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14 Counsel for Plaintiffs ECOLOGICAL RIGHTS FOUNDATION

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF ORANGE

17 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 SIRIO NORTH AMERICA, INC.;
21 NATURAL CONCRETE PRODUCTS, LLC;
22 TITAN CONCRETE PRODUCTS, LLC;
23 TITAN MANUFACTURING AND
24 DISTRIBUTING, INC.; and PAVESTONE,
25 LLC.

26 Defendants.

Case No. CGC-16-554269

[PROPOSED] CONSENT JUDGMENT
AS TO TITAN MANUFACTURING
AND DISTRIBUTING, INC.

27 **1. INTRODUCTION**

28 1.1 On September 15, 2016, the Ecological Rights Foundation (“ERF”) acting on behalf of itself and the general public, filed a Complaint for civil penalties and injunctive relief (“Complaint”) in San Francisco Superior Court, Case No. CGC-16-554269, against defendant Titan Manufacturing and Distributing, Inc., (also referred to herein as “Titan” 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

1 California who use wood-burning outdoor heating products, such as fire pits (“Covered
2 Products”), that use of those products causes exposures to carbon monoxide. Carbon monoxide
3 is a chemical known to the State of California to cause reproductive toxicity. The Complaint
4 was based upon a 60-Day Notice letter, sent by ERF on June 27, 2016 to Titan, the California
5 Attorney General, all District Attorneys, and all City Attorneys with populations exceeding
6 750,000.

7 1.2 Defendant is a business that employs more than ten persons, and manufactures,
8 distributes, and sells 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
10 standing near the Covered Products when they are in use. Pursuant to Health and Safety Code
11 Section 25249.8, carbon monoxide is a chemical known to the State of California to cause
12 reproductive toxicity. ERF alleges that Covered Products that are manufactured, distributed or
13 sold by Defendant for use in California require a warning under Proposition 65, pursuant to
14 Health and Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties
15 stipulate that this Court has jurisdiction over the allegations of violations contained in the
16 Complaint and personal jurisdiction over Titan Manufacturing and Distributing, Inc., that venue
17 is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
18 Judgment as a full settlement and 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, final and binding settlement of any and all
21 claims between the parties for the purpose of avoiding prolonged litigation. This Consent
22 Judgment shall not constitute an admission with respect to any material allegation of the
23 Complaint, each and every allegation of which Titan denies, nor may this Consent Judgment, or
24 compliance with it, be used as evidence of any wrongdoing, misconduct, culpability or liability
25 on the part of Titan.

26 1.4 The term “Effective Date” means the date this Consent Judgment is entered by the
27 Court.
28

1 **2. INJUNCTIVE RELIEF**

2 **2.1 Warnings**

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

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

8 Or,

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

12 Or,

13 **WARNING:** Fuels used in wood or charcoal burning appliances, and the products of
14 combustion of such fuels, contain chemicals, such as carbon monoxide, known to the
15 State of California to cause cancer and birth defects or other reproductive harm.

16
17 Titan also may, at its sole option, utilize the warning text options set forth in Title 27, California
18 Code of Regulations, Section 25603(a)(2)(b), as long as such warning identifies the reproductive
19 toxicity endpoint. The warning statements shall be affixed to or printed on the Covered Product
20 itself and the Covered Product's instruction booklet. The warning shall be prominently affixed
21 to or printed on the Covered Product and its instruction booklet, and displayed with such
22 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
23 Product and its instruction booklet, as to render it likely to be read and understood by an ordinary
24 individual under customary conditions of purchase or use. A warning may be contained in the
25 same section of the instruction booklet that contains other safety warnings concerning the use of
26 the Covered Product. The type size of the warning must be legible, and no smaller than any
27 other warning provided with the Covered Product. The word "**WARNING**" shall be in all
28

1 capital letters and bold print. Defendant may utilize a symbol consisting of a black exclamation
2 point in a yellow equilateral triangle with a bold black outline.

3 **2.2 Reporting**

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

7 **3. SETTLEMENT PAYMENTS**

8 **3.1 Civil Penalties**

9 Pursuant to Health and Safety Code section 25249.7(b)(2), Titan shall pay \$4,500 in civil
10 penalties. The penalty payment will be allocated in accordance with California Health and Safety
11 Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California
12 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
13 penalty amount paid to Ecological Rights Foundation. Defendant will provide these payments in
14 two checks for the following amounts made payable to: 1) “OEHHA” in the amount of \$3,375,
15 and 2) “Ecological Rights Foundation” in the amount of \$1,125.

16 **3.2 Attorneys’ Fees and Litigation Costs**

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

20 **3.3 Payments**

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

24 Fredric Evenson
25 Ecology Law Center
26 P.O. Box 1000
27 Santa Cruz, CA 95061
28

The payment to OEHHA shall be delivered to:

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

4. MATTERS COVERED BY THIS CONSENT JUDGMENT

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

4.2 ERF hereby fully releases and discharges the Released Entities from any and all claims, actions, causes of action, suits, demands, liabilities, damages, penalties, fees, costs and expenses asserted, or that could have been asserted from the handling or use of the Covered Products, as to any alleged violation of Proposition 65 or its implementing regulations arising from the failure to provide Proposition 65 warnings on the Covered Products regarding carbon monoxide.

4.3 It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice or the Complaint and relating to the Covered Products will develop or be discovered. ERF on behalf of itself only, on one hand, and Titan, on the other hand,

1 acknowledge that this Consent Judgment is expressly intended to cover and include all such
2 unknown claims up through the Effective Date, including all rights of action therefor. ERF and
3 Titan acknowledge that the claims released in Sections 4.1 and 4.2 above may include unknown
4 claims, and nevertheless waive California Civil Code section 1542 as to any such unknown
5 claims. California Civil Code section 1542 reads as follows:

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

11 ERF on behalf of itself only, on the one hand, and Titan, on the other hand, acknowledge and
12 understand the significance and consequences of this specific waiver of California Civil Code
13 section 1542.

14 **5. ENTRY OF CONSENT JUDGMENT**

15 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
16 Upon entry of the Consent Judgment, Titan and ERF waive their respective rights to a hearing or
17 trial on the allegations of the Complaint.

18 **6. ENFORCEMENT OF JUDGMENT**

19 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
20 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
21 San Francisco County, giving the notice required by law, enforce the terms and conditions
22 contained herein.

23 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
24 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
25 violation of Proposition 65 or this Consent Judgment.

26 **7. MODIFICATION OF JUDGMENT**

27 7.1 This Consent Judgment may be modified only upon written agreement of the
28 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
any party as provided by law and upon entry of a modified Consent Judgment by the Court.

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

2 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
3 terms this Consent Judgment.

4 **9. AUTHORITY TO STIPULATE**

5 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
7 of the party represented and legally to bind that party.

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

9 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
10 California Attorney General on behalf of the parties so that the Attorney General may review this
11 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
12 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
13 and in the absence of any written objection by the Attorney General to the terms of this Consent
14 Judgment, the parties may then submit it to the Court for approval.

15 **11. ENTIRE AGREEMENT**

16 11.1 This Consent Judgment contains the sole and entire agreement and understanding
17 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
18 negotiations, commitments and understandings related hereto. No representations, oral or
19 otherwise, express or implied, other than those contained herein have been made by any party
20 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
21 deemed to exist or to bind any of the parties.

22 **12. GOVERNING LAW**

23 12.1 The validity, construction and performance of this Consent Judgment shall be
24 governed by the laws of the State of California, without reference to any conflicts of law
25 provisions of California law.
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1 **13. EXECUTION AND COUNTERPARTS**

2 13.1 This Consent Judgment may be executed in counterparts which taken together
3 shall be deemed to constitute one document.

4 **14. COURT APPROVAL**

5 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
6 effect, and cannot be used in any proceeding for any purpose.

7 **15. NOTICES**

8 15.1 Any notices or payments due under this Consent Judgment shall be sent by
9 personal delivery or Certified Mail.

10 If to Ecological Rights Foundation:

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

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12
13
14 If to Titan Manufacturing & Distributing:

Mr. Russell R Robinson, President
Titan Manufacturing and Distributing, Inc.
141 Eastley Street, Suite 113
Collierville, TN 38017

1 IT IS SO STIPULATED:

2 DATED: 1/31/2017

3 ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

4 BY: *James Lampion*, EXEC. DIR.
5 JAMES LAMPORT, EXECUTIVE DIRECTOR

6 DATED: 1/20/2017

7 TITAN MANUFACTURING &
8 DISTRIBUTING, INC.

9 BY: *Robert E. Hill*
10 ITS: *Chief Operating Officer*

11 IT IS SO ORDERED, ADJUDGED AND DECREED:

12 DATED: _____

13 _____
14 JUDGE OF THE SUPERIOR COURT

15 34085998v3