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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 MSKS IP INC., a corporation, METAL)
14 SUPERMARKETS FRANCHISING)
15 AMERICA INC., a corporation, and DOES 1)
16 through 100, inclusive,)
17 Defendants.)

CASE NO. 22STCV17979

[PROPOSED] CONSENT JUDGMENT

Judge: Hon. Maurice A. Leiter
Dept.: 54
Compl. Filed: June 1, 2022

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 APS&EE, LLC (“Plaintiff”) and Metal Supermarkets Franchising America Inc.
5 (“MSFA”). Plaintiff and MSFA shall hereinafter collectively be referred to as the “Parties.”

6 **1.1.2** Plaintiff is a limited liability company organized in the State of California,
7 acting in the interest of the general public in protecting the environment, improving human
8 health and the health of ecosystems, and supporting environmentally sound practices, which
9 includes promoting awareness of exposure to toxic chemicals and reducing exposure to
10 hazardous substances found in consumer products.

11 **1.1.3** Plaintiff alleges that MSFA is a person in the course of doing business as
12 the term is defined in California *Health & Safety Code* section 25249.6 et seq. (“Proposition
13 65”).

14 **1.2 Allegations**

15 **1.2.1** Lead is listed as a chemical known to the state of California to cause
16 cancer and birth defects or other reproductive harm. Plaintiff alleges that MSFA manufactures,
17 imports, sells, and distributes for sale in the state of California: brass bars including, but not
18 limited to, square brass bars 0.5”, of all shapes and lengths, including plates and sheets,
19 containing Lead. Plaintiff further alleges that the Covered Products expose consumers in
20 California to Lead without having first provided them a clear and reasonable warning for the
21 exposure as Plaintiff alleges is required by Proposition 65. MSFA denies Plaintiff’s allegations
22 that any of its products require Proposition 65 warnings.

23 **1.2.2** The products covered by this Consent Judgment are brass bars including,
24 but not limited to, square brass bars 0.5”, of all shapes and lengths, including plates and sheets,
25 that (1) are or were imported, sold, shipped, delivered, or distributed for sale to consumers in
26 California by MSFA, and (2) were imported, sold, shipped, delivered, or distributed for sale to
27 consumers in California by MSFA’s franchisees prior to the Effective Date. All such products
28 are collectively referred to as (“Covered Products”).

1 **1.2.3** On March 1, 2022, Plaintiff served a Sixty-Day Notice of Violation (the
2 “Notice”) to MSFA and MSKS IP INC., and the various public enforcement agencies regarding
3 the alleged violation of Proposition 65 with respect to the Covered Products. The Notice alleged
4 that MSFA had violated Proposition 65 by failing to sufficiently warn consumers in California of
5 the health hazards associated with exposures to Lead contained in the Covered Products
6 including, but not limited to, brass bars 0.5”.

7 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
8 violations alleged in the Notice.

9 On June 1, 2022, Plaintiff, acting in the public interest, filed the instant action (the
10 “Complaint”) in the Superior Court for the County of Los Angeles, alleging violations of
11 Proposition 65.

12 **1.3 No Admissions**

13 MSFA denies the material, factual, and legal allegations in the Notice and
14 Complaint and maintains that all the Covered Products have been, and are, in compliance
15 with all laws. Nothing in this Consent Judgment shall be construed as an admission of any
16 fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with
17 this Consent Judgment be construed as an admission of any fact, finding, conclusion of
18 law, issue of law, or violation of law. This Section shall not, however, diminish or
19 otherwise affect MSFA’s obligations, responsibilities, and duties under this Consent
20 Judgment.

21 **1.4 Compromise**

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

25 **1.5 Jurisdiction and Venue**

26 For purposes of this Consent Judgment only, the Parties stipulate that the above-entitled
27 Court has jurisdiction over MSFA as to the allegations in the Complaint, that venue is proper in
28 Los Angeles County, and that this Court has jurisdiction to enter and enforce the provisions of

1 this Consent Judgment pursuant to California Code of Civil Procedure Section 664.6 and
2 Proposition 65.

3 **1.6 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall be the date on
5 which Plaintiff serves notice to MSFA or its counsel that the Court has approved and entered this
6 Consent Judgment.


7 **2. INJUNCTIVE RELIEF**

8 **2.1 Reformulation Standard**


9 After the Effective Date, MSFA shall not sell, ship, deliver, or distribute for sale Covered
10 Products in California unless (a) the Covered Products sold, shipped, delivered or distributed for
11 sale by MSFA contain no more than 100 parts per million (0.01%) of Lead (“Reformulated
12 Product”), or (b) the Covered Products sold, shipped, delivered or distributed for sale by MSFA
13 are sold, shipped, delivered or distributed for sale with a clear and reasonable warning as
14 described below in Section 2.2.

15 **2.2 Proposition 65 Warnings**

16 **2.2.1** Whenever a clear and reasonable warning is required under Section 2.1,
17 MSFA shall use a warning with the capitalized and emboldened wording substantially similar to
18 the following:

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

22 Or, if the warning is printed on or affixed to a Covered Product or its immediate
23 container, box or wrapper:

24  **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

25
26 The symbol depicted above shall consist of a black exclamation point in a yellow
27 equilateral triangle with a bold black outline. Where the label for the product is not printed using
28

1 the color yellow, the symbol may be printed in black and white. The symbol shall be placed to
2 the left of the text of the warning, in a size no smaller than the height of the word “WARNING”.

3 **2.2.2 Internet Sales.** A Covered Product that is sold by MSFA on its website to
4 persons located in California shall provide the warning message by a clearly marked hyperlink
5 on the product display page or by otherwise prominently displaying the warning to the purchaser
6 before the purchaser completes his or her purchase of the Covered Product from MSFA. MSFA
7 shall have no responsibility for providing Proposition 65 warnings to consumers that: (1) visit
8 MSFA’s website and do not purchase a Covered Product from MSFA and/or (2) visit MSFA’s
9 website and subsequently purchase brass bars from one or more of MSFA’s franchisee(s),
10 provided however, that MSFA shall provide, within 30 days of the Effective Date, a one-time
11 written communication to each of its California franchisees recommending that each of them
12 comply with the warning requirements of this section to the extent applicable to any such entity
13 under Proposition 65. This requirement shall not be interpreted to modify the rights and
14 responsibilities of MSFA as set forth in any agreement between MSFA and its California
15 franchisees.

16 In lieu of the preceding warning content and methods set forth above in Section 2.2,
17 MSFA may use any warning content and method that is consistent with Title 27, California Code
18 of Regulations, § 25600 et seq., as amended August 30, 2016 and subsequently thereafter. In the
19 event that Proposition 65 warnings for Lead should no longer be required by law with respect to
20 the Covered Products, then MSFA shall have no further obligations pursuant to this Consent
21 Judgment, but any such modification shall have no effect on MSFA’s financial obligations set
22 forth herein.

23 **2.3 Sell-Through Period**

24 The injunctive requirements of Section 2 shall not apply to Covered Products that MSFA
25 has distributed to California customers as of the Effective Date, or those Covered Products
26 currently in the inventory of MSFA’s California franchisees, which Products are subject to the
27 releases provided in Section 4.1.

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1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Settlement Amount**

3 MSFA shall pay nineteen thousand dollars (\$19,000.00) in settlement and total
4 satisfaction of all the claims referred to in the Notice, the Complaint, and this Consent Judgment.
5 This includes civil penalties in the amount of two thousand dollars (\$2,000.00) pursuant to
6 Health and Safety Code section 25249.7(b) and attorneys' fees and costs in the amount of
7 seventeen thousand dollars (\$17,000.00) pursuant to Code of Civil Procedure section 1021.5.

8 **3.2 Civil Penalty Pursuant to Proposition 65**

9 In settlement of all claims referred to in this Consent Judgment, MSFA shall pay a total
10 civil penalty of two thousand dollars (\$2,000.00) to be apportioned in accordance with *Health*
11 *and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$1,500.00) for State of California
12 Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25%
13 (\$500.00) for Plaintiff.

14 MSFA shall issue two (2) checks for the civil penalty: (1) a check or money order made
15 payable to "OEHHA" in the amount of \$1,500.00; and (2) a check or money order made payable
16 to "Law Offices of Lucas T. Novak" in the amount of \$500.00. MSFA shall remit the payments
17 within five (5) business days of the Effective Date, to:

18 Lucas T. Novak, Esq.
19 LAW OFFICES OF LUCAS T. NOVAK
20 8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

21 After Plaintiff's counsel receives the check made payable to OEHHA, Plaintiff's counsel shall be
22 responsible for forwarding said check to OEHHA.

23 **3.3 Reimbursement of Plaintiff's Fees and Costs**

24 MSFA shall reimburse Plaintiff's reasonable experts' and attorney's fees and costs
25 incurred in prosecuting the instant action, for all work performed through execution and approval
26 of this Consent Judgment in the public interest. Accordingly, MSFA shall issue a check or
27 money order made payable to "Law Offices of Lucas T. Novak" in the amount of seventeen
28 thousand dollars (\$17,000.00). MSFA shall remit the payment within five (5) business days of

1 the Effective Date, to:

2 Lucas T. Novak, Esq.
3 LAW OFFICES OF LUCAS T. NOVAK
4 8335 W Sunset Blvd., Suite 217
5 Los Angeles, CA 90069

6 **4. CLAMS COVERED AND RELEASED**

7 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

8 Plaintiff, acting in its individual capacity, and in the public interest, in consideration of
9 the promises and monetary payments contained herein, hereby releases MSFA and its parents,
10 subsidiaries, affiliated entities under common ownership, its directors, officers, principals,
11 agents, employees, attorneys, insurers, accountants, predecessors, successors, assigns,
12 franchisees and MSKS IP INC. ("Defendant Entities"), and all entities to whom Defendant
13 Entities directly or indirectly distribute, ship, or sell the Covered Products including but not
14 limited to downstream distributors, wholesalers, customers, retailers, franchisees, franchisors,
15 cooperative members, and all of the foregoing entities' owners, directors, officers, agents,
16 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors,
17 and assigns (collectively referred to as the "Releasees") from all claims for violations of
18 Proposition 65 based on exposure to Lead from Covered Products that have been marketed,
19 supplied or distributed by MSFA or its franchisees prior to the Effective Date. This Consent
20 Judgment is a full, final and binding resolution of all Proposition 65 claims that were or could
21 have been asserted against MSFA, Defendant Entities and Releasees, or any of them, for failure
22 to provide warnings for alleged exposures to Lead in Covered Products. Compliance with the
23 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
24 exposures to Lead from Covered Products.

25 **4.2 Defendant's Release of Plaintiff**

26 MSFA and Defendant Entities, by this Consent Judgment, waive all rights to institute any
27 form of legal action against Plaintiff, its shareholders, directors, members, officers, employees,
28 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

1 MSFA and/or any Defendant Entities in this matter.

2 **4.3 Plaintiff's Individual Release of Claims**

3 Plaintiff, in its individual capacity only, and on behalf of itself and its successors, heirs,
4 assigns, agents, and attorneys, also provides a release herein to Defendant, Defendant Entities
5 and Releasees from all claims as to all chemicals listed under Proposition 65 in all Covered
6 Products supplied or distributed by MSFA or its franchisees prior to the Effective Date. In
7 addition, Plaintiff, in its individual capacity only, and on behalf of itself and its successors, heirs,
8 assigns, agents, and attorneys, also provides a release herein to Defendant, Defendant Entities
9 and Releasees which shall be effective as a full and final accord and satisfaction, as a bar to all
10 actions, causes of action, obligations, costs, expenses, attorney's fees, damages, losses, claims,
11 liabilities and demands of any nature, character, or kind, whether known or unknown, suspected
12 or unsuspected, with respect to any other issue concerning the Covered Products that have been
13 supplied or distributed by MSFA or its franchisees prior to the Effective Date. In this regard,
14 Plaintiff has had the benefit of counsel, and has been advised of, understands, and knowingly and
15 specifically waives its rights under Section 1542 of California Civil Code which provides as
16 follows:

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

21 **5. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason, it is not approved and entered by the Court within one
24 year after it has been fully executed by the Parties unless the Parties mutually agree to extend
25 that time period due to what they mutually agree are reasonably unforeseen circumstances.

26 **6. SEVERABILITY**

27 Should any part or provision of this Consent Judgment for any reason be declared by a
28 court to be invalid, void or unenforceable, the remaining portions and provisions shall continue

1 in full force and effect.

2 **7. GOVERNING LAW**

3 The terms of this Consent Judgment shall be governed by the laws of the State of
4 California.

5 **8. NOTICES**

6 Unless otherwise specified herein, all correspondence and notice required by this Consent
7 Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or
8 certified mail; or (iii) a recognized overnight or two-day courier on any Party by the other Party
9 to the following addresses:
10

11 **TO MSFA:**

12 Metal Supermarkets Family of
13 Companies
14 5399 Eglinton Ave W Ste 210
15 Etobicoke, ON M9C 5K6,
16 Canada

16 With a copy to:

17 Rohit Sabnis, Esq.
18 Keller and Heckman LLP
19 3 Embarcadero Ctr, Ste 1420
20 San Francisco, CA 94111
21

TO PLAINTIFF:

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

22 Any Party may, from time to time, specify in writing to the other, a change of address to
23 which notices, and other communications shall be sent.
24

25 **9. COUNTERPARTS**

26 This Consent Judgment may be executed in counterparts, each of which shall be deemed
27 an original, and all of which, when taken together, shall constitute the same document. Execution
28 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

1 Judgment shall have the same force and effect as the originals.

2 **10. POST EXECUTION ACTIVITIES**

3 Plaintiff agrees to comply with the reporting form requirements referenced in Health and
4 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and
5 Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the
6 settlement, which motion Plaintiff shall draft and file. In furtherance of obtaining such approval,
7 the Parties agree to mutually employ their best efforts, including those of their counsel, to
8 support the entry of this agreement as judgment, and to obtain judicial approval of their
9 settlement in a timely manner. For purposes of this Section, “best efforts” shall include, at a
10 minimum, supporting the motion for approval, responding to any objection that any third-party
11 may make, and appearing at the hearing before the Court if so requested. If this Consent
12 Judgment is not entered by the Court, it shall be of no force or effect and shall not be introduced
13 into evidence or otherwise used in any proceeding for any purpose.

14 In addition, Plaintiff agrees to execute and file with the Court a dismissal without
15 prejudice of MSKS IP INC. within five (5) business days of receipt and clearance of the
16 payments set forth above in Section 3.

17 **11. AUTHORIZATION**

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

23 **12. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**


24 If a dispute arises with respect to either Party’s compliance with the terms of this Consent
25 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone,
26 and/or in writing and endeavor to resolve the dispute in an amicable manner. No action or
27 motion may be filed in the absence of such a good faith attempt to resolve the dispute
28 beforehand.

1 **13. ENTIRE AGREEMENT**

2 This Consent Judgment contains the sole and entire agreement and understanding of
3 the Parties with respect to the entire subject matter herein, and any and all prior
4 discussions, negotiations, commitments, and understandings related hereto. No
5 representations, oral or otherwise, express or implied, other than those contained herein
6 have been made by any Party. No other agreements, oral or otherwise, unless specifically
7 referred to herein, shall be deemed to exist or to bind any Party.

8
9
10 **AGREED TO:**

11 Date: 8/9/2022

12 By: 

13 Authorized Representative of APS&EE, LLC

14
15 **AGREED TO:**

16 Date: August 8, 2022

17 By: 

18 Authorized Representative of METAL SUPERMARKETS
19 FRANCHISING AMERICA INC.

20
21 **IT IS SO ORDERED.**

22 Dated: _____

23 _____
24 JUDGE OF THE SUPERIOR COURT