

1 WILLIAM VERICK, SBN 140972  
2 KLAMATH ENVIRONMENTAL LAW CENTER  
3 FREDRIC EVENSON, SBN 198059  
4 424 First Street  
5 Eureka, CA 95501  
6 Telephone: (707) 268-8900  
7 Facsimile: (707) 268-8901  
8 E-mail: wverick@igc.org

9 DAVID WILLIAMS, SBN 144479  
10 BRIAN ACREE, SBN 202505  
11 370 Grand Avenue, Suite 5  
12 Oakland, CA 94610  
13 Telephone: (510) 647-1900  
14 Facsimile: (510) 647-1905  
15 E-mail: davidhwilliams@earthlink.net

16 Attorneys for Plaintiff  
17 MATEEL ENVIRONMENTAL JUSTICE FOUNDATION

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**FOR THE COUNTY OF SAN FRANCISCO**

MATEEL ENVIRONMENTAL JUSTICE  
FOUNDATION,,

Plaintiff,

v.

ACE HARDWARE CORPORATION and  
ASHBY LUMBER CO.,

Defendants.

Case No. CGC-11-511553

**[PROPOSED] CONSENT JUDGMENT AS  
TO ASHBY LUMBER CO.**

**1. INTRODUCTION**

1.1 On June 9, 2011, the MATEEL ENVIRONMENTAL JUSTICE FOUNDATION ("Mateel") acting on behalf of itself and the general public, filed a Complaint for civil penalties and injunctive relief ("Complaint") in San Francisco County Superior Court, Case No. CGC-11-511553, against Defendant Ashby Lumber Co. ("ASHBY" or "Defendant"). The Complaint alleges, among other things, that Defendant violated provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, *et seq.* ("Proposition

ENDORSED  
FILED  
San Francisco County Superior Court

MAR - 2 2012

CLERK OF THE COURT  
BY: CYNTHIA S. HERBERT  
Deputy Clerk

1 65”). In particular, Mateel alleges that ASHBY has knowingly and intentionally exposed persons  
2 to lead by selling lead wool (like steel wool except made from lead), without first providing a  
3 clear and reasonable warning to such individuals pursuant to the requirements of Proposition 65  
4 Lead is listed as a chemical known to the State of California to cause cancer and birth defects or  
5 other reproductive harm

6 1.2 On February 17, 2011, a 60-Day Notice letter (“Notice Letter”) was sent by Mateel  
7 to ASHBY, the California Attorney General, all California District Attorneys, and all City  
8 Attorneys of every California City with a population exceeding 750,000.

9 1.3 ASHBY is a business that employs ten or more persons and manufactures,  
10 distributes, markets, and/or offers for sale lead wool, within the State of California. Lead wool  
11 contains and/or is made from material containing lead. Lead and lead compounds are listed as  
12 chemicals known to the State of California to cause cancer, and lead is listed as a chemical known  
13 to the State of California to cause reproductive toxicity pursuant to Health and Safety Code  
14 Section 25249.9. Plaintiff Mateel alleges that lead wool sold by ASHBY for use in California  
15 requires a warning under Proposition 65 pursuant to Health and Safety Code Section 25249.6.

16 1.4 For purposes of this Consent Judgment, the term “Covered Product” shall be  
17 defined as lead wool, to the extent lead wool is distributed and sold within the State of California,  
18 and is marketed and/or sold by ASHBY, regardless of whether the lead wool bears ASHBY  
19 labels.

20 1.5 For purposes of this Consent Judgment, the parties stipulate that this Court has  
21 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction  
22 over ASHBY as to the acts alleged in the Complaint, that venue is proper in the County of San  
23 Francisco and that this Court has jurisdiction to enter this Consent Judgment as a full settlement  
24 and resolution of the allegations contained in the Complaint and of all claims that were or could  
25 have been raised by any person or entity based in whole or in part, directly or indirectly, on the  
26 facts alleged therein or arising therefrom or related thereto.

27 1.6 This Consent Judgment resolves claims that are denied and disputed. The parties  
28 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims

1 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment  
2 shall not constitute an admission with respect to any material allegation of the Complaint, each  
3 and every allegation of which ASHBY denies; nor may this Consent Judgment or compliance  
4 with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of  
5 ASHBY or any other person or entity related to the Defendant.

6 1.7 All products already received or offered for sale by ASHBY on or before the date  
7 on which the court enters this Consent Judgment ("Effective Date") are deemed to be covered by  
8 the waiver and release provisions of Paragraphs 4 of this Consent Judgment and shall not be  
9 subject to any enforcement action by Mateel under Paragraph 5 of this Consent Judgment. The  
10 warning requirements of Paragraph 7 of this Consent Judgment shall apply to lead wool received  
11 or offered for sale by ASHBY after the Effective Date.

12  
13 **SETTLEMENT PAYMENT**

14 2.1 In settlement of all of the claims that are alleged, or could have been alleged in the  
15 Complaint and/or Notice Letter concerning the Covered Product, ASHBY shall pay \$5,000 to the  
16 Klamath Environmental Law Center ("KELC") to cover Plaintiff's attorneys' fees. The above  
17 described payment shall be forwarded by ASHBY to its attorney of record in this case so that it is  
18 received by its attorney at least 5 days prior to the hearing date scheduled for approval of this  
19 Consent Judgment. On the same day on which ASHBY's attorney of record receives the above-  
20 described payment, Ashby's attorney shall notify Mateel by e-mail at [wverick@igc.org](mailto:wverick@igc.org) that the  
21 attorney has such payment in his or her possession. No later than the day the court enters this  
22 Consent Judgment, ASHBY's attorney of record shall deliver to Mateel, by overnight next  
23 business day delivery, the above described payment. Delivery shall be made to the Klamath  
24 Environmental Law Center, 424 First Street, Eureka, California, 95501. If the Consent Judgment  
25 is not approved with 120 days of the date scheduled for approval, the above described payments  
26 shall be returned and the provisions of this Consent judgment shall become null and void.

27 2.2 ASHBY shall not be required to pay a civil penalty pursuant to Health and Safety  
28 Code Section 25249.7(b).

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

**3. ENTRY OF CONSENT JUDGMENT**

3.1 The parties hereby request that the Court promptly enter this Consent Judgment. Upon entry of the Consent Judgment, ASHBY and Mateel waive their respective rights to a hearing or trial on the allegations of the Complaint.

**4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

4.1 As to alleged exposure to lead or lead compounds from Covered Products, this Consent Judgment provides a full and complete release of liability on behalf of the Public Interest, as defined in California Health & Safety Code §25249.7(d) to ASHBY, its past, present and future parents, subsidiaries affiliates, predecessors, successors, and assigns, and all those to whom Ashby may have sold or distributed Covered Products (the “Released Entities”), as to all claims and matters raised in the Notice of Violation. Notwithstanding any other provision of this Consent Judgment, the only claims released on behalf of the Public Interest are claims or matters that are within the scope of Mateel’s February 17, 2011, 60 Day Notice Letter to Ashby.

4.2 As to lead allegedly contained in the Covered Product, Mateel, acting on behalf of itself and its agents, attorneys, successors and assigns, waives all rights to institute any form of legal action, and releases all claims against ASHBY and its parents, subsidiaries or affiliates, predecessors, officers, directors, employees, and all of its customers, manufacturers, distributors, wholesalers, and retailers, including, but not limited to any other person in the course of doing business, and the successors and assigns of any of them, who may manufacture, use, maintain, distribute or sell the Covered Product, whether under Proposition 65 or otherwise. In furtherance of the foregoing, Mateel, acting on behalf of itself hereby waives any and all rights and benefits which it now has, or in the future may have, conferred upon it with respect to the Covered Product by virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:

“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO

1                   EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE  
2                   RELEASE, WHICH IF KNOWN BY HIM MUST HAVE  
3                   MATERIALLY AFFECTED HIS SETTLEMENT WITH THE  
4                   DEBTOR.”

5   Mateel understands and acknowledges that the significance and consequence of this waiver of  
6   California Civil Code Section 1542 is that even if Mateel suffers future damages arising out of or  
7   resulting from, or related directly or indirectly to, in whole or in part, the Covered Product, it will  
8   not be able to make any claim for those damages against ASHBY, its parents, subsidiaries or  
9   affiliates, predecessors, officers, directors, employees, or any of its customers, manufacturers,  
10   distributors, wholesalers, or retailers, including but not limited to any other person in the course  
11   of doing business, and the successors and assigns of any of them, who may manufacture, use,  
12   maintain, distribute or sell the Covered Product. Furthermore, Mateel acknowledges that it  
13   intends these consequences for any such claims which may exist as of the date of this release but  
14   which Mateel does not know exist, and which, if known, would materially affect its decision to  
15   enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of  
16   ignorance, oversight, error, negligence, or any other cause.

17  
18           **5.    ENFORCEMENT OF JUDGMENT**

19           5.1    The terms of this Consent Judgment shall be enforced exclusively by the parties  
20   hereto. The parties may, by noticed motion or order to show cause before the Superior Court of  
21   San Francisco County, giving the notice required by law, enforce the terms and conditions  
22   contained herein.

23  
24           **6.    MODIFICATION OF JUDGMENT**

25           6.1    Except as provided for in Paragraph 7.3(c), this Consent Judgment may be  
26   modified only upon written agreement of the parties and upon entry of a modified Consent  
27   Judgment by the Court thereon, or upon motion of any party as provided by law and upon entry of  
28   a modified Consent Judgment by the Court.

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

6.2 Notwithstanding any other term or provision of this Consent Judgment, if Plaintiff agrees to or is otherwise bound by injunctive relief terms or provisions relating to the reformulation of, or provisions of Proposition 65 warnings for, the Covered Product, which are more favorable to another settling party than this Consent Judgment otherwise provides to ASHBY, then the terms of injunctive relief provided for in Section 7 of this Consent Judgment shall automatically be deemed to have been modified to add such more favorable terms or provisions as an option, which the Defendant may elect for compliance with this Consent Judgment.

7. **INJUNCTIVE RELIEF - CLEAR AND REASONABLE WARNING**

7.1 The Covered Product shall be deemed to comply with Proposition 65 if each package of the Covered Product offered for sale in California provides the warning specified in paragraph 7.2.

7.2 Settling Defendant shall provide Proposition 65 warnings as of the Effective Date affixed to the outside packaging of each package of Covered Product ASHBY offers for sale in California. The warning shall state the following and shall be provided in the format described below:

ASHBY shall provide the following warning statement:

**“WARNING:** This product contains lead, a chemical known to the State of California to cause birth defects or other reproductive harm. Do not place your hands in your mouth after handling the product. ***Wash your hands after touching this product.”***

The word “WARNING” shall be in bold. The words “Wash hands after handling” shall be in bold and italicized.

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

8. **AUTHORITY TO STIPULATE**

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

9. **RETENTION OF JURISDICTION**

This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

10. **ENTIRE AGREEMENT**

This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

11. **GOVERNING LAW**

The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions of California law.





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

DATED: 2/6/12

ASHBY LUMBER CO.

Jeffrey O. Hogan  
By: JEFFREY O. HOGAN  
Its: PRESIDENT

IT IS SO ORDERED, ADJUDGED AND DECREED:

HAROLD KAHN

DATED:

MAR - 2 2012

JUDGE OF THE SUPERIOR COURT