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MIGUEL A. CUSTODIO, JR., STATE BAR NO. 248744
VINEET DUBEY, STATE BAR NO. 243208
CUSTODIO & DUBEY LLP
448 S. Hill St., Suite 615
Los Angeles, CA 90013
Telephone: (213) 593-9095
Facsimile: (213) 785-2899

Attorneys for Plaintiff Ecological Alliance, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
(Unlimited Jurisdiction)

ECOLOGICAL ALLIANCE, LLC, a California
limited liability company,

Plaintiff,

v.

TUF-TUG, INC., a Delaware corporation,

Defendant.

Case No.: 20STCV16237

~~PROPOSED~~ STIPULATED
CONSENT JUDGMENT

FILED
Superior Court of California
County of Los Angeles

10/16/2020

Sherr R. Carter, Executive Officer / Clerk of Court

By: S. Barrera Deputy

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2 Plaintiff Ecological Alliance, LLC ("Plaintiff"), and Defendant Tuf-Tug, Inc.
3 ("Defendant") hereby enter into this Stipulated Consent Judgment ("Consent Judgment") as
4 follows:

5 WHEREAS: On or about January 31, 2020, Plaintiff, through Plaintiff's counsel, served a
6 60 Day Notice to Deuer Developments, Inc. ("Deuer") and Tractor Supply Company ("Tractor
7 Supply") (collectively, the "Notice Recipients"), as well as to the California Attorney General,
8 the District Attorneys of every County in the State of California, and the City Attorneys for every
9 City in the State of California with a population greater than 750,000 (collectively, "Public
10 Prosecutor(s)") alleging that the Notice Recipients violated California's Safe Drinking Water and
11 Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6, et seq., and its
12 implementing regulations (collectively, "Proposition 65") and that Plaintiff intended to file an
13 enforcement action in the public interest; and

14 WHEREAS: Defendant, as an affiliate of Deuer, has assumed the defense of Deuer and
15 Tractor Supply; and

16 WHEREAS: Plaintiff alleges that Defendant manufactured and/or distributed hoist pullers
17 (collectively the "Covered Products") that were sold or distributed for sale in California and
18 further alleges that those Covered Products expose consumers in the State of California to
19 chemicals including Diisononyl phthalate ("DINP"), which are listed by the State of California
20 pursuant to California Health and Safety Code § 25249.8; and

21 WHEREAS: Plaintiff further alleges that persons in the State of California were exposed
22 to DINP in Covered Products without being provided the Proposition 65 warning set out at
23 California Health and Safety Code § 25249.6 and its implementing regulations ("Proposition 65
24 Warning");

25 WHEREAS: Defendant denies the allegations of the 60 Day Notice, and denies that it has
26 violated Proposition 65 and expressly denies that it has engaged in any wrongdoing whatsoever,

27 WHEREAS: Plaintiff seeks to provide the public with Proposition 65 warnings and
28 believes that this objective is achieved by the actions described in this Consent Judgment; and

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2 WHEREAS: Plaintiff and Defendant wish to resolve their differences without the delay
3 and expense of litigation.

4 NOW THEREFORE BE IT RESOLVED AND AGREED UPON AS BETWEEN
5 PLAINTIFF ACTING IN THE PUBLIC INTEREST AND DEFENDANT AS FOLLOWS:
6

7 INTRODUCTION

8 1.1. On January 31, 2020, Plaintiff served the 60-Day Notice upon the Notice
9 Recipients and on Public Prosecutors. No Public Prosecutors commenced an
10 enforcement action. No Public Prosecutor having commenced an enforcement action,
11 Plaintiff proceeded to file its Complaint against Defendant in the present action.

12 1.2. Defendant employs ten (10) or more persons.

13 1.3. For purposes of this Consent Judgment only, Plaintiff and Defendant (the
14 "Parties") stipulate that: 1) this Court has jurisdiction over the allegations of violation
15 contained in the Complaint, and personal jurisdiction over Defendant as to the acts
16 alleged in the Complaint; 2) venue is proper in the County of Los Angeles; and 3) this
17 Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all
18 claims which were or could have been raised in the Complaint based on the facts alleged
19 therein with respect to the Covered Products, and of all claims which were or could have
20 been raised by any person or entity based in whole or in part, directly or indirectly, on the
21 facts alleged in the 60-Day Notice, in the present action, or arising therefrom or related
22 thereto, with respect to Covered Products, including any Proposition 65 claim arising out
23 of an exposure to Covered Products (collectively, "Proposition 65 Claims").

24 1.4. The Parties enter into this Consent Judgment as a full and final settlement of the
25 Proposition 65 Claims, for the purpose of avoiding prolonged and costly litigation and of
26 resolving the issues raised therein both as to past and future conduct. By execution of
27 this Consent Judgment and agreeing to comply with its terms, the Parties do not admit
28 any fact, conclusion of law, or violation of law, nor shall Defendant's compliance with

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2 the Consent Judgment constitute or be construed as an admission by Defendant of any
3 fact, conclusion of law, or violation of law. Defendant denies the material, factual, and
4 legal allegations in the 60-Day Notice and the Complaint and expressly denies any
5 wrongdoing whatsoever.

6 2. DEFINITIONS

- 7 2.1. "Effective Date" shall mean, with respect to this Consent Judgment, the date the
8 Consent Judgment has been approved and entered by the Court.

9 3. INJUNCTIVE RELIEF

- 10 3.1. For each Covered Product, Defendant agrees to undertake, or cause to be
11 undertaken on its behalf, either (a) reformulation of the Covered Product to bring it
12 within the Proposition 65 exemption identified in Section 3.2 below, or (b) provide a
13 warning as prescribed in Sections 3.3-3.4 below. Compliance with this Section 3.1 will
14 constitute compliance by Defendant with all requirements of Proposition 65 relating to
15 DINP exposure in the Covered Products:

- 16 3.2. Proposition 65 Exemption for the Covered Products

17 Any Covered Product that is sold, or offered for sale, to consumers in the State of
18 California after six (6) months after the Effective Date shall be deemed to comply with
19 Proposition 65, and be exempt from any Proposition 65 warning requirements with respect
20 to DINP, if no "Accessible Component Part" of such Covered Product contains more than
21 0.1 percent (1,000 parts per million) of DINP. For purposes of this Consent Judgment,
22 "Accessible Component Part" shall mean components of the Covered Products to which a
23 person would be exposed to DINP by direct contact during normal use of the Covered
24 Product.

- 25 3.3. Warning Option

26 Covered Products that do not meet the warning exemption standard set forth in Section 3.2
27 above, shall be accompanied by a warning as described in Section 3.4 below. This
28 warning requirement shall only be required as to Covered Products that are manufactured,

distributed, marketed, sold or shipped for sale to consumers by Defendant in the State of California, after six (6) months after the Effective Date. No Proposition 65 warning shall be required as to any Covered Products that are already in the stream of commerce as of the Effective Date, and all such Covered Products are hereby deemed to be exempt from Proposition 65 with respect to DINP.

3.4. Warning Language

Where required to meet the criteria set forth in Section 3.3, Defendant shall provide one of the following warning statements on or within the unit packaging of the Covered Products, or affixed to the Covered Products, displayed in a reasonably conspicuous manner:

(1) **WARNING:** This product can expose you to chemicals including DINP, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(2) **WARNING:** Cancer and Reproductive Harm –
www.P65Warnings.ca.gov.

If Defendant elects to use the warning statements identified in either (1) or (2) above, it shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the label for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING”.

3.5. Force Majeure

4. The six (6) month deadlines in Sections 3.1 and 3.2 may be extended by Defendant upon notice to Plaintiff if Defendant’s ability to perform its obligations under this Agreement are delayed or materially impacted by a Force Majeure Event. “Force Majeure Event” means the

COVID-19 pandemic and resulting governmental orders, which include but are not limited to stay-at-home orders. Defendant will resume the performance of its obligations as soon as reasonably practicable after the removal of the Force Majeure Event.

MONETARY RELIEF

4.1. Within ten (10) days of the Effective Date, Defendant shall pay the total sum of \$19,000 which includes \$4,000 in civil penalties and \$15,000 in payment of Plaintiff's costs and reasonable attorney's fees. The \$4,000 civil penalty shall be apportioned pursuant to Health and Safety Code section 25249.12 (d), with 75%, or \$3,000, paid to the State of California's Office of Environmental Health Hazard Assessment and 25%, or \$1,000, payable to Plaintiff.

4.2. The payments specified in Section 4.1. shall be made by wire transfer to Plaintiff's counsel Custodio & Dubey LLP as set forth below. Plaintiffs' counsel will remit the portions due to the State of California Office of Environmental Health Hazard Assessment and to Plaintiff.

Bank: Bank of America, N.A.

Routing Transit No.: 026009593

Account No.: 325104702031

Beneficiary: Custodio & Dubey LLP

5. CLAIMS COVERED AND RELEASE

5.1. This Consent Judgment is a full, final, and binding resolution between Plaintiff, on behalf of itself, and acting in the public interest, and Defendant, and all of Defendant's parent companies, as well as all of Defendant's officers, directors, members, shareholders, employees, attorneys, agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, and retailers, their parent and all subsidiaries, and affiliates, thereof, their respective employees, agents and assigns, as well as all other upstream and downstream entities in the distribution chain for any of the Covered Products, and the predecessors, successors, and assigns of any of them, including but not limited to Alitus Partners, LLC, Deuer and Tractor Supply (collectively, the "Released

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2 Parties”), for any alleged violation of Proposition 65, and its implementing regulations,
3 for failure to provide Proposition 65 warnings for the Covered Products with respect to
4 DINP, and fully resolves all claims that have been brought, or which could have been
5 brought in this action up to and including the Effective Date. Plaintiff on behalf of itself,
6 and in the public interest, hereby discharges the Released Parties from any and all claims,
7 actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and
8 expenses asserted, or that could have been asserted, with respect to any alleged violation
9 of Proposition 65 arising from the failure to provide Proposition 65 warnings about
10 exposures to DINP for any or all of the Covered Products, through and including the
11 Effective Date.

12 5.2. It is possible that other claims not known to the Parties arising out of the facts
13 contained in the 60-Day Notice, or alleged in the Complaint, relating to the Covered
14 Products, will hereafter be discovered or developed. Plaintiff, on behalf of itself only, on
15 the one hand, and Defendant, on the other hand, acknowledge that this Consent Judgment
16 is expressly intended to cover and include all such claims through and including the
17 Effective Date, including all rights of action thereon. Plaintiff and Defendant
18 acknowledge that the claims released in Sections 5.1 and 5.2 may include unknown
19 claims, and nevertheless intend to release such claims, and in doing so waive California
20 Civil Code § 1542 which reads as follows:

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

26 5.3. Plaintiff understands and acknowledges that the significance and consequence of
27 this waiver of California Civil Code § 1542 is that even if Plaintiff suffers future damages
28 arising out of or resulting from, or related directly or indirectly to, in whole or in part, the

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2 Covered Products, including but not limited to any exposure to, or failure to warn with
3 respect to exposure to, the Covered Products, Plaintiff will not be able to make any claim
4 for those damages against any of the Released Parties.

5 5.4. Compliance by Defendant with the terms of this Consent Judgment shall constitute
6 compliance with Proposition 65 with respect to exposure to DINP in the Covered
7 Products as set forth in the 60 Day Notice and/or the Complaint.

8 **6. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(F)**

9 6.1. Plaintiff and its attorneys agree to comply with the reporting form requirements
10 referenced in California Health and Safety Code § 25249.7(f).

11 **7. PROVISION OF NOTICE**

12 7.1. When any Party is entitled to receive any notice or writing under this Consent
13 Judgment, the notice or writing shall be sent by first class certified mail with return
14 receipt requested, or by electronic mail, as follows:

15 To Defendant:

16 Megan P. Caldwell, Esq.
17 Husch Blackwell LLP
18 1801 Wewatta St., Suite 1000
19 Denver, CO 80202
20 Megan.Caldwell@huschblackwell.com

21 To Plaintiff:

22 Vineet Dubey, Esq.
23 Custodio & Dubey LLP
24 448 S. Hill St., Ste 615
25 Los Angeles, CA 90013
26 dubey@cd-lawyers.com

27 7.2. Any party may modify the person and address to whom the notice is to be sent by
28 sending the other Party notice that is transmitted in the manner set forth in section 7.1.

29 **8. COURT APPROVAL**

30 8.1. Upon execution of his Consent Judgment by all Parties, Plaintiff shall prepare and
file, at its sole cost and expense, a Motion for Approval of this Consent Judgment that
Defendant shall support. This Consent Judgment shall not become effective until

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2 approved and entered by the Court. If this Consent Judgment is not entered by the Court,
3 it shall be of no force or effect, and shall not be introduced into evidence or otherwise
4 used in any proceeding for any purpose.

5 **9. GOVERNING LAW AND CONSTRUCTION**

6 9.1. The terms of this Consent Judgment shall be governed by the laws of the State of
7 California.

8 **10. ENTIRE AGREEMENT**

9 10.1. 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
11 discussions, negotiations, commitments, or understandings related thereto, if any, are
12 hereby merged herein and therein.

13 10.2. There are no warranties, representations, or other agreements between the Parties
14 except as expressly set forth herein. No representations, oral or otherwise, express or
15 implied, other than those specifically referred to in this Consent Judgment have been
16 made by any Party hereto.

17 10.3. No other agreements not specifically contained or referenced herein, oral or
18 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
19 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or
20 to bind any of the Parties hereto only to the extent that they are expressly incorporated
21 herein.

22 10.4. No supplementation, modification, waiver, or termination of this Consent
23 Judgment shall be binding unless executed in writing by the Party to be bound thereby,
24 and approved and ordered by the Court.

25 10.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or
26 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor
27 shall such waiver constitute a continuing waiver.

28 **11. RETENTION OF JURISDICTION**

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2 11.1. This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

4 **12. NO EFFECT ON OTHER SETTLEMENTS**

5 12.1. Nothing in this Consent Judgment shall preclude Plaintiff from resolving any
6 claim against another entity on terms that are different from those contained in this
7 Consent Judgment.

8 **13. EXECUTION IN COUNTERPARTS**

9 13.1. This Consent Judgment may be executed in counterparts, each of which shall be
10 deemed to be an original, and all of which, taken together, shall constitute the same
11 document. Execution of the Consent Judgment by e-mail, facsimile, or other electronic
12 means, shall constitute legal and binding execution and delivery. Any photocopy of the
13 executed Consent Judgment shall have the same force and effect as the original.

14 **14. AUTHORIZATION**

15 14.1. The undersigned are authorized to stipulate to, enter into, and execute this Consent
16 Judgment on behalf of their respective parties, and have read, understood, and agree to all
17 of the terms and conditions of this Consent Judgment.

18 **15. SEVERABILITY**

19 15.1. If subsequent to Court approval of this Consent Judgment, any part or provision is
20 declared by a Court to be invalid, void, or unenforceable, the remaining portions or
21 provisions shall continue in full force and effect.

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23 **AGREED TO:**

24 **Ecological Alliance LLC**

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26 Date: 10/8/20

27 By: [Signature]

28 Harmony Welsh, Managing Member

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AGREED TO:

Tuf-Tug, Inc.

Date: 10/5/2020

By: 

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered.

Dated: 10/16/2020



Ruth Ann Kwan

JUDGE OF THE SUPERIOR COURT
Ruth Ann Kwan / Judge