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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)
12) Plaintiff,)
13)
14) v.)
15) ACE HARDWARE CORPORATION, a)
16) corporation, and DOES 1 through 100,)
17) inclusive,)
18) Defendants.)
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CASE NO. BC631622

[PROPOSED] CONSENT JUDGMENT

Judge: Hon. Elizabeth A. White
Dept.: 48
Compl. Filed: August 24, 2016

Unlimited Jurisdiction

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1 **1. RECITALS**

2 **1.1 The Parties**

3 1.1.1 This Consent Judgment (“Consent Judgment”) is entered into by and
4 between Plaintiff, APS&EE, LLC (“Plaintiff”) and Defendant, Ace Hardware Corporation
5 (“Defendant”). Plaintiff and Defendant shall hereinafter collectively be referred to as the
6 “Parties.”

7 1.1.2 Plaintiff is an organization based in California with an interest in
8 protecting the environment, improving human health and the health of ecosystems, and
9 supporting environmentally sound practices, which includes promoting awareness of exposure to
10 toxic chemicals and reducing exposure to hazardous substances found in consumer products.

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

14 **1.2 Allegations**

15 Plaintiff alleges that Defendant manufactured, distributed, sold, and/or offered to sell the
16 “Ace” brand of galvanized nails containing dangerous levels of lead, including, without
17 limitation: “Ace” hot galvanized box, 1 lb., #53455, 6d 2in., 0-82901-19701-0 in the State of
18 California causing users in California to be exposed to lead without providing a clear and
19 reasonable warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a
20 chemical known to the State of California to cause cancer and birth defects or other reproductive
21 harm. For purposes of this Consent Judgment, the terms “Product” or “Products” shall mean and
22 are defined as “Ace” brand galvanized nails containing lead that are manufactured, sold or
23 distributed for sale in California by Ace Hardware Corporation or any of its authorized
24 wholesalers, retailers, franchisees, cooperative members or licensees.

25 A sixty-day notice of violation dated June 13, 2016 (“60-Day Notice”), along with a
26 Certificate of Merit, was provided by Plaintiff to Defendant and various public enforcement
27 agencies regarding the alleged violation of Proposition 65. On August 24, 2016, in the public
28 interest, Plaintiff filed the instant action in the Superior Court for the County of Los Angeles,

1 alleging violations of Proposition 65.

2 **1.3 No Admissions**

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

9 **1.4 Jurisdiction And Venue**

10 For purposes of this Consent Judgment only, the Parties stipulate that the above-entitled
11 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper
12 in Los Angeles County, and that this Court has jurisdiction to enter and enforce the provisions of
13 this Consent Judgment pursuant to California Code of Civil Procedure (“CCP”) § 664.6 and
14 Proposition 65.

15 **1.5 Effective Date**

16 The “Effective Date” shall be the date this Consent Judgment is approved and entered by
17 the Court.

18 **2. INJUNCTIVE RELIEF AND REFORMULATION**

19 **2.1 Reformulation**

20 As of the Effective Date, Defendant shall not distribute, sell, or offer for sale the Products
21 in California unless (a) the galvanizing solution in which the Products are submerged has a lead
22 content by weight of no more than 100 parts per million (0.01%), or (b) the Product is
23 distributed, sold, or offered for sale with a clear and reasonable warning as described in Section
24 2.2.

25 **2.2 Clear And Reasonable Warnings**

26 (a) **Retail Store Sales.** Whenever a clear and reasonable warning is required
27 under Section 2.1, it shall state the following with the capitalized and emboldened wording:

28 **“WARNING:** This product contains lead, a chemical known to the State of

1 California to cause cancer and birth defects or other reproductive harm.”

2 If Defendant has reason to believe that the Products contain additional chemicals listed
3 under Proposition 65, it may use the word “chemicals” in lieu of “lead, a chemical.”

4 Defendant agrees that each warning shall be prominently placed with such
5 conspicuousness, as compared with other words, statements, designs, or devices as to render it
6 likely to be read and understood by an ordinary consumer prior to sale. For purposes of this
7 Consent Judgment, a clear and reasonable warning for the Products shall consist of a warning
8 that appears on the product, the product’s package, label or other labeling as defined by Title 27,
9 California Code of Regulations, § 25602.

10 **(b) Internet Sales.** Products offered for sale directly by Defendant in
11 California via the internet that do not meet the reformulation standard described in section 2.1
12 shall be accompanied by a Proposition 65 warning, either: (a) on the same web page on which
13 the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the
14 same web page as the price for the Product prior to sales completion; (d) on one or more web
15 pages displayed to a purchaser during the checkout process prior to sales completion; or (e) on a
16 web page with a conspicuous hyperlink from the Product display page. The warning shall
17 contain the following capitalized and emboldened wording and shall appear with such
18 conspicuousness, as compared with other words, statements or designs as to render it likely to be
19 read and understood by an ordinary individual prior to sale:

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

22 If Defendant has reason to believe that the Products contain additional chemicals listed
23 under Proposition 65, it may use the word “chemicals” in lieu of “lead, a chemical”.

24 **2.3 Sell-through For Existing Inventory**

25 The injunctive requirements of Section 2 shall not apply to Products that were
26 manufactured or in the stream of commerce as of the Effective Date, which products are subject
27 to the releases provided in Section 4.1.
28

1 **3. PAYMENTS**

2 **3.1 Civil Penalty Pursuant To Proposition 65**

3 In settlement of all causes of action in Plaintiff's Complaint, Defendant shall pay a total
4 civil penalty of four thousand dollars (\$4,000.00) to be apportioned in accordance with *Health*
5 *and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$3,000.00) paid to State of California
6 Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25%
7 (\$1,000.00) paid to Plaintiff.

8 Defendant shall issue two (2) checks for the civil penalty: (1) a check or money order
9 made payable to "OEHHA" in the amount of \$3,000.00; and (2) a check or money order made
10 payable to "Law Offices of Lucas T. Novak" in the amount of \$1,000.00. Defendant shall remit
11 the payments within five (5) business days of the Effective Date, to:

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

16 Plaintiff agrees that it or a duly appointed representative shall mail or otherwise deliver
17 the check made payable to "OEHHA" to the Office of Environmental Health Hazard
18 Assessment.

18 **3.2 Reimbursement Of Plaintiff's Fees And Costs**

19 Defendant shall reimburse Plaintiff's reasonable experts' and attorney's fees and costs
20 incurred in prosecuting the instant action, for all work performed through execution of this
21 agreement and entry of this Consent Judgment. Accordingly, Defendant shall issue a check or
22 money order made payable to "Law Offices of Lucas T. Novak" in the amount of twenty two
23 thousand dollars (\$22,000.00). Defendant shall remit the payment within five (5) business days
24 of the Effective Date, to:

25 Lucas T. Novak, Esq.
26 LAW OFFICES OF LUCAS T. NOVAK
27 8335 W Sunset Blvd., Suite 217
28 Los Angeles, CA 90069

1 **4. RELEASES**

2 **4.1 Plaintiff's Release Of Proposition 65 Claims Against Defendant**

3 Plaintiff, acting in its individual capacity, its past and current agents, shareholders,
4 directors, members, officers, employees, attorneys, successors and assignees, and in the public
5 interest, in consideration of the promises and monetary payments contained herein, hereby
6 releases Defendant, its parents, subsidiaries, shareholders, directors, members, officers,
7 employees, attorneys, successors and assignees, as well as the manufacturer(s) and/or supplier(s)
8 of the Products, Defendant's downstream distributors, wholesalers, retailers, franchisees,
9 cooperative members and licensees (collectively "Released Parties"), from any violation arising
10 under Proposition 65 pertaining to the failure to warn about exposures to lead from Products
11 manufactured, sold or distributed for sale in California prior to the Effective Date, as alleged or
12 otherwise asserted in the 60-Day Notice or Plaintiff's Complaint. Compliance with the terms of
13 this Consent Judgment constitutes compliance with Proposition 65 by Defendant and Released
14 Parties with regard to the alleged or actual failure to warn about exposures to lead from Products
15 manufactured, sold or distributed for sale in California after the Effective Date.

16 **4.2 Defendant's Release Of Plaintiff**

17 Defendant, and on behalf of all of the other Released Parties, by this Consent Judgment,
18 waives all rights to institute any form of legal action against Plaintiff, its shareholders, directors,
19 members, officers, employees, attorneys, experts, successors and assignees for actions or
20 statements made or undertaken, whether in the course of investigating claims or seeking
21 enforcement of Proposition 65 against Defendant in this matter.

22 **4.3 Waiver Of Unknown Claims**

23 Each of the Parties acknowledges that it is familiar with California Civil Code § 1542
24 which provides:

25 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
26 **WHICH THE CREDITOR DOES NOT KNOW OR**
27 **SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE**
28 **TIME OF EXECUTING THE RELEASE, WHICH IF**
KNOWN BY HIM OR HER MUST HAVE MATERIALLY
AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR.

1 Each of the Parties waives and relinquishes any right or benefit it has or may have under
2 California Civil Code § 1542 or any similar provision under the statutory or non-statutory law of
3 any other jurisdiction to the full extent that it may lawfully waive all such rights and benefits.

4 The Parties acknowledge that each may subsequently discover facts in addition to, or different
5 from, those that it believes to be true with respect to the claims released herein. The Parties
6 agree that this Consent Judgment and the releases contained herein shall be and remain effective
7 in all respects notwithstanding the discovery of such additional or different facts.

8 **5. COURT APPROVAL**

9 Upon execution of this Consent Judgment by all Parties, Plaintiff shall file a noticed
10 Motion for Approval and Entry of Consent Judgment in the above-entitled Court. This Consent
11 Judgment is not effective until it is approved and entered by the Court. It is the intention of the
12 Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such
13 approval, the Parties and their respective counsel agree to mutually employ their best efforts to
14 support the entry of this agreement in a timely manner, including cooperating on drafting and
15 filing any papers in support of the required motion for judicial approval.

16 **6. SEVERABILITY**

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

20 **7. GOVERNING LAW**

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

23 **8. NOTICES**

24 All correspondence and notices required to be provided under this Consent Judgment
25 shall be in writing and delivered personally or sent by first class or certified mail addressed as
26 follows:
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28

1 TO DEFENDANT:

2 Levi W. Heath, Esq.
3 Barnes & Thornburg LLP
4 2029 Century Park East
5 Suite 300
6 Los Angeles, CA 90067

TO PLAINTIFF:

Lucas T. Novak, Esq.
Law Offices of Lucas T. Novak
8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

7 **9. INTEGRATION**

8 This Consent Judgment constitutes the entire agreement between the parties with respect
9 to the subject matter hereof and may not be amended or modified except in writing.

10 **10. COUNTERPARTS**

11 This Consent Judgment may be executed in counterparts, each of which shall be deemed
12 an original, and all of which, when taken together, shall constitute the same document.

13 Execution and delivery of this Consent Judgment by email, facsimile, or other electronic means
14 shall constitute legal and binding execution and delivery. Any photocopy of the executed
15 Consent Judgment shall have the same force and effect as the originals.

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1 **11. AUTHORIZATION**

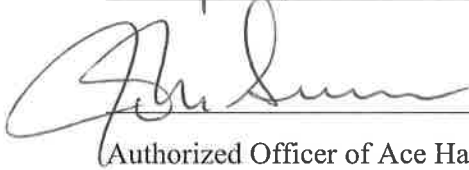
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties. Each Party has read, understood, and agrees to all of the terms and conditions
4 of this Consent Judgment. Each Party warrants to the other that it is free to enter into this
5 Consent Judgment and 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:

11/11/2016

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11 By:



Authorized Officer of Ace Hardware Corporation

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13
14 **AGREED TO:**

15 Date:

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17 By:

Authorized Officer of APS&EE, LLC

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20 **IT IS SO ORDERED.**

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22 Dated: _____

JUDGE OF THE SUPERIOR COURT

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11. AUTHORIZATION

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

AGREED TO:

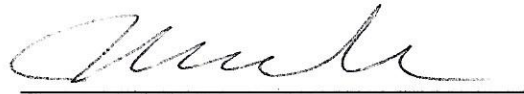
Date: _____

By: _____

Authorized Officer of Ace Hardware Corporation

AGREED TO:

Date: 11/10/16

By: 

Authorized Officer of APS&EE, LLC

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE SUPERIOR COURT