

ENDORSED  
FILED  
ALAMEDA COUNTY

JUL 9 - 2001

CLERK OF THE SUPERIOR COURT  
By SARA DALLESKE

Deputy

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9  
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF ALAMEDA

12  
13 MICHAEL DIPIRRO, an individual ) No. H218287-0  
14 )  
Plaintiff, ) CONSENT JUDGMENT  
15 )  
v. )  
16 )  
FEIN POWER TOOLS, INC.; and )  
17 DOES 1 through 1000, )  
18 Defendants. )  
19 \_\_\_\_\_ )  
20  
21

22 This Consent Judgment ("Agreement" or "Consent Judgment")  
23 is entered into by and between Michael DiPirro, a California  
24 citizen ("DiPirro"), and Fein Power Tools, Inc. ("Fein") as of  
25 June 28, 2001 (the "Effective Date").  
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CONSENT JUDGMENT

1 WHEREAS:

2 A. DiPirro states that he is an individual residing in  
3 San Francisco, California, who seeks to promote awareness of  
4 exposures to toxic chemicals and improve human health by  
5 reducing or eliminating hazardous substances contained in (or  
6 produced by) consumer and industrial products;

7 B. Fein states that it is a company that manufactures  
8 or distributes various power tools and related products sold  
9 in the State of California whose customary use and application  
10 may produce dust which contains chemicals listed pursuant to  
11 Proposition 65 (California Health & Safety Code §25249.5 et  
12 seq.) including lead (or lead compounds), crystalline silica,  
13 arsenic and/or chromium (hexavalent compounds) (the "Listed  
14 Chemicals");

15 C. The products manufactured or distributed by Fein  
16 which are covered by this Agreement are set forth in Exhibit A  
17 (the "Products") and have been sold in California since  
18 February 21, 1997;

19 D. DiPirro states that on November 24, 2000, he served  
20 Fein and public enforcement agencies with a document entitled  
21 "60-Day Notice of Violation" which alleged that Fein was in  
22 violation of Health & Safety Code §25249.6 for not warning  
23 purchasers of its Products in California that the use of such  
24 Products may result in exposure of California users of such  
25 Products to Listed Chemicals;

26 E. On February 21, 2001, DiPirro filed a complaint and  
27 commenced a lawsuit entitled Michael DiPirro v. Fein, Case No.

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CONSENT JUDGMENT

1 H218287-0 (the "Lawsuit"), pending in the Alameda County  
2 Superior Court ("Court"), naming Fein as defendant and  
3 alleging violations of Business & Professions Code §17200 and  
4 Health & Safety Code §25249.6 on behalf of the general public  
5 and on behalf of individuals in California who allegedly have  
6 been exposed to Listed Chemicals produced by customary use of  
7 the Products of Fein;

8 F. On or about April 3, 2001, Fein filed with the Court  
9 an answer to the Lawsuit denying each and every allegation in  
10 Plaintiff's Complaint and asserting numerous affirmative  
11 defenses;

12 G. DiPirro and Fein desire to enter into this Agreement  
13 to resolve the matters pertaining to the Lawsuit and avoid the  
14 time, expense and uncertainty of further litigation;

15 H. Neither the terms of, nor compliance with, this  
16 Agreement shall be construed as an admission by Fein or its  
17 affiliates, representatives and distributors of any fact,  
18 finding, issue of law, violation of law or liability, *provided*  
19 *that* this paragraph shall not diminish or otherwise affect the  
20 obligations, responsibilities, and duties of Fein under this  
21 Agreement.

22 I. The parties enter into this Consent Judgment as a  
23 full and final resolution of all claims and allegations that  
24 were or that could have been alleged by Plaintiff in the  
25 Notice and Complaint arising out of the facts or conduct  
26 alleged therein, and in order that the parties may avoid  
27 protracted litigation on such claims and, to the maximum  
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CONSENT JUDGMENT

1 extent permitted by law, provide Defendant with *res judicata*  
2 protection against future claims based on the same or similar  
3 allegations. This Consent Judgment is not and shall not be  
4 construed as an admission by Defendant of any allegation or  
5 issue of fact or law asserted in the Notice or Complaint.  
6 Defendant expressly denies any allegation or issue of fact or  
7 law asserted in the Notice or Complaint. Defendant expressly  
8 denies any alleged violation of Proposition 65 and/or  
9 California Business and Professions Code Section 17200, et  
10 seq.

11  
12 **NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, THE**  
13 **SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, DIPIRRO AND FEIN**  
14 **AGREE AS FOLLOWS:**

15 1. **Product Warnings.** Beginning immediately from the  
16 Effective Date, Fein shall initiate commercially reasonable  
17 efforts to revise the current product or packaging warnings  
18 for the Products manufactured or distributed by Fein sold in  
19 California consistent with this Agreement ("Revised  
20 Warnings"). Fein agrees that it will provide Revised Warnings  
21 on all Products sold in California and manufactured or  
22 distributed by Fein more than four months after the date this  
23 Agreement is approved and entered by the Court, the use of  
24 which are likely to result in exposure by users to lead (or  
25 lead compounds), crystalline silica, arsenic, and/or chromium  
26 (hexavalent compounds) or any other, or combination of, Listed  
27 Chemicals. The Revised Warnings shall bear one of the  
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CONSENT JUDGMENT

1 following warning statements:

2           **"WARNING:**   Some dust created by power sanding,  
3                           sawing, grinding, drilling, and other  
4                           construction activities contains  
5                           chemicals known [to the State of  
6                           California] to cause cancer, birth  
7                           defects or other reproductive harm.  
8                           Some examples of these chemicals are:  
                          •    lead from lead-based paints,  
                          •    crystalline silica from bricks  
                          and cement and other masonry  
                          products, and  
                          •    arsenic and chromium from  
                          chemically-treated lumber.  
9                           Your risk from these exposures varies,  
10                           depending on how often you do this type  
11                           of work. To reduce your exposure to  
12                           these chemicals: work in a well  
                          ventilated area, and work with approved  
                          safety equipment, such as those dust  
                          masks that are specially designed to  
                          filter out microscopic particles."

13 [Note: Text in brackets is optional.]

14   or

15           **"WARNING:**   Some dust created by power sanding,  
16                           sawing, grinding, drilling, and other  
17                           construction activities contains  
18                           chemicals known to the State of  
                          California to cause cancer, birth  
                          defects or other reproductive harm."

19           The Revised Warning shall be placed on a label that is  
20           fastened to the packaging or product and may be included with  
21           the owner's manual. The Revised Warning shall be in a form  
22           reasonably consistent with other warnings provided with the  
23           Products of Fein for California. The Revised Warning shall be  
24           deemed to cover all uses of the Products, and all accessories  
25           and other products used in connection with the Products. The  
26           Revised Warning shall be deemed to provide clear and  
27           reasonable warnings for the Listed Chemicals in accordance .  
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1 with Proposition 65, and no other warning shall be required to  
2 comply with Proposition 65.

3 The foregoing notwithstanding, Fein shall have no  
4 obligation or liability with respect to providing the Revised  
5 Warning to the extent that Proposition 65 does not apply to a  
6 particular user of the Products of Fein or in any particular  
7 circumstances, including to the extent the federal  
8 Occupational Safety and Health Act "OSH Act") preempts  
9 Proposition 65.

10 **2. Payment Pursuant to Health & Safety Code**

11 **§25249.7(b)**. Pursuant to Health & Safety Code §25249.7(b),  
12 Fein shall pay a civil penalty of \$4,800 (four thousand eight  
13 hundred dollars). The payment of \$4,800 shall be paid within  
14 five (5) calendar days of the Effective Date. The penalty  
15 payment is to be made payable to "Chanler Law Group In Trust  
16 For Michael DiPirro" and shall be held in trust until the  
17 Alameda County Superior Court approves and enters the Consent  
18 Judgment. If the Alameda County Superior Court refuses to  
19 enter the Consent Judgment, then Fein shall be reimbursed the  
20 funds paid pursuant to this subparagraph within five (5)  
21 calendar days of notice of such refusal. Penalty monies shall  
22 be apportioned by DiPirro in accordance with Health & Safety  
23 Code § 25192, with 75% of these funds remitted to the State of  
24 California's Department of Toxic Substances Control.

25 Fein understands that the payment schedule as stated in  
26 this Consent Judgment is a material factor upon which DiPirro  
27 and his attorneys have relied in entering into this Consent  
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CONSENT JUDGMENT

1 Judgment. Fein agrees that all payments will be made in a  
2 timely manner in accordance with the payment due dates. Fein  
3 will be given a five (5) calendar day grace period from the  
4 date payment is due. Fein agrees to pay Michael DiPirro a  
5 \$250 per calendar day fee for each day the payment is received  
6 after the grace period ends. For purposes of this paragraph,  
7 each new day (requiring an additional \$250 payment) will begin  
8 at 5 p.m. (PST).

9 **3. Reimbursement of Fees and Costs.** The parties  
10 acknowledge that DiPirro offered to resolve the dispute  
11 without reaching terms on the amount of fees and costs to be  
12 reimbursed, thereby leaving this open issue to be resolved  
13 after the material terms of the agreement had been reached,  
14 and the matter settled. Fein then expressed a desire to  
15 resolve the fee and cost issue concurrently with other  
16 settlement terms, so the parties tried to (and did) reach an  
17 accord on the compensation due to DiPirro and his counsel  
18 under the private attorney general doctrine codified at C.C.P.  
19 §1021.5. Consistent therewith, Fein agrees to reimburse  
20 DiPirro for his fees and costs, incurred as a result of  
21 investigating and bringing this matter to Fein's attention and  
22 litigating and negotiating a settlement in the public interest  
23 and on behalf of the general public. Fein shall pay \$16,700  
24 (sixteen thousand seven hundred dollars) for attorneys' fees  
25 and costs, including all investigation fees and costs and  
26 litigation costs. Fein agrees to pay the total sum of \$16,700  
27 within five (5) calendar days of the Effective Date. The  
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CONSENT JUDGMENT

1 payment is to be made payable to "Chanler Law Group" and shall  
2 be held in trust until the Alameda County Superior Court  
3 approves and enters the Consent Judgment. If the Alameda  
4 County Superior Court refuses to enter the Consent Judgment,  
5 then Fein shall be reimbursed the funds paid pursuant to this  
6 subparagraph within five (5) calendar days of notice of such  
7 refusal. Penalty monies shall be apportioned by DiPirro in  
8 accordance with Health & Safety Code § 25192, with 75% of  
9 these funds remitted to the State of California's Department  
10 of Toxic Substances Control.

11 Fein understands that the payment schedule as stated in  
12 this Consent Judgment is a material factor upon which DiPirro  
13 and his attorneys have relied in entering into this Consent  
14 Judgment. Fein agrees that all payments will be made in a  
15 timely manner in accordance with the payment due dates. Fein  
16 will be given a five (5) calendar day grace period from the  
17 date payment is due. Fein agrees to pay Michael DiPirro and  
18 his attorneys a \$250 per calendar day fee for each day the  
19 payment is received after the grace period ends. For purposes  
20 of this paragraph, each new day (requiring an additional \$250  
21 payment) will begin at 5 p.m. (PST).

22 **4. DiPirro's Release of Fein.** DiPirro, by this  
23 Agreement, on behalf of himself, his agents, representatives,  
24 attorneys, assigns, and in the interest of the general public,  
25 pursuant to Business and Professions Code §17204 and Calif.  
26 Health & Safety Code §25249.7(d), hereby waives all rights to  
27 institute or participate in, directly or indirectly, any form  
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CONSENT JUDGMENT



1 of legal action, covenants not to sue, and releases any and  
2 all claims, liabilities, obligations, losses, costs, expenses,  
3 fines, damages, penalties, restitution, or injunctive,  
4 equitable, legal or other relief, whether known or unknown,  
5 suspected or unsuspected, actual or contingent, including, but  
6 not limited to, any and all claims under Proposition 65 or  
7 Cal. Business & Professions Code §17200 et seq. against Fein  
8 and its directors, officers, employees, affiliates, successors  
9 or assigns and its parents, divisions, subdivisions,  
10 subsidiaries, affiliates, franchisees, cooperative members,  
11 licensees, sales representatives, distributors, wholesalers  
12 and retailers who sell Products (collectively, "Settling  
13 Group"), whether under Proposition 65 or the Business &  
14 Profession Code §17200 et seq. based on the alleged violation  
15 of these laws in connection with the Products. This Agreement  
16 is a full, final, and binding resolution between DiPirro, on  
17 behalf of himself, and in the interest of the general public,  
18 on the one hand, and the Settling Group, on the other hand, of  
19 any violation of Proposition 65, Business and Professionals  
20 Code §17200 et seq., or any other statutory or common law  
21 claim that could have been asserted in the complaint against  
22 Settling Group for failure to provide clear and reasonable  
23 warnings of exposure to chemicals known to cause cancer or  
24 reproductive toxicity associated with the Products, or any  
25 other claim based upon facts alleged in the Complaint, whether  
26 based on actions committed by Fein or by any entity to whom it  
27 distributes or sells Products. Compliance with this  
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CONSENT JUDGMENT

1 Agreement resolves any issue now, in the past, or in the  
2 future concerning compliance by the Settling Group. In  
3 addition, DiPirro, on behalf of himself, his attorneys, and  
4 his representatives, waives all rights to institute any form  
5 of legal action against Fein and its attorneys or  
6 representatives, for all actions or statements made by Fein,  
7 and its attorneys or representatives, in the course of  
8 responding to alleged violations by Fein of Proposition 65 or  
9 Business & Profession Code §17200.

10 With respect to such released matters, this Consent  
11 Judgment shall have a preclusive effect such that no other  
12 person or entity, whether purporting to act on his, her, or  
13 its own behalf, or in the public interest, shall be permitted  
14 to take any action against Fein regarding such released  
15 matters, and/or for any violation alleged or that could have  
16 been alleged, based upon the facts states in the Notice and  
17 Complaint

18 **5. Fein's Release of DiPirro.** Fein, by this Agreement,  
19 waives all rights to institute any form of legal action  
20 against DiPirro and his attorneys or representatives, for all  
21 actions or statements made by DiPirro, and his attorneys or  
22 representatives, in the course of seeking enforcement of  
23 Proposition 65 or Business & Profession Code §17200 against  
24 Fein.

25 **6. Court Approval; No Admission.** If, for any reason,  
26 this Consent Judgment is not approved by the Court, this  
27 Agreement shall be deemed null and void. The entry of this  
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1 Consent Judgment notwithstanding, neither the terms of, nor  
2 compliance with, this Agreement shall be construed as an  
3 admission by Fein or Settling Group of any fact, finding,  
4 issue of law, violation of law or liability, *provided that*  
5 this paragraph shall not diminish or otherwise affect the  
6 obligations, responsibilities, and duties of Fein under this  
7 Agreement.

8       **7. Changes to Revised Warnings.** In the event that Fein  
9 obtains analytical, risk assessment or other data ("Exposure  
10 Data") that shows an exposure to any or all Products poses "no  
11 significant risk" or will have "no observable effect," as each  
12 such standard is applicable and as each is defined under  
13 Health & Safety Code §25249.10(c), Fein shall provide DiPirro  
14 with ninety (90) days prior written notice of its intent to  
15 limit or eliminate the warning provisions under this Agreement  
16 based on the Exposure Data and shall provide DiPirro with all  
17 such supporting Exposure Data. Within ninety (90) days of  
18 receipt of Fein Exposure Data, DiPirro shall provide Fein with  
19 written notice of his intent to challenge the Exposure Data  
20 (in the event that he chooses to make such a challenge). If  
21 DiPirro fails to provide Fein written notice of his intent to  
22 challenge the Exposure Data within ninety (90) days of receipt  
23 of Fein's notice and the Exposure Data, DiPirro shall waive  
24 all rights to challenge the Exposure Data, and Fein shall be  
25 entitled to limit or eliminate the warning provisions required  
26 under this Agreement with respect to those Product(s) to which  
27 the Exposure Data applies. If DiPirro timely notifies Fein of  
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1 his intent to challenge the Exposure Data, DiPirro and Fein  
2 shall negotiate in good faith for a period not to exceed  
3 thirty (30) days following receipt of Fein's notice to attempt  
4 to reach a settlement of this issue. If a settlement is not  
5 reached, DiPirro and Fein agree to submit such challenge to  
6 the superior court for determination, pursuant to the court's  
7 continuing jurisdiction of this matter under C.C.P. §664.6 and  
8 this Agreement. The prevailing party shall be entitled to  
9 reasonable attorneys' fees and costs associated with bringing  
10 a motion brought under this paragraph to the court for  
11 determination.

12 **8. Severability.** In the event that any of the  
13 provisions of this Agreement are held by a court to be  
14 unenforceable, the validity of the enforceable provisions  
15 shall not be impaired or adversely affected.

16 **9. Attorneys' Fees.** In the event that a dispute arises  
17 with respect to any provision(s) of this Agreement, the  
18 prevailing party shall be entitled to recover costs and  
19 reasonable attorneys' fees.

20 **10. Governing Law.** The terms of this Agreement shall be  
21 governed by the laws of the State of California.

22 **11. Notices.** All correspondence to DiPirro shall be  
23 mailed to:

24 Jennifer Henry or David R. Bush  
25 Bush & Henry  
26 4400 Keller Avenue, Suite 200  
Oakland, CA 94605  
(510) 577-0747

1 All correspondence to Fein shall be mailed to:

2 Christopher Cable  
3 Fein Power Tools, Inc.  
4 1030 Alcon Street  
5 Pittsburgh, PA 15220

6 **12. Compliance with Reporting Requirements.** The parties  
7 agree to comply with the reporting form requirements  
8 referenced in Health & Safety Code §25249.7(f). As of the  
9 Effective Date, the California Attorney General's reporting  
10 forms are not available. DiPirro represents, however, that he  
11 will cause his counsel to send a copy of this Agreement to the  
12 appropriate unit of the California Attorney General's Office  
13 prior to or concurrently with the presentation of the Consent  
14 Judgment to the Court.

15 **13. Counterparts and Facsimile.** This Agreement may be  
16 executed in counterparts and facsimile, each of which shall be  
17 deemed an original, and all of which, when taken together,  
18 shall constitute one and the same document.

19 **14. Entire Agreement; Amendment.** This Agreement  
20 constitutes the entire agreement and understanding of the  
21 parties regarding the subject matter and supersedes all prior  
22 communications and understandings. This Agreement shall not  
23 be amended or modified except in a writing signed by the  
24 authorized representative of each party.

25 **15. Authorization.** The undersigned are authorized to  
26 execute this Agreement on behalf of its respective parties and  
27 have read, understood and agree to all of the terms and  
28 conditions of this Agreement.

1           16. No Previous Assignment. Plaintiff warrants and  
2 represents that it has not previously assigned or transferred,  
3 or purported to assign or transfer, to any third party any  
4 released claim.

5 **AGREED TO:**

**AGREED TO:**

6 DATE: 6/29/01  
7

DATE: \_\_\_\_\_

8   
9 \_\_\_\_\_  
Michael DiPirro  
PLAINTIFF


\_\_\_\_\_   
Fein Power Tools, Inc.  
DEFENDANT

11 **APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

12 DATE: 6/29/01  
13

DATE: \_\_\_\_\_

14   
15 \_\_\_\_\_  
David Bush  
Attorneys for Plaintiff  
16 MICHAEL DIPIRRO

\_\_\_\_\_   
Meryl Macklin  
Attorneys for Defendant  
FEIN POWER TOOLS, INC.

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16. No Previous Assignment. Plaintiff warrants and represents that it has not previously assigned or transferred, or purported to assign or transfer, to any third party any released claim.

AGREED TO:

AGREED TO:

DATE: \_\_\_\_\_

DATE: 6/29/2001

Michael DiPirro  
PLAINTIFF

CMC/CMAA  
Fein Power Tools, Inc.  
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: \_\_\_\_\_

DATE: 6-29-01

David Bush  
Attorneys for Plaintiff  
MICHAEL DIPIRRO

[Signature]  
Meryl Macklin  
Attorneys for Defendant  
FEIN POWER TOOLS, INC.

CONSENT JUDGMENT

# **Exhibit A**



**EXHIBIT A**

[To Be Provided Upon Mutual Agreement of the Parties]

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- Drills (corded and cordless)
- Angle Drills (corded and cordless)
- Hammer Drills (corded and cordless)
- Core Drills (stone and metal)
- Rotary Hammers
- Screwdrivers (corded and cordless)
- Impact Wrenches
- Tappers
- Angle Grinders
- Straight Grinders
- Half-Sheet Sanders
- Rotary Sanders
- Oscillating Sanders
- Random Orbit Sanders
- Caulking Cutters
- Window Cutters
- Sheet Metal Shears
- Nibblers
- Jigsaws
- Circular Saws
- Hacksaws
- Vacuums
- Pipe Milling Machines
- Pipe Saws
- Routers
- High Frequency Tools
- Die Grinders

CONSENT JUDGMENT