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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CENTER FOR ENVIRONMENTAL HEALTH,)	Case No. RG 15-785401
a non-profit corporation,)	
)	
Plaintiff,)	[PROPOSED] CONSENT JUDGMENT
)	AS TO MIDWEST AIR
v.)	TECHNOLOGIES, INC.
)	
MIDWEST AIR TECHNOLOGIES, INC., <i>et al.</i> ,)	
)	
Defendants.)	

1. INTRODUCTION

1.1 This Consent Judgment is entered into by Plaintiff Center For Environmental Health (“CEH”), a California non-profit corporation, and Defendant Midwest Air Technologies, Inc. (“Defendant”) to settle certain claims asserted by CEH against Defendant as set forth in the operative complaint in the matter entitled *Center for Environmental Health v. Midwest Air Technologies, Inc., et al.*, Alameda County Superior Court Case No. 15-785401 (the “Action”).

1.2 On June 19, 2015, CEH provided a “Notice of Violation” relating to the California Safe Drinking Water and Toxic Enforcement Act of 1986 (“Proposition 65”) to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Defendant regarding the

1 presence of lead and lead compounds (collectively referred to herein as “Lead”) in galvanized
2 steel chain link fence framework and gates (“Covered Products”).

3 1.3 On September 11, 2015, CEH filed the Complaint in the Action, naming
4 Defendant as a defendant in that Action.

5 1.4 Defendant manufactures, distributes, and/or sells Covered Products in the State of
6 California.

7 1.5 For purposes of this Consent Judgment only, CEH and Defendant (the “Parties”)
8 stipulate that this Court has jurisdiction over the allegations of violations contained in the
9 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that
10 venue is proper in the County of Alameda, and that this Court has jurisdiction to enter this
11 Consent Judgment as a full and final resolution of all claims which were or could have been
12 raised in the Complaint based on the facts alleged therein with respect to Covered Products
13 manufactured, distributed, and/or sold by Defendant.

14 1.6 CEH and Defendant enter into this Consent Judgment as a full and final settlement
15 of all claims that were raised in the Complaint, or which could have been raised in the Complaint,
16 arising out of the facts or conduct related to Defendant alleged therein. By execution of this
17 Consent Judgment and agreeing to comply with its terms, the Parties do not admit any facts or
18 conclusions of law including, but not limited to, any facts or conclusions of law suggesting or
19 demonstrating any violations of Proposition 65 or any other statutory, common law, or equitable
20 requirements. Nothing in this Consent Judgment is or shall be construed as an admission by the
21 Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with
22 the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
23 conclusion of law, issue of law, or violation of law. Defendant denies the material, factual, and
24 legal allegations in CEH’s Complaint and expressly denies any wrong doing whatsoever.
25 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument,
26 or defense the Parties may have in this or any other pending or future legal proceedings. This
27 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties
28 solely for purposes of settling, compromising, and resolving issues disputed in this action.

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of Covered Products.** As of the date of approval of this Consent
3 Judgment by the Court (the “Effective Date”), Defendant shall not manufacture, ship, sell, or
4 offer for sale any Covered Product in California or anywhere else unless such Covered Product
5 complies with the following Lead Limits:

6 2.1.1 “Paint or other Surface Coatings” as that term is defined in 16 C.F.R.
7 § 1303.2(b): no more than 0.009 percent Lead by weight (90 parts per million) (“ppm”).

8 2.1.2 Polyvinyl chloride (“PVC”): no more than 0.02 percent Lead by weight
9 (200 ppm).

10 2.1.3 All other materials: no more than 0.03 percent Lead by weight (300 ppm).

11 **3. ENFORCEMENT**

12 **3.1 Enforcement Procedures.** Prior to bringing any motion or order to show cause to
13 enforce the terms set forth in Section 2 of this Consent Judgment, a Party seeking to enforce shall
14 provide the violating party thirty (30) days advanced written notice of the alleged violation. The
15 Parties shall meet and confer during such thirty (30) day period in an effort to try to reach
16 agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the
17 Party seeking to enforce may, by new action, motion, or order to show cause before the Superior
18 Court of Alameda, seek to enforce the terms and conditions contained in this Consent Judgment.
19 The prevailing party on any motion or application to enforce this Consent Judgment shall be
20 entitled to its reasonable attorney’s fees and costs incurred as a result of such motion or
21 application. This Consent Judgment may only be enforced by the Parties.

22 **4. PAYMENTS**

23 **4.1 Payments from Defendant.** Within five (5) days of the Effective Date,
24 Defendant shall pay the total sum of \$47,500.

25 **4.2 Allocation of Payments.** The total settlement amount for Defendant shall be paid
26 in four (4) separate checks made payable and allocated as follows:

27 4.2.1 Defendant shall pay the sum of \$6,300 as a civil penalty pursuant to Health
28 & Safety Code § 25249.7(b). The civil penalty payment shall be apportioned in accordance with

1 Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California's Office of
2 Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of
3 the civil penalty payment in the amount of \$4,725 shall be made payable to OEHHA and
4 associated with taxpayer identification number 68-0284486. This payment shall be delivered as
5 follows:

6 For United States Postal Service Delivery:

7 Attn: Mike Gyurics
8 Fiscal Operations Branch Chief
9 Office of Environmental Health Hazard Assessment
P.O. Box 4010, MS #19B
Sacramento, CA 95812-4010

10 For Non-United States Postal Service Delivery:

11 Attn: Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

14 The CEH portion of the civil penalty payment in the amount of \$1,575 shall be made
15 payable to the Center for Environmental Health and associated with taxpayer identification
16 number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero
17 Street, San Francisco, CA 94117.

18 4.2.2 Defendant shall pay the sum of \$9,400 as payment to CEH in lieu of
19 penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title
20 11, § 3202(b). CEH will use such funds to continue its work educating and protecting people
21 from exposures to toxic chemicals, including heavy metals. CEH may also use a portion of such
22 funds to monitor compliance with the reformulation requirements of this and other similar
23 Consent Judgments and to purchase and test Covered Products to confirm compliance with such
24 reformulation requirements. In addition, as part of its *Community Environmental Action and*
25 *Justice Fund*, CEH will use four percent (4%) of such funds to award grants to grassroots
26 environmental justice groups working to educate and protect people from exposures to toxic
27 chemicals. The method of selection of such groups can be found at the CEH web site at
28 www.ceb.org/justicefund. The payment in lieu of penalty check shall be made payable to the

Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

4.2.3 Defendant shall pay the sum of \$31,800 as reimbursement of reasonable attorneys' fees and costs. The attorneys' fees and cost reimbursement check shall be made payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5. MODIFICATION AND DISPUTE RESOLUTION

5.1 **Modification.** This Consent Judgment may be modified from time to time by express written agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion and in accordance with law.

5.2 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

6. CLAIMS COVERED AND RELEASE

6.1 This Consent Judgment is a full, final, and binding resolution between CEH and Defendant and Defendant's parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, and their successors and assigns ("Defendant Releasees"), and all to whom they distribute or sell Covered Products directly or indirectly including, but not limited to, distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of any violation of Proposition 65 or any other statutory or common law claims that have been or could have been asserted in the public interest against Defendant, Defendant Releasees, and Downstream Defendant Releasees, regarding the failure to warn about exposure to Lead arising in connection with Covered Products manufactured, distributed, or sold by Defendant prior to the Effective Date.

6.2 CEH, for itself and acting on behalf of the public interest pursuant to Health & Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against

1 Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any
2 violation of Proposition 65 or any other statutory or common law claims that have been or could
3 have been asserted in the public interest regarding the failure to warn about exposure to Lead
4 arising in connection with Covered Products manufactured, distributed, or sold by Defendant
5 prior to the Effective Date.

6 6.3 Compliance with the terms of this Consent Judgment by Defendant and the
7 Defendant Releasees shall constitute compliance with Proposition 65 by Defendant, the
8 Defendant Releasees, and their Downstream Defendant Releasees with respect to any alleged
9 failure to warn about Lead in Covered Products manufactured, distributed, or sold by Defendant
10 after the Effective Date.

11 **7. PROVISION OF NOTICE**

12 7.1 When any Party is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class and electronic mail as follows:

14 7.1.1 **Notices to Defendant.** The person for Defendant to receive notices
15 pursuant to this Consent Judgment shall be:

16 Michael E. Delehunt
17 Megan O. Curran
18 FOLEY & LARDNER LLP
19 555 California Street, Suite 1700
20 San Francisco, CA 94104
21 MDelehunt@foley.com
22 MCurran@foley.com

23 7.1.2 **Notices to Plaintiff.** The person for CEH to receive notices pursuant to
24 this Consent Judgment shall be:

25 Howard Hirsch
26 LEXINGTON LAW GROUP
27 503 Divisadero Street
28 San Francisco, CA 94117
hhirsch@lexlawgroup.com

7.2 Any Party may modify the person and address to whom the notice is to be sent by
sending the other Party notice by first class and electronic mail.

1 **8. COURT APPROVAL**

2 8.1 This Consent Judgment shall become effective on the Effective Date, provided
3 however, that CEH shall prepare and file a Motion for Approval of this Consent Judgment and
4 Defendant shall support approval of such Motion.

5 8.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
6 effect and shall not be introduced into evidence or otherwise used in any proceeding for any
7 purpose.

8 **9. GOVERNING LAW AND CONSTRUCTION**

9 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California.

11 **10. ENTIRE AGREEMENT**

12 10.1 This Consent Judgment contains the sole and entire agreement and understanding
13 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
14 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
15 and therein. There are no warranties, representations, or other agreements between the Parties
16 except as expressly set forth herein. No representations, oral or otherwise, express or implied,
17 other than those specifically referred to in this Consent Judgment have been made by any Party
18 hereto. No other agreements not specifically contained or referenced herein, oral or otherwise,
19 shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically
20 contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the
21 Parties hereto only to the extent that they are expressly incorporated herein. No supplementation,
22 modification, waiver, or termination of this Consent Judgment shall be binding unless executed in
23 writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent
24 Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof
25 whether or not similar, nor shall such waiver constitute a continuing waiver.

26 **11. RETENTION OF JURISDICTION**

27 11.1 This Court shall retain jurisdiction of this matter to implement or modify the
28 Consent Judgment.

12. **AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

12.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

13. **NO EFFECT ON OTHER SETTLEMENTS**

13.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim against another entity on terms that are different than those contained in this Consent Judgment.

14. **EXECUTION IN COUNTERPARTS**

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

IT IS SO STIPULATED:

Dated: 8 April, 2016

CENTER FOR ENVIRONMENTAL HEALTH



Signature

CHARLIE PIZZANO

Printed Name

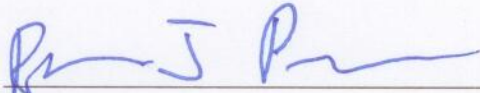
ASSOCIATE DIRECTOR

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Dated: April 8, 2016

MIDWEST AIR TECHNOLOGIES, INC.


Signature

Robert J. PATTON
Printed Name

Vice President & General Counsel
Title

IT IS SO ORDERED, ADJUDGED,
AND DECREED:

Dated: _____

JUDGE OF THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA