



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

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TEXT JUDGMENT

ECOLOGICAL RIGHTS FOUNDATION VS. HAYNEEDLE, INC. ET AL

001C05831199

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APR 20 2017

CLERK OF THE COURT

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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 HAYNEEDLE, INC., et al.,

21 Defendants.

Case No. CGC-16-554010

JK
~~PROPOSED~~ CONSENT JUDGMENT
AS TO HAYNEEDLE, 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-16-554010, against defendant
26 Hayneedle, Inc., (also referred to herein as “Hayneedle” or “Defendant”). The Complaint alleges,
27 among other things, that Defendant violated provisions of the Safe Drinking Water and Toxic
28 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 (“Covered Products”), that use of those products
causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the State of

1 California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice letter,
2 sent by ERF on June 27, 2016 to Hayneedle, the California Attorney General, all District
3 Attorneys, and all City Attorneys with populations exceeding 750,000.

4 1.2 Defendant is a business that employs more than ten persons, and manufactures,
5 distributes, and sells Covered Products. Some Covered Products Defendant distributes, markets
6 and sells are branded under the company's own private label, "Red Ember" ("House Brand
7 Covered Products"). Other products sold by Defendant are distributed and marketed by third
8 parties ("Third-Party Covered Products"). The combustion of wood creates significant amounts of
9 carbon monoxide to be released into the air, causing inhalation exposures to those using or standing
10 near the Covered Products when they are in use. Pursuant to Health and Safety Code Section
11 25249.8, carbon monoxide is a chemical known to the State of California to cause reproductive
12 toxicity. ERF alleges that Covered Products that are manufactured, distributed or sold by
13 Defendant for use in California require a warning under Proposition 65, pursuant to Health and
14 Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties stipulate that
15 this Court has jurisdiction over the allegations of violations contained in the Complaint and
16 personal jurisdiction over Hayneedle, Inc., that venue is proper in the County of San Francisco,
17 and that this Court has jurisdiction to enter this Consent Judgment as a full settlement and
18 resolution of the allegations contained in the Complaint.

19 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
20 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
21 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
22 not constitute an admission with respect to any material allegation of the Complaint, each and
23 every allegation of which Hayneedle denies, nor may this Consent Judgment, or compliance with
24 it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
25 Hayneedle.

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 House Brand Covered Products**

6 No later than January 31, 2017, Covered Products offered for sale in California shall
7 include one of the following warning statements:

8 **WARNING:** Fuels burned in wood or charcoal burning appliances, and the by-
9 products of combustion of such fuels, contain chemicals, including Carbon Monoxide,
10 known to the State of California to cause birth defects or other reproductive harm.

11 Or,

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

15 The warnings shall be prominently affixed to or printed on the House Brand Covered Products and
16 their instruction booklets, (Instruction Booklet Warnings shall be included no later than July of
17 2017) and displayed with such conspicuousness, as compared with other words, statements,
18 designs, or devices on the House Brand Covered Products and their instruction booklets, as to
19 render them likely to be read and understood by an ordinary individual under customary conditions
20 of purchase or use. Warnings may be contained in the same section of the instruction booklets that
21 contains other safety warnings concerning the use of the House Brand Covered Products. The type
22 size of the warning must be legible, and no smaller than any other warning provided with the
23 House Brand Covered Products. The word "**WARNING:**" shall be in upper case letters and bold
24 text. Defendant may utilize a symbol consisting of a black exclamation point in a yellow equilateral
25 triangle with a bold black outline.

1 2.2 Internet Warnings for Third-Party Covered Products

2 Defendants shall cause to be posted, on line, on their public website, the warning
3 described in paragraph 2.1, above, for any “Third Party Products” offered for sale in California.

4 2.3 **Reporting**

5 No later than 75 days after January 31, 2017, Defendant shall provide a report to ERF
6 documenting its compliance with paragraph 2.1. The report shall include photographs of the
7 warning posting and documentation that the warnings are being included with House Brand
8 Covered Products that are offered for sale in California.

9 **3. SETTLEMENT PAYMENTS**

10 3.1 Civil Penalties and Payments In Lieu of Penalties

11 Pursuant to Health and Safety Code section 25249.7(b)(2), based solely on the sales of its
12 House Brand Covered Products, Hayneedle shall pay \$12,000 in civil penalties. The penalty
13 payment will be allocated in accordance with California Health and Safety Code section
14 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of
15 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
16 amount paid to Ecological Rights Foundation. Defendant will provide these payments in two
17 checks for the following amounts made payable to: 1) “OEHHA” in the amount of \$9,000, and
18 2) “Ecological Rights Foundation” in the amount of \$3,000. Additionally, Hayneedle shall pay
19 \$2,500, as payments in lieu of civil penalties (“PILP”), to Rose Foundation for Communities and
20 the Environment (“Rose Foundation”), a grantmaking public charity, for use toward informing
21 Californians about risks of exposures to Proposition 65 listed chemicals known to cause
22 reproductive or developmental harm, or toward protecting California residents from such risks.
23 Neither ERF, nor any of its board members, attorneys, or any of their relatives, shall be eligible
24 for grants from the PILP made by Defendant pursuant to this Consent Judgment. Rose
25 Foundation shall maintain adequate records to document that the funds are used for the above-
26 described purposes. Rose Foundation shall, within 30 days of any request from ERF or the
27 California Attorney General, provide sufficient documentation of how 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, Hayneedle shall pay \$17,500 to the Ecology Law Center
4 to cover Plaintiff's attorneys' fees and costs.

5 **3.3 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 delivered to:

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

11 The payment to OEHHA shall be delivered to:

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

15
16 **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

17 4.1 As to House Brand Covered Products, this Consent Judgment is a final and binding
18 resolution between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day
19 Notice Letter) acting in the public interest, and Hayneedle of: (i) any violation of Proposition 65
20 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or
21 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or
22 could have been asserted by any person or entity against Hayneedle or its parents, subsidiaries or
23 affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers, or any other
24 person in the course of doing business, and the successors and assigns of any of them, who may
25 use, maintain, distribute or sell Covered Products ("Released Entities"), based on its or their failure
26 to provide clear and reasonable warnings of exposures to carbon monoxide from Covered
27 Products. As to alleged exposures to carbon monoxide from Covered Products, compliance with
28

1 the terms of this Consent Judgment resolves any issue, now and in the future, concerning
2 compliance by Hayneedle and the Released Entities, with the requirements of Proposition 65 with
3 respect to House Brand Covered Products, and any alleged resulting exposure.

4 4.2 As to Third-Party Covered Products, this Consent Judgment is a final and binding
5 resolution between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day
6 Notice Letter) acting in the public interest, and Hayneedle of: (i) any violation of Proposition 65
7 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or
8 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or
9 could have been asserted by any person or entity against Hayneedle or its parents, subsidiaries or
10 affiliates, who may use, maintain, distribute or sell Third-Party Covered Products, based on its or
11 their failure to provide clear and reasonable warnings of exposures to carbon monoxide from
12 Third-Party Covered Products. As to alleged exposures to carbon monoxide from Third-Party
13 Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now
14 and in the future, concerning compliance by Hayneedle with the requirements of Proposition 65
15 with respect to Third-Party Covered Products, and any alleged resulting exposure.

16 **5. ENTRY OF CONSENT JUDGMENT**

17 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
18 Upon entry of the Consent Judgment, Hayneedle and ERF waive their respective rights to a hearing
19 or trial on the allegations of the Complaint.

20 **6. ENFORCEMENT OF JUDGMENT**

21 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
22 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
23 San Francisco County, giving the notice required by law, enforce the terms and conditions
24 contained herein.

25 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
26 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
27 violation of Proposition 65 or this Consent Judgment.

1 **7. MODIFICATION OF JUDGMENT**

2 7.1 This Consent Judgment may be modified only upon written agreement of the parties
3 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
4 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

6 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
7 this Consent Judgment.

8 **9. AUTHORITY TO STIPULATE**

9 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
10 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
11 the party represented and legally to bind that party.

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

13 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
14 California Attorney General on behalf of the parties so that the Attorney General may review this
15 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
16 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
17 and in the absence of any written objection by the Attorney General to the terms of this Consent
18 Judgment, the parties may then submit it to the Court for approval.

19 **11. ENTIRE AGREEMENT**

20 11.1 This Consent Judgment contains the sole and entire agreement and understanding
21 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
22 negotiations, commitments and understandings related hereto. No representations, oral or
23 otherwise, express or implied, other than those contained herein have been made by any party
24 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
25 to exist or to bind any of the parties.

1 **12. GOVERNING LAW**

2 12.1 The validity, construction and performance of this Consent Judgment shall be
3 governed by the laws of the State of California, without reference to any conflicts of law provisions
4 of California law.

5 **13. EXECUTION AND COUNTERPARTS**

6 13.1 This Consent Judgment may be executed in counterparts which taken together shall
7 be deemed to constitute one document.

8 **14. COURT APPROVAL**

9 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
10 effect, and cannot be used in any proceeding for any purpose.

11 **15. NOTICES**

12 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
13 delivery or Certified Mail.

14
15 If to Ecological Rights Foundation: Fredric Evenson
16 Ecology Law Center
17 P.O. Box 1000
Santa Cruz, CA 95061

18 If to Hayneedle, Inc.: Pollock and James, LLP
19 1792 Second St.
20 Napa, CA 94559

21 IT IS SO STIPULATED:

22
23 DATED: OCTOBER 31, 2016

24 ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

25 BY: *James Lafort, its EXEC. DIR.*
26 JAMES LAMPORT, EXECUTIVE DIRECTOR
27
28

1 DATED:

2 11-22-2016

HAYNEEDLE, INC.


3 By: 

4 Its: 

5 IT IS SO ORDERED, ADJUDGED AND DECREED:

6 DATED:

7 4/20/17



8 JUDGE OF THE SUPERIOR COURT

9 HAROLD KAHN

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