

SEP 07 2007

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

By: J. Dale, Deputy

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 CENTER FOR ENVIRONMENTAL HEALTH  
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 10 COUNTY OF MARIN  
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13 CENTER FOR ENVIRONMENTAL HEALTH, )  
 a non-profit corporation, )

Case No. CV 064425

Plaintiff,

~~PROPOSED~~ CONSENT JUDGMENT

v.

17 SMITH & HAWKEN, LTD.; and DOES 1  
 18 through 200, inclusive,

Defendants.

1           **I. INTRODUCTION**

2           1.1 On or about April 24, 2006, Plaintiff the Center for Environmental Health  
3 (“CEH”), a non-profit corporation acting in the public interest, served Smith & Hawken, Ltd.  
4 (“Smith & Hawken”) and the appropriate public enforcement agencies with the requisite 60-day  
5 notice (the “Notice”) that Smith & Hawken was in violation of Proposition 65.

6           1.2 On October 11, 2006, CEH filed a complaint (the “Complaint”) in Marin  
7 County Superior Court, entitled *Center for Environmental Health v. Smith & Hawken, Ltd., et*  
8 *al.*, Marin County Superior Court Case No. CV 064425 (the “Action”), for civil penalties and  
9 injunctive relief pursuant to the provisions of California Health & Safety Code §25249.5, *et seq.*  
10 (“Proposition 65”).

11           1.3 Defendant Smith & Hawken is a corporation that employs 10 or more  
12 persons and imports, distributes and sells copper containers with soldered parts (the “Products”),  
13 including without limitation copper trays, planters, urns, wall fountains, pots, flower buckets,  
14 birdbaths, and saucers, made of materials containing lead and/or lead compounds (referred to  
15 interchangeably herein as “Lead”) in the State of California.

16           1.4 Smith & Hawken and CEH are referred to herein as the “Parties.”

17           1.5 CEH’s Notice and the Complaint in this Action allege that Smith &  
18 Hawken exposes individuals who use or otherwise handle the Products to Lead, chemicals  
19 known to the State of California to cause cancer and birth defects or other reproductive harm,  
20 without first providing clear and reasonable warning to such persons regarding the  
21 carcinogenicity and reproductive toxicity of Lead. The Notice and Complaint allege that Smith  
22 & Hawken’s conduct violates Health & Safety Code §25249.6, the warning provision of  
23 Proposition 65.

24           1.6 For purposes of this Consent Judgment only, the Parties stipulate that this  
25 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and  
26 personal jurisdiction over Smith & Hawken as to the acts alleged in CEH’s Complaint, that  
27 venue is proper in the County of Marin, and that this Court has jurisdiction to enter this Consent  
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1 Judgment as a full and final resolution of all claims which were or could have been raised in the  
2 Complaint based on the facts alleged therein.

3           **1.7** The Parties enter into this Consent Judgment pursuant to a settlement of  
4 certain disputed claims between the Parties as alleged in the Complaint. By executing this  
5 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties'  
6 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of  
7 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the  
8 Consent Judgment constitute or be construed as an admission by the Parties of any fact,  
9 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall  
10 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or  
11 any other or future legal proceeding. This Consent Judgment is the product of negotiation and  
12 compromise and is accepted by the parties, for purposes of settling, compromising and resolving  
13 issues disputed in this action, including future compliance by Smith & Hawken with Section 2 of  
14 this Consent Judgment, and shall not be used for any other purpose.

15           **2. COMPLIANCE - REFORMULATION**

16           **2.1 Lead reformulation.** After October 1, 2007 (the "Reformulation Date"),  
17 Smith & Hawken shall not manufacture, purchase for distribution or sale, or accept delivery of  
18 any Product that contains Lead in concentrations that exceed 200 parts per million ("ppm") or is  
19 comprised of any material that contains Lead in concentrations that exceed 200 ppm.

20           **2.2 Products in inventory.**

21                   **2.2.1 Products In Inventory Sold To Consumers By Smith &**  
22 **Hawken.** After October 1, 2007, Smith & Hawken shall not sell or cause to be sold in California  
23 any Product that was manufactured, purchased for distribution or sale, or delivered to Smith &  
24 Hawken prior to the Reformulation Date, unless the Product is sold with the following warning:  
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1                   **WARNING: This product contains lead, a chemical known to**  
2                   **the State of California to cause cancer, birth defects and other**  
3                   **reproductive harm. Wash hands thoroughly after coming into**  
4                   **contact with this product.**

5   The warning shall be displayed with such conspicuousness, as compared with other words,  
6   statements, or designs as to render it likely to be read and understood by an ordinary individual.

7   The warning statement shall not be preceded, followed, or surrounded by words, symbols, or  
8   other matter that reduces its conspicuousness or that introduces, modifies, qualifies, or explains  
9   the required text, such as "legal notice required by law." This warning may be conveyed by  
10  sticker, hang tag, or label on the Product itself, or by shelf signs or signs at all cash registers.

11  Shelf and cash register signs shall have dimensions of no less than 7 inches by 11 inches, and  
12  shall both identify the specific Products that contain Lead and state the warning language set  
13  forth above. If the warning is a sign posted at each cash register, it shall be sufficiently specific  
14  such that a reasonable consumer can tell if a particular Product is covered by the warning. An  
15  example of a sign posted at a cash register that meets the requirements of this Section is attached  
16  hereto as Exhibit A.

17                                   **2.2.2           Products In Inventory Sold To California Wholesale**

18  **Customers By Smith & Hawken.** After October 1, 2007, Smith & Hawken shall send to all of  
19  its non-retail customers located in California ("Wholesale Customers") a copy of the warning  
20  sign attached hereto as Exhibit A and instructions requiring that the warning is displayed or  
21  conveyed in a manner consistent with this Section 2.2. If Smith & Hawken signs or contracts  
22  with a new Wholesale Customer, Smith & Hawken shall provide the new Wholesale Customer  
23  with a copy of the warning sign and instructions prescribed by this Section upon signing or  
24  contracting with that customer and before shipping any Products to that Wholesale Customer. A  
25  copy of instructions to be sent to Wholesale Customers is attached hereto as Exhibit B. Smith &  
26  Hawken shall make quarterly visits to each Wholesale Customer who has received a shipment of  
27  Products from Smith & Hawken to ensure that the instructions are followed. Smith & Hawken  
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1 shall make these quarterly visits so long as each Wholesale Customer continues to purchase the  
2 Products from Smith & Hawken and for a period of one year after the final purchase of Products  
3 by a particular Wholesale Customer. If Smith & Hawken finds that a Wholesale Customer has  
4 not complied with the instructions, it shall provide the Wholesale Customer with an additional  
5 copy of the warning sign and instructions on proper display of the warning signs. If Smith &  
6 Hawken provides warnings and instructions, and makes quarterly visits to Wholesale Customers  
7 as specified in this Section, Smith & Hawken shall not be held responsible if a Wholesale  
8 Customer fails to display or convey warnings consistent with this Section. Smith & Hawken's  
9 provision of warnings and instructions, and quarterly visits to Wholesale Customers consistent  
10 with the requirements of this Section constitute compliance with Proposition 65 with regard to  
11 Lead in Products sold to Wholesale Customers.

12           **2.3 Certification of level from suppliers.** With each shipment of Products  
13 received by Smith & Hawken on or after the Reformulation Date, Smith & Hawken shall obtain  
14 written certification with corresponding test results for the solder used in each of the Products  
15 from its suppliers of such Products certifying that neither the Products nor any materials from  
16 which the Products are made contain Lead in concentrations exceeding 200 ppm. For solder  
17 components of the Products, the test results may be obtained from the solder manufacturer, and  
18 such test results may be used to certify the solder on multiple shipments of the Products,  
19 provided however that the certification from the supplier must clearly state that all of the solder  
20 used in the particular Product that is the subject of the certification is the same as the solder  
21 referenced in the test results attached to such certification.

22           **2.4 Testing.** In order to help ensure compliance with the requirements of  
23 Sections 2.1, Smith & Hawken shall perform random testing of the Products to confirm that the  
24 solder used in making the Products contains less than 200 ppm Lead. Testing pursuant to this  
25 Section shall be conducted pursuant to the testing protocol attached hereto as Exhibit C (the  
26 "Test Protocol") by an independent, accredited domestic laboratory. The results of all testing  
27 performed pursuant to this Section shall be retained by Smith & Hawken for a period of three  
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1 years from the date of the test and shall be made available to CEH upon reasonable request. The  
2 frequency and amount of testing required shall be as follows:

3                   **2.4.1 Sample Testing.** During each fiscal quarter starting with  
4 the fiscal quarter ending on December 31, 2007, Smith & Hawken will select eight random  
5 Products with different Stock Keeping Units ("SKUs") for testing. If during any fiscal quarter,  
6 Smith & Hawken has less than eight Products with different SKUs, it may test multiple randomly  
7 selected Products with the same SKU. Smith & Hawken shall, to the extent that it has less than  
8 eight suppliers in a particular fiscal quarter, ensure that the eight selected pieces include at least  
9 one Product received from each of its suppliers for that fiscal quarter. Smith & Hawken shall  
10 continue the sample testing for a minimum period of three years (12 fiscal quarters of testing),  
11 provided however that the sample testing shall continue until such time as Smith & Hawken's  
12 testing pursuant to this Section shows no test results exceeding the 200 ppm reformulation level  
13 for a period of eight consecutive fiscal quarters (2 years).

14                   **2.5 Confirmatory testing by CEH.** CEH may conduct periodic testing of the  
15 Products sold in California. Any such testing will be conducted pursuant to the Test Protocol at  
16 an independent laboratory. In the event that CEH's testing demonstrates Lead levels in excess of  
17 200 ppm for one or more Products, CEH shall inform Smith & Hawken of the violation(s),  
18 including information sufficient to permit Smith & Hawken to identify the Product(s). Smith &  
19 Hawken shall, within seven days following receipt of such notice, provide CEH, at the address  
20 listed in Section 12, with the following certification and testing information demonstrating its  
21 compliance with Section 2.3 of this Consent Judgment: supplier certification and testing  
22 information for all shipments received since the Reformulation Date that included the same  
23 SKU(s) as that of the Product(s) referenced in CEH's notice to Smith & Hawken. The Parties  
24 shall then meet and confer in an attempt to informally determine an appropriate course of action  
25 to address the CEH test result. If the Parties are unable to informally agree upon an appropriate  
26 action to address the CEH test result, the provisions of Sections 2.6, 2.7 and 2.8 shall apply.

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1                   **2.6 Stipulated Penalty.** Smith & Hawken shall be liable for stipulated  
2 payments in lieu of penalties for Products sold in California for which CEH produces tests  
3 demonstrating Lead levels exceeding 200 ppm as set forth below. These payments shall be made  
4 to CEH and used for the purposes described in Section 3.1.1 and to pay for related attorneys' fees  
5 and costs. The stipulated payments in lieu of penalties and other remedies provided for herein  
6 are in addition to any other remedies available to enforce the terms of this Consent Judgment.

7                   **2.6.1 No stipulated penalty assuming compliance with Section**  
8 **2.3.** If Smith & Hawken provides CEH with information demonstrating that it complied with  
9 Section 2.3 for the Products that tested at Lead levels exceeding 200 ppm, there shall be no  
10 stipulated penalty for those Products.

11                   **2.6.2 Stipulated penalty assuming non-compliance with**  
12 **Section 2.3** If Smith & Hawken fails to provide CEH with information demonstrating that it  
13 complied with Section 2.3 for the Products that tested at Lead levels exceeding 200 ppm, the  
14 stipulated penalty shall be as follows for each unit of Product for which CEH produces a test  
15 result with Lead levels exceeding 200 ppm:

16                   First Occurrence:     \$5,000  
17                   Second Occurrence:   \$10,000  
18                   Third Occurrence:    \$20,000  
19                   Thereafter:            \$50,000

20                   **2.7 Sale of Products testing between 200 ppm and 600 ppm Lead.** Should  
21 testing conducted by CEH or Smith & Hawken pursuant to Sections 2.4 or 2.5 demonstrate that a  
22 Product contains Lead levels in excess of 200 ppm but less than 600 ppm, Smith & Hawken shall  
23 either recall such Product pursuant to Section 2.8, or alternatively Smith & Hawken may, no  
24 more than twice, sell such Products pursuant to and in compliance with all of the warning  
25 requirements of Section 2.2 as if such Product was a Product in inventory thereunder.

26                   **2.8 Recall of Products testing in excess of 600 ppm Lead.** Prior to any  
27 recall, the Parties shall then meet and confer in an attempt to informally determine an appropriate  
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1 course of action to address a test result exceeding 600 ppm Lead. If the Parties are unable to  
2 informally agree upon an appropriate action to address the CEH test result, the provisions of this  
3 Section shall apply. Should CEH or Smith & Hawken testing pursuant to Sections 2.4 or 2.5  
4 demonstrate that a Product contains Lead levels in excess of 600 ppm ("Recall Product"), Smith  
5 & Hawken shall use its best efforts to identify and recall all Products with the same SKU that  
6 were purchased in the same purchase order as any Recall Product from its retail outlets in  
7 California. Smith & Hawken shall destroy or return to the supplier all such Products and send  
8 certification to CEH that it has completed this process. Such certification shall indicate how  
9 many units of the Products were returned or destroyed via the recall. In addition, Smith &  
10 Hawken shall increase its random testing by testing an additional six randomly selected Products  
11 from the supplier of each delivered shipment of Products that failed a random test from such  
12 supplier for the two shipments purchased immediately following a Product test exceeding 200  
13 ppm.

### 14 3. SETTLEMENT PAYMENTS

15 3.1 Smith & Hawken shall pay a total of \$70,000 as a settlement payment.  
16 This total shall be paid in two separate checks delivered to the offices of the Lexington Law  
17 Group, LLP and made payable and allocated as follows:

18 3.1.1 Smith & Hawken shall pay the sum of \$23,000 as payment  
19 to CEH in lieu of penalty pursuant to Health & Safety Code Section 25249.7(b), and California  
20 Code of Regulations, Title 11, §3203(b). This payment in lieu of penalty check shall be made  
21 payable to the "Center For Environmental Health." CEH will use such funds to continue its work  
22 educating and protecting people from exposures to toxic chemicals, including heavy metals. In  
23 addition, CEH may use a portion of such funds to monitor compliance with the reformulation  
24 requirements of this and other similar Consent Judgments.

25 3.1.2 Smith & Hawken shall pay the sum of \$47,000 to  
26 reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees,  
27 and any other costs incurred as a result of investigating, bringing this matter to Smith &  
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1 Hawken's attention, litigating and negotiating a settlement in the public interest. The attorneys  
2 fees and cost reimbursement check shall be made payable to the Lexington Law Group, LLP.

3           **3.2 Timing of payments.** The payments required under this Section shall be  
4 delivered to the address set forth in Section 12 below within seven days of entry of this Consent  
5 Judgment by the Court. Any failure by Smith & Hawken to comply with the payment terms  
6 herein shall be subject to a stipulated late fee in the amount of \$100 for each day after the  
7 delivery date the payment is received. The late fees required under this Section shall be  
8 recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought  
9 pursuant to Section 5 of this Consent Judgment.

10           **4. MODIFICATION OF CONSENT JUDGMENT**

11           **4.1** This Consent Judgment may be modified by written agreement of CEH  
12 and Smith & Hawken, or upon motion of CEH or Smith & Hawken as provided by law.

13           **5. ENFORCEMENT OF CONSENT JUDGMENT**

14           **5.1** This Consent Judgment may be enforced against Smith & Hawken by  
15 CEH or the California Attorney General only. CEH may, by motion or application for an order  
16 to show cause before the Superior Court of the County of Marin, enforce the terms and  
17 conditions contained in this Consent Judgment. Should CEH prevail on any motion or  
18 application under this Section, CEH shall be entitled to recover its reasonable attorneys' fees and  
19 costs associated with such motion or application.

20           **5.2** Prior to filing any motion or application for an order to show cause before  
21 the Superior Court of the County of Marin to enforce the terms and conditions contained in this  
22 consent judgment, the Parties shall meet and confer in an attempt to informally solve any  
23 disputes between the Parties.

24           **6. APPLICATION OF CONSENT JUDGMENT**

25           **6.1** This Consent Judgment shall apply to and be binding upon the Parties  
26 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of  
27 them.

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**7. CLAIMS COVERED AND RELEASE**

7.1 This Consent Judgment is a full, final and binding resolution between CEH, acting on behalf of itself and the general public, and Smith & Hawken of any violation of Proposition 65 or any other statutory or common law claim that was or could have been asserted in the Complaint against Smith & Hawken or its parents, subsidiaries, affiliates, directors, officers, employees, agents, downstream distributors, downstream retailers or customers, based on failure to warn about exposure to Lead contained in any Products manufactured, distributed or sold by Smith & Hawken on or prior to the date of entry of this Consent Judgment. Compliance with this Consent Judgment by Smith & Hawken shall hereinafter constitute compliance with Proposition 65 by Smith & Hawken with respect to Lead in the Products. This release does not limit or effect the obligations of any Party created under this Consent Judgment.

**8. SEVERABILITY**

8.1 In the event that any of the provisions of this Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions shall not be adversely affected.

**9. SPECIFIC PERFORMANCE**

9.1 The Parties expressly recognize that Smith & Hawken's obligations under this Consent Judgment are unique. In the event that Smith & Hawken is found to be in breach of this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the Parties agree that it would be extremely impracticable to measure the resulting damages and that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may sue in equity for specific performance, and Smith & Hawken expressly waives the defense that a remedy in damages will be adequate.

**10. GOVERNING LAW**

10.1 The terms of this Consent Judgment shall be governed by the laws of the State of California.

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**11. RETENTION OF JURISDICTION**

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

**12. PROVISION OF NOTICE**

12.1 All correspondence and required notices pursuant to this Consent Judgment shall be sent to the following:

For CEH:

Eric S. Somers  
Lexington Law Group, LLP  
1627 Irving Street  
San Francisco, CA 94122

For Smith & Hawken:

Peter Obstler  
O'Melveny & Myers, LLP  
275 Battery Street  
San Francisco, CA 94111

**13. COURT APPROVAL**

13.1 If this Consent Judgment is not approved by the Court, it shall be of no further force or effect. The Parties agree to support a Motion for Approval of this Consent Judgment.

**14. EXECUTION AND COUNTERPARTS**

14.1 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

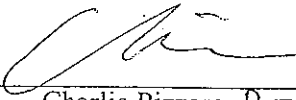
**15. AUTHORIZATION**

15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally bind that party. The undersigned have read, understand and agree to all of the terms and conditions of this

1 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and  
2 costs.

3  
4 **AGREED TO:**

5  
6 CENTER FOR ENVIRONMENTAL HEALTH

7   
8 \_\_\_\_\_  
9 Charlie Pizzaro PIZZARO  
Assistant Executive Director  
Center for Environmental Health  
10 ASSOCIATE

11 SMITH & HAWKEN, LTD.

12  
13 \_\_\_\_\_  
Signature

14  
15 \_\_\_\_\_  
Printed Name

16  
17 \_\_\_\_\_  
Title

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19 **ORDER AND JUDGMENT**

20 Based upon the stipulated Consent Judgment between the Parties, the settlement is  
21 approved and judgment is hereby entered according to the terms herein.

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23 Dated: \_\_\_\_\_  
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26 \_\_\_\_\_  
Judge, Superior Court of the State of California  
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1 Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and  
2 costs.

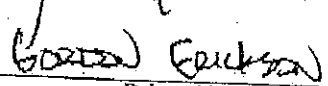
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4 **AGREED TO:**

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6 **CENTER FOR ENVIRONMENTAL HEALTH**

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8 \_\_\_\_\_  
9 Charlie Pizzaro  
Assistant Executive Director  
Center for Environmental Health

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11 **SMITH & HAWKEN, LTD.**

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13 \_\_\_\_\_  
Signature

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15 \_\_\_\_\_  
Printed Name

16 **CEO**  
17 \_\_\_\_\_  
Title

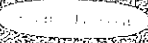
18  
19 **ORDER AND JUDGMENT**

20 Based upon the stipulated Consent Judgment between the Parties, the settlement is  
21 approved and judgment is hereby entered according to the terms herein.  
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23 Dated: **SEP 07 2007**

24  
25 **LYNN DURYEE**  
26 \_\_\_\_\_  
Judge, Superior Court of the State of California  
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# WARNING

Smith & Hawken copper containers bearing either NO stamp or the following stamp  on the bottom of the product contain lead.

**"WARNING: This product contains Lead, a chemical known the State of California to cause cancer, birth defects and other reproductive harm. Wash hands thoroughly after coming into contact with this product."**

Smith & Hawken is reformulating the materials used in its copper containers to reduce or eliminate the lead in the product. All products with the following stamp on the bottom have been reformulated and DO NOT contain lead.

**Smith & Hawken**

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**EXHIBIT B**  
**Letter of Instruction to Wholesale Customers**  
[Smith & Hawken Letterhead]  
**IMPORTANT LEGAL NOTICE**

Date:  
Attention: Dealers/Distributors of Smith & Hawken Copper Containers  
Subject: California Proposition 65 Warnings

\*\*\*\*\*

This letter is to advise you that certain copper containers sold by Smith & Hawken (the "Products") contain solder that is made from lead. Smith & Hawken has entered into a Consent Judgment in a Proposition 65 Enforcement Action that requires the provision of warning materials with these copper containers. Lead is a chemical known to the State of California to cause cancer and reproductive toxicity.

Although Smith & Hawken is in the process of reformulating its entire product line to no longer contain leaded solder, your shipments from Smith & Hawken have included, or may include, Products that pursuant to the Consent Judgment, require a Proposition 65 warning. A copy of the warning required by the Consent Judgment is enclosed. This warning must be displayed with all Smith & Hawken Products. You must convey this warning by shelf signs on all shelves with Smith & Hawken Products, or by placing these signs at all cash registers. The signs must be displayed in a manner that is conspicuous and that makes them likely to be read and understood by an ordinary individual under customary conditions of purchase in your store.

Failure to provide a Proposition 65 warning for the Products may subject you to legal action by the California Attorney General or any person acting in the public interest, wherein monetary penalties of up to \$2,500 per violation may be sought.

Should you have any questions or concerns about this matter, please do not hesitate to contact [ ] at [ ] by phone, or by mail at the above address. In addition, we will be glad to supply additional warning signs if requested.

Sincerely,  
  
\_\_\_\_\_  
Title

1 **EXHIBIT C - Test Protocol**

2 The following protocol shall be applied separately to each component of the Product:

- 3 a) Comminute a small, representative, and discrete portion of the material to be  
4 analyzed.
- 5 b) Prepare the sample for analysis using microwave digestion. Microwave digestion  
6 protocols from either of the following two methods may be used provided that the  
7 samples are completely digested:
- 8 1. California Health and Safety Code §25214.4 (incorporating EPA  
9 3050B)
  - 10 2. NIOSH 7082 (Lead by Flame AAS) Appendix – Microwave  
11 Digestion for Lead in Paint Chips (and other matrices)
- 12 c) Analyze the sample for total Lead (Pb) content using Graphite Furnace Atomic  
13 Absorption Spectrophotometry (GFAAS) or Inductively Coupled Plasma Mass  
14 Spectrometry (ICP-MS) using standard operating procedures.
- 15 d) Lead content shall be expressed in parts per million (ppm).
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