

FILED
Superior Court of California
County of Los Angeles

JUN 06 2018

Sherril R. Carter, Executive Officer/Clerk
By *[Signature]*, Deputy
Oscar Chavez

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7 Attorney for Plaintiff, APS&EE, LLC

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10 APS&EE, LLC, a limited liability company,)
11)
12 Plaintiff,)
13)
14 v.)
15)
16 MIDWEST FASTENER CORP., a)
corporation, and DOES 1 through 100,)
inclusive,)
Defendants.)

CASE NO. BC697493

[PROPOSED] CONSENT JUDGMENT

Judge: Hon. Holly J. Fujie
Dept.: 56
Compl. Filed: March 12, 2018

Unlimited Jurisdiction

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1 **1. RECITALS**

2 **1.1 The Parties**

3 **1.1.1** This Consent Judgment (“Consent Judgment”) is entered into by and
4 between Plaintiff, APS&EE, LLC (“Plaintiff”) and Defendant, Midwest Fastener Corp.
5 (“Defendant”). Plaintiff and Defendant shall hereinafter collectively be referred to as the
6 “Parties.”

7 **1.1.2** Plaintiff is an organization based in California with an interest in
8 protecting the environment, improving human health and the health of ecosystems, and
9 supporting environmentally sound practices, which includes promoting awareness of exposure to
10 toxic chemicals and reducing exposure to hazardous substances found in consumer products.

11 **1.1.3** Defendant is a corporation and a person in the course of doing business as
12 the term is defined in California *Health & Safety Code* section 25249.6 et seq. (“Proposition
13 65”).

14 **1.2 Allegations**

15 Plaintiff has alleged that Defendant manufactured, distributed, sold, and/or offered to sell
16 in California galvanized nails, including, but not limited to, casing nails 8D 2-1/2”, and
17 galvanized anchor bolts, including, but not limited to, 1/2 -13 x 12, #09406 (hereinafter
18 collectively the “Product(s)”), causing users to be exposed to lead, without providing a clear and
19 reasonable warning required by Proposition 65. Lead is listed by the State of California as known
20 to cause cancer and birth defects or other reproductive harm.

21 On December 19, 2017, Plaintiff provided a Sixty-Day Notice of Violation (“60-Day
22 Notice”), including a Certificate of Merit, to Defendant, along with Orchard Supply Company,
23 LLC dba Orchard Supply Hardware, and the various public enforcement agencies regarding the
24 alleged violation of Proposition 65. Plaintiff, acting in the public interest, subsequently filed the
25 instant action in the Superior Court for the County of Los Angeles, alleging violations of
26 Proposition 65 (the “Complaint”).

27 **1.3 No Admissions**

28 Defendant denies all allegations in Plaintiff’s Notice and Complaint and maintains that

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1 the Products have been, and are, in compliance with all laws, and that Defendant has not violated
2 Proposition 65. This Consent Judgment shall not be construed as an admission of liability by
3 Defendant but to the contrary as a compromise of claims that are expressly contested and denied.
4 However, nothing in this section shall affect the Parties' obligations, duties, and responsibilities
5 under this Consent Judgment.

6 **1.4 Jurisdiction And Venue**

7 For purposes of this Consent Judgment only, the Parties stipulate that the above-entitled
8 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper
9 in Los Angeles County, and that this Court has jurisdiction to enter and enforce the provisions of
10 this Consent Judgment pursuant to California Code of Civil Procedure ("CCP") § 664.6 and
11 Proposition 65.

12 **1.5 Effective Date**

13 The "Effective Date" shall be five (5) days after Plaintiff's counsel provides written
14 notice to Defendant or its counsel that the Motion to Approve this Consent Judgment is approved
15 and entered by the Court.

16 **2. INJUNCTIVE RELIEF AND REFORMULATION**

17 **2.1 Reformulation Standard**

18 As of sixty (60) days after the Effective Date, and continuing thereafter, Defendant shall
19 not directly distribute or sell the Products to persons in California or to any retailer, distributor,
20 wholesaler, or person that it knows will sell or offer the Products for sale in California unless (a)
21 the galvanizing solution in which the Products are submerged has a lead content by weight of no
22 more than 100 parts per million (0.01%), or (b) the Product is distributed, sold, or offered for
23 sale with a clear and reasonable warning as described in Section 2.2.

24 **2.2 Proposition 65 Warnings**

25 **2.2.1** Whenever a clear and reasonable warning is required for Products under
26 Section 2.1, Defendant shall comply with 27 Cal. Code Regs. § 25601, et seq. (operative Aug.
27 30, 2018) and use the following Warning or Alternative Warning described below:

28 (a) **Warning.** The "Warning" shall consist of the statement:

6/23/2018

1 **⚠ WARNING:** This product can expose you to lead, which is known to
2 the State of California to cause cancer and birth defects or other
3 reproductive harm. For more information go to
 www.P65Warnings.ca.gov.

4 (b) **Alternative Warning.** Defendant may, but is not required to, use the alternative
5 short-form warning as shown below (“Alternative Warning”):

6 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

7 **2.2.2** Consistent with 27 Cal. Code Regs. § 25601, et seq. (operative Aug. 30,
8 2018), the Products shall carry said warning directly on each unit or its label, labeling, package,
9 shelf container or bin, with such conspicuousness as compared with other words, statements or
10 designs as to render it likely to be read and understood by an ordinary consumer prior to sale.

11 **2.2.3 Compliance with Warning Regulations.** Defendant shall be deemed to
12 be in compliance with the warning requirements of this Consent Judgment by either adhering to
13 Sections 2.2.1 and 2.2.2 of this Consent Judgment or by complying with warning requirements
14 adopted by OEHHA after the Effective Date that pertain to such products.

15 **2.3 Sell-through For Existing Inventory**

16 The injunctive requirements of Section 2 shall not apply to Products that were sold by
17 Defendant and in the stream of commerce prior to sixty (60) days after the Effective Date, which
18 Products are subject to the releases provided in Section 4.1.

19 **3. PAYMENTS**

20 **3.1 Civil Penalty Pursuant To Proposition 65**

21 In settlement of all causes of action in Plaintiff’s Complaint, Defendant shall pay a total
22 civil penalty of four thousand dollars (\$4,000.00) to be apportioned in accordance with *Health*
23 *and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$3,000.00) for State of California
24 Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25%
25 (\$1,000.00) for Plaintiff.

26 Defendant shall issue two (2) checks for the civil penalty: (1) a check or money order
27 made payable to “OEHHA” in the amount of \$3,000.00; and (2) a check or money order made
28 made payable to “OEHHA” in the amount of \$3,000.00; and (2) a check or money order made

1 payable to "Law Offices of Lucas T. Novak" in the amount of \$1,000.00. Defendant shall remit
2 the payments within five (5) business days of the Effective Date, to:

3 Lucas T. Novak, Esq.
4 LAW OFFICES OF LUCAS T. NOVAK
5 8335 W Sunset Blvd., Suite 217
6 Los Angeles, CA 90069

6 **3.2 Reimbursement Of Plaintiff's Fees And Costs**

7 Defendant shall reimburse Plaintiff's reasonable experts' and attorney's fees and costs
8 incurred in prosecuting the instant action, for all work performed through execution of this
9 agreement and entry of this Consent Judgment. Accordingly, Defendant shall issue a check or
10 money order made payable to "Law Offices of Lucas T. Novak" in the amount of twenty-three
11 thousand five hundred dollars (\$23,500.00). Defendant shall remit the payment within five (5)
12 business days of the Effective Date, to:

13 Lucas T. Novak, Esq.
14 LAW OFFICES OF LUCAS T. NOVAK
15 8335 W Sunset Blvd., Suite 217
16 Los Angeles, CA 90069

16 Other than the payment required hereunder, each Party is to bear its own attorneys' fees and
17 costs.

18 **4. RELEASES**

19 **4.1 Plaintiff's Release Of Proposition 65 Claims Against Defendant**

20 Plaintiff, acting in its individual capacity, and in the public interest, in consideration of
21 the promises and monetary payments contained herein, hereby releases Defendant, its parents,
22 subsidiaries, affiliates, divisions, shareholders, directors, members, officers, employees,
23 representatives, agents, attorneys, and their predecessors, successors and assignees ("Defendant
24 Releasees"), as well as all entities to whom Defendant Releasees directly or indirectly distribute
25 or sell the Products, including but not limited to manufacturers, suppliers, distributors,
26 wholesalers, customers, licensors, licensees, franchisees, cooperative members, and retailers,
27 including without limitation Orchard Supply Company, LLC dba Orchard Supply Hardware and
28 its respective parents, affiliates and subsidiaries, shareholders, directors, officers, agents,

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1 employees, attorneys, successors and assignees, franchisees, cooperative members and licensees
2 (all collectively, including Defendant Releasees, "Released Parties"), from any claims or
3 allegations of violation arising under Proposition 65 pertaining to the failure to warn about
4 exposures to Lead from the Products that Defendant has sold or distributed for sale in California
5 prior to sixty (60) days after the Effective Date. Compliance with the terms of this Consent
6 Judgment constitutes compliance with Proposition 65 with regard to the Products.

7 **4.2 Defendant's Release Of Plaintiff**

8 Defendant, and on behalf of all of the other Released Parties, by this Consent Judgment,
9 waives all rights to institute any form of legal action against Plaintiff, its shareholders, directors,
10 members, officers, employees, attorneys, experts, successors and assignees for actions or
11 statements made or undertaken, whether in the course of investigating claims or seeking
12 enforcement of Proposition 65 against Defendant in this matter.

13 **4.3 Waiver Of Unknown Claims**

14 Each of the Parties acknowledges that it is familiar with California Civil Code § 1542
15 which provides:

16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
17 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
18 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
19 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

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

27 **5. COURT APPROVAL**

28 Upon execution of this Consent Judgment by all Parties, Plaintiff shall file a noticed

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1 Motion for Approval and Entry of Consent Judgment in the above-entitled Court. This Consent
2 Judgment is not effective until it is approved and entered by the Court. It is the intention of the
3 Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such
4 approval, the Parties and their respective counsel agree to mutually employ their best efforts to
5 support the entry of this agreement in a timely manner, including cooperating on drafting and
6 filing any papers in support of the required motion for judicial approval.

7 **6. SEVERABILITY**

8 Should any part or provision of this Consent Judgment for any reason be declared by a
9 Court to be invalid, void or unenforceable, the remaining portions and provisions shall continue
10 in full force and effect.

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
14 reason of law generally or as to the Products, then Defendant shall have no further obligations
15 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so
16 affected.

17 **8. NOTICES**

18 All correspondence and notices required to be provided under this Consent Judgment
19 shall be in writing and delivered personally or sent by first class or certified mail addressed as
20 follows:

21 **TO DEFENDANT:**

22 Bryan Kleyn
23 Midwest Fastener Corp
24 9031 Shaver Road
Portage, MI 49024-6164

TO PLAINTIFF:

Lucas T. Novak
Law Offices of Lucas T. Novak
8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

25 **9. INTEGRATION**

26 This Consent Judgment constitutes the entire agreement between the parties with respect
27 to the subject matter hereof and may not be amended or modified except in writing.

28 **10. COUNTERPARTS**

07/28/2018


1 This Consent Judgment may be executed in counterparts, each of which shall be deemed
2 an original, and all of which, when taken together, shall constitute the same document.
3 Execution and delivery of this Consent Judgment by email, facsimile, or other electronic means
4 shall constitute legal and binding execution and delivery. Any photocopy of the executed
5 Consent Judgment shall have the same force and effect as the originals.

6 **11. AUTHORIZATION**

7 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties. Each Party has read, understood, and agrees to all of the terms and conditions
9 of this Consent Judgment. Each Party warrants to the other that it is free to enter into this
10 Consent Judgment and not subject to any conflicting obligation that will or might prevent or
11 interfere with the execution or performance of this Consent Judgment by said party.

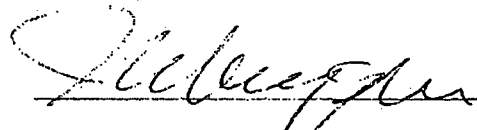
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13 **AGREED TO:**

14 Date: 3-12-18

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16 By: 
17 Authorized Officer of Midwest Fastener Corp.

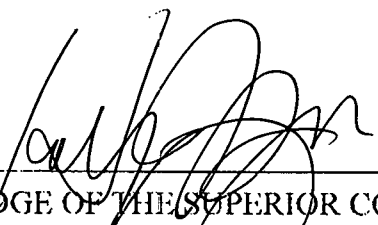
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19 **AGREED TO:**

20 Date: 3/12/18

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22 By: 
23 Authorized Officer of APS&EE, LLC

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25 **IT IS SO ORDERED.**

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27 Dated: 6-6-18


JUDGE OF THE SUPERIOR COURT
JUDGE HOLLY J. FUJIE

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