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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
20 Plaintiff,
21 v.
22 ARETT SALES CORPORATION, et al.,
23
24 Defendants.

25 Case No. CGC-17-559416

26 [PROPOSED] CONSENT JUDGMENT
27 AS TO CY TOP LIMITED

28 **1. INTRODUCTION**

1.1 On June 8, 2017, the Ecological Rights Foundation (“ERF”) acting on behalf of itself and the general public, filed an Amended Complaint for civil penalties and injunctive relief (“Complaint”) in San Francisco Superior Court, Case No. CGC-17-559416, against defendant, CY Top Limited, (also referred to herein as “CY Top” or “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, fire bowls, and chimineas), that use of those

1 products causes exposures to carbon monoxide. Carbon monoxide is a chemical known to the
2 State of California to cause reproductive toxicity. The Complaint was based upon a 60-Day Notice
3 letter dated March 27, 2017 sent by ERF to CY Top, the California Attorney General, all District
4 Attorneys, and all City Attorneys with populations exceeding 750,000.

5 1.2 ERF and CY Top are hereinafter referred to collectively as the "Parties."

6 1.3 ERF alleges that wood-burning outdoor heating products that are manufactured,
7 distributed or sold by Defendant for use in California ("Covered Products") require a warning
8 under Proposition 65, pursuant to Health and Safety Code Section 25249.6. Defendant is a business
9 that manufactures, distributes, and sells its own brand(s) of Covered Products. Pursuant to Health
10 and Safety Code Section 25249.8, carbon monoxide is a chemical known to the State of California
11 to cause reproductive toxicity. ERF alleges that the combustion of wood creates significant
12 amounts of carbon monoxide to be released into the air, causing inhalation exposures to those
13 using or standing near the Covered Products when they are in use. For purposes of this Consent
14 Judgment, the parties stipulate that this Court has jurisdiction over the allegations of violations
15 contained in the Complaint and personal jurisdiction over CY Top, that venue is proper in the
16 County of San Francisco, and that this Court has jurisdiction to enter this Consent Judgment as a
17 full settlement and resolution of the allegations contained in the Complaint brought in the public
18 interest pursuant to Health and Safety Code Section 25249.7(d).

19 1.4 The Parties have entered into this Consent Judgment in order to settle, compromise,
20 and resolve claims that are denied and disputed and thus avoid prolonged and costly litigation.
21 The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all
22 claims between the parties for the purpose of avoiding prolonged litigation. This Consent
23 Judgment shall not constitute an admission against interest with respect to any material allegation
24 of the Complaint, each and every allegation of which Defendant denies, nor may this Consent
25 Judgment, or compliance with it, be used as evidence of any wrongdoing, misconduct, culpability
26 or liability on the part of CY Top.

1 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
2 prejudice, waive, or impair any right, remedy, argument or defense the Parties may have in any
3 current or future legal proceeding unrelated to these proceedings.

4 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
5 Court. The term "Execution Date" means the date this Consent Judgment has been executed by all
6 the Parties.

7 **2. INJUNCTIVE RELIEF**

8 2.1 Warnings

9 Covered Products manufactured beginning 60 days after the Effective Date and offered
10 for sale in California shall include one of the following warning statements:

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

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

17 The required warning statements shall be affixed to or printed on the Covered Product itself and
18 the Covered Product's instruction manual. The warning shall be prominently affixed to or
19 printed on the Covered Product and its instruction manual, and displayed with such
20 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
21 Product and its instruction manual, as to render it likely to be read and understood by an ordinary
22 individual under customary conditions of purchase or use. A warning may be contained in the
23 same section of the instruction manual that contains other safety warnings concerning the use of
24 the Covered Product. The type size of the warning must be legible, and no smaller than any
25 other warning provided with the Covered Product. The word "**WARNING:**" shall be in upper
26 case letters and bold text. Defendant may utilize a symbol consisting of a black exclamation
27 point in a yellow equilateral triangle with a bold black outline.

1 2.2 Reporting

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

5 **3. SETTLEMENT PAYMENTS**

6 3.1 Civil Penalties and Payments In Lieu of Penalties

7 Pursuant to Health and Safety Code section 25249.7(b)(2), CY Top shall pay \$10,000 in
8 civil penalties. The penalty payment will be allocated in accordance with California Health and
9 Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the
10 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
11 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will provide these
12 payments in two checks for the following amounts made payable to: 1) “OEHHA” in the amount
13 of \$7,500, and 2) “Ecological Rights Foundation” in the amount of \$2,500.

14 3.2 Attorneys’ Fees and Litigation Costs

15 In settlement of all of the claims that are alleged, or could have been alleged, in the
16 Complaint concerning Covered Products, CY Top shall pay \$25,000 to the Ecology Law Center
17 to cover Plaintiff’s attorneys’ fees and costs.

18 3.2 Payments

19 All Payments shall be sent no later than 10 days after the Effective Date via USPS
20 certified mail, return receipt requested, to the following addresses: All payments to Ecological
21 Rights Foundation and Ecology Law Center shall be made by check payable to “Ecology Law
22 Center Attorney Client Trust Account” and delivered to:

23 Fredric Evenson
24 Ecology Law Center
25 P.O. Box 1000
26 Santa Cruz, CA 95061

26 The payment to OEHHA shall be delivered to:

27 Mike Gyurics
28 Fiscal Operations Branch Chief

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

4.1 This Consent Judgment is a final and binding resolution between ERF, acting on behalf of itself and (as to those matters raised in the 60-Day Notice Letter) in the public interest, and CY Top 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 against CY Top or its parents, subsidiaries or affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers, including but not limited to Wal-Mart Stores, Inc. and its affiliates and subsidiaries, all other upstream or downstream entities in the chain of distribution, marketplace hosts, or any other person in the course of doing business, and the successors and assigns of any of them, who may use, maintain, distribute or sell Covered Products (“Released Entities”), based on its or their exposures of persons to carbon monoxide from Covered Products and their failure to provide a clear and reasonable warning of exposure to such individuals. As to alleged exposures to carbon monoxide from Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance by CY Top and the Released Entities, with the requirements of Proposition 65 with respect to Covered Products, and any alleged resulting exposure.

4.2 It is possible that other claims not known to the Parties, arising out of the facts alleged in the Notice or the Complaint and relating to the Covered Product, will develop or be discovered. ERF on behalf of itself only, and CY Top on behalf of itself only, acknowledge that this Consent Judgment is expressly intended to cover and include all such claims up through and including the Effective Date, including all rights of action therefor. ERF and CY Top acknowledge that the claims released above may include unknown claims, and nevertheless waive California Civil Code Section 1542 as to any such unknown claims. California Civil Code Section 1542 reads as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
3 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
OR HER SETTLEMENT WITH THE DEBTOR.

4 ERF on behalf of itself only, and CY Top on behalf of itself only, acknowledge and understand
5 the significance and consequences of this specific waiver of California Civil Code Section 1542.

6 **5. ENTRY OF CONSENT JUDGMENT**

7 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment.
8 Upon entry of the Consent Judgment, CY Top and ERF waive their respective rights to a hearing
9 or trial on the allegations of the Complaint.

10 **6. ENFORCEMENT OF JUDGMENT**

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

15 6.2 In any proceeding brought by either Party to enforce this Consent Judgment, such
16 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
17 violation of Proposition 65 or this Consent Judgment.

18 **7. MODIFICATION OF JUDGMENT**

19 7.1 This Consent Judgment may be modified only upon written agreement of the
20 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
21 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

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

23 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
24 this Consent Judgment.

1 **9. AUTHORITY TO STIPULATE**

2 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of
4 the Party represented and legally to bind that party.

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

6 10.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
7 California Attorney General on behalf of the Parties so that the Attorney General may review this
8 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
9 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
10 and in the absence of any written objection by the Attorney General to the terms of this Consent
11 Judgment, the Parties may then submit it to the Court for approval.

12 **11. ENTIRE AGREEMENT**

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

19 **12. GOVERNING LAW**

20 12.1 The validity, construction and performance of this Consent Judgment shall be
21 governed by the laws of the State of California, without reference to any conflicts of law provisions
22 of California law.

23 **13. EXECUTION AND COUNTERPARTS**

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

1 **14. COURT APPROVAL**

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

4 **15. NOTICES**

5 If Any notices or payments due under this Consent Judgment shall be sent by
6 personal delivery or Certified Mail.

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

11 If to CY Top Limited: Mark Elliott
12 Pillsbury Winthrop Shaw Pittman LLP
13 725 S. Figueroa St, Suite 2800 Los
14 Angeles, CA 90017

15 IT IS SO STIPULATED:

16 DATED: *NOVEMBER 7, 2017*

17 ECOLOGICAL RIGHTS FOUNDATION
Ecological Rights Foundation

18 BY: *James L. Lafort*, EXEC. DIR.
19 JAMES L. LAFORT, EXECUTIVE DIRECTOR

20
21
22 DATED:

CY TOP LIMITED

23
24
25 BY: _____

26 IT IS SO ORDERED, ADJUDGED AND DECREED:

27 DATED: _____

28 _____
JUDGE OF THE SUPERIOR COURT

1 **14. COURT APPROVAL**

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3 effect, and cannot be used in any proceeding for any purpose.

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6 delivery or Certified Mail.

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

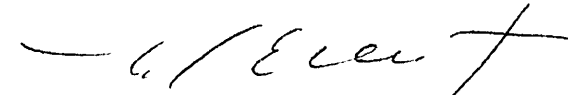
12 If to CY Top Limited: Mark Elliott
13 Pillsbury Winthrop Shaw Pittman LLP
14 725 S. Figueroa St, Suite 2800
15 Los Angeles, CA 90017

16 IT IS SO STIPULATED:

17 DATED: ECOLOGICAL RIGHTS FOUNDATION

18 BY: _____
19 JAMES LAMPORT, EXECUTIVE DIRECTOR

20 DATED: 10/26/17 CY TOP LIMITED

21
22 BY: 
23 MARK E. ELLIOTT, ON BEHALF OF CY TOP

24 IT IS SO ORDERED, ADJUDGED AND DECREED:

25 DATED: _____

26 _____
27 JUDGE OF THE SUPERIOR COURT
28