PARTIES/ATTORNEYS

Plaintiff	APS&EE, LLC	Lucas Novak, Esq.
Defendant	American General Tool Group dba Thrifty Supply Co; Central Network Retail Group dba Outdoor Supply Hardware	Randy Vogel, Esq.

TENTATIVE RULING

The court has reviewed this matter. It adopts the tentative ruling posted in advance of the April 23, 2025 hearing and incorporates it here. It also finds that the concerns raised in that tentative ruling have been satisfactorily resolved by the supplemental briefing and supplemental declaration. The court approves the motion to approve the settlement and consent judgment. No appearance is required.

April 23, 2025 TENTATIVE RULING:

This matter is continued for further briefing of the following issues:

- whether the Proposed Consent Judgment was timely served on the Attorney General when it was not submitted by the court or signed by the parties until April 11, 2025;
- whether the Proposed Consent Judgment serves the public interest when it contains a provision that obsoletes the "Plaintiff's release of Defendants" should defendants "institute any form of legal action against Plaintiff." This appears to be a form of self-protection available only to plaintiff and in no way implicating the public interest.
- Whether the case remains ripe where the warnings required by the Consent Judgment have been implemented prior to the settlement.
- Whether the proposed civil penalty is reasonable, paying particular attention to the points raised below.

Moreover, the court directs submission of prelawsuit notices to the governmental entities and the violator so the court can determine its sufficiency under *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, as directed by *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46.

The matter is continued to May 21, 2025 at 8:30 a.m. No appearance is required on April 23, 2025, unless the plaintiff wishes to address this tentative. Any

supplemental briefing as well as submissions must be served and filed at least 10 calendar days prior to the hearing.

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code[1], §§ 25249.5 et seq., the "Act" or "Proposition 65"[2]) was added to the California Code by ballot measure in 1987. It prohibits "expos[ing] any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." (§ 24249.6.)[3] Persons who violate or threaten to violate this section may be enjoined in any court of competent jurisdiction and are subject to a civil penalty. (§24249.7, subds. (a), (b).) A private citizen (also sometimes called "private enforcer") may enforce the Act if applicable government agencies fail to undertake enforcement after notice of violation has been given to the applicable government agencies and to the alleged violator. (*Id.* at subd. (d).)

In this case, plaintiff APS&EE LLC filed its complaint on December 5, 2024, alleging that defendants, Thrifty Supply Co., American General Tool Group, Outdoor Supply Hardware, and Central Network Retail Group, "have and continue to manufacture, distribute, sell, and/or offer to sell Thrifco brand of brass fittings, including but not limited to 3/8" Comp X 3/8" FIP 90* Elbow, 0-48314-01392-7," which contains lead. Plaintiff asserts that defendants continually fail to include the necessary warning about the risk of exposure in lead in these brass fittings, in violation of the Act. Defendants answered on March 14, 2025. On March 6, 2025, plaintiff filed a motion to approve settlement and consent judgment for court approval.

Legal Background

"In 2002, the Legislature required judicial review of Proposition 65 settlements because of concern that in some cases, defendants and private plaintiffs have found common ground by entering into a settlement that does not provide any real protection to the public in the event of a violation, but does provide compensation to the plaintiffs' attorneys. (Sen. Rules Com., Analysis of Sen. Bill No. 471 (2001–2002 Reg. Sess.) as amended Sept. 13, 2001, p. 4.) The Legislature sought to prevent settlements which simply result ion [sic] inadequate public warning in exchange for payments of attorney's fees. (Sen. Rules Com., Analysis of Sen. Bill No. 471 (2001–2002 Reg. Sess.) as amended Sept. 13, 2001, p. 3.)" (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 49 [cleaned up] (*Kintetsu*).)

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[1] All subsequent statutory references are to the Health and Safety Code, unless otherwise specified.
[2] It is still colloquially referred to as "Proposition 65."
[3] This case does not implicate section 25249.5, which is the part of the initiative concerned with discharges into drinking water.

To stamp a consent agreement with the judicial imprimatur, the court must determine the proposed settlement is just. (*Id.* at 61.) In the context of Proposition 65 litigation, brought to vindicate the public interest, the trial court also must ensure that its judgment serves the public interest. Where the proposed judgment contains multiple provisions, the court must consider whether each serves the public interest. (*Id.* at 62—finding release was too broad and unilateral opt-out provision rendered settlement illusory.)

Additionally, the court must consider:

- whether the legal issue remains justiciable pursuant to *Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175 [before consent judgment entered, plaintiff discovered product had not violated Prop 65; consent judgment governing future products that might violate Prop 65 thus rejected]; and
- whether the pre-lawsuit notice to the government entities was sufficient pursuant to *Consumer Defense Group v. Rental Housing Industry Members* (2006)137 Cal.App.4th 1185.

(*Kintetsu, supra,* at p. 62.)

Finally, the court must consider whether the requirements of section 25249.7, subdivision (f)(4) have been met. That section provides: "If there is a settlement of an action brought by a person in the public interest under subdivision (d), the plaintiff shall submit the settlement ... to the court for approval ... and the court may approve the settlement only if the court makes all of the following findings: [¶] (A) Any warning that is required by the settlement complies with this chapter. [¶] (B) Any award of attorney's fees is reasonable under California law. [¶] (C) Any penalty amount is reasonable...."

Procedural Considerations

Where the Prop 65 settlement emanates from a private enforcement action, the "private enforcer" shall serve the Settlement on the Attorney General within five days after the action is subject to a settlement, or concurrently with service of the motion for judicial approval of settlement pursuant to Health and Safety Code section 25249.7(f)(4), whichever is sooner. The motion and all supporting papers and exhibits shall be served on the Attorney General no later than forty-five days prior to the date of the hearing of the motion. (Cal. Code Regs., tit. 11, § 3003 (a).)

Here, the proof of service was filed on March 6, 2025, attesting to service on the same date, which is indeed at least 45 days prior to the date of the hearing on

the motion.[4] Although the proof of service indicates the Proposed Consent Judgment was emailed along with the motion papers,[5] the court notes that the Proposed Consent Judgment was not filed with the court until April 11, 2025 and was not executed by plaintiff's authorized representative, the last party to sign, until April 11, 2025. There is thus a conflict in the evidence presented as to whether the Proposed Consent Judgment was served on the Attorney General "within five days after the action is subject to a settlement, or concurrently with service of the motion for judicial approval of settlement pursuant to Health and Safety Code section 25249.7(f)(4), whichever is sooner."

Plaintiff is directed to address this in a supplement.

Does the Consent Judgment Serve the Public Interest?

As noted above, the trial court must ensure that the judgment serves the public interest. Accordingly, the court reviews the terms of the Consent Judgment. Generally, the Consent Judgment provides:

- defendants deny all allegations in the complaint and maintain their products are in compliance with all laws and not violative of Prop 65;
- defendants agree to reformulate their product to comply with a specified standard *or* to distribute their products with a clear warning (Proposed Consent Judgment ¶ 2.1);
- Defendants agree to a civil penalty of $1,500 to be apportioned in accordance with Health and Safety Code section 25249.12(c)(1) and (d), with 75% ($1,125.00) for State of California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25% ($375.00) for Plaintiff (Proposed Consent Judgment, ¶ 3.1)
- Defendants agree to pay plaintiff's attorney's fees and costs in the total amount of $18,000 (Proposed Consent Judgment, ¶ 3.2);
- Plaintiff releases: "Defendant, its parents, subsidiaries, shareholders, directors, members, officers, employees, attorneys, successors and assignees, and their downstream distributors, retailers, and franchisees, including Thrifty Supply Co., Outdoor Supply Hardware, and Central Network Retail Group (all of the foregoing collectively "Released Parties"), from any alleged Proposition 65 violation claims asserted in Plaintiff's Notices or Complaint

[4] Despite the regulations' requirement that "service shall be in a manner prescribed by Code of Civil Procedure section 1010-1020" (see Cal. Code Regs., tit. 11, § 3006), the Office of Attorney General has stated by letter that "We will consider service to be complete for purposes of calculating 45 days before the hearing on the date that you send the hard copy and the electronic copy. These procedures will remain in effect until further written notice from our office." (https://oag.ca.gov/prop65/ag-letters, last accessed 4/15/25, letter dated March 18, 2020.) Thus, no extension of time for manner of service needs to be calculated.

[5] According to the Office of Attorney General, "All motions, supporting papers and exhibits to be served on the Attorney General 45 days prior to the date of hearing should be sent by electronic mail to Prop65.Motions@doj.ca.gov." (https://oag.ca.gov/prop65, last accessed 4/15/15.)

regarding failure to warn about Lead exposure from the Products sold by Defendant before and up to the Effective Date." (Proposed Consent Judgment, ¶ 4.1);

- Defendant "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." (Proposed Consent Judgment, ¶ 4.2.)
- Both parties waive unknown claims even if a party "subsequently discover[s] 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." (Proposed Consent Judgment, ¶ 4.3.)

1. Breadth of Release

In *Kintetsu,* the court observed:

"Some of the provisions of each judgment are so contrary to the public interest that standing alone, they require the reversal of the judgments. The broad release purports to preclude the public from future litigation of both known claims and additionally discovered ones. Under the terms of the release, any member of the public loses the right to pursue a claim regardless of whether [plaintiff] had knowledge of the claim and regardless of whether relevant scientific knowledge has changed."

(*Kintetsu, supra,* 141 Cal.App.4th at 63, fn. 13.)

In *Kintetsu*, the release and waiver provisions broadly released all known and unknown claims. The court further observed that the judgment included a statement that "[t]he provision of said warnings shall be deemed to satisfy any and all obligations under Proposition 65 by any and all person(s) or entity(ies) with respect to any and all environmental and occupational exposures to Noticed Chemicals" and therefore did not cover only past conduct." Here, however, the release specifies it applies only "to before and up to the Effective Date." (Proposed Consent Judgment, ¶ 4.1) Moreover, there does not appear to be any language similar to that in *Kintetsu*, in which it is suggested that the Prop 65 warnings are deemed to satisfy all obligations in the future.

The court finds the release is within the public interest. No further briefing is required.

2. Unilateral Withdrawal

The *Kintetsu* court also noted that the judgment contained a provision that allowed defendants to unilaterally opt-out during the remaining pendency of that lawsuit or up until the time "any third-party litigation involving the [instant] Lawsuits . . . becomes final, including any and all appeals or any other third-party litigation contesting the validity of this Consent Judgment." (*Id.* at 64, at fn. 14.) This, the court concluded, arguably rendered the judgment illusory and also "also renders precarious any benefit received by the public from the judgment." (*Id.*)

Here, there does not appear to be a unilateral opt-out as such. However, there is a provision that obsoletes the "Plaintiff's release of Defendants" should defendants "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." (Proposed Consent Judgment, ¶ 4.2) This appears to be a form of self-protection available only to plaintiff and in no way implicating the public interest.

The court is simply not sure what to make of this in relation to *Kintetsu*. Accordingly, plaintiff will be directed to address this in a supplement.

Justiciability and Prelawsuit Notice

1. Justiciability

The concept of justiciability involves the intertwined criteria of standing and ripeness. (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1182–1183 (*Johnson & Johnson*).) In this case, standing is governed by statute. Plaintiff has standing because the statute allows suits by a private person in the public interest if no public prosecutor is pursuing the action, and if proper notice is given. (*Id.*)

Ripeness is another matter. The ripeness requirement prevents courts from issuing purely advisory opinions. It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion. The ripeness doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy. (*Id.*)

This case was ripe when it was filed, because there was an existing controversy – that is, whether defendants were in violation of Proposition 65's warning requirements.

In *Johnson & Johnson*, the complaint alleged that defendants manufactured, distributed, and sold surgical implants composed of nickel and nickel compounds, chemicals known to the State of California to cause cancer, that when the devices were implanted they would leach chemicals into the body (or, in some of the complaints, that they would expose vital organs to the chemicals), and that defendants had failed to give warnings to the persons into whose bodies the devices were implanted, thus violating section 25249.6. This case was ripe when it was filed, because there was an existing controversy whether defendants were in violation of Proposition 65's warning requirements. The ripeness status of this case changed once plaintiff discovered that the allegations of the complaint were wrong, that defendants had not violated and were not violating the law. Plaintiff's own expert found that the specific products at issue posed no significant risk level of exposure and, as currently marketed, did not require a warning under Proposition 65. The court held that a trial court hearing a Proposition 65 case must dismiss that case when the plaintiff concedes that it lacks merit, and may not enter a judgment which, rather than resolving a dispute between the parties, purports to act like legislation, in that its function is to regulate the acts which may be undertaken by non-parties, at some speculative time in the future. (*Id.* at 1183-1187.)

According to the declaration of attorney Novak, "Defendant disputed that all of the Products were in violation and claimed that it had since changed the packaging to include Proposition 65 warnings. Since receiving Plaintiff's Notices, Defendant's counsel also informed Plaintiff that all violating Products had been removed from the store shelves so that warnings could be added." (Novak Decl., ¶ 16.) While this remedial measure seems markedly different than the status of the *Johnson & Johnson* case, in which the plaintiff's own expert admitted there was not and had been no violation, the court nevertheless instructs plaintiff's counsel to be prepared to address whether the case remains ripe where the warnings required by the Consent Judgment have been implemented prior to the settlement.

2. Prelawsuit Notice

A prerequisite for the private enforcement by way of litigation of the warning provisions of Proposition 65 is a 60–day notice from the would-be private enforcer to the alleged violator and to relevant prosecutorial authorities—particularly the Attorney General's office—sufficient to give the alleged violator and the appropriate governmental authorities opportunity to both undertake a meaningful investigation and instigate remedial action prior to the filing of litigation. (*Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1188

[concluding that insufficiency of presuit notice was an extra-statutory ground on which rejection of settlement of subsequent Proposition 65 action could be based.) The *Kintetsu* court subsequently directed that "notice as discussed in *Consumer Defense Group, supra*, 137 Cal.App.4th 1185, 40 Cal.Rptr.3d 832" must be considered in assessing the proposed settlement.

While the court acknowledges that *Consumer Defense Group* and *Kintetsu* were both cases in which the settlement was opposed by the Attorney General, there is no reasonable basis for imposing a greater burden of review in cases in which the AG opposes then cases in which it does not. Absent submission of authority to the contrary, the court finds that cases in which the AG does not register opposition deserve the same scrutiny to protect the public. Here, the presuit notices are not in the record. The court is thus unable to make any findings on whether they are adequate. The parties are directed to address this deficiency.

Statutory Provisions

1. Warning Requirement

Health and Safety Code section 25249.7 subdivision (f)(4)(A) requires that, in order to approve a settlement, the court must find that "Any warning that is required by the settlement complies with" the clear and reasonable warning requirement of Proposition 65.

The court assesses the warning requirement because that concerns the public health. The purpose of Proposition 65 was "to identify chemicals known to cause cancer or birth defects, and to prevent exposure to those chemicals through our water supplies, in the workplace, and by other means." (*Nicolle-Wagner v. Deukmejian* (1991) 230 Cal.App.3d 652, 655.) Requiring a warning for future actions provides the public with notice and the opportunity to decide whether to expose themselves to the relevant chemicals. The effect on public health is similar to the effect on the environment that a federal court considers in approving a settlement under the Clean Water Act. (*U.S. v. Telluride Co.* (D.Colo.1994) 849 F.Supp. 1400, 1402 [rejecting settlement that was inconsistent with Clean Water Act].)

The effect on public health distinguishes court approval of a proposition 65 settlement from other arguably analogous situations. The court is not exercising its fiduciary duty to protect absent class members who have received notice and have the opportunity to object or opt out. (CRC 3.769; *Kintetsu*, 141 Cal.App.4th at 61; *Duran v. Obesity Research Institute, LLC* (2016) 1 Cal.App.5th 635, 646.) The court is not approving the allocation of costs among parties. (*In re Tutu Water Wells CERCLA Litigation* (3rd Cir. 2003) 326 F.3d 201, 207 [*CERCLA*].) The court is not protecting the defendant in a criminal plea to ensure the ensure that the

constitutional standards of voluntariness and intelligence are met. (Penal Code 1192.5; *People v. Palme*r (2013) 58 Cal.4th 110, 118.)

Court approval of a consent judgment puts the court in the position of a regulatory agency. The parties are in effect asking the court to approve the establishment of a regulatory safe harbor for the warning regiment.

Here, the agreed-upon warning appears to be consistent with both regulatory directives. It will appear on the label (Cal. Code Regs., tit. 27, § 25602(a)(3)) with warning language that complies with the content requirements. (Code Regs., tit. 27, § 25603 (a).) The Proposed Consent Judgment also provides for a warning for internet purchases. (Code Regs., tit. 27, § 25603 (b).)

The court finds the warning complies with the clear and reasonable warning requirement of Proposition 65.

2. Attorney's Fees

The court must consider whether the award of attorney's fees is reasonable under California law. (§ 25249.7, subd. (f)(4).) Here, the parties have agreed to $18,000 in attorney fees. According to fees and costs summary attached as Exhibit A to the Novak Declaration, the fees incurred were $25,605, with the attorney hourly rate billed at $695 per hour and paralegal rate billed at $375 per hour.[6]

According to the settlement guidelines in the California Code of Regulations, "[h]ourly fees [in Proposition 65 litigation] should be those reasonable for attorneys of similar skill and experience in the relevant market area. Once a lodestar fee is a calculated, a multiplier of that amount is not reasonable unless a showing is made that the case involved a substantial investment of time and resources with a high risk of an adverse result, and obtained a substantial public benefit." (Cal.Code Regs., tit. 11, § 3201.) An hourly rate of $695 is objectively unreasonable for this locale, as is a paralegal rate of $375/hour. This court would likely be inclined to award an attorney rate of $500/hour (considering attorney Novak's skill and expertise) and $250/hour for a paralegal rate. Under that calculation (and assuming the hours reportedly spent are accurate), the attorney and paralegal fees would amount to $18,225. Costs reportedly amount to $1,293, and prelawsuit investigation (e.g., to find this violator and testing confirm the violation) amounted to $3,776.

[6] The statute does not specify the analytical basis for the reasonableness of the fees. In *Consumer Defense Group v. Rental Housing Industry Members* (2006) 137 Cal.App.4th 1185, 1219, the court referenced the factors used to gauge attorney fee awards in private attorney general cases to support its conclusion that the requested fee (which was in excess of $540,000) was objectively unconscionable. That court did not hold, however, that settlements must adhere to those standards; it used them as a reference to confirm its conclusion that the "settlement represents the perversity of a shakedown process in which attorney fees are obtained by bargaining away the public's interest in warnings that might actually serve some public purpose." (*Ibid.*)

Based on this calculus, the court is satisfied that the $18,000 reached in settlement is reasonable.

3. Civil Penalty Amount

Pursuant to the Consent Judgment, Defendant has agreed to pay civil penalties in the amount of $1,500.00. The civil penalty amount is to be apportioned with 75% remitted to the State of California OEHHA, and the remaining 25% remitted to Plaintiff. (§ 25249.12, subd. (c) & (d).) The court must consider whether this penalty amount is reasonable. (§ 25249.7, subd. (f)(4).)

Health and Safety Code section 25249.7(b)(1) provides: "A person who has violated Section 25249.5 or 25249.6 is liable for a civil penalty not to exceed two thousand five hundred dollars ($2,500) per day for each violation in addition to any other penalty established by law." Section (b)(2) provides: "In assessing the amount of a civil penalty for a violation of this chapter, the court shall consider all of the following:

(A) The nature and extent of the violation.
(B) The number of, and severity of, the violations.
(C) The economic effect of the penalty on the violator.
(D) Whether the violator took good faith measures to comply with this chapter and the time these measures were taken.
(E) The willfulness of the violator's misconduct.
(F) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as a whole.
(G) Any other factor that justice may require."

With respect to the number of, and severity of, the violations, the court finds it is unclear how many violations are alleged to have occurred since March 13, 2023 (one year prior to the service of the Notice of Violation). According to attorney Novak, "based on Plaintiff's investigations at the stores where the Products were sold, Plaintiff estimates around 500 individual units were being offered for sale with no warnings . . . while the actual sales numbers of violating Products remain unresolved, it can reasonably be assumed there were less than a thousand violating sales in California, and this is just one factor to consider for civil penalties." (Novak Decl., ¶ 16.) It is unclear how this is a reasonable assumption. Attorney Novak has explained that the Product was pulled off shelves shortly after the Notice of Violation was received in order to add a warning, but that does not inform the court, or the plaintiff, of the sales that occurred *prior to* the Notice of Violation. Moreover, the court notes that there are 13 Orchard Supply Hardware stores throughout California (according to the https://www.outdoorsupplyhardware.com/Locations, last accessed 4/16/25) and that the product is sold on the internet. (See Novak Decl., ¶ 6.) The suggested penalty of $1,500 amounts to only 60% of the maximum penalty for *one day* of the 365 days between March 13, 2023 and March 13, 2024. While the

court understands that a discount regularly occurs in the course of negotiations and realistic assessment of available penalties, it will need a more comprehensive understanding of how the parties determined that $1,500 was sufficient.

Plaintiff addresses the economic effect on the violator, candidly admitting that the proposed civil penalty will not likely impact defendant's business as a whole "but the penalties are significant enough to cut into monies earned from California sales of the violating Products. For example, if one assumes 500 California sales at an average of $8 each, that equals $4,000 total, and while the retailer still profited from sales, Defendant was likely only paid $2,000." (Novak Decl., ¶ 17.) At what rate of sale? Annual? Daily? More is needed.

Plaintiff addresses the deterrent effect that the imposition of the penalty would have on both the violator and the regulated community as follows: As for the violator, it can assume that if it does not comply with the law, it may be forced to pay additional civil penalties and attorney fees; and as for the regulated community, plaintiff notes that all settlements are public record and "this Consent Judgment will likely provide other companies with the incentive to ensure future compliance with Proposition 65, since other companies will see that violations related to their similar products may result in depletion of their own profits through payment of civil penalties and attorneys' fees." (Novak Decl., ¶ 20.) It seems unlikely that a $1,500 penalty is sufficient to prompt compliance and raises suspicion that the penalty has been traded for attorney fees. (*Consumer Defense Group v. Rental Housing Industry Members, supra*, 137 Cal.App.4th at 1215—describing the ease with which Proposition 65 litigation may be instigated and survive the pleading and pretrial stages.)

The court needs further briefing to ascertain whether the penalty is reasonable.

The parties are instructed to appear at the hearing for oral argument. Appearance by Zoom Videoconference is optional and does not require the filing of Judicial Council form RA-010, Notice of Remote Appearance. (See Remote Appearance (Zoom) Information | Superior Court of California | County of Santa Barbara.)