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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 HARBOR FREIGHT TOOLS USA, INC.,

15 Defendant.

Case No.: RG18890561

CONSENT JUDGMENT

Judge: Dennis Hayashi

Dept.: 518

Hearing Date: September 26, 2018

Hearing Time: 2:30 PM

Reservation #: R-1978706

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Anthony
3 Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and Harbor Freight Tools
4 USA, Inc. (“Harbor Freight” or “Defendant”) with Ferreiro and Defendant collectively referred to
5 as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. Harbor Freight is alleged to
8 be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from Fluid Siphon Pump Hoses without
12 providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition
13 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

14 **1.3 Notice of Violation/Complaint.** On or about May 1, 2017, Ferreiro served Harbor
15 Freight, and various public enforcement agencies with documents entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that Fluid Siphon
18 Pump Hoses exposed users in California to DEHP. No public enforcer has brought and is diligently
19 prosecuting the claims alleged in the Notice. On January 25, 2018, Ferreiro filed a complaint (the
20 “Complaint”) in the matter.

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.

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

2. **DEFINITIONS**

2.1 **Covered Products.** The term "Covered Products" means Fluid Siphon Pump Hoses that are manufactured, distributed and/or offered for sale in California by Harbor Freight.

2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is entered as a Judgment of the Court.

3. **INJUNCTIVE RELIEF: WARNINGS**

3.1 As of sixty (60) days from the Effective Date, Harbor Freight shall not manufacture or order from any supplier any Covered Products intended for retail sale in California that contains DEHP on any component to which consumers are exposed in excess of 0.1% (1,000 ppm) (hereinafter "Reformulated Products") unless the Covered Product is accompanied by a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered Products sold by Harbor Freight before the date this Consent Judgment is signed by both Parties may sell through without a warning even if not Reformulated Products. Until August 30, 2018, the warning shall consist of either:

(a) The statement: "WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm."; or

(b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word "warning" in bold all capital letters, followed by the statement "This product can expose you to chemicals including di(2-ethylhexyl)phthalate (DEHP), which is known to the State of California to cause cancer and

1 birth defects or other reproductive harm. For more information, go to
2 www.P65Warnings.ca.gov.”; or (2) a warning consisting of a symbol that is a black
3 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
4 word “warning” in bold all capital letters, followed by the statement “Cancer and
5 Reproductive Harm - www.P65Warnings.ca.gov.”¹

6 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section
7 3.1(b) shall be used.

8 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
9 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
10 automatic process, providing that the warning is displayed with such conspicuousness, as compared
11 with other words, statements, or designs as to render it likely to be read and understood by an
12 ordinary individual under customary conditions of purchase or use. A warning may be contained
13 in the same section of the packaging, labeling, or instruction booklet that states other safety
14 warnings, if any, concerning the use of the product and shall be at least the same size as those other
15 safety warnings.

16 4. MONETARY TERMS

17 4.1 **Civil Penalty.** Harbor Freight shall pay a Civil Penalty of \$3,000.00 pursuant to
18 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
19 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
20 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
21 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date, Harbor Freight shall issue two
23 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and
24 (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$750.00. Payment owed to
25 Ferreiro pursuant to this Section shall be delivered to the following payment address:
26

27 ¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other
28 transmission format is being printed in color for purposes of other language, symbols or designs.

1 Evan J. Smith, Esquire
2 Brodsky & Smith, LLC
3 Two Bala Plaza, Suite 510
4 Bala Cynwyd, PA 19004

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

7 For United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 P.O. Box 4010
12 Sacramento, CA 95812-4010

13 For Non-United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 1001 I Street
18 Sacramento, CA 95814

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

21 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Harbor Freight shall
22 pay \$25,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
23 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
24 Harbor Freight's attention, litigating and negotiating and obtaining judicial approval of a settlement
25 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

26 **5. RELEASE OF ALL CLAIMS**

27 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
28 acting on his own behalf, and on behalf of the public interest, and Harbor Freight, and its parents,
shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees

1 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
2 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
3 Notice, with respect to any Covered Products manufactured, distributed, or sold by Harbor Freight
4 prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other
5 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
6 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
7 alleged in the Complaint, or that could have been brought pursuant to the Notice against Harbor
8 Freight or its Downstream Releasees of the Product ("Proposition 65 Claims"). Compliance with
9 the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
10 Covered Products.

11 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
12 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
13 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
14 legal action and releases Harbor Freight, Defendant Releasees, and Downstream Releasees from
15 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
16 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
17 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
18 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
19 from Covered Products manufactured, distributed, or sold by Harbor Freight, Defendant Releasees
20 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
21 Ferreiro hereby specifically waives any and all rights and benefits which he now has, or in the
22 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code,
23 which provides as follows:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
25 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
26 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
27 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
28 SETTLEMENT WITH THE DEBTOR.

1 5.3 Harbor Freight waives any and all claims against Ferreiro, his attorneys and other
2 representatives, for any and all actions taken or statements made (or those that could have been
3 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to Covered Products.

6 **6. INTEGRATION**

7 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
8 any and all prior negotiations and understandings related hereto shall be deemed to have been
9 merged within it. No representations or terms of agreement other than those contained herein exist
10 or have been made by any Party with respect to the other Party or the subject matter hereof.

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed or
14 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
15 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
16 to the extent that, Covered Products are so affected.

17 **8. NOTICES**

18 8.1 Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
20 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
21 by the other party at the following addresses:

22 For Defendant:

23 Bruce Nye
24 Scali Rasmussen
25 1901 Harrison Street, 14th Floor
26 Oakland, CA 94612

27 And

28 For Ferreiro:

1 Evan Smith
2 Brodsky & Smith, LLC
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

8 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
9 which shall be deemed an original, and all of which, when taken together, shall constitute one and
10 the same document.

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

13 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
14 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
15 Defendant agrees it shall support approval of such Motion.

16 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
17 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
18 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
19 30 days, the case shall proceed on its normal course.

20 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
21 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
22 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
23 its normal course on the trial court's calendar.

24 **11. MODIFICATION**

25 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
26 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

27 **12. ATTORNEY'S FEES**

28 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 **14. AUTHORIZATION**

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

12
13 **AGREED TO:**

14
15 Date: 6/25/18

16 By: Anthony Ferreiro

17 ANTHONY FERREIRO

18 **AGREED TO:**

19 Date: 6/22/18

20 By: Jimmy Haggan

21 HARBOR FREIGHT TOOLS USA, INC.

22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23 Dated: _____

24 Judge of Superior Court