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8 Attorneys for Defendant  
9 Wagner Spray Tech Corporation  
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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

11	_____	)	Case No. H221315-0
12	MICHAEL DIPIRRO,	)	
13		)	<b>CONSENT JUDGMENT</b>
14	vs.	)	<b>[PROPOSED]</b>
15	WAGNER SPRAY TECH., et al.,	)	
16	Defendants.	)	

1. INTRODUCTION

1.1. On July 9, 2001, Plaintiff Michael DiPirro filed a complaint in the Superior Court for County of Alameda against Wagner Spray Tech Corporation (hereinafter "Settling Defendant"). The complaint alleges that Settling Defendant violated The Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"), *Health and Safety Code* § 25249.5, et seq., and *Business & Professions Code* § 17200 et seq. ("The Unfair Competition Law" or "UCL").

1.2. Plaintiff acts in the interest of the general public of the State of California only as to those matters described in the complaint, and 60-day Notice Letter that Plaintiff sent to Settling Defendant and public enforcers on April 23, 2001 as required by *Health and Safety Code* § 25249.7.

1        1.3.   Settling Defendant distributes and sells power drills ("Covered  
2   Products").   The complaint alleges that the Covered Products expose individuals  
3   in California to fumes, gases or dust which contain chemicals listed pursuant to  
4   Proposition 65 as "known to the State of California" to cause cancer and/or birth  
5   defects or other reproductive toxicity, including lead (or lead compounds),  
6   crystalline silica, arsenic and chromium (hexavalent compounds) (the "Listed  
7   Chemicals"), and that Settling Defendant has violated provisions of  
8   Proposition 65, and the UCL, because it has not first provided a clear and  
9   reasonable warning to such individuals.

10       1.4.   For purposes of this Consent Judgment only, the parties stipulate that  
11   this court has jurisdiction over the allegations of violations contained in the  
12   Plaintiff's complaint and personal jurisdiction over Settling Defendant as to the  
13   acts alleged in the complaint, that venue is proper in the county of Alameda, and  
14   that this court has jurisdiction to enter this Consent Judgment.

15       1.5.   For the purpose of avoiding prolonged litigation, the parties enter into  
16   this Consent Judgment as a full settlement of all claims that were or could have  
17   been raised in the complaint based upon the facts alleged therein, or which could  
18   have been raised in the complaint arising out of the facts alleged therein. This  
19   Consent Judgment is a compromise of disputed claims, and none of the provisions  
20   herein shall be construed as an admission by any party of any fact, finding, issue  
21   of law, or violation of law, including Proposition 65, the UCL, or any other  
22   statute, regulation, or common law requirement related to alleged exposure to the  
23   Listed Chemicals from the Covered Products. Neither shall this Consent  
24   Judgment be construed as an admission that any act provided for herein, or any  
25   warnings regarding exposure to the Listed Chemicals from the Covered Products  
26   are required under Proposition 65, the UCL, or any other statute, regulation, or  
27   common law requirement. However, this paragraph shall not diminish or  
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otherwise affect the obligation, responsibilities, and duties of the parties under this Consent Judgment.

## 2. INJUNCTIVE RELIEF

2.1. Product Warnings. Settling Defendant shall not ship or cause to be shipped any Covered Products for sale in California within 60 days of the entry of this Consent Judgment by the court unless it provides Proposition 65 warnings for such Covered Products in accordance with this Paragraph 2.

2.2. Warnings in Manuals. Settling Defendant may provide a Proposition 65 warning in the owner's manual for a Covered Product if all of the following conditions are met:

2.2.1. the warning shall state the following:

### 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.]

2.2.2. the warning shall be located in one of the following places in

1 the owner's manual: the outside of the front cover, the inside of the  
2 front cover, the first page other than the cover, or the outside of the  
3 back cover. Unless a different warning is approved by the Attorney  
4 General, the warning shall have the exact content as the warning in  
5 subparagraph 2.2.1, except that, at the option of Settling Defendant,  
6 the bracketed language may be omitted. The warning shall be printed  
7 in a font no smaller than the font used for other safety warnings in  
8 the manual. Alternatively, the warning may be included in a safety  
9 warning section consistent with specifications UL 745-1 or UL 45,  
10 issued by Underwriters Laboratories Inc., as amended. The warning  
11 may either be printed in the manual or contained in a durable label or  
12 sticker affixed to the manual.

13 2.2.3. the Covered Product contains a durable label or sticker  
14 directing the operator's attention to the owner's manual;

15 2.2.4. the owner's manual is intended by Settling Defendant to be  
16 provided with the original packaging of the Covered Product to the  
17 initial consumer/purchaser;

18 2.2.5. at least one other safety warning appears in the owner's  
19 manual; and

20 2.2.6. all or a substantial portion of operation instructions, if any, are  
21 contained in the owner's manual.

22 2.3. Warnings on the Product. As an alternative to complying with the  
23 requirements of subparagraph 2.2, Settling Defendant may satisfy its obligations  
24 under this Consent Judgment by providing warnings on the product. Any such  
25 warning may be provided by affixing a warning with the following language:

26 WARNING:

27 Some dust created by using power tools contains chemicals known to  
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1 the State of California to cause cancer and birth defects or other  
2 reproductive harm.

3 2.4. Alternative Warning Requirements. If, with respect to Covered  
4 Products, the Attorney General of the State of California or Plaintiff permit any  
5 other warning standard or vary the permissible manner, form, size or content of  
6 the warning, as to any particular class of potentially exposed persons, by way of  
7 settlement or compromise with any other person in the course of doing business,  
8 or any other entity, or if another warning standard, manner, form, size or content  
9 of warning is incorporated by way of final judgment as to any other person in the  
10 course of doing business, or any other entity, then Settling Defendant may, give  
11 warnings on the same terms as provided in those settlements, compromises or  
12 judgments, whereupon Settling Defendant shall have no further obligation  
13 pursuant to paragraph 2.

14 2.5. Upon the occurrence of one or more of the following events, or any  
15 change in law not expressly enumerated herein that renders one or more of the  
16 Covered Products and/or Listed Chemicals expressly or impliedly exempt from  
17 Proposition 65, Settling Defendant will have no further obligations pursuant to  
18 this Consent Judgment with respect to such Covered Product and/or Listed  
19 Chemical:

20 2.5.1. Entry of a final judgment determining that Covered Products do  
21 not require warnings for the Listed Chemicals pursuant to Proposition  
22 65;

23 2.5.2. The promulgation of a safe use determination or interpretive  
24 guideline exempting the Covered Products from Proposition 65

25 2.5.3. The amendment of either Proposition 65 or its implementing  
26 regulations affecting the Covered Products; or

27 2.5.4. The removal of a Listed Chemical from the list of chemicals  
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known to the State of California to cause cancer or reproductive toxicity.

2.6. Settling Defendant shall provide notice to Plaintiff of its intent to provide alternative warnings in accordance with Paragraph 2.3, or of its intent to discontinue warnings on the basis of Paragraph 2.4, a minimum of thirty days in advance of taking any such action. Within ten days of service of such notice, Plaintiff may object to Settling Defendant's notice of intent to discontinue or provide alternate warnings, in which case the parties agree to meet and confer regarding Plaintiff's objections. If Plaintiff's objections are not resolved or withdrawn within 30 days after service thereof, and for good cause shown, Settling Defendant may petition the court to allow for relief from or modification of this Consent Judgment. Settling Defendant shall not provide alternate warnings or discontinue warnings without obtaining either Plaintiff's written consent or further court order.

### 3. DUTIES LIMITED TO CALIFORNIA

3.1. This Consent Judgment shall have no effect on Covered Products sold by Settling Defendant and shipped to customers for use outside the State of California.

### 4. PAYMENT PURSUANT TO HEALTH & SAFETY PURSUANT TO HEALTH & SAFETY CODE §25249.7(b)

4.1. Settling Defendant shall pay a civil penalty of \$1,500. The payment of \$1,500 shall be paid within five (5) calendar days after the date this document is fully executed (the "Effective Date") and shall be held in trust by Plaintiff's counsel until the Alameda County Superior Court approves and enters the Consent Judgment. The penalty payment is to be made payable to "Chanler Law Group In Trust For Michael DiPirro". If the Consent Judgment is not approved by the Court, Plaintiff will return all funds, within ten (10) calendar days of notice of the

1 Court's decision. Plaintiff agrees to pay Settling Defendant a \$250 per calendar  
2 day fee for each day the payment is not received after the expiration of this ten-  
3 day period. Penalty monies shall be apportioned by Plaintiff in accordance with  
4 Health & Safety Code §25192, with 75% of these funds remitted to the State of  
5 California's Department of Toxic Substances Control.

6 4.2. Plaintiff asserts that the payment schedule as stated in this Consent  
7 Judgment is a material factor upon which he has relied in entering into this  
8 Consent Judgment. Settling Defendant agrees that all payments will be made in a  
9 timely manner in accordance with the payment due dates. Settling Defendant will  
10 be given a five (5) calendar day grace period from the date payment is due.  
11 Settling Defendant agrees to pay Plaintiff a \$250 per calendar day fee for each  
12 day the payment is not received after the grace period ends. For purposes of this  
13 paragraph, each new day (requiring an additional \$250 payment) will begin at 5  
14 p.m. (PST).

#### 15 5. ATTORNEYS' FEES AND COSTS

16 5.1. Plaintiff offered to resolve the dispute without reaching terms on the  
17 amount of fees and costs to be reimbursed, thereby leaving this open issue to be  
18 resolved after the material terms of the agreement had been reached, and the  
19 matter settled. Settling Defendant then expressed a desire to resolve the fee and  
20 cost issue concurrently with other settlement terms, so the parties tried to (and  
21 did) reach an accord on the compensation claimed by DiPirro and his counsel  
22 under the private attorney general doctrine codified at C.C.P. §1021.5.

23 5.2. Settling Defendant shall pay the total sum of \$13,500 to Plaintiff and  
24 his counsel, for investigation fees, attorneys' fees and litigation costs he claims to  
25 have incurred as a result of investigating, bringing the matter to Settling  
26 Defendant's attention, litigating and negotiating a settlement in the public  
27 interest. . Settling Defendant agrees to pay \$13,500 within five (5) calendar days  
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1 of the Effective Date of the Agreement. Such sum shall be held in trust by  
2 Plaintiff's counsel until the Alameda County Superior Court approves and enters  
3 the Consent Judgment. If the Consent Judgment is not approved by the Court,  
4 Plaintiff will return all funds within ten (10) calendar days of notice of the  
5 Court's decision. Plaintiff agrees to pay Settling Defendant a \$250 per calendar  
6 day fee for each day the payment is not received after the expiration of this ten-  
7 day period. Payment should be made payable to the "Chanler Law Group".

8 5.3. Plaintiff asserts that the payment schedule as stated in this Consent  
9 Judgment is a material factor upon which he and his counsel have relied in  
10 entering into this Consent Judgment. Settling Defendant agrees that all payments  
11 will be made in a timely manner in accordance with the payment due dates.  
12 Settling Defendant will be given a five (5) calendar day grace period from the  
13 date payment is due. Settling Defendant agrees to pay Plaintiff and his counsel a  
14 \$250 per calendar day fee for each day the payment is not received after the grace  
15 period ends. For purposes of this paragraph, each new day (requiring an  
16 additional \$250 payment) will begin at 5 p.m. (PST).

17 5.4. Additional Contingent Fees and Costs.

18 5.4.1. In the event that the California Attorney General's office,  
19 pursuant to 11 CCR § 3000, et seq., serves objections to this Consent  
20 Judgment on either of the parties, such that it requires Plaintiff to  
21 incur additional legal fees or costs relating to this Consent Judgment,  
22 Settling Defendant agrees to cooperate with Plaintiff in performing  
23 what actions need to be done to satisfy the Attorney General's  
24 concerns and finalize the Consent Judgment, including making further  
25 court appearances. Settling Defendant agrees to meet and confer with  
26 Plaintiff regarding the reimbursement of any fees and costs incurred  
27 by Plaintiff and his counsel in excess of \$1,500 from the date of



1 receipt of the Attorney General's objections. Should the parties not  
2 reach agreement on the reimbursement of fees within thirty (30) days  
3 of the "meet and confer" date, Plaintiff reserves the right to rescind  
4 this Agreement and re-institute an enforcement action against Settling  
5 Defendant, provided that all sums paid by Settling Defendant  
6 pursuant to paragraphs 4.1 and 5.1 are returned to Settling Defendant  
7 within ten (10) days from the date on which Plaintiff notifies Settling  
8 Defendant of his intent to rescind this Agreement. In such case, all  
9 applicable statutes of limitation shall be deemed tolled for the period  
10 between the date Plaintiff filed the instant action and the date  
11 Plaintiff notifies Settling Defendant that he is rescinding this  
12 Agreement pursuant to this Paragraph.

13 5.4.2. Such additional legal fees or costs relating to this Consent  
14 Judgment include, but are not limited to: further editing and  
15 finalizing of the Consent Judgment; corresponding with opposing  
16 counsel; retention of experts; presenting of the Consent Judgment (or  
17 any modifications thereof) to the Attorney General for further  
18 comment; and any briefing and/or appearance before the Court related  
19 to this Consent Judgment; all occurring as a result of the Attorney  
20 General's objections.

21 5.4.3. Plaintiff agrees to document all fees and costs incurred from  
22 the date of receipt of the Attorney General's objections through the  
23 date of court approval of the Consent Judgment. Prior to receiving  
24 such documentation, Settling Defendant agrees to enter into a letter  
25 agreement in which the parties agree that, by transmitting such  
26 information, no privilege will be waived by Plaintiff or his counsel.

27 5.4.4. If the parties agree to such additional reimbursement of legal  
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1 fees and costs, reimbursement shall be due within ten (10) calendar  
2 days after receipt of both notice of Court approval of the Consent  
3 Judgment and final billing statement from Plaintiff.

4 6. CLAIMS COVERED AND RELEASE

5 6.1. This Consent Judgment is a final and binding resolution and release  
6 between Settling Defendant and its past and present officers, directors, trustees,  
7 agents, employees, attorneys, parents, subsidiaries, divisions, successors and  
8 assigns (collectively, "Releasees") and any person within Settling Defendant's  
9 chain of distribution, including, but not limited to, suppliers, wholesalers,  
10 distributors, retailers, sales personnel, customers, and any other person in the  
11 course of doing business (collectively "Downstream Releasees") and the Plaintiff  
12 and the general public of the State of California in whose interest the Plaintiff  
13 brought this action, of all claims, liabilities, obligations, losses, attorney's or  
14 investigation fees, costs, expenses, fines, damages, violations or causes of action  
15 for violation of Proposition 65, the Unfair Competition Act, or any other statutory  
16 or common law claim that could have been asserted against any Releasee by the  
17 Plaintiff based upon the facts alleged in the 60-day notice letters and/or the  
18 complaint, including failure to provide clear, reasonable, and lawful warnings of  
19 exposure to Listed Chemicals from the Covered Products.

20 6.2. Subject to Paragraph 2 of this Consent Judgment, Settling Defendant's  
21 compliance with the terms of this Consent Judgment constitutes compliance by  
22 each Releasee with: (1) any claimed requirement to provide a clear and reasonable  
23 warning with respect to Covered Products, and any resulting exposure to the  
24 Listed Chemicals. To the extent that the warnings and instructions required by  
25 Paragraph 2 of this Consent Judgment are given, no further warnings are required  
26 under Proposition 65 as to all exposures to Listed Chemicals arising from the use  
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1 of Covered Products manufactured, distributed or sold by any Releasee or  
2 Downstream Releasee.

3 6.3. Settling Defendant, by this Agreement, waives all rights to institute any  
4 form of legal action against Plaintiff and his employees, successors, assigns,  
5 attorneys and representatives, for all actions or statements made by Plaintiff, and  
6 hi attorneys or representatives, in the course of seeking enforcement of  
7 Proposition 65 or the UCL against Settling Defendant with respect to the Covered  
8 Products.

9 6.4. This Consent Judgment is intended as a full settlement and compromise  
10 of all claims herein with respect to Covered Products, except as set forth herein.  
11 No claim is reserved as between the parties hereto except as set forth herein, and  
12 Plaintiff in his individual capacity only and Settling Defendant expressly waive  
13 any and all rights which they may have under the provisions of Section 1542 of  
14 the *Civil Code* of the State of California, which provides:

15 "A general release does not extend to claims which the creditor does  
16 not know or suspect to exist in his favor at the time of executing the  
17 release, which if known by him must have materially affected his  
18 settlement with the debtor."

## 19 7. SEVERABILITY

20 7.1. In the event that any of the provisions of this Consent Judgment are held  
21 by a court to be unenforceable, the validity of the enforceable provisions shall not  
22 be adversely affected.

## 23 8. MODIFICATION OF CONSENT JUDGMENT

24 8.1. This Consent Judgment may be modified by written agreement of the  
25 parties after noticed motion, and upon entry of a modified Consent Judgment by  
26 the court.

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1 9. ENFORCEMENT OF CONSENT JUDGMENT

2 9.1. The parties may, by motion or order to show cause before the Superior  
3 Court of the County of Alameda, enforce the terms and conditions of this Consent  
4 Judgment. In any action brought by any party to enforce this Consent Judgment,  
5 the prevailing party may seek any fines, costs, penalties or remedies provided by  
6 law. Additionally, the prevailing party shall be entitled to recover its reasonable  
7 attorney's fees and costs.

8 9.2. The parties may enforce the terms and conditions of this Consent  
9 Judgment pursuant to paragraph 9.1 only after the complaining party first provides  
10 30 days notice to the party allegedly failing to comply with the terms and  
11 conditions of this Consent Judgment and attempts to resolve such party's failure to  
12 comply in an open and good faith manner.

13 10. GOVERNING LAW AND CONSTRUCTION

14 10.1. This Consent Judgment shall be governed by the laws of the State of  
15 California.

16 10.2. The Parties, including their counsel, have participated in the preparation  
17 of this Consent Judgment and this Consent Judgment is the result of the joint  
18 efforts of the Parties. This Consent Judgment was subject to revision and  
19 modification by the Parties and has been accepted and approved as to its final  
20 form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity  
21 existing in this Consent Judgment shall not be interpreted against any Party as a  
22 result of the manner of the preparation of this Consent Judgment. Each Party to  
23 this Consent Judgment agrees that any statute or rule of construction providing  
24 that ambiguities are to be resolved against the drafting Party should not be  
25 employed in the interpretation of this Consent Judgment and, in this regard, the  
26 Parties hereby waive California Civil Code section 1654.

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1 11.ENTIRE AGREEMENT

2 11.1. This Consent Judgment contains the sole and entire agreement and  
3 understanding of the Parties with respect to the entire subject matter hereof, and  
4 any and all prior discussions, negotiations, commitments, or understandings  
5 related thereto, if any, are hereby merged herein and therein. There are no  
6 warranties, representations, or other agreements between the Parties except as  
7 expressly set forth herein. No representations, oral or otherwise, express or  
8 implied, other than those specifically referred to in this Consent Judgment have  
9 been made by any Party hereto. No other agreements not specifically contained or  
10 referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the  
11 Parties hereto. No supplementation, modification, waiver, or termination of this  
12 Consent Judgment shall be binding unless executed in writing by the Party to be  
13 bound thereby. No waiver of any of the provisions of this Consent Judgment shall  
14 be deemed or shall constitute a waiver of any of the other provisions hereof  
15 whether or not similar, nor shall such waiver constitute a continuing waiver.

16 12.NOTICES

17 12.1. All notices or correspondence to be given pursuant to this Consent  
18 Judgment or relating to this Consent Judgment shall be served on any party by the  
19 others at the following addresses:

20 For Plaintiff Michael DiPirro:

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

24  
25 For Settling Defendant:

26 Daniel R. Pahl  
27 Risk Manager  
Wagner Spray Tech Corp.  
1770 Fernbrook Lane  
28 Minneapolis, MN 55447

1 Telephone: (763) 553-7000  
2 Telecopier: (763) 553-7288

3 With a copy to:

4 Jeffrey B. Margulies  
5 Parker, Milliken, Clark, O'Hara & Samuelian  
6 333 South Hope Street, 27<sup>th</sup> Floor  
Los Angeles, CA 90071  
Telephone: (213) 683-6500  
Telecopier: (213) 683-6669

7 12.2. All matters required hereunder after entry of this Consent Judgment shall  
8 be served by certified mail, return receipt, overnight delivery by recognized  
9 courier service, or by personal delivery.

10 13.COMPLIANCE WITH REPORTING REQUIREMENTS

11 13.1. Plaintiff will comply with the reporting form requirements referenced in  
12 *Health & Safety Code* § 25249.7(f), as established in 8 CCR §§ 3000-3008.  
13 Pursuant to § 3008, this Consent Judgment shall not be presented to the court until  
14 at least 30 days have elapsed since service of the settlement on the Attorney  
15 General, or fewer than 30 days have elapsed but the Attorney General has stated  
16 in writing that he does not object to entry of the settlement.

17 13.2. It is expressly understood and agreed by the Parties hereto that the rights  
18 and obligations contained in this Consent Judgment are expressly conditioned on  
19 the non-opposition by the California Attorney General's Office to this Consent  
20 Judgment. Should the Attorney General object to the Consent Judgment within 30  
21 days of submission thereto, the parties shall negotiate in good faith to modify the  
22 Consent Judgment in a manner that resolves the objection of the Attorney General.  
23 If the Parties cannot agree on appropriate modifications within 15 days of  
24 receiving the Attorney General's objections, this Consent Judgment shall, at any  
25 Party's option, be deemed null and void as to that Party and shall not bind that  
26 Party and shall not be construed as an admission or waiver of any claim or  
27 defense and cannot be used for any purpose.

1 14.COUNTERPARTS

2 14.1. This Consent Judgment may be executed in counterparts or by facsimile,  
3 each of which shall be deemed an original, and all of which, when taken together,  
4 shall constitute one and the same document.

5 15.COURT APPROVAL

6 15.1. If this Consent Judgment is not approved by the court, it shall be of no  
7 force or effect and cannot be used in any proceeding for any purpose.

8 16.AUTHORIZATION

9 16.1. The undersigned are authorized to execute this Consent Judgment on  
10 behalf of their respective parties and have read, understood and agree to all of the  
11 terms and conditions of this Consent Judgment.

12 Dated:  
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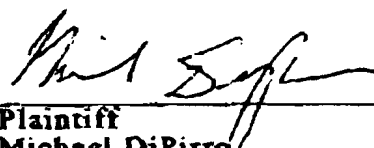
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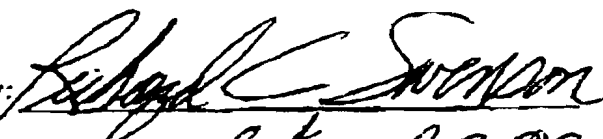
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Dated: 11/8, 2001

By:   
Plaintiff  
Michael DiPirro

WAGNER SPRAY TECH  
CORPORATION

By:   
Its President and C.O.O.

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10 behalf of their respective parties and have read, understood and agree to all of the  
11 terms and conditions of this Consent Judgment.

12 Dated:

13  
14  
15  
16  
17 Dated: 11/8, 2001

By: \_\_\_\_\_  
Plaintiff  
Michael DiPirro

WAGNER SPRAY TECH  
CORPORATION

19  
20 By: Richard C. Simpson  
21 Its President and C.O.O.  
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1 APPROVED AS TO FORM:

2 Dated: 2001

BUSH & HENRY

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Nov. 26, 2001

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By:



David Bush  
Attorneys for Plaintiff  
Michael DiPirro

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Dated: 11/9, 2001

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PARKER, MILLIKEN, CLARK, O'HARA  
& SAMUELIAN

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By:



Jeffrey B. Margulies  
Attorneys for Defendant  
Wagner Spray Tech Corporation

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14 IT IS SO ORDERED, ADJUDGED, AND DECREED

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Dated: \_\_\_\_\_, 2001

Judge of the Superior Court of the  
State of California

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