



December 21, 2016

DMS NOTICE
P – 16 – 2
DISCARD: RETAIN

TO: WEIGHTS AND MEASURES OFFICIALS

SUBJECT: Settlement – Smitty’s Supply, Inc., dba Smitty’s, a Louisiana Company

Enclosed is a copy of the Final Judgment and Permanent Injunction Pursuant to Stipulation issued against Smitty’s Supply, Inc., dba Smitty’s, a Louisiana Company. The case was filed on October 25, 2016, by the District Attorney’s Office for Orange County. This judgement is a permanent injunction under Business and Professions Code (BPC) §§17203 and 17535 from violating BPC §§17200 and 17500 due to unfair and fraudulent business acts or practices. There were several violations for selling, or offering for sale, petroleum or automotive products of a different grade than represented on the label and adulterated or mislabeled product that does not meet the latest automotive manufacturer’s recommended requirements as indicated on the label. These were in violation of BPC §§12602, 13400, 13413(a), 13460, 13480, 13482, 13710(b), 13711(a) – (d), 13713, 13740, and 13741 respectively.

Random product testing that began in 2012. It was determined that samples from Custom Plus™ Motor Oils products sold within the State of California did not meet the specifications represented on the label. The California Department of Food and Agriculture (CDFA), Division of Measurement Standards (DMS) conducted additional investigations of product.

Total settlement was in the amount of \$751,155. Civil penalties were \$555,000 payable to Orange County and investigative costs of \$151,155 and *cy pres* restitution in the amount of \$45,000, are both made payable to CDFA DMS.

The Department sincerely appreciates the work performed by Deputy District Attorney Michelle Cipolletti, Orange County District Attorneys’ Office and Special Investigator Pat Uyehara, CDFA DMS in this matter. If you have any questions, please contact John Larkin, Supervising Special Investigator, Enforcement Branch, DMS at (916) 229-3000 or john.larkin@cdfa.ca.gov.

Sincerely,

Kristin J. Macey
Director

Enclosure

cc: Gary Leslie, County/State Liaison, CDFA



10/25/2016

Clerk of the Superior Court
By Jeannette Torres, Deputy Clerk

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

OCT 26 2016

ALAN CARLSON, CLERK OF THE COURT

A. Bovard
BY: A. BOVARD

1 TONY RACKAUCKAS, District Attorney
County of Orange, State of California
2 JOSEPH D'AGOSTINO, Senior Assistant District Attorney
By: MICHELLE CIPOLETTI (Bar No. 167191)
3 Deputy District Attorney
Consumer and Environmental Protection Unit
4 401 Civic Center Drive West
Santa Ana, CA 92701-4575
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7
8 **IN SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

10 THE PEOPLE OF THE STATE OF CALIFORNIA,) Case No. 30-2016-00883178-CJ-BT-CJC
11 CALIFORNIA,) Assigned for All Purposes to:
12) Judge Mary Schulte
13 Plaintiff,) *Filing fees exempt per Gov. Code*
) *§6103*
14 vs.)
15 SMITTY'S SUPPLY, INC., a Louisiana) **[Proposed] FINAL JUDGMENT**
Corporation) **AND PERMANENT INJUNCTION**
16 Defendant) **PURSUANT TO STIPULATION**

17
18 Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA ("Plaintiff"), by and
19 through Tony Rackauckas, District Attorney of the County of Orange, State of California,
20 and Defendant Smitty's Supply, Inc. ("Defendant"), appearing through its attorney Eric
21 Arevalo, of Schumann | Rosenberg, LLP, as well as Chad Tate, Executive Vice President and
22 Chief Operations Officer of Smitty's Supply Inc., have stipulated to entry of this Final
23 Judgment and Permanent Injunction ("Judgment").

24 Based on such stipulation and for good cause appearing,

25 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:**

26 **JURISDICTION**

27 1. This Court has jurisdiction over the parties to and the subject matter of this
28 lawsuit, venue in this Court is proper, and this Court has jurisdiction to enter this Judgment.

1 DEFINITIONS

2 2. For purposes of this Judgment, "statement" shall mean and include any
3 verbal or written representation, advertisement, act, or announcement communicated to the
4 public generally through any medium, including but not limited to, labels on containers of
5 motor oil, brake fluid, gear oil, coolant, transmission fluid, or any other automotive or
6 petroleum product offered for sale to member of the public of California.

7 3. The term "petroleum products" shall be defined and include those products
8 listed and described in Bus. & Prof. Code § 13400 (l)(m)(o) and (p), as currently worded,
9 or amended during the term of this injunction.

10 4. The term "automotive products" shall be defined by the Bus. & Prof. Code
11 §13700(a), as currently worded, or amended during the term of this injunction, more
12 specific definitions of these automotive products shall be defined by Bus. & Professions
13 Code §13700 (b)-(h), as currently worded, or amended during the term of this injunction

14 APPLICABILITY

15 5. The injunctive provisions of this Judgment and all references to Defendant in
16 the injunctive provisions of this Judgment shall apply to Defendant Smitty's Supply, Inc., its
17 parent companies, subsidiaries, affiliated organizations, officers, directors, partners,
18 independent contractors, employees, agents, representatives, heirs, assignees and successors
19 in interest (including through stock sale, merger, or sale of all or substantially all assets of
20 Defendant).

21 PERMANENT INJUNCTION

22 6. Effective upon entry of this Judgment, Defendant and all persons,
23 corporations and entities set forth in Paragraph 5 above, are hereby permanently enjoined
24 and restrained under Bus. & Prof. Code §§17203 and 17535, from violating, Bus. & Prof.
25 Code §§17200 and 17500 by any of, but not limited to, the following acts or practices:

26 A. Falsely representing that any of its petroleum or automotive products
27 including, but not limited to, motor oil, gear oil, brake fluid, transmission fluid
28 and engine coolant or anti-freeze, meet specified grades, classifications,

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specifications, industry standards, qualities, engine compatibility, or conform with specific test results, when in fact the products do not, in violation of Bus. & Prof. Code §17500.

B. Selling, or offering for sale, any petroleum or automotive product of a different grade than represented on the label, in violation of Bus. & Prof. Code §§13413(a), 13460 or any other law.

C. Selling, or offering for sale, any petroleum or automotive product of Defendant's owned brand that labels do not comply with Bus. & Prof. Code §13482, or any other law. This provision shall not apply to product manufactured by Defendant that is sold, offered for sale, and/or distributed by its customers under their own private brand with labels that were developed and designed by the customer, so long as the product delivered to said customer by Smitty's was properly labeled by Smitty's. This provision shall not impose upon Defendant a duty to inspect and/or advise its customers of any legal requirements for the compliant labeling of any petroleum product sold or offered for sale by the customer under its own private brand.

D. Selling, offering for sale, or distributing, any petroleum or automotive product that is adulterated or mislabeled in violation of Bus. & Prof. Code §13740, 13741, §13711(c), 13713, 13480, 13482 or any other law. This provisions shall not apply to any automotive product that is adulterated or mislabeled by a customer of Defendant, whether such adulteration or mislabeling occurs intentionally, by inadvertence, or by want of due and/or reasonable care by Defendant's customers, so long as the product delivered to said customer by Smitty's was properly labeled by Smitty's and unadulterated. This provision shall not modify, alter, or in any way extinguish Plaintiff's burden of proof on establishing that Defendant itself sold, offered for sale or distributed an automotive product that is adulterated or mislabeled in violation of Bus. & Prof. Code §13740, §13711(c), 13713, or any other law.

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E. Making false or misleading statements by any means whatsoever regarding quality, quantity, performance, price, discount, or savings in the sale of any commodity regulated pursuant to Chapter 15 of the Bus. & Prof. Code, in violation of Bus. & Prof. Code §13741, or any other law.

F. Distributing and/or selling automotive transmission fluid that does not meet the latest automotive manufacturer’s recommended requirements for the type indicated on the label and/or that is adulterated, in violation of Bus. & Prof. Code §§13710 (b), 13713 or 13740, 13741 or any other law.

G. Distributing and/or selling any automotive coolant or anti-freeze that does not comply with Bus. & Prof. Code §§13740, 13400,13711(a) - (d), California Code of Regulations 4161, or any other law.

H. Distributing and/or selling a commodity contained in a package that does not conform to the regulations set forth in the California Code of Regulations in violation of Bus. & Prof. Code §12602, including, but not limited to The California Code of Regulations requirement that these packages have a separate declaration of identity, and any such package exposed for sale shall specify conspicuously on its label the name, and address of the actual manufacturer, packer or distributor.

I. Distributing or selling any petroleum or automotive product that does not contain a batch number in violation of Bus, & Prof. Code §13711(a)(6), Bus, & Prof. Code § 13711(b)(7) or any other law.

7. Any successor statute or renumbered statute will have the same force and effect as the statutes cited in this Final Judgment.

QUALITY ASSURANCE PROGRAM

8. Defendant shall develop and implement a quality assurance program to ensure that all products manufactured by Defendant for sale or distribution to California retail outlets or distributors comply with industry standards and/or requirements in addition to all state (California) and federal laws. The program must include some manner of testing products to

1 ensure they meet appropriate standards. Additionally, this program must include that Smitty's
2 place a date and batch number on every product which can be tracked via a computer program
3 so that the location and quantity of all Smitty's products for sale or distribution in California
4 can be easily traced. The program must be maintained in writing and must be explained to the
5 following category of employees of Defendants: Production Department (which include Plant
6 Manager, Assistant Plant Manager, Director of Production, Production Manager, Assistant
7 Production Manager, Production Supervisor, Line Leader, Line Worker, and Production
8 Forklift Operator), Quality Control Department (which include Director of Quality & EHS,
9 Quality Supervisor, Executive Coordinator Quality & EHS, Quality Technician II, Quality
10 Technician I), and Laboratory and Blending Department (which include Director of
11 Laboratory/Blending Laboratory Manager, Blending Manager, Loader / Unloader, Blender,
12 Laboratory Technician I, Laboratory Technician II). A signed acknowledgement by each
13 employee within the category of employees listed above, that they will abide by the program
14 must be maintained by Defendant during the tenure of each employee's employment and for
15 two (2) years after termination of employment. Copies of all records required to be created and
16 kept pursuant to this section must be produced to Plaintiff within thirty (30) days following a
17 written request.

18 9. Upon request Defendant shall provide to Measurement Standards, or any
19 California government prosecutor issuing an administrative subpoena, a list of the location and
20 quantity of any Smitty's product batches (identified by batch number) distributed by Smitty's
21 in California that have been issued a Notice of Violation by Measurement Standards. Such lists
22 must be produced to Plaintiff within thirty (30) days following a written request, or
23 administrative subpoena unless otherwise agreed between the parties.

24 10. Defendant shall provide to the State of California, Department of Food and
25 Agriculture, Division of Measurement Standards ("Measurement Standards"), within 90 days
26 of entry of this Judgment, a confidential list containing the brand name or private label
27 purchaser, name of the distributor, and name of the retailer of all petroleum and automotive
28 products manufactured by Defendant and sold, offered for sale, or distributed for sale in

1 California ("Confidential List"). This Confidential List shall be updated, and provided to
2 Measurement Standards annually. Additionally, upon request, Defendant shall notify
3 Measurement Standards of any additional petroleum or automotive products(s) not contained
4 on the list required in this section within thirty (30) days of such request.
5 The notices and responses to additional requests required to be supplied in this section by
6 Defendant shall be mailed to the following address:

7 State of California
8 Department of Food and Agriculture
9 Division of Measurement Standards
10 169 E. Liberty Avenue
11 Anaheim, CA 92801
12 Attn: *Supervising Special Petroleum Investigator*

13 11. Measurement Standards acknowledge that the Confidential List identified above
14 in Paragraph 10 will contain confidential trade secret and sensitive client information which if
15 disclosed to the public or Defendants' competitors, could cause Defendant significant and
16 catastrophic pecuniary damage. Accordingly, Measurement Standards shall maintain the
17 initial Confidential List, and any subsequent updates received to the originally disclosed
18 Confidential List, confidential. Furthermore, Measurement Standards will not, under any
19 circumstances, disclose the list, or any of the contents thereof, to the public, Defendants'
20 competitors, or any other person and/or entity outside of Measurement Standards, with the
21 exception of other governmental investigating or prosecuting officers for the purposes of
22 investigating and/or enforcing potential non-compliance with this Judgment and/or state or
23 federal laws.

24 12. Defendant's continuing duty to provide Measurement Standards with yearly
25 updates to the Confidential List as specified in Paragraph 10 above, shall expire and
26 extinguish after the elapsing of three (3) calendar years from the date of the execution of this
27 Judgment, unless Defendant receives a "valid" notice of violation from Measurement
28 Standards, regarding any one of their products sold in California; then this obligation shall be
extended for an additional three (3) calendar years from the issuance of that "valid" notice of

1 violation. Defendants' shall be relieved of the obligation to update the Confidential list
2 permanently only after three (3) consecutive calendar years of no "valid" notices of violation
3 from Measurement Standards on any of their products sold in California. The determination of
4 whether a notice of violation is "valid" shall not require the filing or litigation of a complaint,
5 but shall be agreed upon in writing between a representative of the District Attorney's Office
6 and a representative of Defendant. If no agreement can be reached between the
7 representatives, the Court shall make this determination, after a noticed motion by The
8 People. The People and Defendant shall stipulate to the validity and entry of test results
9 photos, and any other paperwork generated by Measurement Standards for this hearing. The
10 agreement and/or Court determination as to whether the violation is "valid" shall be binding
11 only for the purpose of determining when the obligations of paragraph 10 will expire.

12 **CIVIL PENALTIES AND COSTS**

13 13. Within five (5) business days following execution of this Judgment by the
14 Parties, Defendants shall pay a total of SEVEN HUNDRED AND FIFTY-ONE THOUSAND
15 ONE HUNDRED AND FIFTY-FIVE DOLLARS (\$751,155.00) in separate checks as
16 follows:

17 A. Civil penalties in the amount of FIVE HUNDRED AND FIFTY FIVE
18 THOUSAND DOLLARS (\$555,000.00) pursuant to Bus. And Prof. Code §§
19 17206 and 17536, payable by cashier's check to "The County of Orange."

20 B. Costs of investigation in the amount of ONE HUNDRED FIFTY ONE
21 THOUSAND ONE HUNDRED FIFTY FIVE DOLLARS (\$151,155.00)
22 pursuant to Bus. And Prof. Code §§ 17206(e) and 17536(d) payable by cashier's
23 check to "The Cashier of the Department of Food and Agriculture, Division of
24 Measurement Standards, PCA Code 55001."

25 C. *Cy pres* restitution in the sum of FORTY FIVE THOUSAND
26 DOLLARS (\$45,000.00) payable by cashier's check to "The Cashier of the
27 Department of Food and Agriculture, Division of Measurement Standards, PCA
28 Code 55001". In recognition of the infeasibility and impracticality of

1 identifying consumers who may have suffered actual loss, but never
2 complained, and the fact that the disproportionate cost of identifying and
3 making restitution to said individual consumers would far exceed the gain, the
4 parties agree that Defendant shall pay this *cy pres* restitution pursuant to Bus.
5 And Prof. Code §§ 17203 and 17535. These *cy pres* funds shall be used solely
6 for the purchase of a new truck that will be used by the Dept. of Food and
7 Agriculture, Division of Measurement Standards Anaheim Field Office to
8 facilitate field investigations of petroleum and/or automotive product
9 compliance. In order to properly enable these investigations, this truck shall be
10 full size, possess the equipment necessary to conduct undercover investigations,
11 and secure evidence collected.

12 14. All payments made pursuant to this Judgment, shall be hand delivered to the
13 following address, unless explicitly agreed upon otherwise by Plaintiff's and Defendant's
14 Attorneys':

15
16 Orange County District Attorney's Office
17 Consumer Protection Unit
18 401 Civic Center Drive West
19 Santa Ana, California 92701
20 Attention: DDA Michelle Cipolletti

21 15. All cashier's checks shall be held in trust by the Orange County District
22 Attorney's Office and under no circumstances shall be cashed unless and until notice has been
23 received that the Court has executed the Judgment. If for any reason the Court does not
ultimately execute the Judgment all checks will be returned to Smitty's.

24 ADDITIONAL PROVISIONS

25 16. The parties waive the right to appeal this Judgment both as to form and content.

26 17. Defendant shall cooperate fully, and shall require that any parent companies,
27 subsidiaries, affiliated organizations, officers, directors, partners, independent contractors,
28 employees, agents, representatives, heirs, assignees and successors in interest (including

1 through stock sale, merger, or sale of all or substantially all assets of any Defendant) cooperate
2 fully with the District Attorney's Office for the County of Orange ("District Attorney"), The
3 Department of Food and Agriculture, Division of Measurement Standards, or any other
4 Federal, State, County or Municipal Agency in any investigation concerning compliance with
5 this Judgment.

6 18. The Payments required pursuant to this Judgment are not dischargeable in
7 bankruptcy.

8 19. This Judgment fully and finally resolves only those matters specifically set forth
9 in the allegations of the Complaint filed in this action for conduct, which occurred prior to the
10 entry of this Judgment.

11 20. Nothing in this Judgment shall be construed as relieving Plaintiff or Defendant
12 of their obligation to comply, or as prohibiting Plaintiff or Defendant from complying, with all
13 applicable local, state and federal laws, regulations or rules, nor shall any of the provisions of
14 this Judgment be deemed to be permission to engage in any acts or practices prohibited by any
15 applicable law, regulation or rule.

16 21. Any notices or communications required to be transmitted between Defendant
17 and Plaintiff pursuant to this Judgment shall be provided in writing by first class mail,
18 overnight delivery, or personal delivery to the parties or their successors as follows:

19
20 To Plaintiff:

21 Orange County District Attorney's Office
22 Consumer Protection Unit
23 401 Civic Center Drive West
24 Santa Ana, California 92701
25 Attention: DDA Michelle Cipolletti, Esq.

26
27 To Defendant:

28 Smitty's Supply, Inc.
P.O. Box 530
Roseland, LA 70456
Attention: Tiffany Cressionnie

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With a copy to:

Schumann | Rosenberg, LLP.
3100 Bristol Street, Suite 100
Costa Mesa, CA 92626
Attention: Eric Arevalo, Esq.

22. Any notices provided pursuant to the requirement of this Judgment shall be deemed given five (5) business days after mailing by first class mail or two (2) business day after overnight delivery, or personal delivery.

23. The terms and enforcement of this Judgment shall be governed by the laws of the State of California and venue shall be located in the Superior Court of California, County of Orange, Central Justice Center.

24. In any action or motion brought by the District Attorney to enforce this Judgment in which the District Attorney obtains any or all of the relief sought, the District Attorney shall be entitled to request attorney's fees and costs in the discretion of the Court in addition to any other remedies provided by law and equity.

JURISDICTION RETAINED

25. Jurisdiction is retained for the purpose of enabling any party to this Judgment to apply to the Court, pursuant to a duly noticed motion, for such further order and directions as may be necessary and appropriate for the construction of or the carrying out of this Judgment, including for any modification of its injunctive provisions, for the enforcement of compliance therewith, and for punishment of violations thereof.

EFFECT AND ENTRY

26. The Clerk is ordered to enter this Injunction and Final Judgment.

DATED: 10/26/16

Mary Fingal Schulte
JUDGE OF THE SUPERIOR COURT
Mary Fingal Schulte