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ECOLOGICAL RIGHTS FOUNDATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

FRONTGATE MARKETING, INC.,

Defendant.

Case No. CGC-16-555419

[PROPOSED] CONSENT JUDGMENT

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. CGC-16-555419, against Defendant Frontgate Marketing, Inc., (also referred to herein as “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 California who use wood-burning outdoor heating products, such as fire pits (“Covered Products”), that use of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the State of

1 California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice letter,
2 sent by ERF on September 12, 2016 to Defendant, the California Attorney General, all District
3 Attorneys, and all City Attorneys with populations exceeding 750,000.

4 1.2 Defendant is a business that employs more than ten people, and manufactures,
5 distributes, and/or sells Covered Products. ERF alleges that the combustion of wood results in
6 significant amounts of carbon monoxide being released into the air, causing inhalation exposures
7 to those using or standing near the Covered Products when they are in use. Pursuant to Health and
8 Safety Code Section 25249.8, carbon monoxide is a chemical known to the State of California to
9 cause reproductive toxicity. ERF alleges that Covered Products that are manufactured, distributed
10 or sold by Defendant for use in California require a warning under Proposition 65, pursuant to
11 Health and Safety Code Section 25249.6. For purposes of this Consent Judgment, the parties
12 stipulate that this Court has jurisdiction over the allegations of violations contained in the
13 Complaint and personal jurisdiction over Defendant, that venue is proper in the County of San
14 Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
15 and resolution 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 Defendant 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 Defendant.

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

25 **2. INJUNCTIVE RELIEF**

26 **2.1 Warnings**

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

3 **WARNING:** Combustion byproducts produced when using this product include carbon
4 monoxide, a chemical known to the State of California to cause birth defects or other
5 reproductive harm. For more information go to www.P65Warnings.ca.gov.

6 Or,

7 **WARNING:** Combustion byproducts produced when using this product include carbon
8 monoxide and other chemicals known to the State of California to cause cancer, birth
9 defects or other reproductive harm. For more information go to
10 www.P65Warnings.ca.gov.

11 The warning statement shall be prominently affixed to or printed on the Covered Product and in
12 its instruction booklet, if any, and displayed with such conspicuousness, as compared with other
13 words, statements, designs, or devices on the Covered Product and in its instruction booklet, as to
14 render it likely to be read and understood by an ordinary individual under customary conditions of
15 purchase or use. A warning may be contained in the same section of the instruction booklet that
16 contains other safety warnings concerning the use of the Covered Product. The type size of the
17 warning must be legible, and no smaller than any other warning provided with the Covered
18 Product. The word “**WARNING:**” shall be in upper case letters and bold text.

19 2.2 **Reporting**

20 No later than 75 days after the Execution Date, Defendant shall provide a report to ERF
21 documenting its compliance with paragraph 2.1. The report shall include photographs of the
22 warning posting and documentation that the warnings are being included with Covered Products
23 that are offered for sale in California.

24 3. **SETTLEMENT PAYMENTS**

25 3.1 Civil Penalties and Payments In Lieu of Penalties

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

6 3.2 Attorneys’ Fees and Litigation Costs

7 In settlement of all of the claims that are alleged, or could have been alleged, in the
8 Complaint concerning Covered Products, Defendant shall pay \$20,000 to Ecology Law Center to
9 cover Plaintiff’s attorneys’ fees and costs.

10 3.3 Payments

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

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

17 The payment to OEHHA shall be delivered to:

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

21 4. MATTERS COVERED BY THIS CONSENT JUDGMENT

22 4.1 This Consent Judgment is a final and binding resolution between Defendant and ERF,
23 acting on behalf of itself and on behalf of the general public as to those matters raised in the 60-
24 Day Notice Letter, of: (i) any violation of Proposition 65 (including but not limited to the claims
25 made in the Complaint); and (ii) any other statutory or common law claim to the fullest extent that
26 any of the foregoing described in (i) or (ii) were or could have been asserted by any person or
27 entity against Defendant or their parents, subsidiaries or affiliates, and all of their suppliers,
28 customers, distributors, wholesalers, retailers, or any other person in the course of doing business,

1 and the successors and assigns of any of them, who may use, maintain, distribute or sell Covered
2 Products (“Released Entities”), based on its or their failure to provide clear and reasonable
3 warnings of exposures to carbon monoxide from Covered Products. As to alleged exposures to
4 carbon monoxide from Covered Products, compliance with the terms of this Consent Judgment
5 resolves any issue, now and in the future, concerning compliance by Defendant and the Released
6 Entities, with the requirements of Proposition 65 with respect to Covered Products, and any alleged
7 resulting exposure.

8 4.2 ERF, on behalf of itself, further waives and releases any and all claims it may have
9 against Defendant with respect to any other application of Proposition 65 to the Covered Products,
10 or arising out of the facts alleged in the 60-Day Notice Letter or the Complaint and relating to the
11 Covered Products. It is possible that other claims not known to ERF arising out of the facts alleged
12 in the 60-Day Notice Letter or the Complaint, and relating to the Covered Products will develop
13 or be discovered. ERF, on behalf of itself only, acknowledges that this Consent Judgment is
14 expressly intended to cover and include all such claims up through the Effective Date, including
15 all rights of action therefor. ERF acknowledges that the claims released in Section 4.1 above may
16 include unknown claims, and nevertheless waives any and all rights and benefits otherwise
17 conferred by California Civil Code Section 1542 as to any such unknown claims. California Civil
18 Code Section 1542 reads in full as follows:

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

24 ERF, on behalf of itself only, understands and acknowledges the significance and consequence
25 of this express waiver of California Civil Code Section 1542.

26 **5. ENTRY OF CONSENT JUDGMENT**

27 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
28 Upon entry of the Consent Judgment, Defendant and ERF waive their respective rights to a hearing
or trial on the allegations of the Complaint.

1 **6. ENFORCEMENT OF JUDGMENT**

2 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
3 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
4 San Francisco County, giving the notice required by law, enforce the terms and conditions
5 contained herein. In any proceeding brought by either party to enforce this Consent Judgment,
6 such party may seek whatever fines, costs, penalties or remedies as may be provided by law for
7 any violation of Proposition 65 or this Consent Judgment.

8 **7. MODIFICATION OF JUDGMENT**

9 7.1 This Consent Judgment may be modified only upon written agreement of the parties
10 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
11 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

13 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
14 this Consent Judgment.

15 **9. AUTHORITY TO STIPULATE**

16 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
17 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
18 the party represented and legally to bind that party.

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

20 10.1 ERF shall serve a copy of this Consent Judgment, signed by both parties, on the
21 California Attorney General on behalf of the parties so that the Attorney General may review this
22 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
23 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
24 and in the absence of any written objection by the Attorney General to the terms of this Consent
25 Judgment, the parties may then submit it to the Court for approval.
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1 **11. ENTIRE AGREEMENT**

2 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
3 the parties with respect to the entire subject matter hereof and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
7 to exist or to bind any of the parties.

8 **12. GOVERNING LAW**

9 12.1 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California, without reference to any conflicts of law provisions
11 of California law.

12 **13. EXECUTION AND COUNTERPARTS**

13 13.1 This Consent Judgment may be executed in counterparts which taken together shall
14 be deemed to constitute one document. The exchange of copies of this Consent Judgment and of
15 signature pages by facsimile transmission, or by electronic mail in “portable document format”
16 (“pdf”) form, shall constitute effective execution and delivery of this Consent Judgment as to the
17 Parties, and the signatures of the Parties transmitted by facsimile and/or pdf shall be deemed to
18 be their original signatures for all purposes.

19 **14. COURT APPROVAL**

20 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect,
21 and cannot be used in any proceeding for any purpose.

22 **15. NOTICES**

23 15.1 Any notices or payments due under this Consent Judgment shall be sent by personal
24 delivery or Certified Mail.

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26 If to Ecological Rights Foundation: Fredric Evenson
27 Ecology Law Center
28 P.O. Box 1000
 Santa Cruz, CA 95061

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If to Frontgate Marketing, Inc.:

Jay W. Connolly
Seyfarth Shaw LLP
560 Mission St., 31st Floor
San Francisco, CA 94105

IT IS SO STIPULATED:

DATED: SEPTEMBER 12, 2017

ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

BY: *James L. Lampert*, EXEC. DIR.
JAMES LAMPART, EXECUTIVE DIRECTOR

DATED:

FRONTGATE MARKETING, INC.

BY: *Ch T [Signature]*

ITS: *SVP, Senior Counsel*

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT