

1 Fredric Evenson (State Bar No. 198059)
2 ECOLOGY LAW CENTER
3 P.O. Box 1000
4 Santa Cruz, California 95061
5 Telephone: (831) 454-8216
6 Email: evenson@ecologylaw.com

7 Christopher Sproul (Bar No. 126398)
8 ENVIRONMENTAL ADVOCATES
9 5135 Anza Street
10 San Francisco, California 94121
11 Telephone: (415) 533-3376, (510) 847-3467
12 Facsimile: (415) 358-5695
13 Email: csproul@enviroadvocates.com

14 Counsel for Plaintiff,
15 ECOLOGICAL RIGHTS FOUNDATION

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

18 ECOLOGICAL RIGHTS FOUNDATION,

19 Plaintiff,

20 v.

21 ARETT SALES CORPORATION, JENSEN
22 DISTRIBUTION SERVICES, ALLAN
23 BLOCK CORPORATION, NANTUCKET
24 PAVERS, INC., LAYNE LABORATORIES,
25 INC., PATINA PRODUCTS, INC., CY TOP
26 LIMITED,

27 Defendants.

F I L E D

Superior Court of California
County of San Francisco

JUN 0 5 2018

CLERK OF THE COURT

BY: *Alan Han*
Deputy Clerk

Case No. CGC-17-559416

^{llc}
~~PROPOSED~~ CONSENT JUDGMENT
AS TO ARETT SALES CORPORATION
AND JENSEN DISTRIBUTION
SERVICES

28 **1. INTRODUCTION**

1.1 On June 8, 2017, 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-17-559416, against defendants Arett Sales Corporation and Jensen Distribution Services, a dba of Jensen-Byrd LLC (also referred to herein as "Settling Defendants"). 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 25249.5, *et seq.* (Proposition 65) by failing to give clear and reasonable

1 warnings to those residents of California who use “La Hacienda” brand wood-burning outdoor
2 heating products) such as fire pits and chimineas (“Covered Products”), that use of those products
3 causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the State of
4 California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice letter,
5 sent by ERF on March 27, 2017 to Settling Defendants, the California Attorney General, all
6 District Attorneys, and all City Attorneys with populations exceeding 750,000.

7 1.2 Settling Defendants are businesses that employ more than ten persons, and
8 manufacture, distribute, or sell Covered Products. ERF alleges that the combustion of wood
9 creates significant amounts of carbon monoxide to be released into the air, causing inhalation
10 exposures to those using or standing near the Covered Products when they are in use. Pursuant to
11 Health 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 Settling Defendants for use in California require a warning
14 under 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 Settling Defendants, that
17 venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter this
18 Consent Judgment as a full settlement and 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, final and binding settlement of any and all
21 claims between the parties for the purpose of avoiding prolonged litigation. This Consent
22 Judgment shall not constitute an admission with respect to any material allegation of the
23 Complaint, each and every allegation of which Settling Defendants deny, nor may this Consent
24 Judgment, or compliance with it, be used as evidence of any wrongdoing, misconduct, culpability
25 or liability on the part of Settling Defendants.

26 1.4 The term “Effective Date” means the date this Consent Judgment is entered by the
27 Court.

2

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Warnings**

3 No later than 60 days after the Effective Date, all Covered Product shipped for sale into
4 California shall include one of the following warning statements:

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

8 OR,

9 **WARNING:** Combustion by products produced when using this product include carbon
10 monoxide and other chemicals known to the State of California to cause cancer, birth defects
11 or other reproductive harm.

12 OR,

13 **WARNING:** This product can expose you to carbon monoxide, which is a combustion by
14 product known to the State of California to cause birth defects or other reproductive harm.

15 For more information go to www.P65Warnings.ca.gov.

16 OR,

17 **WARNING:** Combustion by products produced when using this product include carbon
18 monoxide, a chemical known to the State of California to cause birth defects or other
19 reproductive harm.

20 OR,

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

24 Settling Defendants also may, at their sole option, utilize the warning text options set forth in Title
25 27, California Code of Regulations, Section 25603(a)(2)(b), as long as such warning identifies the
26 reproductive toxicity endpoint. The warning statements shall be affixed to or printed on the product
27 itself or its packaging and the product's instruction booklet (if any). The warning shall be
28

1 prominently affixed to or printed on the product or its packaging and its instruction booklet (if
2 any), and displayed with such conspicuousness, as compared with other words, statements,
3 designs, or devices on the product and its instruction booklet (if any), as to render it likely to be
4 read and understood by an ordinary individual under customary conditions of purchase or use. A
5 warning may be contained in the same section of the instruction booklet (if any) that contains other
6 safety warnings concerning the use of the product. The type size of the warning must be legible,
7 and no smaller than any other warning provided with the product. The word "WARNING" shall
8 be in all capital letters and bold print. Defendants may utilize a symbol consisting of a black
9 exclamation point in a yellow equilateral triangle with a bold black outline.

10 2.2 Reporting

11 No later than 75 days after the Effective Date, each Defendant shall provide a report to
12 ERF confirming its compliance with the warning requirements of paragraph 2.1, and the payment
13 to OEHHA pursuant to paragraph 3.1.

14 3. SETTLEMENT PAYMENTS

15 3.1 Civil Penalties

16 Pursuant to Health and Safety Code section 25249.7(b)(2), Settling Defendants combined
17 through counsel shall pay a total of \$10,000 in civil penalties. The penalty payment will be
18 allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with
19 75% of the penalty amount remitted to the California Office of Environmental Health Hazard
20 Assessment ("OEHHA") and the remaining 25% of the penalty amount paid to Ecological Rights
21 Foundation. Defendant through counsel will provide these payments in two checks for the
22 following amounts made payable to: 1) "OEHHA" in the amount of \$7,500, and 2) "Ecological
23 Rights Foundation" in the amount of \$2,500.

24 3.2 Attorneys' Fees and Litigation Costs

25 In settlement of all of the claims that are alleged, or could have been alleged, in the
26 Complaint concerning Covered Products, Settling Defendants combined shall pay a total of
27 \$17,500 to the Ecology Law Center to cover Plaintiff's attorneys' fees and costs.

1 **3.3 Payments**

2 All Payments shall be sent no later than 10 days after the Effective Date via USPS certified
3 mail, return receipt requested, to the following addresses: Payments to Ecological Rights
4 Foundation and Ecology Law Center shall be delivered to:

5 Fredric Evenson
6 Ecology Law Center
7 P.O. Box 1000
8 Santa Cruz, CA 95061

9 The payment to OEHHA shall be delivered to:

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

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

16 4.1 This Consent Judgment is a full, final and binding resolution between ERF, acting
17 on behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest,
18 and Settling Defendants of: (i) any violation of Proposition 65 (including but not limited to the
19 claims made in the Complaint); and (ii) any other statutory or common law claim to the fullest
20 extent that any of the foregoing described in (i) or (ii) were or could have been asserted by any
21 person or entity against Settling Defendants or its parents, including ACE Hardware Corporation,
22 subsidiaries or affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers,
23 or any other person in the course of doing business, and the successors and assigns of any of them,
24 who may use, maintain, distribute or sell Covered Products ("Released Entities"), based on its or
25 their failure to provide clear and reasonable warnings of exposures to carbon monoxide from
26 Covered Products. As to alleged exposures to carbon monoxide under Proposition 65 from wood
27 burning outdoor heating products, compliance with the terms of this Consent Judgment resolves
28 any issue, now and in the future, concerning compliance by Settling Defendants and the Released
Entities, with the requirements of Proposition 65 with respect to Covered Products, and any alleged
resulting exposure.

1 4.2 ERF hereby fully releases and discharges the Released Entities from any and all
2 claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and
3 expenses asserted, or that could have been asserted from the handling or use of the Covered
4 Products, as to any alleged violation of Proposition 65 or its implementing regulations arising from
5 the failure to provide Proposition 65 warnings on the Covered Products.

6 4.3 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 Products will develop or be
8 discovered. ERF, on behalf of itself only, acknowledges that this Consent Judgment is expressly
9 intended to cover and include all such unknown claims up through the Effective Date, including
10 all rights of action therefor. ERF acknowledges that the claims released in Sections 4.1 and 4.2
11 above may include unknown claims, and nevertheless waive California Civil Code section 1542
12 as to any such unknown claims. California Civil Code section 1542 reads as follows:

13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
14 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
15 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.

16 ERF acknowledges and understands the significance and consequences of this specific waiver of
17 California Civil Code section 1542.

18 **5. ENTRY OF CONSENT JUDGMENT**

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

22 **6. ENFORCEMENT OF JUDGMENT**

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

1 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
2 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
3 violation of Proposition 65 or this Consent Judgment.

4 **7. MODIFICATION OF JUDGMENT**

5 7.1 This Consent Judgment may be modified only upon written agreement of the parties
6 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
7 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

9 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
10 this Consent Judgment.

11 **9. AUTHORITY TO STIPULATE**

12 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
14 the party represented and legally to bind that party.

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

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

22 **11. ENTIRE AGREEMENT**

23 11.1 This Consent Judgment contains the sole and entire agreement and understanding
24 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
25 negotiations, commitments and understandings related hereto. No representations, oral or
26 otherwise, express or implied, other than those contained herein have been made by any party
27
28

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
2 to exist or to bind any of the parties.

3 **12. GOVERNING LAW**

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

7 **13. EXECUTION AND COUNTERPARTS**

8 13.1 This Consent Judgment may be executed in counterparts which taken together shall
9 be deemed to constitute one document.

10 **14. COURT APPROVAL**

11 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
12 effect, and cannot be used in any proceeding for any purpose.

13 **15. NOTICES**

14 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
15 delivery or Certified Mail.

16 If to Ecological Rights Foundation:

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

17
18 If to JENSEN DISTRIBUTION SERVICES:

Lee N. Smith
Coleman & Horowitz, LLP
499 W. Shaw Ave., Suite 116
Fresno, CA 93704

19
20 If to ARETT SALES CORPORATION

Lee N. Smith
Coleman & Horowitz, LLP
499 W. Shaw Ave., Suite 116
Fresno, CA 93704

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

DATED: FEBRUARY 13, 2018

ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

BY: *James Lampion* EXEC. DIR.
JAMES LAMPOR, EXECUTIVE DIRECTOR

DATED: _____

ARETT SALES CORPORATION

BY: _____

ITS: _____

DATED: _____

JENSEN DISTRIBUTION SERVICES

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

DATED: _____

ECOLOGICAL RIGHTS FOUNDATION

By: _____
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: 1/25/18

ARETT SALES CORPORATION

By: Cathy Schapira

Its: CFO

DATED: _____

JENSEN DISTRIBUTION SERVICES

By: _____

Its: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO STIPULATED:

DATED: _____

ECOLOGICAL RIGHTS FOUNDATION

BY: _____
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: _____

ARETT SALES CORPORATION

BY: _____

ITS: _____

DATED: _____

JENSEN-BYRD LLC DBA JENSEN
DISTRIBUTION SERVICES

BY: *[Signature]*

ITS: General Manager

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: 6/5/10

[Signature]

JUDGE OF THE SUPERIOR COURT

HAROLD KAHN