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Attorney for Plaintiff, APS&EE, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

APS&EE, LLC, a limited liability company, Plaintiff, v. E. MISHAN & SONS, INC., a corporation, and DOES 1 through 100, inclusive, Defendants.	CASE NO. 21STCV11854 **[PROPOSED] CONSENT JUDGMENT** Judge: Hon. Terry Green Dept.: 14 Compl. Filed: March 29, 2021 Unlimited Jurisdiction

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1. RECITALS

1.1 The Parties

1.1.1 This Consent Judgment ("Consent Judgment") is entered into by and between APS&EE, LLC ("Plaintiff") and E. MISHAN & SONS, INC. ("Defendant"). Plaintiff and Defendant shall hereinafter collectively be referred to as the "Parties."

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

1.1.3 Plaintiff alleges that Defendant is a person in the course of doing business as the term is defined in California *Health & Safety Code* section 25249.6 et seq. ("Proposition 65").

1.2 Allegations

1.2.1 Plaintiff alleges that Defendant sold Emson XHoses, including but not limited to 25ft, 0-80313-01255-6 (hereinafter collectively the "Products"), in the State of California causing users in California to be exposed to hazardous levels of Lead without providing "clear and reasonable warnings", in violation of Proposition 65. Lead is potentially subject to Proposition 65 warning requirements because it is listed as known to cause cancer and birth defects or other reproductive harm.

1.2.2 On September 28, 2020, Plaintiff sent a Sixty-Day Notice of Violation (the "Notice") to Defendant and the various public enforcement agencies regarding the alleged violation of Proposition 65 with respect to the Products. On March 29, 2021, Plaintiff, acting in the public interest, filed the instant action (the "Complaint") in the Superior Court for the County of Los Angeles, alleging violations of Proposition 65.

1.3 No Admissions

Defendant denies all allegations in Plaintiff's Notice and Complaint and maintains that the Products have been, and are, in compliance with all laws, and that Defendant has not violated Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by

Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Defendant. However, nothing in this section shall affect the Parties' obligations, duties, and responsibilities under this Consent Judgment.

1.4 Compromise

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

1.5 Jurisdiction and Venue

For purposes of this Consent Judgment only, the Parties stipulate that the above-entitled Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Los Angeles County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to California Code of Civil Procedure Section 664.6 and Proposition 65.

1.6 Effective Date

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

2. INJUNCTIVE RELIEF

2.1 Reformulation Standard

As of thirty (30) days after the Effective Date, and continuing thereafter, Defendant shall not distribute for sale in California, sell or offer for sale the Products in California unless (a) the Product contains no more than 100 parts per million (0.01%) of Lead ("Reformulated Product"), or (b) the Product is distributed, sold, or offered for sale with a clear and reasonable warning as described below in Section 2.2.

2.2 Clear And Reasonable Warnings

After the Effective Date, for any Products that are not Reformulated Products, such

Products shall be accompanied by a clear and reasonable warning. Defendant shall provide a warning statement substantially similar to the following:

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

Or

Any warning that substantially and materially complies with the requirements of 27 CCR Section 25600 et. seq., and amended subsequently thereafter, or other text or methods authorized or mandated by those regulations, or other State of California regulations or legislation pertaining to Proposition 65 warnings related to such Products.

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

The warning shall be provided with such conspicuousness as compared with other words, statements or designs as to render it likely to be read and understood by an ordinary consumer prior to purchase. A Product that is sold by Defendant on the internet to persons located in California shall also provide the warning message by a clearly marked hyperlink on the product display page, or otherwise prominently displayed to the purchaser before the purchaser completes his or her purchase of the Product. For Products that Defendant provides for a downstream entity to sell on the internet, Defendant shall include an instruction that the entity comply with the warning requirements of this section.

2.3 Products in the Stream of Commerce

Any Products that have been distributed, shipped, or sold by Defendant prior to thirty (30) days after the Effective Date shall not be subject to the injunctive requirements of Sections 2.1 and 2.2, which products are subject to the releases provided in Section 4.1.

3. PAYMENTS

3.1 Civil Penalty Pursuant To Proposition 65

In settlement of all claims referred to in this Consent Judgment, Defendant shall pay a total civil penalty of fifteen thousand dollars ($15,000.00) to be apportioned in accordance with *Health and Safety Code* section 25249.12(c)(1) and (d), with 75% ($11,250.00) for State of California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25% ($3,750.00) for Plaintiff.

Defendant shall issue two (2) checks for the civil penalty: (1) a check or money order made payable to "OEHHA" in the amount of $11,250.00; and (2) a check or money order made payable to "Law Offices of Lucas T. Novak" in the amount of $3,750.00. Defendant shall remit the payments within five (5) business days of the Effective Date, to:

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

Upon receipt of the above civil penalty checks, Law Offices of Lucas T. Novak shall forward the payments to OEHHA and Plaintiff.

3.2 Reimbursement Of Plaintiff's Fees And Costs

Defendant shall reimburse Plaintiff's reasonable experts' and attorney's fees and costs incurred in prosecuting the instant action for all work performed through execution and approval of this Consent Judgment. Accordingly, Defendant shall issue a check or money order made payable to "Law Offices of Lucas T. Novak" in the amount of twenty-six thousand dollars ($26,000.00). Defendant shall remit the payment within five (5) business days of the Effective Date, to:

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

4. RELEASES

4.1 Public Release

This Consent Judgment is a full, final, and binding resolution between Plaintiff and Defendant of any violation of Proposition 65 that was or could have been asserted by Plaintiff,

acting on behalf of itself and in a representative capacity in the public interest under Health & Safety Code § 25249.7, against Defendant, its parents, subsidiaries, affiliated entities, directors, officers, employees, attorneys, and the predecessors, successors, or assigns of each of them, and each entity to whom Defendant directly or indirectly exports, distributes or sells the Products, including, without limitation, distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Released Parties"), based on failure to warn of alleged exposures to lead from the Products sold, shipped, or distributed for sale in California by Defendant before and up to thirty (30) days after the Effective Date. The release in this Section 4.1 applies to all Products that Defendant sold, shipped, or distributed prior to and up to thirty (30) days after the Effective Date, regardless of the date any other Released Parties distribute or sell the Products.

Compliance with the terms of this Consent Judgment shall constitute compliance with Proposition 65 by Defendant and the Released Parties with respect to lead in the Products manufactured, sold, or distributed for sale in California on and after the Effective Date.

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 Released Party should institute any such action, then Plaintiff's release of said Released Party 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

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

6. SEVERABILITY

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

7. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendant may provide written notice to Plaintiff of any asserted change in the law, and with the exception of Sections 3.1 and 3.2 above, have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are so affected. None of the terms of this Consent Judgment shall have any application to Products sold outside of the State of California.

8. NOTICES

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

TO DEFENDANT:	TO PLAINTIFF:
Donald A. Beshada, Esq. Beshada Farnese LLP 108 Wanaque Avenue Pompton Lakes, NJ 07442	Lucas T. Novak, Esq. Law Offices of Lucas T. Novak 8335 W Sunset Blvd., Suite 217 Los Angeles, CA 90069

9. COUNTERPARTS

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

10. MODIFICATION

This Consent Judgment may only be modified by a written instrument executed by the Parties to be bound thereby, and after approval by the Court upon a noticed motion. Any motion to modify shall be served on all Parties and the Office of the Attorney General.

11. DISPUTE RESOLUTION

If Plaintiff determines at a future date that a violation of this Consent Judgment has occurred, Plaintiff shall provide notice to Defendant. Prior to bringing any action to enforce any requirement of this Consent Judgment, Plaintiff shall provide Defendant with written notice of the grounds for such allegation together with all supporting information as well as a complete demand for the relief sought. The Parties shall then meet and confer regarding the basis for the allegation to resolve the matter informally, including providing Defendant with a reasonable opportunity of at least thirty (30) days to cure any alleged violation. Should such attempt at informal resolution fail, the party alleging a violation may file its lawsuit seeking the proposed relief.

12. 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: _____

By: _____

Authorized Representative of APS&EE, LLC

AGREED TO:

Date: MAY 13 21

By: _____

Authorized Representative of E. Mishan & Sons, Inc.

IT IS SO ORDERED.

Dated: _____

_____

JUDGE OF THE SUPERIOR COURT

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: 5/13/21

By: _____

Authorized Representative of APS&EE, LLC

AGREED TO:

Date: May 12 21

By: _____

Authorized Representative of E. Mishan & Sons, Inc.

IT IS SO ORDERED.

Dated: _____

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JUDGE OF THE SUPERIOR COURT