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11 Attorneys For Plaintiff
12 MATEEL ENVIRONMENTAL JUSTICE
13 FOUNDATION

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN FRANCISCO

16 MATEEL ENVIRONMENTAL JUSTICE)
17 FOUNDATION,)

18 Plaintiff,)

19 v.)

20 SMITH & HAWKEN, LTD., et al.,)

21 Defendants.)

ENDORSED
FILED
San Francisco County Superior Court

JUN 25 2009

GORDON PARK-LI, Clerk
BY: ERICKA LARNAUTI
Deputy Clerk

Case No. 482167

CONSENT JUDGMENT AS TO
SMITH & HAWKEN, LTD.

23 1. INTRODUCTION

24 1.1 On November 21, 2008, the Mateel Environmental Justice Foundation ("Plaintiff
25 MEJF") acting on behalf of itself and the general public, filed a Complaint for civil penalties and
26 injunctive relief ("Complaint") in San Francisco Superior Court, Case No. CGC-08-482167,
27 against defendant Smith & Hawken, LTD., (referred to as "Smith & Hawken" or "Defendant").
28

1 The Complaint alleges, among other things, that Defendant violated provisions of the Safe
2 Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5,
3 et seq. (Proposition 65) by failing to give clear and reasonable warnings to those residents of
4 California who handle and use hose nozzles made from leaded brass, that handling and use of
5 these products causes those residents to be exposed to lead and/or lead compounds. Lead is
6 known to the State of California to cause cancer and/or birth defects or other reproductive harm.
7 The Complaint was based upon a 60-Day Notice letter, dated October 19, 2006, sent by MEJF to
8 Smith & Hawken, the California Attorney General, all District Attorneys, and all City Attorneys
9 with populations exceeding 750,000.

10 1.2 Defendant is a business that employs more than ten persons, and manufactures,
11 distributes, and/or sells brass hose nozzles, brass quick connects, and other brass home and
12 garden irrigation products, all of which are made from leaded-brass (hereinafter "Brass
13 Nozzles"). Pursuant to Health and Safety Code Section 25249.8, lead and lead compounds are
14 chemicals known to the State of California to cause cancer and reproductive toxicity. Plaintiff
15 MEJF alleges that Brass Nozzles that are sold by Smith & Hawken for use in California require a
16 warning under Proposition 65, pursuant to Health and Safety Code Section 25249.6. Smith &
17 Hawken denies that a warning is required. For purposes of this Consent Judgment, the parties
18 stipulate that this Court has jurisdiction over the allegations of violations contained in the
19 Complaint and personal jurisdiction over Smith & Hawken as to the acts alleged in the
20 Complaint, that venue is proper in the County of San Francisco and that this Court has
21 jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations
22 contained in the Complaint and of all claims which were or could have been raised by any person
23 or entity based in whole or in part, directly or indirectly, on the facts alleged therein or arising
24 therefrom or related to.

25 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
26 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
27 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment
28 shall not constitute an admission with respect to any material allegation of the Complaint, each

1 and every allegation of which Smith & Hawken denies, nor may this Consent Judgment or
2 compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on
3 the part of Smith & Hawken.

4 1.4 For purposes of this Consent Judgment, the term "Covered Products" means Brass
5 Nozzles as described in paragraph 1.2.

6 1.5 The term "Effective Date" means 90 days after entry of this Consent Judgment.

7 **2. SETTLEMENT PAYMENT**

8 2.1 In settlement of all of the claims that are alleged, or could have been alleged, in the
9 Complaint concerning Covered Products, Smith & Hawken shall pay \$20,000 to the Klamath
10 Environmental Law Center ("KELC") to cover Plaintiff's attorneys' fees. Additionally, Smith &
11 Hawken shall pay \$5,000 to the Ecological Rights Foundation and \$5,000 to Californians for
12 Alternatives to Toxics for use toward reducing exposures to toxic chemicals and other pollutants,
13 and toward increasing consumer, worker and community awareness of health hazards posed by
14 lead and other toxic chemicals. The parties agree and acknowledge that the charitable
15 contributions made pursuant to this section shall not be construed as a credit against the personal
16 claims of absent third parties for restitution against the defendant. The above described payments
17 shall be forwarded by Defendant so that they are received at least 5 days prior to the hearing date
18 scheduled for approval of this Consent Judgment. If the Consent Judgment is not approved
19 within 120 days of the date scheduled for approval, the above described payments shall be
20 returned and the provisions of this Consent judgment shall become null and void.

21 2.2 Smith & Hawken shall not be required to pay a civil penalty pursuant to Health
22 and Safety Code Section 25249.7(b).

23 **3. ENTRY OF CONSENT JUDGMENT**

24 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
25 Upon entry of the Consent Judgment, Smith & Hawken and MEJF waive their respective rights to
26 a hearing or trial on the allegations of the Complaint.

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1 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

2 4.1 This Consent Judgment is a final and binding resolution between MEJF, acting on
3 behalf of itself and (as to those matters raised in the 60-Day Notice Letter) the public interest, and
4 Smith & Hawken of: (i) any violation of Proposition 65 regarding exposure of persons to lead or
5 lead compounds from Covered Products (including but not limited to the claims made in the
6 Complaint); and (ii) any other statutory or common law claim to the fullest extent that any of the
7 foregoing described in (i) or (ii) were or could have been asserted by any person or entity against
8 Smith & Hawken or its parents, subsidiaries or affiliates, and all of their suppliers, customers,
9 distributors, wholesalers, retailers, or any other person in the course of doing business, and the
10 successors and assigns of any of them, who may use, maintain, distribute or sell Covered
11 Products ("Released Entities"), based on its or their exposure of persons to lead or lead
12 compounds from Covered Products or their failure to provide a clear and reasonable warning of
13 exposure to such individuals; and (iii) as to alleged exposures to lead or lead compounds from
14 Covered Products, any other claim based in whole or in part on the facts alleged in the Complaint,
15 whether based on actions committed by the Released Entities or others. As to alleged exposures
16 to lead or lead compounds from Covered Products, compliance with the terms of this Consent
17 Judgment resolves any issue, now and in the future, concerning compliance by Smith & Hawken
18 and the Released Entities, with the requirements of Proposition 65 with respect to Covered
19 Products, and any alleged resulting exposure.

20 4.2 As to alleged exposures to lead or lead compounds from Covered Products, MEJF,
21 by and on behalf of itself and its respective agents, successors and assigns, waives any and all
22 rights to institute any form of legal action, and releases all claims against Smith & Hawken and
23 the Released Entities, and all of their respective parents, subsidiaries or affiliates, and all of their
24 suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of
25 doing business, and the successors and assigns of any of them, who may use, maintain, distribute
26 or sell the Covered Products, whether, under Proposition 65 or otherwise, arising out of or
27 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
28 including but not limited to any exposure to, or failure to warn with respect to, the Covered

1 Products (referred to collectively in this paragraph as the "Claims"). In furtherance of the
2 foregoing, as to alleged exposures to Covered Products, MEJF hereby waives any and all rights
3 and benefits which it now has, or in the future may have, conferred upon it with respect to the
4 Claims by virtue of the provisions of section 1542 of the California Civil Code, which provides as
5 follows:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
7 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
8 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
9 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
10 DEBTOR.

11 4.3 MEJF understands and acknowledges that the significance and consequence of this
12 waiver of California Civil Code section 1542 is that even if MEJF suffers future damages arising
13 out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered
14 Products, including but not limited to any exposure to, or failure to warn with respect to exposure
15 to, lead or lead compounds from Covered Products, MEJF will not be able to make any claim for
16 those damages against Smith & Hawken or the Released Entities. Furthermore, MEJF
17 acknowledges that it intends these consequences for any such Claims as may exist as of the date
18 of this release but which MEJF does not know exist, and which, if known, would materially affect
19 their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge
20 is the result of ignorance, oversight, error, negligence, or any other cause.

21 **5. ENFORCEMENT OF JUDGMENT**

22 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
23 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
24 San Francisco County, giving the notice required by law, enforce the terms and conditions
25 contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment
26 only after that Party first provides 60 days notice to the Party allegedly failing to comply with the
27 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
28 comply in an open and good faith manner.

1 5.2 In any proceeding brought by either party to enforce this Consent Judgment, such
2 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
3 violation of Proposition 65 or this Consent Judgment.

4 **6. MODIFICATION OF JUDGMENT**

5 6.1 This Consent Judgment may be modified only upon written agreement of the
6 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
7 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

8 **7. INJUNCTIVE RELIEF**

9 7.1 The requirements of this paragraph 7 shall apply only to Covered Products that are
10 manufactured by Smith & Hawken after the Effective Date.

11 7.2 As to any Covered Product that contains a component made from brass that
12 contains lead as an intentionally added ingredient, where such brass comes into contact with the
13 user, a warning that contains one of the following warning statements shall be provided:

14 (a) **“WARNING: This product contains chemicals, including lead, known to**
15 **the State of California to cause birth defects and other reproductive harm. *Wash hands after***
16 ***handling”* or,**

17 (b) **“WARNING: Handling the brass parts of this product will expose you to**
18 **lead, a chemical known to the State of California to cause birth defects and other reproductive**
19 **harm. *Wash hands after handling.”***

20 The word **“WARNING”** shall be in bold text, and the phrase **“Wash hands after handling”**
21 shall be in bold italic text.

22 (c) The warning statements required in paragraph 7.2 shall be affixed to or
23 printed on the Covered Product itself or to the Covered Product’s packaging, labeling, or
24 instruction booklet, if any. The warning shall be prominently affixed to or printed on the Covered
25 Product or packaging, labeling, or instruction booklet, and displayed with such conspicuousness,
26 as compared with other words, statements, designs, or devices on the Covered Product, or its
27 packaging, labeling, or instruction booklet, as to render it likely to be read and understood by an
28 ordinary individual under customary conditions of purchase or use. For purposes of this

1 paragraph, a warning may be contained in the same section of the packaging, labeling, or
2 instruction booklet that contains other safety warnings, if any, concerning the use of the Covered
3 Product, or near its displayed price and/or UPC code. The type size of the warning must be
4 legible, but need not be any larger than any other warning provided for the Covered Product, and
5 its relative size may take into account the nature, immediacy, and acuteness of the risks for which
6 other warnings are provided.

7 **8. TERMINATION AND RETENTION OF JURISDICTION**

8 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
9 terms this Consent Judgment.

10 **9. AUTHORITY TO STIPULATE**

11 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
12 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
13 the party represented and legally to bind that party.

14 **10. DUTIES LIMITED TO CALIFORNIA**

15 10.1 This Consent Judgment shall have no effect on Covered Products sold by Smith &
16 Hawken outside the State of California.

17 **11. SERVICE ON THE ATTORNEY GENERAL**

18 11.1 KELC shall serve a copy of this Consent Judgment, signed by both parties, on the
19 California Attorney General on behalf of the parties so that the Attorney General may review this
20 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
21 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
22 and in the absence of any written objection by the Attorney General to the terms of this Consent
23 Judgment, the parties may then submit it to the Court for approval.

24 **12. ENTIRE AGREEMENT**

25 12.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
27 negotiations, commitments and understandings related hereto. No representations, oral or
28 otherwise, express or implied, other than those contained herein have been made by any party

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
2 deemed to exist or to bind any of the parties.

3 **13. GOVERNING LAW**

4 13.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 **14. EXECUTION AND COUNTERPARTS**

8 14.1 This Consent Judgment may be executed in counterparts and by means of
9 facsimile, which taken together shall be deemed to constitute one document.

10 **15. COURT APPROVAL**

11 15.1 If this Consent Judgment, in its entirety, is not approved by the Court, it shall be of
12 no force or effect, and cannot be used in any proceeding for any purpose.

13 **16. NOTICES**

14 16.1 Any notices under this Consent Judgment shall be by personal delivery of First
15 Class Mail.

16 If to MEJF: William Verick, Esq.
17 Klamath Environmental Law Center
18 424 First Street
Eureka, CA 95501

19 If to Smith & Hawken: Peter Obstler, Esq.
20 O'Melveny & Meyers, LLP
21 Two Embarcadero Center
22 28th Floor
23 San Francisco, CA 94111

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IT IS SO STIPULATED:

DATED: 4/30/09

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

BY: *William Verick*
WILLIAM VERICK

DATED: 11 April 2009

SMITH & HAWKEN, LTD.

BY: *James J. Amerson*
ITS: *EVP, FINANCE & Operations*

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: JUN 25 2009

PETER J. BUSCH

JUDGE OF THE SUPERIOR COURT