

1 Lucas Novak (SBN 257484)  
2 LAW OFFICES OF LUCAS T. NOVAK  
3 8335 W Sunset Blvd., Suite 217  
4 Los Angeles, CA 90069  
5 Telephone: (323) 337-9015  
6 Email: lucas.nvk@gmail.com

7 Attorney for Plaintiff, APS&EE, LLC

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

10 APS&EE, LLC, a limited liability company, )  
11 Plaintiff, )  
12 v. )  
13 BUILDING MATERIAL DISTRIBUTORS, )  
14 INC., a corporation, TRACTOR SUPPLY )  
15 COMPANY, a corporation, and DOES 1 )  
16 through 100, inclusive, )  
17 Defendants. )

CASE NO. BC629195

**[PROPOSED] CONSENT JUDGMENT**

Judge: Hon. John P. Doyle

Dept.: 58

Compl. Filed: August 2, 2016

Unlimited Jurisdiction

18 ///  
19 ///  
20 ///  
21 ///  
22 ///  
23 ///  
24 ///  
25 ///  
26 ///  
27 ///  
28 ///

1 **1. RECITALS**

2 **1.1 The Parties**

3 **1.1.1** This Consent Judgment is entered into by and between APS&EE, LLC  
4 (“APS&EE”) and Building Material Distributors, Inc. (“BMD”). APS&EE and BMD may  
5 hereinafter individually be referred to as a “Party” and collectively be referred to as the “Parties.”

6 **1.1.2** APS&EE is an organization based in California with an interest in  
7 improving human health and supporting environmentally sound practices, which includes  
8 promoting awareness of exposure to toxic chemicals and reducing exposure to hazardous  
9 substances found in consumer products.

10 **1.1.3** BMD employs ten (10) or more employees and is a person in the course of  
11 doing business as the term is defined in California *Health & Safety Code* section 25249.6 et seq.  
12 (“Proposition 65”).

13 **1.2 Allegations**

14 **1.2.1** APS&EE alleges that BMD sold Quick Build hot-dip galvanized nails,  
15 including 3 1/2” – 16d 16HGBXP in the State of California causing users in California to be  
16 exposed to hazardous levels of lead without providing “clear and reasonable warnings”, in  
17 violation of Proposition 65. Lead is potentially subject to Proposition 65 warning requirements  
18 because it is listed as known to cause cancer and birth defects or other reproductive harm. For  
19 purposes of this Consent Judgment, the terms “Product” or “Products” shall mean and are  
20 defined as fasteners distributed by BMD under its own brand, with the mark “Quick Build”,  
21 “Western Fencing”, or “Master Fasteners”.

22 **1.2.2** On May 23, 2016, APS&EE provided a Sixty-Day Notice of Violation  
23 (“60-Day Notice”), along with a Certificate of Merit, to BMD, Tractor Supply Company, and the  
24 various public enforcement agencies regarding the alleged violation of Proposition 65 with  
25 respect to the Products. On August 2, 2016, in the public interest, APS&EE filed the Complaint  
26 in this matter, alleging violation of Proposition 65 with respect to lead in the Products.

27 ///

28 ///

1           **1.3     No Admissions**

2           BMD denies all allegations in APS&EE’s 60-Day Notice and Complaint and maintains  
3 that the Products have been, and are, in compliance with all laws, and that BMD has not violated  
4 Proposition 65. This Consent Judgment shall not be construed as an admission of liability by  
5 BMD, but to the contrary as a compromise of claims that are expressly contested and denied.  
6 However, nothing in this section shall affect the Parties’ obligations, duties, and responsibilities  
7 under this Consent Judgment.

8           **1.4     Compromise**

9           The Parties enter into this Consent Judgment in order to resolve the controversy  
10 described above in a manner consistent with prior Proposition 65 settlements and consent  
11 judgments that were entered in the public interest and to avoid prolonged and costly litigation  
12 between them.

13           **1.5     Effective Date**

14           The “Effective Date” shall be the date upon which this Consent Judgment is approved  
15 and entered by the Court.

16 **2.     INJUNCTIVE RELIEF**

17           **2.1     Reformulation Standard**

18           After the Effective Date, BMD shall not distribute, sell or offer for sale the Products in  
19 California unless (a) the galvanizing solution in which the Products are submerged has a lead  
20 content by weight of no more than 300 parts per million (0.03%) when analyzed pursuant to  
21 Environmental Protection Agency test method 3050B or equivalent, or (b) the Product is  
22 distributed, sold, and/or offered for sale with a clear and reasonable warning as described in  
23 Section 2.2 below.

24           **2.2     Proposition 65 Warnings**

25           If the Products do not meet the Reformulation Standard, then BMD shall not distribute,  
26 supply, sell and/or offer for sale in California the Products unless clear and reasonable  
27 Proposition 65 warnings are provided with each unit with the following warning with the  
28 capitalized and emboldened wording:

1           “**WARNING:** This product contains lead, a chemical known to the State of  
2           California to cause cancer and birth defects or other reproductive harm.”

3           Alternatively, if it has reason to believe the Products contain additional chemicals  
4 listed under Proposition 65, BMD may use the following statement in lieu of the one set  
5 forth above:

6           “**WARNING:** This product contains chemicals known to the State of California  
7           to cause cancer and/or birth defects or other reproductive harm.”

#### 8                           **2.2.1 Method of Transmission**

9           The warning statement shall be prominently displayed on the label, packaging, or box of  
10 the Product, with such conspicuousness, as compared with other words, statements or designs as  
11 to render it likely to be read and understood by an ordinary purchaser prior to sale. A Product  
12 that is sold by BMD online shall also provide the warning message by a clearly marked  
13 hyperlink on the product display page, or otherwise prominently displayed to the purchaser  
14 before the purchaser completes his or her purchase of the Product(s).

15           Should the State of California revise or replace the regulations presently appearing at  
16 California Code of regulations Title 27, Article 6, so as to permit or require different warning  
17 language, then BMD may use a warning that conforms to such revised regulations.

#### 18                           **2.2.2 Notification of Warning Requirement**

19           All invoices sent to BMD’s customers shall contain language instructing them that  
20 unlabeled packaging of the Products should be accompanied by a Proposition 65 warning that  
21 complies with Section 2.2 of this Consent Judgment.

### 22   **3.    PAYMENTS**

#### 23                           **3.1    Civil Penalty Pursuant To Proposition 65**

24           In settlement of all claims referred to in this Consent Judgment, BMD shall pay a total  
25 civil penalty of six thousand dollars (\$6,000) to be apportioned in accordance with *Health and*  
26 *Safety Code* section 25249.12(c)(1) and (d), with 75% (\$4,500) for State of California Office of  
27 Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25% (\$1,500) for  
28 APS&EE.

1 BMD shall issue two (2) checks for the civil penalty: (1) a check or money order made  
2 payable to "OEHHA" in the amount of \$4,500; and (2) a check or money order made payable to  
3 "Law Offices of Lucas T. Novak" in the amount of \$1,500. BMD shall remit the payments  
4 within five (5) business days of the Effective Date, to:

5 Lucas T. Novak, Esq.  
6 LAW OFFICES OF LUCAS T. NOVAK  
7 8335 W Sunset Blvd., Suite 217  
8 Los Angeles, CA 90069

### 8 **3.2 Reimbursement Of APS&EE's Fees And Costs**

9 BMD shall reimburse APS&EE's reasonable experts' and attorney's fees and costs  
10 incurred in prosecuting the instant action, for all work performed through execution and approval  
11 of this Consent Judgment. Accordingly, BMD shall issue a check or money order made payable  
12 to "Law Offices of Lucas T. Novak" in the amount of twenty-nine thousand dollars (\$29,000).  
13 BMD shall remit the payment within five (5) business days of the Effective Date, to:

14 Lucas T. Novak, Esq.  
15 LAW OFFICES OF LUCAS T. NOVAK  
16 8335 W Sunset Blvd., Suite 217  
17 Los Angeles, CA 90069

## 18 **4. RELEASES**

### 19 **4.1 APS&EE's Release Of BMD**

20 APS&EE, acting in its individual capacity, its past and current agents, shareholders,  
21 directors, members, officers, employees, attorneys, successors and assignees, and in the public  
22 interest, in consideration of the promises and monetary payments contained herein, hereby  
23 releases BMD, its parents, subsidiaries, shareholders, directors, members, officers, employees,  
24 attorneys, successors and assignees, as well as its downstream distributors, retailers, and  
25 customers, including Tractor Supply Company (collectively "Released Parties"), from any  
26 alleged Proposition 65 violation claims asserted in APS&EE's 60-Day Notice and/or Complaint  
27 regarding the Products sold and/or offered for sale by BMD in California before and up to the  
28 Effective Date.

1           **4.2     BMD’s Release Of APS&EE**

2           BMD, its parents, subsidiaries, shareholders, directors, members, officers, employees,  
3 attorneys, successors and assignees, and on behalf of the Released Parties, by this Consent  
4 Judgment, waives all rights to institute any form of legal action against APS&EE, its  
5 shareholders, directors, members, officers, employees, attorneys, experts, successors and  
6 assignees, for actions or statements made or undertaken, whether in the course of investigating  
7 claims or seeking enforcement of Proposition 65 against BMD in this matter.

8           **4.3     Waiver Of Unknown Claims**

9           Each of the Parties acknowledges that it is familiar with Section 1542 of California Civil  
10 Code which provides as follows:

11           “A general release does not extend to claims which the creditor does not know or  
12 suspect to exist in his or her favor at the time of executing the release, which if  
13 known by him or her must have materially affected his or her settlement with the  
14 debtor.”

15           Each of the Parties waives and relinquishes any right or benefit it has or may have under  
16 Section 1542 of California Civil Code or any similar provision under the statutory or non-  
17 statutory law of any other jurisdiction to the full extent that it may lawfully waive all such rights  
18 and benefits. The Parties acknowledge that each may subsequently discover facts in addition to,  
19 or different from, those that it believes to be true with respect to the claims released herein. The  
20 Parties agree that this Consent Judgment and the releases contained herein shall be and remain  
21 effective in all respects notwithstanding the discovery of such additional or different facts.

22           **5.     COURT APPROVAL**

23           Upon execution of this Consent Judgment by all Parties, APS&EE shall file a noticed  
24 Motion for Approval and Entry of Consent Judgment in the above-entitled Court. This Consent  
25 Judgment is not effective until it is approved and entered by the Court. It is the intention of the  
26 Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such  
27 approval, the Parties and their respective counsel agree to mutually employ their best efforts to  
28 support the entry of this agreement in a timely manner, including cooperating on drafting and

1 filing any papers in support of the required motion for judicial approval.

2 **6. SEVERABILITY**

3 Should any part or provision of this Consent Judgment for any reason be declared by a  
4 Court to be invalid, void or unenforceable, the remaining portions and provisions shall continue  
5 in full force and effect.

6 **7. GOVERNING LAW**

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

9 **8. NOTICES**

10 All correspondence and notices required to be provided under this Consent Judgment  
11 shall be in writing and delivered personally or sent by first class or certified mail addressed as  
12 follows:

13 TO BMD:  14 Trenton M. Diehl, Esq. 15 Snider, Diehl, Sloup & 16 Rasmussen, LLP 17 P.O. Box 560 18 Lodi, CA 95241-0560	TO APS&EE:  Lucas T. Novak, Esq. Law Offices of Lucas T. Novak 8335 W Sunset Blvd., Suite 217 Los Angeles, CA 90069
--	--

19 **9. EXECUTION IN COUNTERPARTS**

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

25 ///

26 ///

27 ///

28 ///

1 **10. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their  
3 respective Parties. Each Party has read, understood, and agrees to all of the terms and conditions  
4 of this Consent Judgment. Each Party warrants to the other that it is free to enter into this  
5 Consent Judgment and is not subject to any conflicting obligation that will or might prevent or  
6 interfere with the execution or performance of this Consent Judgment by said Party.

7  
8 **AGREED TO:**


9 Date: \_\_\_\_\_

10  
11 By: \_\_\_\_\_

12 Authorized Officer of APS&EE, LLC

13  
14 **AGREED TO:**

15 Date: 10/18/2016

16  
17 By:  \_\_\_\_\_

18 Authorized Officer of Building Material Distributors, Inc.

19  
20 **IT IS SO ORDERED.**

21  
22 Dated: \_\_\_\_\_

\_\_\_\_\_   
JUDGE OF THE SUPERIOR COURT



1 **10. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their  
3 respective Parties. Each Party has read, understood, and agrees to all of the terms and conditions  
4 of this Consent Judgment. Each Party warrants to the other that it is free to enter into this  
5 Consent Judgment and is not subject to any conflicting obligation that will or might prevent or  
6 interfere with the execution or performance of this Consent Judgment by said Party.  
7

8 **AGREED TO:**

9 Date: October 17, 2016

10  
11 By: [Signature]  
12 Authorized Officer of APS&EE, LLC  
13

14 **AGREED TO:**

15 Date: \_\_\_\_\_

16  
17 By: \_\_\_\_\_  
18 Authorized Officer of Building Material Distributors, Inc.  
19

20 **IT IS SO ORDERED.**

21  
22 Dated: \_\_\_\_\_  
23 JUDGE OF THE SUPERIOR COURT  
24  
25  
26  
27  
28