

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership
2 Including Professional Corporations
STEPHEN J. O'NEIL, CAL. BAR NO. 127120
3 333 South Hope Street, 48th Floor
Los Angeles, California 90071
4 Tel: (213) 620-1780
Fax: (213) 620-1398
5

6 Attorneys for Defendant
PIER 1 IMPORTS, INC.

7
8 SUPERIOR COURT OF CALIFORNIA
9 IN AND FOR THE COUNTY SAN FRANCISCO
10

11
12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 PIER 1 IMPORTS, INC.; and DOES 1
16 through 150,

17 Defendants.

Case No. CGC-02-413100
[Complaint Filed: October 3, 2002]

CONSENT JUDGMENT

18
19 This Consent Judgment ("Agreement" or "Consent Judgment") is entered into
20 by and between Michael DiPirro and PIER 1 IMPORTS (U.S.), INC., a subsidiary of Pier 1
21 Imports, Inc. (hereinafter referred to as "PIER 1"), as of December 6, 2002, (the "Effective
22 Date"). The parties agree to the following terms and conditions:
23

24 **WHEREAS:**

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

1 B. DiPirro alleges that PIER 1 is a company that offers for sale a certain
2 votive holder and photo frames that contain lead or lead compounds, a substance known to
3 the State of California to cause cancer and birth defects (or other reproductive harm);

4 C. A list of such PIER 1 products that DiPirro alleges contain lead (or lead
5 compounds) (the "Listed Chemical"), and which are covered by this Agreement, is provided
6 in Exhibit A (all such PIER 1 products to be collectively referred to hereinafter as the
7 "Products");

8 D. On April 23, 2001, Michael DiPirro first served PIER 1, and other
9 public enforcement agencies with a document entitled "60-Day Notice of Violation" that
10 provided PIER 1, and such public enforcers, with notice that PIER 1 was allegedly in
11 violation of Health & Safety Code § 25249.6 for failing to warn purchasers that the photo
12 frames (identified on Exhibit A) sold in California expose users to the Listed Chemical;

13 E. On December 7, 2001, Michael DiPirro served PIER 1 and other public
14 enforcement agencies with a second document entitled "60-Day Notice of Violation" that, in
15 addition to the allegations set forth in the April 23, 2001 Notice, provided PIER 1 and such
16 public enforcers with notice that PIER 1 was allegedly in violation of Health & Safety Code
17 § 25249.6 for failing to warn purchasers that the votive holder (identified on Exhibit A) sold
18 in California exposes persons to lead/lead compounds;

19 F. On July 6, 2001, Michael DiPirro filed a complaint entitled Michael
20 DiPirro v. PIER 1 et al. in the Alameda County Superior Court, naming PIER 1 as a
21 defendant and alleging violations of Business & Professions Code § 17200, as well as
22 Health & Safety Code § 25249.6 on behalf of individuals in California who allegedly have
23 been exposed to the Listed Chemical, listed pursuant to Proposition 65, contained in certain
24 products that PIER 1 distributes for sale. This case in Alameda shall be dismissed without
25 prejudice within ten (10) business days of the Effective Date of this Agreement; and

26 G. On October 3, 2002, Michael DiPirro filed a complaint entitled Michael
27 DiPirro v. Pier 1, et al. in the San Francisco Superior Court, naming PIER 1 as a defendant
28 and alleging violations of Business & Professions Code §§ 17200, 17500, as well as

1 Health & Safety Code § 25249 on behalf of individuals in California who allegedly have
2 been exposed to the Listed Chemical, listed pursuant to Proposition 65, contained in the
3 votive holder. The complaint in this case in San Francisco shall be amended by stipulation to
4 include the photo frames identified on Exhibit A within ten (10) business days of the
5 dismissal of the case presently pending in Alameda.

6 **NOW THEREFORE, MICHAEL DIPIRRO AND PIER 1 AGREE AS FOLLOWS:**

7 **1.0 Product Warnings.**

8 (a) Subject to Paragraph 1.0(b) below, beginning immediately after the
9 Effective Date of this Agreement, PIER 1 shall begin to revise its product packaging and
10 store display to ensure that all of the Products sold in California bear the following warning
11 statement:

12 **"WARNING:**

13 **This product contains lead, a substance known**
14 **to the State of California to cause cancer, and**
birth defects (or other reproductive harm).

15 In the alternative, PIER 1 may choose not to sell the Products in California,
16 and shall remove the Products from its stores in California within thirty (30) days from the
17 Effective Date.

18 (b) In no event shall PIER 1 offer any of the Products for sale in California
19 after thirty (30) days from the Effective Date, unless they are produced with lead-free solder
20 and came (defined below) or bear the warning statement listed in Paragraph 1.0(a). The
21 warning stated above may be placed on: (1) a product label or (2) the accompanying
22 packaging as a sticker so that it is likely to be read by an ordinary individual under
23 customary conditions of purchase for the Products. For purposes of this Consent Judgment,
24 a warning sticker placed on product packaging that is not available to the consumer before
25 purchase, or on product packaging that does not accompany the Products when purchased, is
26 not reasonably calculated to transmit the requisite warning and, thus, may not be used to
27 comply with this paragraph.

28

1 (c) Notwithstanding any other provision of this Agreement, no warning for
2 exposure to lead shall or need be provided by PIER 1 for: (1) any products offered by Pier 1
3 for sale in California containing 0.8 percent lead or less (by weight) in each material used in
4 the products (such as solder or came) or (2) any products that yield a result of less than
5 .5 micrograms (ugs) of lead by a ghost wipe test conducted on all metal portions of the
6 perimeter or other surface area of the product, performed as outlined in NIOSH method of
7 detection 9100. Nothing in this paragraph or this Consent Judgment shall be construed as
8 imposing a more stringent exposure threshold than is imposed under Proposition 65.

9 **1.1 Lead-Free Component Commitment.**

10 As part of its commitment to promote the public health, PIER 1 agrees, over
11 the next 12 months from the Effective Date, to use reasonable efforts to specify, or cause the
12 specification of, lead-free solder and came (solder and came containing 0.8% lead or less by
13 weight) whenever such materials are used in the products to be sold by PIER 1 in the state of
14 California. For purposes of this Agreement, the term "use reasonable efforts" shall mean
15 communicate in writing in its order documents, such as a purchase order, Pier 1's
16 requirement that the manufacturer utilize lead-free solder and came whenever such materials
17 are used in the products to be sold by Pier 1 in the state of California.

18 **1.2 Interim Health Safety Efforts**

19 To the extent that PIER 1 does not remove the Products from stores in
20 California, PIER 1, in an attempt to ensure that all Products already in the stream of
21 commerce contain the requisite health hazard warnings at the point of sale, agrees (1) to send
22 a written communication within 45 days of the Effective Date, with a copy to counsel for
23 plaintiff, to the appropriate person at any distribution center or warehouse that distributes the
24 Products to California and to each California retail store that has any inventory of any
25 Products after 30 days from the Effective Date, that explains such retail outlet's duty to
26 provide toxic warnings for the Products and includes a sufficient number of warning stickers
27 (with warning language from Paragraph 1.0(a)) and requires that they be placed on Products
28 still on PIER 1's sales floors or otherwise in PIER 1's inventory and (2) within 60 days of the

1 Effective Date, to have someone communicate in writing to each of said appropriate persons
2 (at any distribution center or warehouse that distributes Products to California and to each
3 California retail store that has any inventory of any Products after 30 days of the Effective
4 Date) to ensure receipt and compliance with the interim health safety efforts.

5 **2. Payment Pursuant To Health & Safety Code § 25249.7(b).**

6 Pursuant to Health & Safety Code § 25249.7(b), PIER 1 shall pay a civil
7 penalty of \$25,000 to be made in three payments: (1) \$10,000 within five business days of
8 the Effective Date; (2) \$5,000 on or before January 31, 2003; and (3) \$10,000 on or before
9 November 30, 2003. Mr. DiPirro agrees to waive the second payment, and PIER 1 shall not
10 be required to make the second payment, if PIER 1 certifies by declaration of an officer or
11 director to Mr. DiPirro, no later than January 31, 2003, that it has complied with the Interim
12 Health Safety provisions set forth in paragraph 1.2. Mr. DiPirro agrees to waive the third
13 payment, and PIER 1 shall not be required to make the third payment, if PIER 1 certifies by
14 declaration of an officer or director to Mr. DiPirro, no later than November 30, 2003, that it
15 has either (1) ceased ordering the Products for sale in California, or caused the Products to
16 be designed or reformulated so that no warning is necessary, pursuant to Section 1(c), on
17 Products it ordered after the Effective Date; or (2) has used "reasonable efforts," as defined
18 in Paragraph 1.1, and documented in a written report to be prepared by PIER 1 and
19 transmitted to Mr. DiPirro with the certification described above.

20 The penalty payment is to be made payable to "Sheffer & Chanler LLP In
21 Trust For Michael DiPirro". If the Consent Judgment is not approved by the Court, DiPirro
22 will return all funds, with interest thereon at the prevailing federal funds rate (currently set at
23 1.25% per annum), within five (5) calendar days of notice of the Court's decision. All
24 penalty monies shall be apportioned by DiPirro in accordance with Health & Safety Code
25 § 25192, with 75% of these funds remitted to the State of California's Department of Toxic
26 Substances Control.

1 **3.0 Reimbursement of Fees and Costs.**

2 The parties acknowledge that DiPirro and his counsel offered to resolve this
3 dispute without reaching terms on the amount of fees and costs to be reimbursed to them,
4 thereby leaving this fee issue to be resolved after the material terms of the agreement had
5 been settled. PIER 1 then expressed a desire to resolve the fee and cost issue shortly after
6 the other settlement terms had been finalized. The parties then attempted to (and did) reach
7 an accord on the compensation due to DiPirro and his counsel under the private attorney
8 general doctrine codified at C.C.P. § 1021.5 for all work performed through the Effective
9 Date of the Agreement.

10 Under the private attorney general doctrine codified at C.C.P. § 1021.5,
11 PIER 1 shall reimburse DiPirro and his counsel for his fees and costs, incurred as a result of
12 investigating, bringing this matter to PIER 1's attention, litigating and negotiating a
13 settlement in the public interest. PIER 1 shall pay DiPirro and his counsel \$32,800 except as
14 provided for in paragraph 3.1 to 3.6 below, for all attorneys' fees, expert and investigation
15 fees, and litigation costs, within five business days of the Effective Date. Payment should be
16 made payable to "Sheffer & Chanler LLP". If the Consent Judgment is not approved by the
17 Court, DiPirro and Sheffer & Chanler LLP will return all funds, with interest' thereon at the
18 prevailing federal funds rate (currently set at 1.25% per annum), within five (5) calendar
19 days of notice of the Court's decision.

20 **3.1 Additional Fees and Costs in Seeking Judicial Approval.**

21 The parties acknowledge that, pursuant to recent interpretations of Health &
22 Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
23 Agreement. Accordingly, the parties agree to use their best efforts to file a *Joint Motion to*
24 *Approve the Agreement* within a reasonable period of time after execution of this
25 Agreement. Best efforts shall mean that PIER 1 shall send to DiPirro an initial draft of the
26 Motion To Approve within ten (10) business days of receiving a motion template from
27 plaintiff. Best efforts shall also mean that PIER 1 agrees to return any modifications or
28 comments on subsequent drafts received from plaintiff within five (5) business days of their

1 receipt. Pursuant to C.C.P. § 1021.5, PIER 1 agrees to reimburse DiPirro and his counsel
2 for their reasonable fees and costs incurred in seeking judicial approval of this Agreement, to
3 the extent described in paragraphs 3.2 through 3.6.

4 **3.2** If no opposition to the motion to approve (nor objection to the terms of
5 the Agreement) is filed or otherwise transmitted by any third party, PIER 1 agrees to
6 reimburse DiPirro under Paragraph 3.1, for additional reasonable fees and costs in an
7 amount not to exceed \$4,800.00.

8 **3.3** In the event that any third party, including any public enforcer, objects
9 or otherwise comments to one or more provisions of this Agreement, PIER 1 agrees to use its
10 reasonable efforts to support each of the terms of the Agreement, as well as to cooperate
11 with DiPirro in seeking judicial approval of this Agreement.

12 **3.4** In the event that such an objection or opposition is transmitted or filed
13 by any third party, PIER 1 agrees to reimburse DiPirro under Paragraph 3.1, in addition to
14 any reasonable fees and costs due under Paragraph 3.2, for his additional reasonable
15 attorneys' fees and costs incurred in securing approval of this Consent Judgment in an
16 amount not to exceed \$2,500.00.

17 **3.5** In the event that defending this Agreement from such objection or
18 opposition from any third party requires a declaration from an expert, then PIER 1 agrees to
19 reimburse DiPirro, in addition to any attorney's fees and costs under Paragraph 3.2 or 3.4,
20 for such expert's reasonable fees and costs in an amount not to exceed \$2,000.00.

21 **3.6** PIER 1's payment of DiPirro's legal fees and costs pursuant to
22 Paragraphs 3.1-3.5 shall be due within twenty (20) calendar days after receipt of a billing
23 statement (that provides, at a minimum, the amount of hours each professional and
24 paraprofessional has worked and an itemization of the costs incurred) from DiPirro
25 ("Additional Fee Claim"). DiPirro shall provide detailed billing statements to PIER 1 for
26 any charges made pursuant to this Paragraph 3. Payment of the Additional Fee Claim shall
27 be made payable to the "Sheffer & Chanler LLP" PIER 1 has the right to object to DiPirro's
28 reimbursement request and may submit the resolution of this issue to the American

1 Arbitration Association (AAA) to determine the reasonableness of the additional fees and
2 costs sought. Any arbitration claim on this issue of reimbursement for the Additional Fee
3 Claim must be filed with AAA and served on DiPirro within ten (10) calendar days
4 following DiPirro's service of the Additional Fee Claim on PIER 1. If an arbitration notice is
5 not filed with AAA in a timely manner, PIER 1's right to arbitrate this matter is waived.
6 DiPirro may then file a motion, pursuant to C.C.P. § 1021.5, with the Court seeking his (and
7 his attorneys') fees and costs incurred as set forth in this paragraph.

8 **4. Michael DiPirro's Releases.**

9 (a) **PIER 1:** Michael DiPirro, by this Agreement, on behalf of himself, his
10 agents, representatives, attorneys, assigns, and in the interest of the general public, waives all
11 rights to institute or participate in, directly or indirectly, any form of legal action, and
12 releases all claims, liabilities, obligations, losses, costs, expenses, fines, penalties, fees, and
13 damages, restitution, injunction, and any other form of relief, whether legal or equitable,
14 against PIER 1 and its directors, officers, employees, agents, parents, subsidiaries, affiliates
15 (as such term is defined by the United States Securities & Exchange Commission),
16 successors and assigns, whether under Proposition 65 or the Business & Profession Code
17 § 17200 or § 17500, inter alia, based on their alleged failure to warn about exposure to the
18 Listed Chemical contained in any of PIER 1's products.

19 (b) This Agreement is a full, final, and binding resolution between DiPirro,
20 on behalf of himself and in the interest of the general public, and PIER 1, of any violation of
21 Proposition 65, Business & Professions Code §§ 17200 or 17500, inter alia, or any other
22 claim that could have been asserted based on alleged failure to warn for exposure to lead in
23 PIER 1's products or other facts alleged in the Complaint. The parties intend that
24 compliance with this Agreement will resolve any issue now, in the past, or in the future
25 concerning the products' past and present, and future (up to the date of compliance
26 established in Paragraph 1, above, and in the future so long as PIER 1 complies with this
27 Agreement) compliance with Proposition 65 as such compliance pertains to PIER 1's
28 products. In addition, DiPirro, on behalf of himself, his attorneys, and his agents, waives all

1 rights to institute any form of legal action against PIER 1 and its attorneys or representatives,
2 for all actions or statements made by PIER 1 or its attorneys or representatives, in the course
3 of responding to alleged violations of Proposition 65 or Business & Profession Code
4 § 17200 and § 17500 by PIER 1 Provided, however, that DiPirro shall remain free to
5 institute any form of legal action to enforce the provisions of this Consent Judgment.

6 **5. PIER 1's Release of Michael DiPirro.** PIER 1, by this Agreement,
7 waives all rights to institute any form of legal action against Michael DiPirro and his
8 attorneys or representatives, for all actions or statements made by Michael DiPirro or his
9 attorneys or representatives, in the course of seeking enforcement of Proposition 65 or
10 Business & Profession Code § 17200 and § 17500 against PIER 1 in this litigation.
11 Provided, however, that PIER 1 shall remain free to institute any form of legal action to
12 enforce the provisions of this Consent Judgment.

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

15 **7. PIER 1 Sales Data.** PIER 1 understands that the sales data provided to
16 counsel for DiPirro by PIER 1 was a material factor upon which DiPirro has relied to
17 determine the amount of payments made pursuant to Health & Safety Code § 25249.7(b) in
18 this Agreement. To the best of PIER 1's knowledge, the sales data provided is true and
19 accurate. In the event that DiPirro discovers facts that demonstrate to a reasonable degree of
20 certainty that the sales data is materially inaccurate, the parties shall meet in a good faith
21 attempt to resolve the matter within ten (10) business days of PIER 1's receipt of notice from
22 DiPirro of his intent to challenge the accuracy of the sales data. If this good faith attempt
23 fails to resolve DiPirro's concerns, DiPirro shall have the right to re-institute an enforcement
24 action against PIER 1, for those additional Products, based upon any existing 60-Day
25 Notices of violation served on PIER 1. In such case, all applicable statutes of limitation
26 shall be deemed tolled for the period between the date DiPirro filed the instant action and the
27 date DiPirro notifies PIER 1 that he is re-instituting the action for the additional Products.
28 Provided, however, that PIER 1 shall have no additional liability, and DiPirro waives any

1 claims that might otherwise be asserted, from the Effective Date until the date that DiPirro
2 provides notice under this Paragraph 7, so long as PIER 1 has complied with the
3 requirements of Paragraph 2 for all of the Products, including those numbers of Products
4 additionally discovered.

5 **8. Severability.** In the event that any of the provisions of this Agreement
6 is held by a court to be unenforceable, the validity of the enforceable provisions shall not be
7 adversely affected.

8
9 **9. No Explicit or Implied Admissions.** Nothing in this Agreement shall
10 be construed as an admission by PIER 1 of any fact, finding, issue of law or violation of law,
11 nor shall compliance with this Agreement constitute or be construed as an admission by
12 PIER 1 of any fact, finding, conclusion, issue of law or violation of law. However, this
13 paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties
14 of PIER 1 under this Agreement.

15 **10. Attorney's Fees.** In the event that a dispute arises with respect to any
16 provision(s) of this Agreement (including, but not limited to, disputes arising from payments
17 to be made under this Agreement), reasonable attorneys' fees incurred from the resolution of
18 such dispute shall be available to the prevailing party. This provision, however, shall not
19 apply to the procedure set forth in Paragraphs 3.1 to 3.6 which are to be governed by the
20 principles of C.C.P. § 1021.5.

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

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

24 Gregory M. Sheffer, Esq.
25 Sheffer & Chanler LLP
26 4400 Keller Ave., Suite 200
27 Oakland, CA 94605
28 Tel: (510) 577-0747

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

All correspondence to PIER 1 shall be mailed to:

Stephen J. O'Neil
Sheppard, Mullin, Richter & Hampton LLP
333 South Hope St., 48th Floor
Los Angeles, CA 90071-1448
Tel: (213) 620-1780

with a copy to:

Pier 1 Imports
Legal Department
301 Commerce Street, Suite 600
Ft. Worth, TX 76102

13. Compliance With Reporting Requirements (Health & Safety Code § 25249.7(f)). The parties acknowledge that the reporting provisions of Health & Safety Code § 25249.7(f) apply to this Consent Judgment. Counsel for DiPirro shall comply with that Paragraph by submitting the required reporting form to, and serving a copy of this Consent Judgment on, the California Attorney General's Office when noticing the Motion to Approve hearing, if one is required by law. Counsel for DiPirro shall submit the Consent Judgment to the Court in accordance with the requirements of Health & Safety Code § 25249.7(f) and its implementing regulations, thereby allowing the Attorney General to serve any comments to this Consent Judgment prior to the end of the review period.

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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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:

AGREED TO:

DATE: 12/11/02

DATE: _____



PIER 1 IMPORTS (U.S.), INC.

By: _____

Michael DiPirro
PLAINTIFF

Name: _____

Title: _____

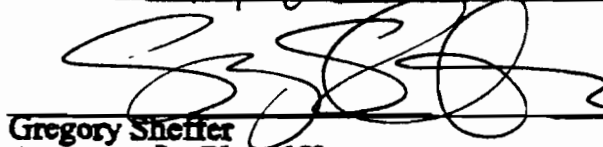
DEFENDANT

APPROVED AS TO FORM:

APPROVED AS TO FORM:

DATE: 12/11/02

DATE: _____



Gregory Sheffer
Attorneys for Plaintiff
MICHAEL DIPIRRO

Stephen J. O'Neil
Sheppard, Mullin, Richter & Hampton LLP
Attorneys for Defendant
PIER 1

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

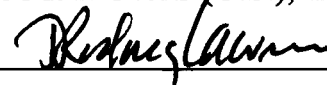
4 **AGREED TO:**
5
6 DATE: _____
7
8 _____

9 Michael DiPirro
10 PLAINTIFF

11 **APPROVED AS TO FORM:**
12
13 DATE: _____

14
15 Gregory Sheffer
16 Attorneys for Plaintiff
17 MICHAEL DIPIRRO

AGREED TO:
DATE: December 6, 2002

PIER 1 IMPORTS (U.S.), INC.
By: 
Name: ROONEY LAWRENCE
Title: EXEC. VICE PRESIDENT

DEFENDANT
APPROVED AS TO FORM:
DATE: December 10, 2002

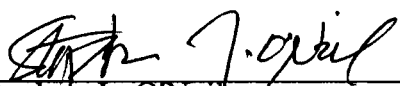

Stephen J. O'Neil
Sheppard, Mullin, Richter & Hampton LLP
Attorneys for Defendant
PIER 1

Exhibit A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Products:

Photo frame with flowers, SKUs 1867752 (4" x 6") and 1867737 (3" x 3")

Dragonfly votive holder, SKU 1810898