

1 Clifford A. Chanler, State Bar No. 135534
2 Christopher M. Martin, State Bar No. 186021
3 HIRST & CHANLER LLP
4 566 W. Adams St., Suite 450
5 Chicago, IL 60661
6 Telephone: (312) 376-1801
7 Facsimile: (312) 376-1804

8 Attorneys for Plaintiff
9 MICHAEL DIPIRRO

10 Dieter Karl Rapp, State Bar No. 126222
11 5927 Balfour Court, Suite 201
12 Carlsbad, CA 92008
13 Telephone: (760) 448-4824
14 Facsimile: (760) 603-9527

15 Attorneys for Defendant
16 COMPUVEST CORPORATION

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 FOR THE COUNTY OF ALAMEDA
19 UNLIMITED CIVIL JURISDICTION
20

21 MICHAEL DIPIRRO,)
22)
23 Plaintiff,)
24 v.)
25)
26 COMPUVEST CORPORATION; and DOES 1)
27 through 150, inclusive,)
28 Defendants.)

Case No. RG-08-404882
ASSIGNED FOR ALL PURPOSES TO
JUDGE Cecilia P. Castellanos
DEPARTMENT 18
**STIPULATION AND [PROPOSED]
ORDER RE: SETTLEMENT
AGREEMENT**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Plaintiff Michael DiPirro (“DiPirro” or “Plaintiff”) and Defendant Compuvest Corporation (“Compuvest” or “Defendant”), with DiPirro and Compuvest referred to as the "Parties."

1.2 Plaintiff

DiPirro is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.3 Compuvest

Compuvest employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

1.4 General Allegations

Plaintiff alleges that Compuvest has manufactured, distributed, and/or sold motherboards and sound cards with solder containing lead in the State of California without the requisite health hazard warnings. Lead is a substance known to cause birth defects and other reproductive harm and is listed pursuant to Proposition 65. Lead shall be referred to hereinafter as the "Listed Chemical."

1.5 Product Description

The products that are covered by this Settlement Agreement are defined as follows: motherboards with solder containing lead, including, but not limited to *Azza Socket A ATX MB Kit w/Athon Xp 2200+ HS/Fan KT3AV, P/N 351004706-01 (#7 78656 03683 3)*, and sound cards with solder containing lead including, but not limited to, *Creative Labs Sound Blaster Live! Sound Card, Model No. CT4780*. Examples of forms of solder include, but are not limited to, solder, solder balls, solder spheres, solder paste, wave solder, solder joints, die bumps, and flip-chip bumps. All such motherboards and sound cards with solder containing lead shall be referred to hereinafter as “Products.”

1 **1.6 Notice of Violation**

2 On March 24, 2008, DiPirro served Compuvest and various public enforcement agencies
3 with a document entitled "60-Day Notice of Violation" ("Notice") that provided Compuvest and
4 such public enforcers with notice of alleged violations of California Health & Safety Code
5 §25249.6 for failing to warn consumers, workers and others that the Products that Compuvest sold
6 exposed users in California to the Listed Chemical. To the best of the Parties' knowledge, no public
7 enforcer has diligently prosecuted the allegations set forth in the Notice.

8 **1.7 Complaint**

9 On August 19, 2008, DiPirro, acting in the interest of the general public in California, filed a
10 complaint ("Complaint" or "Action") in the Superior Court in and for the County of Alameda
11 against Compuvest Corporation and Does 1 through 150, *DiPirro v. Compuvest Corporation; and*
12 *DOES 1 through 150, inclusive, Alameda Superior Court Case No. RG-08-404882*, alleging
13 violations of California Health & Safety Code §25249.6 based on the alleged exposures to the
14 Listed Chemical contained in the Products sold by Compuvest.

15 **1.8 No Admission**

16 Compuvest denies the material factual and legal allegations contained in Plaintiff's Notice
17 and Complaint and maintains that all Products that it has sold and distributed in California have
18 been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed
19 as an admission by Compuvest of any fact, finding, issue of law, or violation of law, nor shall
20 compliance with this Settlement Agreement constitute or be construed as an admission by
21 Compuvest of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
22 denied by Compuvest. However, this Section shall not diminish or otherwise affect Compuvest's
23 obligations, responsibilities and duties under this Settlement Agreement.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Settlement Agreement only, the Parties stipulate that this Court has
26 jurisdiction over Compuvest as to the allegations contained in the Complaint, that venue is proper in
27 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
28

1 this Settlement Agreement.

2 **1.10 Effective Date**

3 For purposes of this Settlement Agreement, the term "Effective Date" shall mean December
4 26, 2008.

5 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

6 **2.1 Product Warnings**

7 After the Effective Date, Compuvest shall not sell, ship, or offer to be shipped for sale in
8 California any Product unless such Product is sold or shipped with one of the clear and reasonable
9 warnings set out in Section 2.1, are otherwise exempt pursuant to Section 2.2. or comply with the
10 reformulation standards set forth in Section 2.3. Each warning shall be prominently placed with
11 such conspicuousness as compared with other words, statements, designs, or devices as to render it
12 likely to be read and understood by an ordinary individual under customary conditions before
13 purchase or use. Each warning shall be provided in a manner such that the consumer or user
14 understands to which *specific* Product the warning applies, so as to minimize if not eliminate the
15 chance that an overwarning situation will arise.

16 Sections 2.1(a)-(c) describe Compuvest's options for satisfying its warning obligations
17 depending, in part, on the manner of sale. The warning requirement of Section 2.1(d) shall apply
18 regardless of the manner of sale. The following warnings will be applicable when the Product is
19 sold either to consumers or in a business-to-business transaction:

20 **(a) Mail Order Catalog and Internet Sales**

21 Compuvest shall satisfy its warning obligations for Products that are sold by mail order
22 catalog or from the Internet to California residents by providing a warning: (i) in the mail order
23 catalog; and/or (ii) on the website. Warnings given in the mail order catalog or on the website shall
24 identify the specific Product to which the warning applies as further specified in Sections 2.1(a)(i),
25 and/or (ii) as applicable:

26 **(i) Mail Order Catalog Warning.** Any warning provided in a mail
27 order catalog must be in the same type size or larger as the Product description text within the
28

1 purchaser during the checkout process. The following warning statement shall be used and shall
2 appear in any of the above instances adjacent to or immediately following the display, description,
3 or price of the Product for which it is given in the same type size or larger as the Product
4 description text:

5 **WARNING:** The materials used in this product contain lead, a
6 chemical known to the State of California to cause
7 cancer and birth defects and other reproductive
8 harm.

9 Please wash hands after handling and avoid
10 inhalation of fumes if heating the solder on the
11 product.

12 Alternatively, the designated symbol may appear adjacent to or immediately following the display,
13 description, or price of the Product for which a warning is being given, provided that the following
14 warning statement also appears elsewhere on the same web page:

15 **WARNING:** Products identified on this page with the following
16 symbol use materials that contain lead, a chemical
17 known to the State of California to cause cancer
18 and birth defects and other reproductive harm: ▼

19 Please wash hands after handling and avoid
20 inhalation of fumes if heating the solder on the
21 product.

22 **2.2 Exceptions To Warning Requirements**

23 The warning requirements set forth in Section 2.1 shall not apply to:

- 24 (i) Any Product received in inventory before the Effective Date; or
- 25 (ii) Any Product in which the only possible point of exposure to the Listed

26 Chemical is embedded in a manner that a consumer or worker would not come into contact with the
27 Listed Chemical under any reasonably anticipated use.

28 **2.3 Public Information Commitment**

In a good faith effort to inform the public about the risk of exposure to lead in Compuvest's
Products sold before the Effective Date, Compuvest hereby commits to provide the following
warning on its main products web page(s) for a period of one year:

1 **WARNING:** Certain desktop sound cards and motherboards sold
2 in California prior to December 26, 2008, contain
3 lead solder. Lead is a chemical known to the State
4 of California to cause cancer and birth defects and
5 other reproductive harm.

 Please wash hands after handling those sound cards
 and motherboards that utilize lead solder and avoid
 inhalation of fumes if heating the solder on the
 product.

6 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)**

7 In settlement of all the claims referred to in this Settlement Agreement, Compuvest shall pay
8 \$2,000 in civil penalties to be apportioned in accordance with California Health & Safety Code
9 §25192, with 75% of these funds remitted to the State of California's Office of Environmental
10 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Michael
11 DiPirro as provided by California Health & Safety Code §25249.12(d). Compuvest shall issue two
12 separate checks for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in
13 Trust for OEHHA" in the amount of \$1,500.00, representing 75% of the total penalty; and (b) one
14 check to "Hirst & Chanler LLP in Trust for Michael DiPirro" in the amount of \$500.00,
15 representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments:
16 (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Michael DiPirro,
17 whose information shall be provided five calendar days before the payment is due.

18 Payment shall be delivered to DiPirro's counsel on or before January 15, 2009, at the
19 following address:

20 Hirst & Chanler LLP
21 Attn: Proposition 65 Controller
22 Capitol Mall Complex
23 455 Capitol Mall, Suite 605
24 Sacramento, CA 95814

23 **4. REIMBURSEMENT OF FEES AND COSTS**

24 **4.1 Attorneys' Fees and Costs**

25 The Parties acknowledge that DiPirro and his counsel offered to resolve this dispute without
26 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
27 issue to be resolved after the material terms of the agreement had been settled. Compuvest then
28

1 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
2 finalized. The Parties then reached an accord on the compensation due to DiPirro and his counsel
3 under the private attorney general doctrine codified at California Code of Civil Procedure §1021.5
4 and under principles of contract law for all work performed through the execution of this Settlement
5 Agreement. Under the private attorney general doctrine and principles of contract law, Compuvest
6 shall reimburse DiPirro and his counsel for fees and costs incurred as a result of investigating,
7 bringing this matter to Compuvest's attention, litigating, and negotiating a settlement in the public
8 interest. Compuvest shall reimburse DiPirro and his counsel \$18,000 for all attorneys' fees, expert
9 and investigation fees, litigation and related costs through the execution of the Agreement. The
10 payment shall be made payable to Hirst & Chanler LLP and delivered in three installment
11 payments. The first payment of \$6,000 shall be paid on or before January 15, 2009. The second
12 payment of \$6,000 shall be paid on or before February 15, 2009. The third payment of \$6,000 shall
13 be paid on or before March 15, 2009. All of the payments shall be delivered to the following
14 address:

15 Hirst & Chanler LLP
16 Attn: Proposition 65 Controller
17 Capitol Mall Complex
455 Capitol Mall, Suite 605
Sacramento, CA 95814

18 Compuvest shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the
19 check payable to "Hirst & Chanler LLP".

20 **4.2 Additional Attorneys' Fees and Costs in Seeking Judicial Approval**

21 Pursuant to CCP §§1021 and 1021.5, the Parties agree that Compuvest will reimburse
22 DiPirro and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
23 this Settlement Agreement in the trial court, in an amount not to exceed \$4,000.00. Such additional
24 fees and costs, exclusive of fees and costs that may be incurred in the event of an appeal include,
25 but are not limited to, drafting and filing of the Motion to Approve papers, fulfilling the reporting
26 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party
27 objections, corresponding with opposing counsel and appearing before the Court related to the
28

1 approval process. Reimbursement of such additional fees and costs shall be due within ten days
2 after receipt of a billing statement from DiPirro ("Additional Fee Claim"). Payment of the
3 Additional Fee Claim shall be made to "Hirst & Chanler LLP," and the payment shall be delivered
4 to the following address:

5 Hirst & Chanler LLP
6 Attn: Proposition 65 Controller
7 Capitol Mall Complex
8 455 Capitol Mall, Suite 605
9 Sacramento, CA 95814

10 Compuvest has the right to object to such reimbursement and may submit the resolution of
11 this issue to the American Arbitration Association (AAA) in Northern California to determine the
12 reasonableness of the additional fees and costs sought, provided that a notice of objection or
13 decision to arbitrate is received by DiPirro by the end of the ten calendar days of receipt of invoice.

14 If an arbitration notice is not filed with AAA in a timely manner, DiPirro may file a motion with
15 the Court pursuant to both CCP §1021.5 and this settlement agreement to recover additional
16 attorney fees and costs incurred as set forth in this paragraph.

17 **5. RELEASE OF ALL CLAIMS**

18 **5.1 Release of Compuvest and Downstream Customers**

19 In further consideration of the promises and agreements herein contained, and for the
20 payments to be made pursuant to Sections 3 and 4, DiPirro, on behalf of himself, his past and
21 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
22 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form
23 of legal action and releases all claims, including, without limitation, all actions, and causes of
24 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
25 losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees)
26 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
27
28

1 against Compuvest and each of its downstream wholesalers, licensors, licensees, auctioneers,
2 retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
3 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
4 shareholders, agents, and employees, sister and parent entities, and original equipment
5 manufacturers and distributors (collectively "releasees"). This release is limited to those claims that
6 arise under Proposition 65, as such claims relate to Compuvest's alleged failure to warn about
7 exposures to the Listed Chemical contained in the Products. The Parties further understand and
8 agree that this release shall not extend upstream to any entities that manufactured the Products or
9 any component parts thereof, or any distributors or suppliers who sold the Products or any
10 component parts thereof to Compuvest.
11

12 Michael DiPirro, in his individual capacity, releases any and all general claims that he may
13 presently have against Compuvest beyond those claims covered in this paragraph. DiPirro, his
14 successors and assigns, further waive any and all rights and benefits which he now has, or in the
15 future may have, conferred upon by virtue of the provisions of Section 1542 of the California Civil
16 Code, which provides as follows:
17

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
19 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE
20 TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST
21 HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

22 **5.2 Compuvest's Release of DiPirro**

23 Compuvest waives any and all claims against DiPirro, his attorneys, and other
24 representatives for any and all actions taken or statements made (or those that could have been
25 taken or made) by DiPirro and his attorneys and other representatives, whether in the course of
26 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
27 and/or with respect to the Products.
28

1 **6. COURT APPROVAL**

2 This Settlement Agreement is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
4 after it has been fully executed by all Parties. If the Court does not approve the Settlement
5 Agreement, the Parties shall meet and confer as to (and jointly agree on) whether to modify the
6 language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then
7 the case shall proceed in its normal course on the Court's calendar. In the event that this Settlement
8 Agreement is entered by the Court and subsequently overturned by any appellate court or the
9 Motion to Approve is not ultimately granted, any monies that have been provided to Plaintiff or his
10 counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen (15) days of
11 the appellate decision becoming final. If the Court's approval is ultimately overturned by an
12 appellate court, the Parties shall meet and confer as to (and jointly agree on) whether to modify the
13 terms of the Settlement Agreement. If the Parties do not jointly agree on a course of action to take,
14 then the case shall proceed in its normal course on the trial court's calendar.
15

16
17 **7. SEVERABILITY**

18 If, subsequent to court approval of this Settlement Agreement, any of the provisions of this
19 Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable
20 provisions remaining shall not be adversely affected.
21

22 **8. ATTORNEYS' FEES**

23 In the event that, after Court approval: (1) Compuvest or any third party seeks modification
24 of this Settlement Agreement pursuant to Section 14 below; or (2) DiPirro takes reasonable and
25 necessary steps to enforce the terms of this Settlement Agreement, the prevailing party shall be
26 entitled to his reasonable attorneys' fees and costs pursuant to CCP §1021.5.
27
28

1 **9. GOVERNING LAW**

2 The terms of this Settlement Agreement shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is repealed or is
4 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Compuvest
5 may provide written notice to DiPirro of any asserted change in the law, and shall have no further
6 obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the
7 Products are so affected.

8 **10. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant to
10 this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class,
11 (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the
12 other Party at the following addresses:
13

14 To Compuvest:

15 Dieter Karl Rapp
16 A Professional Law Corporation
17 5927 Balfour Court, Suite 201
18 Carlsbad, CA 92008

19 To DiPirro:

20 Proposition 65 Coordinator
21 HIRST & CHANLER LLP
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710-2565

25 Any Party, from time to time, may specify in writing to the other Party a change of address
26 to which all notices and other communications shall be sent.

27 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

28 This Settlement Agreement may be executed in counterparts and by facsimile, each of
which shall be deemed an original, and all of which, when taken together, shall constitute one and

1 the same document.

2 **12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

3 DiPirro and his attorneys agree to comply with the reporting form requirements referenced
4 in Health & Safety Code §25249.7(f).

5 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

6 The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a Motion to
7 Approve the Agreement (“noticed motion”) is required to obtain judicial approval of this
8 Settlement Agreement. In furtherance of obtaining such approval, DiPirro, Compvest, and their
9 respective counsel agree to mutually employ their best efforts to support the entry of this agreement
10 as a Settlement Agreement and obtain approval of the Settlement Agreement by the Court in a
11 timely manner. For purposes of this paragraph, best efforts shall include, at a minimum,
12 cooperating on the drafting and filing any papers, asserting any oral argument in support of the
13 required motion for judicial approval, and defending any appellate review of the Court’s approval.
14 This provision is a material component of the Settlement Agreement and shall be treated as such in
15 the event of a breach.

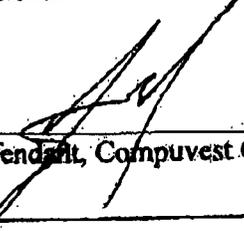
16 **14. MODIFICATION**

17 This Settlement Agreement may be modified only: (1) by written agreement of the Parties
18 and upon entry of a modified Settlement Agreement by the Court thereon; or (2) upon a successful
19 motion of any Party and entry of a modified Settlement Agreement by the Court. The Attorney
20 General shall be served with notice of any proposed modification to this Settlement Agreement at
21 least fifteen (15) days in advance of its consideration by the Court.

22 **15. AUTHORIZATION**

23 The undersigned are authorized to execute this Settlement Agreement on behalf of their
24 respective Parties and have read, understood, and agree to all of the terms and conditions of this
25 Settlement Agreement.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO: Date: _____ By: _____ Plaintiff, Michael DiPirro	AGREED TO: Date: <u>1-14-2008</u> By:  Defendant, Compuvest Corporation
APPROVED AS TO FORM: Date: _____ HIRST & CHANLER LLP By: _____ Christopher M. Martin Attorneys for Plaintiff MICHAEL DIPIRRO	APPROVED AS TO FORM: Date: <u>1-15-2009</u> By:  Dieter Karl Rapp Attorneys for Defendant COMPUVEST CORPORATION

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT