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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 BODUM USA, Inc., et al.

22 Defendants.

Case No. CGC-18-564388

[PROPOSED] CONSENT JUDGMENT

23 **1. INTRODUCTION**

24 1.1 On February 16, 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-18-564388 against defendant Kay  
27 Park-Rec Corporation, (also referred to herein as “Kay Park-Rec” or “Defendant”). The Complaint  
28 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 the  
charcoal grills and hibachis manufactured, distributed or sold by Defendant (“Covered Products”),

1 that use of those products causes exposures to carbon monoxide. Carbon monoxide is a chemical  
2 known to the State of California to cause reproductive toxicity. The Complaint was based upon a  
3 60-Day Notice letter, sent by ERF on September 1, 2017 to Kay Park-Rec, the California Attorney  
4 General, all District Attorneys, and all City Attorneys with populations exceeding 750,000.

5 1.2 Defendant does not dispute that is a business that employs more than ten persons,  
6 and manufactures, distributes, and sells Covered Products. Some Covered Products that Defendant  
7 distributes, markets and sells may use charcoal and the combustion of charcoal creates carbon  
8 monoxide to be released into the air, causing inhalation exposures to those using or standing near  
9 the Covered Products when they are in use. Pursuant to Health and Safety Code Section 25249.8,  
10 carbon monoxide is a chemical known to the State of California to cause reproductive toxicity.  
11 ERF alleges that Covered Products that are manufactured, distributed or sold by Defendant for use  
12 in California require a warning under Proposition 65, pursuant to Health and Safety Code Section  
13 25249.6. For purposes of this Consent Judgment, the parties stipulate that this Court has  
14 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction  
15 over Kay Park-Rec Corporation, that venue is proper in the County of San Francisco, and that this  
16 Court has jurisdiction to enter this Consent Judgment as a full settlement and resolution of the  
17 allegations contained in the Complaint.

18 1.3 This Consent Judgment resolves claims that are denied and disputed. The parties  
19 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims  
20 between the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall  
21 not constitute an admission with respect to any material allegation of the Complaint, each and  
22 every allegation of which Kay Park-Rec denies, nor may this Consent Judgment, or compliance  
23 with it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of  
24 Kay Park-Rec.

25 1.4 The term "Effective Date" means the date that Defendant receives Notice that this  
26 Consent Judgment was entered by the Court.  
27  
28

1     **2.     INJUNCTIVE RELIEF**

2             **2.1     Warnings on Covered Products**

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

5             **WARNING:** Chemicals known to the State of California to cause birth defects or other  
6 reproductive harm, including carbon monoxide, are produced by combustion of charcoal  
7 when used with this product.

8             Or,

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

12            Or,

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

16            Or,

17            Defendant, at its sole option, may use one of the following warnings if Defendant knows  
18 or has reason to believe that warnings for Covered Products also should identify a Proposition 65  
19 carcinogen:

20            **WARNING:** Chemicals known to the State of California to cause cancer and birth  
21 defects or other reproductive harm, including [name of Proposition 65 carcinogen] and  
22 carbon monoxide, are produced by combustion of charcoal when used with this product.

23            Or,

24            **WARNING:** This product can expose you to chemicals including [name of Proposition  
25 65 carcinogen], which are known to the State of California to cause cancer, and carbon  
26 monoxide, which are known to the State of California to cause birth defects or other  
27 reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

1           Settling Defendant also may, at its sole option, utilize the warning text options set forth in  
2 Title 27, California Code of Regulations, Section 25603 (b), as long as such warning identifies  
3 the reproductive toxicity endpoint.

4           The warning statements shall be affixed to or printed on packaging for Covered Products,  
5 as well as printed in the Covered Products' instruction booklets (if any). The warnings shall be  
6 displayed with such conspicuousness, as compared with other words, statements, designs, or  
7 devices as to render them likely to be read and understood by an ordinary individual under  
8 customary conditions of purchase or use. Warnings may be contained in the same section of the  
9 instruction booklets that contains other safety warnings concerning the use of the Covered  
10 Products. The type size of the warning must be legible, and no smaller than any other warning  
11 provided with the Covered Products. The word "**WARNING:**" shall be in upper case letters and  
12 bold text. Defendant may utilize a symbol consisting of a black exclamation point in a yellow  
13 equilateral triangle with a bold black outline or a black exclamation point in a white triangle with  
14 black border if no yellow is used in the section of the packaging, print or online material regarding  
15 the Covered Products that contains other warning language regarding use of the Covered Products.

## 16           2.2     **Reporting**

17           No later than 150 days after the Effective Date, Defendant shall provide a certification  
18 signed by an officer or director of Defendant to ERF confirming its compliance with the warning  
19 requirements of paragraph 2.1, and the payment to OEHHA pursuant to paragraphs 3.1.

## 20     **3.     SETTLEMENT PAYMENTS**

### 21           3.1     Civil Penalties and Payments In Lieu of Penalties

22           Pursuant to Health and Safety Code section 25249.7(b)(2), Kay Park-Rec shall pay  
23 \$4,000 in civil penalties. The penalty payment will be allocated in accordance with California  
24 Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted  
25 to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the  
26 remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will  
27 provide these payments in two checks for the following amounts made payable to: 1) "OEHHA"  
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1 in the amount of \$3,000, and 2) "Ecological Rights Foundation" in the amount of \$1,000.

2 **3.2 Attorneys' Fees and Litigation Costs**

3 In settlement of all of the claims that are alleged, or could have been alleged, in the  
4 Complaint concerning Covered Products, Kay Park-Rec shall pay \$18,000 to the Ecology Law  
5 Center to cover Plaintiff's attorneys' fees and costs.

6 **3.3 Payments**

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

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

13 The payment to OEHHA shall be delivered to:

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

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

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

6 4.2 It is possible that other claims not known to the Parties, arising out of the facts  
7 alleged in the Notice or the Complaint and relating to the Covered Product, will develop or be  
8 discovered. ERF on behalf of itself only, and Kay Park-Rec on behalf of itself only, acknowledge  
9 that this Consent Judgment is expressly intended to cover and include all such claims up through  
10 and including the Effective Date, including all rights of action therefor. ERF and Kay Park-Rec  
11 acknowledge that the claims released above may include unknown claims, and nevertheless  
12 waive California Civil Code Section 1542 as to any such unknown claims. California Civil Code  
13 Section 1542 reads as follows:

14  
15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
16 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
17 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
18 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
19 OR HER SETTLEMENT WITH THE DEBTOR.

20 ERF on behalf of itself only, and Kay Park-Rec on behalf of itself only, acknowledge and  
21 understand the significance and consequences of this specific waiver of California Civil Code  
22 Section 1542.

## 23 5. ENTRY OF CONSENT JUDGMENT

24 5.1 The parties hereby request that the Court promptly enter this Consent Judgment.  
25 Upon entry of the Consent Judgment, Kay Park-Rec and ERF waive their respective rights to a  
26 hearing or trial on the allegations of the Complaint.

## 27 6. ENFORCEMENT OF JUDGMENT

28 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties  
hereto. The parties may, by noticed motion or order to show cause before the Superior Court of

1 San Francisco County, giving the notice required by law, enforce the terms and conditions  
2 contained herein.

3 6.2 In any proceeding brought by either party to enforce this Consent Judgment, such  
4 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any  
5 violation of Proposition 65 or this Consent Judgment.

6 **7. MODIFICATION OF JUDGMENT**

7 7.1 This Consent Judgment may be modified only upon written agreement of the parties  
8 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party  
9 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

11 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms  
12 this Consent Judgment.

13 **9. AUTHORITY TO STIPULATE**

14 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
15 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
16 the party represented and legally to bind that party.

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

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

24 **11. ENTIRE AGREEMENT**

25 11.1 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  
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1 otherwise, express or implied, other than those contained herein have been made by any party  
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
3 to exist or to bind any of the parties.

4 **12. GOVERNING LAW**

5 12.1 The validity, construction and performance of this Consent Judgment shall be  
6 governed by the laws of the State of California, without reference to any conflicts of law provisions  
7 of California law.

8 **13. EXECUTION AND COUNTERPARTS**

9 13.1 This Consent Judgment may be executed in counterparts which taken together shall  
10 be deemed to constitute one document.

11 **14. COURT APPROVAL**

12 14.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
13 effect, and cannot be used in any proceeding for any purpose.

14 **15. NOTICES**

15 15.1 Any notices or payments due under this Consent Judgment shall be sent by USPS  
16 certified mail, return receipt requested.

17  
18 If to Ecological Rights Foundation: Fredric Evenson  
19 Ecology Law Center  
20 P.O. Box 1000  
Santa Cruz, CA 95061

21 If to Kay Park-Rec Corporation: Ann G. Grimaldi  
22 Grimaldi Law Offices  
23 535 Mission, 14<sup>th</sup> Floor  
24 San Francisco, CA 94105  
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IT IS SO STIPULATED:

DATED: 8/6/18

ECOLOGICAL RIGHTS FOUNDATION

BY: James Lamport  
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: July 30, 2018

KAY PARK-REC CORPORATION

BY: Larry B...  
ITS: V.P., TREASURER

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT