



CALIFORNIA DEPARTMENT OF
FOOD & AGRICULTURE

Karen Ross, Secretary

September 10, 2014

DMS NOTICE
QC - 14 - 4
DISCARD: RETAIN

TO: WEIGHTS AND MEASURES OFFICIALS

SUBJECT: Settlement – Lowe’s Home Centers, LLC

Enclosed is a copy of the Final Judgment and Permanent Injunction issued against Lowe’s Home Centers, LLC. The case was filed on August 27, 2014, by the District Attorney’s Office of Marin County in conjunction with the District Attorneys’ offices of Los Angeles, Monterey, San Joaquin, and Stanislaus counties for selling sort measure building products in violation of Section 12024 of the California Business and Professions Code, for misrepresenting building product dimensions (section 12602), unfair competition (section 12700), and false and misleading advertising (section 17500).

The California Department of Food and Agriculture, Division of Measurement Standards (Department) worked with weights and measures investigators from six counties on this case. The total settlement was for \$1,622,343.15. Civil penalties amounted to \$1,400,000.00, agency costs were \$72,343.15 and \$150,000.00 of cy pres restitution was divided equally between the Consumer Protection Prosecution Trust Fund and the Department for use in its quantity control and/or price verification program.

Marin County should be sure to report these penalties on the County Monthly Report. All participating counties should separately record their individual investigative cost reimbursements in the appropriate columns on the report.

The Department appreciates the fine work done by the District Attorneys’ Offices along with the state and county investigators that documented and caused to be prosecuted these violations. If you have any questions, please contact Katherine de Contreras, Supervising Special Investigator, Enforcement Branch at (916) 229-3047, or katherine.decontreras@cdfa.ca.gov.

Sincerely,

Kristin J. Macey
Director

Enclosure

cc: Gary Leslie, County/State Liaison, CDFA



1 EDWARD S. BERBERIAN, District Attorney
ANDRES H. PEREZ, State Bar Number 186219
2 Deputy District Attorney
3501 Civic Center Drive, Room 130
3 San Rafael, California 94903-5207
Telephone: (415) 473-6450
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FILED

AUG 27 2014

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

5 (For a List of Additional Plaintiff's Counsel,
See Attachment "A".)

6 Attorneys for Plaintiff
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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF MARIN

12 PEOPLE OF THE STATE OF CALIFORNIA,) CASE NO. CIV 14 03272
13)
14 Plaintiff,) FINAL JUDGMENT AND
15) PERMANENT INJUNCTION
16 v.)
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18 Plaintiff, THE PEOPLE OF THE STATE OF CALIFORNIA, through
19 its attorneys, EDWARD S. BERBERIAN, the District Attorney for the
20 County of Marin, by Deputy District Attorney Andres H. Perez;
21 JACKIE LACEY, the District Attorney for the County of Los Angeles,
22 by Deputy District Attorney Jeffrey A. McGrath; DEAN D. FLIPPO, the
23 District Attorney for the County of Monterey, by Assistant District
24 Attorney Anne M. Michaels; JAMES P. WILLETT, the District Attorney
25 for the County of San Joaquin, by Deputy District Attorney David J.
26 Irey; and BIRGIT FLADAGER, the District Attorney for the County of
27 Stanislaus, by Deputy District Attorney Richard B. Mury, III, and
28 Defendant Lowe's Home Centers, LLC (henceforth "Lowe's") appearing

COPY

1 through its attorneys, Hunton & Williams LLP, by Ann Marie Mortimer
2 and DLA Piper LLP, by George O'Connell; and, the Parties having
3 stipulated that this Court has jurisdiction over them and the
4 subject matter, and without the Parties' stipulation constituting
5 an admission of any liability or wrongdoing:

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

7 **JURISDICTION**

8 1. This action is brought under California law and this
9 Court has jurisdiction of the subject matter and the parties.

10 **APPLICABILITY**

11 2. The provisions of this injunction are applicable to
12 California Lowe's stores operated by defendant Lowe's Home Centers,
13 LLC, its successors, all employees, and individual agents acting
14 under, by, through, on behalf of, or in concert with Defendant with
15 actual or constructive knowledge of this Judgment.

16 **DEFINITIONS**

17 3. For the purposes of this Final Judgment, the following
18 definitions shall apply:

19 A. "ACTUAL DIMENSIONS" means the true and accurate
20 height, width, depth or circumference dimensions to which the
21 product was manufactured.

22 B. "LOWE'S DIMENSIONAL DESCRIPTION" means any shelf
23 tag, store sign, flyer, newspaper or advertisement created by
24 Lowe's or at Lowe's direction, which states or describes
25 dimensions related to a good or product offered for sale at
26 wholesale or retail by Lowe's.

27 C. "MANUFACTURER DIMENSIONAL DESCRIPTION" means a
28 sign, label, packaging, advertisement, catalogue, or other writing

1 containing a dimensional description provided by the PRODUCT SOURCE
2 to describe the alleged dimensions of a STRUCTURAL DIMENSIONAL
3 BUILDING PRODUCT.

4 D. "NOMINAL DIMENSIONS" means dimensions for
5 STRUCTURAL DIMENSIONAL BUILDING PRODUCTS that are not ACTUAL
6 DIMENSIONS but comply in all respects with the requirements,
7 standards and/or regulations set forth in the following U.S.
8 Department of Commerce publications: Voluntary Product Standard PS
9 20-10, (June 2010), or latest edition, for softwood lumber;
10 Voluntary Product Standard PS 2-10, (June 2011), or latest edition,
11 for wood-based structural-use panels; Voluntary Product Standard PS
12 1-09, (May 2010), or latest edition, for Structural Plywood; and
13 National Institute of Standards and Technology ("NIST") Handbook
14 130, 2012 Edition, Uniform Regulation for the Method of Sales of
15 Commodities, Section 2.12, or latest edition, for hardwood lumber.

16 E. "NOMINAL DIMENSIONS PRODUCT" means a product
17 described using NOMINAL DIMENSIONS instead of, or in addition to,
18 ACTUAL DIMENSIONS and complying in all respects with the
19 requirements, standards and/or regulations set forth in the
20 following U.S. Department of Commerce publications: Voluntary
21 Product Standard PS 20-10, (June 2010), or latest edition, for
22 softwood lumber; Voluntary Product Standard PS 2-10, (June 2011),
23 or latest edition, for wood-based structural-use panels; Voluntary
24 Product Standard PS 1-09, (May 2010), or latest edition, for
25 Structural Plywood; and National Institute of Standards and
26 Technology ("NIST") Handbook 130, 2012 Edition, Uniform Regulation
27 for the Method of Sales of Commodities, Section 2.12, or latest
28 edition, for hardwood lumber. Nominal Dimensions Products can be

1 described either with or without "in" or "ft" designations.

2 F. "POPULAR OR COMMON PRODUCT DESCRIPTION" means a
3 name or designation of STRUCTURAL DIMENSIONAL BUILDING PRODUCT by a
4 measurement which is not the product's ACTUAL DIMENSIONS; for
5 example, a synthetic wood (non-softwood) decking board popularly
6 called 5/4 in X 6 in X L with ACTUAL DIMENSIONS of 1.08 in X 5.432
7 in X L. POPULAR OR COMMON PRODUCT DESCRIPTION can be used either
8 with or without "in" or "ft" designations.

9 G. "PRODUCT SOURCE" means the manufacturer,
10 wholesaler, distributor, originator, or any other source providing
11 the product to Lowe's.

12 H. "STRUCTURAL DIMENSIONAL BUILDING PRODUCT" means a
13 product commonly used in building construction and construction of
14 home improvement projects and sold by Lowe's with reference to
15 three dimensions: length, width/depth and thickness.

16 I. "WEIGHTS AND MEASURES OFFICIAL" means any
17 representative of the California Department of Food and
18 Agriculture's Division of Measurement Standards, or any
19 representative of a County Sealer or Director of a County
20 Department of Agriculture, the Attorney General, a district
21 attorney, a city attorney or their agents.

22 **INJUNCTION**

23 4. Pursuant to Business and Professions Code sections
24 17203 and 17535, Defendant is hereby permanently enjoined and
25 restrained from directly or indirectly doing any of the following
26 acts or practices in or from California.

27 A. Selling any Structural Dimensional Building
28 Product in less quantity than represented in violation of Business

1 and Professions Code §12024, except for Nominal Dimensions Products
2 or as set forth in Paragraphs 6 and 7.

3 B. Packaging or affixing to any STRUCTURAL
4 DIMENSIONAL BUILDING PRODUCT a label that misstates or
5 misrepresents any of the STRUCTURAL DIMENSIONAL BUILDING PRODUCT'S
6 ACTUAL DIMENSIONS, in violation of Business and Professions Code
7 §12602, except for NOMINAL DIMENSIONS PRODUCTS or as set forth in
8 Paragraphs 6 and 7.

9 C. Selling any NOMINAL DIMENSIONS PRODUCT in less
10 quantity than set forth under the current NOMINAL DIMENSIONS in
11 violation of Business and Professions Code §§12024 and 12602.

12 D. With respect to STRUCTURAL DIMENSIONAL BUILDING
13 PRODUCTS, making or disseminating or causing to be made or
14 disseminated in any newspaper or other publication, or by any
15 advertising device, or by public outcry or proclamation, or in any
16 other manner or means whatever, including over the Internet any
17 statement which is untrue or misleading, and which is known, or
18 which by the exercise of reasonable care should be known, to be
19 untrue or misleading in violation of Business and Professions Code
20 §17500. For purposes of this Judgment only, the use of NOMINAL
21 DIMENSIONS to describe products that meet the definition of NOMINAL
22 DIMENSIONS PRODUCTS will not be considered untrue or misleading
23 statements within the meaning of Business and Professions Code
24 §17500.

25 5. Defendant is under no obligation to measure or verify
26 the ACTUAL DIMENSIONS of STRUCTURAL DIMENSIONAL BUILDING PRODUCTS
27 which come with MANUFACTURER DIMENSIONAL DESCRIPTIONS and may
28 reproduce in whole or in part MANUFACTURER DIMENSIONAL DESCRIPTIONS

1 or create LOWE'S DIMENSIONAL DESCRIPTIONS based upon MANUFACTURER
2 DIMENSIONAL DESCRIPTIONS, provided Lowe's does the following:

3 A. Maintains and produces for any WEIGHTS AND
4 MEASURES OFFICIAL, upon request and within five business days,
5 copies of the MANUFACTURER DIMENSIONAL DESCRIPTION relied upon by
6 Lowe's in connection with any STRUCTURAL DIMENSIONAL BUILDING
7 PRODUCT that is allegedly in violation of the laws and regulations
8 related to STRUCTURAL DIMENSIONAL BUILDING PRODUCTS or the terms of
9 this Judgment.

10 6. Defendant shall not be in violation of Paragraph 4 of
11 this Judgment if the false, misleading, deceptive or inaccurate
12 writing or statement which forms the basis for the violation is a
13 MANUFACTURER DIMENSIONAL DESCRIPTION or a LOWE'S DIMENSIONAL
14 DESCRIPTION based on a MANUFACTURER DIMENSIONAL DESCRIPTION and
15 otherwise complies with Paragraph 5 of this Judgment, unless Lowe's
16 was notified in writing by the PRODUCT SOURCE or by a WEIGHTS AND
17 MEASURES OFFICIAL of the false, misleading, deceptive or inaccurate
18 MANUFACTURER DIMENSIONAL DESCRIPTION or LOWE'S DIMENSIONAL
19 DESCRIPTION.

20 A. If Lowe's is notified in writing by the PRODUCT
21 SOURCE or by a WEIGHTS AND MEASURES OFFICIAL that the MANUFACTURER
22 DIMENSIONAL DESCRIPTION or LOWE'S DIMENSIONAL DESCRIPTION based on
23 a MANUFACTURER DIMENSIONAL DESCRIPTION is false, misleading,
24 deceptive or inaccurate, Lowe's shall either immediately: (1)
25 remove all non-conforming product from sale; or (2) permanently
26 correct any false, misleading, deceptive or inaccurate MANUFACTURER
27 DIMENSIONAL DESCRIPTION or LOWE'S DIMENSIONAL DESCRIPTION by
28 immediately removing the false, misleading, deceptive or inaccurate

1 description or posting a notice to customers directing them to
2 check with store personnel for product information. Notice by a
3 WEIGHTS AND MEASURES OFFICIAL, for this paragraph, needs only be
4 served on a store manager and WEIGHTS AND MEASURES OFFICIALS will
5 attempt to provide a courtesy copy to Lowe's Legal Department.

6 B. If immediate removal or permanent correction is
7 not practical, Lowe's shall display in place of the offending
8 writing or statement displayed to consumers relating to the
9 product, a writing, no smaller than the offending writing or
10 statement, notifying customers of the alleged false, misleading,
11 deceptive or inaccurate dimensional description and correcting it
12 ("Correction Notice"). The Correction Notice shall be securely
13 fashioned to the product display. The Correction Notice shall
14 remain in place until either the non-conforming product is removed
15 from sale or the false, misleading, deceptive, or the inaccurate
16 LOWE'S DIMENSIONAL DESCRIPTION or MANUFACTURER'S DIMENSIONAL
17 DESCRIPTION is permanently corrected in-store. A Correction Notice
18 shall be displayed by the end of the following business day in any
19 store where written notice was given by the WEIGHTS AND MEASURES
20 OFFICIAL. In all other stores in California with non-conforming
21 product that is false, misleading, deceptive or inaccurate as
22 identified in the written notice provided by a Weights & Measures
23 Official, Lowe's shall display Correction Notices within five
24 business days of the original written notice.

25 C. Lowe's shall have a reasonable time to remove all
26 non-conforming product or permanently correct the false,
27 misleading, deceptive or inaccurate LOWE'S DIMENSIONAL DESCRIPTION
28 based on the MANUFACTURER DIMENSIONAL DESCRIPTION, such period to

1 be no more than thirty days. For purposes of this provision, non-
2 conforming product shall mean STRUCTURAL DIMENSIONAL BUILDING
3 PRODUCT where the stated dimensional description is false,
4 misleading, deceptive or inaccurate.

5 D. In no event shall Defendant be deemed in
6 violation of this injunction if the Defendant removes the non-
7 conforming product from sale or permanently corrects the false,
8 misleading, deceptive or inaccurate LOWE'S DIMENSIONAL DESCRIPTION
9 within the time specified by this Injunction. In no event shall
10 Lowe's be responsible for making corrections to any false,
11 misleading, deceptive or inaccurate MANUFACTURER DIMENSIONAL
12 DESCRIPTIONS on the actual packaging itself provided by the PRODUCT
13 SOURCE. The issuance of a Notice of Violation or other regulatory
14 action by WEIGHTS AND MEASURES OFFICIALS shall not create a
15 presumptive violation of this injunction but shall constitute
16 written notice as set forth in this paragraph.

17 E. With respect to alleged violations under this
18 Paragraph, Lowe's shall maintain a record of inaccurate
19 MANUFACTURERS DIMENSIONAL DESCRIPTIONS, detailing the date, time of
20 discovery and copies of notifications to/from the manufacturers,
21 and all affected Lowe's stores. Defendant shall retain copies of
22 these inaccuracy notifications for a period of twelve (12) months
23 from the date of discovery and make a copy of these records
24 available to WEIGHTS AND MEASURES OFFICIALS within ten (10)
25 business days upon request of said WEIGHTS AND MEASURES OFFICIALS.

26 F. Nothing in this paragraph 6 is intended to nor
27 shall it prevent WEIGHTS AND MEASURES OFFICIALS from enforcing
28 their statutory duties.

1 7. All LOWE'S DIMENSIONAL DESCRIPTIONS using POPULAR OR
2 COMMON PRODUCT DESCRIPTIONS, including shelf tags, store signs,
3 flyers, newspapers, advertisement or any other writing concerning a
4 STRUCTURAL DIMENSIONAL BUILDING PRODUCT which also states the
5 ACTUAL DIMENSIONS, shall not be in violation of this injunction
6 providing each of the following requirements are met:

7 A. The words "Actual Dimensions" or words of similar
8 import, immediately followed by the ACTUAL DIMENSIONS must be
9 easily visible to the consumer and appear on the shelf tags, store
10 signs, flyers, newspapers, advertisement or writing, immediately
11 above, below or adjacent to (not in a footnote) the POPULAR or
12 COMMON PRODUCT DESCRIPTIONS. The words "Actual Dimensions", "Actual
13 Size", "Actual", or words of similar import and the ACTUAL
14 DIMENSIONS shall appear in the same font, style, color, and at
15 least the same font size as the POPULAR PRODUCT DESCRIPTION. With
16 respect to this subparagraph, Lowe's may seek a modification of the
17 injunction after a 60 day meet and confer process with the District
18 Attorneys if either changes in the law, common business practices,
19 or technological changes shall provide alternative ways of
20 displaying "Actual" or "Actual Size" as prominently as "Popular
21 Product Description".

22 B. The POPULAR OR COMMON PRODUCT DESCRIPTION is
23 clearly described as "Popular Name", "Popular Description",
24 "commonly called", "Common" or words of similar import; and,

25 C. All dimension statements contained in LOWE'S
26 DIMENSIONAL DESCRIPTIONS and permitted or required by this
27 paragraph shall conform with the inch-pound unit, and shall use
28 letter abbreviations, such as "in", "ft", "yd", and shall not use

1 symbols such as " ' ", " " ". The, shelf tag, store sign, flyer,
2 newspaper, or advertisement or statement when considered as a whole
3 shall not be deceptive or misleading. None of LOWE'S DIMENSIONAL
4 DESCRIPTIONS shall be considered product labels where products bear
5 vendor supplied tags, packaging or labels.

6 8. In the event that Defendant believes that the People
7 have entered into an injunction with any other seller of STRUCTURAL
8 DIMENSIONAL BUILDING PRODUCTS, regarding said STRUCTURAL
9 DIMENSIONAL BUILDING PRODUCTS that Defendant believes is less
10 restrictive than the injunctive provisions required herein,
11 Defendant shall have the right to seek modification of this
12 Judgment to reflect the alleged less restrictive terms. After
13 three years, should Defendant believe that based on significantly
14 changed circumstances any injunctive provision of this Judgment may
15 be putting Defendant at a competitive disadvantage, Defendant may
16 seek a modification of the provision of the Judgment to address the
17 significant change in circumstance. At any time in the event of a
18 change in the law, Lowe's may seek to modify this injunction to
19 take into account such change in the law. Prior to seeking any
20 such modifications, Defendant shall provide written notice to the
21 prosecutors that have brought this action stating that Defendant
22 intends to seek the modification. The parties shall have sixty
23 (60) days in which to meet and confer concerning the modification.
24 If the parties are unable to agree on a modification to this
25 Judgment, Defendant may file a motion with the Court seeking a
26 modification of the Judgment.

27 9. The injunctive provisions of this Judgment are in
28 addition to all other obligations and duties imposed by law.

1 costs. Said payment shall be made in the form of checks payable to
2 the Marin County District Attorney's Office and shall be
3 distributed by the Marin District Attorney as follows:

4	<u>Agency</u>	<u>Amount</u>
5	Ca. Division of Measurement Standards	\$65,371.28
6	Merced Department of Weights and Measures	\$ 102.00
7	Sacramento Department of Weights and Measures	\$ 1,400.00
8	Santa Clara Department of Weights and Measures	\$ 948.06
9	Sonoma Department of Weights and Measures	\$ 127.50
10	Stanislaus Department of Weights and Measures	\$ 4,110.31
11	Yolo Department of Weights and Measures	\$ 284.00

12 13. Recognizing the infeasibility of identifying injured
13 consumers who suffered actual loss, the impracticality of providing
14 direct restitution to said consumers, and the disproportionate
15 costs of making restitution to individual consumers, which would
16 far exceed the benefit consumers would gain, the parties agree that
17 Lowe's shall pay, pursuant to Business and Professions Code §§17203
18 and 17535, *cy pres* restitution in the sum of \$150,000.00. Said *cy*
19 *pres* restitution shall be divided equally between the California
20 Department of Food and Agriculture, Division of Measurement
21 Standards, to be used for the "quality control" and/or "price
22 verification" program, and the Consumer Protection Prosecution
23 Trust Fund established in the case of *People v. ITT Consumer*
24 *Financial Corporation* (Alameda Superior Court No. 6560380). The
25 payment required under this paragraph shall be made by bank check
26 payable to the "Marin County District Attorney's Office".

27 14. This Final Judgment represents the complete and final
28 settlement of all claims that have been or could have been brought

1 by the District Attorneys who are parties to this action against
2 Defendant arising from or relating to the subject matter of the
3 Complaint herein which acts occurred prior to the date of entry of
4 this Judgment and occurred in the jurisdictions of the respective
5 District Attorneys' offices.

6 15. The court having reviewed the Complaint, Stipulation,
7 and this Judgment, finds that this Stipulated Final Judgment and
8 Permanent Injunction is a just, reasonable, and equitable
9 resolution, entered in good faith, and is adequate to protect the
10 public from the occurrence in the future of the conduct alleged in
11 the Complaint and to provide complete satisfaction of the public
12 interest in the conduct that is the subject of this Final Judgment,
13 including full and adequate restitution to the public of any
14 allegedly unjust gains that may have been obtained from such
15 conduct.

16 **NOTICE**

17 16. Except where otherwise noted, where notice is to be
18 given under the terms of this Injunction, it shall be sent by first
19 class mail to Lowe's Legal Department, ATTN: General Counsel 1000
20 Lowes Blvd., Mooresville, NC 28117, as well as to Lowe's Counsel of
21 Record: George O'Connell, DLA Piper, 400 Capitol Mall, Suite 2400,
22 Sacramento, CA 95814-4428, and Ann Marie Mortimer, Hunton &
23 Williams, 550 S. Hope St, Suite 2000, Los Angeles, CA 90071, as
24 well as be given to any other person designated in this Injunction
25 for such notice.

26 **RETENTION OF JURISDICTION**

27 17. Jurisdiction is retained for the purpose of enabling
28 any party to this Final Judgment to apply to the Court at any time

1 for such further orders and directions as may be necessary and
2 appropriate for the construction or carrying out the injunctive
3 provisions of this Final Judgment, for the modification or
4 termination of any of its injunctive provisions, and for the
5 enforcement of, compliance with, and punishment of violations of
6 the Final Judgment. However, Defendant shall not seek to terminate
7 the injunctive provisions of this Judgment for at least ten years
8 subsequent to its entry, except as provided herein. If ten years
9 have elapsed and Defendant seeks to terminate this injunction, it
10 shall give at least 30 days notice to each District Attorney's
11 office that is a party to this Final Judgment.

12 JUDGEMENT ENTRY, EFFECTIVENESS AND WAIVER OF APPEAL AND SERVICE

13 18. The parties waive the right to appeal this Final
14 Judgment and waive service and notice of said judgment.

15 19. This Final Judgment will become effective upon entry
16 hereof with the exception of Paragraphs 4 through 7 which will
17 become effective one hundred and eighty (180) days after the date
18 of entry of this Final Judgment.

19 20. The clerk is ordered to immediately enter this
20 Judgment.

21 Date: AUG 27 2014

22 PAUL M. HAAKENSON
23 Judge of the Superior Court
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ATTACHMENT "A"

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