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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 Defendant.

Case No. CGC-16-554010

[PROPOSED] CONSENT JUDGMENT  
AS TO MODERN MARKETING  
CONCEPTS, 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 Modern Marketing Concepts, Inc., (also referred to herein as “Modern Marketing” or  
27 “Defendant”). The Complaint alleges, among other things, that Defendant violated provisions of  
28 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 warnings to those residents  
of California who use wood-burning outdoor heating products, (such as fire pits, fire bowls, and

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

6 1.2 ERF and Modern Marketing 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 Modern  
17 Marketing Concepts, Inc., that venue is proper in the County of San Francisco, and that this Court  
18 has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations  
19 contained in the Complaint.

20 1.4 The Parties have entered into this Consent Judgment in order to settle, compromise,  
21 and resolve claims that are denied and disputed and thus avoid prolonged and costly litigation.  
22 The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all  
23 claims between the Parties for the purpose of avoiding prolonged litigation. This Consent  
24 Judgment shall not constitute an admission against interest with respect to any material allegation  
25 of the Complaint, each and every allegation of which Modern Marketing denies, nor may this  
26 Consent Judgment, or compliance with it, be used as evidence of any wrongdoing, misconduct,  
27 culpability or liability on the part of Modern Marketing.

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                   **PROPOSITION 65 WARNING:** Burning fireplace or wood stove fuels such as natural  
11 firewood results in emission of carbon monoxide, soot, and other combustion by-products  
12 which are known by the State of California to cause cancer, birth defects, or reproductive  
13 harm.

14           Or,

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

18           The word “**WARNING**” shall be in all capital letters and bold print. Modern Marketing may  
19 utilize a symbol consisting of a black exclamation point in a yellow equilateral triangle with a  
20 bold black outline. The required warning statements shall be affixed to or printed on the Covered  
21 Product’s packaging or labeling and the Covered Product’s instruction manual. The warning  
22 shall be prominently affixed to or printed on the Covered Product’s packaging or labeling and its  
23 instruction manual, and displayed with such conspicuousness, as compared with other words,  
24 statements, designs, or devices on the Covered Product and its instruction manual, as to render it  
25 likely to be read and understood by an ordinary individual under customary conditions of  
26 purchase or use. A warning may be contained in the same section of the instruction manual that  
27 contains other safety warnings concerning the use of the Covered Product. The type size of the  
28 warning must be legible, and no smaller than any 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), Modern Marketing  
9 shall pay \$15,000 in civil penalties. The penalty payment will be allocated in accordance with  
10 California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount  
11 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and  
12 the 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 \$11,250, and 2) “Ecological Rights Foundation” in the amount of \$3,750.

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, Modern Marketing shall pay \$20,000 to the  
18 Ecology Law 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

1 The payment to OEHHA shall be delivered to:

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

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

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

21 4.2 It is possible that other claims not known to the Parties, arising out of the facts  
22 alleged in the Notice or the Complaint and relating to the Covered Product, will develop or be  
23 discovered. ERF on behalf of itself only, acknowledges that this Consent Judgment is expressly  
24 intended to cover and include all such claims up through and including the Effective Date,  
25 including all rights of action therefor. ERF acknowledges that the claims released above may  
26 include unknown claims, and nevertheless waive California Civil Code Section 1542 as to any  
27 such unknown claims. California Civil Code Section 1542 reads as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
3 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
4 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
5 OR HER SETTLEMENT WITH THE DEBTOR.

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

8 **5. ENTRY OF CONSENT JUDGMENT**

9 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment. Upon  
10 entry of the Consent Judgment, Modern Marketing and ERF waive their respective rights to a  
11 hearing or trial on the allegations of the Complaint.

12 **6. ENFORCEMENT OF JUDGMENT**

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

17 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such  
18 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any  
19 violation of Proposition 65 or this Consent Judgment.

20 **7. MODIFICATION OF JUDGMENT**

21 7.1 This Consent Judgment may be modified only upon written agreement of the  
22 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of  
23 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

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

25 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms  
26 this Consent Judgment.  
27  
28

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 of  
4 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 deemed  
18 to exist or to bind any of the Parties.

19 **12. GOVERNING LAW**

20 12.1 The validity, construction and performance of this Consent Judgment shall be  
21 governed by the laws of the State of California, without reference to any conflicts of law provisions  
22 of California law.

23 **13. EXECUTION AND COUNTERPARTS**

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

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 personal  
6 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

12 If to Modern Marketing Concepts, Inc.: Jeffrey D. Polsky  
13 Fox Rothschild LLP  
14 345 California St., Suite 2200  
15 San Francisco, CA 94104

16 IT IS SO STIPULATED:

17 DATED: ECOLOGICAL RIGHTS FOUNDATION

18 BY: \_\_\_\_\_  
19 JAMES LAMPORT, EXECUTIVE DIRECTOR

20 DATED: MODERN MARKETING CONCEPTS, INC.

21 BY: Keith J. Starr  
22 Keith J. Starr, President  
23  
24

25 IT IS SO ORDERED, ADJUDGED AND DECREED:

26 DATED: \_\_\_\_\_

27 \_\_\_\_\_  
28 JUDGE OF THE SUPERIOR COURT