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14 Counsel for Plaintiff, ECOLOGICAL RIGHTS FOUNDATION

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

17 ECOLOGICAL RIGHTS FOUNDATION,

Case No. CGC-17-559416

18 Plaintiff,

19 v.

[PROPOSED] SETTLEMENT  
AGREEMENT AND CONSENT ORDER  
AS TO NANTUCKET PAVERS

20 ARETT SALES CORPORATION, JENSEN  
21 DISTRIBUTION SERVICES, ALLAN  
22 BLOCK CORPORATION, NANTUCKET  
23 PAVERS, INC., LAYNE LABORATORIES,  
24 INC., PATINA PRODUCTS, INC., CY TOP  
25 LIMITED,

26 Defendants.

27 **1. INTRODUCTION**

28 1.1 On June 8, 2017, 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-17-559416, against defendant  
Nantucket Pavers, Inc., (also referred to herein as "Nantucket Pavers" or "Settling 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

1 California who use wood-burning fire pits manufactured or distributed by Nantucket Pavers  
2 ("Covered Products"), that use of those products causes exposures to carbon monoxide. Carbon  
3 monoxide is a chemical known to the State of California to cause reproductive toxicity. The  
4 Complaint was based upon a 60-Day Notice letter, sent by ERF on September 12, 2016 to Settling  
5 Defendant, the California Attorney General, all District Attorneys, and all City Attorneys with  
6 populations exceeding 750,000.

7 1.2 Nantucket Pavers is a business that has more than ten employees and manufactures,  
8 distributes, or sells Covered Products. ERF alleges that the combustion of wood creates significant  
9 amounts of carbon monoxide to be released into the air, causing inhalation exposures to those  
10 using or standing near the Covered Products when they are in use. Pursuant to Health and Safety  
11 Code Section 25249.8, carbon monoxide is a chemical known to the State of California to cause  
12 reproductive toxicity. ERF alleges that Covered Products that are manufactured, distributed or  
13 sold by Settling Defendant for use in California require a warning under Proposition 65, pursuant  
14 to Health and Safety Code Section 25249.6. For purposes of this Settlement Agreement and  
15 Consent Order (hereinafter "Consent Order"), the parties stipulate that this Court has jurisdiction  
16 over the allegations of violations contained in the Complaint and personal jurisdiction over Settling  
17 Defendant, that venue is proper in the County of San Francisco, and that this Court has jurisdiction  
18 to enter this Consent Order as a full settlement and resolution of the allegations contained in the  
19 Complaint.

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

1 1.4 The term "Effective Date" means the date this Consent Order is entered by the  
2 Court.

3 **2. INJUNCTIVE RELIEF**

4 **2.1 Warnings**

5 No later than 90 days after the Effective Date, Nantucket Pavers shall not distribute or  
6 offer for sale in California any Covered Product unless the Covered Product is accompanied by  
7 one of the following warning statements:

8 **WARNING:** Chemicals known to the state of California to cause birth defects or other  
9 reproductive harm, including carbon monoxide, are produced by combustion of wood  
10 when used with this product.

11 Or,

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

15 Or,

16 **WARNING:** This product can expose you to carbon monoxide, a chemical known to the  
17 State of California to cause birth defects or other reproductive harm. For more  
18 information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

19 Or,

20 **WARNING:** Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

21 The warning statements shall be affixed to or printed on the Covered Products or their  
22 packaging, as well as printed in the Covered Products' instruction booklets (if any). The  
23 warnings shall be displayed with such conspicuousness, as compared with other words,  
24 statements, designs, or devices as to render them likely to be read and understood by an ordinary  
25 individual under customary conditions of purchase or use. Warnings may be contained in the  
26 same section of the instruction booklets that contains other safety warnings concerning the use of  
27 the Covered Products. The type size of the warning must be legible, and no smaller than any  
28 other warning provided with the Covered Products. The word "WARNING:" shall be in upper  
case letters and bold text. Defendant may utilize a symbol consisting of a black exclamation  
point in a yellow equilateral triangle with a bold black outline or a black exclamation point in a

1 white triangle with black border if no yellow is used in the section of the packaging, print or  
2 online material regarding the Covered Products that contains other warning language regarding  
3 use of the Covered Products.

#### 4 2.2 Reporting

5 No later than 75 days after the Effective Date, each Defendant shall provide a report to  
6 ERF confirming its compliance with the warning requirements of paragraph 2.1, and the payment  
7 to OEHHA pursuant to paragraph 3.1.

### 8 3. SETTLEMENT PAYMENTS

#### 9 3.1 Civil Penalties

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

#### 18 3.2 Attorneys' Fees and Litigation Costs

19 In settlement of all of the claims that are alleged, or could have been alleged, in the  
20 Complaint concerning Covered Products, Settling Defendant shall pay a total of \$16,000 to the  
21 Ecology Law Center to cover Plaintiff's attorneys' fees and costs.

#### 22 3.3 Payments

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

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

1 The payment to OEHHA shall be delivered to:

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

7 **4. MATTERS COVERED BY THIS CONSENT ORDER**

8 4.1 This Consent Order is a full, final and binding resolution between ERF, acting on  
9 behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest,  
10 and Settling Defendant of: (i) any violation of Proposition 65 (including but not limited to the  
11 claims made in the Complaint); and (ii) any other statutory or common law claim to the fullest  
12 extent that any of the foregoing described in (i) or (ii) were or could have been asserted by any  
13 person or entity against Settling Defendant or its parents, subsidiaries or affiliates, and all of their  
14 suppliers, customers, distributors, wholesalers, retailers, or any other person in the course of doing  
15 business, and the successors and assigns of any of them, who may use, maintain, distribute or sell  
16 Covered Products ("Released Entities"), based on its or their failure to provide clear and reasonable  
17 warnings of exposures to carbon monoxide from Covered Products. As to alleged exposures to  
18 carbon monoxide under Proposition 65 from wood burning fire pits, compliance with the terms of  
19 this Consent Order resolves any issue, now and in the future, concerning compliance by Settling  
20 Defendant and the Released Entities, with the requirements of Proposition 65 with respect to  
21 Covered Products, and any alleged resulting exposure.

22 4.2 ERF hereby fully releases and discharges Settling Defendant and the Released  
23 Entities from any and all claims, actions, causes of action, suits, demands, liabilities, damages,  
24 penalties, fees, costs and expenses asserted, or that could have been asserted from the handling or  
25 use of the Covered Products, as to any alleged violation of Proposition 65 or its implementing  
26 regulations arising from the failure to provide Proposition 65 warnings on the Covered Products.

27 4.3 It is possible that other claims not known to the Parties arising out of the facts  
28 alleged in the Notice or the Complaint and relating to the Covered Products will develop or be  
discovered. ERF, on behalf of itself only, acknowledges that this Consent Order is expressly

1 intended to cover and include all such unknown claims up through the Effective Date, including  
2 all rights of action therefor. ERF acknowledges that the claims released in Sections 4.1 and 4.2  
3 above may include unknown claims, and nevertheless waive California Civil Code section 1542  
4 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

10 ERF acknowledges and understands the significance and consequences of this specific waiver of  
11 California Civil Code section 1542.

12 **5. ENTRY OF CONSENT ORDER**

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

16 **6. ENFORCEMENT OF ORDER**

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

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

24 **7. MODIFICATION OF ORDER**

25 7.1 This Consent Order may be modified only upon written agreement of the parties  
26 and upon entry of a modified Settlement Agreement and Consent Order by the Court, or upon  
27 motion of any party as provided by law and upon entry of a modified Consent Order by the Court.

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 Order.

4     **9.     AUTHORITY TO STIPULATE**

5             9.1     Each signatory to this Consent Order certifies that he or she is fully authorized by  
6     the party he or she represents to enter into this Consent Order and to execute it on behalf of the  
7     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 Order, 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 Order prior to its submittal to the Court for approval. No sooner than forty five (45) days  
12    after the Attorney General has received the aforementioned copy of this Consent Order, and in the  
13    absence of any written objection by the Attorney General to the terms of this Consent Order, the  
14    parties may then submit it to the Court for approval.

15    **11.    ENTIRE AGREEMENT**

16            11.1    This Consent Order contains the sole and entire agreement and understanding of  
17    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 Order shall be governed  
24    by the laws of the State of California, without reference to any conflicts of law provisions of  
25    California law.

1   **13.   EXECUTION AND COUNTERPARTS**

2           13.1   This Consent Order may be executed in counterparts which taken together shall be  
3   deemed to constitute one document.

4   **14.   COURT APPROVAL**

5           14.1   If this Consent Order is not approved by the Court, it shall be of no force or effect,  
6   and cannot be used in any proceeding for any purpose.

7   **15.   NOTICES**

8           15.1   Any notices or payments due under this Consent Order shall be sent by personal  
9   delivery or Certified Mail.

10           If to Ecological Rights Foundation:

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

11           If to Nantucket Pavers, Inc.:

Eric Brainsky, Esq.  
BRAINSKY LEVINSON, LLC  
1543 Fall River Avenue, Suite 1  
Seekonk, MA 02771

Norman A. Ryan  
Ryan Carvalho LLP  
Rio Vista Plaza  
8989 Rio San Diego Drive, Suite 368  
San Diego, CA 92108



1  
2 IT IS SO STIPULATED:

3  
4 DATED: January 15, 2019

5 ECOLOGICAL RIGHTS FOUNDATION

6 *Ecological Rights Foundation*

7 BY: *James Lamport* EXEC. DIR.  
8 JAMES LAMPORT, EXECUTIVE DIRECTOR

9 DATED: *1-21-19*

10 NANTUCKET PAVERS, INC.

11 BY: *[Signature]*

12 ITS: *President* *1-21-19*

13  
14 IT IS SO ORDERED, ADJUDGED AND DECREED:

15  
16 DATED: \_\_\_\_\_

17  
18 JUDGE OF THE SUPERIOR COURT