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15 ECOLOGICAL RIGHTS FOUNDATION

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

18 ECOLOGICAL RIGHTS FOUNDATION,

Case No. CGC-16-555429

19 Plaintiff,

20 v.

[PROPOSED] CONSENT JUDGMENT
AS TO ORGILL, INC.

21 ORGILL, INC., et al.,

22 Defendants.

23 **1. INTRODUCTION**

24 1.1 On November 17, 2016, the Ecological Rights Foundation (“ERF”) acting on behalf
25 of itself and the general public, filed a Complaint for civil penalties and injunctive relief
26 (“Complaint”) in San Francisco Superior Court, Case No. 555429, against defendant Orgill, Inc.
27 (“Orgill” or “Defendant”). The Complaint alleges, among other things, that Defendant violated the
28 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
of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical listed
under Proposition 65 as known to the State of California to cause reproductive toxicity. The

1 Complaint was based upon a 60-Day Notice letter, sent by ERF on September 12, 2016 to Orgill,
2 Inc., the California Attorney General, all District Attorneys, and all City Attorneys with
3 populations exceeding 750,000. (“Notice Letter”).

4 1.2 Defendant is a business that employs more than ten persons and either
5 manufactures, and/or distributes, and/or sells Covered Products to residents of California. The
6 complaint alleges combustion of charcoal creates carbon monoxide to be released into the air,
7 causing inhalation exposures to those using, or standing near the Covered Products, when they are
8 in use. ERF alleges that Covered Products that are either manufactured, and/or distributed, and/or
9 sold by Defendant for use in California require a warning under Proposition 65, pursuant to Health
10 and Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties stipulate
11 that this Court has jurisdiction over the allegations of violations contained in the Complaint and
12 personal jurisdiction over Orgill, Inc., that venue is proper in the County of San Francisco, and
13 that this Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution
14 of the allegations contained in the Complaint and the Notice Letter.

15 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties
16 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
17 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall
18 not constitute an admission against interest with respect to any material allegation of the
19 Complaint, each and every allegation of which Orgill denies, nor may this Consent Judgment, or
20 compliance with it, be used as evidence of any wrongdoing, misconduct, culpability or liability on
21 the part of Orgill.

22 1.4 The term “Effective Date” means the date Plaintiff serves notice on Defendant that
23 this Consent Judgment is entered by the Court.

24 **2. INJUNCTIVE RELIEF**

25 **2.1 Warnings on Covered Products**

26 Covered Products that are manufactured, that Defendant distributes for sale in California,
27 and/or sells in California on or after the date which is ninety (90) days after the Effective
28

1 Date shall include one of the following warning options:

2 **WARNING**¹: Combustion byproducts produced when using this product include carbon
3 monoxide, a chemical known to the State of California to cause birth defects or other
4 reproductive harm.

5 Or,

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

9 Or,

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

12
13 The warning statements shall be affixed to or printed on all Covered Products themselves,
14 or on the immediate packaging of the Covered Products, and also in the instruction booklets. The
15 type size of the warning must be legible, and no smaller than any other warning provided with the
16 Covered Products. The word “**WARNING:**” shall be in upper case letters and bold text.
17 Defendant may utilize a symbol consisting of a black exclamation point in a yellow equilateral
18 triangle with a bold black outline. The warning shall be set forth in their instruction booklets, and
19 displayed with such conspicuousness, as compared with other words, statements, or designs in the
20 instruction booklets so as to render them likely to be read and understood by an ordinary individual
21 under customary conditions of purchase or use. Warnings may be contained in the same section
22 of the instruction booklets that contains other safety warnings concerning the use of the Covered
23 Products.

24 2.2 Reporting

25 No later than 120 days after the Effective Date, Defendant shall provide a certification
26 signed by an officer or director of Defendant to ERF confirming its compliance with the warning

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

1 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

2 **3. SETTLEMENT PAYMENTS**

3 3.1 Civil Penalties and Payments In Lieu of Penalties

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

11 3.2 **Attorneys’ Fees and Litigation Costs**

12 In settlement of all of the claims that are alleged, or could have been alleged, in the
13 Complaint concerning Covered Products, Orgill shall pay \$24,000.00 to the Ecology Law Center
14 to cover Plaintiff’s attorneys’ fees and costs.

15 3.3 **Payments**

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

20 Fredric Evenson
21 Ecology Law Center
22 P.O. Box 1000
23 Santa Cruz, CA 95061.

24 The payment to OEHHA shall be delivered to:

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

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

2 4.1 As to Covered Products, this Consent Judgment is a final and binding resolution
3 between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day Notice Letter)
4 acting in the public interest, and Orgill, Inc. of: (i) any violation of Proposition 65 (including but
5 not limited to the claims made in the Complaint); and (ii) any other statutory or common law claim
6 to the fullest extent that any of the foregoing described in (i) or (ii) were or could have been asserted
7 by any person or entity against Orgill or its parents, subsidiaries or affiliates, and all of their
8 suppliers, manufacturers, customers, distributors, wholesalers, retailers, or any other person in the
9 course of doing business, and the predecessors, successors and assigns of any of them, who may
10 use, maintain, distribute or sell Covered Products (“Released Entities”), based on its or their failure
11 to provide clear and reasonable warnings of exposures to carbon monoxide from Covered Products
12 and ERF hereby releases all of the foregoing claims against all the released entities up through and
13 including the Effective Date. After the Effective Date compliance with the terms of this Consent
14 Judgment constitutes compliance with Proposition 65 by any Released Party with regard to any
15 alleged exposures to carbon monoxide from Covered Products.

16 4.2 It is possible that other claims not known to the parties, arising out of the facts
17 alleged in the 60 Day Notice Letter or the Complaint and relating to the Covered Products, will
18 develop or be discovered. ERF on behalf of itself only, and Defendant on behalf of itself only,
19 acknowledge that this Consent Judgment is expressly intended to cover and include all such
20 claims up through and including the Effective Date, including all rights of action therefor. ERF
21 and Orgill acknowledge that the claims released above may include unknown claims, and
22 nevertheless waive California Civil Code Section 1542 as to any such unknown claims.

23 California Civil Code Section 1542 reads as follows:

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

1 ERF on behalf of itself only, and Orgill on behalf of itself only, acknowledge and understand the
2 significant and consequences of this specific waiver of California Civil Code Section 1542.

3 **5. ENTRY OF CONSENT JUDGMENT**

4 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
5 Upon entry of the Consent Judgment, Orgill and ERF waive their respective rights to a hearing or
6 trial on the allegations of the Complaint.

7 **6. ENFORCEMENT OF JUDGMENT**

8 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
9 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
10 San Francisco County, giving the notice required by law, enforce the terms and conditions
11 contained herein.

12 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such
13 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
14 violation of this Consent Judgment.

15 **7. MODIFICATION OF JUDGMENT**

16 7.1 This Consent Judgment may be modified only upon written agreement of the parties
17 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
18 as provided by law and upon entry of a modified Consent Judgment by the Court. Copies of any
19 motion to modify this Consent Judgment shall be served on the Office of the Attorney General.

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

21 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
22 this Consent Judgment.

23 **9. AUTHORITY TO STIPULATE**

24 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
25 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
26 the party represented and legally to bind that party.

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

2 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
3 California Attorney General on behalf of the parties so that the Attorney General may review this
4 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
5 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
6 and in the absence of any written objection by the Attorney General to the terms of this Consent
7 Judgment, Plaintiff may then submit it to the Court for approval. If the Attorney General tenders
8 a written objection, the Plaintiff may seek judicial approval only if both parties concur in seeking
9 such approval.

10 **11. ENTIRE AGREEMENT**

11 11.1 This Consent Judgment contains the sole and entire agreement and understanding
12 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
13 negotiations, commitments and understandings related hereto. No representations, oral or
14 otherwise, express or implied, other than those contained herein have been made by any party
15 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
16 to exist or to bind any of the parties.

17 **12. GOVERNING LAW**

18 12.1 The validity, construction and performance of this Consent Judgment shall be
19 governed by the laws of the State of California, without reference to any conflicts of law provisions
20 of California law. This Consent Judgment shall not apply to Covered Products which are not sold
21 in the State of California.

22 **13. EXECUTION AND COUNTERPARTS**

23 13.1 This Consent Judgment may be executed in counterparts which taken together shall
24 be deemed to constitute one document.

25 **14. COURT APPROVAL**

26 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
27 effect, and cannot be used in any proceeding for any purpose.
28

1 **15. NOTICES**

2 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
3 delivery or Certified Mail.

4
5 If to Ecological Rights Foundation: Fredric Evenson
6 Ecology Law Center
7 P.O. Box 1000
8 Santa Cruz, CA 95061

9 If to Orgill, Inc. Barbara R. Adams
10 Adams Nye Becht LLP
11 222 Kearny Street, 7th Floor
12 San Francisco, CA 94108

13 IT IS SO STIPULATED:

14 DATED: JANUARY 16, 2018

15 ECOLOGICAL RIGHTS FOUNDATION

16 *Ecological Rights Foundation*

17 BY: *James Lampton* EXEC. DIR.
18 JAMES LAMPORT, EXECUTIVE DIRECTOR

19 DATED:

20 ORGILL, INC.

21 BY: *[Signature]*

22 ITS: *Vice Chairman*

23
24 IT IS SO ORDERED, ADJUDGED AND DECREED:

25 DATED: _____

26 _____
27 JUDGE OF THE SUPERIOR COURT
28