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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,

19 Plaintiff,

20 v.

21 A&J MANUFACTURING, LLC, et al.

22 Defendants.

Case No. CGC-18-563746

[PROPOSED] CONSENT JUDGMENT
AS TO A&J MANUFACTURING, LLC

23 **1. INTRODUCTION**

24 1.1 On January 19, 2018 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. CGC-18-563746, against defendant
27 A&J MANUFACTURING, LLC (also referred to herein as “A&J” or “Defendant”). The
28 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 25249.6, *et seq.*
 (“Proposition 65”) through the distribution and/or sale of certain charcoal starters in California

1 without providing warnings that use of those products allegedly causes an exposure to carbon
2 monoxide. Carbon monoxide is a chemical listed by the State of California under Proposition 65
3 as known to cause reproductive toxicity. The Complaint was based on a 60-Day Notice letter sent
4 by ERF on July 21, 2017 to A&J pursuant to Health & Safety Code § 25249.7(d)(1), and to the
5 California Attorney General, all District Attorneys, and all City Attorneys with populations
6 exceeding 750,000.

7 1.2 ERF and A&J are sometimes hereafter collectively referred to as the “Parties, and
8 individually as a “Party”. ERF alleges that charcoal starters that are manufactured, distributed or
9 sold by Defendant for use in California (hereafter “Covered Products”) require a Proposition 65
10 warning pursuant to Health and Safety Code Section 25249.6, because they can cause exposures
11 to carbon monoxide. Plaintiff alleges that Defendant is a business that employs more than ten
12 persons, and that manufactures, distributes, and/or sells Covered Products in California. For
13 purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over
14 the allegations of violations contained in the Complaint, personal jurisdiction over A&J, that venue
15 is proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
16 Judgment as a full and final settlement and resolution of the allegations contained in the Complaint.

17 1.3 **No Admission.**

18 The Parties enter into this Consent Judgment as a full and final settlement of all claims that
19 were raised in the Notice and Complaint, or that could have been raised in the Complaint, arising
20 out of the facts and/or conduct alleged therein. A&J denies the material factual and legal
21 allegations contained in the Notice and the Complaint, and maintains that it is not a person subject
22 to Proposition 65, nor subject to personal jurisdiction in the State of California, and that all of the
23 products it has manufactured, imported, distributed and/or sold, including the Covered Products,
24 have been, and are, in compliance with all laws, and are completely safe for their intended use. By
25 execution of this Consent Judgment and agreeing to comply with its terms, A&J does not admit
26 any facts or conclusions of law including, but not limited to, any facts or conclusions of law
27 suggesting or demonstrating that it has sold any products in the State of California, or that it has
28 committed any violations of Proposition 65, or that it has violated any other statutory, common

1 law or equitable requirements relating to exposure to carbon monoxide from use of Covered
2 Products, such being specifically denied by A&J. Nothing in this Consent Judgment, nor
3 compliance with its terms, shall constitute or be construed as an admission by A&J of any fact,
4 conclusion of law, issue of law or violation of law, nor an admission that it is subject to personal
5 jurisdiction in the State of California. Nothing in this Consent Judgment shall prejudice, waive or
6 impair any right, remedy, argument or defense A&J may have in this or any other future legal
7 proceeding, including A&J's position that it is not subject to Proposition 65 or personal jurisdiction
8 in California. This Consent Judgment is the product of negotiation and compromise and is
9 accepted by A&J for purposes of settling, compromising, and resolving issues disputed in the
10 above captioned action. However, this Section shall not diminish or otherwise affect the
11 obligations, responsibilities and duties of A&J under this Consent Judgment.

12 1.4 Consent to Jurisdiction.

13 For purposes of this Consent Judgment only, A&J stipulates that this Court has jurisdiction
14 over A&J as to the allegations contained in the Complaint, that venue is proper in the County of
15 San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of this
16 Consent Judgment.

17 1.5 Except as expressly set forth herein, nothing in this Consent Judgment shall
18 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
19 other current or future legal proceeding.

20 1.6 The term "Effective Date" means the date this Consent Judgment is entered by the
21 Court.

22 **2. PRODUCT WARNINGS**

23 2.1 Covered Products are deemed to comply with Proposition 65 if, commencing 75
24 days after the Effective Date, A&J provides Proposition 65 warnings as set forth in this Section 2
25 on all Covered Products that are manufactured or distributed for sale in California. No Proposition
26 65 warning shall be required for Covered Products distributed before 75 days after the Effective
27 Date, and all Covered Products distributed before 75 days after the Effective Date shall be deemed
28 to comply with Proposition 65

1 A&J shall provide one of the following warning statements:

2 **[California Proposition 65] WARNING:** The combustion of fuels used in wood or
3 charcoal burning appliances can expose you to chemicals including carbon black, which
4 is known to the State of California to cause cancer, and carbon monoxide, which is known
5 to the State of California to cause birth defects or other reproductive harm. For more
6 information go to: www.P65Warnings.ca.gov.

7 Or,

8 **[California Proposition 65] WARNING:** Burning wood or charcoal can expose you to
9 chemicals including carbon black, which is known to the State of California to cause
10 cancer, and carbon monoxide, which is known to the State of California to cause birth
11 defects or other reproductive harm. For more information go to:
12 www.P65Warnings.ca.gov.

13 Or,

14 **[California Proposition 65] WARNING:** Fuels used in wood or charcoal burning
15 appliances, and the products of combustion of such fuels can expose you to chemicals
16 including carbon black, which is known to the State of California to cause cancer, and
17 carbon monoxide, which is known to the State of California to cause birth defects or other
18 reproductive harm. For more information go to www.P65Warnings.ca.gov.

19 Language in brackets is optional. The word “**WARNING**” shall be in all capital letters and bold
20 print. Preceding the warning, A&J may utilize a symbol consisting of a black exclamation point
21 in a yellow equilateral triangle with a bold black outline at its option.

22 2.2. The warning statement shall be affixed to or printed on the Covered
23 Product itself, or its packaging, or its labeling. The warning shall be displayed with such
24 conspicuousness, as compared with other words, statements, designs, or devices on the Covered
25 Product or its packaging or labeling, so as to render it likely to be read and understood by an
26 ordinary individual under customary conditions of purchase or use. For Covered Products
27 manufactured 75 or more days after the Effective Date, the warning shall be no smaller than 6-
28 point type.

1 **2.3. Reporting**

2 No later than 75 days after the Effective Date, Defendant shall provide a certification
3 executed by an officer or director of Defendant to ERF confirming its compliance with the warning
4 requirements of this Section 2.

5 **3. SETTLEMENT PAYMENTS**

6 In complete resolution of any claims raised or that could have been raised in the captioned
7 action for civil penalties, attorney’s fees, investigative expenses or costs of any kind, Defendant
8 shall pay a total sum of \$20,500 as follows:

9 **3.1 Civil Penalties**

10 Pursuant to Health and Safety Code section 25249.7(b)(2), A&J shall pay \$2,500 in
11 complete resolution of any claim for civil penalties that is alleged, or could have been alleged, in
12 the Complaint. The payment will be allocated in accordance with California Health and Safety
13 Code section 25249.12(c)(1) & (d), with 75% of the amount remitted to the California Office of
14 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the amount paid
15 to Ecological Rights Foundation. Defendant will provide these payments in two checks for the
16 following amounts made payable to: (1) “OEHHA” in the amount of \$1,875; and (2) “Ecological
17 Rights Foundation” in the amount of \$625.

18 **3.2. Attorneys’ Fees and Litigation Costs**

19 In settlement of all claims for attorney’s fees that are alleged, or could have been
20 alleged, in the Complaint, and any claim plaintiff may have to investigative costs, expert fees,
21 attorney’s fees, or any other costs or expenses of any kind in connection with this matter, including
22 but not limited to the expenses of preparing the motion to approve this Consent Judgment, A&J
23 shall pay \$18,000 to the Ecology Law Center.

24 **3.3 Payments**

25 Payments to the Ecological Rights Foundation and the Ecology Law Center, referred to in
26 paragraphs 3.1 and 3.2 above, shall be sent no later than the later of 10 days after the Effective Date,
27 or 10 days after A&J’s receipt of W-9 forms from plaintiff’s counsel for all payees, via certified
28 mail, return receipt requested, or by Federal Express, to the following address:

1 Fredric Evenson
2 Ecology Law Center
3 P.O. Box 1000
4 Santa Cruz, CA 95061

5 The payment to OEHHA, referred to in paragraph 3.1 above, shall be sent no later than 10 days
6 after the Effective Date via certified mail, return receipt requested, or Federal Express, to the
7 following address:

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

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

14 4.1 This Consent Judgment is a final and binding resolution between ERF, acting on
15 behalf of itself and in the public interest as to those matters raised in the 60-Day Notice Letter, and
16 A&J, of: (i) any violation of Proposition 65 (including but not limited to the claims made in the
17 Complaint); and (ii) any other statutory or common law claim to the fullest extent that any of the
18 foregoing were or could have been asserted by any person or entity against A&J or its parents,
19 subsidiaries or affiliates, and all of their suppliers, customers, distributors, wholesalers, retailers,
20 or any other person in the course of doing business, and the successors and assigns of any of them,
21 who may manufacture, use, maintain, distribute or sell Covered Products (“Released Entities”),
22 based on the actual or alleged failure to provide clear and reasonable warnings of exposures to
23 carbon monoxide from Covered Products manufactured, distributed or sold through the Effective
24 Date. As to alleged exposures to carbon monoxide from Covered Products, compliance with the
25 terms of this Consent Judgment resolves any issue, now and in the future, concerning compliance
26 by A&J and the Released Entities with the requirements of Proposition 65 with respect to Covered
27 Products, and any alleged resulting exposure.

28 4.2 ERF and A&J recognize that other claims not known to the Parties may exist
concerning the Covered Products or Defendant’s barbeque grill products. Accordingly, the Parties,
on behalf of themselves, their past and current agents, representatives, attorneys, successors, and/or
assignees, provide a mutual general release herein which shall be effective as a full and final accord

1 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
2 fees, damages, losses, claims, liabilities and demands of any nature, character, or kind, known or
3 unknown, suspected or unsuspected, arising out the manufacture, distribution, sale or use of
4 Covered Products and Defendant's barbeque grill products manufactured prior to the Effective
5 Date. The Parties acknowledge that they are familiar with Section 1542 of the California Civil
6 Code, which provides as follows:

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

10 The Parties hereby expressly waive and relinquish any and all rights and benefits which they may
11 have under, or which may be conferred on them by the provisions of Section 1542 of the California
12 Civil Code as well as under any other state or federal statute or common law principle of similar
13 effect, to the fullest extent that they may lawfully waive such rights or benefits pertaining to the
14 released matters. In furtherance of such intention, the release hereby given shall be and remain in
15 effect as a full and complete release notwithstanding the discovery or existence of any such
16 additional or different claims or facts arising out of the released matters.

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18 4.3 The Parties hereby request that the Court promptly enter this Consent Judgment.
19 Upon entry of the Consent Judgment, A&J and ERF waive their respective rights to a hearing or
20 trial on the allegations of the Complaint, as well as any rights of appeal.

21 **5. ENFORCEMENT OF JUDGMENT**

22 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
23 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
24 San Francisco County, giving the notice required by law, enforce the terms and conditions
25 contained herein.

26 5.2 In any proceeding brought by either Party to enforce this Consent Judgment, such
27 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
28 violation of this Consent Judgment. Any Party seeking to modify this Consent Judgment or to

1 allege a violation thereof shall first attempt in good faith to meet and confer with the other Party
2 for a minimum period of 30 days prior to filing a motion to modify or enforce the Consent
3 Judgment.

4 **6. MODIFICATION OF JUDGMENT**

5 6.1 This Consent Judgment may be modified only upon written agreement of the
6 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
7 any Party as permitted or provided by law and upon entry of a modified Consent Judgment by the
8 Court.

9 **7. RETENTION OF JURISDICTION**

10 7.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
11 of this Consent Judgment.

12 **8. AUTHORITY TO STIPULATE**

13 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
14 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of
15 the Party represented and legally to bind that party.

16 **9. SERVICE ON THE ATTORNEY GENERAL**

17 9.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
18 California Attorney General so that the Attorney General may review this Consent Judgment prior
19 to its submittal to the Court for approval. No sooner than forty-five (45) days after the Attorney
20 General has received the aforementioned copy of this Consent Judgment, and in the absence of
21 any written objection by the Attorney General to the terms of this Consent Judgment, the Parties
22 may then submit it to the Court for approval. ERF shall have the responsibility of preparing and
23 filing the motion to approve this Consent Judgment and all supporting papers.

24 **10. ENTIRE AGREEMENT**

25 10.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
27 negotiations, commitments and understandings related hereto. No representations, oral or
28 otherwise, express or implied, other than those contained herein have been made by any Party

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
2 to exist or to bind any of the Parties.

3 **11. GOVERNING LAW**

4 11.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law provisions
6 of California law. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable
7 by reason of law generally, or as to the Covered Products, then A&J may provide written notice to
8 ERF of any asserted change in the law, and shall have no further obligations pursuant to this
9 Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.
10 Notwithstanding any contrary provision in this judgement, in the event the Proposition 65 safe
11 harbor warning regulations are amended, A&J shall have the right, but not the duty, to amend its
12 product warnings to conform to the new safe harbor warning requirements following notice to
13 ERF.

14 **12. EXECUTION AND COUNTERPARTS**

15 12.1 This consent judgment may be executed in counterparts and by facsimile or
16 portable document format (.pdf), each of which shall be deemed an original, and all of which,
17 when taken together, shall constitute one and the same document.

18 **13. COURT APPROVAL**

19 13.1 If this Consent Judgment is not approved by the court, it shall be of no force or
20 effect, and cannot be used in any proceeding for any purpose. Further, if this Consent Judgment
21 is not approved, no term of this Consent Judgment or any draft thereof, or evidence of the
22 negotiation, documentation, or any other part or aspect of the Parties' settlement discussions,
23 including the parties' participation in the negotiation and preparation of this Consent Judgment,
24 shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this
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1 action, or in any other proceeding, and the Parties agree to meet and confer to determine whether
2 to modify the terms of the Consent Judgment and to resubmit it for approval.

3 **14. NOTICES**

4 14.1 Any notices or payments due under this Consent Judgment shall be sent by personal
5 delivery, federal express, or Certified Mail to the following addresses.

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

11 If to A&J Manufacturing, LLC: Gary J. Smith
12 BEVERIDGE & DIAMOND, P.C.
13 456 Montgomery Street, Suite 1800, San
14 Francisco, CA 94104

15 Any Party may, from time to time, specify in writing to the other Party a change of
16 address to which all notices and other communications under this Consent Judgment shall be
17 sent.
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1 IT IS SO STIPULATED:

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3 DATED: DECEMBER 12, 2018

4 ECOLOGICAL RIGHTS FOUNDATION

5 *Ecological Rights Foundation*

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

8
9 DATED: *1-2-2019*

10 A&J MANUFACTURING, LLC

11 BY: *J. Simms*

12 ITS: President

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14 IT IS SO ORDERED, ADJUDGED AND DECREED:

15 DATED: _____

16 _____
17 JUDGE OF THE SUPERIOR COURT
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