

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Evelyn Wimberley and Lowe's HIW, Inc.

This Settlement Agreement is entered into by and between Evelyn Wimberley (hereinafter "Wimberley"), on the one hand, and Lowe's HIW, Inc. (hereinafter "Lowe's"), with Wimberley and Lowe's collectively referred to as the "Parties." Wimberley is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Wimberley contends that Lowe's is a company in the course of doing business for purposes of Proposition 65.

1.2 General Allegations

Wimberley alleges that Lowe's distributed and/or sold in the State of California Task Force Replacement Flints containing lead and that such sales have not included warnings pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.* ("Proposition 65"). Lead is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive harm.

1.3 Product Description

The products that are covered by this Settlement Agreement are defined as Task Force Replacement Flints containing lead, including but not limited to Task Force Replacement Flints. All such items shall be referred to herein as the "Products."

1.4 Notice of Violation

On or about January 31, 2011, Wimberley served Lowe's, and all public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People of the State of California with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Lowe's and such public enforcers with notice that alleged that Lowe's was in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in California to lead. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission

Lowe's denies the material factual and legal allegations contained in Wimberley's Notice and maintains that all products that it has sold and distributed in California, including the Products, have been and are in compliance with Proposition 65 and all other applicable laws. Nothing in this Settlement Agreement shall be construed as an admission by Lowe's of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Lowe's of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Lowe's. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Lowe's under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Settlement Agreement is fully executed.

2. INJUNCTIVE RELIEF: WARNINGS

2.1 **Warnings.** The Products shall be accompanied by a warning as described in Section 2.2 below. The warning requirements set forth in Section 2.2 below shall apply only to Products that Lowe's offers for sale one hundred eighty (180) days after the Effective Date that are distributed, marketed, sold or shipped for sale or use inside the State of California. The warning requirement shall not apply to Products that are already in the stream of commerce as of the Effective Date.

2.2 Where required under Section 2.1 above, Lowe's shall provide Proposition 65 warnings as follows:

- (a) Lowe's may use either of the following warning statements:
- (1) **WARNING:** This product contains lead, a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

or, where Lowe's has reason to believe that one or more chemicals listed under Proposition 65 are present in a Product,

PROP 65 WARNING: This product contains one or more chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. Wash hands after handling.

(b) The requirements for warnings, set forth in subsection (a) above are imposed pursuant to the terms of this Settlement Agreement. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations.

(c) If Proposition 65 warnings for lead or lead compounds should no longer be required, Lowe's shall have no further obligations pursuant to this Settlement Agreement. In the event that Lowe's ceases to implement or modifies the

warnings required under this Settlement Agreement (because of a change in the law or otherwise), Lowe's shall provide written notice to Wimberley (through counsel) of its intent to do so, and of the basis for its intent, no less than thirty (30) days in advance.

3. **PAYMENT IN LIEU OF PENALTIES PURSUANT TO HEALTH & SAFETY
CODE §25249.7(b)**

In lieu of civil penalties and in settlement of all claims that have been threatened or could be raised with respect to failure to warn pursuant to Proposition 65 with regard to lead in the Products, Lowe's shall cause \$500.00 to be paid in the name of Evelyn Wimberley to the California Office of Environmental Health Hazard Assessment ("OEHHA"). Wimberley shall mail or cause to have mailed this payment in Wimberley's name within thirty days following the Effective Date.

4. **REIMBURSEMENT OF FEES AND COSTS**

The Parties reached an accord on the compensation due to Wimberley and her counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Lowe's shall cause Wimberley's counsel to be reimbursed for fees and costs, incurred as a result of investigating, bringing this matter to Lowe's attention, and negotiating a settlement in the public interest. Lowe's shall cause Wimberley's counsel to be paid \$12,000 for all attorneys' fees, expert and investigation fees, and related costs associated with this matter and the Notice. In order to satisfy the payments in Section 3 and this section, Lowe's shall forward a check in the amount of \$12,500 to the "Law Offices of Stephen Ure" on or before March 15, 2012, which will be deposited into the trust account of Wimberley's attorney. Other than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

5. **RELEASE OF ALL CLAIMS**

5.1 **Release of Lowe's and Upstream Suppliers and Downstream Customers**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Lowe's and each of its upstream and downstream suppliers, distributors, wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, and their respective parent companies, corporate affiliates, subsidiaries, and each of their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This release is limited to those claims that arise under Proposition 65, as such claims relate to Lowe's or the Releasees' alleged failure to warn about exposures to or identification of lead contained in the Products.

Wimberley also, in her individual capacity, on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees and *not* in her representative capacity, provides a general release herein which shall be effective as a full and final accord and

satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, against Lowe's and the Releasees arising under Proposition 65, as such claims relate to Lowe's and the Releasees' alleged failure to warn under Proposition 65 about exposures to or identification of lead contained in the Products sold by Lowe's and the Releasees. Wimberley acknowledges that she is familiar with Section 1542 of the 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.

Plaintiff, in her individual capacity only and *not* in her representative capacity, and on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which she may have under, or which may be conferred on her by the provisions of Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that she may lawfully waive such rights or benefits pertaining to the released matters.

Compliance with the terms of this Settlement Agreement resolves any issue, now and in the future, concerning compliance by Lowe's and the Releasees with the requirements of Proposition 65 with respect to alleged exposure to lead in the Products.

The Parties intend and agree that this Settlement Agreement shall be given full effect for purposes of precluding claims regarding the Products against Lowe's and the Releasees under Proposition 65 as covered under this release. If requested in writing by Lowe's or the Releasees,

Wimberley shall file a complaint and seek approval of this Settlement Agreement through a court approved consent judgment incorporating the terms of this Settlement Agreement pursuant to California Health and Safety Code Section 25249.7, or as may be otherwise allowed by law, and Wimberley shall reasonably cooperate with Lowe's and the Releasees and use her best efforts and that of her counsel to support the entry of a consent judgment incorporating the terms of this Settlement Agreement for approval by a superior court in California.

5.2 Lowe's Release of Wimberley

Lowe's waives any and all claims against Wimberley, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Wimberley and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

Lowe's acknowledges that it is familiar with Section 1542 of the 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.

Lowe's on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

6. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Lowe's shall provide written notice to Wimberley of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement.

7. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the other party at the following addresses:

For Lowe's:

Charles D. May, Esq.
Tharpe & Howell, LLP
15250 Ventura Boulevard, 9th Floor
Sherman Oaks, CA 91403

With a copy to:

Donald Ornelas Jr., Esq.
Agajanian, McFall, Weiss, Tetreault & Crist LLP
346 N. Larchmont Blvd.
Los Angeles, CA 90004

And

For Wimberley:

Mr. Stephen Ure
Law Offices of Stephen Ure, PC.
1518 Sixth Avenue
San Diego, California 92101

Any party, from time to time, may specify in writing to the other party a change of address to which all notices and other communications shall be sent.

8. **COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

9. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Wimberley agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

10. **COURT APPROVAL**



Notwithstanding Section 1.6, the Consent Judgment is not 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 one year after it has been fully executed by all Parties. If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to (and jointly agree on) whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the trial court's calendar, and any monies that have been provided to Plaintiff, or her counsel, pursuant Section 3 and/or Section 4 above, shall be refunded within thirty (30) days of Lowe's providing written notice thereof. In the event that this Consent Judgment is entered by the Court and subsequently overturned by any appellate court, any monies that have been provided to Plaintiff, or her counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen (15) days of the appellate decision becoming final. If the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and confer as to (and jointly agree on) whether to modify the terms of the Consent Judgment. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the trial court's calendar.

11. **MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>March 9</u>, 2012</p> <p>By: </p> <p>On Behalf of Evelyn Wimberley</p>	<p style="text-align: center;">AGREED TO:</p> <p>Date: <u>March 12</u>, 2012</p> <p>By: </p> <p>On Behalf of Lowe's HIW, Inc.</p>
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