



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

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TEXT JUDGMENT

ECOLOGICAL RIGHTS FOUNDATION VS. ORGILL, INC. ET AL

001C05932252

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FILED
San Francisco County Superior Court

JUL 05 2017

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

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15 ECOLOGICAL RIGHTS FOUNDATION

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

18 ECOLOGICAL RIGHTS FOUNDATION,

Case No. CGC-16-555429

19 Plaintiff,

20 v.

21 ~~PROPOSED~~ ^{MMK} CONSENT JUDGMENT
22 AS TO NORTHERN TOOL &
23 EQUIPMENT COMPANY, INC.

24 ORGILL, INC., PICNIC TIME, INC.,
25 M.S.R.S., INC., (dba VM
26 INTERNATIONAL), NORTHERN TOOL &
27 EQUIPMENT COMPANY, INC., P&M
28 PRODUCTS, INC., OLD SMOKEY
PRODUCTS CO., SIYA, INC.,

Defendants.

1. INTRODUCTION

1.1 On November 17, 2016, the Ecological Rights Foundation ("ERF") acting on behalf of itself and the general public, filed a Complaint for civil penalties and injunctive relief ("Complaint") in San Francisco Superior Court, Case No. CGC-16-555429, against defendant Northern Tool & Equipment Company, Inc., (also referred to herein as "Northern Tool" or "Defendant"). The Complaint alleges, among other things, that Defendant violated provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections

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1 25249.5, *et seq.* (Proposition 65) by failing to give clear and reasonable warnings to those
2 residents of California who use charcoal grills and hibachis (“Covered Products”), that use of
3 those products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to
4 the State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day
5 Notice letter, sent by ERF on September 12, 2016 to Northern Tool, the California Attorney
6 General, all District Attorneys, and all City Attorneys with populations exceeding 750,000.

7 1.2 Defendant is a business that employs more than ten persons, and manufactures,
8 imports, distributes, and/or sells Covered Products. . The combustion of charcoal creates
9 significant amounts of carbon monoxide to be released into the air, causing inhalation exposures
10 to those using or standing near the Covered Products when they are in use. Pursuant to Health
11 and Safety Code Section 25249.8, carbon monoxide is a chemical known to the State of
12 California to cause reproductive toxicity. ERF alleges that Covered Products that are
13 manufactured, distributed or sold by Defendant for use in California require a warning under
14 Proposition 65, pursuant to Health and Safety Code Section 25249.6. For purposes of this
15 Consent Judgment, the parties stipulate that this Court has jurisdiction over the allegations of
16 violations contained in the Complaint and personal jurisdiction over Northern Tool & Equipment
17 Company, Inc., that venue is proper in the County of San Francisco, and that this Court has
18 jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations
19 contained in the Complaint.

20 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
21 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
22 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment
23 shall not constitute an admission with respect to any material allegation of the Complaint, each
24 and every allegation of which Northern Tool denies, nor may this Consent Judgment, or
25 compliance with it, be used as evidence of any wrongdoing, misconduct, culpability or liability
26 on the part of Northern Tool.
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1 1.4 The term "Effective Date" means the date on which ERF serves notice on
2 Northern Tool that this this Consent Judgment has been entered as a Judgment by the Court.

3 **2. INJUNCTIVE RELIEF**

4 **2.1 Warnings on Covered Products**

— 5 No later than 90 days after the Effective Date, Covered Products that are manufactured
6 and shipped for sale in California shall include one of the following warning statements:

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

10 Or,

11 **WARNING:** This product can expose you to chemicals including carbon monoxide,
12 which are known to the State of California to cause cancer, or birth defects or other
13 reproductive harm. For more information go to www.P65Warnings.ca.gov.

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

26 **2.2 Reporting**

27 No later than 120 days after the Effective Date, Defendant shall provide a certification
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1 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
2 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

3 **3. SETTLEMENT PAYMENTS**

4 **3.1 Civil Penalties and Payments In Lieu of Penalties**

5 Pursuant to Health and Safety Code section 25249.7(b)(2), Northern Tool shall pay
6 \$17,500 in civil penalties. The penalty payment will be allocated in accordance with California
7 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
8 to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the
9 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
10 provide these payments in two checks for the following amounts made payable to: 1) "OEHHA"
11 in the amount of \$13,125, and 2) "Ecological Rights Foundation" in the amount of \$4,375.

12 **3.2 Attorneys' Fees and Litigation Costs**

13 In settlement of all of the claims that are alleged, or could have been alleged, in
14 the Complaint concerning Covered Products, Northern Tool shall pay \$17,500 to the Ecology
15 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
18 certified mail, return receipt requested, to the following addresses: All payments to Ecological
19 Rights Foundation and Ecology Law Center shall be delivered to:

20
21 Fredric Evenson
22 Ecology Law Center
23 P.O. Box 1000
24 Santa Cruz, CA 95061

25 The payment to OEHHA shall be delivered to:

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

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All up to 1/4/2017

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

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

18 4.2 Civil Code Section 1542 Release

19 It is possible that other claims not known to the Parties, arising out of the facts alleged
20 in the Notice or the Complaint and relating to the Covered Products, will develop or be
21 discovered. ERF on behalf of itself only, and Northern Tool on behalf of itself only,
22 acknowledge that this Consent Judgment is expressly intended to cover and include all such
23 claims up through and including the Effective Date, including all rights of action therefore.
24 ERF and Northern Tool acknowledge that the claims released above may include unknown
25 claims, and nevertheless waive California Civil Code Section 1542 as to any such unknown
26 claims. California Civil Code Section 1542 reads as follows:
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July 4, 2017

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A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER 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.

ERF on behalf of itself only, and Northern Tool on behalf of itself only, acknowledge and understand the significance and consequences of this specific waiver of California Civil Code Section 1542.

5. ENTRY OF CONSENT JUDGMENT

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

6. ENFORCEMENT OF JUDGMENT

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

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

7. MODIFICATION OF JUDGMENT

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

8. TERMINATION AND RETENTION OF JURISDICTION

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

1 **9. AUTHORITY TO STIPULATE**

2 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
4 of the party represented and legally to bind that party.

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

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

12 **11. ENTIRE AGREEMENT**

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

19 **12. GOVERNING LAW**

20 The validity, construction and performance of this Consent Judgment shall be governed
21 by the laws of the State of California, without reference to any conflicts of law provisions of
22 California law.

23 **13. EXECUTION AND COUNTERPARTS**

24 13.1 This Consent Judgment may be executed in counterparts which taken together
25 shall be deemed to constitute one document.
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4-14-2017

1 **14. COURT APPROVAL**

2 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
3 effect, and cannot be used in any proceeding for any purpose.

4 **15. NOTICES**

5 15.1 Any notices or payments due under this Consent Judgment shall be sent by
6 personal delivery or Certified Mail.

7
8 If to Ecological Rights Foundation: Fredric Evenson
9 Ecology Law Center
10 P.O. Box 1000
11 Santa Cruz, CA 95061

11 If to Northern Tool & Equipment Company, Inc.: Melissa Jones
12 Stoel Rives, LLP
13 500 Capitol Mall, Ste. 1600
14 Sacramento, CA 95814

15 **IT IS SO STIPULATED:**

16 DATED: APRIL 19, 2017

17 ECOLOGICAL RIGHTS FOUNDATION
18 *Ecological Rights Foundation*
19 BY: James Lampion, EXEC. DIR.
20 JAMES LAMPSON, EXECUTIVE DIRECTOR

21 DATED: _____

22 NORTHERN TOOL & EQUIPMENT
23 COMPANY, INC.
24 BY: Alan C. Kotwa
25 ITS: Sr Vice President

26 IT IS SO ORDERED, ADJUDGED AND DECREED: 4-14-2017

27 DATED: 7/5/17

28 [Signature]
JUDGE OF THE SUPERIOR COURT
HAROLD KAHN