
16 Escogo and various public enforcement agencies with a document entitled "60-Day Notice of
17 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Escogo
18 was in violation of Proposition 65 for failing to warn consumers and customers that the charcoal
19 lighter fluids exposed users in California to carbon monoxide and soot. No public enforcer
20 diligently prosecuted the claims threatened in the Notice within sixty days plus service time
21 relative to the provision of the Notice to them by Wimberley, such that Wimberley filed a
22 complaint in the matter as captioned above on October 31, 2016.

23 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
24 has jurisdiction over Escogo as to the allegations contained in the complaint filed in this matter,
25 that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve,
26 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
27 of all claims which were or could have been raised in the Complaint based on the facts alleged
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1 therein and/or in the Notices.

2 1.5 Escogo denies the material allegations contained in Wimberley’s Notice and
3 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
4 Judgment shall be construed as an admission by Escogo of any fact, finding, issue of law, or
5 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
6 an admission by Escogo of any fact, finding, conclusion, issue of law, or violation of law, such
7 being specifically denied by Escogo. However, this section shall not diminish or otherwise affect
8 the obligations, responsibilities, and duties of Escogo under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Complaint.** The term “Complaint” shall have the meaning given in Section 1.3.

11 2.2 **Covered Product.** The term “Covered Product” means Escogo’s Smarter Starter
12 Fluid.

13 2.3 **Effective Date.** The term “Effective Date” shall mean the date this Consent
14 Judgment is entered as a Judgment of the Court.

15 2.4 **Listed Chemicals:** The term “Listed Chemicals” shall mean carbon monoxide and
16 soot.

17 2.5 **Notice.** The term “Notice” shall have the meaning given in Section 1.3.

18 2.6 **Releasees.** The terms “Defendant Releasees” and “Downstream Defendant
19 Releasees” shall have the meanings given in Section 5.1.

20 2.7 **Execution Date.** The term “Execution Date” shall mean the date this Consent
21 Judgment is signed by the parties

22 **3. INJUNCTIVE RELIEF: WARNINGS**

23 3.1 ESCOGO has begun labeling the Covered Product with the warning contained in
24 this section. As part of this settlement, it hereby provides further assurances that through and
25 following the Effective Date, Escogo shall not directly sell, or ship for sale in California any
26 Covered Product, unless the Covered Product is accompanied by the following warning:
27 “WARNING: THIS PRODUCT CONTAINS A CHEMICAL KNOWN TO THE STATE OF
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1 CALIFORNIA TO CAUSE CANCER, BIRTH DEFECTS, OR OTHER REPRODUCTIVE
2 HARM. COMBUSTION PRODUCES CARBON MONOXIDE AND OTHER BY-PRODUCTS
3 THAT ARE KNOWN BY THE STATE OF CALIFORNIA TO CAUSE CANCER, BIRTH
4 DEFECTS, OR REPRODUCTIVE HARM.

5 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
6 Covered Product's packaging, labeling, or instruction booklet. The warning shall be prominently
7 affixed to or printed on the packaging, labeling, or instruction booklet and displayed with such
8 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
9 read and understood by an ordinary individual under customary conditions of purchase or use. A
10 warning may be contained in the same section of the packaging, labeling, or instruction booklet
11 that states other safety warnings, if any, concerning the use of the product and shall be at least the
12 same size as those other safety warnings.

13 **4. MONETARY TERMS**

14 4.1 **Civil Penalty.** Escogo shall pay a civil penalty of \$5,000.00 pursuant to Health
15 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
16 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
17 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
18 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

19 4.2 **Attorney Fees.** Escogo agrees to pay and will not oppose an application made by
20 Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs incurred as
21 a result of investigating, bringing this matter to Escogo's attention, litigating and negotiating and
22 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
23 Procedure section 1021.5, in an amount of \$38,000.00 Other than the payment required
24 hereunder, each side is to bear its own attorneys' fees and costs.

25 4.3 Escogo shall wire to the Law Offices of Stephen Ure, PC Trust Account the total
26 sum of \$43,000.00 representing the civil penalty and attorney fees in Sections 4.1 and 4.2 in the
27 following manner following receipt of a fully-executed copy of this Consent Judgment to be
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1 executed by both parties no later than May 2, 2017, and wire instruction information from
2 Wimberley's counsel: May 3, 2017 - \$5,000.00 (civil penalty). June 1, 2017 - \$18,000.00
3 (attorney fees). July 1, 2017 - \$20,000.00 (attorney fees). If payments are not made in
4 accordance with the agreed schedule the entire agreement will be null and void.

5 **5. RELEASE OF ALL CLAIMS**

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

18 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
19 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
20 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
21 legal action and releases any Escogo, Defendant Releasees, and Downstream Defendant
22 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
23 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
24 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
25 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
26 related to or arising from Covered Products manufactured distributed or sold by Escogo or
27 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
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1 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
2 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
3 Code, which provides as follows:
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5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
6 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
7 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
8 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
9 THE DEBTOR.

10 5.3 Escogo 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.

15 **6. INTEGRATION**

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
17 any and all prior negotiations and understandings related hereto shall be deemed to have been
18 merged within it. No representations or terms of agreement other than those contained herein
19 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

20 **7. GOVERNING LAW**

21 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California and apply within the State of California. In the event that Proposition 65 is repealed or
23 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
24 Escogo shall provide written notice to Wimberley of any asserted change in the law, and shall
25 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
26 that, Covered Products are so affected.

27 **8. NOTICES**

28 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 Escogo:

4 Marcus Smith
5 Managing Partner
6 ESCOGO, LLC
7 941 Monroe Jersey Rd.
8 Monroe, GA 30655

9 With copy to:

10 George W. Dowell, Esq.
11 DOWELL LLP
12 1153 Lincoln Avenue, Suite C
13 San Jose, California 95125

14 and

15 For Wimberley:

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

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

22 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

28 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 Escogo 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

1 within twelve months after it has been fully executed by the Parties. In such case, the Parties
2 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
3 any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed
4 on its normal course.

5 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
7 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
8 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
9 trial court, and the case shall proceed on its normal course on the trial court's calendar.

10 **11. MODIFICATION**

11 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
12 and the approval of the Court or upon the granting of a motion brought to the Court by either
13 Party.

14 **12. ATTORNEY'S FEES**

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

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

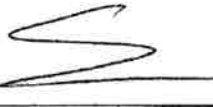
25 **14. AUTHORIZATION**

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

1 **APPROVED AS TO FORM:**

3 AGREED TO: 4 Date : <u>May 2</u> , 2017 5 6 By: <u></u> 7 On Behalf of Evelyn Wimberley Stephen Ure, 8 Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2017 By: _____ On Behalf of Escogo George Dowell Dowell, LLP
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9 **IT IS HEREBY SO STIPULATED:**

11 AGREED TO:	AGREED TO:
12 Date: <u>5/2/17</u>	Date: _____
13 By: <u></u>	By: _____
14 EVELYN WIMBERLEY	Marcus Smith ESCOGO, LLC

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APPROVED AS TO FORM:

AGREED TO: Date : _____, 2017 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: <u>May 2</u> , 2017 By: <u>George W. Dowell</u> On Behalf of Escogo George Dowell Dowell, LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO: Date: _____ By: _____ EVELYN WIMBERLEY	AGREED TO: Date: <u>1 May 2017</u> By: <u>[Signature]</u> Marcus Smith ESCOGO, LLC
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