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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 Defendants.

22 Case No. CGC-16-554010

23 [PROPOSED] CONSENT JUDGMENT  
24 AS TO HAYNEEDLE, INC.

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-16-554010, against defendant  
Hayneedle, Inc., (also referred to herein as “Hayneedle” 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 25249.5, *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 (“Covered Products”), that use of those products  
causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the State of

1 California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice letter,  
2 sent by ERF on June 27, 2016 to Hayneedle, the California Attorney General, all District  
3 Attorneys, and all City Attorneys with populations exceeding 750,000.

4 1.2 Defendant is a business that employs more than ten persons, and manufactures,  
5 distributes, and sells Covered Products. Some Covered Products Defendant distributes, markets  
6 and sells are branded under the company's own private label, "Red Ember" ("House Brand  
7 Covered Products"). Other products sold by Defendant are distributed and marketed by third  
8 parties ("Third-Party Covered Products"). The combustion of wood creates significant amounts of  
9 carbon monoxide to be released into the air, causing inhalation exposures to those using or standing  
10 near the Covered Products when they are in use. Pursuant to Health and Safety Code Section  
11 25249.8, carbon monoxide is a chemical known to the State of California to cause reproductive  
12 toxicity. ERF alleges that Covered Products that are manufactured, distributed or sold by  
13 Defendant for use in California require a warning under Proposition 65, pursuant to Health and  
14 Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties stipulate that  
15 this Court has jurisdiction over the allegations of violations contained in the Complaint and  
16 personal jurisdiction over Hayneedle, Inc., that venue is proper in the County of San Francisco,  
17 and that this Court has jurisdiction to enter this Consent Judgment as a full settlement and  
18 resolution of the allegations contained in the Complaint.

19 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties  
20 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims  
21 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall  
22 not constitute an admission with respect to any material allegation of the Complaint, each and  
23 every allegation of which Hayneedle denies, nor may this Consent Judgment, or compliance with  
24 it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of  
25 Hayneedle.

1 1.4 The term "Effective Date" means the date this Consent Judgment is entered by the  
2 Court. The term "Execution Date" means the date this Consent Judgment has been executed by all  
3 the parties.

4 **2. INJUNCTIVE RELIEF**

5 **2.1 Warnings on House Brand Covered Products**

6 No later than January 31, 2017, Covered Products offered for sale in California shall  
7 include one of the following warning statements:

8 **WARNING:** Fuels burned in wood or charcoal burning appliances, and the by-  
9 products of combustion of such fuels, contain chemicals, including Carbon Monoxide,  
10 known to the State of California to cause birth defects or other reproductive harm.

11 Or,

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

15 The warnings shall be prominently affixed to or printed on the House Brand Covered Products and  
16 their instruction booklets, (Instruction Booklet Warnings shall be included no later than July of  
17 2017) and displayed with such conspicuousness, as compared with other words, statements,  
18 designs, or devices on the House Brand Covered Products and their instruction booklets, as to  
19 render them likely to be read and understood by an ordinary individual under customary conditions  
20 of purchase or use. Warnings may be contained in the same section of the instruction booklets that  
21 contains other safety warnings concerning the use of the House Brand Covered Products. The type  
22 size of the warning must be legible, and no smaller than any other warning provided with the  
23 House Brand Covered Products. The word "**WARNING:**" shall be in upper case letters and bold  
24 text. Defendant may utilize a symbol consisting of a black exclamation point in a yellow equilateral  
25 triangle with a bold black outline.

1           2.2    Internet Warnings for Third-Party Covered Products

2           Defendants shall cause to be posted, on line, on their public website, the warning  
3 described in paragraph 2.1, above, for any “Third Party Products” offered for sale in California.

4           2.3    **Reporting**

5           No later than 75 days after January 31, 2017, Defendant shall provide a report to ERF  
6 documenting its compliance with paragraph 2.1. The report shall include photographs of the  
7 warning posting and documentation that the warnings are being included with House Brand  
8 Covered Products that are offered for sale in California.

9    **3.    SETTLEMENT PAYMENTS**

10          3.1    Civil Penalties and Payments In Lieu of Penalties

11          Pursuant to Health and Safety Code section 25249.7(b)(2), based solely on the sales of its  
12 House Brand Covered Products, Hayneedle shall pay \$12,000 in civil penalties. The penalty  
13 payment will be allocated in accordance with California Health and Safety Code section  
14 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of  
15 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty  
16 amount paid to Ecological Rights Foundation. Defendant will provide these payments in two  
17 checks for the following amounts made payable to: 1) “OEHHA” in the amount of \$9,000, and  
18 2) “Ecological Rights Foundation” in the amount of \$3,000. Additionally, Hayneedle shall pay  
19 \$2,500, as payments in lieu of civil penalties (“PILP”), to Rose Foundation for Communities and  
20 the Environment (“Rose Foundation”), a grantmaking public charity, for use toward informing  
21 Californians about risks of exposures to Proposition 65 listed chemicals known to cause  
22 reproductive or developmental harm, or toward protecting California residents from such risks.  
23 Neither ERF, nor any of its board members, attorneys, or any of their relatives, shall be eligible  
24 for grants from the PILP made by Defendant pursuant to this Consent Judgment. Rose  
25 Foundation shall maintain adequate records to document that the funds are used for the above-  
26 described purposes. Rose Foundation shall, within 30 days of any request from ERF or the  
27 California Attorney General, provide sufficient documentation of how the funds were spent.  
28

1           **3.2 Attorneys' Fees and Litigation Costs**

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

5           **3.3 Payments**

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

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

11          The payment to OEHHA shall be delivered to:

12                    Mike Gyurics  
13                    Fiscal Operations Branch Chief  
14                    Office of Environmental Health Hazard Assessment  
                      P.O. Box 4010  
                      Sacramento, CA 95812-4010

15  
16          **4. MATTERS COVERED BY THIS CONSENT JUDGMENT**

17          4.1     As to House Brand Covered Products, this Consent Judgment is a final and binding  
18 resolution between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day  
19 Notice Letter) acting in the public interest, and Hayneedle of: (i) any violation of Proposition 65  
20 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or  
21 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or  
22 could have been asserted by any person or entity against Hayneedle or its parents, subsidiaries or  
23 affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers, or any other  
24 person in the course of doing business, and the successors and assigns of any of them, who may  
25 use, maintain, distribute or sell Covered Products ("Released Entities"), based on its or their failure  
26 to provide clear and reasonable warnings of exposures to carbon monoxide from Covered  
27 Products. As to alleged exposures to carbon monoxide from Covered Products, compliance with  
28

1 the terms of this Consent Judgment resolves any issue, now and in the future, concerning  
2 compliance by Hayneedle and the Released Entities, with the requirements of Proposition 65 with  
3 respect to House Brand Covered Products, and any alleged resulting exposure.

4 4.2 As to Third-Party Covered Products, this Consent Judgment is a final and binding  
5 resolution between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day  
6 Notice Letter) acting in the public interest, and Hayneedle of: (i) any violation of Proposition 65  
7 (including but not limited to the claims made in the Complaint); and (ii) any other statutory or  
8 common law claim to the fullest extent that any of the foregoing described in (i) or (ii) were or  
9 could have been asserted by any person or entity against Hayneedle or its parents, subsidiaries or  
10 affiliates, who may use, maintain, distribute or sell Third-Party Covered Products, based on its or  
11 their failure to provide clear and reasonable warnings of exposures to carbon monoxide from  
12 Third-Party Covered Products. As to alleged exposures to carbon monoxide from Third-Party  
13 Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now  
14 and in the future, concerning compliance by Hayneedle with the requirements of Proposition 65  
15 with respect to Third-Party Covered Products, and any alleged resulting exposure.

16 **5. ENTRY OF CONSENT JUDGMENT**

17 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.  
18 Upon entry of the Consent Judgment, Hayneedle and ERF waive their respective rights to a hearing  
19 or trial on the allegations of the Complaint.

20 **6. ENFORCEMENT OF JUDGMENT**

21 6.1 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 6.2 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 Proposition 65 or this Consent Judgment.  
28

1    **7.    MODIFICATION OF JUDGMENT**

2           7.1    This Consent Judgment may be modified only upon written agreement of the parties  
3 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party  
4 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

6           8.1    This Court shall retain jurisdiction of this matter to implement and enforce the terms  
7 this Consent Judgment.

8    **9.    AUTHORITY TO STIPULATE**

9           9.1    Each signatory to this Consent Judgment certifies that he or she is fully authorized  
10 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
11 the party represented and legally to bind that party.

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

13           10.1   ERF shall serve a copy of this Consent Judgment, signed by both parties, on the  
14 California Attorney General on behalf of the parties so that the Attorney General may review this  
15 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)  
16 days after the Attorney General has received the aforementioned copy of this Consent Judgment,  
17 and in the absence of any written objection by the Attorney General to the terms of this Consent  
18 Judgment, the parties may then submit it to the Court for approval.

19   **11.   ENTIRE AGREEMENT**

20           11.1   This Consent Judgment contains the sole and entire agreement and understanding  
21 of the parties with respect to the entire subject matter hereof and any and all prior discussions,  
22 negotiations, commitments and understandings related hereto. No representations, oral or  
23 otherwise, express or implied, other than those contained herein have been made by any party  
24 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
25 to exist or to bind any of the parties.

1 DATED:

HAYNEEDLE, INC.

2 11-22-2016

3 BY:



4 ITS:

CEO

5 IT IS SO ORDERED, ADJUDGED AND DECREED:

6 DATED: \_\_\_\_\_

7 \_\_\_\_\_  
8 JUDGE OF THE SUPERIOR COURT  
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1 **12. GOVERNING LAW**

2 12.1 The validity, construction and performance of this Consent Judgment shall be  
3 governed by the laws of the State of California, without reference to any conflicts of law provisions  
4 of California law.

5 **13. EXECUTION AND COUNTERPARTS**

6 13.1 This Consent Judgment may be executed in counterparts which taken together shall  
7 be deemed to constitute one document.

8 **14. COURT APPROVAL**

9 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
10 effect, and cannot be used in any proceeding for any purpose.

11 **15. NOTICES**

12 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal  
13 delivery or Certified Mail.

14  
15 If to Ecological Rights Foundation: Fredric Evenson  
16 Ecology Law Center  
17 P.O. Box 1000  
Santa Cruz, CA 95061

18 If to Hayneedle, Inc.: Pollock and James, LLP  
19 1792 Second St.  
20 Napa, CA 94559

21 IT IS SO STIPULATED:

22  
23 DATED: *OCTOBER 31, 2016*

24 ECOLOGICAL RIGHTS FOUNDATION  
*Ecological Rights Foundation*

25 BY: *James Lampton, its EXEC. DIR.*  
26 JAMES LAMPSON, EXECUTIVE DIRECTOR  
27  
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