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11 Attorneys for Plaintiff Mateel Environmental
Justice Foundation

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO

15
16 MATEEL ENVIRONMENTAL JUSTICE
17 FOUNDATION,

18 Plaintiff,

19 v.

20 ANAWALT LUMBER CO., INC.; AND STOCK
BUILDING SUPPLY WEST,

21 Defendants.

Case No. CGC – 11 – 509698

**CONSENT JUDGMENT
[PROPOSED] AS TO DEFENDANTS
ANAWALT LUMBER CO., STOCK
BUILDING SUPPLY WEST,
FRIEDMAN’S HOME
IMPROVEMENT, PROBUILD
HOLDINGS, INC.**

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23
24 **1. INTRODUCTION**

25 1.1 The Consent Judgment that is the subject of this motion settles Proposition 65
26 enforcement actions that Mateel brought against four defendants in two separate cases. On March
27 30, 2011, the MATEEL ENVIRONMENTAL JUSTICE FOUNDATION (“Plaintiff MEJF”)
28 acting on behalf of itself and the general public, filed the Complaint in this action (“Complaint”),

1 for civil penalties and injunctive relief in San Francisco Superior Court, Case No. CGC-11-
2 509698, against defendants Anawalt Lumber Co., Inc. and Stock Building Supply West. Also on
3 March 30, 2011, Mateel filed Case No. CGC-11-509694, against defendants Friedman’s Home
4 Improvement and Probuild Holdings, Inc. Collectively, the four above-mentioned defendants shall
5 be hereinafter referred to as (“Settling Defendants”). The Complaints allege, among other things,
6 that Settling Defendants violated provisions of the Safe Drinking Water and Toxic Enforcement
7 Act of 1986, Health and Safety Code Sections 25249.5, et seq. (Proposition 65) by failing to give
8 clear and reasonable warnings to those residents of California who handle and use lumber
9 products, including but not limited to railroad ties, that are treated with creosote and/or
10 pentachlorophenol, also referred to herein as “Covered Products”, that they will be exposed to the
11 following Proposition 65-listed chemicals: creosotes, pentachlorophenol, benzo[b]fluoranthene,
12 benzo[k]fluoranthene, benzo[a]pyrene, chrysene, dibenz[a,h,]anthracene, hexachlorobenzene,
13 indeno[1,2,3-cd]pyrene, naphthalene, polychlorinated dibenzo-p-dioxins, and polychlorinated
14 dibenzofurans (“Wood Treatment Chemicals”). The Complaints were based upon 60-Day Notice
15 letters, dated November 12, 2009, sent by MEJF to Settling Defendants, the California Attorney
16 General, all District Attorneys, and all City Attorneys with populations exceeding 750,000.
17 Defendants Friedman’s Home Improvement and Probuild Holdings, Inc. agree to be bound by the
18 Consent Judgment in this action. Upon the Court’s entry of this Consent Judgment, Mateel will
19 dismiss, without prejudice, Case No. CGC – 11 – 509694, as against Friedman’s Home
20 Improvement and Probuild Holdings, Inc.

21 1.2 Settling Defendants are businesses that employ more than ten persons, and market
22 or sell railroad ties that contain the above-listed chemicals. Pursuant to Health and Safety Code
23 Section 25249.8, creosotes, pentachlorophenol, benzo[b]fluoranthene, benzo[k]fluoranthene,
24 benzo[a]pyrene, chrysene, dibenz[a,h,]anthracene, hexachlorobenzene, indeno[1,2,3-cd]pyrene,
25 naphthalene, polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans are chemicals
26 known to the State of California to cause cancer and/or reproductive toxicity. Plaintiff MEJF
27 alleges that handling and use of railroad ties that are marketed or sold by Settling Defendants for
28 use in California results in exposures to the above-listed chemicals and requires a warning under

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

9 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
10 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
11 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
12 not constitute an admission with respect to any material allegation of the Complaint, each and
13 every allegation of which Settling Defendants deny, nor may this Consent Judgment or compliance
14 with it be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
15 Settling Defendant.

16 1.4 For purposes of this Consent Judgment, the term “Covered Products” means lumber
17 products, including but not limited to railroad ties, that are treated with creosote and/or
18 pentachlorophenol offered for sale by Settling Defendants. The term “Effective Date” means 90
19 days after entry of this Consent Judgment.

20 **2. SETTLEMENT PAYMENT**

21 2.1 Settling Defendants shall pay \$38,000.00 to the Klamath Environmental Law
22 Center (“KELC”) to cover Plaintiff’s attorneys’ fees and costs.

23 2.2 Settling Defendants shall also pay \$4,000.00 in civil penalties. Mateel waives its
24 entitlement to 25% of this amount, and thus the entire amount of civil penalties shall be made
25 payable, pursuant to the statute, to the Office of Environmental Health Hazard Assessment
26 (OEHHA).

27 2.3 Additionally, Settling Defendants shall pay \$10,000.00 to the Ecological Rights
28 Foundation for use toward reducing exposures to toxic chemicals and other pollutants, and toward

1 increasing consumer, worker and community awareness of health hazards posed by lead and other
2 toxic chemicals. The parties agree and acknowledge that the charitable contributions made
3 pursuant to this section shall not be construed as a credit against the personal claims of absent third
4 parties for restitution against the defendant.

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

14 **3. ENTRY OF CONSENT JUDGMENT**

15 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
16 Upon entry of the Consent Judgment, Settling Defendants and MEJF waive their respective rights
17 to a hearing or trial on the allegations of the Complaint.

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

19 4.1 This Consent Judgment is a final and binding resolution, as to Covered Products,
20 between MEJF, acting on behalf of itself and (as to those matters raised in the 60-Day Notice
21 Letter) the general public, and Settling Defendants of: (i) any violation of Proposition 65
22 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or
23 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or
24 could have been asserted by any person or entity against Settling Defendants or their present and
25 future parents, subsidiaries affiliates, predecessors, successors, and assigns, and with respect to
26 Settling Defendants and these other entities, each of their officers, directors, employees,
27 shareholders, members, and agents ("Released Entities"), based on its or their exposure of persons
28 to Wood Treatment Chemicals from Covered Products or their failure to provide a clear and

1 reasonable warning of exposure to such individuals; and (iii) as to alleged exposures to Wood
2 Treatment Chemicals from Covered Products, any other claim based in whole or in part on the
3 facts alleged in the Complaint, whether based on actions committed by the Released Entities or
4 others. As to alleged exposures to Wood Treatment Chemicals from Covered Products, compliance
5 with the terms of this Consent Judgment resolves any issue, now and in the future, concerning
6 compliance by Settling Defendants and the Released Entities, with the requirements of Proposition
7 65 with respect to Covered Products, and any alleged resulting exposure. Notwithstanding any
8 other provision in this Consent Judgment, any and all releases on behalf of the General Public are
9 limited to the claims made and the chemicals identified in the 60-Day Notice Letter.

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

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

26 4.3 MEJF understands and acknowledges that the significance and consequence of this
27 waiver of California Civil Code section 1542 is that even if MEJF suffers future damages arising
28 out of or resulting from, or related directly or indirectly to, in whole or in part, the Covered

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

10 **5. ENFORCEMENT OF JUDGMENT**

11 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
12 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
13 San Francisco County, giving the notice required by law, enforce the terms and conditions
14 contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment
15 only after that Party first provides 30 days notice to the Party allegedly failing to comply with the
16 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
17 comply in an open and good faith manner.

18 5.2 In any proceeding brought by either party to enforce this Consent Judgment, such
19 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
20 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 Defendants

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 Defendants may provide clear and reasonable warnings by
4 placing a notice that is visible to consumer 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”).

15 7.3 Product Tags: Settling Defendants may, at their option, provide clear and
16 reasonable warnings by affixing a warning tag to each railroad tie offered for sale in its stores or
17 yards in California. The warning tags shall state:

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

22 The word “WARNING” shall be in bold text, and the phrase “*Where glove when*
23 *handling this product. Not recommended for use with play structures or garden beds*” shall be
24 in bold italic text. Each sign shall be no smaller than 3 inches x 5 inches, and the form and type
25 shall be substantially similar to that which is attached hereto as Exhibit A (hereinafter, the
26 “Product Tag”).

27 **8. AUTHORITY TO STIPULATE**

28

1 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
2 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
3 the party represented and legally to bind that party.

4 **9. DUTIES LIMITED TO CALIFORNIA**

5 9.1 This Consent Judgment shall have no effect on Covered Products sold by Settling
6 Defendants outside the State of California.

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

8 10.1 KELC shall serve a copy of this Consent Judgment, signed by all parties, on the
9 California Attorney General on behalf of the parties so that the Attorney General may review this
10 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
11 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
12 and in the absence of any written objection by the Attorney General to the terms of this Consent
13 Judgment, the parties may then submit it to the Court for approval.

14 **11. ENTIRE AGREEMENT**

15 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
16 the parties with respect to the entire subject matter hereof and any and all prior discussions,
17 negotiations, commitments and understandings related hereto. No representations, oral or
18 otherwise, express or implied, other than those contained herein have been made by any party
19 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
20 to exist or to bind any of the parties.

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23 **12. GOVERNING LAW**

24 12.1 The validity, construction and performance of this Consent Judgment shall be
25 governed by the laws of the State of California, without reference to any conflicts of law
26 provisions of California law.

27 **13. EXECUTION AND COUNTERPARTS**

28

1 13.1 This Consent Judgment may be executed in counterparts and by means of facsimile,
2 which taken together shall be deemed to constitute one document.

3 **14. COURT APPROVAL & CONTINUING JURISDICTION**

4 14.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
5 this Consent Judgment. If this Consent Judgment, in its entirety, is not approved by the Court, it
6 shall be of no force or effect, and cannot be used in any proceeding for any purpose. This Consent
7 Judgment and warning requirements will not be effective until 60 days after approval by the Court.

8 **15. NOTICES**

9 15.1 Any notices under this Consent Judgment shall be by personal delivery of First
10 Class Mail.

- | | | |
|----|--------------------------------------|--|
| 12 | If to MEJF: | William Verick, Esq.
Klamath Environmental Law Center
424 First Street
Eureka, CA 95501 |
| 15 | If to Friedman's Home
Improvement | Stephanie Walker, Esq.
Abbey Weitzenberg Warren & Emery
P. O. Box 1566
Santa Rosa, CA 95402-1566 |
| 18 | If to Probuild
Holdings, Inc. | Daniel T. Pascucci, Esq.
Nathan Hamler, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo,
P.C.
3580 Carmel Mountain Road
Suite 300
San Diego, CA 92130 |
| 21 | If to Anawalt Lumber
Co., Inc. | Brenda K. Radmacher, Esq.
Wood, Smith, Henning & Berman, LLP
505 N. Brand Blvd., Suite 1100
Glendale, CA 91203 |
| 24 | If to Stock Building
Supply West | Brenda K. Radmacher, Esq.
Wood, Smith, Henning & Berman, LLP
505 N. Brand Blvd., Suite 1100
Glendale, CA 91203 |

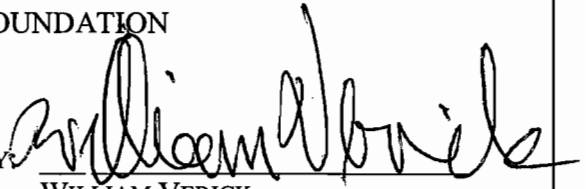
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IT IS SO STIPULATED:

DATED: _____

MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION

BY: 
WILLIAM VERICK

DATED: _____

FRIEDMAN'S HOME IMPROVEMENT

BY: _____

ITS: _____

DATED: _____

PROBUILD HOLDINGS, INC.

BY: _____

ITS: _____

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DATED: 10-6-11

ANAWALT LUMBER CO., INC.

BY: *[Signature]*

ITS: EXECUTIVE VICE PRESIDENT

DATED: _____

STOCK BUILDING SUPPLY WEST

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT