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7 Attorneys for Plaintiff

**FILED**  
Superior Court of California  
County of San Francisco

SEP 29 2016

CLERK OF THE COURT

BY: Rosie Noquera  
Deputy Clerk

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10 **SUPERIOR COURT OF CALIFORNIA**

11 **COUNTY OF SAN FRANCISCO**

12  
13 ERIKA MCCARTNEY, in the public interest, )

14 Plaintiff, )

15 v. )

16 SBC FIREMASTER LTD., and DOES 1 through )  
17 500, inclusive, )

18 Defendants. )  
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CIVIL ACTION NO. CGC-15-545931

*u*  
**~~PROPOSED~~ STIPULATED CONSENT  
JUDGMENT**

[Cal. Health and Safety Code  
Sec. 25249.6, *et seq.*]

1     **1.     INTRODUCTION**

2             **1.1**     This Action arises out of the alleged violations of California’s Safe Drinking Water  
3 and Toxic Enforcement Act of 1986, California Health and Safety Code Section 25249.5 *et seq.*  
4 (also known as and hereinafter referred to as “Proposition 65”) regarding the following product:  
5 Defendant’s “Firemaster Premium Wood Pellets” (hereinafter the “Covered Product”).  
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7             **1.2**     Plaintiff Erika McCartney (“McCartney”) is a California resident acting as a private  
8 enforcer of Proposition 65. McCartney alleges that she brings this Action in the public interest  
9 pursuant to California Health and Safety Code Section 25249.5, *et seq.* and asserts that she is  
10 dedicated to, among other causes, helping safeguard the public from health hazards by reducing the  
11 use and misuse of hazardous and toxic substances, facilitating a safe environment for consumers  
12 and employees, and encouraging corporate responsibility.  
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14             **1.3**     Defendant SBC Firemaster Ltd., is a Canadian corporation, hereinafter referred to as  
15 “SBC Firemaster” or “Defendant.”

16             **1.4**     McCartney and SBC Firemaster are hereinafter sometimes referred to individually  
17 as a “Party” or collectively as the “Parties.”

18             **1.5**     SBC Firemaster manufactured, distributed and/or sold the Covered Product.

19             **1.6**     On or about October 23, 2014, pursuant to California Health and Safety Code  
20 Section 25249.7(d)(1), McCartney served a 60-Day Notice of Violation of Proposition 65 on the  
21 California Attorney General, other public enforcers and SBC Firemaster. Collectively (hereinafter  
22 “Notice of Violation.”)  
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24             **1.7**     After more than sixty (60) days passed since service of the Notice of Violation, and  
25 no designated governmental agency having filed a complaint against SBC Firemaster with regard to  
26

1 the Covered Product or the alleged violations, McCartney filed a complaint (the "Complaint") for  
2 injunctive relief and civil penalties. The Complaint is based on the allegations in the Notice of  
3 Violation.

4           **1.8** The Complaint alleges that SBC Firemaster manufactured, distributed, and/or sold  
5 in California the Covered Product, which allegedly contain wood dust, a substance listed under  
6 Proposition 65 as being known by the State of California to cause cancer, requiring a Proposition  
7 65 warning. Further, the Complaint alleges that use of the Covered Product exposes persons in  
8 California to wood dust without first providing a clear and reasonable warning, in violation of  
9 California Health and Safety Code Section 25249.6. SBC Firemaster generally denies all material  
10 and factual allegations of the Notices of Violation and the Complaint, and specifically denies that  
11 the Plaintiff or California consumers have been harmed or damaged by its conduct. SBC  
12 Firemaster and McCartney each reserve all rights to allege additional facts, claims, and affirmative  
13 defenses if the Court does not approve this Consent Judgment.  
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16           **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and  
17 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent  
18 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of  
19 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent  
20 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,  
21 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,  
22 wrongdoing, or liability, including without limitation, any admission concerning any alleged  
23 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment  
24 shall prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in  
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1 any other or future legal proceeding. Provided, however, nothing in this Section shall affect the  
2 enforceability of this Consent Judgment.

3       **1.10** The "Effective Date" of this Consent Judgment shall be the date this Consent  
4 Judgment is entered as a Judgment.

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6 **2. JURISDICTION AND VENUE**

7       The Parties stipulate that this Court has jurisdiction over the subject matter of this Action  
8 and personal jurisdiction over the Parties, that venue is proper in this Court, and that this Court has  
9 jurisdiction to enter this Consent Judgment pursuant to the terms set forth herein.

10 **3. INJUNCTIVE RELIEF AND WARNINGS**

11       **3.1** Beginning on the Effective Date, SBC Firemaster shall be permanently enjoined  
12 from offering for sale to a consumer in California, directly selling to a consumer in California, or  
13 "Distributing into California" any units of the Covered Product unless the label of the Covered  
14 Products contains a Proposition 65 compliant warning, consistent with Section 3.2, below.  
15 "Distributing into California" means (1) to ship any units of the Covered Product to California; or  
16 (2) to ship any units of the Covered Product to any person whom Defendant knows or has reason to  
17 know will redistribute the Covered Product into California.

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20 **3.2 Clear and Reasonable Warnings**

21 For the Covered Products that are subject to the warning requirement of Section 3.1, SBC  
22 FIREMASTER shall provide the following warning ("Warning"):

23 CALIFORNIA PROPOSITION 65 WARNING: This product contains wood dust, a  
24 substance known to the State of California to cause cancer. Use a dust mask or other  
safeguards to avoid inhaling wood dust.

25 The Warning shall be permanently affixed to or printed on (at the point of manufacture,  
26 prior to shipment to California, or prior to distribution within California) the outside packaging or

1 container of each unit of the Covered Products. The Warning shall be displayed with such  
2 conspicuousness, as compared with other words, statements designs or devices on the outside  
3 packaging or labeling, as to render it likely to be read and understood by an ordinary individual  
4 prior to use. If the Warning is displayed on the product packaging or labeling, the Warning shall be  
5 at least the same size as the largest of any other health or safety warnings on the product packaging  
6 or labeling, and the word "WARNING" shall be in all capital letters. If printed on the labeling  
7 itself, the Warning shall be contained in the same section of the labeling that states other safety  
8 warnings concerning the use of the Covered Products, if any.

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10 **4. SETTLEMENT PAYMENTS**

11 **4.1** SBC shall make a total payment of \$15,000 as civil penalties pursuant to California  
12 Health and Safety Code Section 25249.7(b)(1). This amount shall be paid in two equal installments  
13 of \$7,500, payable not later than November 15, 2016 and December 15, 2016, respectively. Of this  
14 amount, the first check payable in November shall be for \$7,500 (seven thousand five hundred  
15 dollars) shall be payable to the Office of Environmental Health Hazard Assessment ("OEHHA").  
16 The second installment payable in December shall each be in the form of two checks for \$3,750  
17 (three thousand seven hundred fifty dollars), one payable to OEHHA, and one to McCartney.

18 **4.4** McCartney's attorneys' fees and expenses shall be paid in in four installments of  
19 \$10,000 (ten thousand dollars) each, payable to Robert B. Hancock as reimbursement of  
20 McCartney's attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees and  
21 Costs"). These installments shall be paid by check not later than the 15<sup>th</sup> of each of January,  
22 February, March and April, 2017.

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24 **4.5** Any failure by SBC Firemaster to remit payment on or before its due date shall be  
25 deemed a material breach of this Agreement, entitling Plaintiff to rescind. In such event, the  
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1 Parties agree to cooperate in taking any and all steps necessary to vacate and/or set aside any  
2 Judgment or dismissal entered.

3 **5. MODIFICATION OF CONSENT JUDGMENT**

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5 5.1 This Consent Judgment may be modified only by: (i) Written agreement and  
6 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment  
7 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one  
8 of the Parties after exhausting the meet and confer process set forth as follows. If either Party  
9 requests or initiates a modification, then it shall meet and confer with the other Party in good faith  
10 before filing a motion with the Court seeking to modify it. McCartney is entitled to reimbursement  
11 of all reasonable attorneys' fees and costs regarding the Parties' meet and confer efforts for any  
12 modification requested or initiated by SBC Firemaster. Similarly, SBC Firemaster is entitled to  
13 reimbursement of all reasonable attorney's fees and costs regarding the Parties' meet and confer  
14 efforts for any modification requested or initiated by SBC Firemaster. If, despite their meet and  
15 confer efforts, the Parties are unable to reach agreement on any proposed modification the party  
16 seeking the modification may file the appropriate motion and the prevailing party on such motion  
17 shall be entitled recover its reasonable fees and costs associated with such motion. One basis, but  
18 not the exclusive basis, for SBC Firemaster to seek a modification of this Consent Judgment is if  
19 Proposition 65 is changed, narrowed, limited, or otherwise rendered inapplicable in whole or in part  
20 to the Covered Products or wood dust due to legislative change, a change in the implementing  
21 regulations, court decisions, or other legal basis.  
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1 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

2 6.1 This Court shall retain jurisdiction of this matter to enforce, modify or terminate this  
3 Consent Judgment.

4 6.2 Subject to Section 6.3, any Party may, by motion or application for an order to show  
5 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.  
6 The prevailing party in any such motion or application may request that the Court award its  
7 reasonable attorneys' fees and costs associated with such motion or application.  
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10 **7. APPLICATION OF CONSENT JUDGMENT**

11 This Consent Judgment shall apply to and be binding upon the Parties and their respective  
12 officers, directors, successors and assigns, and it shall benefit the Parties and their respective  
13 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,  
14 affiliates, franchisees, licensees, customers, distributors, wholesalers, retailers, predecessors,  
15 successors, and assigns.  
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18 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

19 8.1 This Consent Judgment is a full, final, and binding resolution between McCartney,  
20 on behalf of herself and in the public interest, and SBC FIREMASTER, of any and all direct or  
21 derivative violations (or claimed violations) of Proposition 65 or its implementing regulations for  
22 failure to provide Proposition 65 warnings of exposure to wood dust from the handling, use, or  
23 consumption of the Covered Products and fully resolves all claims that have been or could have  
24 been asserted in this Action up to and including the Effective Date for failure to provide  
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1 Proposition 65 warnings for the Covered Products regarding wood dust. McCartney, on behalf of  
2 herself and in the public interest, hereby forever releases and discharges, SBC FIREMASTER and  
3 its past and present officers, directors, owners, shareholders, employees, agents, attorneys, parent  
4 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, customers,  
5 distributors, wholesalers, retailers, and all other upstream and downstream entities and persons in  
6 the distribution chain of any Covered Product, and the predecessors, successors and assigns of any  
7 of them (collectively, "Released Parties"), from any and all claims and causes of action and  
8 obligations to pay damages, restitution, fines, civil penalties, payment in lieu of civil penalties and  
9 expenses (including but not limited to expert analysis fees, expert fees, attorney's fees and costs)  
10 (collectively, "Claims") arising under, based on, or derivative of Proposition 65 or its implementing  
11 regulations up through the Effective Date relating to actual or potential exposure to wood dust from  
12 the Covered Products and/or failure to warn about wood dust, as set forth in the Notices of  
13 Violation and the Complaint.  
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16 **8.2** Compliance with the terms of this Consent Judgment shall be deemed to constitute  
17 compliance by any Released Party with Proposition 65 regarding alleged exposures to wood dust  
18 from the Covered Products as set forth in the Notice of Violations and the Complaint.

19 **8.3** It is possible that other Claims not known to McCartney arising out of the facts  
20 alleged in the Notice of Violations or the Complaint and relating to wood dust in the Covered  
21 Products that were manufactured, sold or Distributed into California before the Effective Date will  
22 develop or be discovered. McCartney, on behalf of herself only, acknowledges that the Claims  
23 released herein include all known and unknown Claims and waives California Civil Code Section  
24 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as follows:  
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1           **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
2           **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER**  
3           **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**  
4           **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS**  
5           **OR HER SETTLEMENT WITH THE DEBTOR.”**

6           McCartney, on behalf of herself only, acknowledges and understands the significance and  
7           consequences of this specific waiver of California Civil Code section 1542.

8           **8.4**     McCartney, on one hand, and SBC FIREMASTER, on the other hand, each release  
9           and waive all Claims they may have against each other for any statements or actions made or  
10          undertaken by them in connection with the Notice of Violations or the Complaint. However, this  
11          shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.

12          **9.     CONSTRUCTION AND SEVERABILITY**

13          **9.1**     The terms and conditions of this Consent Judgment have been reviewed by the  
14          respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully  
15          discuss the terms and conditions with its counsel. In any subsequent interpretation or construction  
16          of this Consent Judgment, the terms and conditions shall not be construed against any Party.

17          **9.2**     In the event that any of the provisions of this Consent Judgment is held by a court to  
18          be unenforceable, the validity of the remaining enforceable provisions shall not be adversely  
19          affected.

20          **9.3**     The terms and conditions of this Consent Judgment shall be governed by and  
21          construed in accordance with the laws of the State of California.  
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1 **10. PROVISION OF NOTICE**

2 All notices required to be given to either Party to this Consent Judgment by the other shall  
3 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b) certified  
4 mail, (b) overnight courier, or (c) personal delivery to the following:  
5

6 **For McCartney:**

7 Melvin B. Pearlston  
8 Robert B. Hancock  
9 PACIFIC JUSTICE CENTER  
50 California Street, Suite 1500  
San Francisco, California 94111

10 **For SBC Firemaster:**

11 Chad S. Tapp  
12 PORTER SCOTT  
13 350 University Avenue, Suite 200  
Sacramento, California 95825

14 **11. COURT APPROVAL**

15 **11.1** Upon execution of this Consent Judgment by the Parties, McCartney shall notice a  
16 Motion for Court Approval. The Parties shall use their best efforts to support entry of this Consent  
17 Judgment.

18 **11.2** If the California Attorney General objects to any term in this Consent Judgment, the  
19 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to  
20 the hearing on the motion.

21 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated  
22 Consent Judgment, it shall be null and void and have no force or effect.  
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1 **12. EXECUTION AND COUNTERPARTS**

2 This Stipulated Consent Judgment may be executed in counterparts, which taken together  
3 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid and as the  
4 original signature.  
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6 **13. ENTIRE AGREEMENT, AUTHORIZATION**

7 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of  
8 the Parties with respect to the entire subject matter herein, and any and all prior discussions,  
9 negotiations, commitments and understandings related hereto. No representations, oral or  
10 otherwise, express or implied, other than those contained herein have been made by any Party. No  
11 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist  
12 or to bind any Party.  
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14 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized  
15 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly  
16 provided herein, each Party shall bear its own fees and costs.  
17

18 **14. REQUEST FOR FINDINGS AND FOR APPROVAL**

19 **14.1** This Consent Judgment has come before the Court upon the request of the Parties.  
20 The parties request the Court to fully review this Consent Judgment and, being fully informed  
21 regarding the matters which are the subject of this action, to:  
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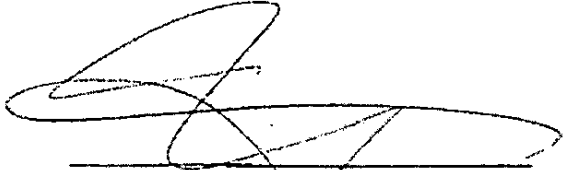
23 (a) Find that the terms and provisions of this Consent Judgment represent a good  
24 faith settlement of all matters raised by the allegations of the Complaint, that the matter has been  
25 diligently prosecuted, and that the public interest is served by such settlement; and  
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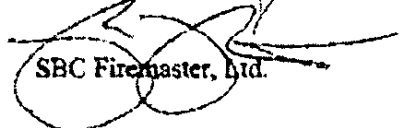
(b) Make the findings pursuant to California Health and Safety Code Section 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

**IT IS SO STIPULATED.**

Dated: 5/31/16

  
Erika McCartney

Dated: MAY 31, 2016

  
SBC Firemaster, Ltd.


Name: Paul PATTON

Title: DIRECTOR

**APPROVED AS TO FORM:**

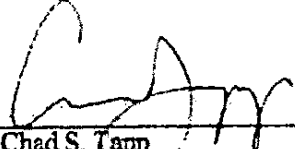
Dated: 6/2/16

PACIFIC JUSTICE CENTER,

By:   
Robert B. Hancock  
Attorneys for Plaintiff  
ERIKA MCCARTNEY

Dated: 05/31/16

PORTER SCOTT, APC

By:   
Chad S. Tapp  
Attorneys for Defendant  
SBC FIREMASTER, LTD.

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**JUDGMENT**

Based upon the Parties' Stipulation, and good cause appearing therefor, this Consent Judgment is approved and judgment is hereby entered according to its terms.

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated: 9/27, 2016.

  
\_\_\_\_\_  
Judge of the Superior Court  
*Hon.* HAROLD KAHN