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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF ALAMEDA**
12 **UNLIMITED CIVIL JURISDICTION**

13 MICHAEL DIPIRRO,
14 Plaintiff,

15 v.

16 AMERICAN RECREATION PRODUCTS,
17 LLC, dba KELTY, INC.; RECREATIONAL
18 EQUIPMENT, INC., dba "R.E.I."; *et al.*,
19 Defendants.

Case No. RG15791674

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1.6 Notice of Violation**

2 On or about April 4, 2015, DiPirro served Defendant and certain requisite public enforcement
3 agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the recipients of
4 DiPirro’s allegation that Defendant violated Proposition 65 by failing to warn its customers and
5 consumers in California that the Products expose users to TDCPP. To the best of the Parties’
6 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth
7 in the Notice.

8 **1.7 Complaint**

9 On or about November 2, 2015, DiPirro filed the instant action against Defendant
10 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subject of the
11 Notice.

12 **1.8 No Admission**

13 Defendant denies the material, factual, and legal allegations contained in the Notice and
14 maintains that all of the products it has manufactured, sold, or distributed for sale in California,
15 including the Products, have been, and are, in compliance with all laws. Notwithstanding the
16 allegations in the Notice, Defendant contends that it has not knowingly manufactured or distributed,
17 or caused to be manufactured or distributed, Products for sale in California in violation of Proposition
18 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
19 finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
20 Judgment constitute or be construed, offered or admitted as evidence in any administrative or judicial
21 proceeding or litigation in any court, agency, or forum, as an admission by Defendant, or its owners,
22 officers, directors, employees, parents, subsidiaries, employees, shareholders, directors, insurers,
23 attorneys, successors and assigns, past and present, affiliated entities or corporations, or entities
24 absorbed by merger or acquisition, of any fact, finding, conclusion of law, issue of law, or violation
25 of law, the same being specifically denied by Defendant. Furthermore, nothing in this Consent
Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may
have in any other or future legal proceeding, except as expressly provided in this Consent Judgment.
This section shall not, however, diminish or otherwise affect Defendant’s obligations,

1 responsibilities, and duties under this Consent Judgment.

2 **1.9 Consent to Jurisdiction**

3 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in Alameda
5 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
6 Judgment.

7 **1.10 Effective Date**

8 For purposes of this Consent Judgment, the term "Effective Date" shall mean March 15, 2016.

9 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

10 **2.1 Reformulation Commitment Option**

11 In order to waive the second civil penalty under Section 3.2, Defendant shall only
12 manufacture for sale or distribute for sale in California, Products that are reformulated
13 ("Reformulated Products"). For purposes of this Consent Judgment, Reformulated Products are
14 Products that meet the Reformulation Standards of Section 2.2 below.

15 **2.2 Reformulation Standard**

16 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products
17 containing no more than 25 parts per million ("ppm") (the equivalent of .0025%) of TDCPP in any
18 material, component, or constituent of a subject product, when analyzed by a laboratory accredited
19 by the State of California, a federal agency, or similar nationally recognized accrediting
20 organization now or in the future (such laboratory referred hereinafter as an "Accredited Lab")
21 pursuant to EPA testing methodologies 8141, 3545 and 8270C, or equivalent methodologies utilized
22 by federal or state agencies to determine the presence, and measure the quantity, of TDCPP in a
23 solid substance.

24 **2.3 Warning**

25 Commencing on the Effective Date, Defendant shall not sell to California consumers Products
which are not Reformulated Products, unless clear and reasonable warnings in the form set forth
below shall appear on such Products. Each warning shall be prominently placed with such
conspicuousness as compared with other words, statements, designs, or devices as to render it likely

1 to be read and understood by an ordinary individual under customary conditions before purchase or
2 use. Each warning shall be provided in a manner such that the consumer or user understands to
3 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion. If a
4 warning is provided pursuant to this Section, the text shall be as follows, at Defendant's option,

5 **Option 1: WARNING: This product contains TDCPP, a chemical**
6 **known to the State of California to cause cancer.**

7 **Option 2: WARNING: This product contains chemicals known to the**
8 **State of California to cause cancer and birth**
9 **defects or other reproductive harm.**

10 **3. MONETARY PAYMENTS**

11 **3.1 Initial Civil Penalty.** Defendant shall pay an initial civil penalty in the amount of
12 \$6,000.00 within five (5) business days of Court approval of this Consent Judgment. The penalty
13 payment will be allocated by DiPirro's counsel in accordance with California Health & Safety Code §
14 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental
15 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to DiPirro.
16 The initial penalty payment shall be delivered to the address listed in Section 3.3 below.

17 **3.2 Final Civil Penalty.** Defendant shall pay a final civil penalty of \$12,000.00 on or
18 before September 1, 2016. The final civil penalty shall be waived in its entirety, however, if, no later
19 than August 1, 2016, an officer of Defendant provides DiPirro with written certification that, as of the
20 date of such certification and continuing into the future, Defendant has met the reformulation
21 standard specified in Section 2 above, such that all Products manufactured for sale in California by
22 Defendant are Reformulated Products. The certification in lieu of a final civil penalty payment
23 provided by this Section is a material term, and time is of the essence. The penalty payment will be
24 allocated by DiPirro's counsel in accordance with California Health & Safety Code § 25249.12(c)(1)
25 & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard
Assessment ("OEHHA") and the remaining 25% of the penalty remitted to DiPirro. The penalty
payment or certification shall be delivered to the address listed in Section 3.3 below.

3.3 Payments Held in Trust. Payments shall be delivered to the Law Offices of David R.

1 Bush, 3270 Mendocino Avenue, Suite 2E, Santa Rosa, CA 95403, within five (5) business days of
2 Court approval of this Consent Judgment, and shall be in the form of three checks for the following
3 amounts made payable to:

- 4 (a) "Law Office of David R. Bush" in the amount of \$4,500.00 for payment to OEHHA.
5 Law Office of David R. Bush agrees to forward such funds to OEHHA in a timely
6 manner.
- 7 (b) "Law Office of David R. Bush" in the amount of \$1,500.00 as payment to Michael
8 DiPirro. David R. Bush agrees to forward such funds in a timely manner; and
- 9 (c) "Bush & Henry" in the amount of \$30,000, as payment for attorneys' fees and costs
10 pursuant to Section 4 below.

11 For any payment that is returned for insufficient funds, payment must be made by a cashier's
12 check within ten (10) calendar days of notification of insufficient funds, plus a stipulated 8% service
13 fee. If the check was returned due to bank error, the penalty shall be reduced to actual bank fees
14 incurred by Plaintiff.

15 **3.3 Issuance of 1099 Forms.** Defendant shall provide DiPirro's counsel with a separate
16 1099 forms for each of its payments under this Agreement as follows:

- 17 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010, Sacramento,
18 CA 95814 (EIN: 68-0284486) for civil penalties paid;
- 19 (b) "Michael DiPirro," whose address and tax identification number shall be furnished
20 upon request after this Agreement has been fully executed by the Parties for his
21 portion of the civil penalties paid; and
- 22 (c) "Law Offices of David R. Bush," for fees and costs reimbursed pursuant to Section 4.

23 **4. REIMBURSEMENT OF FEES AND COSTS**

24 The parties acknowledge that DiPirro and his counsel offered to resolve this dispute without
25 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
issue to be resolved after the material terms of the agreement had been settled. The parties then
attempted to (and did) reach an accord on the compensation due to OEHHA, DiPirro and his counsel
under general contract principles and the private attorney general doctrine codified at California Code

1 of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement.
2 Defendant shall pay \$30,000 for fees and costs incurred as a result of investigating, bringing this
3 matter to Defendant’ attention, and negotiating a settlement in the public interest. Defendant shall
4 issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to “David
5 R. Bush, Attorney at Law” and shall deliver payment within five (5) business days of receiving notice
6 Court approval of this Consent Judgment to the address listed in Section 3.3 above.

7 **5. CLAIMS COVERED AND RELEASED**

8 **5.1 DiPirro’s Public Release of Proposition 65 Claims**

9 DiPirro, acting on his own behalf and in the public interest, releases Defendant, its officers,
10 directors, attorneys, representatives, shareholders, parent company, subsidiaries, affiliates,
11 divisions, clients, and retailers or other downstream entities to which Defendant sells or distributes
12 the Products (including, but not limited to, dot coms, distributors, licensees, licensors, wholesalers,
13 product representatives and customers), including, but not limited to, Exxel Outdoors, LLC, Sierra
14 Design Acquisitions, LLC, Campex (BD) LTD, Recreational Equipment, Inc. (dba “REI”), and
15 Wal-Mart Stores, Inc., and all of their affiliates and subsidiaries from all claims for violations of
16 Proposition 65 up through the Effective Date based on exposures to TDCPP from the Products, as
17 set forth in the Notice and the Complaint. Compliance with the terms of this Consent Judgment
18 constitutes compliance with Proposition 65 with respect to exposures to TDCPP from the Products
19 sold by Defendant after the Effective Date.

20 **5.2 DiPirro’s Individual Release of Claims**

21 DiPirro, in his individual capacity only and *not* in his representative capacity, also provides a
22 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
23 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
24 liabilities and demands of DiPirro of any nature, character, or kind, whether known or unknown,
25 suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical
Tris(1,3-dichloro-2-propyl) phosphate (TDCPP) in the Products.

5.3 Defendant’s Release of DiPirro

Defendant, on its own behalf and on behalf of their past and current agents, representatives,

1 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
2 DiPirro and his attorneys and other representatives, for any and all actions taken or statements made
3 (or those that could have been taken or made) by DiPirro and his attorneys and other representatives,
4 whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it
5 in this matter, or with respect to the Products.

6 **5.4 California Civil Code Section 1542**

7 DiPirro on behalf of himself only, on one hand, and Defendant, on the other hand,
8 acknowledge that this Agreement is expressly intended to cover and include all Proposition 65 claims
9 related to the Products as set forth in the Notice of Violation, up through the Effective Date, including
10 all rights of action therefor. DiPirro and Defendant acknowledge that the claims released in Sections
11 5.2 and 5.3 above may include unknown claims, and nevertheless waive California Civil Code
12 section 1542 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**
16 **BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER**
17 **SETTLEMENT WITH THE DEBTOR.**

18 DiPirro and Defendant each acknowledge and understand the significance and consequences
19 of this specific waiver of California Civil Code section 1542.

20 **6. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and shall
22 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
23 has been fully executed by all Parties.

24 **7. SEVERABILITY**

25 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
adversely affected.

8. GOVERNING LAW

1 The terms of this Consent Judgment shall be governed by the laws of the state of California
2 and apply within the state of California. In the event that Proposition 65 is repealed or is otherwise
3 rendered inapplicable by reason of law generally, or as to the Products, then Defendant may provide
4 written notice to DiPirro of any asserted change in the law, and have no further obligations pursuant
5 to this Consent Judgment, with respect to, and to the extent that, the Products are so affected.
6 Nothing in this Consent Judgment shall be interpreted to relieve Defendants from any obligation to
7 comply with any pertinent state or federal toxics control laws. This Consent Judgment shall be
8 interpreted in accordance with the fair meaning of the terms herein, without regard to which Party
9 may have drafted any specific provision.

9 **9. NOTICES**

10 Unless specified herein, all correspondence and notices required to be provided pursuant to this
11 Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered or
12 certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the
13 other party at the following addresses:

14 For Defendant Exxel Outdoors, LLC, dba American Recreation Products, LLC, dba Kelty, Inc.:

15 Law Firm of Knar K. Mouhibian
16 1008 Lindenwood Lane
17 Los Angeles, CA 90049

18 For DiPirro:

19 Law Offices of David R. Bush
20 3270 Mendocino Avenue, Suite 2E
21 Santa Rosa, CA 95403

22 Any party may, from time to time, specify in writing to the other party a change of address to which
23 all notices and other communications shall be sent.

24 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

25 This Consent Judgment may be executed in counterparts, and by facsimile or portable
document format (PDF) signature, each of which shall be deemed an original, and all of which, when
taken together, shall constitute one and the same document.

11. POST EXECUTION ACTIVITIES

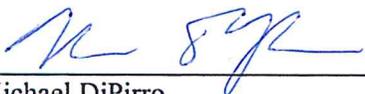
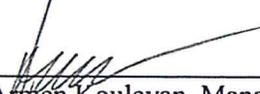
1 DiPirro agrees to comply with the reporting form requirements referenced in Health & Safety
2 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
3 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
4 of obtaining such approval, DiPirro and Defendant agree to mutually employ their best efforts, and
5 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
6 judicial approval of the settlement in a timely manner.

7 **12. MODIFICATION**

8 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
9 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
10 application of any Party and the entry of a modified consent judgment by the Court.

11 **13. AUTHORIZATION**

12 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
13 Parties and have read, understood and agree to all of the terms and conditions of this Consent
14 Judgment.

<p>14 AGREED TO:</p> <p>15 Date: <u>3/25/16</u></p> <p>16 By: <u></u></p> <p>17 Michael DiPirro</p>	<p>14 AGREED TO:</p> <p>15 Date: <u>03-21-16</u></p> <p>16 By: <u></u></p> <p>17 Armen Kouleyan, Managing Member 18 Exxel Outdoors, LLC, dba American 19 Recreation Products, LLC</p>
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