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14 Counsel for Plaintiff, ECOLOGICAL RIGHTS FOUNDATION

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN FRANCISCO

17 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 GOOD DIRECTIONS, INC., et al.,

21 Defendants.

Case No. CGC-16-554009

~~PROPOSED~~ CONSENT JUDGMENT
AS TO PIER 1 IMPORTS (U.S.), INC.

22 **1. INTRODUCTION**

23 1.1 On September 1, 2016, the Ecological Rights Foundation (“ERF”) acting on behalf
24 of itself and the general public, filed a Complaint for civil penalties and injunctive relief
25 (“Complaint”) in San Francisco Superior Court, Case No. CGC-16-554009, against defendant Pier
26 1 Imports (U.S.), Inc., (also referred to herein as “Pier 1 Imports” or “Defendant”). The Complaint
27 alleges, among other things, that Defendant violated provisions of the Safe Drinking Water and
28 Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, *et seq.* (Proposition
65) by failing to give clear and reasonable warnings to those residents of California who use wood-
burning outdoor heating products (such as fire pits, fire bowls, and chimineas), that use of those

ENDORSED
FILED
San Francisco County Superior Court

FEB 24 2017

CLERK OF THE COURT

BY:

Deputy Clerk

1 products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the
2 State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice
3 letter dated June 9, 2016, sent by ERF to Pier 1 Imports, the California Attorney General, all
4 District Attorneys, and all City Attorneys with populations exceeding 750,000.

5 1.2 ERF and Pier 1 Imports are hereinafter referred to collectively as the "Parties."

6 1.3 ERF alleges that wood-burning outdoor heating products that are manufactured,
7 distributed or sold by Defendant for use in California ("Covered Products") require a warning
8 under Proposition 65, pursuant to Health and Safety Code Section 25249.6. Defendant is a business
9 that employs more than ten persons, and manufactures, distributes, and sells its own brand(s) of
10 Covered Products. Pursuant to Health and Safety Code Section 25249.8, carbon monoxide is a
11 chemical known to the State of California to cause reproductive toxicity. ERF alleges that the
12 combustion of wood creates significant amounts of carbon monoxide to be released into the air,
13 causing inhalation exposures to those using or standing near the Covered Products when they are
14 in use. For purposes of this Consent Judgment, the parties stipulate that this Court has jurisdiction
15 over the allegations of violations contained in the Complaint and personal jurisdiction over Pier 1
16 Imports, that venue is proper in the County of San Francisco, and that this Court has jurisdiction
17 to enter this Consent Judgment as a full settlement and resolution of the allegations contained in
18 the Complaint brought in the public interest pursuant to Health and Safety Code Section
19 25249.7(d).

20 1.4 The Parties have entered into this Consent Judgment in order to settle, compromise,
21 and resolve claims that are denied and disputed and thus avoid prolonged and costly litigation.
22 The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all
23 claims between the parties for the purpose of avoiding prolonged litigation. This Consent
24 Judgment shall not constitute an admission against interest with respect to any material allegation
25 of the Complaint, each and every allegation of which Defendant denies, nor may this Consent
26 Judgment, or compliance with it, be used as evidence of any wrongdoing, misconduct, culpability
27 or liability on the part of Pier 1 Imports.

1 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
2 prejudice, waive, or impair any right, remedy, argument or defense the Parties may have in any
3 current or future legal proceeding unrelated to these proceedings.

4 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
5 Court. The term "Execution Date" means the date this Consent Judgment has been executed by all
6 the Parties.

7 **2. INJUNCTIVE RELIEF**

8 2.1 Warnings

9 Covered Products manufactured beginning 60 days after the Effective Date and offered
10 for sale in California shall include one of the following warning statements:

11 **WARNING:** Combustion byproducts produced when using this product include carbon
12 monoxide, a chemical known to the State of California to cause birth defects or other
13 reproductive harm.

14 Or, **WARNING:** This product can expose you to carbon monoxide, which is a
15 combustion byproduct known to the State of California to cause birth defects or other
16 reproductive harm. For more information go to www.P65Warnings.ca.gov.

17
18 The required warning statements shall be affixed to or printed on the Covered Product itself and
19 the Covered Product's instruction manual. The warning shall be prominently affixed to or
20 printed on the Covered Product and its instruction manual, and displayed with such
21 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
22 Product and its instruction manual, as to render it likely to be read and understood by an ordinary
23 individual under customary conditions of purchase or use. A warning may be contained in the
24 same section of the instruction manual that contains other safety warnings concerning the use of
25 the Covered Product. The type size of the warning must be legible, and no smaller than any
26 other warning provided with the Covered Product. The word "**WARNING:**" shall be in upper
27 case letters and bold text. Defendant may utilize a symbol consisting of a black exclamation
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1 point in a yellow equilateral triangle with a bold black outline.

2 2.2 Reporting

3 No later than 75 days after the Effective Date, Defendant shall provide a certification
4 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
5 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1 and 3.3.

6 **3. SETTLEMENT PAYMENTS**

7 3.1 Civil Penalties and Payments In Lieu of Penalties

8 Pursuant to Health and Safety Code section 25249.7(b)(2), Pier 1 Imports shall pay
9 \$10,000 in civil penalties. The penalty payment will be allocated in accordance with California
10 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
11 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
12 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
13 provide these payments in two checks for the following amounts made payable to: 1) “OEHHA”
14 in the amount of \$7,500, and 2) “Ecological Rights Foundation” in the amount of \$2,500.

15 Additionally, Pier 1 Imports shall pay \$4,500, as payments in lieu of civil penalties (“PILP”), to
16 Rose Foundation for Communities and the Environment (“Rose Foundation”), a grantmaking
17 public charity, for use toward informing Californians about risks of exposures to Proposition 65
18 listed chemicals known to cause reproductive or developmental harm, or toward protecting
19 California residents from such risks. Neither ERF, nor any of its board members, attorneys, or
20 any of their relatives, shall be eligible for grants from the PILP made by Defendant pursuant to
21 this Consent Judgment. Rose Foundation shall maintain adequate records to document that the
22 funds are used for the above-described purposes. Rose Foundation shall, within 30 days of any
23 request from ERF or the California Attorney General, provide sufficient documentation of how
24 the funds were spent.

1 3.2 Attorneys' Fees and Litigation Costs

2 In settlement of all of the claims that are alleged, or could have been alleged, in the
3 Complaint concerning Covered Products, Pier 1 Imports shall pay \$17,500 to the Ecology Law
4 Center to cover Plaintiff's attorneys' fees and costs.

5 3.2 Payments

6 All Payments shall be sent no later than 10 days after the Effective Date via USPS certified
7 mail, return receipt requested, to the following addresses: All payments to Ecological Rights
8 Foundation and Ecology Law Center shall be made by check payable to "Ecology Law Center
9 Attorney Client Trust Account" and delivered to:

10 Fredric Evenson
11 Ecology Law Center
12 P.O. Box 1000
 Santa Cruz, CA 95061

13 The payment to OEHHA shall be delivered to:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

17 4. **MATTERS COVERED BY THIS CONSENT JUDGMENT**

18 4.1 This Consent Judgment is a final and binding resolution between ERF, acting on
19 behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest,
20 and Pier 1 Imports of: (i) any violation of Proposition 65 (including but not limited to the claims
21 made in the Complaint); and (ii) any other statutory or common law claim to the fullest extent that
22 any of the foregoing described in (i) or (ii) were or could have been asserted by any person or
23 entity against Pier 1 Imports or its parents, subsidiaries or affiliates, and all of their suppliers,
24 customers, distributors, wholesalers, retailers, all other upstream or downstream entities in the
25 chain of distribution, or any other person in the course of doing business, and the successors and
26 assigns of any of them, who may use, maintain, distribute or sell Covered Products ("Released
27 Entities"), based on its or their exposures of persons to carbon monoxide from Covered Products
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1 and their failure to provide a clear and reasonable warning of exposure to such individuals. As to
2 alleged exposures to carbon monoxide from Covered Products, compliance with the terms of this
3 Consent Judgment resolves any issue, now and in the future, concerning compliance by Pier 1
4 Imports and the Released Entities, with the requirements of Proposition 65 with respect to Covered
5 Products, and any alleged resulting exposure.

6 4.2 It is possible that other claims not known to the Parties, arising out of the facts
7 alleged in the Notice or the Complaint and relating to the Covered Product, will develop or be
8 discovered. ERF on behalf of itself only, and Pier 1 Imports on behalf of itself only, acknowledge
9 that this Consent Judgment is expressly intended to cover and include all such claims up through
10 and including the Effective Date, including all rights of action therefor. ERF and Pier 1 Imports
11 acknowledge that the claims released above may include unknown claims, and nevertheless
12 waive California Civil Code Section 1542 as to any such unknown claims. California Civil Code
13 Section 1542 reads as follows:

14 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
15 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
16 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.

17 ERF on behalf of itself only, and Pier 1 Imports on behalf of itself only, acknowledge and
18 understand the significance and consequences of this specific waiver of California Civil Code
19 Section 1542.

20 **5. ENTRY OF CONSENT JUDGMENT**

21 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment. Upon
22 entry of the Consent Judgment, Pier 1 Imports and ERF waive their respective rights to a hearing
23 or trial on the allegations of the Complaint.

24 **6. ENFORCEMENT OF JUDGMENT**

25 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
26 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
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1 San Francisco County, giving the notice required by law, enforce the terms and conditions
2 contained herein.

3 6.2 In any proceeding brought by either Party to enforce this Consent Judgment, such
4 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
5 violation of Proposition 65 or this Consent Judgment.

6 **7. MODIFICATION OF JUDGMENT**

7 7.1 This Consent Judgment may be modified only upon written agreement of the
8 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
9 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

10 **8. TERMINATION AND RETENTION OF JURISDICTION**

11 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
12 this Consent Judgment.

13 **9. AUTHORITY TO STIPULATE**

14 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
15 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of
16 the Party represented and legally to bind that party.

17 **10. SERVICE ON THE ATTORNEY GENERAL**

18 10.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
19 California Attorney General on behalf of the Parties so that the Attorney General may review this
20 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
21 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
22 and in the absence of any written objection by the Attorney General to the terms of this Consent
23 Judgment, the Parties may then submit it to the Court for approval.

24 **11. ENTIRE AGREEMENT**

25 11.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
27 negotiations, commitments and understandings related hereto. No representations, oral or
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1 otherwise, express or implied, other than those contained herein have been made by any Party
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
3 to exist or to bind any of the Parties.

4 **12. GOVERNING LAW**

5 12.1 The validity, construction and performance of this Consent Judgment shall be
6 governed by the laws of the State of California, without reference to any conflicts of law provisions
7 of California law.

8 **13. EXECUTION AND COUNTERPARTS**

9 13.1 This Consent Judgment may be executed in counterparts which taken together shall
10 be deemed to constitute one document.

11 **14. COURT APPROVAL**

12 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
13 effect, and cannot be used in any proceeding for any purpose.

14 **15. NOTICES**

15 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
16 delivery or Certified Mail.

17
18 If to Ecological Rights Foundation: Fredric Evenson
Ecology Law Center
19 P.O. Box 1000
20 Santa Cruz, CA 95061

21 If to Pier 1 Imports (US), Inc.: Kevin C. Mayer
22 Crowell & Morning LLP
23 515 South Flower Street
40th Fl.
24 Los Angeles, CA 90071
25
26
27
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1 IT IS SO STIPULATED:

2
3 DATED:

ECOLOGICAL RIGHTS FOUNDATION

4
5 BY:

6 JAMES LAMPORT, EXECUTIVE DIRECTOR

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8
9
10 DATED:

PIER 1 IMPORTS (U.S.), INC.

11
12
13 BY:

14 *Carrie Egan*
15 CARRIE EGAN, VICE-PRESIDENT,
16 GLOBAL PROCUREMENT SERVICES

17
18
19 IT IS SO ORDERED, ADJUDGED AND DECREED:

20
21 DATED: _____

22 _____
23 JUDGE OF THE SUPERIOR COURT

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