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Attorneys for Defendant  
W. Atlee Burpee & Co.

SUPERIOR COURT OF CALIFORNIA - COUNTY OF ALAMEDA

MICHAEL DiPIRRO,

Plaintiff,

vs.

W. ATLEE BURPEE & CO.; and  
DOES 1 through 1000,

Defendants.

No. H-221281-0

**CONSENT JUDGMENT**

**1. INTRODUCTION**

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

1           1.2   Between approximately January 19, 2001 through March 31, 2001,  
2   W. Atlee Burpee & Co. ("Burpee") distributed or sold in the State of California  
3   certain lead climbing nails (hereafter referred to as the "Products") that contain  
4   lead, a chemical listed pursuant to Proposition 65 (California Health & Safety Code  
5   §§25249.5 et seq.) (the "Listed Chemical").

6           1.3   On April 23, 2001, DiPirro first served Burpee and all of the requisite  
7   public enforcement agencies with a document entitled "60-Day Notice" which  
8   provided Burpee and such public agencies with notice that Burpee was allegedly in  
9   violation of Health & Safety Code §25249.6 for failing to warn purchasers that the  
10   Products exposed users to the Listed Chemical.

11          1.4   On or about May 1, 2001, Burpee ceased all sales of the Products to  
12   any purchaser in the State of California.

13          1.5   On July 5, 2001, DiPirro filed a complaint entitled Michael DiPirro v.  
14   W. Atlee Burpee & Co., in the Superior Court in and for the County of Alameda,  
15   naming Burpee and various Does as defendants and alleging violations of Business  
16   & Professions Code §17200 et seq., and Health & Safety Code §25249 et seq., on  
17   behalf of individuals in California who allegedly have been exposed to the Listed  
18   Chemical contained in the Products.

19          1.6   On July 10, 2001, Burpee sent letters to all Californians who had  
20   purchased the Products, advising them that the Products contained lead and that  
21   lead is one of the chemicals listed under Proposition 65 as a carcinogen and a  
22   reproductive toxicant. Those letters enclosed gift certificates that were good  
23   towards future Burpee catalog purchases and provided a toll free telephone number  
24   that the purchasers could call if they had any questions or wanted a refund. Lastly,  
25   the letters set forth a warning that stated:

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

1                   **Do not place climbing nails in your mouth. Do not place your hands in**  
2                   **your mouth after handling the nails. Wash your hands after touching**  
3                   **the nails.**

4           1.7   Burpee denies the material factual and legal allegations contained in  
5           the 60-Day Notice and the Complaint filed by DiPirro for alleged violations of  
6           Proposition 65 and Business & Professions Code §17200 et seq., and maintains  
7           that all Products distributed or sold by Burpee in California have been and are in  
8           compliance with all laws.

9           1.8   For purposes of this Consent Judgment, the term "Effective Date"  
10           shall mean December 11, 2001.

11           **2.    INJUNCTIVE RELIEF**

12           2.1   **Product Labeling.** After the Effective Date, Burpee shall not knowingly  
13           ship (or cause to be shipped) to California for sale or distribution any Product that it  
14           knows contains lead (or lead compounds) unless each such Product is accompanied  
15           by a Revised Label on or within the Product package, or affixed to the Product that  
16           states:

17                   **"WARNING: This product contains lead, a chemical known to the**  
18                   **State of California to cause cancer and birth defects**  
19                   **(or other reproductive harm)."**

20                   or

21                   **"WARNING: This product contains a chemical known to the State**  
22                   **of California to cause cancer and birth defects (or other**  
23                   **reproductive harm)."**

24           The warning statement shall be prominent and displayed with such  
25           conspicuousness, as compared with other words, statements, or designs, as to  
26           render it likely to be read and reasonably understood by an ordinary individual under  
27           customary conditions of purchase or use. For purposes of this Consent Judgment,  
28           "Revised Label" does not include an MSDS form that otherwise meets the  
              requirements of Section 2. The labeling revisions may be made in the form of an

1 adhesive sticker, stamp or permanent changes to the outside packaging of the  
2 product package.

3  
4       **2.2** Burpee acknowledges that each of the Products contains lead (or lead  
5 compounds) and DiPirro alleges that the customary use or application of the  
6 Products is likely to expose users to lead (or lead compounds). In the event that  
7 Burpee obtains analytical, risk assessment or other data ("Exposure Data") that  
8 shows that an exposure to any or all of the Products poses "no significant risk" or  
9 will have "no observable effect," as each such standard is applicable and as each is  
10 defined under Health & Safety Code §25249.10(c), Burpee shall provide DiPirro  
11 with 90 days prior written notice of its intent to limit or eliminate the Revised  
12 Labels under this Consent Judgment based on the Exposure Data and shall provide  
13 DiPirro with all such supporting Exposure Data. Within thirty (30) days of receipt of  
14 Burpee's Exposure Data, DiPirro shall provide Burpee with written notice of his  
15 intent to challenge the Exposure Data (in the event that he chooses to make such a  
16 challenge). If DiPirro fails to provide Burpee written notice of his intent to challenge  
17 the Exposure Data within thirty (30) days of receipt of Burpee's notice and the  
18 Exposure Data, DiPirro shall waive all rights to challenge the Exposure Data, and  
19 Burpee shall be entitled to limit or eliminate the Revised Labels required under this  
20 Consent Judgment with respect to those Product(s) to which the Exposure Data  
21 applies. If DiPirro timely notifies Burpee of his intent to challenge the Exposure  
22 Data, DiPirro and Burpee shall negotiate in good faith to attempt to reach a  
23 settlement. In the event that no settlement is reached within thirty (30) days of  
24 mailing by DiPirro of such notice of challenge, DiPirro and Burpee agree to submit  
25 such challenge to the Court for determination, pursuant to the Court's continuing  
26 jurisdiction of this matter under California Code of Civil Procedure Section 664.6  
27 and this Consent Judgment. The prevailing party shall be entitled to reasonable  
28 attorneys' fees and costs associated with such a determination. If DiPirro does not

challenge Burpee's notice or the Court determines that no warning is required for particular Products, Burpee shall no longer be required to provide the warnings described in this Consent Judgment for those Products.

### 3. MONETARY PAYMENTS

3.1 Civil Penalty. Subject to the limitations set forth below, Burpee shall, pursuant to Health & Safety Code §25249.7(b), pay a civil penalty of \$1,000. The payment of \$1,000 shall be made to DiPirro within twenty-five (25) calendar days of the Effective Date and shall be held in trust by DiPirro's counsel until the Alameda County Superior Court approves and enters the Consent Judgment. The penalty payment is to be made payable to the "Chanler Law Group in Trust for Michael DiPirro".

3.2 Any penalty monies received shall be apportioned by DiPirro in accordance with Health & Safety Code § 25192, with 75% of these funds remitted to the State of California. DiPirro shall bear all responsibility for apportioning and paying to the State of California the appropriate civil penalties paid in accordance with this paragraph. In the event this Consent Judgment is not entered, any payment made pursuant to this paragraph shall be returned to Burpee, with interest thereon at a rate of six percent (6%) per annum, within ten (10) days of receipt of notice of the Court's rejection of this proposed Consent Judgment.

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

1 p.m. (PST).

2  
3 **4. REIMBURSEMENT OF FEES AND COSTS**

4 **4.1** The parties acknowledge that DiPirro offered to resolve the dispute  
5 without reaching terms on the amount of fees and costs to be reimbursed, thereby  
6 leaving this open issue to be resolved after the material terms of the agreement had  
7 been reached, and the matter settled. Burpee then expressed a desire to resolve  
8 the fee and cost issue concurrently with other settlement terms, so the parties tried  
9 to (and did) reach an accord on the compensation due to DiPirro and his counsel  
10 under the private attorney general doctrine codified at C.C.P. §1021.5.

11 **4.2** Burpee shall reimburse DiPirro and his counsel for his fees and costs,  
12 incurred as a result of investigating, bringing this matter to Burpee's attention,  
13 litigating and negotiating a settlement in the public interest. Burpee shall pay  
14 \$13,800 for all attorneys' fees, expert and investigation fees, and litigation costs.  
15 Burpee agrees to pay \$13,800 within twenty-five (25) calendar days of the  
16 Effective Date. Such sum shall be held in trust by DiPirro's counsel until the  
17 Alameda County Superior Court approves and enters the Consent Judgment. If the  
18 Consent Judgment is not approved by the Court, DiPirro will return all funds, with  
19 interest thereon at a rate of six percent (6%) per annum, within ten (10) calendar  
20 days of notice of the Court's decision. Payment should be made payable to the  
21 "Chanler Law Group".

22 **4.3** Burpee understands that the payment schedule as stated in this  
23 Consent Judgment is a material factor upon which DiPirro and his counsel have  
24 relied in entering into this Consent Judgment. Burpee agrees that all payments will  
25 be made in a timely manner in accordance with the payment due dates. Burpee will  
26 be given a five (5) calendar day grace period from the date payment is due. Burpee  
27 agrees to pay Michael DiPirro and his counsel a \$250 per calendar day fee for each  
28 day the payment is received after the grace period ends. For purposes of this

1 paragraph, each new day (requiring an additional \$250 payment) will begin at 5  
2 p.m. (PST).

3 **4.4 Additional Contingent Fees and Costs.** In the event that the California  
4 Attorney General's Office, pursuant to 11 CCR 3000 *et seq.*, serves objections to  
5 this Consent Judgment on either of the parties, such that it requires DiPirro to incur  
6 additional legal fees or costs relating to this Consent Judgment, Burpee shall  
7 reimburse DiPirro for reasonable fees and costs incurred by DiPirro and his counsel  
8 in excess of \$1,500 from the date of receipt of the Attorney General's objections.  
9 Such additional legal fees or costs relating to this Consent Judgment include, but  
10 are not limited to: further editing and finalizing of the Consent Judgment;  
11 corresponding with opposing counsel; retention of experts; and presenting of the  
12 Consent Judgment (or any modifications thereof) to the Attorney General for  
13 further comment; and any briefing and/or appearance before the Court related to  
14 this Consent Judgment.

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

20 Such additional reimbursement of legal fees and costs shall be due within  
21 ten (10) calendar days after receipt by Burpee of both notice of Court approval of  
22 the Consent Judgment and final billing statement from DiPirro. Burpee has the right  
23 to object to such reimbursement. If Burpee does object, it shall notify DiPirro's  
24 counsel in writing within five (5) calendar days of its receipt of both the notice of  
25 the Court's approval of the Consent Judgment and DiPirro's billing statement. The  
26 parties shall meet and confer in good faith to resolve the dispute. If the dispute is  
27 not resolved within twenty-one (21) calendar days, either party may submit the  
28 dispute to the Court, pursuant to the Court's continuing jurisdiction to implement

1 the terms of this Consent Judgment. The parties may also agree to resolve the  
2 dispute through mediation, arbitration or other neutral third party dispute resolution  
3 proceeding.

4  
5 **5. RELEASE OF ALL CLAIMS**

6 **5.1 DiPirro's Release of Burpee.** In further consideration of the promises  
7 and agreements herein contained, and for the payments to be made pursuant to  
8 Sections 3 and 4, DiPirro, on behalf of himself, his agents, representatives,  
9 attorneys, assignees, and in the interest of the general public, hereby waives all  
10 rights to institute and participate in, directly or indirectly, any form of legal action  
11 and releases all claims, including, without limitation, all actions, causes of action, in  
12 law or in equity, suits, liabilities, demands, damages, fines, penalties, losses or  
13 expenses (including investigation fees, expert fees and attorneys' fees and other  
14 costs) of any nature whatsoever, whether known or unknown, fixed or contingent  
15 (collectively, "Claims"), against Burpee and any of its parent companies, divisions,  
16 subdivisions, subsidiaries and affiliates (as the term "affiliates" is defined by the  
17 Securities and Exchange Commission) (and the predecessors, successors and  
18 assigns of any of them), and their respective officers, directors, attorneys,  
19 representatives, shareholders, partners, agents, and employees (collectively,  
20 "Burpee Releasees"). This waiver and release shall pertain to Claims arising under  
21 Proposition 65 or Business & Professions Code §17200 et seq., related to the  
22 Burpee Releasees alleged failure to warn about exposures on or before the Effective  
23 Date to the Listed Chemical contained in any of the Products. It is specifically  
24 understood and agreed that Burpee's compliance with the terms of this Consent  
25 Judgment resolves all issues and liability, now and in the future, concerning past  
26 compliance by the Burpee Releasees with the requirements of Proposition 65 or  
27 Business & Professions Code §17200 et seq., with respect to the Listed Chemical  
28 and the Products.



1           **5.2    DiPirro's Release of "Downstream Persons."** DiPirro, on behalf of  
2 himself, his agents, assignees and in the interest of the general public, further  
3 waives all rights to institute any form of legal action and releases all Claims against  
4 each distributor, wholesaler, retailer, dealer, customer, owner, operator, lessor,  
5 lessee or user of the Products, or any of their respective parent, divisions,  
6 subdivisions, subsidiaries and affiliates (as the term "affiliates" is defined by the  
7 Securities and Exchange Commission) (and the predecessors, successors and  
8 assigns of any of them) and their respective officers, directors, shareholders,  
9 partners, attorneys, representatives, agents, employees (collectively, "Downstream  
10 Persons"). This waiver and release shall pertain to Claims arising under  
11 Proposition 65 or Business & Professions Code §17200 et seq., related to the  
12 Downstream Persons' alleged failure to warn about exposures on or before the  
13 Effective Date to the Listed Chemical contained in any of the Products. It is  
14 specifically understood and agreed that this Consent Judgment resolves all issues  
15 and liability, now and in the future, concerning the Downstream Persons' past  
16 compliance with the requirements of Proposition 65 or Business & Professions Code  
17 §17200, et seq. with respect to the Listed Chemical and the Products.

18           **5.3    Burpee's Release of DiPirro.** Burpee waives all rights to institute any  
19 form of legal action against DiPirro or his attorneys or representatives, for any and  
20 all actions taken or statements made on or before the Effective Date by DiPirro, in  
21 the course of seeking enforcement of Proposition 65 or Business & Professions  
22 Code §17200, et seq. against Burpee.

23  
24           **6.       BURPEE'S SALES DATA**

25           **6.1** Burpee understands that the Product sales (and other) information  
26 provided to counsel for DiPirro by Burpee was a material factor upon which DiPirro  
27 has relied to determine a fair and reasonable settlement. To the best of Burpee's  
28 knowledge, the information provided is true and accurate. In the event DiPirro

1 discovers facts which demonstrate to a reasonable degree of certainty that the  
2 information is materially inaccurate, all other parts of this Consent Judgment  
3 notwithstanding, DiPirro shall have the right to move to vacate this Consent  
4 Judgment and re-institute an enforcement action against Burpee, provided that all  
5 sums paid by Burpee pursuant to Section 3.1 and 4.2 are returned to Burpee, with  
6 interest thereon at a rate of six percent (6%) per annum, within five (5) days from  
7 the date on which DiPirro notifies Burpee of his intent to move to vacate this  
8 Consent Judgment. In such case, all applicable statutes of limitation shall be  
9 deemed tolled for the period between the date DiPirro filed the instant action and  
10 the date DiPirro notifies Burpee that he is seeking to vacate this Consent Judgment  
11 pursuant to this paragraph, provided that, in no event shall any statute of limitation  
12 be tolled beyond four (4) years from the date this action was filed.  
13

#### 14 **7. COURT APPROVAL**

15 **7.1** If the Consent Judgment is not approved and entered by the Court  
16 within 300 days of the Effective Date, it shall be deemed null and void as of the  
17 three hundred and first (301st) day after the Effective Date and cannot be used in  
18 any proceeding.  
19

#### 20 **8. SEVERABILITY**

21 **8.1** In the event that any of the provisions of this Consent Judgment are  
22 held by a court to be unenforceable, the validity of the enforceable provisions  
23 remaining shall not be adversely affected thereby.  
24

#### 25 **9. ATTORNEY'S FEES**

26 **9.1** In the event a dispute arises with respect to any provision(s) of this  
27 Consent Judgment, the prevailing party shall be entitled to recover costs and  
28 reasonable attorneys' fees.

1     **10.   GOVERNING LAW**

2             **10.1** The terms of this Consent Judgment shall be governed by the laws of  
3 the State of California. In the event that Proposition 65 is repealed or is otherwise  
4 rendered inapplicable by reason of law generally, or as to the Products specifically,  
5 Burpee shall have no further obligations pursuant to this Consent Judgment with  
6 respect to, and to the extent that, those Products are so affected.

7  
8     **11.   NOTICES**

9             **11.1** All correspondence and notices required to be provided pursuant to  
10 this Consent Judgment shall be in writing and shall be personally delivered or sent  
11 by first-class, registered, certified mail, overnight courier, and/or via facsimile  
12 transmission (with presentation of facsimile transmission confirmation) addressed  
13 as follows:

14             If to DiPirro:             David Bush  
15   Bush & Henry  
16   4400 Keller Ave  
   Oakland, CA 94605  
   (Fax) 510/577-0787

17             If to Burpee:             A. Stuart Hopkins  
18   Vice-President – Human Resources  
19   W. Atlee Burpee & Co.  
20   300 Park Avenue  
   Warminster, PA 18974  
   (fax) 215/674-5004

21             with a copy to:           John E. Dittoe, Esq.  
22   Crosby, Heafey, Roach & May  
23   1999 Harrison Street  
   P.O. Box 2084  
   Oakland, CA 94604-2084  
   (Fax) 510/273-8832

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

26  
27     **12.   NO ADMISSIONS**

28             **12.1** Nothing in this Consent Judgment shall constitute or be construed as

1 an admission by Burpee of any fact, finding, conclusion, issue of law, or violation of  
2 law, nor shall compliance with this Consent Judgment constitute or be construed  
3 as an admission by Burpee of any fact, finding, conclusion, issue of issue of law, or  
4 violation of law, such being specifically denied by Burpee. Burpee reserves all of its  
5 rights and defenses with regard to any claim by any party under Proposition 65 or  
6 otherwise. However, this Paragraph shall not diminish or otherwise affect the  
7 obligations, responsibilities, and duties of Burpee under this Consent Judgment.  
8

### 9 **13. ENTIRE AGREEMENT; MODIFICATION**

10 **13.1** This Consent Judgment constitutes the entire agreement between the  
11 parties relating to the rights and obligations herein granted and assumed, and  
12 supersedes all prior agreements and understandings between the parties. This  
13 Consent Judgment may be modified only upon the written agreement of the parties  
14 or motion to the court, with good cause shown.  
15

### 16 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

17 **14.1** This Consent Judgment may be executed in counterparts and by  
18 facsimile, each of which shall be deemed an original, and all of which, when taken  
19 together, shall constitute one and the same document.  
20

### 21 **15. COMPLIANCE WITH REPORTING REQUIREMENTS**

22 **15.1** The parties acknowledge that the reporting provisions of Health &  
23 Safety Code § 25249.7(f) apply to this Consent Judgment. Counsel for DiPirro  
24 shall comply with that section by submitting the required reporting form to, and  
25 serving a copy of this Consent Judgment on, the California Attorney General's  
26 Office within two business days after the parties execute this Consent Judgment.  
27 Following the expiration of the Attorney General's thirty-day review period, counsel  
28 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, unless the parties cannot agree that all of the Attorney General's objections, if any, cannot be reasonably cured.

**16. AUTHORIZATION**

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

DATE: 12/12/01

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

  
Plaintiff Michael DiPirro

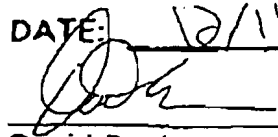
\_\_\_\_\_  
A. Stuart Hopkins  
Vice-President - Human Resources  
Defendant W. Atlee Burpee & Co.

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

DATE: 12/14/01

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

  
David Bush  
Attorneys for Plaintiff  
Michael DiPirro

\_\_\_\_\_  
John E. Dittoe  
Attorneys for Defendant  
W. Atlee Burpee & Co.

CROSS INK, REACH & DAY  
PROFESSIONAL CORPORATION

1 requirements of Health & Safety Code § 25249.7(f) and its implementing  
2 regulations, unless the parties cannot agree that all of the Attorney General's  
3 objections, if any, cannot be reasonably cured.


4  
5 **16. AUTHORIZATION**

6 **16.1** The undersigned are authorized to execute this Consent Judgment on  
7 behalf of their respective parties and have read, understood and agree to all of the  
8 terms and conditions of this Consent Judgment.

9  
10 **DATE:** \_\_\_\_\_

**DATE:** 12/11/2001

11  
12  
13 \_\_\_\_\_  
14 Plaintiff Michael DiPirro

  
A. Stuart Hopkins  
Vice-President - Human Resources  
Defendant W. Atlee Burpee & Co.

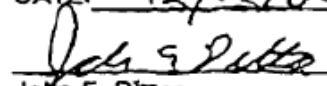
15  
16  
17 **APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

18 **DATE:** \_\_\_\_\_

**DATE:** 12/13/01

19  
20 \_\_\_\_\_  
21 David Rush  
22 Attorneys for Plaintiff  
23 Michael DiPirro

  
John E. Dittus  
Attorneys for Defendant  
W. Atlee Burpee & Co.