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Attorney for Plaintiff, Darren Kenny

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DARREN KENNY, an individual, Plaintiff, v. APEX SUPPLY COMPANY, a corporation, and DOES 1 through 100, inclusive, Defendants.	CASE NO. BC543696 **[PROPOSED] CONSENT JUDGMENT** Judge: Hon. Richard E. Rico Dept.: "17" Compl. Filed: April 25, 2014 Unlimited Jurisdiction

1. <u>Definitions</u>

1.1 "Covered Products" means brass plumbing fittings, including, but not limited to, pipes, nipples, plugs, caps, nuts, unions, reducing unions, swivels, tees, adapters, elbows, and 3/8" flare x 3/4" MIP Adapter "C48612; AP 14972."

1.2 The term "Effective Date" means the date on which this Consent Judgment is entered by the Court.

1.3 The term "Prop 65" means The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5, *et seq.*

1.4 The term "Plaintiff" means Plaintiff Darren Kenny.

1.5 The term "Defendant" means Defendant Apex Supply Company.

1.6 The term "Parties" means Plaintiff and Defendant.

2. Introduction

2.1 This Consent Judgment is entered into by and between the Parties.

2.2 Plaintiff is a citizen of the State of California with an interest in protecting the environment, improving human health and the health of ecosystems, and supporting environmentally sound practices, which includes promoting awareness of exposure to toxic chemicals and reducing exposure to hazardous substances found in consumer products.

2.3 For purposes of this Consent Judgment, Defendant employs ten (10) or more employees and is a person doing business in California for the purpose of Prop 65.

2.4 On or about February 8, 2014, Plaintiff served Defendant with a document entitled "60-Day Notice of Violation" under Prop 65 pursuant to Health & Safety Code § 25249.7(d) (the "Notice") alleging that Defendant was in violation of Prop 65.

2.5 The Notice alleges that Defendant manufactures, distributes, and/or sells in California certain plumbing products that expose consumers to lead and lead compounds without the requisite Prop 65 warnings, or has done so in the past, and that its conduct violates Health & Safety Code § 25249.6, the warning provisions of Prop 65.

2.6 On April 25, 2014, in the interest of the general public, Plaintiff filed a Complaint against Defendant in the above-captioned action alleging violation of Prop 65 with respect to the Covered Products.

2.7 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has jurisdiction over the allegations of violation contained in the Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint; (ii) venue is proper in the County of Los Angeles; and (iii) this Court has jurisdiction to enter this Consent Judgment.

2.8 The Parties enter into this Consent Judgment to resolve all claims of Prop 65 violations regarding lead and lead compounds in the Covered Products, based on the Notice and Complaint, up through the Effective Date of this agreement.

2.9 It is the Parties' intention that nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an

admission by the Parties of any fact, conclusion of law, issue of law, or violation of law.

2.10 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceedings, except as provided in this Consent Judgment.

3. Injunctive Relief – Product Labeling

3.1 On or before the Effective Date, to the extent it has not already done so, Defendant shall not ship or deliver for sale or distribution in California Covered Products that contain lead and/or lead compounds, unless such Covered Products are shipped or delivered with a clear and reasonable warning as described in Sections 3.2 and 3.3.

3.2 Each warning required by Section 3.1 shall be placed upon each unit of the Covered Products or its label or package, near the product name, price, or UPC code, in a manner reasonably calculated to be seen by the ordinary consumer.

3.3 Product labeling. The following language, with the capitalized, emboldened and italicized wording, or something in substantially similar form, shall be applied to each unit of the Covered Products in the manner described in Section 3.2:

> "**WARNING:** This product contains chemicals, including lead, known to the State of California to cause cancer, birth defects and other reproductive harm. ***Do not use in connection with drinking water. Wash hands after handling.***"

4. PAYMENTS

4.1 Civil Penalty. In settlement of all causes of action in Plaintiff's Complaint, Defendant shall pay a total civil penalty of Three Thousand Dollars ($3,000) to be allocated in accordance with California Health & Safety Code Sections 15249.12(c)(1) & (d), with seventy five percent (75%) of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining twenty five percent (25%) remitted to Plaintiff. Within five (5) business days of the Effective Date, Defendant shall issue two checks to satisfy the payment of the civil penalties; one check in the amount of Two Thousand Two Hundred Fifty Dollars ($2,250.00) made payable to OEHHA, and a second check in the amount of Seven Hundred Fifty Dollars ($750.00) made payable to "Law Offices of Lucas T. Novak in

Trust for Darren Kenny."

4.2 Reimbursement of Plaintiff's Fees and Costs. Defendant shall reimburse Plaintiff's reasonable experts' and attorneys' fees and costs incurred in prosecuting the instant action for all work performed through execution and entry of this Consent Judgment in the amount of twenty two thousand dollars ($22,000.00). Said payment shall be made in two (2) installments, as follows: Defendant shall remit the first installment of $11,000.00 within five (5) business days of the Effective Date, and Defendant shall remit the second installment of $11,000.00 within the next thirty-five (35) calendar days.

4.3 Payment Procedures. All payments shall be delivered to:

Lucas T. Novak, Esq.
LAW OFFICES OF LUCAS T. NOVAK
8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

5. <u>Claims Covered and Released</u>

5.1 Plaintiff's Release Of Defendant. Plaintiff, acting in his individual capacity, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, in consideration of the promises and monetary payments contained herein, hereby releases Defendant, and each of its parents, shareholders, directors, officers, employees, attorneys, and any and all successors and assigns ("Defendant Releasees"), all entities to whom it or they directly or indirectly distribute or sell, or have in the past directly or indirectly distributed or sold, Covered Products, including, but not limited to, distributors, wholesalers, customers, and retailers ("Downstream Defendant Releasees") from the claims asserted in Plaintiff's Complaint and the Notice regarding violation of Prop 65 with respect to the Covered Products up through the Effective Date.

5.2 Compliance. Compliance with the terms of this Consent Judgment constitutes compliance with Prop 65 with respect to the exposures to lead or lead compounds from the Covered Products.

5.3 General Release. Each of the Parties acknowledges that it is familiar with Section 1542 of California Civil Code which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

Each of the parties waives and relinquishes any right or benefit it has or may have under Section 1542 of California Civil Code or any similar provision under the statutory or non-statutory law of any other jurisdiction to the full extent that it may lawfully waive all such rights and benefits pertaining to the claims in this Consent Judgment. The Parties acknowledge that each may subsequently discover facts in addition to, or different from, those that it believes to be true with respect to the claims released herein. The Parties agree that this Consent Judgment and the releases contained herein shall be and remain effective in all respects notwithstanding the discovery of such additional or different facts.

5.4 Defendant's Release. On behalf of itself, Defendant Releasees, and Defendant Downstream Releasees, Defendant waives all rights to institute any form of action against Plaintiff, his past and current agents, representatives, attorneys, experts, successors, and/or assignees, for actions or statements made or undertaken, whether in the course of investigating claims or seeking enforcement of Prop 65 against Defendant in this matter.

6. <u>Entire Agreement</u>

6.1 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, or understandings related thereto, if any, are hereby merged herein and therein.

6.2 No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any party hereto.

6.3 No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the party to be bound thereby.

6.4 No waiver of any provision of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof, whether similar or not, nor shall such

waiver constitute a continuing waiver.

7. Governing Law and Application

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of California and shall apply only to Covered Products that are sold or offered for sale in the State of California.

7.2 This Consent Judgment shall apply to and be binding upon the Parties and their successors and assigns.

7.3 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

7.4 This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by the Parties and their counsel.

7.5 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any party as a result of the manner of the preparation of this Consent Judgment.

8. Provision of Notice

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

TO DEFENDANT:	TO PLAINTIFF:
Ronie M. Schmelz, Esq. EDWARDS WILDMAN PALMER LLP 1901 Avenue of the Stars, Suite 1700 Los Angeles, CA 90067	Lucas T. Novak, Esq. LAW OFFICES OF LUCAS T. NOVAK 8335 W Sunset Blvd., Suite 217 Los Angeles, CA 90069

9. Execution and Counterparts

This Consent Judgment may be executed in counterparts and by means of facsimile and/or portable document format (pdf), which taken together shall be deemed to constitute one document.

10. Compliance with Health and Safety Code Section 25249.7(f)

Plaintiff agrees to comply with the reporting form requirements referenced in California

Health and Safety Code Section 25249.7(f).

11. Court Approval

11.1 This Consent Judgment shall become effective upon entry by the Court.

11.2 Upon execution of this Consent Judgment by all Parties, Plaintiff shall file a noticed Motion for Approval & Entry of Consent Judgment in the above-entitled Court. This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void, and shall never be introduced into evidence or otherwise used in any proceeding for any purpose if, for any reason, it is not approved and entered by the Court within one (1) year after its full execution by all Parties. It is the intention of the Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such approval, the Parties and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement in a timely manner, including cooperating on drafting and filing any papers in support of the required motion for judicial approval.

12. Authorization

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 this Consent Judgment on behalf of the party represented and legally bind that party.

13. Severability

Subsequent to Court approval of this Consent Judgment, should any part or provision of this Consent Judgment or Prop 65, for any reason, be declared by the California legislature or a Court to be invalid, void, or unenforceable, the remaining portions and provisions shall continue in full force and effect.

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The undersigned have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

Except as explicitly provided herein, each party to bear his or its own fees and costs.

AGREED TO:

Date: September 5, 2014 Plaintiff Darren Kenny

By: _____

Darren Kenny

Date: September __, 2014 Defendant Apex Supply Company

By: _____

Its: _____

ORDER AND JUDGMENT

Based upon the Stipulated Consent Judgment between Plaintiff Darren Kenny, on the one hand, and Defendant Apex Supply Company, on the other hand, the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: _____ _____

Judge of the Los Angeles Superior Court

The undersigned have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

Except as explicitly provided herein, each party to bear his or its own fees and costs.

AGREED TO:

Date: September __, 2014 Plaintiff Darren Kenny

By: _____

Darren Kenny

Date: September 4, 2014 Defendant Apex Supply Company

By: _____

Its: Vice President

ORDER AND JUDGMENT

Based upon the Stipulated Consent Judgment between Plaintiff Darren Kenny, on the one hand, and Defendant Apex Supply Company, on the other hand, the settlement is approved and the clerk is directed to enter judgment in accordance with the terms herein.

Dated: _____ _____

Judge of the Los Angeles Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/17/14			DEPT. 17
HONORABLE Richard E. Rico	JUDGE	A. ORTIZ	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
12 C. ELLIS, C.A.	Deputy Sheriff	NONE	Reporter

8:31 am	BC543696 DARREN KENNY VS APEX SUPPLY COMPANY	Plaintiff Counsel Defendant Counsel	L. NOVAK, (X) R. SCHMETZ, (X)

NATURE OF PROCEEDINGS:

MOTION OF PLAINTIFF DARREN KENNY, TO APPROVE SETTLEMENT AND CONSENT JUGMENT

The matter is called for hearing on Plaintff Darren Kenny's motion to approve settlement and consent judgment.

The court reads and considers motion.

The motion is heard and argued.

The motion is GRANTED and the amount of attorney fees and costs of $22,000 is granted.
Further the court also notes tha while the motion is also brought pursuant to C.C.P. section 664.6, plaintiff has cited no relevant authority to show the C.C.P. section 664 has any applicability here in connetion with the type of relief sought.

All parties are in possession of the Court's tentative ruling. The Court's tentative ruling is deemed the order of the Court. A copy of said order is filed this date.

MINUTES ENTERED
12/17/14
COUNTY CLERK