

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 Plaintiffs ECOLOGICAL RIGHTS FOUNDATION

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

[PROPOSED] CONSENT JUDGMENT
AS TO LANDMANN USA, 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 Landmann USA, Inc., (also referred to herein as “Landmann” or “Defendant”). The Complaint
27 alleges, among other things, that Defendant violated provisions of the Safe Drinking Water and
28 Toxic 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-

1 burning outdoor heating products, (such as fire pits, fire bowls, and chimneys), that use of those
2 products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the
3 State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice
4 letter dated June 9, 2016, sent by ERF to Landmann, the California Attorney General, all District
5 Attorneys, and all City Attorneys with populations exceeding 750,000.

6 1.2 ERF and Landmann are hereinafter referred to collectively as the “Parties.”

7 1.3 ERF alleges that wood-burning outdoor heating products that are manufactured,
8 distributed or sold by Defendant for use in California (“Covered Products”) require a warning
9 under Proposition 65, pursuant to Health and Safety Code Section 25249.6. Defendant is a business
10 that employs more than ten persons, and manufactures, distributes, and sells its own brand(s) of
11 Covered Products. Pursuant to Health and Safety Code Section 25249.8, carbon monoxide is a
12 chemical known to the State of California to cause reproductive toxicity. ERF alleges that the
13 combustion of wood creates significant amounts of carbon monoxide to be released into the air,
14 causing inhalation exposures to those using or standing near the Covered Products when they are
15 in use. For purposes of this Consent Judgment, the Parties stipulate that this Court has jurisdiction
16 over the allegations of violations contained in the Complaint and personal jurisdiction over
17 Landmann, that venue is proper in the County of San Francisco, and that this Court has jurisdiction
18 to enter this Consent Judgment as a full settlement and resolution of the allegations contained in
19 the Complaint.

20 1.4 The Parties have entered into this Consent Judgment in order to settle, compromise,
21 and resolve all claims fully and finally between the Parties, which claims are denied and disputed,
22 and thus avoid prolonged and costly litigation. This Consent Judgment shall not constitute an
23 admission against interest with respect to any material allegation of the Complaint, each and every
24 allegation of which Landmann denies, nor may this Consent Judgment, or compliance with it, be
25 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Landmann.
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1 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
2 prejudice, waive, or impair any right, remedy, argument or defense the Parties may have in any
3 current or future legal proceeding unrelated to these proceedings.

4 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
5 Court.

6 **2. INJUNCTIVE RELIEF**

7 2.1 Warnings

8 No later than 60 days after the Effective Date, Covered Products offered for sale in
9 California shall include one of the following warning statements:

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

13 Or,

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

17 The word "**WARNING**" shall be in all capital letters and bold print. Landmann may utilize a
18 symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black
19 outline. The required warning shall be prominently affixed to or printed on the Covered Product
20 or its packaging, as well as appear on its instruction manual, and displayed with such
21 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
22 Product and its instruction manual, as to render it likely to be read and understood by an ordinary
23 individual under customary conditions of purchase or use. A warning may be contained in the
24 same section of the instruction manual that contains other safety warnings concerning the use of
25 the Covered Product. The type size of the warning must be legible, and no smaller than any
26 other warning provided with the Covered Product.

1 2.2 Reporting

2 No later than 75 days after the Effective Date, Defendant shall provide a certification
3 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
4 requirements of paragraph 2.1, and the payments to OEHHA and Rose Foundation pursuant to
5 paragraph 3.1.

6 **3. SETTLEMENT PAYMENTS**

7 3.1 **Civil Penalties**

8 Pursuant to Health and Safety Code section 25249.7(b)(2), Landmann shall pay
9 \$14,500 in civil penalties. The penalty payment will be allocated in accordance with California
10 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
11 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
12 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
13 provide these payments in two checks for the following amounts made payable to: 1) “OEHHA”
14 in the amount of \$10,875, and 2) “Ecological Rights Foundation” in the amount of \$3,625.

15 3.2 **Attorneys’ Fees and Litigation Costs**

16 In settlement of all of the claims that are alleged, or could have been alleged, in
17 the Complaint concerning Covered Products, Landmann shall pay \$17,500 to the Ecology Law
18 Center to cover Plaintiff’s attorneys’ fees and costs.

19 3.3 **Payments**

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

23 Fredric Evenson
24 Ecology Law Center
25 P.O. Box 1000
26 Santa Cruz, CA 95061

27 The payment to OEHHA shall be delivered to:
28

1 Mike Gyurics
2 Fiscal Operations Branch Chief
3 Office of Environmental Health Hazard Assessment
4 P.O. Box 4010
5 Sacramento, CA 95812-4010

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

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

22 4.2 It is possible that other claims not known to the Parties, arising out of the facts alleged
23 in the Notice or the Complaint and relating to the Covered Products, will develop or be
24 discovered. ERF on behalf of itself only, acknowledges that this Consent Judgment is expressly
25 intended to cover and include all such claims up through and including the Effective Date,
26 including all rights of action therefor. ERF acknowledges that the claims released above may
27 include unknown claims, and nevertheless waive California Civil Code Section 1542 as to any
28 such unknown claims. California Civil Code Section 1542 reads as follows:

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

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
2 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.

3 ERF on behalf of itself only, acknowledges and understands the significance and consequences
4 of this specific waiver of California Civil Code Section 1542.

5 **5. ENTRY OF CONSENT JUDGMENT**

6 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment. Upon
7 entry of the Consent Judgment, Landmann and ERF waive their respective rights to a hearing or
8 trial on the allegations of the Complaint.

9 **6. ENFORCEMENT OF JUDGMENT**

10 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
11 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
12 San Francisco County, giving the notice required by law, enforce the terms and conditions
13 contained herein.

14 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
15 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
16 violation of Proposition 65 or this Consent Judgment.

17 **7. MODIFICATION OF JUDGMENT**

18 7.1 This Consent Judgment may be modified only upon written agreement of the
19 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
20 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

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

22 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
23 this Consent Judgment.

24 **9. AUTHORITY TO STIPULATE**

25 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
26 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of
27 the Party represented and legally to bind that party.

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

2 10.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
3 California Attorney General on behalf of the parties so that the Attorney General may review this
4 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
5 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
6 and in the absence of any written objection by the Attorney General to the terms of this Consent
7 Judgment, the Parties may then submit it to the Court for approval.

8 **11. ENTIRE AGREEMENT**

9 11.1 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 discussions,
11 negotiations, commitments and understandings related hereto. No representations, oral or
12 otherwise, express or implied, other than those contained herein have been made by any Party
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
14 to exist or to bind any of the Parties.

15 **12. GOVERNING LAW**

16 12.1 The validity, construction and performance of this Consent Judgment shall be
17 governed by the laws of the State of California, without reference to any conflicts of law provisions
18 of California law.

19 **13. EXECUTION AND COUNTERPARTS**

20 13.1 This Consent Judgment may be executed in counterparts which taken together shall
21 be deemed to constitute one document.

22 **14. COURT APPROVAL**

23 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
24 effect, and cannot be used in any proceeding for any purpose.

25 **15. NOTICES**

26 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
27 delivery or Certified Mail.

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If to Ecological Rights Foundation:

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

If to Landmann USA, Inc.:

Tim Braaten, President
Landmann USA, Inc.,
7405 Graham Rd.
Fairburn, GA 30213

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1 IT IS SO STIPULATED:

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3 DATED: 1/18/2017

ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

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5 BY: *James Lampton* EXEC. DIR
6 JAMES LAMPORT, EXECUTIVE DIRECTOR

7 DATED: 1/17/17

LANDMANN USA, INC.

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10 BY: *Tim Braaten*
11 TIM BRAATEN, PRESIDENT

12 IT IS SO ORDERED, ADJUDGED AND DECREED:

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14 DATED: _____

15 _____
16 JUDGE OF THE SUPERIOR COURT
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