

1 STEPHEN URE, ESQ.
LAW OFFICES OF STEPHEN URE, PC
2 11622 El Camino Real, Suite 100
San Diego, CA 92130
3 Telephone: 619-235-5400
4 Attorneys for Plaintiff Evelyn Wimberley
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10 EVELYN WIMBERLEY,
11 Plaintiff,
12 v.
13 TARGET CORPORATION., et al.including ACE
HARDWARE CORPORATION
14 Defendants,
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Case No. 37-2017-00003677-CU-NP-NC

**STIPULATION FOR ENTRY OF
CONSENT JUDGMENT AS TO
DEFENDANT ACE HARDWARE
CORPORATION**

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Evelyn
3 Wimberley acting on behalf of the public interest (hereinafter "Wimberley"), and Ace Hardware
4 Corporation (hereinafter "Ace"), with Wimberley and Ace collectively referred to as the "Parties"
5 and each of them as a "Party." Wimberley is an individual residing in California who seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Ace employs ten or more
8 persons and is a person in the course of doing business for purposes of Proposition 65, Cal.
9 Health & Safety Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Wimberley alleges that Ace has offered for
11 sale in the State of California and has sold in California, Black Diamond Charwood Charcoal that
12 allegedly upon combustion exposes individuals to carbon monoxide and soot, and that such sales
13 have not been accompanied by Proposition 65 warnings. Carbon monoxide and soot are listed
14 under Proposition 65 as chemicals known to the State of California to cause cancer, birth defects
15 or other reproductive harm.

16 1.3 **Notice of Violation/Complaint.** On or about October 23, 2017 Wimberley served
17 Ace and various public enforcement agencies with a document entitled "60-Day Notice of
18 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Ace was in
19 violation of Proposition 65 for failing to warn consumers and customers that the Covered
20 Products exposed users in California to carbon monoxide and soot. The Covered Products sold
21 by Ace are manufactured by Black Diamond International Forest Group, LLC. No public
22 enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service
23 time relative to the provision of the Notice to them by Wimberley, such that Wimberley filed an
24 amendment to a previously filed complaint and added Ace as Defendant in the matter as
25 captioned above on January 5, 2018.

26 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
27 has jurisdiction over Ace as to the allegations contained in the complaint and amendment thereto
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1 (“Complaint”) filed in this matter, that venue is proper in the County of San Diego, and that this
2 Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as
3 a full and final binding resolution of all claims which were or could have been raised in the
4 Complaint based on the facts alleged therein and/or in the Notices.

5 1.5 Ace denies the material allegations contained in Wimberley’s Notice and
6 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
7 Judgment shall be construed as an admission by Ace of any fact, finding, issue of law, or
8 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
9 an admission by Ace of any fact, finding, conclusion, issue of law, or violation of law, such being
10 specifically denied by Ace. However, this section shall not diminish or otherwise affect the
11 obligations, responsibilities, and duties of Ace under this Consent Judgment.

12 **2. DEFINITIONS**

13 2.1 **Complaint.** The term “Complaint” shall have the meaning given in Section 1.3.

14 2.2 **Covered Products.** The term “Covered Products” refers to: charcoal products
15 sold to ACE by Black Diamond International Forest Group, LLC including Black Diamond
16 Charwood UPC 862238000128 .

17 2.3 **Effective Date.** The term “Effective Date” shall mean the date this Consent
18 Judgment is entered as a Judgment of the Court.

19 2.4 **Listed Chemicals:** The term “Listed Chemicals” shall mean carbon monoxide and
20 soot.

21 2.5 **Notice.** The term “Notice” shall have the meaning given in Section 1.3.

22 2.6 **Releasees.** The terms “Defendant Releasees” and “Downstream Defendant
23 Releasees” shall have the meanings given in Section 5.1.

24 2.7 **Execution Date.** The term “Execution Date” shall mean the date this Consent
25 Judgment is signed by the parties.

1 **3. INJUNCTIVE RELIEF: WARNINGS**

2 3.1 Since February of 2018, Ace has not purchased additional Covered Products and
3 after the Effective Date will not ship any remaining Covered Product for sale into California
4 unless the Covered Product is accompanied by a warning that is consistent with the current
5 warning requirements under 27 CCR §25600 et seq. Ace will use its best efforts to have Ace
6 retailers label the existing store inventory which can continue to be sold until the inventory is
7 exhausted.

8 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
9 Covered Product's packaging, labeling, or instruction booklet and displayed with such
10 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
11 read and understood by an ordinary individual under customary conditions of purchase or use. A
12 warning may be contained in the same section of the packaging, labeling, or instruction booklet
13 that states other safety warnings, if any, concerning the use of the product and shall be at least the
14 same size as those other safety warnings.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** Ace shall pay a civil penalty of one thousand dollars (\$1000) to be
17 apportioned in accordance with California Code of Regulations Title 11 Division 4 – Proposition
18 65 Private Enforcement with 75% of these funds remitted to the State of California's Office of
19 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
20 Wimberley, as provided by California Health & Safety Code § 25249.7.

21 4.2 **Attorney Fees.** Ace agrees to pay and will not oppose an application made by
22 Wimberley's counsel for an award of attorney fees, inclusive of all expenses and costs incurred as
23 a result of investigating, bringing this matter to Ace's attention, litigating and negotiating and
24 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
25 Procedure section 1021.5, in an amount of twenty thousand dollars (\$20,000). Other than the
26 payment required hereunder, each side is to bear its own attorneys' fees and costs.
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1 4.3 Ace shall wire Wimberley's counsel the total sum of twenty-one thousand dollars
2 (\$21,000) representing the civil penalty and attorney fees in Sections 4.1 and 4.2 within 20 days
3 following the Execution Date and upon receipt of W-9 and wire instruction information from
4 Wimberley's counsel.
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6 **5. RELEASE OF ALL CLAIMS**
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8 5.1 This consent judgment is a full, final, and binding resolution between Wimberley
9 acting in the public interest, and Ace, it's parents, shareholders, divisions, subdivisions,
10 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns
11 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
12 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
13 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
14 cooperative members, ("Releasees"), of all claims for violations of Proposition 65 based on
15 exposure to Listed Chemicals from Covered Products as set forth in the Notice, with respect to
16 any Covered Products sold or shipped by Ace prior to the Effective Date. Compliance with the
17 terms of this consent judgment constitutes compliance with Proposition 65 with regard to the
18 Covered Products.

19 5.2 In addition to the foregoing, Wimberley, on behalf of herself, her past and current
20 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
21 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
22 legal action and releases any Defendant Releasees, and Releasees from any and all manner of
23 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
24 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature
25 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
26 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
27 sold by Ace or Defendant Releasees. With respect to the foregoing waivers and releases in this
28 paragraph, Wimberley hereby specifically waives any and all rights and benefits which she now

1 has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the
2 California Civil Code, which provides as follows:
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4 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT
5 KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
6 RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED
HIS OR HER SETTLEMENT WITH THE DEBTOR.

7 5.3 Ace waives any and all claims against Wimberley, her attorneys and other
8 representatives, for any and all actions taken or statements made (or those that could have been
9 taken or made) by Wimberley and her attorneys and other representatives, whether in the course
10 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
11 matter, and/or with respect to Covered Products.

12 **6. INTEGRATION**

13 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
14 any and all prior negotiations and understandings related hereto shall be deemed to have been
15 merged within it. No representations or terms of agreement other than those contained herein
16 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

17 **7. GOVERNING LAW**

18 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California and apply within the State of California. In the event that Proposition 65 is repealed or
20 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
21 Ace shall provide written notice to Wimberley of any asserted change in the law, and shall have
22 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
23 Covered Products are so affected.

24 **8. NOTICES**

25 8.1 Unless specified herein, all correspondence and notices required to be provided
26 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
27 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
28 party by the other party at the following addresses:

1 For Ace Hardware Corporation.:

2 Lee N. Smith
3 Coleman & Horowitz, LLP
4 499 W. Shaw Ave, Suite 116
5 Fresno, CA 93704

6 and

7 For Wimberley:

8 Stephen Ure
9 Law Offices of Stephen Ure, PC.
10 11622 El Camino Real, Suite 100
11 San Diego, California 92130

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
16 which shall be deemed an original, and all of which, when taken together, shall constitute one and
17 the same document.

18 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
19 **APPROVAL**

20 10.1 Wimberley agrees to comply with the requirements set forth in California Health
21 & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent
22 Judgment and Ace agrees it shall support approval of such Motion.

23 10.2 This Consent Judgment shall not be effective until it is approved and entered by
24 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
25 within twelve months after it has been fully executed by the Parties. In such case, the Parties
26 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
27 any monies that have been paid pursuant to Section 4 shall be refunded and the case shall proceed
28 on its normal course.

10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
appellate court, the Parties shall meet and confer as to whether to modify the terms of this

1 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies
2 that have been paid pursuant to Section 4 shall be refunded within 15 days after remittitur to the
3 trial court, and the case shall proceed on its normal course on the trial court's calendar.

4 **11. MODIFICATION**

5 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
6 and the approval of the Court or upon the granting of a motion brought to the Court by either
7 Party.

8 **12. ATTORNEY'S FEES**

9 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
10 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
11 unless the unsuccessful party has acted with substantial justification. For purposes of this
12 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
13 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

14 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
15 pursuant to law.

16 **13. RETENTION OF JURISDICTION**

17 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
18 Consent Judgment.

19 **14. AUTHORIZATION**

20 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
21 their respective Parties and have read, understood and agree to all of the terms and conditions of
22 this document and certifies that he or she is fully authorized by the Party he or she represents to
23 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
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AGREED TO:

Date: 9/4, 2018

By: 

On Behalf of Evelyn Wimberley
Stephen Ure,
Law Offices of Stephen Ure, PC

AGREED TO:

Date: SEP 04, 2018

By: 

On Behalf of Ace Hardware Corporation
Lee N. Smith
Coleman & Horowitz, LLP

IT IS HEREBY SO STIPULATED:

AGREED TO:

Date: 8/11/2018

By: 

EVELYN WIMBERLEY

AGREED TO:

Date: 8/30/18

By: 

ACE HARDWARE CORPORATION