



1 Lee N. Smith, Esq., State Bar No. 138071  
 2 Anthony J. DeCristoforo, Esq., State Bar No. 166171  
 3 STOEL RIVES LLP  
 4 980 Ninth Street, Suite 1900  
 5 Sacramento, CA 95814  
 6 Fax: 916.447.4781

**ENDORSED  
 FILED  
 ALAMEDA COUNTY**

JUN 09 2009

*Adygin*, Exec. Off./Clerk

7 Attorneys for Defendant,  
 8 ACE HARDWARE CORPORATION

9 Reuben Yeroushalmi, State Bar No. 193981  
 10 Daniel D. Cho, State Bar No. 105409  
 11 Ben Yeroushalmi, State Bar No. 232540  
 12 YEROUSHALMI & ASSOCIATES  
 13 3700 Wilshire Blvd., Suite 480  
 14 Los Angeles, CA 90010  
 15 Telephone: (213) 382-3183  
 16 Facsimile: (213) 382-3430

17 Attorneys for Plaintiff,  
 18 CONSUMER ADVOCACY GROUP, INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA,  
 20 COUNTY OF ALAMEDA

21 CONSUMER ADVOCACY GROUP, INC., in )	Case No. RG07331650 (Lead Case)
22 the public interest, )	
23 )	(This Document relates to Case No.
24 )	RG08374636, which has been consolidated
25 )	under this action)
26 )	
27 )	<del>PROPOSED</del> PARTIAL CONSENT
28 )	JUDGMENT BETWEEN PLAINTIFF
29 )	CONSUMER ADVOCACY GROUP,
30 )	INC. AND ACE HARDWARE
31 )	CORPORATION
32 )	
33 )	Health & Safety Code §25249.5 <i>et seq.</i>

34 1. INTRODUCTION

35 1.1 On March 4, 2008, plaintiff Consumer Advocacy Group, Inc. ("CAG"),  
 36 a non-profit corporation, filed a complaint in Superior Court of California for the County of  
 37 Alameda, entitled *Consumer Advocacy Group v. Ace Hardware Corporation, et al.* Alameda

ORIGINAL

1 Superior Court Case No. RG08374636 (the "Action"), for civil penalties and injunctive relief  
2 pursuant to the provisions of Cal. Health & Safety Code §25249.5 *et seq.* ("Proposition 65").  
3 CAG's Complaint named Ace Hardware Corporation ("Ace") and several other parties as  
4 Defendants. On November 7, 2008, the Action was consolidated under a similar action  
5 entitled *Consumer Advocacy Group v. Oreg Corporation, et al.*, Alameda Superior Court  
6 Case No. Case No. RG07331650.

7 1.2 Ace is a corporation that employs 10 or more persons. Ace sells or has  
8 sold to California consumers, or has otherwise made available for distribution in the State of  
9 California, consumer products intended for the testing of chlorine levels in Pools and Spas,  
10 including but not limited to the Ace Two-Way Pool Test Kit, Ace Two-Way Test Kit Refill,  
11 Ace 4 Way Pool Test Kit Refill and other substantially similar products commonly referred to  
12 as "OTO Test Kits" or "OTO Solution" (collectively referred to as the "Ace Products"). The  
13 Ace Products allegedly contain 3,3'-Dimethylbenzidine (ortho-tolidine) and/or 3,3'-  
14 Dimethylbenzidine dihydrochloride (collectively "OTO") in varying amounts.

15 1.3 On or about June 27, 2007, CAG served Ace and the appropriate public  
16 enforcement agencies with notice that Ace was in violation of Proposition 65. CAG's notice  
17 and the Complaint in this Action allege that Ace exposes people who handle the Ace Products  
18 to OTO, without providing clear and reasonable warnings, in violation of Health & Safety  
19 Code §25249.6.

20 1.4 On or about April 6, 2009 CAG and Ace entered into a Settlement  
21 Agreement to resolve all claims brought in the Action. A full and accurate copy of the  
22 Settlement Agreement is attached as Exhibit A and incorporated by reference.

23 1.5 For purposes of this Consent Judgment only, the parties stipulate that  
24 this Court has jurisdiction over the allegations of violations contained in CAG's Complaint  
25 and personal jurisdiction over Ace as to the acts alleged in CAG's Complaint, that venue is  
26 proper in the County of Alameda, and that this Court has jurisdiction to enter this Consent  
27 Judgment as a full and final resolution of all claims which were or could have been raised  
28 against Ace in the Complaint based on the facts alleged therein.

1           1.6    The parties enter into this Consent Judgment pursuant to a settlement of  
2 certain disputed claims as alleged in the Complaint for the purpose of avoiding prolonged and  
3 costly litigation.

4           1.7    Nothing in this Consent Judgment shall be construed as an admission  
5 by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall  
6 compliance with the Consent Judgment constitute or be construed as an admission by the  
7 Parties of any fact, conclusion of law, issue of law, or violation of law.

8           1.8    Nothing in this Consent Judgment shall prejudice, waive or impair any  
9 right, remedy, argument or defense the Parties may have in this or any other or future legal  
10 proceeding.

11           1.9    This Consent Judgment is the product of negotiation and compromise  
12 and is being entered into by the Parties, for purposes of settling, compromising and resolving  
13 issues disputed in this action, including future compliance by Ace with Section 2 of this  
14 Consent Judgment and shall not be used for any other purpose, or in any other matter.

15           **2. COMPLIANCE - WARNING**

16           2.1    As of as of June 15, 2009, Ace agrees, promises and represents that  
17 Ace or its supplier will place a Proposition 65 compliant warning label conspicuously  
18 in or on the packaging of any pool test kits or chemicals sold by Ace into the state of  
19 California that contain OTO, where persons who handle such products are likely to see  
20 and read the warning labels.

21           **3. SETTLEMENT PAYMENT**

22           3.1    Within 5 days following the entry of this Consent Judgment by the  
23 Court, Ace shall pay a total of NINETY TWO THOUSAND DOLLARS (\$92,000.00) to  
24 CAG by transmitting payment to the offices of Yeroushalmi & Associates. The payment shall  
25 be apportioned as follows:

26                   3.1.1 Monetary Payment in Lieu of Penalty: The sum of TWELVE  
27 THOUSAND DOLLARS (\$12,000.00) shall be paid directly to CAG in lieu  
28 of any and all penalties pursuant to Health and Safety Code § 25249.7(b).

1 CAG shall use such funds to continue its work protecting people from  
2 exposures to toxic chemicals, including those listed under Proposition 65;  
3 protecting the environment; improving human health; and supporting  
4 environmentally sound practices. Payment shall be to "Consumer Advocacy  
5 Group, Inc."

6 3.1.2 Attorneys' Fees and Costs: The sum of EIGHTY THOUSAND  
7 DOLLARS (\$80,000.00) shall be paid directly to CAG's legal counsel  
8 Yeroushalmi & Associates in order to reimburse CAG and its attorneys for  
9 their reasonable investigation fees and costs, attorneys' fees, and any other  
10 costs incurred as a result of investigating, bringing this matter to Acc's  
11 attention, litigating and negotiating a settlement in the public interest. Payment  
12 shall be to "Yeroushalmi & Associates."

#### 13 4. MODIFICATION OF CONSENT JUDGMENT

14 4.1 This written Consent Judgment may be modified by written agreement  
15 of CAG and Ace which shall be entered as a stipulation and Order of the Court; or, upon a  
16 noticed joint motion and entry of a consent judgment by the Court thereon; or, upon the  
17 separately noticed motion of CAG or Ace as provided by law and entry of a modified consent  
18 judgment by the Court.

#### 19 5. ENFORCEMENT OF CONSENT JUDGMENT

20 5.1 The terms of this Consent Judgment may only be enforced by the  
21 Parties hereto and, except as specifically provided herein, shall not create any rights in favor  
22 of non-signatories. In the event that a Party hereto thinks that another Party is not complying  
23 with this Consent Judgment, it shall serve written notice stating the factual basis of such  
24 alleged non-compliance by first class mail and facsimile on the attorneys for the allegedly  
25 non-complying Party. The alleged non-complying Party thereafter shall have fifteen (15)  
26 business days from receipt of the written notice to provide a written response contesting the  
27 alleged non-compliance and/or to cure the alleged non-compliance without incurring any  
28 fines, costs, penalties, or liabilities (including attorneys' fees and or costs related to such

1 alleged non-compliance). If the issue of compliance is not resolved to either Party's  
2 satisfaction within fifteen (15) business days following the original fifteen-day notice period,  
3 then the Party may seek to enforce the terms and conditions contained herein by noticed  
4 motion or order to show cause before the Superior Court of Alameda County. In any  
5 proceeding brought by any Party to enforce this Consent Judgment, such Party may seek  
6 whatever fines, costs, penalties or remedies as may be provided by law for any violation of  
7 the Consent Judgment. The prevailing Party in any such proceeding shall be entitled to  
8 reasonable attorneys' fees and costs. This Court shall retain jurisdiction of this matter to  
9 implement the Consent Judgment and to resolve any disputes relating thereto.

10 **6. APPLICATION OF CONSENT JUDGMENT**

11 6.1 This Consent Judgment shall apply to and be binding upon the parties  
12 hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of  
13 them. The protections afforded to Ace by the Settlement Agreement and this Consent  
14 Judgment shall also inure to the benefit of Ace's manufacturer, supplier, distributors and  
15 retailers of the Ace Products, only as to the products sold by Ace.

16 **7. CLAIMS COVERED AND RELEASED**

17 7.1 This Consent Judgment is a full, final and binding resolution between  
18 CAG and Ace of any violation of Proposition 65 that could have been asserted against Ace in  
19 the Complaint based on Ace's failure to warn about exposure to listed chemicals contained in  
20 the Ace Products prior to the date of entry of this judgment. Compliance with the terms of  
21 this Consent Judgment shall constitute compliance with Proposition 65 with respect to  
22 exposures to OTO by Ace with respect to the Ace Products. Without limiting any of the  
23 foregoing, this release shall not limit, impair or bar either Party's obligations or enforcement  
24 rights established by Consent Judgment. To the extent that Ace Retailers sell OTO products  
25 after June 15, 2009 without Proposition 65 warning labels, which they may have obtained  
26 from sources other than Ace, those retailers are not covered in this release as to those  
27 products.

28 ////

1 ///

2 **8. SEVERABILITY**

3 8.1 In the event that any of the provisions of this Consent Judgment are  
4 held by a court to be unenforceable, the validity of the enforceable provisions shall not be  
5 adversely affected.

6 **9. GOVERNING LAW**

7 9.1 The terms of this Consent Judgment shall be governed by the laws of  
8 the State of California.

9 **10. PROVISION OF NOTICE**

10 10.1 All notices required pursuant to this Consent Judgment and  
11 correspondence shall be sent to the following:

12 For CAG:

13 Reuben Ycroushalmi  
14 YEROUSHALMI & ASSOCIATES  
15 3700 Wilshire Boulevard, Suite 480  
16 Los Angeles, CA 90010  
Telephone: 213-382-3183  
Facsimile: 213-382-3430

17 For Ace:

18 Lee N. Smith, Esq.  
19 STOEL RIVERS LLP  
20 980 Ninth Street, Suite 1900  
21 Sacramento, CA 95814  
Telephone: 916-447-0700  
Fax: 916.447.4781

22 **11. COURT APPROVAL**

23 11.1 If this Consent Judgment is not approved by the Court, it shall be of no  
24 further force or effect.

25 11.2 CAG shall comply with Health and Safety Code section 25249.7(f) and  
26 with Title 11 California Code of Regulations section 3003.

27 **12. EXECUTION AND COUNTERPARTS**

28 12.1 The stipulations to this Consent Judgment may be executed in

1 counterparts and by means of facsimile, which taken together shall be deemed to constitute  
2 one document. A facsimile or pdf signature shall be as valid as the original.

3 **13. AUTHORIZATION**

4 13.1 Each signer of this Consent Judgment certifies that he or she is fully  
5 authorized by the party he or she represents to stipulate to this Consent Judgment and to enter  
6 into and execute the Consent Judgment on behalf of the party represented and legally bind  
7 that party. The undersigned have read, understand and agree to all of the terms and conditions  
8 of this Consent Judgment. Except as explicitly provided herein, each party is to bear its own  
9 fees and costs.

10 CONSUMER ADVOCACY GROUP, INC.

11 By: *Lyn Marcus*  
12 Lyn Marcus  
13 Its: President

Dated: April 8, 2009

14 ACE HARDWARE CORPORATION  
15 By: *John J. ...*  
16 Its: General Merchandise Manager

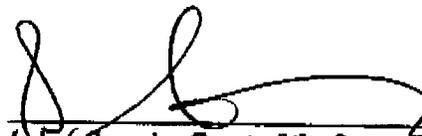
Dated: April 9, 2009

**ORDER AND JUDGMENT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Based upon the stipulated Consent Judgment between Consumer Advocacy Group, Inc. and Ace Hardware Corporation the settlement is approved and judgment is hereby entered according to the terms herein.

Dated: June 9, 2009

  
\_\_\_\_\_  
Judge, Superior Court of the State of California

Robert B. Freedman