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ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2001

CLERK OF SUPERIOR COURT
BY _____

5 Clifford A. Chanler, State Bar No. 135534
CHANLER LAW GROUP
6 Magnolia Lane (off Huckleberry Hill)
New Canaan, CT 06840-3801
7 Tel: (203) 966-9911

8 Attorneys for Plaintiff
MICHAEL DIPIRRO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 IN AND FOR THE COUNTY OF ALAMEDA

11
12 MICHAEL DIPIRRO,) No. H217763-6
13 Plaintiff)
14 v.) CONSENT JUDGMENT
15)
16 NITTO KOHKI U.S.A., INC.; NITTO)
KOHKI CO., LTD.; and DOES 1)
17 through 1000,)
18 Defendants.)
_____)

19
20 This Consent Judgment ("Agreement") is entered into by
21 and between Michael DiPirro, a California citizen ("DiPirro"),
22 and Nitto Kohki U.S.A., Inc. ("Nitto Kohki"), as of March 31,
23 2001 (the "Effective Date"). The parties agree to the
24 following terms and conditions, as outlined in the following
25 Settlement Agreement:

26 ///

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into by and between Michael DiPirro, a California citizen ("DiPirro"), and Nitto Kohki U.S.A., Inc. ("Nitto Kohki"), as of March 31, 2001 (the "Effective Date").

WHEREAS:

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

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

C. The products manufactured or distributed by Nitto Kohki which are covered by this Agreement are set forth in Exhibit A (the "Products") and have been sold in California;

D. DiPirro states that on or about November 6, 2000 he served Nitto Kohki and public enforcement agencies with a document entitled "60-Day Notice of Violation" which alleged that Nitto Kohki was in violation of Health & Safety Code §25249.6 for not warning purchasers of its Products in California that the use of such Products may result in exposure of California users of such Products to Listed Chemicals;

E. Nitto Kohki states that in December 2000 it served DiPirro with a letter which alleged that Nitto Kohki was not in violation of Health & Safety Code §25249.6;

F. On or about January 17, 2001, DiPirro filed a complaint and commenced a lawsuit entitled Michael DiPirro v. Nitto Kohki U.S.A., Inc., et al., Case No. H217763-6 (the "Lawsuit"), pending in the Alameda County Superior Court ("Court"), naming Nitto Kohki as defendant and alleging violations of Business & Professions Code §17200 and Health & Safety Code §25249.6 on behalf of the general public and on behalf of individuals in California who allegedly have been exposed to Listed Chemicals produced by customary use of the Products of Nitto Kohki;

G. On or about March 9, 2001, Nitto Kohki filed with the Court an answer to the Lawsuit which alleged that Nitto Kohki was not in violation of Health & Safety

Code §25249.6;

H. DiPirro and Nitto Kohki desire to enter into this Agreement to resolve the matters pertaining to the Lawsuit and avoid the time, expense and uncertainty of further litigation;

I. Neither the terms of, nor compliance with, this Agreement shall be construed as an admission by Nitto Kohki or its affiliates, representatives and distributors of any fact, finding, issue of law, violation of law or liability, *provided that* this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of Nitto Kohki under this Agreement.

NOW THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS HEREBY ACKNOWLEDGED, DIPIRRO AND NITTO KOHKI AGREE AS FOLLOWS:

1. **Product Warnings.** Beginning immediately from the Effective Date, Nitto Kohki shall initiate commercially reasonable efforts to revise the current product or packaging warnings for the Products manufactured or distributed by Nitto Kohki and sold in California consistent with this Agreement ("Revised Warnings"). Nitto Kohki agrees that it will provide Revised Warnings on all Products sold in California and manufactured or distributed by Nitto Kohki more than four months after the date this Agreement is approved and entered by the Court, the use of which are likely to result in exposure by users to lead (or lead compounds), crystalline silica, arsenic, and/or chromium (hexavalent compounds) or any other, or combination of, Listed Chemicals. The Revised Warnings shall bear one of the following warning statements:

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

Your risk from these exposures varies, depending on how often you do this type of work. To reduce your exposure to 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."

[Note: Text in brackets is optional.]

or

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

The Revised Warning may be (1) printed in the owner's manual in accordance with Exhibit B or (2) placed on a label that is (a) fastened to the packaging, product or owner's manual or (b) included with the owner's manual. The Revised Warning shall be in a form reasonably consistent with other warnings provided with the Products of Nitto Kohki for California. The Revised Warning shall be deemed to cover all uses of the Products, and all accessories and other products used in connection with the Products. The Revised Warning shall be deemed to provide clear and reasonable warnings for all substances listed in accordance with Proposition 65, and no other warning shall be required to comply with Proposition 65.

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

2. Payment Pursuant to Health & Safety Code §25249.7(b). Pursuant to Health & Safety Code §25249.7(b), Nitto Kohki shall pay a civil penalty of \$6,000.00 (six thousand dollars). The payment shall be delivered within five (5) calendar days after the Court approves and enters this Agreement and dismisses the Lawsuit. The penalty payment is to be made payable to "Chanler Law Group In Trust For Michael DiPirro" and sent to the offices of Chanler Law Group. Penalty monies shall be apportioned by DiPirro in accordance with Health & Safety Code §25192 and DiPirro shall remit 75% of these funds to the State of California's Department of Toxic Substances Control in a timely manner. Promptly upon the request of Nitto Kohki, DiPirro will provide evidence of such remittance to the State of California.

3. Reimbursement of Fees and Costs. The parties acknowledge that DiPirro offered to resolve the dispute without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving this open issue to be resolved after the material terms of the agreement had been reached, and the matter settled. Nitto Kohki then expressed a desire to resolve the fee and cost issue concurrently with other settlement terms, so the parties tried to reach an accord on the compensation due to DiPirro and his counsel under the private attorney general doctrine codified at C.C.P. §1021.5. Consistent therewith, Nitto Kohki agrees to reimburse DiPirro for his fees and costs, incurred as a

result of investigating and bringing this matter to Nitto Kohki's attention and litigating and negotiating a settlement in the public interest and on behalf of the general public. Nitto Kohki shall pay \$13,500.00 (thirteen thousand five hundred dollars) for pre-60 Day Notice investigation fees and attorneys' fees, \$7,640.00 (seven thousand six hundred and forty dollars) for attorneys' fees and costs, and \$360.00 (three hundred and sixty dollars) litigation costs. Nitto Kohki agrees to pay and deliver the total sum of \$21,500.00 (twenty one thousand five hundred dollars) for such fees and costs within five (5) days after the Court approves and enters this Agreement and dismisses the Lawsuit. Payment should be made payable to the "Chanler Law Group" and sent to the offices of Chanler Law Group.

4. DiPirro's Release of Nitto Kohki. DiPirro, by this Agreement, on behalf of himself, his agents, representatives, attorneys, assigns, the citizens of the State of California and the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims, liabilities, obligations, losses, costs, expenses, fines, damages, penalties, restitution, or injunctive, equitable, legal or other relief, against Nitto Kohki and its directors, officers, employees, affiliates, successors or assigns and its parents, divisions, subdivisions, subsidiaries, affiliates, franchisees, cooperative members, licensees, sales representatives, distributors, wholesalers and retailers who sell Products (collectively, "Settling Group"), whether under Proposition 65 or the Business & Profession Code §17200 et seq. based on the alleged violation of these laws in connection with the Products. This Agreement is a full, final, and binding resolution between DiPirro, on behalf of himself, all citizens of the State of California and the general public, on the one hand, and the Settling Group, on the other hand, of any violation of Proposition 65, Business and Professions Code section 17200 et. seq., or any other statutory or common law claim that could have been asserted in the complaint against Settling Group for failure to provide clear and reasonable warnings of exposure to chemicals known to cause cancer or reproductive toxicity associated with the Products, or any other claim based upon facts alleged in the Complaint, whether based on actions committed by Nitto Kohki or by any entity to whom they distribute or sell Products. Compliance with this Agreement resolves any issue now, in the past, or in the future concerning compliance by the Settling Group. In addition, DiPirro, on behalf of himself, his attorneys, and his representatives, waives all rights to institute any form of legal action against Nitto Kohki and its attorneys or representatives, for all actions or statements made by Nitto Kohki, and its attorneys or representatives, in the course of responding to alleged violations by Nitto Kohki of Proposition 65 or Business & Profession Code §17200.

5. Nitto Kohki's Release of DiPirro. Nitto Kohki, by this Agreement, waives all rights to institute any form of legal action against DiPirro and his attorneys or representatives, for all actions or statements made by DiPirro, and his attorneys or representatives, in the course of seeking enforcement of Proposition 65 or Business &

Profession Code §17200 against Nitto Kohki.

6. Stipulated Judgment; No Admission. Promptly upon the execution of this Agreement, DiPirro and Nitto Kohki shall execute and file a stipulated judgment to be approved pursuant to C.C.P. §664.6 by the Court in accordance with the terms of this Agreement. If, for any reason, the stipulated judgment is not approved by the Court, this Agreement shall be deemed null and void. The entry of a stipulated judgment notwithstanding, neither the terms of, nor compliance with, this Agreement shall be construed as an admission by Nitto Kohki or Settling Group of any fact, finding, issue of law, violation of law or liability, *provided that* this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of Nitto Kohki under this Agreement.

7. Changes to Revised Warnings. In the event that Nitto Kohki obtains analytical, risk assessment or other data ("Exposure Data") that shows an exposure to any or all Products poses "no significant risk" or will have "no observable effect," as each such standard is applicable and as each is defined under Health & Safety Code §25249.10(c), Nitto Kohki shall provide DiPirro with ninety (90) days prior written notice of its intent to limit or eliminate the warning provisions under this Agreement based on the Exposure Data and shall provide DiPirro with all such supporting Exposure Data. Within ninety (90) days of receipt of Nitto Kohki Exposure Data, DiPirro shall provide Nitto Kohki with written notice of his intent to challenge the Exposure Data (in the event that he chooses to make such a challenge). If DiPirro fails to provide Nitto Kohki written notice of his intent to challenge the Exposure Data within ninety (90) days of receipt of Nitto Kohki's notice and the Exposure Data, DiPirro shall waive all rights to challenge the Exposure Data, and Nitto Kohki shall be entitled to limit or eliminate the warning provisions required under this Agreement with respect to those Product(s) to which the Exposure Data applies. If DiPirro timely notifies Nitto Kohki of his intent to challenge the Exposure Data, DiPirro and Nitto Kohki shall negotiate in good faith for a period not to exceed thirty (30) days following receipt of Nitto Kohki's notice to attempt to reach a settlement of this issue. If a settlement is not reached, DiPirro and Nitto Kohki agree to submit such challenge to the superior court for determination, pursuant to the court's continuing jurisdiction of this matter under C.C.P. §664.6 and this Agreement. The prevailing party shall be entitled to reasonable attorneys' fees and costs associated with bringing a motion brought under this paragraph to the court for determination. Also, furthermore, Nitto Kohki shall be entitled to modify, limit or eliminate the warnings contemplated by this Agreement to comply with, or as a result of changes in, applicable laws, regulations, judicial decisions, governmental policies or other legal authorities.

8. Severability. In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the enforceable provisions shall not

be impaired or adversely affected.

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

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

11. Notices. All correspondence to DiPirro shall be mailed to:

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

or

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

All correspondence to Nitto Kohki shall be mailed to:

President,
Nitto Kohki U.S.A., Inc.
4525 Turnberry Drive
Hanover Park, Illinois 60103

with a copy to:

Jeremy A. Gibson
Masuda, Funai, Eifert & Mitchell, Ltd.
One East Wacker Drive, Suite 3200
Chicago, Illinois 60601-2002
(312) 245-7500

12. Compliance with Reporting Requirements. The parties agree to comply with the reporting form requirements referenced in Health & Safety Code §25249.7(f). As of the Effective Date, the California Attorney General's reporting forms are not

available. DiPirro represents, however, that he will cause his counsel to send a copy of this Agreement to the appropriate unit of the California Attorney General's Office prior to or concurrently with the presentation of the Stipulated Judgment to the Court.

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

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

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

AGREED TO:

AGREED TO:

DATE: 4/12/01

DATE: March 31, 2001


Michael DiPirro


Nitto Kohki U.S.A., Inc.

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


AGREED TO:

AGREED TO:

DATE: _____

DATE: March 31, 2001

Michael DiPirro

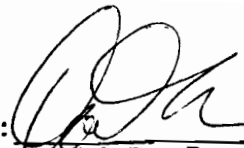


Nitto Kohki U.S.A., Inc.

APPROVED AS TO FORM:

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Dated: 4/12, 2001

by: 
David R. Bush
Attorneys for Plaintiff
MICHAEL DIPIRRO

Dated: April 9, 2001

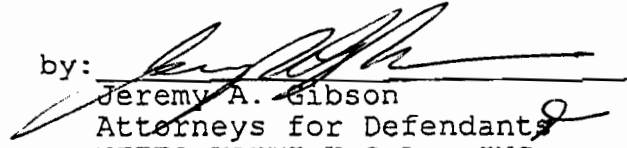

by: 
Jeremy A. Gibson
Attorneys for Defendants
NITTO KOHKI U.S.A., INC.;
~~NITTO KOHKI CO., LTD.~~


Exhibit A

EXHIBIT A

Bevelers;
Chippers;
Chisels;
Cutters;
Drills;
Filers;
Grinders;
Hairliners;
Power Drivers;
Punches;
Saws;
Scalers;
Selfers;
Shears;
Wrenches; and
Accessories for or used in connection with the above.

Exhibit B

EXHIBIT B

Warnings in Manuals. A Revised Warning for Products may be provided in the owner's manual for purposes of Paragraph 1 if all of the following conditions are met:

- a. The warning shall be located in one of the following places in the owner's manual: the outside of the front cover; the inside of the front cover; the first page other than the cover; or the outside of the back cover; The warning shall have the content as the warning under subparagraph 1, except that, at the option of Nitto Kohki, the bracketed language may be omitted; The warning shall be printed in a font no smaller than the font used for other safety warnings in the manual. The format shown in Paragraph 1 is illustrative only, *provided that* the warning meets the other requirements of this Agreement; Alternatively, the warning may be included in a safety warning section consistent with specifications UL 745-1 or UL 45, issued by Underwriters Laboratories Inc., as amended; The warning may either be printed in the manual or contained in a durable label or sticker affixed to the manual. If the graphic is used, and the manual is printed in a single color of ink on paper, then the warning need not contain the yellow color;
- b. The Product contains a durable label or sticker directing the operator's attention to the owner's manual;
- c. The owner's manual is intended by Nitto Kohki to be provided with the original packaging of the Product to the initial consumer/purchaser;
- d. At least one other safety warning appears in the owner's manual;
and
- e. All or a substantial portion of operation instructions, if any, are contained in the owner's manual.