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20 Justice Foundation

ENDORSED
FILED
San Francisco County Superior Court

FEB 03 2012

CLERK OF THE COURT
BY: CYNTHIA S. HERBERT
Deputy Clerk

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA
22 COUNTY OF SAN FRANCISCO

23 MATEEL ENVIRONMENTAL JUSTICE
24 FOUNDATION,

25 Plaintiff,

26 v.

27 D&J LUMBER CO., INC. et al.

28 Defendants.

Case No. CGC - 11 - 509694

CONSENT JUDGMENT
[PROPOSED] AS TO DEFENDANTS
D&J LUMBER CO, INC.

1. INTRODUCTION

1.1 On March 30, 2011, the MATEEL ENVIRONMENTAL JUSTICE FOUNDATION ("Plaintiff MEJF") acting on behalf of itself and the general public, filed the Complaint in this action ("Complaint"), for civil penalties and injunctive relief in San Francisco Superior Court, Case No. CGC-11-509694, against defendants D&J LUMBER CO., INC. ("Settling Defendant").

1 The Complaints allege, among other things, that Settling Defendant violated provisions of the Safe
2 Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, et
3 seq. (Proposition 65) by failing to give clear and reasonable warnings to those residents of
4 California who handle and use lumber products, including but not limited to railroad ties, that are
5 treated with creosote and/or pentachlorophenol, also referred to herein as "Covered Products", that
6 they will be exposed to the following Proposition 65-listed chemicals: creosotes,
7 pentachlorophenol, benzo[b]fluoranthene, benzo[k]fluoranthene, benzo[a]pyrene, chrysene,
8 dibenz[a,h]anthracene, hexachlorobenzene, indeno[1,2,3-cd]pyrene, naphthalene, polychlorinated
9 dibenzo-p-dioxins, and polychlorinated dibenzofurans ("Wood Treatment Chemicals"). The
10 Complaint was based upon a 60-Day Notice letter, dated November 12, 2009, sent by MEJF to
11 Settling Defendant, the California Attorney General, all District Attorneys, and all City Attorneys
12 with populations exceeding 750,000.

13 1.2 On September 22, 2011, Mateel sent an additional 60-Day Notice letter to Settling
14 Defendant, the California Attorney General, all District Attorneys, and all City Attorneys with
15 populations exceeding 750,000, alleging that Settling Defendant was additionally in violation of
16 Proposition 65 for the sale used guardrail posts treated with cooper chromated arsenate, creosote
17 and/or pentachlorophenol. The parties stipulate that the complaint in this action is hereby amended
18 to include the allegations made in this notice letter, that the term "Covered Products" shall include
19 the products identified in the notice letter, and that the term "Wood Treatment Chemicals" shall
20 include copper chromated arsenate.

21 1.3 Settling Defendant is a business that employs more than ten persons, and markets or
22 sells lumber products, including railroad ties and guardrail posts, that contain the above-listed
23 chemicals. Pursuant to Health and Safety Code Section 25249.8, creosotes, pentachlorophenol,
24 benzo[b]fluoranthene, benzo[k]fluoranthene, benzo[a]pyrene, chrysene, dibenz[a,h]anthracene,
25 hexachlorobenzene, indeno[1,2,3-cd]pyrene, naphthalene, polychlorinated dibenzo-p-dioxins,
26 polychlorinated dibenzofurans, and copper chromated arsenate are chemicals known to the State of
27 California to cause cancer and/or reproductive toxicity. Plaintiff MEJF alleges that handling and
28 use of railroad ties that are marketed or sold by Settling Defendant for use in California results in

1 exposures to the above-listed chemicals and requires a warning under Proposition 65, pursuant to
2 Health and Safety Code Section 25249.6. Settling Defendant denies that a warning is required.
3 For purposes of this Consent Judgment, the parties stipulate that this Court has jurisdiction over the
4 allegations of violations contained in the Complaint and personal jurisdiction over Settling
5 Defendants as to the acts alleged in the Complaint, that venue is proper in the County of San
6 Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
7 and resolution of the allegations contained in the Complaint and of all claims which were or could
8 have been raised by any person or entity based in whole or in part, directly or indirectly, on the
9 facts alleged therein or arising therefrom or related to.

10 1.4 This Consent Judgment resolves claims that are denied and disputed. The parties
11 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
12 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
13 not constitute an admission with respect to any material allegation of the Complaint, each and
14 every allegation of which Settling Defendant denies, nor may this Consent Judgment or
15 compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability on
16 the part of Settling Defendant.

17 1.5 For purposes of this Consent Judgment, the term "Covered Products" means those
18 lumber products, including but not limited to railroad ties and used guardrail posts, that are treated
19 with copper chromated arsenate, creosote and/or pentachlorophenol, offered for sale by Settling
20 Defendant. The term "Effective Date" means 90 days after entry of this Consent Judgment.

21 **2. SETTLEMENT PAYMENT**

22 2.1 Settling Defendant shall pay \$9,500.00 to the Klamath Environmental Law Center
23 ("KELC") to cover Plaintiff's attorneys' fees and costs.

24 2.2 Settling Defendant shall also pay \$1,000.00 in civil penalties. Mateel waives its
25 entitlement to 25% of this amount, and thus the entire amount of civil penalties shall be made
26 payable, pursuant to the statute, to the Office of Environmental Health Hazard Assessment
27 (OEHHA).

28

1 2.3 Additionally, Settling Defendant shall pay \$1,500.00 to the Ecological Rights
2 Foundation for use toward reducing exposures to toxic chemicals and other pollutants, and toward
3 increasing consumer, worker and community awareness of health hazards posed by lead and other
4 toxic chemicals. The parties agree and acknowledge that the charitable contributions made
5 pursuant to this section shall not be construed as a credit against the personal claims of absent third
6 parties for restitution against the Settling Defendant.

7 2.4 The above described payments shall be forwarded by Settling Defendant to its
8 respective counsel so that they are received at least 5 days prior to the hearing date scheduled for
9 approval of this Consent Judgment. Defendant's counsel shall notify via email Klamath
10 Environmental Law Center upon receipt of the funds. If the Consent Judgment is not approved
11 within 120 days of the date scheduled for approval, the above described payments shall be returned
12 and the provisions of this Consent judgment shall become null and void. If the Consent Judgment
13 is approved and entered by the Court, on that day Defendant's counsel shall ensure the above
14 described payments are delivered, via UPS or Fedex for next business day delivery, to Klamath
15 Environmental Law Center.

16 3. ENTRY OF CONSENT JUDGMENT

17 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
18 Upon entry of the Consent Judgment, Settling Defendant and MEJF waive their respective rights to
19 a hearing or trial on the allegations of the Complaint.

20 4. MATTERS COVERED BY THIS CONSENT JUDGMENT

21 4.1 This Consent Judgment is a final and binding resolution, as to Covered Products,
22 between MEJF, acting on behalf of itself and (as to those matters raised in the 60-Day Notice
23 Letter) the general public, and Settling Defendant of: (i) any violation of Proposition 65 (including
24 but not limited to the claims made in the Complaint); and (ii) any other statutory or common law
25 claim to the fullest extent that any of the foregoing described in (i) or (ii) were or could have been
26 asserted by any person or entity acting on behalf of the public against Settling Defendant or its
27 past, present and future parents, subsidiaries affiliates, predecessors, successors, and assigns, and
28 with respect to Settling Defendant and these other entities, each of their past, present, and future

1 officers, directors, employees, shareholders, members, and agents (“Released Entities”), based on
2 its or their exposure of persons to Wood Treatment Chemicals from Covered Products and their
3 failure to provide a clear and reasonable warning of exposure to such individuals. As to alleged
4 exposures to Wood Treatment Chemicals from Covered Products, compliance with the terms of
5 this Consent Judgment resolves any issue, now and in the future, concerning compliance by
6 Settling Defendant and the Released Entities, with the requirements of Proposition 65 with respect
7 to Covered Products, and any alleged resulting exposure. Notwithstanding any other provision in
8 this Consent Judgment, any and all releases on behalf of the General Public are limited to the
9 claims made and the chemicals identified in the 60-Day Notice Letter.

10 4.2 As to alleged exposures to wood treatment chemicals set forth above from Covered
11 Products, MEJF, by and on behalf of itself and its respective agents, successors and assigns, waives
12 any and all rights to institute any form of legal action, and releases all claims against Settling
13 Defendant and the Released Entities, whether, under Proposition 65 or otherwise, arising out of or
14 resulting from, or related directly or indirectly to, in whole or in part, the Covered Products,
15 including but not limited to any exposure to, or failure to warn with respect to, the Covered
16 Products that was or could have been alleged by Plaintiff against any of the Released Entities
17 based on the facts alleged in the Complaint, or facts similar to those alleged (referred to
18 collectively in this paragraph as the “Claims”). In furtherance of the foregoing, as to alleged
19 exposures to Wood Treatment Chemicals from Covered Products, MEJF hereby waives any and all
20 rights and benefits which it now has, or in the future may have, conferred upon it with respect to
21 the Claims by virtue of the provisions of section 1542 of the California Civil Code, which provides
22 as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
25 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
26 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
27 DEBTOR.

28 4.3 MEJF understands and acknowledges that the significance and consequence of this
waiver of California Civil Code section 1542 is that even if MEJF suffers future damages arising

1 out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered
2 Products, including but not limited to any exposure to, or failure to warn with respect to exposure
3 to, Wood Treatment Chemicals from Covered Products, MEJF will not be able to make any claim
4 for those damages against Settling Defendant or the Released Entities; provided however, Plaintiff
5 cannot and expressly does not release any claims for personal injury that could be brought by any
6 other individual or organization. Furthermore, MEJF acknowledges that it intends these
7 consequences for any such Claims as may exist as of the date of this release but which MEJF does
8 not know exist, and which, if known, would materially affect their decision to enter into this
9 Consent Judgment, regardless of whether their lack of knowledge is the result of ignorance,
10 oversight, error, negligence, or any other cause.

11 **5. ENFORCEMENT OF JUDGMENT**

12 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
13 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
14 San Francisco County, giving the notice required by law, enforce the terms and conditions
15 contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment
16 only after that Party first provides 30 days notice to the Party allegedly failing to comply with the
17 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
18 comply in an open and good faith manner.

19 5.2 In any proceeding brought by either party to enforce this Consent Judgment, such
20 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
21 violation of Proposition 65 or this Consent Judgment.

22 **6. MODIFICATION OF JUDGMENT**

23 6.1 This Consent Judgment may be modified only upon written agreement of the parties
24 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
25 as provided by law and upon entry of a modified Consent Judgment by the Court.

26 **7. CLEAR AND REASONABLE WARNINGS**

27 7.1 The requirements of this paragraph shall apply only to Covered Products that are
28 offered for sale in California by Settling Defendants after the Effective Date. Settling Defendant

1 shall provide a warning for all Covered Products that are offered for sale in California, by placing a
2 warning or warnings at their stores as set forth in either subparagraph 7.2 or 7.3:

3 7.2 Yard Warning: Settling Defendant may provide clear and reasonable warnings by
4 placing a notice that is visible to consumers in each location where railroad ties are displayed for
5 sale in its stores or yards in California. The Warning shall state:

6 **“WARNING: Railroad ties [or other Covered Product] contain chemicals known**
7 **to the State of California to cause cancer, birth defects and other reproductive**
8 **harm. *Wear gloves when handling this product. Not recommended for use with***
9 ***play structures or garden beds.*”**

10 The word “WARNING” shall be in bold text, and the phrase “*Wear gloves when handling this*
11 *product. Not recommended for use with play structures or garden beds*” shall be in bold italic
12 text. Each sign shall be no smaller than 8.5 inches x 11 inches, and the form and type shall be
13 substantially similar to that which is attached hereto as Exhibit A (hereinafter, the “Warning
14 Sign”). A warning may be considered “visible to consumers” if it is placed next to the pricing
15 information for the Covered Product so that the customer has an unobscured view of the warning,
16 but in no event shall such a warning be placed more than 10 feet from where the product is
17 displayed.

18 7.3 Product Tags: Settling Defendant may, at its option, provide clear and reasonable
19 warnings by affixing a warning tag to each railroad tie offered for sale in its stores or yards in
20 California. The warning tags shall state:

21 **“WARNING: Railroad ties [or other Covered Product] contain chemicals known**
22 **to the State of California to cause cancer, birth defects and other reproductive**
23 **harm. *Wear gloves when handling this product. Not recommended for use with***
24 ***play structures or garden beds.*”**

25 The word “WARNING” shall be in bold text, and the phrase “*Where glove when*
26 *handling this product. Not recommended for use with play structures or garden beds*” shall be
27 in bold italic text. Each sign shall be no smaller than 3 inches x 5 inches, and the form and type
28

1 shall be substantially similar to that which is attached hereto as Exhibit A (hereinafter, the
2 "Product Tag").

3 **8. AUTHORITY TO STIPULATE**

4 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
5 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
6 the party represented and legally to bind that party.

7 **9. DUTIES LIMITED TO CALIFORNIA**

8 9.1 This Consent Judgment shall have no effect on Covered Products sold by Settling
9 Defendants outside the State of California.

10 **10. SERVICE ON THE ATTORNEY GENERAL**

11 10.1 KELC shall serve a copy of this Consent Judgment, signed by all parties, on the
12 California Attorney General on behalf of the parties so that the Attorney General may review this
13 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
14 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
15 and in the absence of any written objection by the Attorney General to the terms of this Consent
16 Judgment, the parties may then submit it to the Court for approval.

17 **11. ENTIRE AGREEMENT**

18 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
19 the parties with respect to the entire subject matter hereof and any and all prior discussions,
20 negotiations, commitments and understandings related hereto. No representations, oral or
21 otherwise, express or implied, other than those contained herein have been made by any party
22 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
23 to exist or to bind any of the parties.

24 **12. GOVERNING LAW**

25 12.1 The validity, construction and performance of this Consent Judgment shall be
26 governed by the laws of the State of California, without reference to any conflicts of law
27 provisions of California law.

28 //

1 **13. EXECUTION AND COUNTERPARTS**

2 13.1 This Consent Judgment may be executed in counterparts and by means of facsimile,
3 which taken together shall be deemed to constitute one document

4
5 **14. COURT APPROVAL & CONTINUING JURISDICTION**

6 14.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
7 this Consent Judgment. If this Consent Judgment, in its entirety, is not approved by the Court, it
8 shall be of no force or effect, and cannot be used in any proceeding for any purpose. This Consent
9 Judgment and warning requirements will not be effective until 60 days after approval by the Court.

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1 15. NOTICES

2 15.1 Any notices under this Consent Judgment shall be by personal delivery of First
3 Class Mail.

4 If to MEJF: William Verick, Esq.
5 Klamath Environmental Law Center
6 424 First Street
7 Eureka, CA 95501

8 If to D&J Lumber Co., Brenda K. Radmacher, Esq.
9 Inc. Wood, Smith, Henning & Berman, LLP
10 505 N. Brand Blvd., Suite 1100
11 Glendale, CA 91203

12 IT IS SO STIPULATED:

13 DATED: _____ MATEEL ENVIRONMENTAL JUSTICE
14 FOUNDATION

15 BY: _____
16 WILLIAM VERICK

17 DATED: _____ D&J LUMBER CO., INC.

18 BY: _____

19 ITS: _____

20 IT IS SO ORDERED, ADJUDGED AND DECREED:

21 DATED: _____

22 _____
23 JUDGE OF THE SUPERIOR COURT
24
25
26
27
28

1 **15. NOTICES**

2 15.1 Any notices under this Consent Judgment shall be by personal delivery of First
3 Class Mail.

4 If to MEJF: William Verick, Esq.
5 Klamath Environmental Law Center
6 424 First Street
7 Eureka, CA 95501

8 If to D&J Lumber Co., Inc. Brenda K. Radmacher, Esq.
9 Wood, Smith, Henning & Berman, LLP
10 505 N. Brand Blvd., Suite 1100
11 Glendale, CA 91203

12 **IT IS SO STIPULATED:**

13 DATED: 1/21/12

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

14 BY: William Verick
15 WILLIAM VERICK

16 DATED: 12/20/11

D&J LUMBER CO., INC.

17 BY: Michael [Signature]
18
19 ITS: CEO

20 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

21 DATED: FEB 03 2012

22 HAROLD KAHN
23
24 JUDGE OF THE SUPERIOR COURT