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JAN 24 2005

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20 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 IN AND FOR THE COUNTY OF MONTEREY

23 PEOPLE OF THE STATE OF CALIFORNIA,
24 Plaintiff,
25 v.
26 MIT ENGINEERING & CONSTRUCTION,
27 INC.,
28 Defendant,

No. M72916
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S MOTION
FOR ENTRY OF CONSENT
JUDGMENT
Hearing Date: March 18, 2005
Time: 9:00 am
Department:

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 This motion seeks the Court's approval of a Consent Agreement and Stipulation for
3 Entry of Final Consent ("Consent Judgment") between the parties which would settle the
4 Complaint filed in this matter. A proposed "Order Entering Consent Judgment" has been lodged
5 with the Court simultaneously with the filing of the Complaint.

6 The Plaintiff is the People of the State of California represented by Bill Lockyer,
7 Attorney General of the State of California ("Attorney General"), John D. Phillips, District
8 Attorney for the County of San Joaquin, and Dean D. Flippo, District Attorney for the County
9 of Monterey. The settlement is the result of good-faith, arms-length negotiations. The settling
10 defendant is MIT Engineering and Construction, Inc. ("MIT").

11 **INTRODUCTION**

12 The case against MIT is based on investigations that originated in Monterey, Sacramento,
13 and San Joaquin counties. Based on the violations found in those counties, the People have
14 alleged the same unfair business practices against the Settling Defendants throughout the State of
15 California.

16 The Consent Judgment resolves those alleged statewide violations. MIT has represented
17 that it has addressed the alleged violations and the Consent Judgment imposes a permanent
18 injunction on MIT to comply with the applicable laws pertaining to its business activities. With
19 regard to the monetary payments by MIT, the Consent Judgment is structured so that civil
20 penalties and costs of enforcement, a total of \$230,000 are paid directly to the counties or
21 agencies which investigated or prosecuted the action while \$100,000 will go to an environmental
22 enforcement projects which will result in a potential statewide benefit to the People.

23 In any case, the Consent Judgment does not resolve, release or affect MIT's obligations
24 to properly address any environmental harm, impact, or regulatory directives resulting from
25 releases of motor vehicle fuels and other hazardous substances from its activities.

26 **THE PROPOSED SETTLEMENT**

27 The proposed civil settlement is embodied in the Consent Judgment. The Consent
28 Judgment is based on the alleged unfair business practices which MIT engaged in at facilities in

1 the State of California related to the repair, replacement, and modification of underground
2 storage tank systems.

3 The proposed Consent Judgment contains the following material provisions:

4 **1. Payments for Civil Penalties, Costs and Environmentally Beneficial Projects:**

5 MIT will pay a total of TWO HUNDRED AND THIRTY THOUSAND DOLLARS
6 (\$230,000.00) which will be allocated as follows:

7 a. **Civil Penalties:** ONE HUNDRED THOUSAND DOLLARS (\$100,000.00)

8 b. **Reimbursement of Costs of Investigation and Enforcement:** THIRTY
9 THOUSAND DOLLARS (\$30,000.00) which will be divided between the three
10 prosecuting offices.

11 c. **Environmental Project:** ONE HUNDRED THOUSAND DOLLARS
12 (\$100,000.00) which will be paid to the Environmental Protection Prosecution Fund.
13 This Fund is administered by the California Attorney General's Office and was
14 established by order of this court in another matter, *People v. 7-Eleven, Inc.*
15 (Monterey Superior Court, Case No. M71822). The Fund will be used by state and
16 local prosecutors for environmental protection cases.

16 **2. Injunctive Relief:**

17 Pursuant to Business and Professions Code section 17203, and the Court's equitable
18 powers, MIT will comply with the applicable provisions of Chapter 6.5, Chapter 6.7, and
19 Chapter 6.95 of Division 20 of the Health and Safety Code. The injunction which is imposed on
20 MIT is one which generally compels compliance with applicable laws as opposed to one which
21 imposes specific and detailed conduct on a settling defendant.

22 **3. Scope of the Settlement:**

23 The scope of the settlement provided by the Consent Judgment follows the regular
24 practice of the Attorney General's Office regarding environmental enforcement matters:

25 A. Settlement of all claims in the Complaint or claims which could have been
26 asserted based on the specific facts alleged in the complaint. Claims that may be
27 based on unknown facts or facts which should have been known to the People but
28 which are not asserted in the Complaint are not addressed in the Consent

1 Judgment.

2 B. The Consent Judgment does not settle any claims or causes of action for cleanup
3 resulting from releases of petroleum products or other hazardous substances from
4 underground tank systems. Those claims are expressly reserved and are intended
5 to be addressed by local agencies or regional water quality control boards who
6 have jurisdiction to oversee and regulate such activities.

7 **ARGUMENT FOR ENTRY OF CONSENT JUDGMENT**

8 **I. The Terms of the Consent Judgments are Within the People's Prosecutorial**
9 **Discretion, and are Subject to Disapproval by the Court Only if the Consent**
10 **Judgments are Clearly Contrary to Public Policy or Law**

11 In determining whether a particular settlement is appropriate, the Court should afford
12 substantial deference to the judgment of the Attorney General and the District Attorneys. The
13 Attorney General is constitutionally designated as the "chief law officer of the state" and has the
14 constitutional duty to ensure that state law is adequately enforced. (See Cal.Const. Art. V, § 13;
15 *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 353.) Under Chapters 6.5, 6.7, and
16 61.95 of Division 20 of the Health and Safety Code and the Unfair Competition Act (Bus. &
17 Prof. Code § 12600 *et seq.*), the Attorney General and the District Attorneys sue "in the name of
18 the People of the State of California," which signifies that the action is an exercise of the
19 sovereign power. (See Gov. Code § 100.) The discretionary power of a prosecutor to
20 investigate, prosecute charges, and negotiate settlements traditionally applied in criminal
21 proceedings has been specifically held to apply to civil law enforcement actions filed by the
22 Attorney General under section 17200. (*People v. Cimarusti* (1978) 81 Cal.App.3d 314, 322-
23 24.) As that court stated, it is "the function of the executive to engage in any negotiation with
24 the defense by which a lenient disposition of the charge made is secured without trial." *Id.*, at
25 323. Accordingly, the determination of the Attorney General and the District Attorneys to settle
26 on the terms set forth in the Consent Judgment should be accorded substantial deference by the
27 Court. As a judgment of the Court, the settlement may be rejected if it is contrary to public
28 policy or incorporates an erroneous rule of law. (*California State Auto. Assn. Inter-Ins. Bureau*
v. Superior Court (1990) 50 Cal.3d 658, 664.) Such circumstances are rare, however, and do

1 not exist here. (See *Mary R. v. B & R Corp.* (1983) 149 Cal.App.3d 308, 316-317 (settlement
2 between physician and patient purporting to bar state from access to information relevant to
3 physician's fitness to practice medicine contrary to public policy); *Valdez v. Taylor Auto*
4 *Company* (1954) 129 Cal.App.2d 810, 819 (trial stipulation stating erroneous conclusion of law
5 to follow from a given factual finding not binding on court in entering judgment).)

6 The settlement in this case also is not subject to other standards of review that apply in
7 tort cases or class actions. Because the settlement does not discharge any liability for
8 contribution, the requirement of a "good faith" determination pursuant to Code of Civil
9 Procedure section 877.6 does not apply.¹ Nor is this a class action in which individual persons
10 will lose their personal claims, which would necessitate a determination, on behalf of the absent
11 class members, that the settlement is "fair, reasonable and adequate." To the contrary, an action
12 under section 17200 and, by analogy, an action under Chapters 6.5, 6.7, and 6.95 of Division 20
13 of the Health and Safety Code, is "fundamentally a law enforcement action designed to protect
14 the public and not to benefit private parties," and therefore is not subject to the procedural
15 requirements of class actions. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17.)

16 **II. The Consent Judgment Obtains a Beneficial Resolution of Disputed Issues and** 17 **Avoids Prolonged Litigation**

18 Because the litigation process "is fraught with complexities, uncertainties, delays, and
19 risks of many kinds[.]" public policy in California favors settlement. (*Neary v. Regents of*
20 *University of California* (1992) 3 Cal.4th 273, 280.) In this case, the Plaintiff would have to
21 demonstrate violations of the applicable requirements at each of the facilities identified in the
22 Complaint. Moreover, Plaintiff would have to provide rationales for penalty assessments at each
23 of the facilities. Because Plaintiff's legal and factual bases for imposing daily civil penalties is
24 disputed by the Settling Defendants, litigating this case will be time consuming, complex, and
25 may involve a significant delay in obtaining any resolution. The Consent Judgment resolves these
26 issues in favor of the People by assessing a set penalty amount, providing for reimbursement of

27
28 1. That section applies only where the complaint alleges that the defendants are "joint
tortfeasors or co-obligors on a contract debt" and approval of the settlement discharges the
settling defendant from liability for contribution.

1 the People's costs of investigation and enforcement, providing funds for a number of programs
2 with benefits statewide, and addressing injunctive responsibilities of Settling Defendants related
3 to compliance with specific environmental statutory schemes.

4 **CONCLUSION**

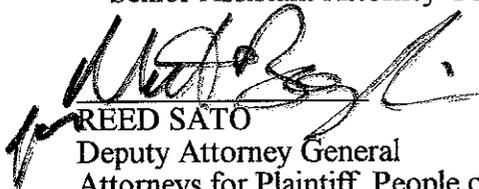
5 For the foregoing reasons, the People respectfully request that the Court approve and
6 enter the Consent Judgment.

7 **RESPECTFULLY SUBMITTED:**

8 **FOR THE PLAINTIFF**

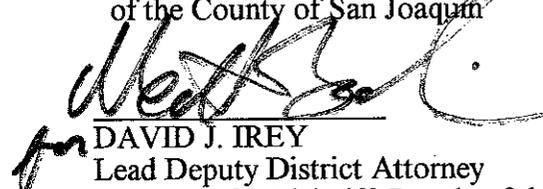
9 Dated: January 24, 2005

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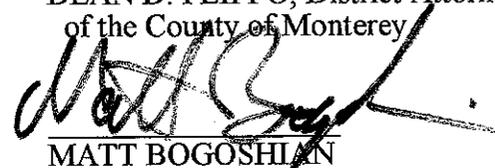
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