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14
15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ALAMEDA
17

18 MICHAEL DIPIRRO,
19
20 Plaintiff,

21 v.

22 BROWNELLS, INC.; and DOES 1 through
23 1000,
24 Defendants.

ENDORSED
FILED
ALAMEDA COUNTY

JAN - 8 2001

CLERK OF THE SUPERIOR COURT
By NANCY REGAS

Deputy

No. H214431-1

~~PROPOSED~~ CONSENT JUDGMENT
RESOLVING ALL CLAIMS

1 This Consent Judgment (“Judgment”) is entered into by and between Michael
2 DiPirro, a California citizen, and Brownells, Inc., an Iowa corporation (“Brownells”). Together
3 DiPirro and Brownells shall be referred to as the “Parties.” It is entered into on the basis of the
4 following facts, understandings and intentions of the Parties.

5 A. Mr. DiPirro is an individual residing in San Francisco, California, who
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by
7 reducing or eliminating hazardous substances contained in consumer and industrial products.

8 B. Brownells is a company that currently sells certain sporting goods
9 maintenance and repair products (“Products”) in the State of California that have been alleged to
10 contain or produce chemicals listed pursuant to Proposition 65, California Health & Safety Code
11 §25249.5 et seq. (“Listed Chemicals”).

12 C. On May 1, 2000, Mr. DiPirro first served Brownells and the requisite
13 public enforcement agencies specified in Health & Safety Code §25249.7, i.e., Attorney General,
14 district attorney, and city attorney or prosecutor (individually and collectively, “Public
15 Enforcer(s)”), with a “60-Day Notice of Violation,” which provided Brownells and such Public
16 Enforcers with notice that Brownells was allegedly in violation of Health & Safety Code
17 §25249.6 for failing to warn purchasers that certain Products it sells in California expose users to
18 four Listed Chemicals: cadmium, nickel and nickel compounds, carbon monoxide, and lead and
19 lead compounds. The specific Products that allegedly contain these Listed Chemicals are set
20 forth in Exhibit “A” (“Exhibit A Products”). These Exhibit A Products allegedly have been sold
21 or offered for sale by Brownells for use in California during the period from May 1, 1996 to
22 present.

23 D. On July 13, 2000, Mr. DiPirro filed a complaint entitled Michael DiPirro
24 v. Brownells, Inc., et al. (the “Complaint”) in the Alameda County Superior Court, naming
25 Brownells as a defendant and alleging violations of Business & Professions Code §17200 and
26

1 Health & Safety Code §25249.6 on behalf of individuals in California who allegedly have been
2 exposed to the Listed Chemicals contained in or produced by the Exhibit A Products.

3 E. Since filing the Complaint, Mr. DiPirro tentatively has identified
4 additional Products that have been sold or offered for sale by Brownells for use in California that
5 allegedly contain or produce Listed Chemicals. The types of additional Products that allegedly
6 contain such Listed Chemicals are set forth in Exhibit "B" ("Exhibit B Products"). These
7 Exhibit B Products allegedly have been sold or offered for sale by Brownells for use in California
8 during the period from May 1, 1996 to present.

9 F. Mr. DiPirro has expressed his intent to serve Brownells and the requisite
10 Public Enforcers with another "60-Day Notice of Violation," asserting that Brownells is in
11 violation of Health & Safety Code §25249.6 for allegedly failing to warn purchasers that the
12 Exhibit B Products it sells in California expose users to Listed Chemicals. Furthermore, Mr.
13 DiPirro has expressed his intent to file a separate complaint against Brownells asserting claims
14 similar to those in the present action, should no Public Enforcers take action against Brownells
15 with respect to these Exhibit B Products.

16 G. Brownells and DiPirro have stipulated to this Consent Judgment, which
17 shall cover all Exhibit A Products that have been sold or offered for sale by Brownells for use in
18 California during the period from May 1, 1996 to present.

19 H. Furthermore, in an effort to foster early resolution of any claims asserted
20 by Mr. DiPirro regarding the Exhibit B Products, and to conserve judicial resources that
21 necessarily would be utilized to adjudicate such claims, the Parties have stipulated that this
22 Consent Judgment also shall cover all Exhibit B Products that have been sold or offered for sale
23 by Brownells for use in California during the period from May 1, 1996 to present. However, this
24 Consent Judgment shall not cover any Exhibit B Product if, following the issuance of a 60-Day
25 Notice Letter, a Public Enforcer chooses to take action against Brownells with respect to such
26 Exhibit B Products within the applicable 60-day period.

1 I. Nothing in this Consent Judgment shall be construed as an admission by
2 Brownells of any fact, finding, issue of law, or violation of law, nor shall compliance with this
3 Consent Judgment constitute or be construed as an admission by Brownells of any fact, finding,
4 conclusion, issue of law, or violation of law. However, this paragraph shall not diminish or
5 otherwise affect the obligations, responsibilities, and duties of Brownells under this Consent
6 Judgment.

7 The Parties agree to the follow terms and conditions:

8 1. **Product Warnings.** Brownells shall initiate revisions to its health hazard
9 warnings for its Products to provide the language set forth in the section 1.1 through 1.3 below.
10 Beginning on December 30, 2000, and April 1, 2001, Brownells agrees that it will not knowingly
11 ship (or cause to be shipped) any Exhibit A or Exhibit B Products, respectively, that contain a
12 Listed Chemical for sale in the State of California unless such Products comply with sections 1.1
13 through 1.3 below:

14 1.1 For any Product covered in Exhibit A and B that contains only
15 chemicals known to the State to cause cancer, such Products shall bear the following warning
16 statement:

17 **“WARNING: This product contains chemicals known to the State of**
18 **California to cause cancer.”;**

19 1.2 For any Product covered by Exhibit A and B that contains only
20 chemicals known to the State to birth defects or other reproductive harm, such Products shall
21 bear the following warning statement:

22 **“WARNING: This product contains chemicals known to the State of**
23 **California to cause birth defects or other reproductive**
24 **harm.”;**

1 1.3 For any Product covered in Exhibit A and B that contains
2 chemicals known to the State to cause cancer and birth defects or other reproductive harm, such
3 Products shall bear the following warning statement:

4 **“WARNING: This product contains chemicals known to the State of**
5 **California to cause cancer and birth defects (or other**
6 **reproductive harm).”;**

7 The warning statement shall be prominently placed upon the Product’s
8 label, packaging, or accompanying materials with such conspicuousness, as compared with other
9 words, statements, designs or devices on the label as to render it likely to be read and understood
10 by an ordinary individual under customary conditions of purchase or use.

11 **2. Payment Pursuant To Health & Safety Code §25249.7(b).** Pursuant to
12 Health & Safety Code §25249.7(b), Brownells shall pay a civil penalty of \$12,000. The first
13 \$6,000 of this civil penalty (“First Civil Penalty Payment”) shall be paid on or before January 5,
14 2001. Provided there has been no intervention by a Public Enforcer, the remaining \$6,000 of this
15 civil penalty (“Second Civil Penalty Payment”) shall be paid within fifteen (15) days following
16 expiration of the 60-day period for any Notice of Violation issued by Mr. DiPirro with respect to
17 the Exhibit B Products. These penalty payments are to be made payable to “Chanler Law Group
18 In Trust For Michael DiPirro”. Penalty monies shall be apportioned by DiPirro in accordance
19 with Health & Safety Code §25192, with 75% of these funds remitted to the State of California’s
20 Department of Toxic Substances Control.

21 **3. Reimbursement Of Fees And Costs.** The parties acknowledge that
22 DiPirro offered to resolve the dispute without reaching terms on the amount of fees and costs to
23 be reimbursed, thereby leaving this issue open to be resolved after the material terms of the
24 agreement had been reached, and the matter settled. Brownells then expressed a desire to resolve
25 the fee and cost issue concurrently with other settlement terms, so the parties tried to reach an
26 accord on the compensation due to DiPirro and his counsel under the private attorney general

1 doctrine codified at C.C.P. §1021.5. Brownells shall reimburse DiPirro for his fees and costs
2 incurred as a result of investigating, bringing this matter to Brownell's attention, litigating and
3 negotiating a settlement in the public interest. Brownells shall pay the total sum of \$35,000 for
4 investigation fees, attorneys' fees, and litigation costs. The first \$28,000 of these fees and costs
5 ("First Fee Payment") shall be paid on or before January 5, 2001. Provided there has been no
6 intervention by a Public Enforcer, the remaining \$7,000 of these fees and costs ("Second Fee
7 Payment") shall be paid within fifteen (15) days following expiration of the 60-day period for
8 any Notice of Violation issued by Mr. DiPirro with respect to the Exhibit B Products. Payment
9 should be made payable to the "Chanler Law Group".

10 **4. Michael DiPirro's Release Of Brownells.**

11 **4.1 Actions Concerning Exhibit A Products:** Michael DiPirro, by this
12 Consent Judgment, on behalf of himself and the citizens of the State of California, agrees to
13 waive all rights to institute or participate in, directly or indirectly, any form of legal action, and
14 releases all claims, liabilities, obligations, losses, costs, expenses, fines and damages, against
15 Brownells and its distributors, retailers, customers, directors, officers, employees, affiliates,
16 successors and assigns, whether under Proposition 65 or the Business & Profession Code §17200
17 et seq. based on Brownells's alleged failure to warn about exposure to any Listed Chemicals
18 contained in any of the Exhibit A Products.

19 **4.2 Actions Concerning Exhibit B Products:** Provided there has been
20 no diligent prosecution by a Public Enforcer, Michael DiPirro, by this Consent Judgment, on
21 behalf of himself and the citizens of the State of California, also agrees to waive all rights to
22 institute or participate in, directly or indirectly, any form of legal action, and releases all claims,
23 liabilities, obligations, losses, costs, expenses, fines and damages, against Brownells and its
24 distributors, retailers, customers, directors, officers, employees, affiliates, successors and assigns,
25 whether under Proposition 65 or the Business & Profession Code §17200 et seq. based on
26

1 Brownells's alleged failure to warn about exposure to any Listed Chemicals contained in any of
2 the Exhibit B Products.

3 **5. Brownells's Release Of Michael DiPirro.**

4 **5.1** Actions Concerning Exhibit A Products: Brownells, by this
5 Consent Judgment, waives all rights to institute any form of legal action against Michael DiPirro,
6 for all actions or statements made by Michael DiPirro in the course of seeking enforcement by
7 this action of Proposition 65 or Business & Profession Code §17200 against Brownells
8 concerning Exhibit A Products.

9 **5.2** Actions Concerning Exhibit B Products: Provided there has been
10 no diligent prosecution by a Public Enforcer, Brownells, by this Consent Judgment, waives all
11 rights to institute any form of legal action against Michael DiPirro, for all actions or statements
12 made by Michael DiPirro in the course of seeking enforcement by any other action under
13 Proposition 65 or Business & Profession Code §17200 against Brownells concerning Exhibit B
14 Products.

15 **6. Stipulated Judgment.**

16 **6.1** If, for any reason, this Consent Judgment is not approved by the
17 Court, this Consent Judgment shall be deemed null and void, and all payments made by
18 Brownells shall be returned in full within five (5) days of notification of the Court's failure to
19 approve this Consent Judgment.

20 **6.2** If this Consent Judgment is approved by the Court, but a Public
21 Enforcer chooses to take action against Brownells with respect to any Exhibit B Products, then
22 this Consent Judgment shall be deemed null and void with respect to such Products and shall be
23 deemed to apply solely to the Exhibit A Products. If the Second Civil Penalty Payment and/or
24 Second Fee Payment already has been made by Brownells then such payment(s) shall be returned
25 in full within five (5) days of notification of such action by a Public Enforcer.

26

1 7. **Product Characterization.** Brownells acknowledges that the Exhibit A
2 and Exhibit B Products may contain one or more Listed Chemicals and Plaintiff alleges that the
3 customary use or application of the Exhibit A and Exhibit B Products is likely to expose users to
4 such Listed Chemicals. In the event that Brownells obtains analytical, risk assessment or other
5 data (“Exposure Data”) that shows an exposure to any or all Exhibit A and Exhibit B Products
6 will have “no significant risk” or “no observable effect,” as such standards are applicable and as
7 defined under Health & Safety Code §25249.10(c) and Brownells seeks to eliminate the
8 warnings, then Brownells shall provide DiPirro with ninety (90) days prior written notice of its
9 intent to limit or eliminate the warning provisions under this Consent Judgment based on the
10 Exposure Data and shall provide DiPirro with all such supporting Exposure Data. Within ninety
11 (90) days of receipt of Brownells Exposure Data, DiPirro shall provide Brownells with written
12 notice of his intent to challenge the Exposure Data (in the event that he chooses to make such a
13 challenge). If DiPirro fails to provide Brownells written notice of his intent to challenge the
14 Exposure Data within ninety (90) days of receipt of Brownells’s notice and the Exposure Data,
15 DiPirro shall waive all rights to challenge the Exposure Data, and Brownells shall be entitled to
16 limit or eliminate the warning provisions required under this Consent Judgment with respect to
17 those Product(s) to which the Exposure Data applies. If DiPirro timely notifies Brownells of his
18 intent to challenge the Exposure Data, Brownells (a) may stop its efforts to eliminate the
19 warnings upon notice to DiPirro with no further liability or obligations or (b) shall negotiate in
20 good faith with DiPirro for a period not to exceed thirty (30) days following receipt of
21 Brownells’s notice to attempt to reach a settlement of this issue. If a settlement is not reached,
22 DiPirro and Brownells agree to submit such challenge to the superior court for determination,
23 pursuant to the court’s continuing jurisdiction of this matter under C.C.P. §664.6 and this
24 Consent Judgment. The prevailing party shall be entitled to reasonable attorneys’ fees and costs
25 associated with bringing a motion brought under this paragraph to the court for determination.
26 Notwithstanding the foregoing, in the event that Brownells is no longer required to provide the

1 warnings provided for herein under applicable law, regulation or court order, then Brownells may
2 discontinue the warnings with no further liability or obligations to the extent that new law,
3 regulation or court order provides.

4 **8. Severability.** In the event that any of the provisions of this Consent
5 Judgment are later held by a court to be unenforceable, the validity of the enforceable provisions
6 shall not be adversely affected.

7 **9. Attorney's Fees.** In the event that a dispute arises with respect to any
8 provision(s) of this Consent Judgment, the prevailing party shall be entitled to recover costs and
9 reasonable attorneys' fees.

10 **10. Governing Law.** The terms of this Consent Judgment shall be governed
11 by the laws of the State of California.

12 **11. Notices.** All correspondence to Michael DiPirro shall be mailed to:

13 Hudson Bair, Esq.
14 Kapsack & Bair, LLP
1440 Broadway, Suite 610
Oakland, CA 94612
15 (510) 645-0027

16 or

16 Clifford A. Chanler, Esq.
17 Chanler Law Group
Magnolia Lane (off Huckleberry Hill)
New Canaan, CT 06840-3801
18 (203) 966-9911

19 All correspondence to Brownells shall be mailed to:

20 Rick R. Rothman, Esq.
21 John D. Schlotterbeck, Esq.
McCutchen, Doyle, Brown & Enersen, LLP
355 South Grand Avenue, Suite 4400
22 Los Angeles, CA 90071
(213) 680-6400

23 Either Party may at any time change the name and address of its
24 designated representative to receive notice by providing notice of such change to the other
25 Party's designated representative.
26


1 12. **Compliance With Reporting Requirements.** The Parties agree to
2 comply with the reporting form requirements referenced in Health & Safety Code §25249.7(f).
3 As of the date of this Consent Judgment, the California Attorney General's reporting forms are
4 not available. Defendant represents, however, that his counsel will send a copy of this Consent
5 Judgment to the California Attorney General's Office prior to or concurrently with its submission
6 to the Alameda County Superior Court for approval.

7 13. **Counterparts and Facsimile.** This Consent Judgment may be executed
8 in counterparts and facsimile, each of which shall be deemed an original, and all of which, when
9 taken together, shall constitute one and the same document.

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

13 **IN WITNESS HEREOF,** the Parties hereto execute this Consent Judgment, and
14 the Court enters it, as of the date last written below.

15
16 DATED: 12/20/00
17

18 
19 _____
MICHAEL DIPIRRO

20 DATED: _____
21

BROWNELLS, INC.

22 By: _____
23 PETER BROWNELL
24 Vice-President

25 **IT IS SO ORDERED, ADJUDGED AND DECREED.**
26

1 12. **Compliance With Reporting Requirements.** The Parties agree to
2 comply with the reporting form requirements referenced in Health & Safety Code §25249.7(f).
3 As of the date of this Consent Judgment, the California Attorney General's reporting forms are
4 not available. Defendant represents, however, that its counsel will send a copy of this Consent
5 Judgment to the California Attorney General's Office prior to or concurrently with its submission
6 to the Alameda County Superior Court for approval.

7 13. **Counterparts and Facsimile.** This Consent Judgment may be executed
8 in counterparts and facsimile, each of which shall be deemed an original, and all of which, when
9 taken together, shall constitute one and the same document.

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

13 **IN WITNESS HEREOF,** the Parties hereto execute this Consent Judgment, and
14 the Court enters it, as of the date last written below.

15
16 DATED: _____

MICHAEL DIPIRRO

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19
20 DATED: _____

BROWNELLS, INC.

21
22 By: Peter R Brownell
23 PETER BROWNELL
24 Vice-President
25
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IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED: JAN - 8 2001

HARRY R. SHEPPARD

By: _____
JUDGE OF THE SUPERIOR COURT

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EXHIBIT A PRODUCTS

Lead Bars

Lead Sheets

Lead Weights

Lead-Containing Tools

Solder

Welding Rods

EXHIBIT B PRODUCTS

Maintenance and Repair Tools and Products
Cleaning Kits and Supplies, including Solvents
Sanding and Abrasive Compounds
Adhesives and Sealants
Solders and Fluxes
Oils and Lubricants
Paints, Finishes and Coating Products
Powders and Resins