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14 Counsel for Plaintiff,
15 ECOLOGICAL RIGHTS FOUNDATION

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

18 ECOLOGICAL RIGHTS FOUNDATION,

Case No. CGC-16-554270

19 Plaintiff,

20 v.

[PROPOSED] CONSENT JUDGMENT
AS TO DAGAN INDUSTRIES, INC.

21 AOSOM, LLC; AZ PATIO HEATERS, LLC;
22 DAGAN INDUSTRIES, INC.; SNOW JOE,
23 LLC; and MEREDITH CORPORATION,
24

25 Defendants.

26 **1. INTRODUCTION**

27 1.1 On September 15, 2016, the Ecological Rights Foundation (“ERF”) acting on
28 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-16-554270, against defendant
 Dagan Industries, Inc., (also referred to herein as “Dagan Industries” 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.*

1 (Proposition 65) by failing to give clear and reasonable warnings to those residents of California
2 who use wood-burning outdoor heating products, (such as fire pits, fire bowls, and chimineas),
3 that use of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical
4 known to the State of California to cause reproductive toxicity. The Complaint was based upon a
5 60-Day Notice letter dated June 27 2016, sent by ERF to Dagan Industries, the California Attorney
6 General, all District Attorneys, and all City Attorneys with populations exceeding 750,000.

7 1.2 ERF and Dagan Industries are hereinafter referred to collectively as the “Parties.”

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

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

3 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
4 prejudice, waive, or impair any right, remedy, argument or defense the Parties may have in any
5 current or future legal proceeding unrelated to these proceedings.

6 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
7 Court.

8 **2. INJUNCTIVE RELIEF**

9 2.1 Warnings

10 No later than 120 days after the Effective Date, Covered Products manufactured and
11 offered for sale in California after said Effective Date shall include one of the following warning
12 statements:

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

16 Or,

17 **WARNING:** This product can expose you to chemicals, including carbon monoxide, that
18 are known to the State of California to cause birth defects or other reproductive harm.

19 **For more information go to www.P65Warnings.ca.gov**

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

4 2.2 Reporting

5 No later than 180 days after the Effective Date, Defendant shall provide a certification
6 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
7 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

8 3. SETTLEMENT PAYMENTS

9 3.1 Civil Penalties

10 Pursuant to Health and Safety Code section 25249.7(b)(2), Dagan Industries shall pay \$
11 5,000 in civil penalties. The penalty payment will be allocated in accordance with California
12 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
13 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
14 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
15 provide these payments in two checks for the following amounts made payable to: 1) “OEHHA”
16 in the amount of \$3,750, and 2) “Ecological Rights Foundation” in the amount of \$1,250.

17 3.2 Attorneys’ Fees and Litigation Costs

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

21 3.3 Payments

22 All Payments shall be sent no later than 10 days after the Effective Date via USPS First Class mail
23 to the following addresses: All payments to Ecological Rights Foundation and Ecology Law
24 Center shall be delivered to:

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

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2 The payment to OEHHA shall be delivered to:

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

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

4.1 This Consent Judgment is a 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 Dagan Industries 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 Dagan Industries or its parents, subsidiaries or affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers, all other upstream or downstream entities in the chain of distribution, 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 exposures of persons to carbon monoxide from Covered Products and their failure to provide a clear and reasonable warning of exposure to such individuals. 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 Dagan Industries and the Released Entities, with the requirements of Proposition 65 with respect to Covered Products, and any alleged resulting exposure.

4.2 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 Product, will develop or be discovered. ERF on behalf of itself only, and Dagan Industries on behalf of itself only, acknowledge that this Consent Judgment is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefor. ERF

1 and Dagan Industries acknowledge that the claims released above may include unknown claims,
2 and nevertheless waive California Civil Code Section 1542 as to any such unknown claims.

3 California Civil Code Section 1542 reads as follows:

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

9 ERF on behalf of itself only, and Dagan Industries on behalf of itself only, acknowledge and
10 understand the significance and consequences of this specific waiver of California Civil Code
11 Section 1542.

12 **5. ENTRY OF CONSENT JUDGMENT**

13 5.1 The parties hereby request that the Court promptly enter this Consent Judgment. Upon
14 entry of the Consent Judgment, Dagan Industries and ERF waive their respective rights to a hearing
15 or trial on the allegations of the Complaint.

16 **6. ENFORCEMENT OF JUDGMENT**

17 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
18 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
19 San Francisco County, giving the notice required by law, enforce the terms and conditions
20 contained herein.

21 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
22 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
23 violation of Proposition 65 or this Consent Judgment.

24 **7. MODIFICATION OF JUDGMENT**

25 7.1 This Consent Judgment may be modified only upon written agreement of the parties
26 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
27 as provided by law and upon entry of a modified Consent Judgment by the Court.
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1 **8. TERMINATION AND RETENTION OF JURISDICTION**

2 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
3 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 of
7 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 deemed
21 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 provisions
25 of California law.

1 **13. EXECUTION AND COUNTERPARTS**

2 13.1 This Consent Judgment may be executed in counterparts which taken together shall
3 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 personal
9 delivery or Certified Mail.

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

14 If to Dagan Industries Inc.: Michael P. Ribons
15 Law Offices of Michael P. Ribons, APC
16 5959 Topanga Canyon Blvd., Ste. 220
17 Woodland Hills, CA 91367
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1 IT IS SO STIPULATED:

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3 DATED: APRIL 12, 2017

ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

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

7 DATED: 3/15/17

DAGAN INDUSTRIES INC.

9 BY: *Jeff Dagan*

10
11
12 IT IS SO ORDERED, ADJUDGED AND DECREED:

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15 DATED: _____

16 _____
17 JUDGE OF THE SUPERIOR COURT