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MICHAEL DIPIRRO  
9

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

13 MICHAEL DIPIRRO, ) No. H217705-2  
14 Plaintiff, )  
15 v. )  
16 NUPLA CORPORATION; and DOES 1 ) CONSENT JUDGMENT  
through 1000, )  
17 Defendants. )  
18

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20  
21 This Consent Judgment ("Agreement" or "Consent Judgment")  
22 is entered into by and between Michael DiPirro and Nupla  
23 Corporation, a California corporation, ("Nupla") as of  
24 September 19, 2001 (the "Effective Date"). The parties agree  
25 to the following terms and conditions:  
26  
27  
28

CONSENT JUDGMENT

1 WHEREAS:

2 A. Michael DiPirro 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  
6 consumer and industrial products;

7 B. Nupla is a company that currently manufactures,  
8 distributes and sells certain brass hammers and other non-  
9 marring and non-sparking hammers as set forth in Exhibit A  
10 that contain lead (or lead compounds), a substance known to  
11 the State of California to cause cancer and birth defects (or  
12 other reproductive harm);

13 C. A list of the products which contain lead (or  
14 lead compounds) (the "Listed Chemical") and which are covered  
15 by this Agreement is provided in Exhibit A (the "Products").  
16 The Products have been distributed and sold by Nupla in  
17 California since January 11, 1997; and

18 D. On November 6, 2000, Michael DiPirro first  
19 served Nupla and other public enforcement agencies with a  
20 document entitled "60-Day Notice of Violation" which provided  
21 Nupla and such public enforcers with notice that Nupla was in  
22 violation of Health & Safety Code §25249.6 for allegedly  
23 failing to warn purchasers that certain products it sells in  
24 California expose users to one or more Proposition 65-listed  
25 chemicals; and

26 E. On March 23, 2001, Michael DiPirro filed a  
27 complaint entitled Michael DiPirro v. Nupla Corporation, et

28 CONSENT JUDGMENT

1 al. in the Alameda County Superior Court, naming Nupla as a  
2 defendant and alleging violations of Business & Professions  
3 Code §17200 and Health & Safety Code §25249.6 on behalf of  
4 individuals in California who allegedly have been exposed to  
5 one or more chemicals listed pursuant to Proposition 65  
6 contained in certain Nupla products.

7 F. Nothing in this Agreement shall be construed as  
8 an admission by Nupla of any fact, finding, issue of law, or  
9 violation of law, nor shall compliance with this Agreement  
10 constitute or be construed as an admission by Nupla of any  
11 fact, finding, conclusion, issue of law, or violation of law.

12 However, this paragraph shall not diminish or otherwise  
13 affect the obligations, responsibilities, and duties of Nupla  
14 under this Agreement.

15  
16 **NOW THEREFORE, MICHAEL DIPIRRO AND Nupla AGREE AS FOLLOWS:**

17 1. **Product Warnings.** Nupla shall begin to take  
18 steps to its sale of the Brass Hammer Products (as defined in  
19 Exhibit A) to provide the language set forth in the section  
20 1.1 below. Beginning on November 15, 2001, Nupla agrees that  
21 it will not knowingly sell any Brass Hammer Products  
22 containing the Listed Chemical in the State of California  
23 unless such Products comply with section 1.1 below:

24 1.1 All Brass Hammers Products shall bear the  
25 following warning statement:

26 "WARNING: This product contains lead, a  
27 chemical known to the State of  
28 California to cause cancer and birth  
defects (or other reproductive

CONSENT JUDGMENT

1 harm).";

2 or

3 "WARNING: This product contains a chemical  
4 known to the State of California to  
5 cause cancer and birth defects (or  
6 other reproductive harm).";

7 The warning statement shall be prominently  
8 placed with such conspicuousness, as compared with other  
9 words, statements, designs or devices, as to render it likely  
10 to be read and understood by an ordinary individual under  
11 customary conditions of purchase.

12 1.2 Nupla also manufactures non-sparking and non-  
13 marring hammers as referenced in the 60-Day Notice of Intent  
14 to Sue and the Complaint. These products, as further  
15 described in Exhibit A hereto, contain no external metallic  
16 components, and a normal user would not reasonably come in  
17 contact with any brass components when using these products.  
18 Nupla shall not provide a Proposition 65 warning for exposure  
19 to lead regarding these products. For purposes of this  
20 Consent Judgment, a Proposition 65 warning is one that  
21 contains language similar to the warning language stated in  
22 paragraph 1.1 hereof.

23 2. Payment Pursuant To Health & Safety Code

24 §25249.7(b). Pursuant to Health & Safety Code §25249.7(b),  
25 Nupla shall pay a civil penalty of \$2,500 (two thousand five  
26 hundred dollars). The payment of \$2,500 shall be paid within  
27 thirty (30) calendar days of the Effective Date and shall be  
28 held in trust by DiPirro's counsel until the Alameda County

CONSENT JUDGMENT

1 Superior Court approves and enters the Consent Judgment. The  
2 penalty payment is to be made payable to "Chanler Law Group In  
3 Trust For Michael DiPirro". If the Consent Judgment is not  
4 approved by the Court, DiPirro will return all funds, with  
5 interest thereon at a rate of six percent (6%) per annum,  
6 within ten (10) calendar days of notice of the Court's  
7 decision. Penalty monies shall be apportioned by DiPirro in  
8 accordance with Health & Safety Code §25192, with 75% of these  
9 funds remitted to the State of California's Department of  
10 Toxic Substances Control.

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

22 3. Reimbursement Of Fees And Costs. The parties  
23 acknowledge that DiPirro offered to resolve the dispute  
24 without reaching terms on the amount of fees and costs to be  
25 reimbursed, thereby leaving this open issue to be resolved  
26 after the material terms of the agreement had been reached,  
27 and the matter settled. Nupla then expressed a desire to

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1 resolve the fee and cost issue concurrently with other  
2 settlement terms, so the parties tried to reach an accord on  
3 the compensation due to DiPirro and his counsel under the  
4 private attorney general doctrine codified at C.C.P. §1021.5.

5 Nupla shall reimburse DiPirro and his counsel for  
6 his fees and costs, incurred as a result of investigating,  
7 bringing this matter to Nupla's attention, litigating and  
8 negotiating a settlement in the public interest. Nupla shall  
9 pay \$21,500 (twenty one thousand five hundred dollars) for all  
10 attorneys' fees, expert and investigation fees, and litigation  
11 costs. Nupla agrees to pay the total sum of \$21,500 within  
12 thirty (30) calendar days of the Effective Date. Such sum  
13 shall be held in trust by DiPirro's counsel until the Alameda  
14 County Superior Court approves and enters the Consent  
15 Judgment. ~~If the Consent Judgment is not approved by the~~  
16 ~~Court, DiPirro will return all funds, with interest thereon at~~  
17 ~~a rate of six percent (6%) per annum, within ten (10) calendar~~  
18 ~~days of notice of the Court's decision. Payment should be~~  
19 ~~made payable to the "Chanler Law Group".~~

20 Nupla understands that the payment schedule as  
21 stated in this Consent Judgment is a material factor upon  
22 which DiPirro and his counsel have relied in entering into  
23 this Consent Judgment. Nupla agrees that all payments will be  
24 made in a timely manner in accordance with the payment due  
25 dates. Nupla will be given a five (5) calendar day grace  
26 period from the date payment is due. Nupla agrees to pay  
27 Michael DiPirro and his counsel a \$250 per calendar day fee

28 CONSENT JUDGMENT

1 for each day the payment is received after the grace period  
2 ends. For purposes of this paragraph, each new day (requiring  
3 an additional \$250 payment) will begin at 5 p.m. (PST).

4           3.1       Additional Contingent Fees and Costs. In  
5 the event that the California Attorney General's office,  
6 pursuant to 11 CCR 3000, et seq., serves objections to this  
7 Consent Judgment on either of the parties, such that it  
8 requires plaintiff to incur additional legal fees or costs  
9 relating to this Consent Judgment, Defendant shall reimburse  
10 DiPirro for any fees and costs incurred by DiPirro and his  
11 counsel in excess of \$1,500 from the date of receipt of the  
12 Attorney General's objections, provided that DiPirro first  
13 obtains Defendant's consent to proceed with the Consent  
14 Judgment under these circumstances and further provided that  
15 ~~the total amount of any such additional fees and costs do not~~  
16 ~~exceed a total of \$3,000 above the initial \$1,500.~~ Such  
17 additional legal fees or costs relating to this Consent  
18 Judgment include, but are not limited to: further editing and  
19 finalizing of the Consent Judgment; corresponding with  
20 opposing counsel; retention of experts; presenting of the  
21 Consent Judgment (or any modifications thereof) to the  
22 Attorney General for further comment; and any briefing and/or  
23 appearance before the Court related to this Consent Judgment.  
24 Such additional reimbursement of legal fees and costs shall be  
25 due within ten (10) calendar days after receipt of both notice  
26 of Court approval of the Consent Judgment and final billing  
27 statement from plaintiff. Defendant has the right to object

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1 to such reimbursement and may submit the resolution of this  
2 issue to the American Arbitration Association (AAA) in  
3 Northern California to determine the reasonableness of the  
4 additional fees and costs sought, provided that such notice of  
5 objection or decision to arbitrate is received by plaintiff by  
6 the end of the ten (10) calendar days. If an arbitration  
7 notice is not filed with AAA in a timely manner, DiPirro may  
8 file a motion with the Court for fees and costs pursuant to  
9 CCP §1021.5 and this Consent Judgment associated with any  
10 additional fees and costs incurred as set forth in this  
11 paragraph.

12           4.   **Michael DiPirro's Release Of Nupla.** Michael  
13 DiPirro, by this Agreement, on behalf of himself, his agents,  
14 representatives, attorneys, assigns and in the interest of the  
15 general public, waives all rights to institute or participate  
16 in, directly or indirectly, any form of legal action,  
17 including, but not limited to, any pending lawsuit, and  
18 releases all claims, liabilities, obligations, losses, costs,  
19 expenses, fines and damages, against Nupla and its past,  
20 present, and future subsidiaries, officers, trustees,  
21 directors, employees, agents, indemnitors, representatives,  
22 shareholders, insurers, successors in interest and  
23 predecessors in interest, distributors, including, but not  
24 limited to, W.W. Grainger, Inc., customers, successors and  
25 assigns, whether under Proposition 65 or the Business &  
26 Profession Code §17200 et seq., based on Nupla's alleged  
27 failure to warn about exposure to the Listed Chemical

28 CONSENT JUDGMENT



1 contained in any of the Products as alleged in the Complaint.

2           5.    **Nupla's Release Of Michael DiPirro.** Nupla, by  
3 this Agreement, waives all rights to institute any form of  
4 legal action against Michael DiPirro and his attorneys or  
5 representatives, for all actions or statements made by Michael  
6 DiPirro, and his attorneys or representatives, in the course  
7 of seeking enforcement of Proposition 65 or Business &  
8 Profession Code §17200 against Nupla, as alleged in the  
9 Complaint.

10           6.    **Court Approval.** If, for any reason, this  
11 Consent Judgment is not approved by the Court, this Agreement  
12 shall be deemed null and void.

13           7.    **Nupla Sales Data.** Nupla understands that the  
14 sales data provided to counsel for DiPirro by Nupla was a  
15 ~~material factor upon which DiPirro has relied to determine the~~  
16 amount of payments made pursuant to Health & Safety Code  
17 §25249.7(b) in this Agreement. To the best of Nupla's  
18 knowledge, the sales data provided is true and accurate. In  
19 the event that DiPirro discovers facts which demonstrate to a  
20 reasonable degree of certainty that the sales data is  
21 materially inaccurate, the parties shall meet in a good faith  
22 attempt to resolve the matter within ten (10) days of Nupla's  
23 receipt of notice from DiPirro of his intent to challenge the  
24 accuracy of the sales data. If this good faith attempt fails  
25 to resolve DiPirro's concerns, DiPirro shall have the right to  
26 rescind the Agreement and re-institute an enforcement action  
27 against Nupla, provided that all sums paid by Nupla pursuant

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CONSENT JUDGMENT

1 to paragraphs 2 and 3 are returned to Nupla within ten (10)  
2 days from the date on which DiPirro notifies Nupla of his  
3 intent to rescind this Agreement. In such case, all  
4 applicable statutes of limitation shall be deemed tolled for  
5 the period between the date DiPirro filed the instant action  
6 and the date DiPirro notifies Nupla that he is rescinding this  
7 Agreement pursuant to this Paragraph.

8           8.    Product Characterization. Nupla acknowledges  
9 that each of the Brass Hammer Products listed in Exhibit A  
10 contains lead (or lead compounds) and Plaintiff alleges that  
11 the customary use or application of the Brass Hammer Products  
12 is likely to expose users to lead (or lead compounds), a  
13 substance known to the State of California to cause cancer  
14 and/or birth defects (or other reproductive harm). In the  
15 event that Nupla obtains analytical, ~~risk assessment~~ or other  
16 data ("Exposure Data") that shows an exposure to any or all  
17 Brass Hammer Products poses "no significant risk" or will have  
18 "no observable effect," as each such standard is applicable  
19 and as each is defined under Health & Safety Code §25249.10(c)  
20 and Nupla seeks to eliminate the warnings, then Nupla shall  
21 provide DiPirro with ninety (90) days prior written notice of  
22 its intent to limit or eliminate the warning provisions under  
23 this Agreement based on the Exposure Data and shall provide  
24 DiPirro with all such supporting Exposure Data. Within ninety  
25 (90) days of receipt of Nupla Exposure Data, DiPirro shall  
26 provide Nupla with written notice of his intent to challenge  
27 the Exposure Data (in the event that he chooses to make such a

28 CONSENT JUDGMENT

1 challenge). If DiPirro fails to provide Nupla written notice  
2 of his intent to challenge the Exposure Data within ninety  
3 (90) days of receipt of Nupla's notice and the Exposure Data,  
4 DiPirro shall waive all rights to challenge the Exposure Data,  
5 and Nupla shall be entitled to limit or eliminate the warning  
6 provisions required under this Agreement with respect to those  
7 Product(s) to which the Exposure Data applies. If DiPirro  
8 timely notifies Nupla of his intent to challenge the Exposure  
9 Data, DiPirro and Nupla (a) may stop its efforts to eliminate  
10 the warnings upon notice to DiPirro with no further liability  
11 or obligations or (b) shall negotiate in good faith for a  
12 period not to exceed thirty (30) days following receipt of  
13 Nupla's notice to attempt to reach a settlement of this issue.

14 If a settlement is not reached, DiPirro and Nupla agree to  
15 ~~submit such challenge to the superior court for determination,~~  
16 ~~pursuant to the court's continuing jurisdiction of this matter.~~  
17 under C.C.P. §664.6 and this Agreement. The prevailing party  
18 shall be entitled to reasonable attorneys' fees and costs  
19 associated with bringing a motion brought under this paragraph  
20 to the court for determination.

21 **9. Severability.** In the event that any of the  
22 provisions of this Agreement are held by a court to be  
23 unenforceable, the validity of the enforceable provisions  
24 shall not be adversely affected.

25 **10. Attorney's Fees.** In the event that a dispute  
26 arises with respect to any provision(s) of this Agreement  
27 (including, but not limited to, disputes arising from the late  
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CONSENT JUDGMENT

1 payments provisions in paragraphs 2 and 3), the prevailing  
2 party shall be entitled to recover costs and reasonable  
3 attorneys' fees.

4 11. **Governing Law.** The terms of this Agreement  
5 shall be governed by the laws of the State of California.

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

8 — — Jennifer Henry or David Bush  
9 Bush & Henry  
10 4400 Keller Ave., Suite 200  
Oakland, CA 94605  
(510) 577-0747

11 All correspondence to Nupla shall be mailed to:

12  
13 Kurt Weissmuller, Esq.  
14 Weston, Benshoof, Rochefort,  
Rubalcava & MacCuish LLP  
15 333 South Hope Street, 16<sup>th</sup> Floor  
Los Angeles, CA 90071  
16 (213) 576-1000

17  
18 13. **Compliance With Reporting Requirements (Health &**  
19 **Safety Code §25249.7(f)).** The parties agree to comply with the  
20 reporting form requirements referenced in Health & Safety Code  
21 §25249.7(f). DiPirro represents that his counsel will send a  
22 copy of this Agreement to the California Attorney General's  
23 Office within two days of the Effective Date. DiPirro shall  
24 present this Consent Judgment to the Alameda County Superior  
25 Court thirty (30) days after serving the Attorney General with  
26 a copy of this Consent Judgment, thereby allowing the Attorney  
27 General to serve any comments on this Consent Judgment prior  
28 to the end of the thirty (30)-day period.

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14. 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.

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

AGREED TO:  
DATE: 9/21/01


AGREED TO:  
DATE: \_\_\_\_\_

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

\_\_\_\_\_  
Nupla Corporation  
DEFENDANT

APPROVED AS TO FORM:  
DATE: 9/20/01

APPROVED AS TO FORM:  
DATE: \_\_\_\_\_

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

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Kurt Weissmuller  
Attorneys for Defendant  
NUPLA CORPORATION

CONSENT JUDGMENT

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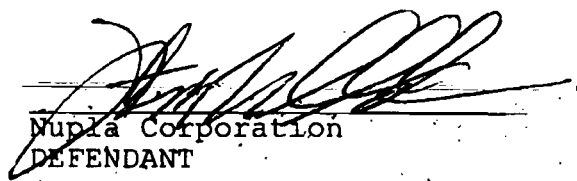
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DATE: \_\_\_\_\_

DATE: SEPT. 19, 2001

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

  
\_\_\_\_\_  
Nupia Corporation  
DEFENDANT

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

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

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

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

\_\_\_\_\_  
Kurt Weissmuller  
Attorneys for Defendant  
NUPLA CORPORATION

CONSENT JUDGMENT

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**AGREED TO:**  
DATE: \_\_\_\_\_

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

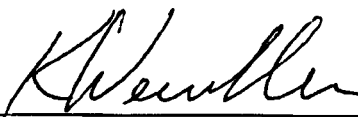
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Michael DiPirro  
PLAINTIFF

\_\_\_\_\_  
Nupla Corporation  
DEFENDANT

**APPROVED AS TO FORM:**  
DATE: \_\_\_\_\_

**APPROVED AS TO FORM:**  
DATE: 9/20/01

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

  
\_\_\_\_\_  
Kurt Weissmuller  
Attorneys for Defendant  
NUPLA CORPORATION

CONSENT JUDGMENT

# **Exhibit A**



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**EXHIBIT A**

1. Brass Hammer Products include all hammers manufactured by Nupla that have a brass hammer head that a normal user of the product would reasonably come in contact with when using the products, including product numbers:

688157	6894176	30-040	30-140	30-540	30-542
30-543	30-640	30-740	6030024	6881588	6894126
6894440	30-025	30-125	30-525	30-625	30-725
6030010	6881589	6894105	6894439	30-015	30-515
30-615	30-715	6030023			

The Brass Hammer Products also include versions of these products manufactured by Nupla that are branded for the following Nupla customers: J.H. Williams Co.; Armstrong Brothers Tool Co.; Gray Forgings & Stampings Ltd.; Martin Tool & Forge; Matco Tools Corp.; and Snap-on Tools Corp.

2. Non-sparking and non-marring hammer products include all hammers manufactured by Nupla that have no exposed metal so that a normal user would not reasonably come in contact with any brass components during use. These products include the following: non-marring hammers or mallets, soft-faced hammers or mallets, surface protective hammers or mallets, dead blow hammers or mallets, and any other non-metallic hammer or mallet including all non-sparking versions thereof. Non-sparking and non-marring hammers also include versions of these products manufactured by Nupla that are branded for Nupla's customers.

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