

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between the California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and Art Supply Enterprises, Inc., dba MacPherson's (MacPherson's), with its principal location at 1375 Ocean Avenue, Emeryville, California 94608 (collectively, the "Parties," or individually, "Party").

LEGAL BACKGROUND

- (1) **Purpose.** The California Health and Safety Code mandates CARB adopt regulations to achieve the maximum feasible reduction in volatile organic compounds (VOCs) and Reactive Organic Compounds (ROCs) in consumer products. (Health & Saf. Code § 41712.)
- (2) **Regulation.** CARB adopted the *Regulation for Reducing the Ozone Formed from Aerosol Coating Product Emissions* (Aerosol Coating Regulation) to reduce ROCs from aerosol coating products. (Cal. Code Regs., tit. 17, § 94520 et seq.)
- (3) **Regulatory Provisions.** Any person who sells, supplies, offers for sale, applies, or manufactures any aerosol coating product for use in California, shall comply with the standards set forth in the Aerosol Coating Regulation, including the reactivity or ozone limits; prohibitions on products containing ozone depleting substances, methylene chloride, perchloroethylene, or trichloroethylene; labeling; reporting; dating; and other administrative requirements. (Cal. Code Regs., tit. 17, §§ 94520-94526.) If anywhere on the container of any aerosol coating product, the manufacturer represents that the product may be used or is suitable for a specific use in which a lower limit applies, the lowest applicable limit shall apply. (Cal. Code Regs., tit. 17, § 94524, subd. (a).)
- (4) **Penalty Provisions.** Failure to comply with the regulatory requirements is a violation of state law that may result in penalties up to eleven thousand seven hundred ten dollars (\$11,710.00 USD) for strict liability violations for each day in which the violation occurs. (Cal. Code Regs., tit. 17, § 94520 et seq.; Health & Saf. Code §§ 42400 et seq., 42402 et seq., and 42411.)

CASE BACKGROUND

- (5) **Corporate Entity.** At all relevant times, Art Supply Enterprises, Inc. was organized under the laws of California as a corporation doing business as MacPherson's and conducted business in the State of California.

- (6) Allegations. This Settlement Agreement settles Notice of Violation (NOV) CP22-02-02, which was issued on March 7, 2022. CARB alleged MacPherson's violated the Aerosol Coating Regulation by selling, supplying, offering for sale, applying, or manufacturing the following products for use in California (Cal. Code Regs., tit. 17, § 94522):
- (a) Montana Primer Spray that is subject to and exceeded a reactivity limit of 0.70 grams of ozone per gram of product ($\text{g O}_3 / \text{g product}$) for the Primer category;
 - (b) Montana Gold Professional Spray Paint Shock Black and Montana Tarblack Low-Pressure Bitumen Spray Paint that are subject to and exceeded the reactivity limit of $0.80 \text{ g O}_3 / \text{g product}$ for the Flat Coating category; and
 - (c) Montana Black Graffiti Spray Paint Copperchrome that is subject to and exceeded the reactivity limit of $1.25 \text{ g O}_3 / \text{g product}$ for the Metallic Coating category.

CARB also alleged in NOV CP22-02-02 that MacPherson's violated the Aerosol Coating Regulation by selling, supplying, offering for sale, applying, or manufacturing for use in California, Montana Black Whiteout Graffiti Spray Paint Super White that did not display the aerosol coating product category and applicable reactivity limit, and by failing to submit an annual explanation of the code representing the date of manufacture (Cal. Code Regs., tit. 17, § 94524). In addition, MacPherson's disclosed selling, supplying, offering for sale, applying, or manufacturing for use in California, additional aerosol coating products that are subject to and exceeded the reactivity limits for the applicable aerosol coating categories. CARB alleges that if the allegations described in Paragraph 6 were proven, civil penalties could be imposed against MacPherson's for each and every day the noncompliant product was sold, supplied, offered for sale, applied, or manufactured for use in California.

- (7) Acknowledgment. MacPherson's admits to the facts in paragraphs 1 through 6, but denies any liability resulting from said allegations.
- (8) Consideration. In consideration of the foregoing, and of the promises and facts set forth herein, the Parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed alleged violations and voluntarily agree to resolve this matter by means of this Settlement Agreement. In order to resolve the violations described herein, MacPherson's has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, CARB accepts this Settlement Agreement in termination and full settlement of this matter.

TERMS AND CONDITIONS

In consideration of CARB not filing a legal action against MacPherson's for the alleged violations referred to above in Paragraph 6, and in consideration of MacPherson's agreement to complete all terms and conditions set forth below, CARB and MacPherson's agree as follows:

- (9) Settlement Amount. MacPherson's shall pay a civil penalty of one hundred twenty-five thousand three hundred ninety dollars (\$125,390.00 USD). MacPherson's shall make payment within 30 calendar days from the date CARB notifies MacPherson's of the full execution of the Settlement Agreement.
- (10) Civil Penalty Payment Method. MacPherson's shall pay the civil penalty by check, credit card, wire transfer, or portal, payable to the California Air Resources Board, using instructions provided separately by CARB in a Payment Transmittal Form. MacPherson's is responsible for all payment processing fees. Payments shall be accompanied by the Payment Transmittal Form to ensure proper application. At the time of payment, MacPherson's shall provide CARB with proof of payment and the Payment Transmittal Form to the email address listed in Paragraph 12 (Notices). CARB shall deposit the civil penalty amount into the Air Pollution Control Fund for the purpose of carrying out CARB's duties and functions to ensure the integrity of its air pollution control programs. Should payment instructions change, CARB will provide notice to MacPherson's in accordance with Paragraph 12 (Notices).
- (11) Documents. MacPherson's shall promptly email the signed and dated Settlement Agreement directly to the Investigator managing the settlement, or may mail or email the signed and dated Settlement Agreement to the mail or email address listed in Paragraph 12 (Notices).
- (12) Notices. Unless otherwise specified in this Settlement Agreement, whenever notifications, submissions, or communications are required by this Settlement Agreement, they shall be submitted in writing to the address or email below:

As to CARB:

California Air Resources Board
Enforcement Division / Settlement Agreements
Consumer Products Enforcement Section
P.O. Box 2815
Sacramento, California 95812-2815
Settlement_Agreement@arb.ca.gov (Send Confirmation of Payment)

As to MacPherson's:

Art Supply Enterprises, Inc., dba MacPherson's
1375 Ocean Avenue
Emeryville, California 94608

As to MacPherson's Legal Representation:

Greg Sperla
DLA Piper LLP (US)
1415 L Street, Suite 270
Sacramento, California 95814-3976
Greg.Sperla@us.dlapiper.com

Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. Notices submitted pursuant to this section shall be deemed submitted upon emailing or mailing.

- (13) Repeat Violations. MacPherson's agrees to comply with all regulatory requirements and acknowledges that repeat violations could result in increased penalties in the future.
- (14) Entirety. This Settlement Agreement constitutes the entire agreement and understanding between the Parties concerning the Case Background and supersedes and replaces any and all prior negotiations and agreements of any kind, whether written or oral, between the Parties concerning the Case Background hereof. This Settlement Agreement consists of 8 pages and 32 paragraphs.
- (15) Binding Effect. This Settlement Agreement binds MacPherson's, and any principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations and CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Settlement Agreement.
- (16) Effective Date. The effective date shall be the date upon which this Settlement Agreement is fully executed.
- (17) Modification and Termination. No agreement to modify, amend, extend, supersede, terminate, or discharge this Settlement Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all Parties to this Settlement Agreement.
- (18) Severability. Each provision of this Settlement Agreement is severable, and in the event that any provision of this Settlement Agreement is held to be illegal, invalid or unenforceable in any jurisdiction, the remainder of this Settlement Agreement remains in full force and effect.
- (19) Choice of Law. This Settlement Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.

- (20) Non-Discharge. It is further agreed that the penalties described in this Settlement Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit.
- (21) Rules of Construction. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Settlement Agreement.
- (22) Non-Waiver. The failure to enforce any provision of this Settlement Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Settlement Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Settlement Agreement or otherwise provided by law.
- (23) Intent to be Bound. The Parties represent that: They have participated fully in the review and drafting of this Settlement Agreement; understand and accept all terms; enter into this Settlement Agreement freely and voluntarily; have had an opportunity to consult with legal counsel; are fully informed of the terms and effect of this Settlement Agreement; have agreed to this Settlement Agreement after independent investigation and agree it was not arrived at through fraud, duress, or undue influence; and knowingly and voluntarily intend to be legally bound by this Settlement Agreement.
- (24) Venue. The Superior Court of California, located in the County of Sacramento, shall hear any dispute between the Parties arising from this Settlement Agreement.
- (25) Counterparts and Electronic Signatures. This Settlement Agreement may be executed in counterparts. Electronic, facsimile or photocopied signatures shall be considered as valid signatures.
- (26) Release. In consideration of full payment of the civil penalty and all other undertakings above, CARB hereby releases MacPherson's and its principals, officers, receivers, trustees, successors and assignees, subsidiary and parent corporations, from any claims CARB may have based on the circumstances described in all paragraphs contained in the Case Background above.
- (27) Authority. The undersigned represents that he or she has full authority to enter into this Settlement Agreement.

PENALTY BASIS

- (28) Per Unit Penalty. The per unit penalty in this case is a maximum of eleven thousand seven hundred ten dollars (\$11,710.00 USD) per day under Health and Safety Code sections 42400 et seq., for violations of the Aerosol Coating Regulation. In this case, based on specific factors as discussed in Paragraph 30 below, the per unit penalties are: (1) \$17,000 per ton for the 3.27 tons of excess ozone forming compound emissions resulting from the products outlined in the NOV; (2) \$10,000 per ton for the 6.36 tons of excess ozone forming compound emissions resulting from the additional products disclosed by MacPherson's; (3) \$3,000 per day for one day of violation from not displaying the aerosol coating category and reactivity limit; and (4) \$3,000 per day for one day of violation from failing to submit the annual explanation of the date code.
- (29) Emissions. The provisions cited above prohibit ozone and/or toxic compound emissions above a specified limit for the specified product category. Since CARB has alleged that the products did not meet regulatory requirements, the emissions above the specified reactivity limit were in excess and illegal.
- (30) Aggravating and Mitigating Factors. The penalties in this matter were determined in consideration of all relevant circumstances, including statutory factors as described in CARB's Enforcement Policy. CARB considered whether the violator came into compliance quickly and cooperated with the investigation; the extent of harm to public health, safety and welfare; nature and persistence of the violation, including the magnitude of the excess emissions; compliance history; preventative efforts taken; innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods; efforts to attain, or provide for, compliance prior to violation; action taken to mitigate the violation; financial burden to the violator; voluntary disclosure, and any other relevant circumstances. The penalties are set at levels sufficient to deter violations, to remove any economic benefit or unfair advantage from noncompliance, to obtain swift compliance, and the potential costs, risks, and uncertainty associated with litigation. Penalties in future cases might be smaller or larger depending on the unique circumstances of the case.
- (31) Confidential Business Information. CARB may have based this penalty in part on confidential business information provided by MacPherson's or confidential settlement communications.
- (32) Effect of Settlement/Reservation of Rights. The following shall apply:
- (a) This Settlement Agreement resolves the civil claims of CARB for the violations alleged in this Settlement Agreement.

- (b) CARB reserves, and this Settlement Agreement is without prejudice to, all claims, rights, and remedies against MacPherson's with respect to all matters not expressly resolved in this Settlement Agreement. Notwithstanding any other provision of the Settlement Agreement, CARB reserves all claims, rights, and remedies, whether in law or equity, against MacPherson's with respect to:
- (i) Noncompliance with or enforcement of any provision of this Settlement Agreement.
 - (ii) Facts that were not disclosed by MacPherson's to CARB.
 - (iii) Violation of the California Health and Safety Code and its implementing regulations, or other State laws, regulations, or permit condition(s) not expressly resolved in this Settlement Agreement.
 - (iv) Any imminent and substantial endangerment to the public health, welfare, or the environment in California, whether related to the violations addressed in this Settlement Agreement or otherwise.
 - (v) Any criminal liability.
 - (vi) Any claim(s) of any officer or agency of the United States or California, other than CARB.
- (c) In any subsequent administrative or judicial proceeding initiated by CARB for injunctive relief, civil penalties, or other appropriate relief relating to enforcement of the Settlement Agreement, MacPherson's shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by CARB in the subsequent proceeding were or should have been brought in the instant case.
- (d) This Settlement Agreement does not limit or affect the rights of MacPherson's or of CARB against any third parties not covered by this Settlement Agreement, nor does it limit the rights of third parties not covered by this Settlement Agreement against MacPherson's, except as otherwise provided by law. This Settlement Agreement shall not be construed to create rights in, or grant any cause of action to, any third party not covered by this Settlement Agreement.
- (e) This Settlement Agreement is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. MacPherson's is responsible for achieving and maintaining compliance with all applicable federal, State, and local laws, regulations, and permits; MacPherson's

compliance with this Settlement Agreement shall not be a defense to any action commenced pursuant to any such laws, regulations, or permits. CARB does not, by its execution of this Settlement Agreement, warrant or aver in any manner that MacPherson's compliance with any aspect of this Settlement Agreement will result in compliance with any provisions of federal, State, or local laws, regulations, or permits.

ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

Signature: /S/
Name: Steven S. Cliff, Ph.D.
Title: Executive Officer
Date: June 16, 2023

Art Supply Enterprises, Inc., dba MacPherson's

Signature: /S/
Name: David J. Schofield
Title: Chief Executive Officer and President
Date: May 18, 2023