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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF ALAMEDA

9 UNLIMITED CIVIL JURISDICTION

10
11
12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 CHECKWORKS, INC., *et al.*,

16 Defendants.
17

Case No. RG17863289

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Michael DiPirro (“DiPirro”),
4 and CHECKWORKS, INC. (“Defendant” or “Checkworks”), with DiPirro and Defendant
5 individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 DiPirro alleges that Defendant manufactures, imports, sells, or distributes for sale in the state
16 of California, checkbook covers containing Diisononyl phthalate (“DINP”) and Di-isodecyl phthalate
17 (“DIDP”) without first providing the clear and reasonable exposure warning required by Proposition
18 65. DINP is listed pursuant to Proposition 65 as a chemical that is known to the State of California to
19 cause cancer. DIDP is listed pursuant to Proposition 65 as a chemical that is known to the State of
20 California to cause birth defects or other reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl pouches and checkbook covers and
23 similar financial products used to cover or hold personal or business checks, containing DINP and/or
24 DIDP that are sold, or distributed for sale in California by Defendant, including, but not limited to,
25 *Vinyl Black Checkbook Cover, Blue Vinyl Checkbook Cover for 1Up/Estate Business Checks*
26 *(#62810490593), and Vinyl Security Pouch for 7-Ring Binder (#62810490590)* (“Products”).
27
28

1 **1.6 Notice of Violation**

2 On or about April 12, 2016, DiPirro served Defendant and certain requisite public
3 enforcement agencies with a “60-Day Notice of Violation”, a document that informed the recipients
4 of DiPirro’s allegation that Defendant violated Proposition 65 by failing to warn its customers and
5 consumers in California that its checkbook Products expose users to DINP. On or about December 9,
6 2016, DiPirro served Defendant and certain requisite public enforcement agencies with a
7 “Supplemental 60-Day Notice of Violation”, a document that informed the recipients of DiPirro’s
8 allegation that Defendant violated Proposition 65 by failing to warn its customers and consumers in
9 California that its checkbook and vinyl pouch Products expose users to DINP and DIDP (collectively,
10 “Notice”). To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
11 prosecuting the allegations set forth in the Notice.

12 **1.7 Complaint**

13 On or about June 8, 2017, DiPirro filed the instant action against Defendant (“Complaint”) for
14 the alleged violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

15 **1.8 No Admission**

16 Defendant disputes that it has violated Proposition 65 as described in the Notice, the
17 Complaint, or otherwise. Defendant denies the material, factual, and legal allegations contained in
18 the Notice and the Complaint, and maintains that all of the products it has sold or distributed for sale
19 in California, including the Products, have been, and are, in compliance with all laws. Defendant
20 specifically denies that it manufactured any of the Products. Nothing in this Consent Judgment shall
21 be construed as an admission by Defendant with respect to any material allegation in the Complaint,
22 or of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with
23 this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding,
24 conclusion of law, issue of law, or violation of law, the same being specifically denied by Defendant.
25 Further, this Consent Judgment or compliance with it shall not be used as evidence of any
26 wrongdoing, misconduct, culpability or liability on the part of Defendant. This section shall not,
27 however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under this

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Alameda
4 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
5 Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean February 2,
8 2018.

9 **2. INJUNCTIVE RELIEF: PRODUCT WARNINGS**

10 Commencing on the Effective Date, for all Products that contain DINP and/or DIDP, and are
11 shipped in California by Defendant, Defendant shall provide a clear and reasonable warning as set
12 forth below. Each warning shall be prominently placed with such conspicuousness as compared
13 with other words, statements, designs, or devices as to render it likely to be read and understood by
14 an ordinary individual under customary conditions before purchase or use. Each warning shall be
15 provided in a manner such that the consumer or user understands to which specific Product the
16 warning applies, so as to minimize the risk of consumer confusion. The text of the warning shall be
17 printed in black ink on a light background, in a font that is easy to read and legible, but in no case
18 less than in 10 point font.

19 For Products that are not Reformulated Products, and are shipped for sale in California by
20 Defendant prior to August 1, 2018, Defendant may use one of the following warnings, at Defendant’s
21 option. For Products that are not Reformulated Products, that are shipped for sale in California by
22 Defendant after July 31, 2018, Defendant shall use the warning language under “Option 2” below,
23 which shall include a symbol consisting of a black exclamation point in a yellow equilateral triangle
24 with a bold black outline as shown below (the symbol may be black on white if the color yellow is
25 otherwise not used on the Product’s packaging).

26 **OPTION 1:**

1 **WARNING: This product contains one or more phthalate chemicals**
2 **known to the State of California to cause cancer, birth**
3 **defects, and other reproductive harm.**

4 **OPTION 2:**



6 **WARNING: This product can expose you to chemicals including**
7 **DINP, which are known to the State of California to**
8 **cause cancer, and chemicals including DIDP, which are**
9 **known to the State of California to cause birth defects**
10 **or other reproductive harm. For more information go**
11 **to www.P65Warnings.ca.gov.**

12 **3. MONETARY PAYMENTS**

13 **3.1 Civil Penalty.** Defendant shall pay a civil penalty in the amount of \$4,000.00
14 pursuant to the payment terms in Section 3.2 below. The penalty payment will be allocated by
15 DiPirro’s counsel in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with
16 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
17 (“OEHHA”) and the remaining 25% of the penalty remitted to DiPirro. The penalty payment shall be
18 delivered to the address listed in Section 3.2 below.

19 **3.2 Payments Held in Trust.** Payments shall be delivered to the offices of Bush &
20 Henry, Attorneys at Law, PC, 6761 Sebastopol Avenue, Suite 111, Sebastopol, CA 95472, as
21 follows, and shall be in the form of three checks for the following amounts made payable to:

- 22 (a) “Bush & Henry, Attorneys at Law” in the amount of \$3,000.00 for payment
23 to OEHHA. Bush & Henry agree to forward such funds to OEHHA in a
24 timely manner. Alternatively, at Defendant’s option, it can choose to deliver
25 to the offices of Bush & Henry a certified or cashier’s check made payable to
26 “Office of Environmental Health Hazard Assessment.”
27 (b) “Bush & Henry, Attorneys at Law” in the amount of \$1,000.00 as payment
28 to Michael DiPirro. Bush & Henry agree to forward such funds in a timely
 manner. Alternatively, at Defendant’s option, it can choose to deliver to the
 offices of Bush & Henry a certified or cashier’s check made payable to
 “Michael DiPirro.”

1 (c) "Bush & Henry, Attorneys at Law, PC" in the amount of \$26,000, as payment
2 for attorneys' fees and costs pursuant to Section 4 below.

3 Payment shall be made in three (3) equal payments of \$10,000 each, due on or before: 1)
4 March 1, 2018 (3 checks: 1 \$3,000 check made out to Bush & Henry for OEHHA per Section (a)
5 above; 1 \$1,000 check made out to Bush & Henry for Michael DiPirro per Section (b) above; and 1
6 \$6,000 check made out to Bush & Henry per Section (c) above) ; 2) April 1, 2018 (1 \$10,000 check
7 made out to Bush & Henry per Section (c) above); and 3) May 1, 2018 (1 \$10,000 check made out to
8 Bush & Henry per Section (c) above). For any payment that is returned for insufficient funds,
9 payment must be made by a cashier's check within ten (10) calendar days of notification of
10 insufficient funds, plus a 10% service fee. Any payment that is not actually received by the due date
11 will also be subject to a 10% fee.

12 **3.3 Issuance of 1099 Forms.** Defendant shall provide DiPirro's counsel with a separate
13 1099 form for each of its payments under this Agreement as follows:

- 14 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010,
15 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
16 (b) "Michael DiPirro," whose address and tax identification number shall be
17 furnished upon request after this Agreement has been fully executed by the
18 Parties for his portion of the civil penalties paid; and
19 (c) "Bush & Henry, Attorneys at Law, PC," for fees and costs reimbursed
20 pursuant to Section 4.

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

22 The parties acknowledge that DiPirro and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
24 issue to be resolved after the material terms of the agreement had been settled. The parties then
25 attempted to (and did) reach an accord on the compensation due to OEHHA, DiPirro and his counsel
26 under general contract principles and the private attorney general doctrine codified at California Code
27 of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement.
28 Defendant shall pay \$26,000 for fees and costs incurred as a result of investigating, bringing this

1 matter to Defendant’s attention, and negotiating a settlement in the public interest. Defendant shall
2 issue a separate 1099 for fees and costs (EIN: 81-1257634), shall make the check payable to “Bush &
3 Henry, Attorneys at Law, PC” and shall deliver payment pursuant to Section 3.2 above.

4 **5. CLAIMS COVERED AND RELEASED**

5 **5.1 DiPirro’s Public Release of Proposition 65 Claims**

6 DiPirro, acting on his own behalf and in the public interest, releases Defendant, its officers,
7 directors, principals, members, managers, employees, partners, predecessors, successors, assigns,
8 heirs, attorneys, representatives, shareholders, subsidiaries, affiliates, divisions and retailers, from
9 all claims for violations of Proposition 65 up through the Effective Date based on exposures to
10 DINP and/or DIDP from the Products, as set forth in the Notice and the Complaint. Compliance
11 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
12 exposures to DINP and DIDP from the Products sold by Defendant after the Effective Date, as set
13 forth in the Notice.

14 **5.2 DiPirro’s Individual Release of Claims**

15 DiPirro, in his individual capacity only and *not* in his representative capacity, also provides a
16 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
17 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
18 liabilities and demands of DiPirro of any nature, character or kind, whether known or unknown,
19 suspected or unsuspected, arising out of alleged or actual exposures to DINP and DIDP in the
20 Products imported, manufactured, sold or distributed for sale by Defendant in the State of California
21 before the Effective Date.

22 **5.3 Defendant’s Release of DiPirro**

23 Defendant, on its own behalf and on behalf of its past and current agents, representatives,
24 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
25 DiPirro and his attorneys and other representatives, for any and all actions taken or statements made
26 (or those that could have been taken or made) by DiPirro and his attorneys and other
27 representatives, whether in the course of investigating claims, otherwise seeking to enforce
28 Proposition 65 against it in this matter, or with respect to the Products.

1 **5.4 Waiver of Section 1542 of the California Civil Code**

2 It is possible that other claims not known to the Parties, arising out of the facts alleged
3 in the Notices or the Complaint and relating to the Covered Products, will develop or be
4 discovered. Plaintiff, on behalf of himself only, and Defendant, on behalf of itself, its
5 successors, assigns, and any and all persons taking by or through it, hereby knowingly and
6 voluntarily waive all rights and benefits which are provided by the terms and provisions of
7 Section 1542 of the Civil Code of the State of California, or any comparable statute or law
8 which may exist under the laws of the State of California, and hereby acknowledge that this
9 waiver is an essential and material term of this mutual release. Plaintiff and Defendant
10 acknowledge that Civil Code Section 1542 provides 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 FAVOR**
13 **AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR**
14 **HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
15 **THE DEBTOR.**

16 **6. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and shall
18 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
19 has been fully executed by all Parties.

20 **7. SEVERABILITY**

21 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
22 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
23 adversely affected.

24 **8. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed or is otherwise
27 rendered inapplicable by reason of law generally, or as to the Products, then Defendant may provide
28 written notice to DiPirro of any asserted change in the law, and have no further obligations pursuant
to this Consent Judgment, with respect to, and to the extent that, the Products are so affected.

Nothing in this Consent Judgment shall be interpreted to relieve Defendant from any obligation to

1 comply with any pertinent state or federal toxics control laws. This Consent Judgment shall be
2 interpreted in accordance with the fair meaning of the terms herein, without regard to which Party
3 may have drafted any specific provision.

4 **9. NOTICES**

5 Unless specified herein, all correspondence and notices required to be provided pursuant to
6 this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered
7 or certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the
8 other party at the following addresses:

9 For Defendant CHECKWORKS, INC.:

10 Adam D. Wieder, Esq.
11 Musick, Peeler & Garrett LLP
12 2801 Townsgate Road, Suite 200
Westlake Village, CA 91361

13 For DiPirro:

14 Bush & Henry, Attorneys at Law, PC
15 6761 Sebastopol Avenue, Suite 111
Sebastopol, CA 95472

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

18 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

19 This Consent Judgment may be executed in counterparts, and by facsimile or portable
20 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
21 taken together, shall constitute one and the same document.

22 **11. POST EXECUTION ACTIVITIES**

23 DiPirro agrees to comply with the reporting form requirements referenced in Health & Safety
24 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
25 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
26 of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and
27 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
28 judicial approval of the settlement in a timely manner.

1 **12. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
4 application of any Party and the entry of a modified consent judgment by the Court.

5 **13. AUTHORIZATION**


6 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
7 Parties and have read, understood and agree to all of the terms and conditions of this Consent
8 Judgment.

9
10 **AGREED TO:**

AGREED TO:

11 Date: 2/16/18

Date: _____

12
13 By: 
14 Michael DiPirro

By: _____, President
CHECKWORKS, INC.

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12. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party and the entry of a modified consent judgment by the Court.

13. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

Date: _____

Date: 19 February 2018

By: _____

By: Mary-Jo Uniac
Mary-Jo Uniac, President
CHECKWORKS, INC.

Michael DiPirro