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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF LOS ANGELES
9 CENTRAL DISTRICT

10 AFS ENTERPRISES, LLC,

11 Plaintiff,

12 vs.

13 LDR Industries Inc.,

14 Defendant

) Case No.: BC515013

) Unlimited Jurisdiction

) *Honorable William F. Fahey*
) *Department 69*

) **[PROPOSED] CONSENT JUDGMENT**

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16
17 **1. DEFINITIONS**

18 The products covered by this Consent Judgment shall be designated "Covered
19 Products." The Covered Products are LDR Industries Inc. pop-up drain assemblies.

20 The term "Effective Date" means the date this Consent Judgment is approved by the
21 Superior Court of the State of California, County of Los Angeles – Central District.

22 The term "Listed Chemical" means lead and lead compounds.

23 The term "Parties" means Plaintiff AFS Enterprises, LLC ("AFS") and Defendant LDR
24 Industries Inc. ("LDR")

25 **2. INTRODUCTION**

26 This Consent Judgment is entered into by and between Plaintiff AFS and Defendant
27 LDR. AFS and LDR are collectively referred to as the "Parties."

28 AFS is a company residing in California who is acting as a private enforcer pursuant to

1 California Health & Safety Code § 25249.7(d).

2 For purposes of this Consent Judgment, LDR employs 10 or more persons and is a person
3 doing business in California for the purpose of Proposition 65.

4 On or about March 22, 2013, AFS served LDR, Orchard Supply Hardware (“OSH”) and
5 various public enforcement agencies with a document entitled “60-Day Notice of Violation”
6 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that LDR and OSH were
7 in violation of Proposition 65.

8 AFS’s Notice alleges that LDR and OSH have manufactured, distributed, and/or offered
9 for sale in California certain plumbing accessories that expose consumers to lead and lead
10 compounds without the requisite Proposition 65 warnings.

11 Lead and lead compounds (the “Listed Chemical”) are listed pursuant to Proposition 65
12 as a chemical known to the State of California to cause cancer, birth defects and other
13 reproductive harm.

14 The Notice alleges that LDR’s and OSH’s conduct violates Health & Safety Code
15 §25249.6, the warning provision of Proposition 65.

16 On July 12, 2013, Plaintiff filed the action entitled AFS ENTERPRISES LLC VS LDR
17 INDUSTRIES Case No. BC515013, alleging violations of Proposition 65.

18 LDR denies the material, factual, and legal allegations contained in the Notice and
19 Complaint, and maintains that all products sold, distributed, or offered for sale in California have
20 been and are in compliance with all laws, including, without limitation, Proposition 65.

21 The Parties enter into this Consent Judgment to resolve all Proposition 65 claims
22 concerning LDR’s products set forth in AFS’s Notice and all Proposition 65 claims set forth in
23 Plaintiff’s Complaint, including claims against LDR’s customer, OSH. By executing this
24 Consent Judgment, the Parties do not admit any facts or conclusions or law.

25 It is the Parties’ intent that nothing in this Consent Judgment shall be construed as an
26 admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor
27 shall compliance with the Consent Judgment constitute or be construed as an admission by the
28

1 Parties of any fact, conclusion of law, issue of law, or violation of law.

2 Upon approval of this Consent Judgment, the Parties waive their respective rights to a
3 hearing or a trial on the allegations of the Complaint.

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

7 **3. INJUNCTIVE RELIEF**

8 Consumers come into contact with the covered Products and potential exposure when
9 they install or repair the Covered Products.

10 Accordingly, Products that are shipped by LDR for sale or for use in California on or after
11 180 days after the Effective Date shall include a warning as provided below.

12 Product Labeling. The following warning statement shall be applied to the Products:

13 “WARNING: This product contains [one or more] chemicals, including lead, known to
14 the State of California to cause cancer, and birth defects or other reproductive harm.
15 Wash hands after handling” [(California law requires this warning to be given to
16 customers in the State of California.)]

17 Bracketed language may be omitted at LDR's option. LDR may add additional listed
18 chemicals to the warning unless the Attorney General advised that the inclusion of such
19 additional chemicals would render the warning misleading or constitute over warning.
20

21 **4. SETTLEMENT PAYMENTS**

22 **4.1 Civil Penalty**

23 LDR shall pay a total civil penalty payment of \$8,000, within ten (10) days of the
24 Execution Date, as follows: the civil penalty shall be apportioned in accordance with California
25 Health & Safety Code § 25249.12 (c) and (d), with 75% of these funds remitted to the State of
26 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the
27 remaining 25% of the penalty remitted to AFS, both pursuant to the procedures set forth in
28 Section 4.3.

1 **4.2 Reimbursement of AFS's Fees and Costs**

2 The parties acknowledge that AFS and its counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this
4 fee issue to be resolved after the material terms of the agreement had been settled. LDR
5 expressed a desire to resolve the fee and cost issue after the other settlement terms had been
6 agreed. The Parties then attempted to (and did) reach an accord on the compensation due to
7 AFS and its counsel under general contract principles and the private attorney general doctrine
8 codified at California Code of Civil Procedure § 1021.5, for all work performed in this matter,
9 except fees that may be incurred on appeal. Under these legal principles, LDR shall pay the
10 amount of \$14,500 for fees and costs incurred investigating, litigating and enforcing this matter,
11 including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and
12 obtaining approval of this Settlement Agreement in the public interest.
13

14 **4.3 Payment Procedures**

15 All payments required by Sections 4.1 and 4.2 shall be within ten (10) days of the
16 Execution Date, in three checks made payable as follows:

- 17 (a) one check to "OEHHA" in the amount of \$6,000;
18 (b) one check to "Law Office of Daniel N. Greenbaum in Trust for AFS Enterprises,
19 LLC" in the amount of \$2,000;
20 (c) one check to "Law Office of Daniel N. Greenbaum" in the amount of \$14,500.

21 **4.4 Issuance of 1099 Forms**

22 LDR shall issue separate 1099 forms, as follows:

- 23 (a) one 1099 form to the "Office of Environmental Health Hazard Assessment" (EIN:
24 68-0284486) in the amount of \$6,000;
25 (b) a second 1099 form to "AFS Enterprises, LLC" in the amount of \$2,000, whose
26 address and tax identification number shall be furnished to defendant at the time
27 this settlement is executed.
28 (c) a third 1099 to "Law Office of Daniel N. Greenbaum" (EIN: 45-3084082) in the

1 amount of \$14,500.

2 **4.5 Issuance of Payments.**

3 **4.5.1** All payments owed to AFS, pursuant to Section 4.1, shall be delivered to
4 the following payment address:

5
6 Daniel N. Greenbaum, Esq.
7 Law Office of Daniel N. Greenbaum
8 1467 South Holt Avenue #2
9 Los Angeles, CA 90035

10 **4.5.2** All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section
11 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following
12 addresses:

13 Mike Gyrics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
17 Sacramento, CA 95812-4010

18 With a copy of the checks payable to OEHHA mailed to the Law Office of Daniel N. Greenbaum
19 at the address set forth above in 4.5.1, as proof of payment to OEHHA.

20 **5. CLAIMS COVERED AND RELEASED**

21 This Consent Judgment is a full, final, and binding resolution between AFS on behalf
22 of itself, its past and current attorneys, agents, representatives, successors, assigns, and any
23 other person acting in the public interest pursuant to Health & Safety Code § 25249.7(d) on
24 the one hand; and LDR, and its parents, shareholders, divisions, subdivisions, subsidiaries,
25 partners, sister companies, and affiliates, and their successors and assigns ("Defendant
26 Releasees"), all entities to whom they directly or indirectly distribute or sell or have in the past
27 directly or indirectly distributed or sold Covered Products, including but not limited to
28 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and
Defendant Releasees' licensors and licensees, including but not limited to OSH ("Downstream

1 Defendant Releasees”), on the other hand; regarding any violation of Proposition 65 or the
2 Unfair Competition Act that was or could have been asserted against LDR, Defendant
3 Releasees, and Downstream Defendant Releasees, with respect to the failure to warn about
4 any Covered Products manufactured, shipped, distributed or sold by LDR, Defendant
5 Releasees or Downstream Defendant Releasees prior to the Effective Date. The Parties
6 further understand and agree that this release shall not extend upstream to any entities that
7 manufactured the Covered Products or any component parts thereof for LDR or to any
8 distributors or suppliers who sold the Covered Products or any component parts thereof to
9 LDR.

10 In further consideration of the promises and agreements herein contained, the injunctive
11 relief commitments set forth in Section 3, and for the payments to be made pursuant to Section 4,
12 AFS, on behalf of itself, its past and current agents, representatives, attorneys, including but not
13 limited to the Daniel Greenbaum, Esq., successors, and/or assignees, hereby waives all rights to
14 institute or participate in, directly or indirectly, any form of legal action and releases all claims,
15 including, without limitation, all actions, and causes of action, in law or in equity, suits,
16 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,
17 but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever,
18 whether known or unknown, fixed, or contingent (collectively "Claims") that were brought or
19 could have been brought against LDR, the Defendant Releasees, and the Downstream Defendant
20 Releasees based on claims arising under Proposition 65 with respect to Listed Chemicals in the
21 Covered Products, as such claims relate to the alleged failure to warn under Health & Safety
22 Code Section 25249.6.

24 In furtherance of the foregoing, AFS on its own behalf hereby waives any and all rights
25 and benefits which it now has, or in the future may have respecting the Covered Products,
26 conferred upon it with respect to claims involving Covered Products by virtue of the provisions
27 of Section 1542 of the California Civil Code, which provides as follows:
28

1 "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
2 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
3 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
4 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
5 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
6 WITH THE DEBTOR."

7 By executing this Consent Judgment, AFS understands and acknowledges that the
8 significance and consequence of this waiver of California Civil Code Section 1542 is that even if
9 AFS suffers future damages arising out of or resulting from, or related directly or indirectly to, in
10 whole or in part, the Covered Products, including but not limited to any exposure to, or failure to
11 warn with respect to exposure to lead or lead compounds from, the Covered Products, AFS will
12 not be able to make any claim for those damages against LDR, Defendant Releasees, and all
13 Downstream Defendant Releasees, and the successors and assigns of any of them, who may
14 manufacture, use, maintain, distribute, retail or sell the Covered Products. Furthermore, AFS
15 acknowledges that it intends these consequences for any such claims and any other claims which
16 may exist as of the date of this release pertaining to the Covered Products listed in the Notice but
17 which AFS does not know exist, and which, if known, would materially affect its decision to
18 enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of
19 ignorance, oversight, error, negligence, or any other cause.

20 On behalf of itself and Defendant Releasees, LDR waives all rights to institute any form of
21 action against AFS, its attorneys, consultants, and representatives for all actions taken or
22 statements made in the course of this Action prior to the date of the execution of this Consent
23 Judgment.

24 Compliance with the terms of this Consent Judgment by LDR resolves any issue, now
25 and in the future, raised by the parties to this Consent Judgment or any other person suing in
26 the public interest pursuant to § 25249.7(d) concerning compliance by LDR, the Defendant
27 Releasees, and the Downstream Defendant Releasees with the requirements of with
28 Proposition 65 with respect to lead and lead compounds in any Covered Products that are

1 manufactured, shipped, or sold by LDR, the Defendant Releasees, or the Downstream
2 Defendant Releasees following the Effective Date.

3 For avoidance of doubt, the Parties expressly state that OSH is a third-party beneficiary
4 of this Section 5.

5 **6. ENFORCEMENT**

6 Any Party may file suit to enforce the terms and conditions contained in this Consent
7 Judgment, as provided in this paragraph. A Party may enforce any of the terms and conditions of
8 this Consent Judgment only after that Party first provides 30 days written notice to the Party
9 allegedly failing to comply with the terms and conditions of this Consent Judgment and attempts
10 to resolve such Party's failure to comply in an open and good faith manner. The Parties agree
11 that the requirements of this paragraph shall also apply to any alleged failures to comply with the
12 terms and conditions of this Consent Judgment by Downstream Defendant Releasees, in which
13 case notice of such alleged failures shall be given to LDR.

14 **7. MODIFICATION**

15 This Consent Judgment may be modified from time to time by express written agreement
16 of the Parties, with the approval of the Court, or by an order of this Court upon motion and in
17 accordance with law. A Party seeking to modify this Consent Judgment shall attempt in good
18 faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent
19 Judgment. The Attorney General shall be served with notice of any proposed modification to
20 this Consent Judgment at least fifteen (15) days in advance of its consideration by the Court.

21 **8. ENTIRE AGREEMENT**

22 This Consent Judgment contains the sole and entire agreement and understanding of the
23 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
25 and therein. No representations, oral or otherwise, express or implied, other than those
26 specifically referred to in this Consent Judgment have been made by any Party hereto. No
27 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
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1 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
2 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
3 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

4 **9. GOVERNING LAW AND APPLICATION**

5 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and shall apply only to Covered Products that are sold or offered for sale in the State
7 of California. In the event that Proposition 65 is repealed, preempted, or otherwise rendered
8 inapplicable by reason of law generally, or as to the Covered Products, then LDR shall have no
9 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
10 Covered Products are so effected.

11 This Consent Judgment shall apply to and be binding upon AFS and LDR and its
12 divisions, subdivisions, and subsidiaries, and the Parties' successors and assigns.

13 The Parties, including their counsel, have participated in the preparation of this Consent
14 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
15 Consent Judgment was subject to revision and modification by the Parties and has been
16 accepted and approved as to its final form by all Parties and their counsel.

17 *Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be*
18 *interpreted against any Party as a result of the manner of the preparation of this Consent*
19 *Judgment.*

20 **10. PROVISION OF NOTICE**

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

23 For AFS:

24 Daniel Greenbaum, Esq., 1467 South Holt Ave. #2, Los Angeles, CA 90035

25 For LDR:

26 Nathan Metcalf, Hanson Bridgett, LLP, 425 Market Street, 26th Floor, San Francisco, CA 94105
27
28

1 **11. ATTORNEY'S FEES**

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

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

9 **12. EXECUTION AND COUNTERPARTS**

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

13 **14. COMPLIANCE WITH HEALTH AND SAFETY CODE § 25249.7(t)**

14 AFS agrees to comply with the reporting form requirements referenced in California
15 Health and Safety Code § 25249.7(f).

16 **15. COURT APPROVAL**

17 This Consent Judgment shall become effective upon entry by the Court. Plaintiff shall
18 prepare and file a Motion for Approval of this Consent Judgment and Defendant LDR shall
19 support entry of this Consent Judgment.

20 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and
21 shall never be introduced into evidence or otherwise used in any proceeding for any purpose
22 other than to allow the Court to determine if there was a material breach of the previous section.

23 **16. AUTHORIZATION**

24 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
25 party he or she represents to stipulate to this Consent Judgment and to enter into and execute the
26 Consent Judgment on behalf of the party represented and legally bind that party.
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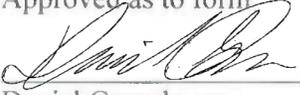
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The undersigned have read, understand and agree to all of the terms and conditions of this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

AGREED TO: Dated:



AFS Enterprises LLC

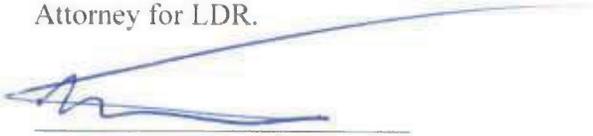
Approved as to form


Daniel Greenbaum.

Dated:
12/2/13

LDR Industries . Inc.
By:


David Pollans, V.P. Finance

Approved as to form.
Attorney for LDR.


Nathan Metcalf.