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8 Attorneys for Plaintiff
9 Michael DiPirro

ENDORSED
FILED
ALAMEDA COUNTY

JUN 01 2016

CLERK OF THE SUPERIOR COURT
By T.L. Deputy

MAY 25 2016

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION

13
14 MICHAEL DIPIRRO,
15 Plaintiff,

16 v.

17 AMERICAN RECREATION PRODUCTS,
18 LLC, dba KELTY, INC.; RECREATIONAL
19 EQUIPMENT, INC., dba "R.E.I."; et al.,

20 Defendants.

Case No. RG15791674

^{T.L.}
**[PROPOSED] JUDGMENT PURSUANT TO
TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: May 26, 2016
Time: 3:00 p.m.
Dept. 23
Judge: Hon. Victoria Kolakowski

Reservation No. R- 1727490

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Plaintiff, Michael DiPirro, and Defendant, American Recreation Products, LLC,
dba Kelty, Inc., having agreed through their respective counsel that judgment be entered
pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and
following this Court's issuance of an Order approving this Proposition 65 settlement and
Consent Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6,
judgment is hereby entered in accordance with the terms of the Consent Judgment attached
hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to
enforce the settlement under Code of Civil Procedure section 664.6.

IT IS SO ORDERED.

Dated: June 1, 2018



JUDGE OF THE SUPERIOR COURT

Victoria S. Kolakowski

EXHIBIT 1

1 David R. Bush, State Bar No. 154511
2 Jennifer Henry, State Bar No. 208221
3 Bush & Henry
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5 Santa Rosa, CA 95403
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8 Attorneys for Plaintiff
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ALAMEDA**
12 **UNLIMITED CIVIL JURISDICTION**

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17 LLC, dba KELTY, INC.; RECREATIONAL
18 EQUIPMENT, INC., dba "R.E.I."; *et al.*,

19 Defendants.

Case No. RG15791674

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Plaintiff, Michael DiPirro (“DiPirro”),
4 and Exxel Outdoors, LLC, doing business as named defendant AMERICAN RECREATION
5 PRODUCTS, LLC, dba KELTY, INC. (“Defendant” or “American Rec”), with DiPirro and
6 Defendant individually referred to as a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 DiPirro is an individual residing in California who seeks to promote awareness of exposures
9 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
10 contained in consumer products.

11 **1.3 Defendant**

12 Defendant employs ten or more persons and is a person in the course of doing business for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
14 section 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 DiPirro alleges that Defendant manufactures, imports, sells, or distributes for sale in the state
17 of California, tents containing Tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) without first
18 providing the clear and reasonable exposure warning required by Proposition 65. TDCPP is listed
19 pursuant to Proposition 65 as a chemical that is known to the State of California to cause cancer.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are tents containing TDCPP that are designed,
22 purchased, imported, manufactured, sold, commissioned, brokered, licensed or unlicensed, or
23 distributed for sale in California by Defendant, including, but not limited to, *Kelty Discovery 2 Tent*
24 (*#869-082-0001*), and tents sold under the names Kelty, Wenzel (including without limitation Wenzel
25 Starlite Backpacking Tent), Sierra Designs, Ultimate Direction, Campex, Starlite, Ozark Trail
26 (including without limitation the Ozark Trail 4-person Dome Tent), TICLA, Slumberjack, Tailgaterz,
27 Mountain Trails, Suisse Sport, and Master Sportsman (“Products”).

1 **1.6 Notice of Violation**

2 On or about April 4, 2015, DiPirro served Defendant and certain requisite public enforcement
3 agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the recipients of
4 DiPirro’s allegation that Defendant violated Proposition 65 by failing to warn its customers and
5 consumers in California that the Products expose users to TDCPP. To the best of the Parties’
6 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth
7 in the Notice.

8 **1.7 Complaint**

9 On or about November 2, 2015, DiPirro filed the instant action against Defendant
10 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subject of the
11 Notice.

12 **1.8 No Admission**

13 Defendant denies the material, factual, and legal allegations contained in the Notice and
14 maintains that all of the products it has manufactured, sold, or distributed for sale in California,
15 including the Products, have been, and are, in compliance with all laws. Notwithstanding the
16 allegations in the Notice, Defendant contends that it has not knowingly manufactured or distributed,
17 or caused to be manufactured or distributed, Products for sale in California in violation of Proposition
18 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
19 finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
20 Judgment constitute or be construed, offered or admitted as evidence in any administrative or judicial
21 proceeding or litigation in any court, agency, or forum, as an admission by Defendant, or its owners,
22 officers, directors, employees, parents, subsidiaries, employees, shareholders, directors, insurers,
23 attorneys, successors and assigns, past and present, affiliated entities or corporations, or entities
24 absorbed by merger or acquisition, of any fact, finding, conclusion of law, issue of law, or violation
25 of law, the same being specifically denied by Defendant. Furthermore, nothing in this Consent
Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may
have in any other or future legal proceeding, except as expressly provided in this Consent Judgment.
This section shall not, however, diminish or otherwise affect Defendant’s obligations,

1 responsibilities, and duties under this Consent Judgment.

2 **1.9 Consent to Jurisdiction**

3 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Alameda
5 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
6 Judgment.

7 **1.10 Effective Date**

8 For purposes of this Consent Judgment, the term "Effective Date" shall mean March 15, 2016.

9 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

10 **2.1 Reformulation Commitment Option**

11 In order to waive the second civil penalty under Section 3.2, Defendant shall only
12 manufacture for sale or distribute for sale in California, Products that are reformulated
13 ("Reformulated Products"). For purposes of this Consent Judgment, Reformulated Products are
14 Products that meet the Reformulation Standards of Section 2.2 below.

15 **2.2 Reformulation Standard**

16 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products
17 containing no more than 25 parts per million ("ppm") (the equivalent of .0025%) of TDCPP in any
18 material, component, or constituent of a subject product, when analyzed by a laboratory accredited
19 by the State of California, a federal agency, or similar nationally recognized accrediting
20 organization now or in the future (such laboratory referred hereinafter as an "Accredited Lab")
21 pursuant to EPA testing methodologies 8141, 3545 and 8270C, or equivalent methodologies utilized
22 by federal or state agencies to determine the presence, and measure the quantity, of TDCPP in a
23 solid substance.

24 **2.3 Warning**

25 Commencing on the Effective Date, Defendant shall not sell to California consumers Products
which are not Reformulated Products, unless clear and reasonable warnings in the form set forth
below shall appear on such Products. Each warning shall be prominently placed with such
conspicuousness as compared with other words, statements, designs, or devices as to render it likely

1 to be read and understood by an ordinary individual under customary conditions before purchase or
2 use. Each warning shall be provided in a manner such that the consumer or user understands to
3 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion. If a
4 warning is provided pursuant to this Section, the text shall be as follows, at Defendant's option,

5 **Option 1: WARNING: This product contains TDCPP, a chemical**
6 **known to the State of California to cause cancer.**

7 **Option 2: WARNING: This product contains chemicals known to the**
8 **State of California to cause cancer and birth**
9 **defects or other reproductive harm.**

10 3. MONETARY PAYMENTS

11 **3.1 Initial Civil Penalty.** Defendant shall pay an initial civil penalty in the amount of
12 \$6,000.00 within five (5) business days of Court approval of this Consent Judgment. The penalty
13 payment will be allocated by DiPirro's counsel in accordance with California Health & Safety Code §
14 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental
15 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to DiPirro.
16 The initial penalty payment shall be delivered to the address listed in Section 3.3 below.

17 **3.2 Final Civil Penalty.** Defendant shall pay a final civil penalty of \$12,000.00 on or
18 before September 1, 2016. The final civil penalty shall be waived in its entirety, however, if, no later
19 than August 1, 2016, an officer of Defendant provides DiPirro with written certification that, as of the
20 date of such certification and continuing into the future, Defendant has met the reformulation
21 standard specified in Section 2 above, such that all Products manufactured for sale in California by
22 Defendant are Reformulated Products. The certification in lieu of a final civil penalty payment
23 provided by this Section is a material term, and time is of the essence. The penalty payment will be
24 allocated by DiPirro's counsel in accordance with California Health & Safety Code § 25249.12(c)(1)
25 & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard
Assessment ("OEHHA") and the remaining 25% of the penalty remitted to DiPirro. The penalty
payment or certification shall be delivered to the address listed in Section 3.3 below.

3.3 Payments Held in Trust. Payments shall be delivered to the Law Offices of David R.

1 Bush, 3270 Mendocino Avenue, Suite 2E, Santa Rosa, CA 95403, within five (5) business days of
2 Court approval of this Consent Judgment, and shall be in the form of three checks for the following
3 amounts made payable to:

- 4 (a) "Law Office of David R. Bush" in the amount of \$4,500.00 for payment to OEHHA.
5 Law Office of David R. Bush agrees to forward such funds to OEHHA in a timely
6 manner.
- 7 (b) "Law Office of David R. Bush" in the amount of \$1,500.00 as payment to Michael
8 DiPirro. David R. Bush agrees to forward such funds in a timely manner; and
- 9 (c) "Bush & Henry" in the amount of \$30,000, as payment for attorneys' fees and costs
pursuant to Section 4 below.

10 For any payment that is returned for insufficient funds, payment must be made by a cashier's
11 check within ten (10) calendar days of notification of insufficient funds, plus a stipulated 8% service
12 fee. If the check was returned due to bank error, the penalty shall be reduced to actual bank fees
13 incurred by Plaintiff.

14 **3.3 Issuance of 1099 Forms.** Defendant shall provide DiPirro's counsel with a separate
15 1099 forms for each of its payments under this Agreement as follows:

- 16 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010, Sacramento,
17 CA 95814 (EIN: 68-0284486) for civil penalties paid;
- 18 (b) "Michael DiPirro," whose address and tax identification number shall be furnished
19 upon request after this Agreement has been fully executed by the Parties for his
20 portion of the civil penalties paid; and
- (c) "Law Offices of David R. Bush," for fees and costs reimbursed pursuant to Section 4.

21 **4. REIMBURSEMENT OF FEES AND COSTS**

22 The parties acknowledge that DiPirro and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
24 issue to be resolved after the material terms of the agreement had been settled. The parties then
25 attempted to (and did) reach an accord on the compensation due to OEHHA, DiPirro and his counsel
under general contract principles and the private attorney general doctrine codified at California Code

1 of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement.
2 Defendant shall pay \$30,000 for fees and costs incurred as a result of investigating, bringing this
3 matter to Defendant' attention, and negotiating a settlement in the public interest. Defendant shall
4 issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "David
5 R. Bush, Attorney at Law" and shall deliver payment within five (5) business days of receiving notice
6 Court approval of this Consent Judgment to the address listed in Section 3.3 above.

7 **5. CLAIMS COVERED AND RELEASED**

8 **5.1 DiPirro's Public Release of Proposition 65 Claims**

9 DiPirro, acting on his own behalf and in the public interest, releases Defendant, its officers,
10 directors, attorneys, representatives, shareholders, parent company, subsidiaries, affiliates,
11 divisions, clients, and retailers or other downstream entities to which Defendant sells or distributes
12 the Products (including, but not limited to, dot coms, distributors, licensees, licensors, wholesalers,
13 product representatives and customers), including, but not limited to, Exxel Outdoors, LLC, Sierra
14 Design Acquisitions, LLC, Campex (BD) LTD, Recreational Equipment, Inc. (dba "REI"), and
15 Wal-Mart Stores, Inc., and all of their affiliates and subsidiaries from all claims for violations of
16 Proposition 65 up through the Effective Date based on exposures to TDCPP from the Products, as
17 set forth in the Notice and the Complaint. Compliance with the terms of this Consent Judgment
18 constitutes compliance with Proposition 65 with respect to exposures to TDCPP from the Products
19 sold by Defendant after the Effective Date.

20 **5.2 DiPirro's Individual Release of Claims**

21 DiPirro, in his individual capacity only and *not* in his representative capacity, also provides a
22 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
23 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
24 liabilities and demands of DiPirro of any nature, character, or kind, whether known or unknown,
25 suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical
Tris(1,3-dichloro-2-propyl) phosphate (TDCPP) in the Products.

5.3 Defendant's Release of DiPirro

Defendant, on its own behalf and on behalf of their past and current agents, representatives,

1 DiPirro agrees to comply with the reporting form requirements referenced in Health & Safety
2 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
3 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
4 of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and
5 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
6 judicial approval of the settlement in a timely manner.

7 **12. MODIFICATION**

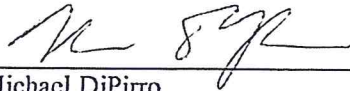
8 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
9 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
10 application of any Party and the entry of a modified consent judgment by the Court.

11 **13. AUTHORIZATION**

12 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
13 Parties and have read, understood and agree to all of the terms and conditions of this Consent
14 Judgment.

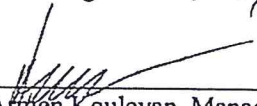
15 **AGREED TO:**

16 Date: 3/25/16

17 By: 
18 Michael DiPirro

15 **AGREED TO:**

16 Date: 03-21-16

17 By: 
18 Arden Kouleyan, Managing Member
19 Exxel Outdoors, LLC, dba American
20 Recreation Products, LLC