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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 Plaintiff,)

12 v.)

13 ACE HARDWARE CORPORATION, a)
14 corporation, and DOES 1 through 100,)
inclusive,)

15 Defendants.)
16)

CASE NO. 19STCV26224

[PROPOSED] CONSENT JUDGMENT

Judge: Hon. Elizabeth R. Feffer

Dept.: 39

Compl. Filed: July 26, 2019

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 person in the course of doing business as the term is
12 defined in California *Health & Safety Code* section 25249.6 et seq. (“Proposition 65”).

13 **1.2 Allegations**

14 **1.2.1** Plaintiff alleges that Defendant sold Ace Hardware Deck Screws,
15 including but not limited to 6x1-1/8, #5387303, 0-82901-21753-4 (hereinafter collectively the
16 “Products”) in the State of California causing users in California to be exposed to hazardous
17 levels of Lead without providing “clear and reasonable warnings”, in violation of Proposition 65.
18 Lead is potentially subject to Proposition 65 warning requirements because it is listed as known
19 to cause cancer and birth defects or other reproductive harm.

20 **1.2.2** On May 2, 2019, Plaintiff sent a Sixty-Day Notice of Violation (the
21 “Notice”) to Defendant and the various public enforcement agencies regarding the alleged
22 violation of Proposition 65 with respect to the Products. On July 26, 2019, Plaintiff, acting in the
23 public interest, filed the instant action (the “Complaint”) in the Superior Court for the County of
24 Los Angeles, alleging violations of Proposition 65.

25 **1.3 No Admissions**

26 Defendant denies all allegations in Plaintiff’s Notice and Complaint and maintains that
27 the Products have been, and are, in compliance with all laws, and that Defendant has not violated
28 Proposition 65. This Consent Judgment shall not be construed as an admission of liability by

1 Defendant but to the contrary as a compromise of claims that are expressly contested and denied.
2 However, nothing in this section shall affect the Parties' obligations, duties, and responsibilities
3 under this Consent Judgment.

4 **1.4 Compromise**

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

9 **1.5 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 Section 664.6 and
14 Proposition 65.

15 **1.6 Effective Date**

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

18 **Execution Date.** The term "Execution Date" shall mean the date this Consent Judgment
19 is signed by the parties

20 **2. INJUNCTIVE RELIEF**

21 **2.1 Reformulation Standard**

22 After the Effective Date, Defendant shall not manufacture or ship the Products for sale
23 into California unless (a) the finished Product produces a test result no higher than a ratio of 1.0
24 microgram of lead per 100 square centimeters based on a wipe sample collected using NIOSH
25 Method 9100 or equivalent ("Reformulated Products"), or (b) the Product is distributed, sold, or
26 offered for sale with a clear and reasonable warning as described below in Section 2.2.

27 **2.2 Proposition 65 Warnings**

28 **2.2.1** Whenever a clear and reasonable warning is required under Section 2.1,

1 Defendant shall use a warning with the capitalized and emboldened wording substantially similar
2 to the following, or otherwise compliant with Prop 65:

3 **WARNING:** This product can expose you to Lead which is known to the State
4 of California to cause cancer and birth defects or other
5 reproductive harm. For more information go to
6 www.P65Warnings.ca.gov.

7 The warning shall be accompanied by a symbol consisting of a black exclamation point
8 in a yellow equilateral triangle with a bold black outline. Where the label for the product is not
9 printed using the color yellow, the symbol may be printed in black and white. The symbol shall
10 be placed to the left of the text of the warning, in a size no smaller than the height of the word
11 “WARNING”.

12 **2.2.2** The Products shall carry said warning directly on each unit or its label or
13 package, with such conspicuousness as compared with other words, statements or designs as to
14 render it likely to be read and understood by an ordinary consumer prior to sale. A Product that is
15 sold by Defendant on the internet shall also provide the warning message by a clearly marked
16 hyperlink on the product display page, or otherwise prominently displayed to the purchaser
17 before the purchaser completes his or her purchase of the Product. For Products that Defendant
18 provides for a downstream retailer to sell on the internet, Defendant shall include an instruction
19 that the retailer comply with the warning requirements of this section.

20 **3. PAYMENTS**

21 **3.1 Civil Penalty Pursuant To Proposition 65**

22 In settlement of all claims referred to in this Consent Judgment, Defendant shall pay a
23 total civil penalty of three thousand dollars (\$3,000.00) to be apportioned in accordance with
24 *Health and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$2,250.00) for State of
25 California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining
26 25% (\$750.00) for Plaintiff. These penalties will be included in Defendant’s total payment made
27 to Plaintiff’s Counsel under section 3.3 and Plaintiff’s Counsel will in turn arrange for payments
28 to Plaintiff and OEHHA after the effective date.

1 **3.2 Reimbursement Of Plaintiff's Fees And Costs**

2 Defendant shall reimburse Plaintiff's reasonable experts' and attorney's fees and costs
3 incurred in prosecuting the instant action, for all work performed through execution and approval
4 of this Consent Judgment in the amount of twenty-one thousand dollars (\$21,000.00).

5 **3.3 Total Payment**

6 Defendant shall arrange to mail Plaintiff's Counsel the total sum of \$24,000
7 representing the civil penalty and attorney fees in Sections 3.1 and 3.2 within 30 days following
8 the Execution Date and upon receipt of the appropriate W-9.

9 Defendant or its agent shall remit the payment to:

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

13 **4. RELEASES**

14 **4.1 Plaintiff's Release Of Defendant**

15 Plaintiff, acting in its individual capacity, and in the public interest, in consideration
16 of the promises and monetary payments contained herein, hereby releases Defendant, and its
17 parents, shareholders, members, directors, officers, managers, employees, representatives,
18 agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
19 and their predecessors, successors and assigns and all entities from whom they obtain and to
20 whom they directly or indirectly distribute or sell the Products, including but not limited to
21 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
22 franchisees, and cooperative members, including but not limited to JC Grand Corporation and
23 their respective parents, shareholders, members, directors, officers, managers, employees,
24 representatives, principals, agents, attorneys, franchisees, cooperative members, marketplaces,
25 insurers, divisions, subdivisions, subsidiaries, partners, sister companies, affiliates, each entity to
26 whom they directly or indirectly distribute or sell the Products, and their respective predecessors,
27 successors, and assigns ("Releasees") of all claims for violations of Proposition 65 based on
28 exposure to lead from the Products as set forth in the Notice, with respect to any Products

distributed by JC Grand or distributed or sold by Defendant prior to the Effective Date.
Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to warnings about lead exposure from the Products.

4.2 Defendant's Release Of Plaintiff

Defendant, by this Consent Judgment, waives all rights to institute any form of legal action against Plaintiff, its shareholders, directors, members, officers, employees, attorneys, experts, successors and assignees for actions or statements made or undertaken, whether in the course of investigating claims or seeking enforcement of Proposition 65 against Defendant in this matter. If any Releasee should institute any such action, then Plaintiff's release of said Releasee in this Consent Judgment shall be rendered void and unenforceable.

4.3 Waiver Of Unknown Claims

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

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

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

5. COURT APPROVAL

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

1 **2.2** This Consent Judgment shall not be effective until it is approved and entered by
2 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
3 within twelve months after it has been fully executed by the Parties. In such case, the Parties
4 agree to meet and confer on how to proceed and if such agreement is not reached within 30-days,
5 any monies that have been paid pursuant to Section 3.3 shall be refunded and the case shall
6 proceed on its normal course.

7
8 **6. SEVERABILITY**

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

12 **7. GOVERNING LAW**

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

15 **8. NOTICES**

16 All correspondence and notice required to be provided under this Consent Judgment shall
17 be in writing and delivered personally or sent by first class or certified mail addressed as follows:

18 TO DEFENDANT:

19 Lee N. Smith, Esq.
20 Craig A. Tristao, Esq.
21 COLEMAN & HOROWITT, LLP
22 499 W Shaw Avenue, Suite 116
23 Fresno, CA 93704

24 TO PLAINTIFF

25 Lucas Novak, Esq.
26 Law Offices of Lucas T. Novak
27 8335 W Sunset Blvd., Suite 217
28 Los Angeles, CA 90069

29 **9. COUNTERPARTS**

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

10. **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 is 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:

2/28/20

By:

[Signature]

Authorized Representative of APS&EE, LLC

AGREED TO:

Date:

2-26-20

By:

[Signature]

Authorized Representative of Ace Hardware Corporation

John Surane, EVP

IT IS SO ORDERED.

Dated: _____

JUDGE OF THE SUPERIOR COURT