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ECOLOGICAL RIGHTS FOUNDATION

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO

ECOLOGICAL RIGHTS FOUNDATION,

Plaintiff,

v.

CLARK ASSOCIATES, INC., et al.,

Defendants.

Case No. CGC-18-567068

[PROPOSED] CONSENT JUDGMENT  
AS TO CLARK ASSOCIATES, INC.

**1. INTRODUCTION**

1.1 On June 8, 2018, the Ecological Rights Foundation (“ERF”) acting on behalf of itself and the general public, filed a complaint for civil penalties and injunctive relief in San Francisco Superior Court, Case No. CGC-18-567068 (“Complaint”), against, among others, defendant Clark Associates, Inc., (also referred to herein as “Clark” or “Defendant”). ERF and Clark may each be referred to individually as a “Party” and/or collectively as the “Parties.” The Complaint alleges, among other things, that Defendant violated provisions of the Safe Drinking

1 Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, *et seq.*  
2 (“Proposition 65”) by failing to give clear and reasonable warnings to residents of California  
3 who use charcoal grills, including but not limited to, the Backyard Pro 30” Heavy-Duty Steel  
4 Charcoal Grill, manufactured, distributed, imported, sold, and/or offered for sale in California by  
5 Clark (“Covered Products”), and that use of the Covered Products causes exposures to carbon  
6 monoxide. Carbon monoxide is a chemical known to the State of California to cause  
7 reproductive toxicity. The Complaint is based upon a 60-Day Notice letter, sent by ERF on  
8 December 4, 2017, to Clark, the California Attorney General, all District Attorneys, and all City  
9 Attorneys with populations exceeding 750,000 (the “Notice”).

10 1.2 Defendant is a person in the course of doing business for purposes of Proposition  
11 65, that manufactures, distributes, imports, sells, and/or offers for sale Covered Products. ERF  
12 alleges that the intended use of Covered Products causes carbon monoxide to be released into the  
13 air from the combustion of charcoal fuel, causing inhalation exposures to consumers when they  
14 use the Covered Products. Pursuant to Health and Safety Code Section 25249.8, carbon  
15 monoxide is a chemical known to the State of California to cause reproductive toxicity. ERF  
16 alleges that Covered Products that are manufactured, distributed, imported, sold, and/or offered  
17 for sale in California by Defendant and others require a warning under Proposition 65, pursuant  
18 to Health and Safety Code Section 25249.6. For purposes of this Consent Judgment, the Parties  
19 stipulate that this Court has jurisdiction over the allegations contained in the Complaint and  
20 personal jurisdiction over Clark, that venue is proper in the County of San Francisco, and that  
21 this Court has jurisdiction to enter this Consent Judgment as a full and final settlement and  
22 resolution of the allegations contained in the Complaint and Notice.

23 1.3 This Consent Judgment resolves claims that are denied and disputed. The Parties  
24 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims  
25 between the Parties for the purpose of avoiding prolonged litigation. This Consent Judgment  
26 shall not constitute an admission with respect to any material, factual, and legal allegation in the  
27 Complaint or Notice, each and every allegation of which Clark denies. Nor may this Consent  
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Judgment, or compliance with it, be used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Clark or its affiliated companies. Clark has been providing Proposition 65-compliant warnings on its products, including the Covered Products, since February 2018.


1.4 The term “Effective Date” means the date that Defendant’s counsel receives notice from ERF’s counsel that this Consent Judgment was approved and entered by the Court.

## **2. INJUNCTIVE RELIEF**


### **2.1 Warnings on Covered Products**

Commencing no later than one hundred twenty (120) days after the Effective Date, Clark shall provide clear and reasonable warnings for all Covered Products offered for sale in California as set forth in this section 2.1(a)-(b). There shall be no obligation for Clark to provide a warning for Covered Products that enter the stream of commerce prior to the Effective Date.

#### **(a) Long Form Warning<sup>1</sup>**

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

#### **(b) Short Form Warning<sup>2</sup>**

 **WARNING:** [Cancer and ]Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### **2.2 Warning Placement**

The warning shall be affixed to, or printed on packaging for, Covered Products. Further, to the extent Clark provides instruction booklets with Covered Products, Clark shall affix such warnings inside Covered Products’ instruction booklets on the earlier of either: (i) one year after the Effective Date, or (ii) when new instruction booklets are printed or reprinted. Any warnings provided in accordance with this Consent Judgment shall be displayed with such conspicuousness, as compared with other words, statements, designs, or devices as to render

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<sup>1</sup> Bracketed content is optional.

<sup>2</sup> *Id.*

1 them likely to be read and understood by an ordinary individual under customary conditions of  
2 purchase or use. The word “**WARNING:**” shall be in upper case letters and bold text as shown  
3 above. The warning symbol to the left of the word “**WARNING**” must be a black exclamation  
4 point in a yellow equilateral triangle with a black outline, except if the packaging does not use  
5 the color yellow, then Defendant may utilize a black exclamation point in a white triangle with  
6 black border.

### 7 **2.3 Compliance with Warning Regulations**

8 Clark shall be deemed to be in compliance with this Consent Judgment by either adhering  
9 to sections 2.1(a)-(b) and 2.2, or by complying with warning requirements adopted by the  
10 California Office of Health Hazard Assessment (OEHHA), or as they may be amended, under  
11 Article 6 of Title 27 of the California Code of Regulations.

### 12 **2.4 Reporting**

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

## 16 **3. SETTLEMENT PAYMENTS**

### 17 **3.1 Civil Penalties and Payments In Lieu of Penalties**

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

1                   3.2     **Attorneys' Fees and Litigation Costs**

2                   In settlement of all of the claims that are alleged, or could have been alleged, in  
3 the Complaint or Notice concerning Covered Products, Clark shall pay \$17,500 to the Ecology  
4 Law Center to cover Plaintiff's attorneys' fees and costs.

5                   3.3     **Payments**

6                   All Payments shall be sent no later than ten (10) business days after the Effective Date  
7 via USPS certified mail, return receipt requested or by UPS or FedEx Two-Day or Overnight  
8 Delivery, to the following addresses: All payments to Ecological Rights Foundation and  
9 Ecology Law Center shall be delivered to:

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

14                   The payment to OEHHA shall be delivered to:

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

20                   or

21                   For Non-United States Postal Service Delivery:

22                   Mike Gyurics  
23                   Fiscal Operations Branch Chief  
24                   Office of Environmental Health Hazard Assessment  
25                   1001 I Street  
26                   Sacramento, CA 95814

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

28                   4.1     As to Covered Products, this Consent Judgment is a full, final, and binding  
resolution between ERF, acting on behalf of itself and acting in the public interest, and Clark,  
and its parents, subsidiaries or affiliates, shareholders, officers, employees, representatives,  
agents, all of their suppliers, customers, distributors, wholesalers, retailers (including, but not  
limited to The Webstaurant Store, Inc.), and their respective parents, affiliates, subsidiaries,

1 shareholders, officers, employees, representatives, agents, or any other person in the course of  
2 doing business, and the successors, predecessors, and assigns of any of them, who may use,  
3 maintain, distribute directly or indirectly, or sell Covered Products (including, but not limited to  
4 Amazon.com, Inc.) ("Released Entities"), of all claims for violations of Proposition 65 based on  
5 exposures to carbon monoxide from Covered Products as set forth in the Notice, with respect to  
6 any Covered Products manufactured, distributed, sold, or offered for sale prior to one hundred  
7 twenty (120) days after the Effective Date. This Consent Judgment shall have preclusive effect  
8 such that no other person or entity, whether purporting to act in his, her, or its interests or the  
9 public interest shall be permitted to pursue and/or take any action with respect to any violation of  
10 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the  
11 Notice against Clark or any of the Released Entities. Compliance with the terms of this Consent  
12 Judgment constitutes compliance with Proposition 65 with regard to carbon monoxide exposures  
13 from Covered Products.

14 4.2 In addition to the foregoing, ERF, on behalf of itself, successors and/or assignees,  
15 and not its representative capacity, hereby waives all rights to institute or participate in,  
16 directly or indirectly, any form of legal action against and releases Clark and Released  
17 Entities from any and all manner of actions, causes of actions, claims, demands, rights  
18 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges,  
19 losses, costs, expenses, attorney's fees, of any nature whatsoever, known or unknown, in  
20 law or equity, fixed or contingent, now or in the future, with respect to any alleged  
21 violations of Proposition 65 arising from Clark's Covered Products. Notwithstanding the  
22 above, nothing herein shall limit ERF's ability to enforce this Consent Judgment pursuant  
23 to Section 6 below.

24 4.3 It is possible that other claims not known to the Parties, arising out of the facts  
25 alleged in the Notice or the Complaint and relating to the Covered Product, will develop or be  
26 discovered. ERF on behalf of itself only, and Clark on behalf of itself only, acknowledge that  
27 this Consent Judgment is expressly intended to cover and include all such claims up through  
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1 and including the Effective Date, including all causes of action, claims, demands, rights, suits,  
2 obligations, debts, contracts, agreements promises, liabilities, damages, charges, losses, costs,  
3 expenses, of any nature, known or unknown, in law or equity, now or in the future, with respect  
4 to any alleged violations of Proposition 65 relating to the Covered Products. ERF and Clark  
5 acknowledge that the claims released above may include unknown claims, and nevertheless  
6 waive California Civil Code Section 1542 as to any such unknown claims. California Civil  
7 Code Section 1542 reads as follows:

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

12 ERF on behalf of itself only, and Clark on behalf of itself only, acknowledge and understand the  
13 significance and consequences of this specific waiver of California Civil Code Section 1542.

14 **5. ENTRY OF CONSENT JUDGMENT**

15 5.1 The Parties hereby request that the Court promptly enter this Consent Judgment.

16 **6. ENFORCEMENT OF JUDGMENT**

17 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties  
18 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of  
19 San Francisco County, giving the notice required by law, enforce the terms and conditions  
20 contained herein.

21 6.2 In any proceeding brought by either Party to enforce this Consent Judgment, such  
22 Party may seek whatever fines, costs, penalties or remedies as may be provided by law for any  
23 violation of Proposition 65 or this Consent Judgment.

24 **7. MODIFICATION OF JUDGMENT**

25 7.1 This Consent Judgment may be modified only upon written agreement of both  
26 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon a  
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1 successful motion of any Party as provided by law and upon entry of a modified Consent  
2 Judgment by the Court.

3 **8. AUTHORITY TO STIPULATE**

4 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
5 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf  
6 of the Party represented and legally to bind that Party.

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

8 9.1 ERF shall serve a copy of this Consent Judgment on the California Attorney  
9 General within five (5) days after it is executed by both Parties or concurrently with service of  
10 the motion for judicial approval of this Consent Judgment (whichever is sooner), consistent with  
11 Title 11, Section 3003 of the California Code of Regulations. Plaintiff shall also serve the  
12 motion for approval of this Consent Judgment, and all supporting papers, on the Attorney  
13 General no later than forty-five (45) days prior to the date of the hearing on the motion,  
14 consistent with Title 11, Section 3003 of the California Code of Regulations.

15 **10. ENTIRE AGREEMENT**

16 10.1 This Consent Judgment contains the sole and entire agreement and understanding  
17 of 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  
21 deemed 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  
25 provisions of California law.  
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1 **12. EXECUTION AND COUNTERPARTS**

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

4 **13. COURT APPROVAL**

5 13.1 If this Consent Judgment is not approved by the Court within one year after it is  
6 executed by both Parties, it shall be of no force or effect, and cannot be used in any proceeding  
7 for any purpose.

8 **14. NOTICES**

9 14.1 Any notices or payments due under this Consent Judgment shall be sent by USPS  
10 certified mail, return receipt requested, or overnight delivery via FedEx or UPS.

11  
12 If to Ecological Rights Foundation:

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

16 If to Clark Associates, Inc.:

17 Malcolm C. Weiss ([mweiss@huntonak.com](mailto:mweiss@huntonak.com))  
18 Hunton Andrews Kurth LLP  
19 550 South Hope Street  
20 Suite 2000  
Los Angeles, CA 90071

21 Jamie L. Pereyda ([jpereyda@huntonak.com](mailto:jpereyda@huntonak.com))  
22 Hunton Andrews Kurth LLP  
23 50 California Street  
24 Suite 1700  
25 San Francisco, CA 94111  
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ECOLOGICAL RIGHTS FOUNDATION

BY: James Lamport, EXEC. DIR.  
JAMES LAMPORT, EXECUTIVE DIRECTOR

CLARK ASSOCIATES, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

JUDGE OF THE SUPERIOR COURT

1 IT IS SO STIPULATED.

2  
3 DATED: JANUARY 24, 2019

ECOLOGICAL RIGHTS FOUNDATION

4 *Ecological Rights Foundation*

5 BY: *James Lampion*, EXEC. DIR.  
6 JAMES LAMPORT, EXECUTIVE DIRECTOR

7  
8  
9 DATED: January 25, 2019

CLARK ASSOCIATES, INC.

10 BY: *M. H. Zeswitz*  
11 MARK H. ZESWITZ, CFO

12  
13  
14 IT IS SO ORDERED, ADJUDGED AND DECREED:

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

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