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6 *Attorneys for Plaintiff, Evelyn Wimberley*

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NORTH COUNTY DIVISION
SAN DIEGO SUPERIOR COURT

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN DIEGO

10 UNLIMITED CIVIL JURISDICTION

11 EVELYN WIMBERLEY,)

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14 Plaintiff

17 and

18 THE HOME DEPOT INC.,)
19 INSTAFIRE INC.,)

20 AND DOES 1-25 INCLUSIVE)

21 Defendants.)
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CASE NO.:

37-2016-00038654-CU-NP-NC

[PROPOSED]

JUDGMENT APPROVING

PROP 65 STIPULATION AND

CONSENT JUDGMENT

(Cal. Health & Safety Code § 25249.6 et seq.)

Date: August 18, 2017

Time: 01:30PM

Dept. N-27

Hon. Jacqueline M. Stern

Action Filed: November 03, 2016

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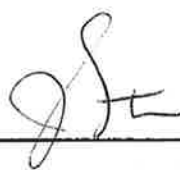
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In the above entitled action, Plaintiff, Evelyn Wimberley and Defendant Instafire Inc, having agreed through their respective counsel that judgment be entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a [Proposed] Consent Judgment entered into by the parties, and following issuance of an order approving this Proposition 65 settlement agreement and entering this Consent Judgment on Aug-23, 2017.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil Procedure §664.6, judgment is entered in accordance with the Consent Judgment attached hereto as Exhibit 1.

IT IS SO ORDERED.

Dated: 8/23/17



JUDGE OF THE SUPERIOR COURT
JACQUELINE M STERN

Exhibit No. 1

1 STEPHEN URE, ESQ.
2 LAW OFFICES OF STEPHEN URE, PC
3 11622 El Camino Real, Suite 100
4 San Diego, CA 92130
5 Telephone: 619-235-5400
6
7 Attorneys for Plaintiff Evelyn Wimberley

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,
11 Plaintiff,
12 v.
13 THE HOME DEPOT, Inc., et al.
14 Defendants,

Case No. 37-2016-00038654-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT INSTAFIRE, INC.**

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1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Evelyn
3 Wimberley acting on behalf of the public interest (hereinafter "Wimberley"), and InstaFire, Inc.
4 (hereinafter "InstaFire"), with Wimberley and InstaFire collectively referred to as the "Parties"
5 and each of them as a "Party." Wimberley is an individual residing in California who seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products.

8 1.2 **Allegations and Representations.** Wimberley alleges that InstaFire has offered
9 for sale in the State of California and has sold in California, charcoal starters that expose
10 individuals to carbon monoxide and soot, and that such sales have not been accompanied by
11 adequate Proposition 65 warnings. Carbon monoxide and soot are listed under Proposition 65 as
12 chemicals known to the State of California to cause cancer, birth defects or other reproductive
13 harm.

14 1.3 **Notices of Violation/Complaint.** On or about March 04, 2016, Wimberley served
15 InstaFire and various public enforcement agencies with a document entitled "60-Day Notice of
16 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that InstaFire
17 was in violation of Proposition 65 for failing to adequately warn consumers and customers that
18 the charcoal starter exposed users in California to carbon monoxide and soot. No public enforcer
19 diligently prosecuted the claims threatened in the Notice within sixty days plus service time
20 relative to the provision of the Notice to them by Wimberley, such that Wimberley filed a
21 Complaint in the matter as captioned above on November 3, 2016.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
23 has jurisdiction over InstaFire as to the allegations contained in the Complaint filed in this matter,
24 that venue is proper in the County of San Diego, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein and/or in the Notices.

1 1.5 InstaFire denies the material allegations contained in Wimberley's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
3 Judgment shall be construed as an admission by InstaFire of any fact, finding, issue of law, or
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
5 an admission by InstaFire of any fact, finding, conclusion, issue of law, or violation of law, such
6 being specifically denied by InstaFire. However, this section shall not diminish or otherwise
7 affect the obligations, responsibilities, and duties of InstaFire under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Complaint.** The term "Complaint" shall have the meaning given in Section 1.3.

10 2.2 **Covered Product.** The term "Covered Product" means InstaFire's InstaFire
11 Charcoal Starter that is sold in California.

12 2.3 **Effective Date.** The term "Effective Date" shall mean the date this Consent
13 Judgment is entered as a Judgment of the Court.

14 2.4 **Listed Chemicals:** The term "Listed Chemicals" shall mean carbon monoxide and
15 soot.

16 2.5 **Notice.** The term "Notice" shall have the meaning given in Section 1.3.

17 2.6 **Releasees.** The terms "Defendant Releasees" and "Downstream Defendant
18 Releasees" shall have the meanings given in Section 5.1.

19 2.7 **Execution Date.** The term "Execution Date" shall mean the date this Consent
20 Judgment is signed by the parties.

21 **3. INJUNCTIVE RELIEF: WARNINGS**

22 3.1 Commencing on the Effective Date, InstaFire shall not manufacture, sell to
23 Downstream Defendant Releasees, or ship for sale to Downstream Defendant Releasees in
24 California any Covered Product, unless the Covered Product is accompanied by the following
25 warning: "CALIFORNIA PROP 65 WARNING: Combustion (burning) of this product, like other
26 products including raw wood, produces carbon monoxide, soot, and other substances known by
27 the State of California to cause cancer, birth defects or reproductive harm."
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1 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
2 Covered Product's packaging, labeling, or instruction booklet. The warning shall be prominently
3 affixed to or printed on the packaging, labeling, or instruction booklet and displayed with such
4 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
5 read and understood by an ordinary individual under customary conditions of purchase or use. A
6 warning may be contained in the same section of the packaging, labeling, or instruction booklet
7 that states other safety warnings, if any, concerning the use of the product and shall be at least the
8 same size as those other safety warnings.

9 3.3 Nothing in this section will prevent InstaFire from modifying the warning set forth
10 in Section 3.1 to comply with future change in Proposition 65 requirements.

11 **4. MONETARY TERMS**

12 4.1 **Civil Penalty.** InstaFire shall pay a civil penalty of \$2,000.00 pursuant to Health
13 & Safety Code § 25249.7(b), to be apportioned in accordance with California Health & Safety
14 Code § 25192, with 75% of these funds remitted to the State of California's Office of
15 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
16 Wimberley, as provided by California Health & Safety Code § 25249.12(d).

17 4.2 **Attorney Fees.** InstaFire shall reimburse Wimberley's counsel for fees and costs,
18 incurred as a result of investigating, bringing this matter to InstaFire's attention, litigating,
19 negotiating, and obtaining judicial approval of a settlement in the public interest, pursuant to
20 Code of Civil Procedure § 1021.5, in an amount of \$43,000.00. Other than the payment required
21 hereunder, each side is to bear its own attorneys' fees and costs.

22 4.3 **Payment of Penalty.** InstaFire shall deliver to Wimberley's counsel via bank wire
23 the amount of \$2,000.00, representing the civil penalty in Section 4.1, by March 15, 2017
24 following receipt of a fully-executed copy of this Consent Judgment, and delivery instruction
25 information from Wimberley's counsel.

26 4.4 **Attorney's Fees Payment Schedule.** InstaFire shall deliver to Wimberley's
27 counsel via bank wire the amount of \$43,000.00 representing the attorney fees in Section 4.2, by
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1 March 15, 2017 following receipt of a fully-executed copy of this Consent Judgment, and
2 delivery instruction information from Wimberley's counsel. This Settlement will be null and void
3 if payments are not timely made.

4 **5. RELEASE OF ALL CLAIMS**

5 5.1 This Consent Judgment is a full, final, and binding resolution between Wimberley
6 acting in the public interest, and InstaFire, its parents, shareholders, divisions, subdivisions,
7 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
8 ("Defendant Releasees"), and all entities to whom they directly or indirectly distribute or sell
9 Covered Product, including but not limited to manufacturers, suppliers, distributors, wholesalers,
10 customers, licensors, licensees, retailers, franchisees, and cooperative members ("Downstream
11 Defendant Releasees"), of all claims for violations of Proposition 65 based on exposure to Listed
12 Chemicals from Covered Product as set forth in the Notice and herein, with respect to any
13 Covered Product manufactured, distributed, or sold by InstaFire prior to the Effective Date.
14 InstaFire, the Defendant Releasees and the Downstream Defendant Releasees are specifically
15 released of all claims for violations of Proposition 65 based on exposure to Listed Chemicals
16 from Covered Product with respect to any Covered Product manufactured, distributed, or sold by
17 InstaFire prior to the Effective Date. Compliance with the terms of this Consent Judgment
18 constitutes compliance with Proposition 65 with respect to the listed chemicals in Covered
19 Product. Covered Product already in the possession of Downstream Defendant Releasees is
20 exempt from the requirements of Section 3.1 above.

21 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
22 agents, representatives, attorneys, and successors and/or assignees, and not in her representative
23 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
24 legal action and releases any InstaFire, Defendant Releasees, and Downstream Defendant
25 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
26 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
27 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
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1 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
2 related to or arising from Covered Product manufactured distributed or sold by InstaFire or
3 Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
4 Wimberley hereby specifically waives any and all rights and benefits which she now has, or in the
5 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
6 Code, which provides as follows:
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8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
10 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
11 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
12 THE DEBTOR.

11 5.3 InstaFire waives any and all claims against Wimberley, her attorneys and other
12 representatives, for any and all actions taken or statements made (or those that could have been
13 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
14 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
15 matter, and/or with respect to Covered Product.

16 6. INTEGRATION

17 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
18 any and all prior negotiations and understandings related hereto shall be deemed to have been
19 merged within it. No representations or terms of agreement other than those contained herein
20 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

21 7. GOVERNING LAW

22 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
23 California and apply within the State of California. This Consent Judgment resolves any issue,
24 now or in the future, with the requirements of Proposition 65 with respect to alleged exposures to
25 Listed Chemicals arising from Covered Product. In the event that Proposition 65 is repealed or is
26 otherwise rendered inapplicable by reason of law generally, or as to Covered Product, then
27 InstaFire shall provide written notice to Wimberley of any asserted change in the law, and shall
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10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within twelve months after it has been fully executed by the Parties. In such case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30 days, any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed on its normal course.

10.3 If the Court approves this Consent Judgment and is reversed or vacated by an appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the trial court, and the case shall proceed on its normal course on the trial court's calendar.

11. **MODIFICATION**

11.1 This Consent Judgment may be modified only by further stipulation of the Parties and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12. **ENFORCEMENT OF CONSENT JUDGMENT**

12.1 Either Party may bring an action to enforce the terms of this Consent Judgment.

13. **ATTORNEY'S FEES**

13.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure § 2016, *et seq.*

13.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

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14. RETENTION OF JURISDICTION

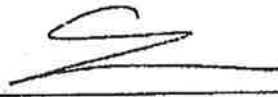
14.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

15. AUTHORIZATION


15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

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APPROVED AS TO FORM:


AGREED TO: Date: <u>MARCH 7</u> , 2017 By: <u></u> On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2017 By: _____ On Behalf of InstaFire Ethan T. Boyer Noonan Lance Boyer & Banach, LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO:	AGREED TO:
Date: <u>3/7/17</u>	Date: _____
By: <u></u> EVELYN WIMBERLEY	By: _____ Frank Weston InstaFire, Inc

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APPROVED AS TO FORM:

AGREED TO: Date: _____, 2017 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: <u>3/8</u> , 2017 By:  On Behalf of InstaFire Ethan T. Boyer Noonan Lance Boyer & Banach, LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____

By: _____

EVELYN WIMBERLEY

Frank Weston
InstaFire, Inc

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APPROVED AS TO FORM:

AGREED TO: Date : _____, 2017 By: _____ On Behalf of Evelyn Wimberley Stephen Ure, Law Offices of Stephen Ure, PC	AGREED TO: Date: _____, 2017 By: _____ On Behalf of InstaFire Ethan T. Boyer Noonan Lance Boyer & Banach, LLP
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IT IS HEREBY SO STIPULATED:

AGREED TO: Date: _____ By: _____ EVELYN WIMBERLEY	AGREED TO: Date: <u>3.3.2017</u> By: <u>[Signature]</u> Frank Weston InstaFire, Inc
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