

1 Fredric Evenson (State Bar No. 198059)
2 ECOLOGY LAW CENTER
3 P.O. Box 1000
4 Santa Cruz, California 95061
5 Telephone: (831) 454-8216
6 Email: evenson@ecologylaw.com

7 Christopher Sproul (Bar No. 126398)
8 ENVIRONMENTAL ADVOCATES
9 5135 Anza Street
10 San Francisco, California 94121
11 Telephone: (415) 533-3376, (510) 847-3467
12 Facsimile: (415) 358-5695
13 Email: csproul@enviroadvocates.com

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., et al.,

21 Defendants.

22 Case No. CGC-16-554269

23 [PROPOSED] CONSENT JUDGMENT
24 AS TO ROCHESTER CONCRETE
25 PRODUCTS, INC.

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
29 (“Complaint”) in San Francisco Superior Court, Case No. CGC-16-554269, against defendant
30 Rochester Concrete Products, LLC, (also referred to herein as “Rochester” or “Defendant”). The
31 Complaint alleges, among other things, that Defendant violated provisions of the Safe Drinking
32 Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, *et seq.*
33 (Proposition 65) by failing to give clear and reasonable warnings to those residents of California
34 who use wood- burning outdoor heating products, such as fire pits (“Covered Products”), that use
35 of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical known

1 to the State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day
2 Notice letter, sent by ERF on June 27, 2016 to Rochester, the California Attorney General, all
3 District 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. The combustion of wood creates significant amounts of
6 carbon monoxide to be released into the air, causing inhalation exposures to those using or standing
7 near the Covered Products when they are in use. Pursuant to Health and Safety Code Section
8 25249.8, carbon monoxide is a chemical known to the State of California to cause reproductive
9 toxicity. ERF alleges that Covered Products that are manufactured, distributed or sold by
10 Defendant for use in California require a warning under Proposition 65, pursuant to Health and
11 Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties stipulate that
12 this Court has jurisdiction over the allegations of violations contained in the Complaint and
13 personal jurisdiction over Rochester, Inc., that venue is proper in the County of San Francisco, and
14 that this Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution
15 of the allegations contained in the Complaint.

16 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
17 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
18 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
19 not constitute an admission with respect to any material allegation of the Complaint, each and
20 every allegation of which Rochester denies, nor may this Consent Judgment, or compliance with
21 it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
22 Rochester.

23 1.4 The term "Effective Date" means the date this Consent Judgment is entered by the
24 Court.

25
26 **2. INJUNCTIVE RELIEF**

27 **2.1 Warnings**

1 No later than 60 days after the Effective Date, Covered Products offered for sale in
2 California shall include the following warning statement:

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

6 The warning statements shall be affixed to or printed on the Covered Product itself, or its
7 immediate container or wrapper, and the Covered Product's instruction booklet. The warning
8 shall be prominently affixed to or printed on the Covered Product, or its immediate container or
9 wrapper, and its instruction booklet, and displayed with such conspicuousness, as compared with
10 other words, statements, designs, or devices on the Covered Product, or its immediate container
11 or wrapper, and its instruction booklet, as to render it likely to be read and understood by an
12 ordinary individual under customary conditions of purchase or use. A warning may be contained
13 in the same section of the instruction booklet that contains other safety warnings concerning the
14 use of the Covered Product. The type size of the warning must be legible, and no smaller than
15 any other warning provided with the Covered Product. The word "**WARNING**" shall be in all
16 capital letters and bold print and shall be preceded by a bold black-outlined yellow equilateral
17 triangle with an exclamation point in the center ("the symbol"). Where the warning statement
18 for the Covered Product is not printed using the color yellow, the symbol may be printed in black
19 and white. The warning stickers depicted in Exhibits A are deemed to be compliant on-product
20 or on-packaging warnings, notwithstanding the font sizes used on the "Fragile" sticker depicted
21 in Exhibit B.

22 2.2 Reporting

23 No later than 75 days after the Execution Date, Defendant shall provide a certification
24 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
25 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1 and 3.3.

26 3. SETTLEMENT PAYMENTS

27 3.1 Civil Penalties and Payments In Lieu of Penalties

28

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

8 3.2 Attorneys’ Fees and Litigation Costs

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

12 3.3 Payments

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

16 Fredric Evenson
17 Ecology Law Center
18 P.O. Box 1000
19 Santa Cruz, CA 95061

20 The payment to OEHHA shall be delivered to:

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

26 4. MATTERS COVERED BY THIS CONSENT JUDGMENT

27 4.1 This Consent Judgment is a final and binding resolution between ERF, acting on
28 behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest,
and Rochester 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

1 against Rochester or its parents, subsidiaries or affiliates, and all of their suppliers, customers,
2 distributors, wholesalers, retailers, or any other person in the course of doing business, and the
3 successors and assigns of any of them, who may use, maintain, distribute or sell Covered Products
4 (“Released Entities”), based on its or their failure to provide clear and reasonable warnings of
5 exposures to carbon monoxide from Covered Products. As to alleged exposures to carbon
6 monoxide from Covered Products, compliance with the terms of this Consent Judgment resolves
7 any issue, now and in the future, concerning compliance by Rochester and the Released Entities,
8 with the requirements of Proposition 65 with respect to Covered Products, and any alleged
9 resulting exposure.

10 **5. ENTRY OF CONSENT JUDGMENT**

11 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
12 Upon entry of the Consent Judgment, Rochester and ERF waive their respective rights to a hearing
13 or trial on the allegations of the Complaint.

14 **6. ENFORCEMENT OF JUDGMENT**

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

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

22 **7. MODIFICATION OF JUDGMENT**

23 7.1 This Consent Judgment may be modified only upon written agreement of the parties
24 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
25 as provided by law and upon entry of a modified Consent Judgment by the Court.
26
27
28

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 due under this Consent Judgment shall be sent by personal delivery or
9 Certified Mail.

10
11 If to Ecological Rights Foundation: Fredric Evenson
12 Ecology Law Center
13 P.O. Box 1000
14 Santa Cruz, CA 95061

15 If to Rochester Concrete Products, LLC: Tarifa B. Laddon
16 Faegre Baker Daniels LLP
17 11766 Wilshire Blvd., Suite 750
18 Los Angeles, CA 90025

19 IT IS SO STIPULATED:
20 DATED: *AUGUST 17, 2017*

21 ECOLOGICAL RIGHTS FOUNDATION
22 *Ecological Rights Foundation*

23 BY: *James Lampert, EXEC. DIR.*
24 JAMES LAMPORT, EXECUTIVE DIRECTOR

25 DATED: ROCHESTER CONCRETE PRODUCTS,
26 LLC

27 BY: _____

28 ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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 due under this Consent Judgment shall be sent by personal delivery or
9 Certified Mail.

10
11 If to Ecological Rights Foundation: Fredric Evenson
12 Ecology Law Center
13 P.O. Box 1000
14 Santa Cruz, CA 95061

15 If to Rochester Concrete Products, LLC: Tarifa B. Laddon
16 Faegre Baker Daniels LLP
17 11766 Wilshire Blvd., Suite 750
18 Los Angeles, CA 90025

19 IT IS SO STIPULATED:

20 DATED: ECOLOGICAL RIGHTS FOUNDATION

21 BY: _____
22 JAMES LAMPORT, EXECUTIVE DIRECTOR

23 DATED: 7-13-2017 ROCHESTER CONCRETE PRODUCTS,
24 LLC

25 BY:  _____

26 ITS: vice president

27 IT IS SO ORDERED, ADJUDGED AND DECREED:

28 DATED: _____

JUDGE OF THE SUPERIOR COURT

Exhibit A

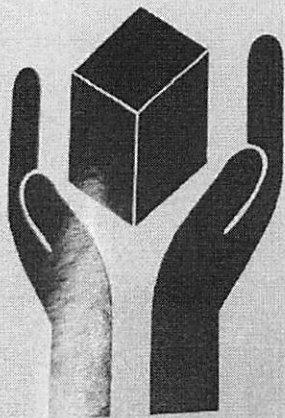


WARNING: This product can expose you to chemicals including carbon monoxide, which is a combustion byproduct known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.



Exhibit B

**-FRAGILE-
HANDLE WITH CARE**



**This shipment left our dock in
perfect condition.**

**Upon arrival, please inspect for damage
and incorrect quantity before signing.**

**ANY DAMAGE TO CONTENTS SHOULD BE NOTED
ON BILL OF LADING FOR CLAIM AGAINST CARRIER.**

S-5364, ULINE, 1-800-295-5510