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

11 DONATUS MCCOY,

12 Plaintiff,

13 v.

14 GENERAL TOOLS & INSTRUMENTS LLC,

15 Defendant.

Case No.: 23CV026282

CONSENT JUDGMENT

Judge: Jenna Whitman

Dept.: 25

Hearing Date: March 7, 2024

Hearing Time: 3:00 PM

Reservation #: 507167356700

1 **1. INTRODUCTION**

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

10 **1.2 Allegations and Representations.** McCoy alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of are General Heavy Duty Circle
12 Cutters without providing a clear and reasonable exposure warning pursuant to Proposition 65.
13 DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause
14 cancer and birth defects or other reproductive harm.

15 **1.3 Notice of Violation/Action.** On or about June 22, 2022, McCoy served GTI and
16 various public enforcement agencies with documents entitled “60-Day Notice of Violation”
17 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
18 Proposition 65 for failing to warn consumers and customers that use of General Heavy Duty Circle
19 Cutters expose users in California to DEHP and DINP. No public enforcer has brought and is
20 diligently prosecuting the claims alleged in the Notice. On January 25, 2023, McCoy filed a
21 complaint (the “Complaint”).

22 **1.4**For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Action filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Action based on the facts alleged therein and
27 in the Notice.
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1 1.5 **No Admission.** Defendant denies the material allegations contained in McCoy's
2 Notice and Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
3 Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law, or
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an
5 admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
6 being specifically denied by Defendant. However, this Section shall not diminish or otherwise
7 affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means General Heavy Duty
10 Circle Cutters that are manufactured, distributed, and/or sold in California by GTI and its
11 downstream distributors, sellers, and/or retailers.

12 2.2 **Effective Date.** The term "Effective Date" means two days after a Notice of Entry
13 of Judgment is served upon GTI, where the Judgment has been entered in conformity with this
14 Consent Judgment.


15 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

16 3.1 **Reformulation of Covered Products.** As of the Effective Date, Covered Products
17 that GTI directly manufactures, imports, distributes, sells, or offers for sale in California shall
18 either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and
19 reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent
20 Judgment, a "Reformulated Product" is a Covered Product that is in compliance with the standard
21 set forth in § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any
22 Reformulated Product.

23 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
25 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
26 and 8270C or other methodology utilized by federal or state government agencies for the purpose
27 of determining the phthalate content in a solid substance.
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1 **3.3 Clear and Reasonable Warning.** As of the Effective Date, and continuing
2 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
3 provided for all Covered Products that Defendant manufacturers, imports, distributes, sells, or
4 offers for sale in California that is not a Reformulated Product. There shall be no obligation for
5 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
6 the date this Consent Judgment is signed by both Parties. The warning shall consist of either the
7 **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

8 (a) **Warning.** The “Warning” shall consist of the statement:

9  **WARNING:** This product can expose you to chemicals including di(2-
10 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
11 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

12 (b) **Alternative Warning:** GTI may, but is not required to, use the alternative short-
13 form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

14  **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

15 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
16 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
21 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
22 electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is
23 displayed with such conspicuousness, as compared with other words, statements, or designs as to
24 render it likely to be read and understood by an ordinary individual under customary conditions of
25 purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of
26 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
27 the use of the Covered Product and shall be at least the same size as those other safety warnings. If
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1 consumer information is provided in a foreign language, GTI shall provide the **Warning** in the
2 foreign language.

3 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
4 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
5 GTI offers Products for sale to consumers in California. The requirements of this Section shall be
6 satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word
7 "**WARNING**," appears on the product display page, or by otherwise prominently displaying the
8 warning to the purchaser prior to completing the purchase. To comply with this Section, GTI shall
9 (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to do so,
10 on the websites of its third-party internet sellers; and (b) if it does not have the ability to post the
11 **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide such
12 sellers with written notice in accordance with Title 27, California Code of Regulations, § 25600.2.
13 Third-party internet sellers of the Covered Product that have been provided with written notice in
14 accordance with Title 27, California Code of Regulations, § 25600.2 are not released in Section 5
15 of this Agreement if they fail to meet the warning requirements herein.

16 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
17 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
18 Judgment or by complying with warning requirements adopted by OEHHA applicable to the
19 Covered Product and exposures at issue after the Effective Date

20 **4. MONETARY TERMS**

21 4.1 **Civil Penalty.** GTI shall pay \$2,000.00 as a Civil Penalty pursuant to Health and
22 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
23 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
24 Penalty remitted to McCoy, as provided by California Health & Safety Code § 25249.12(d).

25 4.1.1 Within ten (10) days of the Effective Date, GTI shall issue two separate
26 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and to (b)
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1 “Donatus McCoy” in the amount of \$500.00. Payment owed to McCoy pursuant to this Section
2 shall be delivered to the following payment address:

3 Evan J. Smith, Esquire
4 Brodsky Smith
5 Two Bala Plaza, Suite 805
6 Bala Cynwyd, PA 19004

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

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

21 A copy of the check payable to OEHHHA shall be mailed to Brodsky & Smith at the address set
22 forth above as proof of payment to OEHHHA.

23 4.2 **Attorneys’ Fees.** Within ten (10) days of the Effective Date, GTI shall pay
24 \$18,000.00 to Brodsky Smith as complete reimbursement for McCoy’s attorneys’ fees and costs
25 incurred as a result of investigating, bringing this matter to GTI’s attention, litigating and
26 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
27 of Civil Procedure § 1021.5.

28 **5. RELEASE OF ALL CLAIMS**

5.1 This Consent Judgment is a full, final, and binding resolution between McCoy
acting on his own behalf, and on behalf of the public interest, and GTI, 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

1 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
2 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees, sellers,
3 retailers, including but not limited to, Lumber City Corporation, ACE Hardware Corporation,
4 Emery Jensen Distribution, LLC, and each of their parents, subsidiaries, affiliates, franchisees and
5 cooperative members (“Downstream Releasees”), of all claims for violations of Proposition 65
6 based on exposure to DEHP from use of the Covered Products manufactured, distributed, or sold
7 by GTI, Lumber City Corporation, ACE Hardware Corporation, and Emery Jensen Distribution,
8 LLC, prior to the Effective Date as set forth in the Notice. It is the Parties’ intention that this
9 Consent Judgment shall have preclusive effect such that no other actions by private enforcers,
10 whether purporting to act in his, her, or its interests or the public interest shall be permitted to
11 pursue and take any action with respect to any violation of Proposition 65 based on exposure to
12 DEHP from use of the Covered Products that was alleged in the Complaint, or that could have been
13 brought pursuant to the Notice against GTI and the Downstream Releasees (“Proposition 65
14 Claims”). Accordingly, McCoy acting on his own behalf and in the public interest hereby releases
15 and discharges GTI, Defendant Releasees, and Downstream Releasees from any and all Proposition
16 65 Claims based on exposure to DEHP from use of Covered Products. GTI’s compliance with the
17 terms of this Consent Judgment constitutes compliance with Proposition 65 by GTI with regard to
18 exposure to DEHP from use of the Covered Products.

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

5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
6 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
7 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
8 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
9 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
10 DEBTOR OR RELEASED PARTY.

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

16 5.4 It is the Parties' intention that the Judgment entered pursuant to this Consent
17 Judgment shall act as a full and final bar to any and all claims pursuant to Proposition 65 based on
18 exposure to DEHP from use of the Covered Products against GTI, Defendant Releasees and
19 Downstream Releasees under the doctrines of *res judicata* and collateral estoppel and any other
20 applicable doctrine, statute, or law.

21 6. OPPORTUNITIES TO CURE

22 6.1 In the event that GTI and/or Defendant Releasees and Downstream Releasees, after
23 the Effective Date, sells any Covered Product that is found Plaintiff or his representatives not to
24 comply with reformulation or warning pursuant to this Consent Judgment, GTI, Defendant
25 Releasees and Downstream Releasees may, upon 30 days' notice, bring the Covered Product into
26 compliance with such sections by providing Plaintiff's counsel with written confirmation that GTI
27 has corrected the alleged violation.

28 7. INTEGRATION

7.1 This Consent Judgment contains the sole and entire agreement of the Parties and
any and all prior negotiations and understandings related hereto shall be deemed to have been

merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

8. GOVERNING LAW

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

9. NOTICES

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

For Defendant:

Cathleen Huang
Bowles & Verna, LLP
2121 N. California Blvd., Ste. 875
Walnut Creek, CA 94596-8180

And

For McCoy:

Evan Smith
Brodsky Smith
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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.

10. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

3 11.1 McCoy 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 Judgment.
5 Defendant agrees it shall support approval of such Motion.

6 11.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 days, the case shall proceed on its normal course.

10 11.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **12. MODIFICATION**

15 12.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **13. RETENTION OF JURISDICTION**

18 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 13.2 Only the Parties may enforce the terms of this Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood, and agree to all of the terms and conditions of this
24 document and certify that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.

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AGREED TO:

AGREED TO:

Date: 7/18/23
By: Donatus Mccoy
DONATUS MCCOY

Date: 5/3/2023
By: Thomas J. Doney
GENERAL TOOLS & INSTRUMENTS
COMPANY LLC
Thomas J. Doney
General Counsel

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court