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12 Facsimile: (510) 273-8832

13 Attorneys for Defendant
Horizon Hobby, Inc., (sued herein as
14 Horizon Hobby Distributors, Inc.)

15 SUPERIOR COURT OF CALIFORNIA – COUNTY OF ALAMEDA

16 MICHAEL DiPIRRO,
17 Plaintiff,

No. H-218172-5

CONSENT JUDGMENT

18 vs.

19 HORIZON HOBBY DISTRIBUTORS,
20 INC; and DOES 1 through 1000, et.
21 al.,

22 Defendants.

23 **1. INTRODUCTION:**

24 1.1 Michael DiPirro ("DiPirro") is an individual residing in San
25 Francisco, California, who seeks to promote awareness of exposures to toxic
26 chemicals and improve human health by reducing or eliminating hazardous
27 substances contained in consumer and industrial products.

1 1.2 For purposes of this Consent Judgment, the term "Horizon
2 Hobby, Inc." shall mean Horizon Hobby, Inc., a Delaware corporation, and all of its
3 divisions, if any (hereafter collectively referred to as "Horizon").

4 1.3 Since February 13, 1997, Horizon has distributed and sold in the
5 State of California certain fuel products containing nitromethane (hereafter referred
6 to as the "Products" that Plaintiff contends contain or whose customary use and
7 application is likely to produce fumes, gases or exhaust which contain chemicals
8 listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986,
9 California Health & Safety Code §§25249.5 *et seq.*, also known as Proposition 65
10 including, but not limited to, nitromethane (the "Listed Chemical").

11 1.4 On November 24, 2000, Michael DiPirro first served Horizon and
12 other public enforcement agencies with a document entitled "60-Day Notice of
13 Violation" which provided Horizon and such public enforcers with notice that
14 Horizon was allegedly in violation of Health & Safety Code §25249.6 for failing to
15 warn purchasers that the Dynamite Blue Thunder Fuel that it sells in California
16 exposes users to the Listed Chemical.

17 1.5 On January 12, 2001, Michael DiPirro served Horizon and other
18 public enforcement agencies with a document entitled "Supplemental 60 Day Notice
19 of Violation" which provided Horizon and other such public enforcers with notice
20 that Horizon was allegedly in violation of Health & Safety Code §25249.6 for failing
21 to warn purchasers that certain of its fuel products, including Dynamite Blue
22 Thunder Fuel and Hangar 9 AeroBlend Premium Fuel that it sells in California expose
23 users to the Listed Chemical.

24 1.6 On February 13, 2001, Michael DiPirro filed a complaint entitled
25 Michael DiPirro v. Horizon Hobby, et al. in the Alameda County Superior Court,
26 naming Horizon as a defendant and alleging violations of Business & Professions
27 Code §17200 and Health & Safety Code §25249.6 on behalf of individuals in
28 California who allegedly have been exposed to the Listed Chemical contained in

1 certain Horizon products.

2 1.7 On March 26, 2001, Michael DiPirro filed his First Amended
3 Complaint entitled Michael DiPirro v. Horizon Hobby, et al. in the Alameda County
4 Superior Court, naming Horizon as a defendant and alleging violations of Business &
5 Professions Code §17200 and Health & Safety Code §25249.6 on behalf of
6 individuals in California who allegedly have been exposed to the Listed Chemical
7 contained in certain Horizon products. Horizon filed and served its answer to that
8 First Amended Complaint.

9 1.8 Horizon denies the material factual and legal allegations
10 contained in Michael DiPirro's above mentioned 60-Day Notice of Violation and
11 Complaint and maintains that all products distributed or sold by Horizon in California
12 including, but not limited to, the Products, have been and are in compliance with all
13 laws.

14 1.9 Nothing in this Consent Judgment shall be construed as an
15 admission by Horizon of any fact, finding, issue of law, or violation of law, nor shall
16 compliance with this Consent Judgment constitute or be construed as an admission
17 by Horizon of any fact, finding, conclusion, issue of law or violation of law.
18 However, this paragraph shall not diminish or otherwise affect the obligations,
19 responsibilities and duties of Horizon under this Agreement.

20 2.0 For purposes of this Consent Judgment, the term "Effective
21 Date" shall mean October 5, 2001.

22
23 **2. PRODUCT WARNINGS**

24 2.1. Horizon shall not, after November 5, 2001, knowingly distribute
25 or sell in the state of California any Products that contain or whose customary use
26 and application produce fumes, gases or exhaust that contain nitromethane unless
27 such Products comply with the warning requirements set forth in Sections 2.2 and
28 2.3 below.

1 2.2 Products which contain nitromethane shall bear the following
2 warning:

3 **"WARNING: This product contains nitromethane, a
4 chemical known to the State of California to cause cancer.";**

5 or

6 **"WARNING: This product contains a chemical known to
7 the State of California to cause cancer.**

8 2.3 The warnings referenced in Section 2.2 shall be prominently
9 placed on or near the Products at the point of sale with such conspicuousness, as
10 compared with other words, statements, designs or devices in proximity of the
11 location of the Products on the store shelf or on the label, by way of adhesive
12 sticker or otherwise printed on the label, as to render it likely to be read and
13 understood by an ordinary individual under customary conditions of purchase.

14 2.4 Horizon acknowledges that each of the Products contains
15 nitromethane and Michael DiPirro alleges that the customary use or application of
16 the Products is likely to expose users to nitromethane. In the event that Horizon
17 obtains analytical, risk assessment or other data ("Exposure Data") that shows an
18 exposure to any or all Products poses "no significant risk" as such standard is
19 applicable and as is defined under Health & Safety Code §25249.10(c) and Horizon
20 seeks to limit or eliminate any of the warning provisions required under this Consent
21 Judgment, then Horizon shall provide DiPirro with ninety (90) days prior written
22 notice of its intent to limit or eliminate the warning provisions under this Consent
23 Judgment based on the Exposure Data and shall provide DiPirro with all such
24 supporting Exposure Data. Within ninety (90) days of receipt of Horizon's Exposure
25 Data, DiPirro shall provide Horizon with written notice of his intent to challenge the
26 Exposure Data (in the event that he chooses to make such a challenge). If DiPirro
27 fails to provide Horizon written notice of his intent to challenge the Exposure Data
28 within ninety (90) days of receipt of Horizon's notice and the Exposure Data, DiPirro

1 shall waive all rights to challenge the Exposure Data, and Horizon shall be entitled to
2 limit or eliminate the warning provisions required under this Consent Judgment with
3 respect to those Product(s) to which the Exposure Data applies. If DiPirro timely
4 notifies Horizon of his intent to challenge the Exposure Data, DiPirro and Horizon (a)
5 may stop its efforts to eliminate the warnings upon notice to DiPirro with no further
6 liability or obligations or (b) shall negotiate in good faith for a period not to exceed
7 thirty (30) days following receipt of Horizon's notice to attempt to reach a
8 settlement of this issue. If a settlement is not reached, DiPirro and Horizon agree to
9 submit such challenge to the superior court for determination, pursuant to the
10 court's continuing jurisdiction of this matter under C.C.P. §664.6 and this Consent
11 Judgment. The prevailing party shall be entitled to reasonable attorneys' fees and
12 costs associated with bringing a motion brought under this paragraph to the court
13 for determination. Should Horizon so request, DiPirro shall not unreasonably
14 withhold his consent to modifying or eliminating the warning program set forth in
15 Sections 2.2-2.3 herein to make it consistent with the warning program applicable
16 to other nitromethane fuel products substantially similar to the nitromethane
17 Products.

18

19 **3. MONETARY PAYMENTS**

20 **3.1 Payment Pursuant To Health & Safety Code §25249.7(b).**

21 Pursuant to Health & Safety Code §25249.7(b), Horizon shall pay a civil penalty of
22 \$8,000. The payment of \$8,000 shall be paid within five (5) calendar days of the
23 Effective Date and shall be held in trust by DiPirro's counsel until the Alameda
24 County Superior Court approves and enters the Consent Judgment. The penalty
25 payment is to be made payable to "Chanler Law Group In Trust For Michael
26 DiPirro".

27 **3.2** Any penalty monies received shall be apportioned by DiPirro in
28 accordance with Health & Safety Code §25192, with 75% of these funds remitted

1 to the State of California's Department of Toxic Substances Control. DiPirro shall
2 bear all responsibility for apportioning and paying to the State of California the
3 appropriate civil penalties paid in accordance with this paragraph. In the event this
4 Consent Judgment is not entered, any payment made pursuant to this Section shall
5 be returned to Horizon, with interest thereon at a rate of six percent (6%) per
6 annum, within five (5) calendar days of receipt of notice of the Court's rejection of
7 this proposed Consent Judgment.

8 3.3 Horizon understands that the payment schedule as stated in this
9 Consent Judgment is a material factor upon which DiPirro has relied in entering into
10 this Consent Judgment. Horizon agrees that all payments will be made in a timely
11 manner in accordance with the payment due dates. Horizon will be given a five (5)
12 calendar day grace period from the date payment is due. Horizon agrees to pay
13 Michael DiPirro a \$250 per calendar day fee for each day the payment is received
14 after the grace period ends. For purposes of this paragraph, each new day
15 (requiring an additional \$250 payment) will begin at 5 p.m. (PST).

16 17 **4. REIMBURSEMENT OF FEES AND COSTS**

18 **4.1 Reimbursement Of Fees And Costs.** The parties acknowledge
19 that DiPirro offered to resolve the dispute without reaching terms on the amount of
20 fees and costs to be reimbursed, thereby leaving this open issue to be resolved after
21 the material terms of the agreement had been reached, and the matter settled.
22 Horizon then expressed a desire to resolve the fee and cost issue concurrently with
23 other settlement terms, so the parties tried to reach an accord on the compensation
24 due to DiPirro and his counsel under the private attorney general doctrine codified at
25 C.C.P. §1021.5.

26 **4.2** Horizon shall reimburse DiPirro and his counsel for his fees and
27 costs, incurred as a result of investigating, bringing this matter to Horizon's
28 attention, litigating and negotiating a settlement in the public interest. Horizon shall

1 pay \$59,700 for all attorneys' fees, expert and investigation fees, and litigation
2 costs. Horizon agrees to pay the total sum of \$59,700 within five (5) calendar
3 days of the Effective Date. Such sum shall be held in trust by DiPirro's counsel
4 until the Alameda County Superior Court approves and enters the Consent
5 Judgment. If the Consent Judgment is not approved by the Court, DiPirro will
6 return all funds, with interest thereon at a rate of six percent (6%) per annum,
7 within ten (10) calendar days of notice of the Court's decision. Payment should be
8 made payable to the "Chanler Law Group".

9 **4.3** Horizon understands that the payment schedule as stated in this
10 Consent Judgment is a material factor upon which DiPirro and his counsel have
11 relied in entering into this Consent Judgment. Horizon agrees that all payments will
12 be made in a timely manner in accordance with the payment due dates. Horizon
13 will be given a five (5) calendar day grace period from the date payment is due.
14 Horizon agrees to pay Michael DiPirro and his counsel a \$250 per calendar day fee
15 for each day the payment is received after the grace period ends. For purposes of
16 this paragraph, each new day (requiring an additional \$250 payment) will begin at 5
17 p.m. (PST).

18 **4.4 Additional Contingent Fees and Costs.** In the event that the
19 California Attorney General's Office, pursuant to 11 CCR 3000 *et seq*, serves
20 objections to this Consent Judgment on either of the parties, such that it requires
21 DiPirro to incur additional legal fees or costs relating to this Consent Judgment,
22 Horizon shall reimburse DiPirro for reasonable fees and costs incurred by DiPirro and
23 his counsel in excess of \$1,500 from the date of receipt of the Attorney General's
24 objections. Such additional legal fees or costs relating to this Consent Judgment
25 include, but are not limited to: further editing and finalizing of the Consent
26 Judgment; corresponding with opposing counsel; retention of experts; and
27 presenting of the Consent Judgment (or any modifications thereof) to the Attorney
28 General for further comment.

1 DiPirro agrees to document all fees and costs incurred from the date of
2 receipt of the Attorney General's objections through the date of court approval of
3 the Consent Judgment. Prior to receiving such documentation, Horizon agrees to
4 enter into a letter agreement in which the parties agree that, by transmitting such
5 information, no privilege will be waived by DiPirro or his counsel.

6 Such additional reimbursement of legal fees and costs shall be due within
7 ten (10) calendar days after receipt by Horizon of both notice of Court approval of
8 the Consent Judgment and final billing statement from DiPirro. Horizon has the
9 right to object to such reimbursement. If Horizon does object, it shall notify
10 DiPirro's counsel in writing within five (5) calendar days of its receipt of both the
11 notice of the Court's approval of the Consent Judgment and DiPirro's billing
12 statement. The parties shall meet and confer in good faith to resolve the dispute.
13 If the dispute is not resolved within twenty-one (21) calendar days, either party may
14 submit the dispute to the Court, pursuant to the Court's continuing jurisdiction to
15 implement the terms of this Consent Judgment. The parties may also agree to
16 resolve the dispute through mediation, arbitration or other neutral third party dispute
17 resolution proceeding.

18
19 **5. RELEASE OF ALL CLAIMS**

20 **5.1 Michael DiPirro's Release Of Horizon.** In further consideration of the
21 promises and agreements herein contained, and for the payments to be made
22 pursuant to Sections 3 and 4, Michael DiPirro, on behalf of himself, his agents,
23 representatives, attorneys, and/or assignees, and in the interest of the general
24 public, hereby waives all rights to institute or participate in, directly or indirectly,
25 any form of legal action and releases all claims, including, without limitation, all
26 actions, causes of action, in law or in equity, suits, liabilities, demands, obligations,
27 damages, costs, fines, penalties, losses or expenses (including investigation fees,
28 expert fees and attorneys' fees and other costs, other than those stated herein) of

1 any nature whatsoever, whether known or unknown, fixed or contingent
2 (collectively, "Claims"), against Horizon and any of its parent companies, divisions,
3 subdivisions, subsidiaries (and the predecessors, successors and assigns of any of
4 them), and its respective officers, directors, attorneys, representatives,
5 shareholders, partners, agents, and employees (collectively, "Horizon Releasees").
6 This waiver and release shall pertain only to Claims arising under Proposition 65 or
7 Business & Professions Code §17200 *et seq.*, related to the Horizon Releasees
8 alleged failure to warn about exposures on or before the Effective Date to the Listed
9 Chemical contained in or produced by the customary use of any of the Products. It
10 is specifically understood and agreed that Horizon's compliance with the terms of
11 this Release resolves all issues and liability, now and in the future, concerning the
12 Horizon Releasees' compliance with the requirements of Proposition 65 or Business
13 and Professions Code §17200 *et seq.*, as to the Products.

14 **5.2. DiPirro's Release of "Downstream Persons."** In further consideration of
15 the promises and agreements herein contained, and for the payments to be made
16 pursuant to Sections 3 and 4, Michael DiPirro, on behalf of himself, his agents,
17 representatives, attorneys, and/or assignees, and in the interest of the general
18 public, further waives all rights to institute any form of legal action and releases all
19 Claims, as defined above, against each distributor, wholesaler, auctioneer, retailer,
20 dealer, customer, owner, operator, purchaser, lessor, lessee, renter, or user of the
21 Products, or any of their respective parent, divisions, subdivisions, subsidiaries (and
22 the predecessors, successors and assigns of any of them) and their respective
23 officers, directors, shareholders, partners, attorneys, representatives, agents,
24 employees (collectively, "Downstream Persons"). This waiver and release shall
25 pertain only to Claims arising under Proposition 65 or Business & Professions Code
26 §17200 *et seq.*, related to the Downstream Persons' alleged failure to warn about
27 exposures on or before the Effective Date to the Listed Chemical contained in or
28 produced by the customary use of any of the Products. It is specifically understood

1 and agreed that this Consent Judgment resolves all issues and liability, now and in
2 the future, concerning the Downstream Persons' compliance with the requirements
3 of Proposition 65 or Business & Professions Code §17200, *et seq.*, as to the
4 Products.

5 **5.3. Horizon's Release of Michael DiPirro.** Horizon waives all rights to
6 institute any form of legal action against Michael DiPirro, and his attorneys or
7 representatives, for all actions taken or statements made on or before the Effective
8 Date by Michael DiPirro and his attorneys or representatives, in the course of
9 seeking enforcement of Proposition 65 or Business & Professions Code §17200, *et*
10 *seq.* against Horizon.

11
12 **6. HORIZON SALES DATA.** Horizon understands that the sales data provided to
13 counsel for DiPirro by Horizon was a material factor upon which DiPirro has relied to
14 determine the amount of payments made pursuant to Health & Safety Code
15 §25249.7(b) in this Agreement. To the best of Horizon's knowledge, the sales data
16 provided is true and accurate. In the event that DiPirro discovers facts which
17 demonstrate to a reasonable degree of certainty that the sales data is materially
18 inaccurate, the parties shall meet in a good faith attempt to resolve the matter
19 within ten (10) days of Horizon's receipt of notice from DiPirro of his intent to
20 challenge the accuracy of the sales data. If this good faith attempt fails to resolve
21 DiPirro's concerns, DiPirro shall have the right to vacate this Consent Judgment and
22 re-institute an enforcement action against Horizon, provided that all sums paid by
23 Horizon pursuant to Sections 3 and 4 are returned to Horizon within ten (10) days
24 from the date on which DiPirro notifies Horizon of his intent to rescind this
25 Agreement. In such case, all applicable statutes of limitation shall be deemed tolled
26 for the period between the date DiPirro filed the instant action and the date DiPirro
27 notifies Horizon that he is vacating this Consent Judgment pursuant to this
28 Paragraph, provided that in no event, shall any statute of limitations be tolled

1 beyond four (4) years from the date this action was filed.

2
3 **7. COURT APPROVAL.** If this Consent Judgment is not approved and entered by
4 the Court within 120 days of the Effective Date, it shall be deemed null and void as
5 of the one hundred twenty-first (121st) day after the Effective Date and cannot be
6 used in any proceeding.

7
8 **8. SEVERABILITY.** In the event that any of the provisions of this Consent
9 Judgment are held by a court to be unenforceable, the validity of the enforceable
10 provisions remaining shall not be adversely affected.

11
12 **9. ATTORNEY'S FEES.** In the event that a dispute arises with respect to any
13 provision(s) of this Consent Judgment (including, but not limited to, disputes arising
14 from the payments provisions in Sections 3 and 4), the prevailing party shall be
15 entitled to recover costs and reasonable attorneys' fees.

16
17 **10. GOVERNING LAW.** The terms of this Consent Judgment shall be governed
18 by the laws of the State of California. In the event that Proposition 65 is repealed or
19 is otherwise rendered inapplicable by reason of law generally, or as to the Products
20 specifically, Horizon shall have no further obligations pursuant to this Consent
21 Judgment with respect to, and to the extent that, those Products are so affected.

22
23 **11. NOTICES.** All correspondence and notices required to be provided pursuant
24 to this Consent Judgment shall be in writing and shall be personally delivered or
25 sent by first-class, registered, certified mail, overnight courier and/or via facsimile
26 transmission (with presentation of facsimile transmission confirmation) addressed as
27 follows:

28 If to Michael DiPirro: Jennifer Henry or David Bush
Bush & Henry

1 4400 Keller Ave., Suite 200
2 Oakland, CA 94605
(fax) (510) 577-0787

3 If to Horizon Hobby, Inc.: Alan Dodds
4 Horizon Hobby, Inc.
5 4105 Fieldstone Road
6 Champagne, IL 61822
(fax) 800-661-2026

6 With a copy to: John E. Dittoe
7 Crosby, Heafey, Roach & May
8 1999 Harrison Street
9 P.O. Box 2084
Oakland, CA 94604-2084
(fax) (510) 273-8832

10 Either party, from time to time, may specify a change of address or facsimile
11 number to which all notices and other communications shall be sent.

12
13 **12. NO ADMISSIONS:** Nothing in this Consent Judgment shall constitute or be
14 construed as an admission by Horizon of any fact, finding, conclusion, issue of law,
15 or violation of law, nor shall compliance with this Consent Judgment constitute or
16 be construed as an admission by Horizon of any fact, finding, conclusion, issue of
17 issue of law, or violation of law, such being specifically denied by Horizon. Horizon
18 reserves all of its rights and defenses with regard to any claim by any party under
19 Proposition 65 or otherwise. However, this Paragraph shall not diminish or
20 otherwise affect Horizon's obligations, responsibilities and duties under this Consent
21 Judgment.

22
23 **13. ENTIRE AGREEMENT; MODIFICATION:** This Consent Judgment constitutes
24 the entire agreement between the parties relating to the rights and obligations
25 herein granted and assumed, and supersedes all prior agreements and
26 understandings between the parties. This Consent Judgment may be modified only
27 upon the written agreement of the parties and upon entry of a modified or amended
28 Consent Judgment by the Court, or upon motion by any party as provided by law

1 and upon entry of an amended Consent Judgment by the court.

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3 **14. COUNTERPARTS; FACSIMILE SIGNATURES:** This Consent Judgment may be
4 executed in counterparts and by facsimile, each of which shall be deemed an
5 original, and all of which, when taken together, shall constitute one and the same
6 document.

7

8 **15. COMPLIANCE WITH REPORTING REQUIREMENTS (HEALTH & SAFETY CODE**
9 **§25249.7(f)).** The parties acknowledge that the reporting provisions of Health &
10 Safety Code §25249.7(f) apply to this Consent Judgment. Counsel for DiPirro shall
11 comply with that section by submitting the required reporting form to, and serving a
12 copy of this Consent Judgment on the California Attorney General's Office within
13 two business days after the parties execute this Consent Judgment. Following the
14 expiration of the Attorney General's thirty day review period, counsel for DiPirro
15 shall submit the Consent Judgment to the Court in accordance with the
16 requirements of Health & safety Code Section 25249.7(f) and its implementing
17 regulations, unless the parties cannot agree that all of the Attorney General's
18 objections, if any, cannot be reasonably cured.

19

20 **16. AUTHORIZATION.** The undersigned are authorized to execute this Consent
21 Judgment on behalf of their respective parties and have read, understood and agree
22 to all of the terms and conditions of this Consent Judgment.

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28 **AGREED TO:**

AGREED TO:

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DATE: _____

Michael DiPirro
Plaintiff Michael DiPirro

Defendant Horizon Hobby, Inc.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: 10-17-01

DATE: _____

David Bush
David Bush
Attorneys for Plaintiff
Michael DiPirro

John E. Dittos
John E. Dittos
Attorneys for Defendant Horizon
Hobby, Inc.

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DATE: 10/11/01

Plaintiff Michael DiPirro

Alan Daddo
Defendant Horizon Hobby, Inc.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: _____

DATE: _____

David Bush
Attorneys for Plaintiff
Michael DiPirro

John E. Dittoe
Attorneys for Defendant Horizon
Hobby, Inc.

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AGREED TO:
DATE: _____

Plaintiff Michael DiPirro

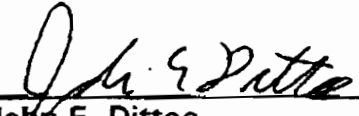
APPROVED AS TO FORM:
DATE: _____

David Bush
Attorneys for Plaintiff
Michael DiPirro

AGREED TO:
DATE: _____

Defendant Horizon Hobby, Inc.

APPROVED AS TO FORM:
DATE: October 11, 2001



John E. Ditto
Attorneys for Defendant Horizon
Hobby, Inc.