

ENDORSED  
FILED  
ALAMEDA COUNTY

JUN 19 2001

CLERK OF THE SUPERIOR COURT  
By SARA DALLESKE

Deputy

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Jennifer Henry, State Bar No. 208221  
2 BUSH & HENRY  
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6 Magnolia Lane (off Huckleberry Hill)  
New Canaan, CT 06840  
7 Tel: (203) 966-9911

8 Attorneys for Plaintiff  
MICHAEL DIPIRRO

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 IN AND FOR THE COUNTY OF ALAMEDA

15 MICHAEL DIPIRRO, ) No. H218476-0  
 )  
16 Plaintiff )  
 )  
17 v. ) CONSENT JUDGMENT  
 )  
18 MR. HEATER, INC.; and DOES 1 )  
through 1000, )  
19 Defendants. )  
20 \_\_\_\_\_ )

24 CONSENT JUDGMENT

1 This Consent Judgment ("Agreement") is entered into by  
2 and between Michael DiPirro, a California citizen, and Mr.  
3 Heater, Inc., an Ohio Corporation, a subsidiary of Enerco  
4 Group, Inc. ("Mr. Heater"), as of June 14, 2001 (the  
5 "Effective Date"). The parties agree to the following terms  
6 and conditions:

7 **WHEREAS:**

8 A. Michael DiPirro is an individual residing in  
9 San Francisco, California, who seeks to promote awareness of  
10 exposures to toxic chemicals and improve human health by  
11 reducing or eliminating hazardous substances contained in or  
12 produced by consumer and industrial products;

13 B. Mr. Heater is a company that currently  
14 manufactures, distributes and/or sells propane heaters in the  
15 State of California that allegedly expose residents of the  
16 State to chemicals in combustion products listed pursuant to  
17 Proposition 65 (California Health & Safety Code §25249.5 et  
18 seq.) including carbon monoxide (the "Listed Chemicals");

19 C. The products that contain, or create an  
20 exposure to, one or more of the "Listed Chemicals" and which  
21 are covered by this Agreement are set forth in Exhibit A (the  
22 "Products"). The Products have been manufactured,  
23 distributed, and/or sold by Mr. Heater for use in California  
24 since at least December 22, 1996;

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1 D. On December 22, 2000, Michael DiPirro first  
2 served Mr. Heater and other public enforcement agencies with  
3 a document entitled "60-Day Notice of Violation" which  
4 provided Mr. Heater and such public enforcers with notice  
5 that Mr. Heater was allegedly in violation of Health & Safety  
6 Code §25249.6 for allegedly failing to warn purchasers that  
7 certain products it sells, or otherwise offers for use in  
8 California expose users to Proposition 65-listed chemicals;  
9 and

10 E. On March 2, 2001, Michael DiPirro filed a  
11 complaint entitled Michael DiPirro v. Mr. Heater, Inc.; et  
12 al. in the Alameda County Superior Court, naming Mr. Heater  
13 as a defendant and alleging violations of Business &  
14 Professions Code §17200 and Health & Safety Code §25249.6 on  
15 behalf of individuals in California who allegedly have been  
16 exposed to the "Listed Chemicals" contained in or produced by  
17 certain Mr. Heater products.

18 F. Mr. Heater at all times denied and denies the  
19 material factual and legal allegations in the 60-Day Notice  
20 and Complaint. Nothing in this Agreement shall be construed  
21 as an admission by Mr. Heater of any fact, finding, issue of  
22 law, or violation of law, nor shall compliance with this  
23 Agreement constitute or be construed as an admission by Mr.  
24 Heater of any fact, finding, conclusion, issue of law, or  
25 CONSENT JUDGMENT

1 violation of law. However, this paragraph shall not diminish  
2 or otherwise affect the obligations, responsibilities, and  
3 duties of Mr. Heater under this Agreement.

4  
5 **NOW THEREFORE, MICHAEL DIPIRRO AND MR. HEATER AGREE AS**  
6 **FOLLOWS:**

7           **1. Product Warnings.** Beginning on September 30,  
8 2001, Mr. Heater agrees that it will not knowingly package  
9 and ship any Products that contain, or create an exposure to,  
10 the Listed Chemicals for sale in the State of California  
11 unless such Products comply with section 1.1 below:

12                   **1.1** All Products that produce an exposure to  
13 the Listed Chemicals shall bear the following warning  
14 statement:

15                           **"WARNING: Combustion by-products produced when**  
16                           **using this product contain carbon**  
17                           **monoxide, a chemical known [to the**  
18                           **State of California] to cause birth**  
                              **defects (or other reproductive**  
                              **harm), and other chemicals known to**  
                              **cause cancer";**

19                           **or**

20                           **"WARNING: Combustion by-products produced when**  
21                           **using this product contain chemicals**  
22                           **known [to the State of California]**  
                              **to cause cancer and birth defects**  
                              **(or other reproductive harm)";**

23                           [TEXT IN BRACKETS IS OPTIONAL]

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1           The warning statement shall be prominently  
2 placed upon the Product's label with such conspicuousness, as  
3 compared with other words, statements, designs or devices on  
4 the label as to render it likely to be read and understood by  
5 an ordinary individual under customary conditions of purchase  
6 or use. Mr. Heater complies with this requirement by  
7 ensuring that the warning is placed on top of any other  
8 health or physical hazard warnings; is segregated from other  
9 language so that it appears as a separate statement; and/or  
10 is written in bold or enlarged type, as compared to other  
11 health or physical hazard warnings.

12           **2. Payment Pursuant To Health & Safety Code**

13 **§25249.7(b)**. Pursuant to Health & Safety Code §25249.7(b),  
14 Mr. Heater shall pay a civil penalty of \$2,000.00 (two  
15 thousand dollars). The payment of \$2,000 shall be received by  
16 Chanler Law Group no later than June 25, 2001. The funds  
17 shall be held in trust by DiPirro's counsel until the Alameda  
18 County Superior Court approves and enters the Consent  
19 Judgment. The penalty payment is to be made payable to  
20 "Chanler Law Group In Trust For Michael DiPirro". If the  
21 Consent Judgment is not approved by the Court, DiPirro will  
22 return all funds, with interest thereon at a rate of six  
23 percent (6%) per annum, within ten (10) calendar days of  
24 notice of the Court's decision. Penalty monies shall be

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1 apportioned by DiPirro in accordance with Health & Safety  
2 Code §25192, with 75% of these funds remitted to the State of  
3 California's Department of Toxic Substances Control.

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

15 **3. Reimbursement Of Fees And Costs.** The parties  
16 acknowledge that DiPirro and his attorneys offered to resolve  
17 the dispute without reaching terms on the amount of fees and  
18 costs to be reimbursed, thereby leaving this open issue to be  
19 resolved after the material terms of the agreement had been  
20 reached, and the matter settled. Mr. Heater then expressed a  
21 desire to resolve the fee and cost issue concurrently with  
22 other settlement terms, so the parties tried to (and did)  
23 reach an accord on the compensation due to DiPirro and his

24 CONSENT JUDGMENT

1 counsel under the private attorney general doctrine codified  
2 at C.C.P. §1021.5.

3 Mr. Heater shall reimburse DiPirro and his counsel  
4 for his fees and costs, incurred as a result of  
5 investigating, bringing this matter to Mr. Heater's  
6 attention, litigating and negotiating a settlement in the  
7 public interest. Mr. Heater shall pay \$11,000.00 (eleven  
8 thousand dollars) for all investigation fees and costs,  
9 attorneys' fees and litigation costs. Mr. Heater agrees the  
10 total sum of \$11,000 shall be received by Chanler Law Group  
11 no later than June 25, 2001. Such sum shall be held in trust  
12 by DiPirro's counsel until the Alameda County Superior Court  
13 approves and enters the Consent Judgment. If the Consent  
14 Judgment is not approved by the Court, DiPirro will return  
15 all funds, with interest thereon at a rate of six percent  
16 (6%) per annum, within ten (10) calendar days of notice of  
17 the Court's decision. Payment should be made payable to the  
18 "Chanler Law Group".

19 Mr. Heater understands that the payment schedule as  
20 stated in this Consent Judgment is a material factor upon  
21 which DiPirro and his counsel have relied in entering into  
22 this Consent Judgment. Mr. Heater agrees that all payments  
23 will be made in a timely manner in accordance with the  
24 payment due dates. Mr. Heater will be given a five (5)

CONSENT JUDGMENT

1 calendar day grace period from the date payment is due. Mr.  
2 Heater agrees to pay Michael DiPirro and his attorneys a \$250  
3 per calendar day fee for each day the payment is received  
4 after the grace period ends. For purposes of this paragraph,  
5 each new day (requiring an additional \$250 payment) will  
6 begin at 5 p.m. (PST).

7 **4. Michael DiPirro's Release Of Mr. Heater.**

8 Michael DiPirro, by this Agreement, on behalf of himself, his  
9 agents, representatives, attorneys, assigns and interest of  
10 the general public, waives all rights to institute or  
11 participate in, directly or indirectly, any form of legal  
12 action, and releases all claims, liabilities, obligations,  
13 losses, costs, expenses, fines and damages, against Mr.  
14 Heater, Enerco Group, Inc., and their subsidiaries,  
15 divisions, subdivisions, brands, employees, agents,  
16 distributors, retailers, and/or customers, and the successors  
17 and assigns of any of them, whether under Proposition 65 or  
18 the Business & Profession Code §17200 et seq. based on Mr.  
19 Heater's alleged failure to warn about exposure to the Listed  
20 Chemicals contained in or produced by any of the Products.

21 **5. Mr. Heater's Release Of Michael DiPirro.** Mr.

22 Heater, by this Agreement, waives all rights to institute any  
23 form of legal action against Michael DiPirro and his  
24 attorneys or representatives, for all actions or statements

25 CONSENT JUDGMENT



1 made by Michael DiPirro, and his attorneys or  
2 representatives, in the course of seeking enforcement of  
3 Proposition 65 or Business & Profession Code §17200 against  
4 Mr. Heater.

5           **6. Court Approval.** If, for any reason, this  
6 Consent Judgment is not approved by the Court, this Agreement  
7 shall be deemed null and void. All funds paid will be  
8 returned within ten (10) calendar days of receiving notice of  
9 the court's decision.

10           **7. Severability.** In the event that any of the  
11 provisions of this Agreement are held by a court to be  
12 unenforceable, the validity of the enforceable provisions  
13 shall not be adversely affected.

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

18           **9. Governing Law.** The terms of this Agreement  
19 shall be governed by the laws of the State of California.

20           **10. Notices.** All correspondence to Michael  
21 DiPirro shall be mailed to:

22                   David R. Bush or Jennifer Henry  
23                   Bush & Henry  
24                   4400 Keller Ave., Suite 200  
                    Oakland, CA 94605-4229  
                    (510) 577-0747

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1  
2 All correspondence to Mr. Heater shall be  
3 mailed to:

4 Peter Hsiao or  
5 Siegmund Shyu  
6 Morrison & Foerster, LLP  
7 555 West Fifth Street  
8 Suite 3500  
9 Los Angeles, CA 90013-1024  
10 (213) 892-5200

11 **11. Compliance With Reporting Requirements.** The  
12 parties agree to comply with the reporting form requirements  
13 referenced in Health & Safety Code §25249.7(f). As of the  
14 Effective Date, the California Attorney General's reporting  
15 forms are not available. DiPirro represents, however, that  
16 his counsel will send a copy of this Agreement to the  
17 California Attorney General's Office once it has been  
18 finalized and prior to presenting it to the Alameda County  
19 Superior Court for approval.

20 **12. Counterparts and Facsimile.** This Agreement  
21 may be executed in counterparts and facsimile, each of which  
22 shall be deemed an original, and all of which, when taken  
23 together, shall constitute one and the same document.

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

CONSENT JUDGMENT

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AGREED TO:

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DATE: 6/14/01

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

Michael DiPirro  
Michael DiPirro  
PLAINTIFF

\_\_\_\_\_  
Mr. Heater, Inc.  
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: June 15, 2001

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

David Bush  
David Bush  
Attorneys for Plaintiff  
MICHAEL DIPIRRO

\_\_\_\_\_  
Siegmond Shyu  
Attorneys for Defendant  
MR. HEATER, INC.

CONSENT JUDGMENT

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Michael DiPirro  
PLAINTIFF

*John De Rosa* BY *T.D. Ward*  
Mr. Heater, Inc. UP + COUNSEL  
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

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

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

\_\_\_\_\_  
David Bush  
Attorneys for Plaintiff  
MICHAEL DIPIRRO

\_\_\_\_\_  
Siegmond Shyu  
Attorneys for Defendant  
MR. HEATER, INC.

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**AGREED TO:**

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

\_\_\_\_\_  
Michael DiPirro  
PLAINTIFF

\_\_\_\_\_  
Mr. Heater, Inc.  
DEFENDANT

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

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

DATE: 6-18-01

\_\_\_\_\_  
David Bush  
Attorneys for Plaintiff  
MICHAEL DIPIRRO

Siegmund Shyu  
Siegmond Shyu  
Attorneys for Defendant  
MR. HEATER, INC.

CONSENT JUDGMENT

# **Exhibit A**

**EXHIBIT A**

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Heaters, including but not limited to Model MH12TS Heater  
8,000-14,000 BTU/HR.

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