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SUSAN DAVIA

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

SUSAN DAVIA,
Plaintiff,
v.
APEX TOOL GROUP LLC, ACE
HARDWARE CORPORATION and
DOES 1-150,
Defendants.

Case No. CIV 1600147

**CONSENT TO JUDGMENT AS TO
DEFENDANT APEX TOOL GROUP, LLC**

1
2 **1. INTRODUCTION**

3 **1.1 The Parties**

4 This Consent to Judgment (“Consent Judgment”) is entered into by and between Plaintiff
5 Susan Davia, (“Davia” or “Plaintiff”) and Defendant Apex Tool Group, LLC (hereafter “Apex”) with
6 Davia and Apex collectively referred to as the “Parties.”

7 **1.2 Plaintiff**

8 Davia is an individual residing in the State of California who seeks to promote awareness of
9 exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Defendant**

12 Apex Tool Group, LLC employs 10 or more persons and each is a person in the course of
13 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Davia alleges that Apex manufactured, distributed and/or sold, in the State of California,
17 certain types of crimpers with vinyl grips comprised of or made with components that exposed users
18 to DEHP without first providing any “clear and reasonable warning” under Proposition 65. DEHP
19 is listed as a reproductive and developmental toxicant pursuant to Proposition 65. DEHP shall be
20 hereafter be referred to as “Listed Chemical.”

21 **1.5 Notice of Violation**

22 On October 20, 2015, Davia served Apex and various public enforcement agencies with valid
23 and compliant Proposition 65 sixty-day notice of violation (“Notice”), together with valid, requisite
24 Certificate of Merit that provided public enforcers and these entities with notice of alleged violations
25 of Health & Safety Code § 25249.6 for failing to warn consumers of the presence of the DEHP in and
26 on their crimpers with vinyl grip products sold in California.

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1 Apex received the Notice. Apex represents that, as of the date it executes this Consent
2 Judgment, it believes that no public enforcer is diligently prosecuting a Proposition 65 enforcement
3 action related to the Listed Chemical in the covered products, as identified in the Notice.

4 **1.6 Complaint**

5 On January 13, 2016, Davia, acting, in the interest of the general public in California, filed a
6 Complaint in the Superior Court of the State of California for the County of Marin, Case No. CIV
7 1600147, alleging violations by Apex Tool Group, LLC, Ace Hardware Corporation and Does 1-150
8 of Health & Safety Code § 25249.6 based, *inter alia*, on the alleged exposures to the Listed Chemical
9 contained in certain crimpers with vinyl grip products (the “Action”).

10 **1.7 No Admission**

11 This Consent Judgment resolves claims that are denied and disputed by Apex. The Parties
12 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between
13 the Parties for the purpose of avoiding prolonged litigation. Apex denies the material factual and
14 legal allegations contained in the Notice and Action, maintains that it did not knowingly or
15 intentionally expose California consumers to the Listed Chemical through the reasonably foreseeable
16 use of the Covered Product and otherwise contends that all Covered products it has manufactured,
17 distributed and/or sold in California have been and are in compliance with all applicable laws.
18 Nothing in this Consent Judgment shall be construed as an admission by Apex of any fact, finding,
19 issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be
20 construed as an admission by Apex of any fact, finding, conclusion, issue of law, or violation of law,
21 such being specifically denied by Apex. However, notwithstanding the foregoing, this section shall
22 not diminish or otherwise affect Apex’s obligations, responsibilities, and duties under this Consent
23 Judgment.

24 **1.8 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Apex as to the allegations contained in the Complaint, that venue is proper in
27 County of Marin, and that this Court has jurisdiction to enter and enforce the provisions of this
28 Consent Judgment.

1 **2. DEFINITIONS**

2 **2.1** The term “Complaint” means the Superior Court of the State of California, County of
3 Marin, Civil Case No. CIV 1600147 Complaint, filed January 13, 2016

4 **2.2** The term “Covered Product” means a crimper with vinyl grip manufactured, caused
5 to be manufactured, distributed, caused to be distributed, sold or caused to be sold to consumers
6 throughout the State of California including, but not limited to, Steel Grip Electrical Crimping Tool
7 (#2262095).

8 **2.3** The term “Effective Date” means the date on which this Consent Judgment is entered
9 by the Court.

10 **2.4** The terms “DEHP Free” and “DEHP Free Standard” mean no more than 1,000 parts
11 per million (“ppm”) by weight of DEHP in a vinyl grip of a Covered Product, as determined by
12 Environmental Protection Agency (“EPA”) Methods 3580A and 8270C or equivalent methods.

13 **2.5** “Manufactured” and “manufactures” have the meaning defined in Section 3(a)(10) of
14 the Consumer Product Safety Act (“CPSA”) [15 U.S.C. § 2052(a)(10)], as amended from time to time.

15 **3. NON-MONETARY RELIEF**

16 **3.1 Formulation Commitment**

17 **3.1.1** By the Effective Date, to the extent it has not already done so, Apex shall instruct its
18 then-current suppliers of Covered Products and of plastic or PVC components used in the
19 manufacture of Covered Products to comply with the DEHP Free Standard for Covered Products and
20 components or raw materials used in the manufacture of Covered Products.

21 **3.1.2** No later than the Effective Date, Apex shall only manufacture or cause to be
22 manufactured, order or cause to be ordered, or distribute or cause to be distributed Covered Products
23 that are DEHP Free.

24 **3.1.3** For every Covered Product ordered, caused to be ordered, manufactured or caused to
25 be manufactured for distribution or sale by Apex after the Effective Date, Apex shall maintain copies
26 of all testing of such products demonstrating compliance with this section, shall maintain copies of
27 all vendor correspondence relating to the DEHP concentration standards and shall produce such
28 copies to Davia within fifteen (15) days of receipt of written request from Davia.

1 **3.2 Previously Obtained Covered Products.**

2 Apex represents, as a material certification of this Consent Judgment, that prior to receipt of
3 the Notice, it had reformulated the Covered Products that it manufactured or caused to be
4 manufactured to be DEHP-Free as defined in Section 2.4 above, and began distributing those
5 products in California by May 31, 2015. As Apex has discontinued any distribution of non-DEHP
6 Covered Products into California prior to execution of this Consent Judgment, there is no need in this
7 agreement for any interim warning provisions.

8 **4. MONETARY PAYMENTS**

9 **4.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

10 As a condition of settlement of all the claims referred to in this Consent to Judgment, Apex
11 Tool Group, LLC shall pay a total of \$5,000 in civil penalties in accordance with this Section. Each
12 penalty payment will be allocated in accordance with California Health & Safety Code §
13 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health
14 Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Davia, as follows:

15 Apex Tool Group, LLC shall issue separate checks to: (a) “OEHHA” (EIN: 68-0284486, Memo
16 line “Prop 65 Penalties”) in the amount of \$3,750; and (b) “Susan Davia” in the amount of \$1,250. All
17 penalty payments shall be delivered to the addresses listed in Section 4.5 below.

18 **4.2 Augmentation of Penalty Payments**

19 For purposes of the penalty assessment under this Agreement, plaintiff is relying entirely
20 upon defendant and its counsel for accurate, good faith reporting to plaintiff of the nature and
21 amounts of relevant sales activity. If within nine (9) months of the Effective Date, plaintiff discovers
22 and presents to Apex evidence that the Covered Products have been distributed by Apex in sales
23 volumes materially different than those identified by such Apex prior to execution of this Agreement,
24 Plaintiff shall provide notice to Apex of the alleged difference in sales volumes. The parties shall
25 thereafter have a period of no less than 30 days after service of the notice under this section to meet
26 and confer in good faith over the difference in sales volumes, civil penalties and attorney fees and
27 costs. Should this thirty (30) day period pass without agreement by the Parties on any additional
28 payments of civil penalties and attorney fees and costs by Apex, plaintiff may seek to vacate this

1 Consent Judgment.

2 **4.3 Reimbursement of Plaintiff's Fees and Costs**

3 The Parties acknowledge that Davia and her counsel offered to resolve this dispute without
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
5 issue to be resolved after the material terms of the agreement had been settled. Apex then expressed
6 a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized.
7 The Parties then attempted to (and did) reach an accord on the compensation due to Davia and her
8 counsel under general contract principles and the private attorney general doctrine codified at
9 California Code of Civil Procedure section 1021.5, for all work performed in this matter, except fees
10 that may be incurred on appeal. Under these legal principles, Apex shall pay the amount of \$23,000
11 for fees and costs incurred investigating, litigating and enforcing this matter, including the fees and
12 costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court's approval of
13 this Consent Judgment in the public interest.

14 **4.4 Payment Timing; Payments Held In Trust**

15 Apex shall deliver all settlement payment funds required by this Consent Judgment to its
16 counsel within one week of the date that this Agreement is fully executed by the Parties. Apex's
17 counsel shall confirm receipt of settlement funds in writing to plaintiff's counsel and, thereafter, hold
18 the amounts paid in trust until such time as the Court approves this settlement contemplated by
19 Section 7.

20 Within ten days of the Effective Date, Apex's counsel shall deliver the settlement payments it
21 has held in trust to plaintiff's counsel, with a separate check for each payee, at the address provided
22 in Section 4.5. All penalty payments designated for OEHHA shall be made payable to "OEHHA",
23 all penalty payments designated for Davia shall be made payable to "Susan Davia" and all attorney
24 fee and cost reimbursement payments shall be made payable to "Sheffer Law Firm". Apex shall be
25 liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing from it
26 under this Section that are not received by Sheffer Law Firm within ten business days of the due date
27 for such payment.

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4.5 Payment Address

All payments required by this Consent Judgment shall be delivered to the following address:

Sheffer Law Firm
Attn: Proposition 65 Controller
81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941

5. ENFORCEMENT

5.1 Prior to bringing any motion, order to show cause, or other proceeding to enforce any term of this Consent Judgment relating to the sale of any Covered Product without warning by a Downstream Releasee in actual or alleged violation of this Consent Judgment, including any action against a Downstream Releasee, Davia shall provide a Notice of Violation (“NOV”) to Apex. The NOV shall include, for each Covered Product: the date(s) the alleged violation(s) was observed and the location at which the Covered Product was offered for sale, and shall be accompanied by all test data obtained by Davia regarding the Covered Product. Davia shall take no further action regarding the alleged violation if, within 30 days of receiving such NOV, Apex provides notice to Davia that either (1) The Covered Product was distributed, sold, or offered for sale by Apex before the Effective Date, or (2) Since receiving the NOV, Apex directed the Downstream Releasee to take corrective action by removing the Covered Product identified in the NOV from sale in California or providing a clear and reasonable warning for the Covered Product identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

6. CLAIMS COVERED AND RELEASE

6.1 Davia’s Releases of Apex

6.1.1 This Consent Judgment is a full, final, and binding resolution between Davia, on behalf of herself, her past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, and Apex and its attorneys, successors, licensors and assigns (“Defendant Releasees”) and each entity to whom it directly or indirectly distributes or sells the Covered Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors, and licensees (“Downstream Releasees”) regarding any violation of Proposition 65 asserted in the Notice against Defendant

1 Releasees regarding the failure to warn about exposure to the Listed Chemical arising in connection
2 with any Covered Product manufactured, sourced, distributed, or sold by Defendant Releasees prior
3 to the Effective Date. Apex's compliance with this Consent Judgment shall constitute compliance
4 with Proposition 65 with respect to the Listed Chemical in the Covered Products after the Effective
5 Date.

6 6.1.2 Davia, acting on her own behalf, and in the public interest, hereby releases Defendant
7 Releasees and Downstream Releasees from all claims for violations of Proposition 65 with respect to
8 the Listed Chemical in the Covered Products manufactured, distributed, sold and/or offered for sale
9 by Apex as set forth in the 60-Day Notice of Violation identified in Section 1.5 of this Agreement.

10 This Section 6.1 release is expressly limited to any alleged violations that occur prior to two
11 months after the Effective Date and does not release any person, party or entity from any liability for
12 any violation of Proposition 65 regarding any Covered Products that occurs more than two months
13 after the Effective Date.

14 The Parties further understand and agree that this Section 6.1 release shall not extend
15 upstream to any entities that manufactured any Covered Product or any component parts thereof, or
16 any distributors or suppliers who sold any Covered Products or any component parts thereof to
17 Defendants.

18 6.1.3 Upon court approval of the Consent Judgment, the Parties waive their respective
19 rights to a hearing or trial on the allegations of the Complaint.

20 **6.2 Apex's Release of Davia**

21 6.2.1 Apex waives any and all claims against Davia, her attorneys, and other representatives
22 for any and all actions taken or statements made (or those that could have been taken or made) by
23 Davia and her attorneys and other representatives, whether in the course of investigating claims or
24 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the
25 Covered Products.

26 6.2.2 Apex also provides a general release herein which shall be effective as a full and final
27 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
28 fees, damages, losses, claims, liabilities and demands of any Apex of any nature, character or kind,

1 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action. Each
2 Apex acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides
3 as follows:

4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
5 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
6 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.

7 Each Ace Hardware Corporation and Apex expressly waives and relinquishes any and all
8 rights and benefits that it may have under, or which may be conferred on it by the provisions of
9 Section 1542 of the California Civil Code as well as under any other state or federal statute or common
10 law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits
11 pertaining to the released matters. In furtherance of such intention, the release hereby given shall be
12 and remain in effect as a full and complete release notwithstanding the discovery or existence of any
13 such additional or different claims or facts arising out of the released matters.

14 **7. SEVERABILITY**

15 If, subsequent to court approval of this Agreement, any of the provisions of this
16 Agreement are determined by a court to be unenforceable, the parties executing this agreement
17 may agree that the validity of the enforceable provisions remaining shall not be adversely
18 affected.

19 **8. COURT APPROVAL**

20 This Consent Judgment is not effective until approved and entered by the Court. If this
21 Consent Judgment is not approved by the Court in its entirety, the Parties shall meet and confer to
22 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval. In
23 meeting and conferring, the Parties agree to undertake any actions reasonably necessary to amend
24 and/or modify this Consent Judgment in order to further the mutual intention of the Parties in
25 entering into this Consent Judgment.

26 **9. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of California.
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1 **10. NOTICES**

2 When any Party is entitled to receive any notice under this Consent Judgment, the notice shall
3 be sent by FedEx (or other tracked delivery service) or electronic mail to the following:

4 For Apex Tool Group, LLC, to:

5 Michael Munn, Vice President and General Counsel
6 Apex Tool Group, LLC
7 1000 Lufkin Rd.
8 Apex, NC 27539

9 With copy to their counsel at:

10 Jeffrey Margulies, Esq.
11 Norton Rose Fulbright US LLP
12 555 South Flower Street, Forty-First Floor
13 Los Angeles, California 90071
14 jeff.margulies@nortonrosefulbright.com

15 For Davia to:

16 Proposition 65 Coordinator
17 Sheffer Law Firm
18 81 Throckmorton Ave., Suite 202
19 Mill Valley, CA 94941

20 Any Party may modify the person and address to whom the notice is to be sent by sending each other
21 Party notice by certified mail and/or other verifiable form of written communication.

22 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

23 Davia agrees to comply with the reporting form requirements referenced, in California Health
24 & Safety Code §25249.7(f) and to file a motion for approval of this Consent Judgment.

25 **12. MODIFICATION**

26 This Consent Judgment may be modified only: (1) by written agreement of the Parties; or (2)
27 upon a successful motion of any party and approval of a modified Consent Judgment by the Court.

28 **13. ADDITIONAL POST-EXECUTION ACTIVITIES**

The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
approval, Davia shall file a motion for approval and Apex will support the entry of this Consent
Judgment by the Court in a timely manner.

1 **14. ENTIRE AGREEMENT**

2 This Settlement contains the sole and entire agreement and understanding of the Parties with
3 respect to the entire subject matter hereof, and any and all prior discussions, negotiations,
4 commitments, and understandings related hereto. No representations, oral or otherwise, express or
5 implied, other than those contained herein have been made by any Party hereto. No other
6 agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind
7 any of the Parties. No supplementation, modification, waiver, or termination of this Consent
8 Judgment shall be binding unless executed in writing by the Party to be bound. No waiver of any of
9 the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
10 other provisions whether or not similar, nor shall such waiver constitute a continuing waiver

11 **15. ATTORNEY'S FEES**

12 **15.1** The prevailing party on any motion, application for order to show cause or other
13 proceeding to enforce a violation or breach of any obligation arising from this Consent Judgment,
14 shall be entitled to their reasonable attorney fees and costs incurred as a result of such motion, order
15 or application, consistent with C.C.P. §1021.5.

16 **15.2** Except as specifically provided in the above paragraph and in Section 4.3, each Party
17 shall bear its own costs and attorney's fees in connection with this action.

18 **15.3** Nothing in this Section 14 shall preclude a Party from seeking an award of sanctions
19 pursuant to law.

20 **16. NEUTRAL CONSTRUCTION**

21 All Parties and their counsel have participated in the preparation of this Consent Judgment
22 and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was
23 subject to revision and modification by the Parties and has been accepted and approved as to its final
24 form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this
25 Consent Judgment shall not be interpreted against any Party as a result of the manner of the
26 preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute
27 or rule of construction providing that ambiguities are to be resolved against the drafting Party should
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1 not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby
2 waive California Civil Code Section 1654.


3 **17. COUNTERPARTS, FACSIMILE SIGNATURES**

4 This Consent Judgment may be executed in counterparts and by facsimile or portable
5 document format (PDF), each of which shall be deemed an original, and all of which, when taken
6 together, shall constitute one and the same document.

7 **18. AUTHORIZATION**

8 The undersigned parties and their counsel are authorized to execute this Consent Judgment
9 on behalf of their respective Parties and have read, understood, and agree to all of the terms and
10 conditions of this Consent Judgment.

11 **IT IS SO AGREED**

<p>12 Dated: April __, 2017</p> <p>13</p> <p>14 _____</p> <p>15 Michael Munn 16 Apex Tool Group, LLC</p>	<p>12 Dated: April ²⁸, 2017</p> <p>13</p> <p>14 </p> <p>15 Plaintiff 16 Susan Davia</p>
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<p>12 Dated: April <u>28</u>, 2017</p> <p>13 </p> <p>14 Michael Munn</p> <p>15 Apex Tool Group, LLC</p>	<p>13 Dated: April __, 2017</p> <p>14 _____</p> <p>15 Plaintiff</p> <p>16 Susan Davia</p>
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