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ECOLOGICAL RIGHTS FOUNDATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

A&J MANUFACTURING, LLC, BLUE
RHINO GLOBAL SOURCING, INC., THE
BLUE RHINO GROUP, ONWARD
MANUFACTURING COMPANY, LTD.,

Defendants.

Case No. CGC-18-563746

[PROPOSED] CONSENT JUDGMENT
AS TO BLUE RHINO GLOBAL
SOURCING, INC

1. INTRODUCTION

1.1 On January 19, 2018, the Ecological Rights Foundation (“ERF”) acting on behalf of itself and the general public, filed a Complaint for Injunctive Relief and Civil Penalties (“Complaint”) in San Francisco Superior Court, Case No. 563746 against defendant Blue Rhino Global Sourcing, Inc., (also referred to herein as “Blue Rhino” 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 about carbon monoxide exposures to those residents of California who use charcoal starters that are manufactured, distributed or sold by Defendant (“Covered Products”), that use of those products causes exposures to carbon

CONSENT JUDGMENT
(Blue Rhino Global Sourcing, Inc.)

1 monoxide, a chemical known to the State of California to cause birth defects and other
2 reproductive harm. The Complaint was based upon a 60-Day Notice letter, sent by ERF on June
3 29, 2017, to Blue Rhino, the California Attorney General, all District Attorneys, and all City
4 Attorneys with populations exceeding 750,000 (the "60-Day Notice").

5 1.2 Defendant is a company that employs more than ten persons, and manufactures,
6 distributes, and/or sells Covered Products. ERF alleges that the Covered Products that Defendant
7 distributes, markets and sells are designed to assist the ignition and combustion of charcoal,
8 which creates carbon monoxide to be released into the air, causing inhalation exposures to those
9 using or standing near the Covered Products when they are in use. Pursuant to Health and Safety
10 Code Section 25249.8, carbon monoxide is a chemical known to the State of California to cause
11 reproductive toxicity. ERF alleges that Covered Products that are manufactured, distributed or
12 sold by Defendant for use in California require a warning under Proposition 65, pursuant to
13 Health and Safety Code Section 25249.6.

14 1.3 ERF and Blue Rhino are hereafter sometimes referred to individually as a "Party" or
15 collectively as the "Parties."

16 1.4 For purposes of this Consent Judgment, the parties stipulate that this Court has
17 jurisdiction over the allegations of violations contained in the Complaint and personal
18 jurisdiction over Blue Rhino, that venue is proper in the County of San Francisco, and that this
19 Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the
20 allegations contained in the Complaint.

21 1.5 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. Nothing in this Consent
24 Judgment, nor compliance with its terms, shall constitute an admission by any of the Parties, or
25 by any of their respective officers, directors, shareholders, employees, agents, parent companies,
26 subsidiaries, divisions, affiliates, suppliers, franchisees, licensees, distributors, wholesalers, or
27 retailers, of any fact, conclusion of law, issue of law, violation of law, fault, wrongdoing, or
28 liability, including without limitation, any admission concerning any alleged violation of

1 Proposition 65 or any other material allegation of the Complaint, each and every allegation of
2 which Blue Rhino denies, nor may this Consent Judgment, or compliance with it, be used as
3 evidence of any wrongdoing, misconduct, culpability or liability on the part of Blue Rhino.

4 1.6 The term “Effective Date” means the date that Defendant receives Notice that this
5 Consent Judgment was entered by the Court.

6 **2. INJUNCTIVE RELIEF**

7 **2.1 Warnings on Covered Products**

8 No later than 120 days after the Effective Date, Covered Products offered for sale in
9 California by Defendant shall include one of the following warning statements:

10 **WARNING:** Chemicals known to the state of California to cause birth defects or other
11 reproductive harm, including carbon monoxide, are produced by combustion of charcoal.

12 Or,

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

16 Or,

17 **WARNING:** This product can expose you to chemicals including combustion by-
18 products (including soot and carbon monoxide), which are known to the State of
19 California to cause birth defects or other reproductive harm. For more information go to
20 www.P65Warnings.ca.gov.

21 Or, any warning subsequently established by statute, regulation, or court decision in a
22 contested matter, that is directly applicable to the same type of product as the Covered
23 Products, and the purpose of which is or includes satisfying Proposition 65 warning
24 requirements.

25 The warning statement shall be affixed to, or printed on packaging for, Covered Products, or
26 provided in a manner established by statute or regulation applicable to the same type of product
27 as the Covered Products, as such may be modified or amended from time to time. In accordance
28 with the current regulations, the warning shall be displayed with such conspicuousness, as

1 compared with other words, statements, designs, or devices as to render it likely to be read and
2 understood by an ordinary individual under customary conditions of purchase or use. The type
3 size of the warning must be legible, and no smaller than any other warning provided on or with
4 the Covered Products. The word “WARNING:” shall be in upper case letters and bold text.
5 Defendant may utilize a symbol consisting of a black exclamation point in a yellow equilateral
6 triangle with a bold black outline, or a black exclamation point in a white triangle with black
7 border if no yellow is used in the section of the packaging, print or online material regarding the
8 Covered Products that contains other warning language regarding use of the Covered Products.

9 2.2 Exemption.

10 All Covered Products that have been or will have been distributed, shipped, or sold, or
11 otherwise placed in the stream of commerce through and including the Effective Date of this
12 Consent Judgment are exempt from the provisions of Section 2.1 and are included in the release
13 in Section 4.1.

14 2.3 Example

15 The warning statement exemplar and graphic, attached hereto as Exhibit A, is hereby
16 deemed to be a clear and reasonable warning under, and to fully comply with, Health & Safety
17 Section 25249.6 and the implementing regulations.

18 No later than 150 days after the Effective Date, an authorized representative of Defendant
19 shall provide written confirmation of its compliance with the warning requirements of paragraph
20 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

21 3. **SETTLEMENT PAYMENTS**

22 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims
23 contained in or referred to in the 60-Day Notice, Complaint, and this Consent Judgment, Blue
24 Rhino shall make payments totaling \$22,000 (twenty two thousand dollars) within ten days of
25 the Effective Date, as more specifically set forth in sections 3.1 and 3.2, below, which shall be in
26 full and final satisfaction of any and all civil penalties and attorneys’ fees and costs owed to
27 ERF, OEHHA, and/or its counsel.

28 3.1 **Civil Penalties and Payments In Lieu of Penalties**

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

3.2 Attorneys’ Fees and Litigation Costs

In settlement of all of the claims that are alleged, or could have been alleged, in the Complaint concerning Covered Products, Blue Rhino shall pay \$19,000 (nineteen thousand dollars) to the Ecology Law Center to cover Plaintiff’s attorneys’ fees and costs.

3.3 Payments

All Payments shall be sent no later than 10 days after the Effective Date via USPS certified mail, return receipt requested, to the following addresses:

All payments to Ecological Rights Foundation and Ecology Law Center shall be delivered to:

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

The payment to OEHHA shall be delivered to:

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

4. **RELEASE OF CLAIMS.**

4.1 As to Covered Products, 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, acting in the public interest. ERF, acting on its own behalf and in the public interest, forever

1 releases and discharges Blue Rhino and its past and present officers, directors, owners,
2 shareholders, employees, agents, attorneys, parent companies, subsidiaries, divisions, affiliates,
3 suppliers, franchisees, licensees, customers, distributors, wholesalers (including without
4 limitation, True Value Company L.L.C. f/k/a True Value Company), retailers, and all other
5 upstream and downstream entities and persons in the distribution chain of any Covered Product,
6 and the predecessors, successors and assigns of any of them (collectively the “Released
7 Persons”), from any and all claims and causes of action for (i) any violation of Proposition 65
8 (including but not limited to the claims made in the Complaint) based on exposure to carbon
9 monoxide from the Covered Products or failure to provide clear and reasonable warnings in
10 connection therewith; and/or (ii) any other statutory or common law claim based on failure to
11 provide clear and reasonable warnings for exposure to carbon monoxide from the Covered
12 Products, to the fullest extent that any of the foregoing described in (i) or (ii) were or could have
13 been asserted by any person or entity up to and including the Effective Date, against Blue Rhino
14 or the other Released Persons. As to actual or alleged exposures to carbon monoxide from
15 Covered Products, compliance with the terms of this Consent Judgment resolves any issue, now
16 and in the future, concerning compliance by Blue Rhino and the Released Persons, with the
17 requirements of Proposition 65 with respect to Covered Products, and any actual or alleged
18 resulting exposure.

19 4.2 Compliance with the terms of this Consent Judgment constitutes compliance
20 now and in the future by Blue Rhino and the Released Persons with Proposition 65 regarding
21 any actual or alleged exposures to carbon monoxide from the Covered Products as set forth in
22 the 60-Day Notice and the Complaint. This Consent Judgment shall apply to and shall benefit
23 Blue Rhino and all Released Persons.

24 4.3 It is possible that other claims not known to the Parties, arising out of the facts
25 alleged in the 60-Day Notice or the Complaint and relating to the Covered Product, will
26 develop or be discovered. ERF on behalf of itself only, and Blue Rhino on behalf of itself only,
27 acknowledge that this Consent Judgment is expressly intended to cover and include all such
28 claims up through and including the Effective Date, including all rights of action therefor. ERF

1 and Blue Rhino acknowledge that the claims released above may include unknown claims, and
2 nevertheless they each waive California Civil Code Section 1542 as to any such unknown
3 claims. California Civil Code Section 1542 reads as follows:

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

9 ERF on behalf of itself only, and Blue Rhino on behalf of itself only, acknowledge and
10 understand the significance and consequences of this specific waiver of California Civil Code
11 Section 1542.

12 **5. ENTRY OF CONSENT JUDGMENT**

13 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.
14 Upon entry of the Consent Judgment, Blue Rhino and ERF waive their respective rights to a
15 hearing or trial on the allegations of the Complaint. Within 5 days of entry of the Consent
16 Judgment, ERF shall file a request for dismissal without prejudice of True Value, Inc. in *ERF v.*
17 *Clark Associates, Inc. et al.*, San Francisco Super. Ct. Case No. 18-CGC-567068.

18 **6. ENFORCEMENT OF JUDGMENT**

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

23 6.2 Before filing a motion or order to show cause under Section 6.1, ERF shall provide
24 Blue Rhino with at least thirty (30) days written notice of any alleged violations of the terms and
25 conditions contained in this Consent Judgment, and the parties shall meet and confer in good
26 faith in an effort to resolve any such alleged violation.

27 6.3 In any proceeding brought by either party to enforce this Consent Judgment, such
28 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
violation of Proposition 65 or 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
4 party as provided by law and upon entry of a modified Consent Judgment by the Court. If either
5 Party requests or initiates a modification, then it shall meet and confer with the other Party in
6 good faith before filing a motion with the Court seeking to modify it.

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

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

10 **9. AUTHORITY TO STIPULATE**

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

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

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

21 **11. ENTIRE AGREEMENT**

22 11.1 This Consent Judgment contains the sole and entire agreement and understanding of
23 the parties with respect to the entire subject matter hereof and any and all prior discussions,
24 negotiations, commitments and understandings related hereto. No representations, oral or
25 otherwise, express or implied, other than those contained herein have been made by any party
26 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
27 deemed to exist or to bind any of the parties.

1 **12. GOVERNING LAW**

2 12.1 The validity, construction and performance of this Consent Judgment shall be
3 governed by the laws of the State of California, without reference to any conflicts of law
4 provisions of California law.

5 **13. EXECUTION AND COUNTERPARTS**

6 13.1 This Consent Judgment may be executed in counterparts which taken together shall
7 be deemed to constitute one document. A facsimile or .pdf signature shall be construed as valid
8 and as the original signature.

9 **14. COURT APPROVAL**

10 14.1 Upon execution of this Consent Judgment by the Parties, ERF shall notice a Motion
11 for Court Approval.

12 14.2 If the California Attorney General objects to any term in this Consent Judgment, the
13 Parties shall use their reasonable and diligent best efforts to resolve the concern in a timely
14 manner, and if possible, prior to the hearing on the motion.

15 14.3 If this Consent Judgment is not approved by the Court, it shall be of no force or
16 effect, and cannot be used in any proceeding for any purpose.

17 **15. NOTICES**

18 15.1 Any notices or payments due under this Consent Judgment shall be sent by USPS
19 certified mail, return receipt requested.

20
21 If to Ecological Rights Foundation: Fredric Evenson
22 Ecology Law Center
23 P.O. Box 1000
24 Santa Cruz, CA 95061
25
26
27
28

If to Blue Rhino Global Sourcing, Inc.: Jordan Burns
Vice President - Legal
One Liberty Plaza
Liberty, MO 64068

With a copy to:

William F. Tarantino
Morrison & Foerster LLP
425 Market Street, Suite 3300
San Francisco, California 94105
WTarantino@mofo.com

IT IS SO STIPULATED:

DATED: January 17, 2019

ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

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

DATED: 1/17/19

BLUE RHINO GLOBAL SOURCING, INC.

BY: *[Signature]*

ITS: JP LEGAL

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT