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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,

19 Plaintiff,

20 v.

21 ORGILL, INC., et al.,

22 Defendants.

23 Case No. CGC-16-555429

24 [PROPOSED] CONSENT JUDGMENT
25 AS TO BURKHEAD
26 MANUFACTURING COMPANY, d/b/a
27 OLD SMOKEY PRODUCTS
28 COMPANY

1 **1. INTRODUCTION**

1.1 On November 17, 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. 555429, against defendant Burkhead Manufacturing Company, d/b/a Old Smokey Products Company (also referred to herein as “Old Smokey” or “Defendant”). The Complaint alleges, among other things, that Defendant violated 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 Defendant’s charcoal grills and hibachis (“Covered Products”) because use

1 of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical listed
2 under Proposition 65 as known to the State of California to cause reproductive toxicity. The
3 Complaint was based upon a 60-Day Notice letter, sent by ERF on September 12, 2016 to Old
4 Smokey, the California Attorney General, all District Attorneys, and all City Attorneys with
5 populations exceeding 750,000. The Complaint also is based on a 60 Day Notice Letter dated
6 December 12, 2016 naming Burkhead Manufacturing Company for the same alleged violations as
7 are set forth in the September 12, 2016 Notice Letter (collectively both letters are the “Notice
8 Letters”).

9 1.2 Defendant is a business that employs more than ten persons and either
10 manufactures, and/or distributes, and/or sells Covered Products to residents of California. The
11 complaint alleges combustion of charcoal creates carbon monoxide to be released into the air,
12 causing inhalation exposures to those using, or standing near the Covered Products, when they are
13 in use. ERF alleges that Covered Products that are either manufactured, and/or distributed, and/or
14 sold by Defendant for use in California require a warning under Proposition 65, pursuant to Health
15 and Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties stipulate
16 that this Court has jurisdiction over the allegations of violations contained in the Complaint and
17 personal jurisdiction over Old Smokey Products Company, that venue is proper in the County of
18 San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a full
19 settlement and resolution of the allegations contained in the Complaint and the 60 Day Notice
20 Letters.

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

1 1.4 The term “Effective Date” means the date Plaintiff serves notice on Defendant that
2 this Consent Judgment is entered by the Court.

3 **2. INJUNCTIVE RELIEF**

4 2.1 **Warnings on Covered Products**

5 Covered Products that are manufactured, that Defendant distributes for sale in California,
6 and/or sells in California on or after the date which is ninety (90) days after the Effective
7 Date shall include one of the following warning options:**WARNING**¹: Combustion
8 byproducts produced when using this product include carbon monoxide, a chemical
9 known to the State of California to cause birth defects or other reproductive harm.

10 Or,

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

14 Or,

15 **WARNING:** Combustion byproducts near this grill include carbon monoxide, a chemical
16 known to the State of California to cause birth defects or other reproductive harm.

17
18 The warning statements shall be affixed to or printed on all Covered Products themselves,
19 or on the immediate packaging of the Covered Products, and also in the instruction booklets. The
20 type size of the warning must be legible, and no smaller than any other warning provided with the
21 Covered Products. The word “**WARNING:**” shall be in upper case letters and bold text.
22 Defendant may utilize a symbol consisting of a black exclamation point in a yellow equilateral
23 triangle with a bold black outline. The warning shall be set forth in their instruction booklets, and
24 displayed with such conspicuousness, as compared with other words, statements, or designs in the
25 instruction booklets so as to render them likely to be read and understood by an ordinary individual
26

27 ¹ Defendant may use the phrases “Proposition 65” or “California Proposition 65” in front of the word **WARNING**,
28 provided the font and boldface text used as are the same as are used for the word **WARNING** .

1 under customary conditions of purchase or use. Warnings may be contained in the same section
2 of the instruction booklets that contains other safety warnings concerning the use of the Covered
3 Products. The word “**WARNING:**” shall be in upper case letters and bold text. Defendant may
4 utilize a symbol consisting of a black exclamation point in a white equilateral triangle with a bold
5 black outline if the pamphlet is printed only in black and white; if printed in color, then Defendant
6 may use a black exclamation point in a yellow equilateral triangle with a bold black outline.

7 **2.2 Reporting**

8 No later than 120 days after the Effective Date, Defendant shall provide a certification
9 signed by an officer or director of Defendant to ERF confirming its compliance with the warning
10 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

11 **3. SETTLEMENT PAYMENTS**

12 **3.1 Civil Penalties and Payments In Lieu of Penalties**

13 Pursuant to Health and Safety Code section 25249.7(b)(2), Old Smokey shall pay
14 \$6,000.00 in civil penalties. The penalty payment will be allocated in accordance with California
15 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
16 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
17 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
18 provide these payments in two checks for the following amounts made payable to: 1) “OEHHA”
19 in the amount of \$4,500, and 2) “Ecological Rights Foundation” in the amount of \$1,500.

20 **3.2 Attorneys’ Fees and Litigation Costs**

21 In settlement of all of the claims that are alleged, or could have been alleged, in the
22 Complaint concerning Covered Products, Old Smokey shall pay \$17,500.00 to the Ecology Law
23 Center to cover Plaintiff’s attorneys’ fees and costs.

24 **3.3 Payments**

25 All Payments shall be sent no later than 10 days after the Effective Date via USPS certified
26 mail, return receipt requested, or via Federal Express or another courier with a tracking and receipt
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1 confirmation system to the following addresses: All payments to Ecological Rights Foundation
2 and Ecology Law Center shall be delivered to:

3 Fredric Evenson
4 Ecology Law Center
5 P.O. Box 1000
6 Santa Cruz, CA 95061.

7 The payment to OEHHA shall be delivered to:

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

13 ERF shall cooperate in providing taxpayer identification information in an timely manner upon
14 request of Defendant to allow for processing of the payments.

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

16 4.1 As to Covered Products, this Consent Judgment is a final and binding resolution
17 between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day Notice Letter)
18 acting in the public interest, and Burkhead Manufacturing Company d/b/a Old Smokey of: (i) any
19 violation of Proposition 65 (including but not limited to the claims made in the Complaint); and
20 (ii) any other statutory or common law claim to the fullest extent that any of the foregoing
21 described in (i) or (ii) were or could have been asserted by any person or entity against Old Smokey
22 or its parents, subsidiaries or affiliates, and all of their suppliers, manufacturers, customers,
23 distributors, wholesalers, retailers, or any other person in the course of doing business, and the
24 predecessors, successors and assigns of any of them, who may use, maintain, distribute or sell
25 Covered Products (“Released Entities”), based on its or their failure to provide clear and reasonable
26 warnings of exposures to carbon monoxide from Covered Products and ERF hereby releases all of
27 the foregoing claims against all the released entities up through and including the Effective Date.
28 After the Effective Date compliance with the terms of this Consent Judgment constitutes
compliance with Proposition 65 by any Released Party with regard to any alleged exposures to
carbon monoxide from Covered Products.

1 4.2 It is possible that other claims not known to the parties, arising out of the facts
2 alleged in the 60 Day Notice Letter or the Complaint and relating to the Covered Products, will
3 develop or be discovered. ERF on behalf of itself only, and Defendant on behalf of itself only,
4 acknowledge that this Consent Judgment is expressly intended to cover and include all such
5 claims up through and including the Effective Date, including all rights of action therefor. ERF
6 and Old Smokey acknowledge that the claims released above may include unknown claims, and
7 nevertheless waive California Civil Code Section 1542 as to any such unknown claims.

8 California Civil Code Section 1542 reads as follows:

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

13 ERF on behalf of itself only, and Old Smokey on behalf of itself only, acknowledge and
14 understand the significant and consequences of this specific waiver of California Civil Code
15 Section 1542.

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, Old Smokey and ERF waive their respective rights to a
19 hearing 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 this Consent Judgment.

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. Copies of any
5 motion to modify this Consent Judgment shall be served on the Office of the Attorney General.

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

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

9 **9. AUTHORITY TO STIPULATE**

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

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

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

22 **11. ENTIRE AGREEMENT**

23 11.1 This Consent Judgment contains the sole and entire agreement and understanding
24 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
25 negotiations, commitments and understandings related hereto. No representations, oral or
26 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 **12. GOVERNING LAW**

4 12.1 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. This Consent Judgment shall not apply to Covered Products which are not sold
7 in the State of California.

8 **13. EXECUTION AND COUNTERPARTS**

9 13.1 This Consent Judgment may be executed in counterparts which taken together shall
10 be deemed to constitute one document.

11 **14. COURT APPROVAL**

12 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
13 effect, and cannot be used in any proceeding for any purpose.

14 **15. NOTICES**

15 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
16 delivery or Certified Mail.

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

20
21 If to Old Smokey Products Company: Bruce K. Jamison
PO Box 4
22 1620 Maury
23 Houston, TX 77001

24 With a Copy to: Judith M. Praitis
25 Amy P. Lally
Sidley Austin LLP
26 555 W. Fifth Street
Los Angeles, CA 90013
27 jpraitis@sidley.com
alally@sidley.com

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IT IS SO STIPULATED:

DATED: ECOLOGICAL RIGHTS FOUNDATION

BY: _____
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: BURKHEAD MANUFACTURING
COMPANY, D/B/A OLD SMOKEY
PRODUCTS COMPANY

BY: _____
ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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IT IS SO STIPULATED:

DATED:

ECOLOGICAL RIGHTS FOUNDATION

BY: _____
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: *December 28, 2016*

BURKHEAD MANUFACTURING
COMPANY, D/B/A OLD SMOKEY
PRODUCTS COMPANY

BY: *Ryan J. J...*
ITS: *President*

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

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IT IS SO STIPULATED:

DATED: FEBRUARY 27, 2017

ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

BY: *James Lafort*, EXEC. DIR.
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED:

BURKHEAD MANUFACTURING
COMPANY, D/B/A OLD SMOKEY
PRODUCTS COMPANY

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT