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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 Plaintiff,

20 v.

21 BERGHOFF INTERNATIONAL, INC., et al.,

22 Defendants.

Case No. CGC-18-564388

[PROPOSED] CONSENT JUDGMENT
AS TO BERGHOFF INTERNATIONAL,
INC.

23 **1. INTRODUCTION**

24 1.1 On June 8, 2018, the Ecological Rights Foundation (“ERF”) acting on behalf of itself
25 and the general public, filed a Complaint for civil penalties and injunctive relief (“Complaint”) in
26 San Francisco Superior Court, Case No. CGC-18-567066 against defendant Berghoff
27 International, Inc. (also referred to herein as “Berghoff” or “Defendant”). The Complaint alleges,
28 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 charcoal
grills (“Covered Products”), that use of those products causes exposures to carbon monoxide.

1 Carbon monoxide is a chemical known to the State of California to cause reproductive toxicity.
2 The Complaint was based upon a 60-Day Notice letter, sent by ERF on October 10, 2017 to
3 Berghoff, the California Attorney General, all District Attorneys, and all City Attorneys with
4 populations exceeding 750,000.

5 1.2 Defendant is a business that employs more than ten persons, and manufactures,
6 distributes, and sells Covered Products. Some Covered Products that Defendant distributes,
7 markets and sells may use charcoal and the combustion of charcoal creates carbon monoxide to be
8 released into the air, causing inhalation exposures to those using or standing near the Covered
9 Products when they are in use. Pursuant to Health and Safety Code Section 25249.8, carbon
10 monoxide is a chemical known to the State of California to cause reproductive toxicity. ERF
11 alleges that Covered Products that are manufactured, distributed or sold by Defendant for use in
12 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 Berghoff, that venue is proper in the County of San Francisco, and that this Court has
16 jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations
17 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 Berghoff denies, nor may this Consent Judgment, or compliance with it,
23 be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Berghoff.

24 1.4 The term "Effective Date" means the date that Defendant receives Notice that this
25 Consent Judgment was entered by the Court.
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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Warnings on Covered Products**

3 As of the Effective Date, for all Covered Products offered for sale in California, Berghoff
4 shall include one of the following warning statements:

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

8 Or,

9 WARNING: Use of this product with charcoal or wood can expose you to carbon
10 monoxide, which is a combustion byproduct known to the State of California to cause birth
11 defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

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

25 **3. SETTLEMENT PAYMENTS**

26 **3.1 Civil Penalties and Payments In Lieu of Penalties**

27 Pursuant to Health and Safety Code section 25249.7(b)(2), Berghoff shall pay \$1,000 in
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1 civil penalties. The penalty payment will be allocated in accordance with California Health and
2 Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the
3 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
4 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will provide these
5 payments in two checks for the following amounts made payable to: 1) “OEHHA” in the amount
6 of \$750 and 2) “Ecological Rights Foundation” in the amount of \$250.

7 **3.2 Attorneys’ Fees and Litigation Costs**

8 In settlement of all of the claims that are alleged, or could have been alleged, in the
9 Complaint concerning Covered Products, Berghoff shall pay \$16,500 to the Ecology Law Center
10 to cover Plaintiff’s attorneys’ fees and costs.

11 **3.3 Payments**

12 The Payments to OEHHA and Ecological Rights Foundation, set forth in Section 3.1, shall
13 be sent no later than 10 days after the Effective Date. The payment to Ecology Law Center, set
14 forth in Section 3.2, shall be sent no later than March 1, 2019. All payments shall be sent via USPS
15 certified mail, return receipt requested to the following addresses:

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

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

20 The payment to OEHHA shall be delivered to:

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

24 **4. RELEASE OF ALL CLAIMS**

25 **4.1 Release of Berghoff**

26 ERF acting on its own behalf and on behalf of its past and current agents,
27 representatives, attorneys, successors and/or assignees (all of whom, collectively, are
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1 defined as the “ERF Releasers”), releases Berghoff, and its parents, subsidiaries, affiliated
2 entities, marketplaces directors, officers, agents, employees, attorneys and each entity to
3 whom Berghoff directly or indirectly distributes or sells the Covered Products, including
4 but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees,
5 cooperative members and licensees and all other upstream and downstream entities in the
6 distribution chain, and the predecessors, successors, and assigns of any of them
7 (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the
8 Effective Date based on failure to warn about alleged exposures to carbon monoxide from
9 use of the Covered Products. This settlement is a full, final and binding resolution of all
10 claims that were or could have been asserted against Berghoff, and/or the Releasees for
11 failure to provide warnings for alleged exposures to chemicals contained in the Covered
12 Products.

13 In further consideration of the promises and agreements herein contained, and for
14 the payment to be made pursuant to Section 3 above, the ERF Releasers provide a release
15 herein which shall be effective as a full and final accord and satisfaction, as a bar to all
16 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
17 claims, liabilities and demands against Berghoff and/or any of the Releasees of any nature,
18 character, or kind, whether known or unknown, suspected or unsuspected, limited to and
19 arising out of the alleged or actual exposure to Proposition 65 chemicals from use of the
20 Covered Products.

21 4.2 **Berghoff’s Release of ERF**

22 Berghoff, on behalf of itself, its past and current agents, representatives, attorneys,
23 successors and/or assignees, hereby waive any and all claims against ERF, its attorneys
24 and other representatives, for any and all actions taken or statements made (or those that
25 could have been taken or made) by ERF and/or its attorneys and other representatives,
26 whether in the course of investigating claims or otherwise seeking to enforce Proposition
27 65 against it in this matter or with respect to the Products.

1 **4.3 California Civil Code Section 1542**

2 It is possible that other claims not known to the Parties arising out of the facts
3 alleged in the Notice and relating to the Products will develop or be discovered. ERF on
4 behalf of itself only, on one hand, and Berghoff, on the other hand, acknowledge that this
5 Agreement is expressly intended to cover and include all such claims up through the
6 Effective Date, including all rights of action therefor. The Parties acknowledge that the
7 claims released in Sections 4.1 and 4.2 above may include unknown claims, and
8 nevertheless waive California Civil Code section 1542 as to any such unknown claims.
9 California Civil Code section 1542 reads as follows:

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

13 ERF and Berghoff each acknowledge and understand the significance and
14 consequences of this specific waiver of California Civil Code section 1542.

15 **5. ENFORCEMENT OF JUDGMENT**

16 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
17 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
18 San Francisco County, giving the notice required by law, enforce the terms and conditions
19 contained herein.

20 5.2 In any proceeding brought by either party to enforce this Consent Judgment, such
21 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
22 violation of Proposition 65 or this Consent Judgment.

23 **6. MODIFICATION OF JUDGMENT**

24 6.1 This Consent Judgment may be modified only upon written agreement of the parties
25 and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party
26 as provided by law and upon entry of a modified Consent Judgment by the Court.

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

2 7.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
3 this Consent Judgment.

4 **8. AUTHORITY TO STIPULATE**

5 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
6 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
7 the party represented and legally to bind that party.

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

9 9.1 ERF shall serve a copy of this Consent Judgment, 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 Judgment prior to its submittal to the Court for approval. No sooner than forty five (45)
12 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
13 and in the absence of any written objection by the Attorney General to the terms of this Consent
14 Judgment, the parties may then submit it to the Court for approval.

15 **10. ENTIRE AGREEMENT**

16 10.1 This Consent Judgment 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 **11. GOVERNING LAW**

23 11.1 The validity, construction and performance of this Consent Judgment shall be
24 governed by the laws of the State of California, without reference to any conflicts of law provisions
25 of California law.

1 **12. EXECUTION AND COUNTERPARTS**

2 12.1 This Consent Judgment may be executed in counterparts which taken together shall
3 be deemed to constitute one document.

4 **13. COURT APPROVAL**

5 13.1 If this Consent Judgment 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 **14. NOTICES**

8 14.1 Any notices or payments due under this Consent Judgment shall be sent by USPS
9 certified mail, return receipt requested.

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11 If to Ecological Rights Foundation: Fredric Evenson
12 Ecology Law Center
13 P.O. Box 1000
14 Santa Cruz, CA 95061

15 If to Berghoff International, Inc.: Elizabeth Coviello, Esq.
16 Law Office of Elizabeth J. Coviello
17 7241 Little Road
18 New Port Richey, Florida 34654

19 IT IS SO STIPULATED:

20 DATED: January 22, 2019

21 ECOLOGICAL RIGHTS FOUNDATION

22 *Ecological Rights Foundation*

23 BY: *James Lampion*, EXEC. DIR.
24 JAMES LAMPION, EXECUTIVE DIRECTOR

25 DATED:

26 BERGHOFF INTERNATIONAL, INC.

27 BY: 

28 ITS: *DAY VAN DEN LANGENBERG - CEO*

1 IT IS SO ORDERED, ADJUDGED AND DECREED:

2 DATED: _____

3 _____
4 JUDGE OF THE SUPERIOR COURT
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