



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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TEXT JUDGMENT

ECOLOGICAL RIGHTS FOUNDATION VS. SMART LIVING COMPANY ET AL

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APR 21 2017

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Deputy Clerk

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

17 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 SMART LIVING COMPANY, et al.,

21 Defendants.

Case No. CGC-16-554012

AK
[PROPOSED] CONSENT JUDGMENT

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-16-554012, against defendant
26 Akerue Industries, LLC, (also referred to herein as “Akerue” 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) and charcoal fueled grills and hibachis, that
use of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical

1 known to the State of California to cause reproductive toxicity. The Complaint was based upon
2 two 60-Day Notice letters, dated June 9, 2016, and June 27, 2016, sent by ERF to Akerue
3 Industries, LLC and its dba "Kay Home Products" the California Attorney General, all District
4 Attorneys, and all City Attorneys with populations exceeding 750,000. Akerue Industries, LLC,
5 and its dba Kay Home Products, shall hereinafter be referred to collectively as "Settling
6 Defendants".

7 1.2 Settling Defendants are businesses that employ more than ten persons, and
8 manufacture, distribute, and sell their own brands of wood-burning outdoor heating products, such
9 as fire pits, fire rings, fire tables and/or chimineas, and charcoal-burning grills and/or hibachis in
10 the State of California (hereinafter "Covered Products"). The combustion of wood and charcoal
11 creates significant amounts of carbon monoxide to be released into the air, causing inhalation
12 exposures to those using or standing near the Covered Products when they are in use. Pursuant to
13 Health and Safety Code Section 25249.8, carbon monoxide is a chemical known to the State of
14 California to cause reproductive toxicity. ERF alleges that Covered Products that are
15 manufactured, distributed or sold by Settling Defendants for use in California require warnings
16 under Proposition 65, pursuant to Health and Safety Code Section 25249.6. For purposes of this
17 Consent Judgment, the parties stipulate that this Court has jurisdiction over the allegations of
18 violations contained in the Complaint and personal jurisdiction over Settling Defendants, that
19 venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this
20 Consent Judgment as a full settlement and resolution of the allegations contained in the Complaint.

21 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
22 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
23 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
24 not constitute an admission with respect to any material allegation of the Complaint, each and
25 every allegation of which Settling Defendants deny, nor may this Consent Judgment, or
26 compliance with it, be used as evidence of any wrongdoing, misconduct, culpability or liability on
27 the part of Settling Defendants.

1 1.4 The term "Effective Date" means the date this Consent Judgment is entered by the
2 Court. The term "Execution Date" means the date this Consent Judgment has been executed by all
3 the parties.

4 **2. INJUNCTIVE RELIEF**

5 2.1 Warnings on Products

6 No later than 120 days after the Effective Date ("Initial Warning Date"), Covered
7 Products shipped by Settling Defendants for sale in California shall include one of the following
8 warning statements:

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

12 Or,

13 **WARNING:** Combustion byproducts produced when using this product include carbon
14 monoxide and other chemicals known to the State of California to cause cancer, birth
15 defects or other reproductive harm.

16 The warning statements required in paragraph 2.1 shall be either affixed to or printed on the
17 Covered Product itself or on the Covered Product's packaging. The warning shall be prominently
18 affixed to or printed on the Covered Product or its packaging, and displayed with such
19 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
20 Product or its packaging, as to render it likely to be read and understood by an ordinary individual
21 under customary conditions of purchase or use. The type size of the warning must be legible, and
22 no smaller than any other warning provided with the Covered Product. The word "**WARNING:**"
23 shall be in upper case letters and bold text.

24 2.2 Warnings in Assembly or Operations Instructions

25 No later than 120 days after the Initial Warning Date, all Covered Products shipped by
26 Settling Defendants for sale in California that include written assembly or operations
27 instructions, shall also include one of the following warning statements in such written materials:
28

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

4 Or,

5 **WARNING:** Combustion byproducts produced when using this product include carbon
6 monoxide and other chemicals known to the State of California to cause cancer, birth
7 defects or other reproductive harm.

8 The warning statements required by this paragraph shall be printed in the Covered Product's
9 assembly or operations instructions, and shall be displayed with such conspicuousness, as
10 compared with other words, statements, designs, or devices, as to render it likely to be read and
11 understood by an ordinary individual under customary conditions of use. A warning may be
12 contained in the same section of the assembly or operations instructions that contains other safety
13 warnings concerning the use of the Covered Product. The type size of the warning must be legible,
14 and no smaller than any other warning provided with the Covered Product. The word
15 **"WARNING:"** shall be in upper case letters and bold text.

16 2.3 Reporting

17 No later than 180 days after the Effective Date, Defendant shall provide a certification
18 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
19 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraph 3.1.

20 **3. SETTLEMENT PAYMENTS**

21 3.1 Civil Penalties and Payments In Lieu of Penalties

22 Pursuant to Health and Safety Code section 25249.7(b)(2), Settling Defendants shall pay
23 \$12,000 in civil penalties. The penalty payment will be allocated in accordance with California
24 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
25 to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the
26 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
27 provide these payments in two checks for the following amounts made payable to: 1) "OEHHA"
28

1 in the amount of \$9,000, and 2) "Ecological Rights Foundation" in the amount of \$3,000.
2 Additionally, Settling Defendants shall pay \$4,500, in lieu of civil penalties, to Rose Foundation
3 for Communities and the Environment ("Rose Foundation"), a grantmaking public charity, for
4 use toward informing Californians about risks of exposures to Proposition 65 listed chemicals
5 known to cause reproductive or developmental harm, or toward protecting California residents
6 from such risks. Neither ERF, nor any of its board members, attorneys, or any of their relatives,
7 shall be eligible for grants from the PILP made by Defendant pursuant to this Consent Judgment.
8 Rose Foundation shall maintain adequate records to document that the funds are used for the
9 above-described purposes. Rose Foundation shall, within 30 days of any request from ERF or the
10 California Attorney General, provide sufficient documentation of how the funds were spent.

11 3.2 Attorneys' Fees and Litigation Costs

12 In settlement of all of the claims that are alleged, or could have been alleged, in the
13 Complaint concerning Covered Products, Settling Defendants shall pay \$17,500 to the Ecology
14 Law Center to cover Plaintiff's attorneys' fees and costs.

16 3.3 Payments

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

21 Fredric Evenson
22 Ecology Law Center
23 P.O. Box 1000
Santa Cruz, CA 95061

24 The payment to OEHHA shall be delivered to:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 P.O. Box 4010
Sacramento, CA 95812-4010

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

2 4.1 This Consent Judgment is a final and binding resolution between ERF, acting on
3 behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest,
4 and Settling Defendants of: (i) any violation of Proposition 65 (including but not limited to the
5 claims made in the Complaint); and (ii) any other statutory or common law claim to the fullest
6 extent that any of the foregoing described in (i) or (ii) were or could have been asserted by any
7 person or entity against Settling Defendants or their parents, subsidiaries or affiliates, and all of
8 their suppliers, customers, distributors, wholesalers, retailers, all other upstream or downstream
9 entities in the chain of distribution, or any other person in the course of doing business, and the
10 successors and assigns of any of them, who may use, maintain, distribute or sell Covered Products
11 (“Released Entities”), based on its or their exposures of persons to carbon monoxide from Covered
12 Products and their failure to provide a clear and reasonable warning of exposure to such
13 individuals. As to alleged exposures to carbon monoxide from Covered Products, compliance with
14 the terms of this Consent Judgment resolves any issue, now and in the future, concerning
15 compliance by Settling Defendants and the Released Entities, with the requirements of Proposition
16 65 with respect to Covered Products, and any alleged resulting exposure.

17 4.2 It is possible that other claims not known to the Parties, arising out of this action and
18 the facts alleged in the Notice or the Complaint relating to the Covered Products, will develop or
19 be discovered. ERF on behalf of itself only, and Settling Defendants on behalf of themselves
20 only, acknowledge that this Consent Judgment is expressly intended to cover and include all such
21 claims by any party up through and including the Effective Date, including all rights of action
22 therefor. ERF and Settling Defendants acknowledge that the claims released above may include
23 unknown claims, and nevertheless waive California Civil Code Section 1542 as to any such
24 unknown claims. California Civil Code Section 1542 reads as follows:

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

1 ERF and Settling Defendants acknowledge and understand the significance and consequences of
2 this specific waiver of California Civil Code Section 1542.

3 **5. ENTRY OF CONSENT JUDGMENT**

4 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
5 Upon entry of the Consent Judgment, Settling Defendants and ERF waive their respective rights
6 to a hearing or trial on the allegations of the Complaint.

7 **6. ENFORCEMENT OF JUDGMENT**

8 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
9 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
10 San Francisco County, giving the notice required by law, enforce the terms and conditions
11 contained herein.

12 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
13 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
14 violation of Proposition 65 or this Consent Judgment.

15 **7. MODIFICATION OF JUDGMENT**

16 7.1 This Consent Judgment may be modified only upon written agreement of the parties
17 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
18 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

20 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
21 this Consent Judgment.

22 **9. AUTHORITY TO STIPULATE**

23 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
25 the party represented and legally to bind that party.
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28

1 **SERVICE ON THE ATTORNEY GENERAL**

2 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
3 California Attorney General on behalf of the parties so that the Attorney General may review this
4 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
5 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
6 and in the absence of any written objection by the Attorney General to the terms of this Consent
7 Judgment, the parties may then submit it to the Court for approval.

8 **ENTIRE AGREEMENT**

9 11.1 This Consent Judgment contains the sole and entire agreement and understanding
10 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
11 negotiations, commitments and understandings related hereto. No representations, oral or
12 otherwise, express or implied, other than those contained herein have been made by any party
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
14 to exist or to bind any of the parties.

15 **GOVERNING LAW**

16 12.1 The validity, construction and performance of this Consent Judgment shall be
17 governed by the laws of the State of California, without reference to any conflicts of law provisions
18 of California law.

19 **EXECUTION AND COUNTERPARTS**

20 13.1 This Consent Judgment may be executed in counterparts which taken together shall
21 be deemed to constitute one document.

22 **COURT APPROVAL**

23 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
24 effect, and cannot be used in any proceeding for any purpose.

25 **NOTICES**

26 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
27 delivery or Certified Mail.

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If to ERF:

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

If to Settling Defendants:

Jack Murray, CEO
Kay Home Products
90 Mcmillen Road
Antioch, IL 60002

IT IS SO STIPULATED:

DATED: NOVEMBER 7, 2016

ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

BY: *James Lafort*, its EXEC. DIR.
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: December 8, 2016

AKERUE INDUSTRIES, LLC
Akerue Industries, LLC
BY: *Jack Murray*, CEO
JACK MURRAY
ITS: *CHIEF EXECUTIVE OFFICER*

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 4/2/17

[Signature]

JUDGE OF THE SUPERIOR COURT
HAROLD KAHN