

IN THE COURT OF COMMON PLEAS  
UNION COUNTY, OHIO

95CV0154

95 DEC 11 AM 10:34

COURT OF COMMON  
PLEAS  
UNION COUNTY

*B. D. Montgomery*  
CLERK

STATE OF OHIO, ex rel.  
BETTY D. MONTGOMERY,  
ATTORNEY GENERAL OF OHIO  
30 East Broad Street  
Columbus, Ohio 43266-0410

CASE NO. \_\_\_\_\_

JUDGE \_\_\_\_\_

Plaintiff,

CONSENT ORDER

v.

ELJER MANUFACTURING, INC.  
PLUMBINGWARE DIVISION  
Oak and Ninth Streets  
Marysville, Ohio 43040

Defendant.

The Complaint in the above-captioned matter having been filed herein, and the Plaintiff State of Ohio by its Attorney General Betty D. Montgomery (hereinafter "Plaintiff") and Defendant Eljer Manufacturing, Inc. ("Eljer Manufacturing") having consented to the entry of this Order,

NOW THEREFORE, without trial of any issue of fact or law, and upon consent of the parties hereto, and without admission of fact or liability by Eljer Manufacturing, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

**I. JURISDICTION AND VENUE**

1. The Court has jurisdiction over the parties and the subject matter of this case. The Complaint states a claim upon which relief can be granted against Defendant under Chapter 3734 of the Ohio Revised Code, and venue is proper in this Court.

**II. PARTIES**

2. The provisions of this Consent Order shall apply to and be binding upon the parties to this action, their agents, officers, employees, assigns, successors in interest and any person acting in concert or privity with any of them.

**APPEALABLE ENTRY**

### III. SATISFACTION OF LAWSUIT

3. Plaintiff alleges in its Complaint, *inter alia*, that Eljer Manufacturing has violated certain provisions of Ohio Rev. Code Chapter 3734 and the rules adopted thereunder, including, but not limited to, its failure to comply with closure financial assurance provisions, post-closure care financial assurance provisions, and third party liability provisions with respect to its Marysville, Ohio facility. Compliance with the terms of this Consent Order shall constitute full satisfaction of any civil liability by Defendant for all violations under such laws alleged in the Complaint. Nothing in this Order shall be construed to limit the authority of the State of Ohio to seek relief for violations not alleged in the Complaint, including violations which occur after the entry of this Consent Order, and nothing in this Order shall be construed to limit the ability of Eljer to protect its rights including, but not limited to, its ability to raise any defenses including force majeure in any subsequent action. While Plaintiff does not agree that any such defenses may exist, it is, however, hereby agreed upon by Eljer Manufacturing and Plaintiff that it is premature at this time to raise and adjudicate the existence of such defenses, and that the appropriate point at which to adjudicate the existence of such defenses is at the time that an enforcement action, if any, is commenced by Plaintiff. Also, nothing in this Consent Order shall be construed as an admission of fact or liability by Eljer Manufacturing.

### IV. INJUNCTION

A. Compliance with the Closure and Post-Closure Financial Assurance Requirements and Third Party Liability Requirements of Ohio Rev. Chapter 3734 and the rules adopted thereunder.

4. Defendant Eljer Manufacturing agrees to refrain and is permanently enjoined from violating those provisions of Ohio Rev. Code Chapter 3734 and the rules adopted thereunder with respect to its Marysville, Ohio facility regarding cost estimates for closure and post-closure activities, establishing and maintaining financial assurance for closure, establishing and maintaining financial assurance for post-closure care, and demonstrating financial responsibility for bodily injury and property damage to third parties.

B. Establishment of Closure/Post-Closure Financial Assurance Trust Account.

5. Defendant Eljer Manufacturing agrees and is hereby enjoined and ordered to immediately establish a closure/post-closure financial assurance trust account in accordance with Ohio Administrative Code Rule 3745-66-43(A) and/or Ohio Administrative Code Rule 3745-66-45(A) -- except in instances in which the provisions of Rule 3745-66-43(A) conflict with the provisions of this Order. In instances in which the provisions of Rule 3745-66-43(A) conflict with the provisions of this Order, Defendant Eljer Manufacturing shall comply with the terms of this Order.

6. The closure/post-closure financial assurance trust account shall be funded by Eljer Manufacturing in accordance with the following payment schedule:

Within Thirty (30) Days of Entry of This Order	\$2,500,000.00
On or Before March 31, 1996	\$3,000,000.00
On or Before September 14, 1996	\$3,000,000.00

7. Defendant Eljer Manufacturing agrees and is hereby enjoined and ordered to provide notice of its establishment of a closure/post-closure financial assurance trust account in accordance with paragraph 5 of this Order to: Ohio EPA, Central Office, Division of Hazardous Waste Management, ATTN: Manager, Compliance Assurance Section, P.O. Box 1049, Columbus, Ohio 43216-1049; and, the State of Ohio Attorney General's Environmental Enforcement Section. Such notice shall be received by the above-listed entities not later than thirty (30) days after Defendant's establishment of such closure/post-closure financial assurance trust account.

8. Defendant Eljer Manufacturing agrees and is hereby enjoined and ordered to provide notice of each of its payments to the closure/post-closure financial assurance trust account established in paragraph 5 of this Order in accordance with the schedule set forth in paragraph 6 to: Ohio EPA, Central Office, Division of Hazardous Waste Management, ATTN:

Manager, Compliance Assurance Section, P.O. Box 1049, Columbus, Ohio 43216-1049; and, the State of Ohio Attorney General's Environmental Enforcement Section. Such notice shall be received by the above-listed entities not later than thirty (30) days after each payment is made to the closure/post-closure financial assurance trust account.

9. In the event that the closure cost estimate for Defendant's Marysville, Ohio facility increases such that it exceeds \$8,500,000.00 -- the total amount initially scheduled to be deposited into the closure/post-closure financial assurance trust account established in paragraph 5 of this Order -- Defendant shall increase the amount of its payments to the trust account (in accordance with the schedule established in paragraph 6 of this Order) such that the total amount of the cost estimate increase is divided equally between the payments remaining. In the event that all of the payments specified in paragraph 6 of this Order have been made prior to the time at which the closure cost estimate increases above \$8,500,000.00, Defendant shall comply with the provisions of Ohio Administrative Code Rule 3745-66-43(A)(6) and/or Ohio Administrative Code Rule 3745-66-45(A)(6).

C. Release of Funds From Closure/Post-Closure Financial Assurance Trust Account.

10. Defendant Eljer Manufacturing agrees and is hereby enjoined and ordered to arrange for the release of funds from the closure/post-closure financial assurance trust account established in paragraph 5 of this Order *only* in accordance with the provisions of paragraph 11 of this Order.

11. Defendant Eljer Manufacturing may arrange for the release of funds from the closure/post-closure financial assurance trust account established in paragraph 5 of this Order on an ongoing basis as Defendant Eljer Manufacturing is invoiced for costs incurred for partial or final closure or post-closure care. Defendant Eljer Manufacturing may not, however, arrange for the release of funds from the closure/post-closure financial assurance trust account for costs related to *closure* such that the balance of such account falls below Defendant's post-closure care cost estimate of One Million, Four Hundred Thousand Dollars (\$1,400,000.00). In the

event that Defendant's post-closure care cost estimate is revised after the entry of this Order, the provisions of this paragraph shall be modified accordingly.

V. CIVIL PENALTY

12. Defendant Eljer Manufacturing shall pay a civil penalty of One Million, Two Hundred Fifty Thousand Dollars (\$1,250,000.00). Of that amount, the payment of Five Hundred Thousand Dollars (\$500,000.00) is suspended. Ohio EPA may petition the Court for the imposition of the suspended civil penalty upon proof that Defendant Eljer Manufacturing has not closed its Marysville, Ohio facility in accordance with a closure plan submitted to, and approved by, the Director of Environmental Protection. In an action brought by Ohio EPA for the suspended civil penalties, Eljer Manufacturing retains its ability to assert any rights which it may have including, but not limited to, its ability to raise any defenses including force majeure. While Plaintiff does not agree that any such defenses may exist, it is, however, hereby agreed upon by Eljer Manufacturing and Plaintiff that it is premature at this time to raise and adjudicate the existence of such defenses, and that the appropriate point at which to adjudicate the existence of such defenses is at the time that an enforcement action, if any, is commenced by Plaintiff. The remaining penalty in the amount of Seven Hundred Fifty Thousand Dollars (\$750,000.00) shall be paid by delivering certified checks to Matt Sanders, Administrative Assistant (or his successor), Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, payable to the order of "Treasurer, State of Ohio", according to the following payment schedule:

- Within Thirty (30) days of Entry of this Order                     \$375,000.00
- Within Twelve (12) months of Entry of this Order                     \$375,000.00

## VI. ENFORCEMENT COSTS

13. Defendant Eljer Manufacturing is ordered to pay the enforcement costs of relator Ohio Attorney General expended in pursuing the instant action, totaling One Thousand Five Hundred Dollars (\$1,500.00) by delivering to Matt Sanders, Administrative Assistant (or his successor), Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428, a certified check for that amount, made payable to the order of "Treasurer, State of Ohio," within thirty (30) days after the entry of this Order. Any check submitted in compliance with this section shall be in addition to and separate from any check submitted pursuant to any other section of this Consent Order.

## VII. STIPULATED PENALTIES

14. In the event that Defendant Eljer Manufacturing failed to meet the deadlines set forth in paragraph 6 of this Order, and upon demand by Ohio EPA, Eljer Manufacturing shall pay stipulated penalties in accordance with the following schedules for each failure to meet a deadline:

- a. For each day of each failure to meet a deadline in paragraph 6, up to thirty (30) days – Five Hundred Dollars (\$500.00) per day.
- b. For each day of each failure to meet a deadline in paragraph 6, from thirty-one (31) days to sixty (60) days – Two Thousand Five Hundred Dollars (\$2,500.00) per day.
- c. For each day of each failure to meet a deadline in paragraph 6, over sixty (60) days – Five Thousand Dollars (\$5,000.00) per day.
- d. However, under no circumstance shall stipulated penalties exceed One Hundred Thousand Dollars (\$100,000.00).

Nothing in this Order is to be construed as any waiver of Eljer Manufacturing's ability to protect its rights including, but not limited to, its ability to raise any defenses including force majeure in a proceeding to obtain stipulated penalties relating to deadlines in paragraph 6. While Plaintiff does not agree that any such defenses may exist, it is, however, hereby agreed upon by Eljer Manufacturing and Plaintiff that it is premature at this time to raise and adjudicate the existence of such defenses, and that the appropriate point at which to

adjudicate the existence of such defenses is at the time that an enforcement action, if any, is commenced by Plaintiff. Such stipulated penalty shall be paid by delivering certified checks in the appropriate amount, payable to the order of "Treasurer, State of Ohio," to Matt Sanders, Administrative Assistant (or his successor), Office of the Ohio Attorney General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428.

#### VIII. RESERVATION OF RIGHTS

15. Nothing in this Order is to be construed as a waiver of Eljer Manufacturing's rights to appeal or challenge any action of Ohio EPA pertaining or relating to closure or post-closure activities, plans or other matters at the Marysville, Ohio facility including, but not limited to, the approval, denial, or modification of the closure and/or post-closure plans.

#### IX. RETENTION OF JURISDICTION

16. The court will retain jurisdiction of this action for the purpose of enforcing this Consent Order.

#### X. COSTS

17. Defendant Eljer Manufacturing is hereby ordered to pay the costs of this action.

#### XI. TERMINATION OF ORDER

18. Upon certification of the closure of its Marysville, Ohio facility, Eljer Manufacturing may move the Court, pursuant to Ohio R. Civ. P. 60(B), to terminate the stipulated penalty provisions of this Order -- including those provisions in paragraph 12 which relate to the suspended portion of the civil penalty -- so long as the closure/Post-closure financial assurance trust account established in paragraph 5 of this Order is fully-funded with respect to estimated post-closure costs at the time of Eljer Manufacturing's motion for termination. Plaintiff takes no position at this time as to such motion, and reserves any rights it may have to oppose the motion.

IT IS SO ORDERED:

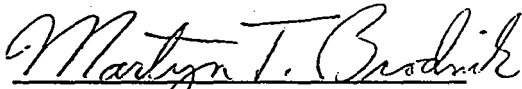
ENTERED THIS 11<sup>th</sup> DAY OF Dec, 1995.

  
\_\_\_\_\_  
JUDGE, UNION COUNTY  
COURT OF COMMON PLEAS

APPROVED:

ELJER MANUFACTURING, INC.

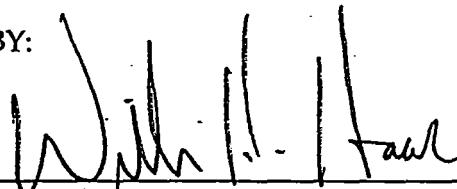
BY:

  
\_\_\_\_\_  
MARTYN T. BRODNIK, ESQ  
Vorys, Sater, Seymour and Pease  
52 East Gay Street  
Post Office Box 1008  
Columbus, Ohio 43216-1008  
(614) 464-5612

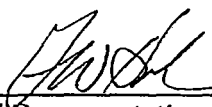
Counsel for Defendant

STATE OF OHIO,  
ex rel. BETTY D. MONTGOMERY  
ATTORNEY GENERAL OF OHIO

BY:

  
\_\_\_\_\_  
WILLIAM H. HAAK (0063952)  
Assistant Attorney General  
Environmental Enforcement Section  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215-3428  
(614) 466-2766

BY:

  
\_\_\_\_\_  
(Authorized Representative of Defendant, Eljer Manufacturing, Inc.)

TITLE:

Vice President