

1 MIGUEL A. CUSTODIO, JR., STATE BAR NO. 248744
2 VINEET DUBEY, STATE BAR NO. 243208
3 CUSTODIO & DUBEY LLP
4 448 S. Hill St., Suite 612
5 Los Angeles, CA 90013
6 Telephone: (213) 785-2909
7 Facsimile: (213) 785-2899

8 Attorneys for Plaintiff Ecological Alliance, LLC

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES
11 (Unlimited Jurisdiction)

12 ECOLOGICAL ALLIANCE, LLC, a California
13 limited liability company,
14
15 Plaintiff,
16
17 v.
18 NATIONAL DIVERSIFIED SALES, INC., a
19 California corporation; and DOES 1 through 10,
20 inclusive,
21
22 Defendants.

Case No.:

**[PROPOSED] STIPULATED
CONSENT JUDGMENT**

Complaint Filed:
Trial Date: Not Set

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Plaintiff Ecological Alliance, LLC (“Plaintiff”), and Defendant National Diversified Sales, Inc. (“Defendant”) hereby enter into this Stipulated Consent Judgment (“Consent Judgment”) as follows:

WHEREAS: On or about December 15, 2015, Plaintiff, through Plaintiff’s counsel, served a 60 Day Notice to Defendant, the California Attorney General, the District Attorneys of every County in the State of California, and the City Attorneys for every City in the State of California with a population greater than 750,000 (collectively, “Public Prosecutor(s)”) alleging that Defendant violated California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6, et seq., and its implementing regulations (collectively, “Proposition 65”) and that Plaintiff intended to file an enforcement action in the public interest; and

(A) WHEREAS: Plaintiff alleges that Defendant manufactured and/or distributed Drain Gates that were sold or distributed for sale in California (collectively the “Covered Products”) and further alleges that those Covered Products expose consumers in the State of California to chemicals including lead, that are listed by the State of California pursuant to California Health and Safety Code § 25249.8; and

(B) WHEREAS: Plaintiff further alleges that persons in the State of California were exposed to listed chemicals in Covered Products without being provided the Proposition 65 warning set out at California Health and Safety Code § 25249.6 and its implementing regulations (“Proposition 65 Warning”); and

(C) WHEREAS: Plaintiff and Defendant jointly seek to provide the public with Proposition 65 warnings and believe that this objective is achieved by the actions described in this Consent Judgment; and

(D) WHEREAS: Plaintiff and Defendant wish to resolve their differences without the delay and expense of litigation.

NOW THEREFORE BE IT RESOLVED AND AGREED UPON AS BETWEEN PLAINTIFF ACTING IN THE PUBLIC INTEREST AND DEFENDANT AS FOLLOWS:

1
2 **I. INTRODUCTION**

3 1.1. On December 15, 2015, Plaintiff served the 60-Day Notice upon Defendant and on
4 Public Prosecutors. No Public Prosecutors commenced an enforcement action. No
5 Public Prosecutor having commenced an enforcement action, Plaintiff proceeded to file
6 its Complaint against Defendant in the present action.

7 1.2. Defendant employs ten (10) or more persons.

8 1.3. For purposes of this Consent Judgment only, Plaintiff and Defendant (the
9 “Parties”) stipulate that: 1) this Court has jurisdiction over the allegations of violation
10 contained in the Complaint, and personal jurisdiction over Defendant as to the acts
11 alleged in the Complaint; 2) venue is proper in the County of Los Angeles; and 3) this
12 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
13 claims which were or could have been raised in the Complaint based on the facts alleged
14 therein with respect to the Covered Products, and of all claims which were or could have
15 been raised by any person or entity based in whole or in part, directly or indirectly, on the
16 facts alleged in the 60-Day Notice, in the present action, or arising therefrom or related
17 thereto, with respect to Covered Products, including any Proposition 65 claim arising out
18 of an exposure to Covered Products (collectively, “Proposition 65 Claims”).

19 1.4. The Parties enter into this Consent Judgment as a full and final settlement of the
20 Proposition 65 Claims, for the purpose of avoiding prolonged and costly litigation and of
21 resolving the issues raised therein both as to past and future conduct. By execution of
22 this Consent Judgment and agreeing to comply with its terms, the Parties do not admit
23 any fact, conclusion of law, or violation of law, nor shall Defendant’s compliance with
24 the Consent Judgment constitute or be construed as an admission by Defendant of any
25 fact, conclusion of law, or violation of law. Defendant denies the material, factual, and
26 legal allegations in the 60-Day Notice and the Complaint and expressly denies any
27 wrongdoing whatsoever. Nothing in this Consent Judgment shall prejudice, waive, or
28 impair any right, remedy, argument, or defense the Parties may have in this or any other
pending or future legal proceedings.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. DEFINITIONS

2.1. "Effective Date" shall mean, with respect to this Consent Judgment, the date the Consent Judgment has been approved and entered by the Court.

3. INJUNCTIVE RELIEF

3.1. Defendant agrees to either undertake, or cause to be undertaken on its behalf, the measures identified in 3.2-3.5 below, compliance with which will constitute compliance by Defendant with all requirements of Proposition 65 relating to the Covered Products:

3.2. Proposition 65 Exemption for the Covered Products

Any Covered Product that is sold, or offered for sale, in the State of California after the Effective Date shall be deemed to comply with Proposition 65, with regard to lead, and be exempt from any Proposition 65 warning requirements, if no "Accessible Component Part" of such Covered Product contains more than 100 ppm of lead. For purposes of this Consent Judgment, "Accessible Component Part" shall mean components of the Covered Products to which a person would be exposed to lead by direct contact during normal use of the Covered Product.

3.3. Warning Option

Covered Products that do not meet the warning exemption standard set forth in Section 3.2 above, shall be accompanied by a warning as described in Section 3.4 below. This warning requirement shall only be required as to Covered Products that are manufactured, distributed, marketed, sold or shipped for sale in the State of California, after the Effective Date. No Proposition 65 warning shall be required as to any Covered Products that are already in the stream of commerce as of the Effective Date, and all such Covered Products are hereby deemed to be exempt from Proposition 65.

3.4. Warning Language

Where required to meet the criteria set forth in Section 3.3, Defendant shall provide the following warning statement on or within the unit packaging of the Covered Products, or affixed to the Covered Products, displayed in such a manner as to be reasonably

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

calculated to be seen by the ordinary consumer:

WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

4. MONETARY RELIEF

4.1. Within ten (10) days of the Effective Date, National Diversified Sales, Inc., shall pay to Plaintiff the total sum of \$32,000 which includes \$5,000 in civil penalties and \$27,000 in payment of Plaintiff's costs and reasonable attorney's fees. The \$5,000 civil penalty shall be apportioned pursuant to Health and Safety Code section 25249.12 (d), with 75%, or \$3,750, paid to the State of California's Office of Environmental Health Hazard Assessment and 25%, or \$1,250, payable to Plaintiff.

4.2. The payment specified in Section 4.1. shall be made by wire transfer to Plaintiff's counsel Custodio & Dubey LLP:

Bank: Bank of America, N.A.

Routing Transit No.: 026009593

Account No.: 325054144600

Beneficiary: Custodio & Dubey LLP

5. CLAIMS COVERED AND RELEASE

5.1. This Consent Judgment is a full, final, and binding resolution between Plaintiff, on behalf of itself, and acting in the public interest, and Defendant, and all of Defendant's parent companies, as well as all of Defendant's officers, directors, members, shareholders, employees, attorneys, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, and retailers, including but not limited to Lowe's Home Centers, LLC, their parent and all subsidiaries, and affiliates, thereof, their respective employees, agents and assigns, as well as all other upstream and downstream entities in the distribution chain for any of the Covered Products, and the predecessors, successors, and assigns of any of them (collectively, the "Released Parties"), for any alleged violation of Proposition 65, and its implementing regulations, for failure to provide Proposition 65 warnings for the Covered Products, and fully resolves all claims

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

that have been brought, or which could have been brought in this action, or in any other action, up to and including the Effective Date. Plaintiff on behalf of itself, and in the public interest, hereby discharges the Released Parties from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that could have been asserted, with respect to any alleged violation of Proposition 65 arising from the failure to provide Proposition 65 warnings for any or all of the Covered Products, or any other claim alleged in this action, or which could have been alleged in this action, through and including the Effective Date.

5.2. Plaintiff, acting on its own behalf, and in the public interest pursuant to California Health and Safety Code § 25249.7(d), release, waive, and forever discharge any and all claims against the Released Parties arising from any violation of Proposition 65 or any other statutory or common law claims that have been or could have been asserted in the public interest regarding the failure to warn under Proposition 65 arising in connection with exposure to the Covered Products, manufactured, distributed, offered for sale, sold, and/or served in the State of California by Released Parties prior to the Effective Date.

5.3. It is possible that other claims not known to the Parties arising out of the facts contained in the 60-Day Notice, or alleged in the Complaint, relating to the Covered Products, will hereafter be discovered or developed. Plaintiff, on behalf of itself only, on the one hand, and Defendant, on the other hand, acknowledge that this Consent Judgment is expressly intended to cover and include all such claims through and including the Effective Date, including all rights of action therefore. Plaintiff and Defendant acknowledge that the claims released in Sections 5.1 and 5.2 may include unknown claims, and nevertheless intend to release such claims, and in doing so waive California Civil Code § 1542 which reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT 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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SETTLEMENT WITH THE DEBTOR.

5.4. Plaintiff understands and acknowledges that the significance and consequence of this waiver of California Civil Code § 1542 is that even if Plaintiff suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered Products, including but not limited to any exposure to, or failure to warn with respect to exposure to, the Covered Products, Plaintiff will not be able to make any claim for those damages against any of the Released Parties.

5.5. Compliance by Defendant with the terms of this Consent Judgment shall constitute compliance with Proposition 65 with respect to exposure to the Covered Products as set forth in the 60 Day Notice and/or the Complaint.

6. PROVISION OF NOTICE

6.1. When any Party is entitled to receive any notice or writing under this Consent Judgment, the notice or writing shall be sent by first class certified mail with return receipt requested, or by electronic mail, as follows:

To Defendant:
Meredith Jones-McKeown
Sheppard, Mullin, Richter and Hampton, LLP
Four Embarcadero Center, 17th Floor
San Francisco CA 94111
Telephone: (415) 434-9100
Facsimile: (415) 434-3947
mjonesmckeown@sheppardmullin.com

To Plaintiff:
Vineet Dubey
Custodio & Dubey LLP
448 S. Hill St., Ste 612
Los Angeles, CA 90013
dubey@cd-lawyers.com

6.2. Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice that is transmitted in the manner set forth in section 6.1.

7. COURT APPROVAL

7.1. Upon execution of his Consent Judgment by all parties, Plaintiff shall prepare and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

file, at its sole cost and expense, a Motion for Approval of this Consent Judgment that Defendant shall support. This Consent Judgment shall not become effective until approved and entered by the Court. If this Consent Judgment is not entered by the Court, it shall be of no force or effect, and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

8. GOVERNING LAW AND CONSTRUCTION

8.1. The terms of this Consent Judgment shall be governed by the laws of the State of California.

9. ENTIRE AGREEMENT

9.1. This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein.

9.2. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party hereto.

9.3. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein.

9.4. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby.

9.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

10. RETENTION OF JURISDICTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

11. NO EFFECT ON OTHER SETTLEMENTS

11.1. Nothing in this Consent Judgment shall preclude Plaintiff from resolving any claim against another entity on terms that are different from those contained in this Consent Judgment.

12. EXECUTION IN COUNTERPARTS

12.1. This Consent Judgment may be executed in counterparts, each of which shall be deemed to be an original, and all of which, taken together, shall constitute the same document. Execution of the Consent Judgment by e-mail, facsimile, or other electronic means, shall constitute legal and binding execution and delivery. Any photocopy of the executed Consent Judgment shall have the same force and effect as the original.

13. AUTHORIZATION

13.1. The undersigned are authorized to stipulate to, enter into, and 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 Consent Judgment.

///
///
///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

14. SEVERABILITY

14.1. If subsequent to Court approval of this Consent Judgment, any part or provision is declared by a Court to be invalid, void, or unenforceable, the remaining portions or provisions shall continue in full force and effect.

AGREED TO :

Ecological Alliance LLC

Date: 4/1/16
By: [Signature]

AGREED TO :

National Diversified Sales, Inc.

Date: 03/31/2016
By: [Signature]

AGREED TO :

National Diversified Sales, Inc.

Date: 3-31-16
By: [Signature]