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15 ECOLOGICAL RIGHTS FOUNDATION

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

18 ECOLOGICAL RIGHTS FOUNDATION,
19
20 Plaintiff,
21 v.
22 SMART LIVING COMPANY, et al.,
23
24 Defendants.

Case No. CGC-16-554012

[PROPOSED] CONSENT JUDGMENT
AS TO TRADEMARK GLOBAL, LLC

25 **1. INTRODUCTION**

26 1.1 On September 1, 2016, the Ecological Rights Foundation (“ERF”) acting on behalf
27 of itself and the general public, filed a Complaint for civil penalties and injunctive relief
28 (“Complaint”) in San Francisco Superior Court, Case No. CGC-16-554012, against defendant
Trademark Global, LLC, (also referred to herein as “Trademark” or “Defendant”). 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 25249.6, *et seq.* (Proposition
65) through the distribution and/or sale of certain wood- burning outdoor heating products in

1 California, such as fire pits, without providing clear and reasonable warnings that use of those
2 products causes exposures to carbon monoxide. Carbon monoxide is a chemical listed by the State
3 of California under Proposition 65 as known to cause reproductive toxicity. The Complaint was
4 based on a June 9, 2016 60-Day Notice letter sent by ERF to Trademark pursuant to Health &
5 Safety Code § 25249.7(d)(1), and to the California Attorney General, all District Attorneys, and
6 all City Attorneys with populations exceeding 750,000.

7 1.2 ERF and Trademark are sometimes hereafter collectively referred to as the “Parties,
8 and individually as a “Party.” ERF alleges that wood burning outdoor heating products that are
9 manufactured, distributed or sold by Defendant for use in California (hereafter “Covered
10 Products”) require a Proposition 65 warning pursuant to Health and Safety Code Section 25249.6,
11 because they can cause exposures to carbon monoxide. Plaintiff alleges that Defendant is a
12 business that employs more than ten persons, and that manufactures, distributes, and sells Covered
13 Products. Pursuant to Health and Safety Code Section 25249.8, carbon monoxide is a chemical
14 listed by the State of California as known to cause reproductive toxicity. For purposes of this
15 Consent Judgment only, the Parties stipulate that this Court has jurisdiction over the allegations of
16 violations contained in the Complaint, personal jurisdiction over Trademark, that venue is proper
17 in the County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment
18 as a full and final settlement and resolution of the allegations contained in the Complaint.

19 1.3 **No Admission.**

20 The Parties enter into this Consent Judgment as a full and final settlement of all claims that
21 were raised in the Notice and Complaint, or that could have been raised in the Complaint, arising
22 out of the facts and/or conduct alleged therein. Trademark denies the material factual and legal
23 allegations contained in the Notice and the Complaint, and maintains that it is not a person subject
24 to Proposition 65, nor subject to personal jurisdiction in the State of California, and that all of the
25 products it has manufactured, imported, distributed and/or sold, including the Covered Products,
26 have been, and are, in compliance with all laws, and are completely safe for their intended use. By
27 execution of this Consent Judgment and agreeing to comply with its terms, Trademark does not
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1 admit any facts or conclusions of law including, but not limited to, any facts or conclusions of law
2 suggesting or demonstrating that it has sold any products in the State of California, or that it has
3 committed any violations of Proposition 65, or any other statutory, common law or equitable
4 requirements relating to carbon monoxide from use of Covered Products, such being specifically
5 denied by Trademark. Nothing in this Consent Judgment, nor compliance with its terms, shall
6 constitute or be construed as an admission by Trademark of any fact, conclusion of law, issue of
7 law or violation of law, nor an admission that it is subject to personal jurisdiction in the State of
8 California. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
9 argument or defense Trademark may have in this or any other future legal proceeding, including
10 Trademark's position that it is not subject to personal jurisdiction in California. This Consent
11 Judgment is the product of negotiation and compromise and is accepted by Trademark for purposes
12 of settling, compromising, and resolving issues disputed in the Action. However, this Section shall
13 not diminish or otherwise affect the obligations, responsibilities and duties of Trademark under
14 this Consent Judgment.

15 1.4 Consent to Jurisdiction.

16 For purposes of this Consent Judgment only, Trademark stipulates that this Court has
17 jurisdiction over Trademark as to the allegations contained in the Complaint, that venue is proper
18 in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions
19 of this Consent Judgment.

20 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
21 prejudice, waive, or impair any right, remedy, argument, or defense the Parties in any other current
22 of future legal proceeding.

23 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
24 Court. The term "Execution Date" means the date this Consent Judgment is fully executed by the
25 Parties.

1 **2. INJUNCTIVE RELIEF**

2 2.1 **Warnings:** Covered Products are deemed to comply with Proposition 65 if
3 Trademark provides Proposition 65 warnings as follows on or after the Effective Date:

4 Trademark shall provide either of the following warning statements:

5 **[California Proposition 65] WARNING:** Combustion byproducts produced when using
6 this product include carbon monoxide and other chemicals known to the State of
7 California to cause cancer, birth defects or other reproductive harm.

8 Or,

9 **[California Proposition 65] WARNING:** This product can expose you to carbon
10 monoxide and other combustion byproducts known to the State of California to cause
11 cancer, birth defects or other reproductive harm. For more information go to
12 www.P65Warnings.ca.gov.

13 Language in brackets is optional. The word “**WARNING**” shall be in all capital letters and bold
14 print. Preceding the warning, Trademark may utilize a symbol consisting of a black exclamation
15 point in a yellow equilateral triangle with a bold black outline at its option.

16 2.2. The warning statement shall be affixed to or printed on the Covered Product itself,
17 or its packaging, or its labeling. The warning shall also be included in the Covered Product’s
18 instruction booklet (if any). The warning shall be displayed with such conspicuousness, as
19 compared with other words, statements, designs, or devices on the Covered Product or its
20 packaging or labeling, and in its instruction booklet, so as to render it likely to be read and
21 understood by an ordinary individual under customary conditions of purchase or use. A warning
22 may be contained in the same section of the instruction booklet that contains other safety warnings
23 concerning the use of the Covered Product. The type size of the warning must be legible, and no
24 smaller than any other warning provided with the Covered Product.

1 **2.3. Reporting**

2 No later than 75 days after the Execution Date, Defendant shall provide a certification
3 executed by an officer or director of Defendant to ERF confirming its compliance with the warning
4 requirements of this Section 2 for Covered Products that are manufactured for sale in California
5 after the Effective Date.

6 **3. SETTLEMENT PAYMENTS**

7 **3.1 Civil Penalties**

8 Pursuant to Health and Safety Code section 25249.7(b)(2), Trademark shall pay
9 \$5,000 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 to
11 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
12 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will provide these
13 payments in two checks for the following amounts made payable to: (1) “OEHHA” in the amount
14 of \$3,750, and (2) “Ecological Rights Foundation” in the amount of \$1,250.

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 the
17 Complaint concerning Covered Products, and any claim plaintiff may have to investigative costs,
18 expert fees, attorney’s fees, or any other costs of any kind in connection with this matter,
19 Trademark shall pay \$17,500 to the Ecology Law Center.

20 **3.3 Payments**

21 Payments to Ecological Rights Foundation and Ecology Law Center, referred to in paragraphs
22 3.1 and 3.2 above, shall be sent no later than 10 days after the Effective Date via certified mail,
23 return receipt requested, or by federal express, to the following address:

24 Fredric Evenson
25 Ecology Law Center
26 P.O. Box 1000
27 Santa Cruz, CA 95061
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1 The payment to OEHHA, referred to in paragraph 3.1 above, shall be sent no later than 10 days
2 after the Effective Date via certified mail, return receipt requested, or federal express, to the
3 following address:

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

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

11 4.1 This Consent Judgment is a final and binding resolution between ERF, acting on
12 behalf of itself and in the public interest as to those matters raised in the 60-Day Notice Letter, and
13 Trademark, of: (i) any violation of Proposition 65 (including but not limited to the claims made in
14 the Complaint); and (ii) any other statutory or common law claim to the fullest extent that any of
15 the foregoing were or could have been asserted by any person or entity against Trademark or its
16 parents, subsidiaries or affiliates, and all of their suppliers, customers, distributors, wholesalers,
17 retailers (including but not limited to Wal-Mart Stores, Inc, and its affiliates and subsidiaries), or
18 any other person in the course of doing business, and the successors and assigns of any of them,
19 who may manufacture, use, maintain, distribute or sell Covered Products (“Released Entities”),
20 based on its or their actual or alleged failure to provide clear and reasonable warnings of exposures
21 to carbon monoxide from Covered Products manufactured, distributed or sold through the
22 Effective Date. As to alleged exposures to carbon monoxide from Covered Products, compliance
23 with the terms of this Consent Judgment resolves any issue, now and in the future, concerning
24 compliance by Trademark and the Released Entities, with the requirements of Proposition 65 with
25 respect to Covered Products, and any alleged resulting exposure.

26 4.2 ERF and Trademark recognize that other claims not known to the Parties may exist
27 concerning the Covered Products. Accordingly, the Parties, on behalf of themselves, their past
28 and current agents, representatives, attorneys, successors, and/or assignees, provide a mutual
general release herein which shall be effective as a full and final accord and satisfaction, as a bar
to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,

1 claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or
2 unsuspected, arising out the manufacture, distribution, sale or use of the Covered Products
3 manufactured prior to the Effective Date. The Parties acknowledge that they are familiar with
4 Section 1542 of the California Civil Code, which provides as follows:

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

10 The Parties hereby expressly waive and relinquish any and all rights and benefits which they may
11 have under, or which may be conferred on them by the provisions of Section 1542 of the California
12 Civil Code as well as under any other state or federal statute or common law principle of similar
13 effect, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the
14 released matters. In furtherance of such intention, the release hereby given shall be and remain in
15 effect as a full and complete release notwithstanding the discovery or existence of any such
16 additional or different claims or facts arising out of the released matters.

17 4.2 The Parties hereby request that the Court promptly enter this Consent Judgment.
18 Upon entry of the Consent Judgment, Trademark and ERF waive their respective rights to a hearing
19 or trial on the allegations of the Complaint, as well as any rights of appeal.

20 **5. ENFORCEMENT OF JUDGMENT**

21 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
22 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
23 San Francisco County, giving the notice required by law, enforce the terms and conditions
24 contained herein.

25 5.2 In any proceeding brought by either Party to enforce this Consent Judgment, such
26 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
27 violation of this Consent Judgment. Any Party seeking to modify this Consent Judgment or to
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1 allege a violation thereof shall first attempt in good faith to meet and confer with the other Party
2 prior to filing a motion to modify the Consent Judgment.

3 **6. MODIFICATION OF JUDGMENT**

4 6.1 This Consent Judgment may be modified only upon written agreement of the
5 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
6 any Party as permitted or provided by law and upon entry of a modified Consent Judgment by the
7 Court.

8 **7. RETENTION OF JURISDICTION**

9 7.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
10 this Consent Judgment.

11 **8. AUTHORITY TO STIPULATE**

12 8.1 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 **9. SERVICE ON THE ATTORNEY GENERAL**

16 9.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
17 California Attorney General so that the Attorney General may review this Consent Judgment prior
18 to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney
19 General has received the aforementioned copy of this Consent Judgment, and in the absence of
20 any written objection by the Attorney General to the terms of this Consent Judgment, the Parties
21 may then submit it to the Court for approval. ERF shall have the responsibility of preparing and
22 filing the motion to approve this consent judgment and all supporting papers.

23 **10. ENTIRE AGREEMENT**

24 10.1 This Consent Judgment contains the sole and entire agreement and understanding
25 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
26 negotiations, commitments and understandings related hereto. No representations, oral or
27 otherwise, express or implied, other than those contained herein have been made by any Party
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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 **11. GOVERNING LAW**

4 11.1 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. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable
7 by reason of law generally, or as to the Covered Products, then Trademark may provide written
8 notice to ERF of any asserted change in the law, and shall have no further obligations pursuant to
9 this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

10 **12. EXECUTION AND COUNTERPARTS**

11 13.1 This consent judgment may be executed in counterparts and by facsimile or
12 portable document format (pdf), each of which shall be deemed an original, and all of which, when
13 taken together, shall constitute one and the same document.

14 **14. COURT APPROVAL**

15 14.1 If this consent judgment is not approved by the court, it shall be of no force or
16 effect, and cannot be used in any proceeding for any purpose. further, if this consent judgment is
17 not approved, no term of this consent judgment or any draft thereof, or of the negotiation,
18 documentation, or other part or aspect of the Parties' settlement discussions, including the parties'
19 participation in the negotiation and preparation of this consent judgment, shall have any effect, nor
20 shall any such matter be admissible in evidence for any purpose in this action, or in any other
21 proceeding, and the Parties agree to meet and confer to determine whether to modify the terms of
22 the consent judgment and to resubmit it for approval.

23 **15. NOTICES**

24 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
25 delivery, federal express, 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 Trademark Global, LLC: Trademark Global, LLC
Attn: Jeff Marshall,
7951 West Erie Avenue
Lorain, Ohio 44053

With Copy to:
J. Robert Maxwell, Esq.
Rogers Joseph O'Donnell
311 California Street, 10th Floor
San Francisco, California 94104

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

IT IS SO STIPULATED:

DATED: MARCH 14, 2017

ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation
BY: *James L. Lampion* EXEC. DIR.
JAMES LAMPOR, EXECUTIVE DIRECTOR

DATED:

TRADEMARK GLOBAL, LLC
BY: _____
ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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If to Ecological Rights Foundation: Fredric Evenson
Ecology Law Center
P.O. Box 1000
Santa Cruz, CA 95061

If to Trademark Global, LLC: Trademark Global, LLC
Attn: Jeff Marshall,
7951 West Erie Avenue
Lorain, Ohio 44053
With Copy to:
J. Robert Maxwell, Esq.
Rogers Joseph O'Donnell
311 California Street, 10th Floor
San Francisco, California 94104

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

IT IS SO STIPULATED:

DATED: ECOLOGICAL RIGHTS FOUNDATION

BY: _____
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: *March 14, 2017* TRADEMARK GLOBAL, LLC

BY: *Crissy H. Marshall*

ITS: *CAO+CFD*

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT