

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA**

**RG11600721: Center for Environmental Health, VS Aerodynamic Aviation
03/05/2025 Hearing on Motion - Other Motion to Enforce and Modify Consent Judgment;
filed by Center for Environmental Health, (Plaintiff) in Department 21**

Tentative Ruling - 03/04/2025 Somnath Raj Chatterjee

The Motion re: PLAINTIFFS NOTICE OF MOTION IN SUPPORT OF PLAINTIFF CENTER FOR ENVIRONMENTAL HEALTHS MOTION TO ENFORCE AND MODIFY CONSENT JUDGMENT filed by Center for Environmental Health, on 12/04/2024 is Denied.

The Motion of Center for Environmental Health to modify Consent Judgment is DENIED.

CONSENT JUDGMENT.

On 12/9/14, CEH entered into a Consent Judgment with Settling Defendants. The Consent Judgment requires (1) clear and reasonable warnings and (2) that defendants sell the aviation fuel with the lowest concentration of Lead that is approved for use and commercially available in California.

The Consent Judgment at Section 2.3.1(a) states:

“[1] As of the Effective Date, Settling Defendants shall not purchase for resale in California, distribute for sale in California, or sell in California Avgas that contains a lead concentration of more than 0.56 grams of lead per liter of fuel.

[2] In addition, each Settling Defendant shall purchase for resale, distribute, and sell in California Avgas with the lowest concentration of lead approved for aviation use that is commercially available to that Settling Defendant on a consistent and sustained basis at prices and on terms, in quantities and at times sufficient to meet demands of the customers of that Settling Defendant in California (“Commercially Available”), including 100VLL once it becomes Commercially Available to that Settling Defendant for the California market.”

The issue in this motion is whether CEH has demonstrated that there is a lower lead alternative that both “approved for aviation use” and “Commercially Available.” CEH has the burden of proof. The Consent Judgment at Section 2.3.1(c) states: “In any such motion, the burden shall be on CEH to establish that a lower lead alternative to 100LL Avgas is Commercially Available to that Settling Defendant for the California market.”

CONSENT JUDGMENT – CONTRACT INTERPRETATION.

The parties are divided by issues of contract interpretation regarding the definitions of “approved for aviation use” and “Commercially Available.”

“Approved for aviation use” is not defined and does not address approved by who or approved at what level. The court can readily identify four alternatives. First, FAA approval in a

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Supplemental Type Certificate (“STC”) (Todzo Decl., ¶ 14). (14 CFR 21.111 et seq.) This might be appropriate because it was in effect when the consent decree was entered, but not appropriate because it concerns a modification from the original design rather than a general approval. Second, approval by FAA’s Piston Engine Aviation Fuels Initiative (“PAFI”). This might be appropriate because the FAA established the PAFI to support the evaluation of unleaded aviation fuel with the objective of ultimately qualifying a fleetwide solution, but not appropriate because it was established in 2014, years after the consent judgment (Barnes Dec. Exh F). Third, approval by the FAA’s Eliminate Aviation Gasoline Lead Emissions (EAGLE) team. This might be appropriate because the FAA established the EAGLE to “Identify at least one unleaded fuel acceptable for safe General Aviation fleet use” and “Minimize the safety and technical impacts associated with high-performance engines using unleaded fuels,” but not appropriate because it was established in 2022, years after the consent judgment (Barnes Dec. Exh E). Fourth, approval by aircraft manufacturers as consistent with their warranties. This might be appropriate because fuel must be consistent with manufacturer design specifications, but not appropriate because “approval” suggests some formal approval process and a decision by an administrative agency.

“Commercially Available” is defined as “commercially available to that Settling Defendant on a consistent and sustained basis at prices and on terms, in quantities and at times sufficient to meet demands of the customers of that Settling Defendant in California.” The definition of “Commercially Available” includes the phrase “commercially available, so the definition is self-referential and circular. The definition is not helpful in defining “commercially available.”

CEH reads “Commercially Available” as focusing on what the Defendants can make available. CEH argues that if the defendants can acquire lower lead fuel “on a consistent and sustained basis at prices and on terms, in quantities and at times sufficient to [provide the fuel to] the customers” then the defendants must buy the fuel and make it available to their customers. This definition is narrow and gives effect to the specific details of the terms on which the fuel must be “commercially available” as set forth in the provision, but this definition does not give reasonable effect to the meaning of the term “commercially available” itself. “When the contract is clear and explicit, the parties’ intent is determined solely by reference to the language of the agreement.” (Gilkyson v. Disney Enter., Inc. (2021) 66 Cal.App.5th 900, 916.) But the term here is not clear and explicit.

Defendants read “Commercially Available” as meaning both “Commercially Available” and commercially feasible, which means that the defendants must not only be able to acquire the Commercially Available lower lead fuel but also be able to store it and to sell it to customers in sufficient volumes to be profitable. There must be “demands of the customers.” This reading is broader and more reasonable because the consent judgment states that the defendants must acquire lower lead fuel “to meet demands of the customers.” If there is little to no demand for the fuel at the prices that defendants would need to charge to sell the lower lead fuel at a break-even basis, then defendants could arguably purchase none of the lower lead fuel and meet the demands of the customers. The phrase “sufficient to meet demands of the customers” is where “Commercially Available” incorporates “commercially feasible.”

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The Court interprets the Consent Judgment in light of the fact this case is brought under Proposition 65, which is designed to provide warnings to the public about the hazards of chemicals. The Consent Judgment requires defendants to use a reformulated product when that product is “approved” and “commercially available.” A defendant may agree to sell or use a reformulated product to avoid liability under Proposition 65, but that does not change Proposition 65’s nature as a warning statute. (Center for Environmental Health v. Perrigo Co. (2023) 89 Cal.App.5th 1, 22-24 [discussing relationship between Prop 65 liability and product reformulation].)

The Court is concerned that the Consent Judgment turned a case about warnings into a case about forcing a fundamental industry shift through the means of a consent decree, particularly here where regulatory bodies and industry groups are currently addressing the same issue—transitioning to the broad-based use of Avgas with lower levels of lead. The Court considers that aviation fuel is a regulated commodity. California legislation effective 1/1/25 states that airports may sell low lead aviation fuel until 12/31/30. (Pub. Util. Code 21711 [“An airport operator or aviation retail establishment shall not sell, distribute, or otherwise make available leaded aviation gasoline to consumers on or after January 1, 2031, in compliance with Section 47107 of Title 49 of the United States Code”].) The FAA also acts in the public interest and in the PAFI and EAGLE initiatives has been investigating unleaded aircraft fuel.

The Court interprets the Consent Judgment in light of the fact that CEH was and is acting in the public interest. (H&S 25249.7(d) [“Actions pursuant to this section may be brought by a person in the public interest”].) The California state legislature and the FAA also act in the public interest.

The Court interprets the Consent Judgment so that it is lawful and reasonable. (Civil Code 1643.) Similarly, the court reads the Consent Judgment consistent with its evident object. (Civil Code 1648.)

The Court as a matter of contract interpretation reads the word “approved” as meaning approved by the FAA for general use and reads the phrase “commercially available” as meaning both commercially available and commercially feasible. This broad interpretation of those terms is appropriate to ensure that the application of the Consent Judgment (1) is consistent with California and federal legislation and regulation regarding aviation fuel, (2) is lawful, reasonable, and consistent with its evident object, and (3) does not undercut a complex regulatory process that accounts for a wider range of stakeholders and issues than those evident here.

BACKGROUND – EVIDENCE

General Aviation Modifications, Inc. (“GAMI”) created G100UL, an unleaded aviation fuel. On September 1, 2022, the FAA approved G100UL, for use in many piston-engine aircraft. (Todzo Decl., ¶ 14.) In April 2024, Vitol Aviation Company (“Vitol”), a company involved in aviation

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gasoline production and wholesale, commenced large-scale production of G100UL. (Emmett Decl. ¶ 1.) Several California airports are selling G100UL low lead fuel. (Moving at 10-11.)

G100UL has not been approved by the FAA’s Piston Engine Aviation Fuels Initiative (“PAFI”), which was created to review unleaded fuels. (Oppo at 4-5) There is no ASTM Standard for unleaded gas, so there is no industry standard against which G100UL can be measured to ensure that it is safe and appropriate. (Oppo at 5-6, 9-10, 15-16.) Several aircraft manufacturers have disapproved use of G100UL for various reasons, including that it degrades tank sealant. (Oppo at 7-9.) G100UL has not been subject to “peer review” because GAMI (its manufacturer) refuses to share information without a confidentiality agreement. (Oppo at 9.)

The evidence submitted in opposition to the motion supports this factual finding. The Court considers the evidence submitted through an ex parte application on 2/18/25. That evidence is not necessary to support the finding that G100UL low lead fuel is not generally accepted. That evidence is further support for the fact finding.

ANALYSIS

The Court compares the evidence with the definition of “approved for aviation use.”

G100UL low lead fuel is not “Approved for aviation use.” Plaintiff has demonstrated that G100UL low lead fuel has been approved for certain aircraft with a Supplemental Type Certificate (“STC”). STC approval concerns a modification from the original design rather than a general approval. Plaintiff has not demonstrated general approval as would be the situation if there were approval under the FAA’s PAFI or EAGLE programs.

The Court compares the evidence with the definition of “Commercially Available.”

The G100UL fuel is available on a consistent and sustained basis. The G100UL fuel is available at prices and on terms that appear reasonable. The storage of G100UL fuel would, however, require airports to build new storage facilities, and the cost of those storage facilities would be overhead that should arguably be considered as a cost of the fuel. The G100UL fuel appears to be available in quantities and at reasonable times.

The G100UL fuel is not able to meet the demands of customers. CEH has not demonstrated that if the Defendants bought G100UL fuel and built the tanks to store the G100UL fuel and made the fuel available that there would be enough demand from customers to be commercially feasible. CEH has not demonstrated that there will be significant demand from consumers for G100UL fuel until it has been reviewed by PAFI, meets an ASTM Standard, has been peer reviewed, and GAMI has addressed concerns such as whether it degrades tank sealant.

The court appreciates that there can be a significant element of conjecture, if not speculation, when projecting customer demand. The Court takes judicial notice that there can be customer

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resistance to the use of new fuels, such as ethanol or electricity to fuel cars, but also that there can be unanticipated demand for new products or services that meet needs that were previously unidentified. On this motion, CEH has the burden of demonstrating that that G100UL fuel is “approved” and “Commercially Available,” and CEH has not met that burden at this time. The science of aircraft fuel will continue to develop. (Opp at 7:13-21.) This order does not preclude CEH from raising the issue again as science develops and the state and FAA regulatory approval processes move forward.

PLEASE NOTE: This tentative ruling will become the ruling of the court if uncontested by 04:00pm the day before your hearing. If you wish to contest the tentative ruling, then both notify opposing counsel directly and the court at the eCourt portal found on the court’s website: www.alameda.courts.ca.gov.

If you have contested the tentative ruling or your tentative ruling reads, “parties to appear,” please use the following link to access your hearing at the appropriate date and time: <https://alameda-courts-ca-gov.zoomgov.com/my/department21> . If no party has contested the tentative ruling, then no appearance is necessary.