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11 **SUPERIOR COURT OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**
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14 ERIKA MCCARTNEY, in the public interest,)
15 Plaintiff,)
16 v.)
17 WEST OREGON WOOD PRODUCTS, INC, an)
Oregon corporation.; and DOES 1 through 500,)
18 inclusive,)
19 Defendants.)
20

CIVIL ACTION NO. CGC-15-544278
**PROPOSED] STIPULATED CONSENT
JUDGMENT; [PROPOSED] ORDER**
[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 (hereinafter collectively the “Covered Product”: Blazer Premium Wood Pellet Fuel.
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7 **1.2** Plaintiff ERIKA MCCARTNEY (“MCCARTNEY”) is a California resident acting
8 as a private enforcer of Proposition 65. MCCARTNEY brings this Action in the public interest
9 pursuant to California Health and Safety Code Section 25249. MCCARTNEY 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 chemicals and substances, facilitating a safe environment for
12 consumers and employees, and encouraging corporate responsibility.
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14 **1.3** Defendant West Oregon Wood Products, Inc., is an Oregon corporation, and is
15 referred to hereinafter as “WEST OREGON.”

16 **1.4** WEST OREGON distributes and sells the Covered Product.

17 **1.5** MCCARTNEY and WEST OREGON are hereinafter sometimes referred to
18 individually as a “Party” or collectively as the “Parties.”

19 **1.6** On or about October 7, 2014, pursuant to California Health and Safety Code Section
20 25249.7(d)(1), MCCARTNEY served a 60-Day Notice of Violations of Proposition 65 (“Notice of
21 Violations”) on the California Attorney General, other public enforcers, and WEST OREGON. A
22 true and correct copy of the Notice of Violations is attached hereto as Exhibit A.
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24 **1.7** After more than sixty (60) days passed since service of the Notice of Violations, and
25 no designated governmental agency filed a complaint against WEST OREGON with regard to the
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1 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 Violations.

4 **1.8** The Complaint and the Notice of Violations each allege that WEST OREGON
5 manufactured, distributed, and/or sold in California the Covered Product, which contains wood
6 dust, a substance listed under Proposition 65 as a carcinogen, and exposed consumers thereto.
7 Further, the Complaint and Notice of Violations allege that use of the Covered Product exposes
8 persons in California to wood dust without first providing clear and reasonable warnings, in
9 violation of California Health and Safety Code Section 25249.6. WEST OREGON generally
10 denies all material and factual allegations of the Notice of Violation and the Complaint, and
11 specifically denies that the Plaintiff or California consumers have been harmed or damaged by its
12 conduct. MCCARTNEY and WEST OREGON each reserves all rights to allege additional facts,
13 claims, and affirmative defenses if the Court does not approve this Consent Judgment.
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15 **1.9** The Parties enter into this Consent Judgment in order to settle, compromise and
16 resolve disputed claims and avoid prolonged and costly litigation. Nothing in this Consent
17 Judgment, nor compliance with its terms, shall constitute or be construed as an admission by any of
18 the Parties, or by any of their respective officers, directors, shareholders, employees, agents, parent
19 companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors,
20 wholesalers, or retailers, of any fact, conclusion of law, issue of law, violation of law, fault,
21 wrongdoing, or liability, including without limitation, any admission concerning any alleged
22 violation of Proposition 65. Except as expressly set forth herein, nothing in this Consent Judgment
23 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, REFORMULATION, TESTING, AND WARNINGS**

11 **3.1** Beginning on the Effective Date, WEST OREGON 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 of the Covered Product without a Proposition 65 compliant
14 warning, consistent with Section 3.3, below, without Court modification of this Consent Judgment.
15 “Distributing into California” or “Distribute into California” means to ship any of the Covered
16 Product to California for sale or to sell any of the Covered Product to a distributor that WEST
17 OREGON knows or has reason to know will sell the Covered Product in California.

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19 **3.2** All Covered Product that have been or will have been distributed, shipped, or sold,
20 or otherwise placed in the stream of commerce through and including the Effective Date of this
21 Consent Judgment are exempt from the provisions of Sections 3.1 and 3.3 and are included within
22 the release in Sections 8.1 through 8.4. To be in compliance with the terms of this Consent
23 Judgment, WEST OREGON is not required to undertake any efforts or conduct to remove such
24 Covered Product from the stream of commerce. On the Effective Date, WEST OREGON shall
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1 provide Plaintiff with the last lot number and expiration date for the Covered Product in the stream
2 of commerce through the Effective Date.

3 **3.3 Clear and Reasonable Warnings**

4 For the Covered Product that is subject to the warning requirement of Section 3.1, WEST
5 OREGON shall provide the following warning ("Warning") as specified below:
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7 CALIFORNIA PROPOSITION 65 WARNING: This product contains and releases
8 compounds known to the State of California to cause cancer, birth defects, or reproductive harm.
9 Use safeguards to avoid inhalation of wood, wood dust, and combustion by-products.

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11 The Warning shall be permanently affixed to or printed on (at the point of manufacture,
12 prior to shipment to California, or prior to distribution within California) the outside packaging or
13 container of each unit of the Covered Product. The Warning shall be displayed with such
14 conspicuousness, as compared with other words, statements designs or devices on the outside
15 packaging or labeling, as to render it likely to be read and understood by an ordinary individual
16 prior to use. If the Warning is displayed on the product container or labeling, the Warning shall be
17 at least the same size as the largest of any other health or safety warnings on the product container
18 or labeling. If printed on the labeling itself, the Warning shall be contained in the same section of
19 the labeling that states other safety warnings concerning the use of the Covered Product.

20 Displaying the Warning that is in Exhibit B hereto on the outside packaging or container of
21 each unit of the Covered Product is deemed to be a clear and reasonable warning under, and to fully
22 comply with, Health & Safety Section 25249.6 and the implementing regulations at Title 27
23 California Code of Regulations Sections 25601 through 25605.2.
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1 **4. SETTLEMENT PAYMENT**

2 **4.1** WEST OREGON shall make a total payment of \$55,000, except as otherwise
3 provided in Section 4.4 below, within ten days of the Effective Date, which shall be in full and final
4 satisfaction of any and all civil penalties, payment in lieu of civil penalties, and attorneys' fees and
5 costs.

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7 **4.2** The payment will be in the form of separate checks sent to counsel for
8 MCCARTNEY, Robert B. Hancock, Pacific Justice Center, 50 California Street, San Francisco,
9 California 94111. The checks shall be payable to the following parties and the payment shall be
10 apportioned as follows:

11 **4.3** \$15,000 (fifteen thousand dollars) as civil penalties pursuant to California Health
12 and Safety Code Section 25249.7(b)(1). Of this amount, \$11,250 (eleven thousand two hundred
13 fifty dollars) shall be payable to the Office of Environmental Health Hazard Assessment
14 ("OEHHA"), and \$3,750 (three thousand seven hundred fifty dollars) shall be payable to
15 MCCARTNEY. (Cal. Health & Safety Code § 25249.12(c)(1) & (d)). MCCARTNEY's counsel
16 will forward the civil penalty to OEHHA.

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18 **4.4** \$40,000 (forty thousand dollars) payable to Pacific Justice Center as reimbursement
19 of MCCARTNEY's attorneys' fees, costs, investigation and litigation expenses ("Attorney's Fees
20 and Costs"). MCCARTNEY and her counsel shall be responsible on their own to establish in the
21 Motion for Court Approval that such Attorney's Fees and Costs are appropriate for the work done
22 in this matter. MCCARTNEY and her counsel agree not to seek more than \$40,000. WEST
23 OREGON shall not oppose the amount of Attorney's Fees and Costs for which McCartney seeks
24 approval as long as the request does not exceed \$40,000.
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1 **5. MODIFICATION OF CONSENT JUDGMENT**

2 **5.1** This Consent Judgment may be modified only by: (i) Written agreement and
3 stipulation of the Parties and upon having such stipulation entered as a modified Consent Judgment
4 by the Court; or (ii) Upon entry of a modified Judgment by the Court pursuant to a motion by one
5 of the Parties after exhausting the meet and confer process set forth as follows. If either Party
6 requests or initiates a modification, then it shall meet and confer with the other Party in good faith
7 before filing a motion with the Court seeking to modify it. MCCARTNEY is entitled to
8 reimbursement of all reasonable attorneys' fees and costs regarding the Parties' meet and confer
9 efforts for any modification requested or initiated by WEST OREGON. Similarly, WEST
10 OREGON is entitled to reimbursement of all reasonable attorney's fees and costs regarding the
11 Parties' meet and confer efforts for any modification requested or initiated by MCCARTNEY. If,
12 despite their meet and confer efforts, the Parties are unable to reach agreement on any proposed
13 modification the party seeking the modification may file the appropriate motion and the prevailing
14 party on such motion shall be entitled recover its reasonable fees and costs associated with such
15 motion. One basis, but not the exclusive basis, for WEST OREGON to seek a modification of this
16 Consent Judgment is if Proposition 65 is changed, narrowed, limited, or otherwise rendered
17 inapplicable in whole or in part to the Covered Product or wood dust due to legislative change, a
18 change in the implementing regulations, court decisions, or other legal basis.
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22 **6. RETENTION OF JURISDICTION, ENFORCEMENT OF CONSENT JUDGMENT**

23 **6.1** This Court shall retain jurisdiction of this matter to enforce, modify or terminate this
24 Consent Judgment.
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1 **6.2** Subject to Section 6.3, any Party may, by motion or application for an order to show
2 cause filed with this Court, enforce the terms and conditions contained in this Consent Judgment.
3 The prevailing party in any such motion or application may request that the Court award its
4 reasonable attorneys' fees and costs associated with such motion or application.
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6 **6.3** Before filing a motion or application for an order to show cause, MCCARTNEY
7 shall provide WEST OREGON with 30 (thirty) days written notice of any alleged violations of the
8 terms and conditions contained in this Consent Judgment. As long as WEST OREGON cures any
9 such alleged violations within the 30 (thirty) day period (or if any such violation cannot practicably
10 be cured within 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as
11 practicable), then WEST OREGON shall not be in violation of the Consent Judgment.
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13 **7. APPLICATION OF CONSENT JUDGMENT**

14 This Consent Judgment shall apply to and be binding upon the Parties and their respective
15 officers, directors, successors and assigns, and it shall benefit the Parties and their respective
16 officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions,
17 affiliates, franchisees, licensees, customers (including "Co-Brand" customers; excluding only
18 "Private Labeler" customers), distributors, wholesalers, retailers, predecessors, successors, and
19 assigns. "Private Labelers" excluded from the benefits of this Consent Judgment are companies
20 who rebrand and offer WEST OREGON manufactured or distributed products under their own
21 brand, not under the WEST OREGON brand. "Co-Brand" customers who shall benefit from this
22 Consent Judgment are companies who offer WEST OREGON manufactured or distributed
23 products with their own brand and the WEST OREGON brand both displayed on the product
24 packaging.
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2 **8. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

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

4 **8.3** It is possible that other Claims not known to MCCARTNEY arising out of the facts
5 alleged in the Notice of Violations or the Complaint and relating to wood dust in the Covered
6 Product that were manufactured, sold or Distributed into California before the Effective Date will
7 develop or be discovered. MCCARTNEY, on behalf of herself only, acknowledges that the Claims
8 released herein include all known and unknown Claims and waives California Civil Code Section
9 1542 as to any such unknown Claims. California Civil Code Section 1542 reads as follows:

11 **“A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
12 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
13 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
14 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.”**

15 MCCARTNEY, on behalf of herself only, acknowledges and understands the significance and
16 consequences of this specific waiver of California Civil Code section 1542.

17 **8.4** MCCARTNEY, on one hand, and WEST OREGON, on the other hand, each release
18 and waive all Claims they may have against each other for any statements or actions made or
19 undertaken by them in connection with the Notice of Violations or the Complaint. However, this
20 shall not affect or limit any Party’s right to seek to enforce the terms of this Consent Judgment.

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22 **9. CONSTRUCTION AND SEVERABILITY**

23 **9.1** The terms and conditions of this Consent Judgment have been reviewed by the
24 respective counsel for the Parties prior to its signing, and each Party has had an opportunity to fully
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1 discuss the terms and conditions with its counsel. In any subsequent interpretation or construction
2 of this Consent Judgment, the terms and conditions shall not be construed against any Party.

3 **9.2** In the event that any of the provisions of this Consent Judgment is held by a court to
4 be unenforceable, the validity of the remaining enforceable provisions shall not be adversely
5 affected.

6 **9.3** The terms and conditions of this Consent Judgment shall be governed by and
7 construed in accordance with the laws of the State of California.
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9 **10. PROVISION OF NOTICE**

10 All notices required to be given to either Party to this Consent Judgment by the other shall
11 be in writing and sent to the following agents listed below by: (a) first-class, registered, (b) certified
12 mail, (b) overnight courier, or (c) personal delivery to the following:
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14 **For Erika McCartney:**

15 Melvin B. Pearlston
16 Robert B. Hancock
17 PACIFIC JUSTICE CENTER
18 50 California Street, Suite 1500
19 San Francisco, California 94111

20 **For West Oregon Wood Products, Inc.:**

21 Christopher Sharron, President
22 West Oregon Wood Products, Inc.
23 PO Box 249
24 Columbia City, OR 97018

25 **11. COURT APPROVAL**

26 **11.1** Upon execution of this Consent Judgment by the Parties, MCCARTNEY shall
notice a Motion for Court Approval. Except as provided in Section 4.4 above, the Parties shall use
their best efforts to support entry of this Consent Judgment.

1 **11.2** If the California Attorney General objects to any term in this Consent Judgment, the
2 Parties shall use their best efforts to resolve the concern in a timely manner, and if possible prior to
3 the hearing on the motion.

4 **11.3** If, despite the Parties' best efforts, the Court does not approve this Stipulated
5 Consent Judgment except as provided in Section 4.4, above, it shall be null and void and have no
6 force or effect.
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8 **12. EXECUTION AND COUNTERPARTS**

9 This Stipulated Consent Judgment may be executed in counterparts, which taken together
10 shall be deemed one document. A facsimile or .pdf signature shall be construed as valid and as the
11 original signature.

12 **13. ENTIRE AGREEMENT, AUTHORIZATION**

13 **13.1** This Consent Judgment contains the sole and entire agreement and understanding of
14 the Parties with respect to the entire subject matter herein, and any and all prior discussions,
15 negotiations, commitments and understandings related hereto. No representations, oral or
16 otherwise, express or implied, other than those contained herein have been made by any Party. No
17 other agreements, oral or otherwise, unless specifically referred to herein, shall be deemed to exist
18 or to bind any Party.
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20 **13.2** Each signatory to this Consent Judgment certifies that he or she is fully authorized
21 by the Party he or she represents to stipulate to this Consent Judgment. Except as explicitly
22 provided herein, each Party shall bear its own fees and costs.
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14. REQUEST FOR FINDINGS AND FOR APPROVAL

14.1 This Consent Judgment has come before the Court upon the request of the Parties. The parties request the Court to fully review this Consent Judgment and, being fully informed regarding the matters which are the subject of this action, to:

(a) Find that the terms and provisions of this Consent Judgment represent a good faith settlement of all matters raised by the allegations of the Complaint, that the matter has been diligently prosecuted, and that the public interest is served by such settlement; and

(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: Sept. 16th 2015



Erika McCartney

Dated: _____

WEST OREGON WOOD PRODUCTS, INC.

Name: _____

Title: _____

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

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3 The parties request the Court to fully review this Consent Judgment and, being fully informed
4 regarding the matters which are the subject of this action, to:

5 (a) Find that the terms and provisions of this Consent Judgment represent a good
6 faith settlement of all matters raised by the allegations of the Complaint, that the matter has been
7 diligently prosecuted, and that the public interest is served by such settlement; and

8 (b) Make the findings pursuant to California Health and Safety Code Section
9 25249.7(f)(4), and approve the Settlement, and this Consent Judgment.

10 **IT IS SO STIPULATED.**

11 Dated: _____

12 Erika McCartney

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16 Dated: 9/8/2015

WEST OREGON WOOD PRODUCTS, INC.

17 Name: 

18 Title: CEO

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ORDER AND 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: _____, 2016.

Judge of the Superior Court