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7 Attorneys for Plaintiff MICHAEL
DIPIRRO

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 vs.

15 VIKING RANGE, LLC; and DOES 1-150,

16 Defendants.

Case No. 22CV021224

**Assigned for all Purposes to
Judge Noël Wise**

[PROPOSED] CONSENT JUDGMENT

Complaint Filed: November 4, 2022
Trial Date: None Set

21 **1. INTRODUCTION**

22 **1.1 Parties**

23 This Consent Judgment is entered into by and between plaintiff, Michael
24 DiPirro (“DiPirro” or “Plaintiff”), and Viking Range, LLC (“Viking” or “Defendant”),
25 with DiPirro and Defendant each individually referred to as a “Party” and collectively
26 as the “Parties.”

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1 **1.2 Plaintiff**

2 DiPirro is an individual residing in California who seeks to promote awareness
3 of exposures to toxic chemicals and improve human health by reducing or eliminating
4 hazardous substances contained in consumer products.

5 **1.3 Defendant**

6 Defendant employs ten or more persons and is a person in the course of doing
7 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
8 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

9 **1.4 General Allegations**

10 DiPirro alleges that Defendant manufactures, sells, or distributes for sale in the
11 State of California certain grill covers that can expose users to Diisononyl Phthalate
12 (“DINP”) without first providing the clear and reasonable exposure warning required
13 by Proposition 65. DINP was listed pursuant to Proposition 65 as a chemical that is
14 known to the State of California to cause cancer on December 20, 2013, and has been
15 subject to the warning requirements since December 20, 2014.

16 **1.5 Product Description**

17 The products covered by this Consent Judgment are certain grill covers that are
18 manufactured, sold, or distributed for sale in California by Defendant, including, but not
19 limited to the 500 Series Vinyl Cover for 30” Built-in Grill. (hereafter the “Products”).

20 **1.6 Notice of Violation**

21 On or about April 21, 2022, DiPirro served Defendant, the Middleby
22 Corporation (“Middleby”) and certain requisite public enforcement agencies with a
23 “60-Day Notice of Violation,” a document that informed the recipients of DiPirro’s
24 allegation that Defendant violated Proposition 65 by failing to warn its customers and
25 consumers in California that the Products expose users to DINP. On May 12, 2022
26 Plaintiff served an amended notice making the same allegations (collectively the
27 “Notice”). To the best of the Parties’ knowledge, no public enforcer has commenced
28 and is diligently prosecuting the allegations set forth in the Notice.

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1.7 Complaint

On or about November 4, 2022, DiPirro filed the instant action (the “Action”) against Defendant for the alleged violations of Health & Safety Code§ 25249.6 that are the subject of the Notice.

1.8 No Admission

This consent judgment is entered into to resolve claims that are disputed and solely to avoid the expense and uncertainty of litigation. Defendant denies the material, factual, and legal allegations contained in the Notice and contends that all Products it manufactures, distributes or sells to California residents comply with all applicable laws and requirements, including but not limited to Proposition 65, and are completely safe for their intended use. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Defendant. This consent judgment shall not be introduced in any legal proceeding as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date it is entered by the Court.

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1 **2. INJUNCTIVE RELIEF: PROPOSITION 65 WARNINGS**

2 **2.1 Product Warnings.** Commencing within thirty (30) days of the Effective
3 Date for all Products that contain the Listed Chemical that are shipped to a California
4 address for sale by Defendant, or any agent, distributor, or affiliated company working
5 on behalf of the Defendant, Defendant shall provide a clear and reasonable warning on
6 each Product as set forth below in Section 2.3, unless the Products are reformulated as set
7 forth in Section 2.4 below. Each warning shall be prominently placed with such
8 conspicuousness as compared with other words, statements, designs, or devices as to
9 render it likely to be read and understood by an ordinary individual under customary
10 conditions before purchase or use. Each warning shall be provided in a manner such that
11 the consumer or user understands to which specific Product the warning applies so as to
12 minimize the risk of consumer confusion.

13 **2.2 Internet Warnings.** For all Products that Defendant offers for sale directly
14 to consumers in California via the internet, Defendant shall provide a warning for such
15 Products by including the warning set forth below in Section 2.3 on one or more of the
16 following: (a) on the product display page; (b) on the product packaging or box, or c) by
17 including a warning in the shipment to the California consumer.

18 **2.3 Text of the Warning.** The text of the warning shall be printed in black ink
19 on a light background, in a font that is easy to read and legible, but in no case less than a
20 size 12 font. The warning triangle shall be the same height or larger than the font for the
21 word “**WARNING.**” Defendant shall use one of the two warnings set forth below, which
22 shall include a symbol consisting of a black exclamation point in a yellow equilateral
23 triangle with a bold black outline as shown below (the symbol may be black or white if
24 the color yellow is otherwise not used on the Product’s packaging).



26 [California Prop. 65] **WARNING:** This product can expose you to
27 DINP, a chemical known to the State of California to cause cancer.
28 For more information go to www.P65Warnings.ca.gov.

Or

1 ▲ [California Prop. 65] **WARNING:** Cancer - www.P65Warnings.ca.gov.

2
3 If Defendant has reason to believe that more than one listed chemical is in
4 the Product, Defendant may use one of the following two warnings:

5 ▲ [California Prop. 65] **WARNING:** This product can expose you to
6 chemicals including DINP, which are known to the State of California
7 to cause cancer, and [name of one or more chemicals] which are
8 known to the State of California to cause birth defects or other
9 reproductive harm. For more information go to
10 www.P65Warnings.ca.gov.

11 or

12 ▲ [California Prop. 65] **WARNING:** Cancer and reproductive harm-
13 www.P65Warnings.ca.gov.

14 Language in brackets optional.

15 2.4 Reformulation Standard. “Reformulated Products” shall mean Products that
16 contain concentrations less than or equal to 0.1% (1,000 parts per million (“ppm”)) each of
17 DEHP, dibutyl phthalate (“DBP”), diisononyl phthalate (“DINP”), diisodecyl phthalate
18 (“DIDP”), di-n-hexyl phthalate (“DnHP”), and butyl benzyl phthalate (“BBP”), in any
19 accessible components when analyzed pursuant to U.S. Environmental Protection Agency
20 testing methodologies 3580A and 8270C, or other methodologies utilized by federal or state
21 government agencies for the purpose of determining the phthalate content in a solid
22 substance. Reformulated Products do not require a Proposition 65 warning for DINP, DEHP,
23 DIDP, BBP, DBP, or DnHP

24 **3. MONETARY PAYMENTS**

25 3.1 **Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).**

26 In complete resolution of any claim for monetary relief of any kind related to the Notices, the
27 Action, and this Consent Judgment (except Plaintiff’s attorney’s fees as set forth in § 4
28 below) Defendant shall make a civil penalty payment of \$1,500 (one thousand five
hundred dollars), in accordance with this section, on or before the Effective Date. The
penalty payment will be allocated in accordance with California Health & Safety Code §

1 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
2 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
3 penalty remitted to DiPirro in accordance with Section 3.2 below. The penalty payment
4 shall be remitted in accordance with the procedure set out in Section 3.2.

5 **3.2 Payments.** All payments shall be delivered within five business days of the
6 Effective Date by ACH payment, Zelle, or wire transfer to the account of Jeremy Fietz
7 (bank information given upon settlement) or in the alternative to Jeremy Fietz, Attorney
8 at Law, 1510 Fourth Street, Santa Rosa CA 95404, and shall be in the form of three
9 checks for the following amounts made payable to:

10 (a) “Jeremy Fietz, Attorney at Law” in the amount of \$1,175 (one
11 thousand one hundred seventy-five dollars) for payment of 75% of
12 the civil penalty to OEHHA. Counsel for DiPirro agrees that it
13 shall be its sole responsibility to forward such funds to OEHHA in
14 a timely manner once received from Defendant. Alternatively, at
15 Defendant’s option, it can choose to deliver a certified or cashier’s
16 check made payable to “Office of Environmental Health Hazard
17 Assessment.”

18 (b) “Jeremy Fietz, Attorney at Law” in the amount of \$375 (three
19 hundred seventy five dollars), as payment of 25% of the civil
20 penalty to Michael DiPirro. Counsel for DiPirro agrees that it
21 shall be its sole responsibility to forward such funds to DiPirro in a
22 timely manner once received. Alternatively, at Defendant’s option,
23 it can choose to deliver a certified or cashier’s check made payable
24 to “Michael DiPirro.”

25 (c) “Jeremy Fietz, Attorney at Law” in the amount of \$66,000 (sixty
26 six thousand dollars) as payment for DiPirro’s attorneys’ fees and
27 costs pursuant to Section 4 below.

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1 For any payment that is returned for any reason, including insufficient funds, a
2 payment for the entire amount owed must be made by Defendant in the form of a
3 cashier's check within five (5) business days of notification of insufficient funds, plus a
4 10% service fee paid to DiPirro's attorneys. Any payment that is not actually received
5 by the due date will also be subject to a 10% late fee.

6 **3.3 Issuance of 1099 Forms.** The Noticed Parties shall provide DiPirro's
7 counsel with a separate 1099 form for each of its payments under this Agreement to:

- 8 (a) "Office of Environmental Health Hazard Assessment", P.O.
9 Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil
10 penalties paid;
- 11 (b) "Michael DiPirro," whose address and tax identification
12 number shall be furnished upon request after this Agreement
13 has been fully executed by the Parties for his portion of the civil
14 penalties paid; and
- 15 (c) "Jeremy Fietz, Attorney at Law" whose address and tax
16 identification number shall be furnished upon request after this
17 Agreement has been fully executed by the Parties, for fees and
18 costs reimbursed pursuant to Section 4.

19 Plaintiff will provide all required W-9 or other tax information before or concurrent with
20 the entry of the consent judgment to permit timely payment.

21 **4. REIMBURSEMENT OF FEES AND COSTS**

22 The parties acknowledge that DiPirro and his counsel offered to resolve this
23 dispute without reaching terms on the amount of fees and costs to be reimbursed to
24 them, thereby leaving this fee issue to be resolved after the material terms of the
25 agreement had been settled. Defendant then expressed a desire to resolve the fee and
26 cost issue shortly after the other settlement terms had been finalized. The parties then
27 attempted to (and did) reach an accord on the compensation due to OEHHA, DiPirro
28 and his counsel under general contract principles and the private attorney general

1 doctrine codified at California Code of Civil Procedure § 1021.5, for all work
2 performed through the mutual execution of this agreement and entry by the court of
3 this consent judgment. Defendant shall pay \$66,000 (sixty six thousand dollars) as
4 complete reimbursement and resolution of any claim for Plaintiff's attorneys' fees and
5 costs and/or other expenses of any kind incurred in connection with the Notice, the
6 Action, and this Consent Judgment, as a result of activities including but not limited
7 to investigating, testing, consulting with experts, bringing this matter to Defendant's
8 attention, litigating, negotiating, and obtaining judicial approval of this Consent
9 Judgment in the public interest pursuant to Code of Civil Procedure § 1021.5, and any
10 other statute or common law of similar effect. Defendant shall deliver payments as
11 described in Section 3, above.

12 **5. CLAIMS COVERED AND RELEASED**

13 **5.1 DiPirro's Public Release of Proposition 65 Claims**

14 DiPirro, acting on his own behalf and in the public interest, releases Defendant
15 and its parents, affiliates (including but not limited to Middleby), shareholders,
16 members, directors, officers, managers, employees, representatives, agents,
17 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and
18 affiliates, and their predecessors, successors and assigns ("Defendant Releasees"),
19 and all entities from whom they obtain and to whom they directly or indirectly
20 distribute or sell the Products, including but not limited to manufacturers, suppliers,
21 distributors, wholesalers, customers, retailers, licensors, and licensee, from all claims
22 for actual or alleged violations of Proposition 65 for Products manufactured, distributed,
23 or sold up through the Effective Date based on actual or alleged exposures to DINP
24 from use of the Products, as set forth in the Notice and the Complaint. It is the
25 Parties' intent that this Consent Judgment shall have preclusive effect such that no
26 other person or entity, whether purporting to act in his, her, or its interests, or in the
27 public interest, shall be permitted to pursue and/or take any action with respect to any
28 violation of Proposition 65 based on exposure to DINP in the Products that were

1 alleged in the Notices and/or the Complaint. Compliance with the terms of this
2 Consent Judgment constitutes compliance with Proposition 65 with respect to
3 exposures to DINP from the use of the Products sold by Defendant after the Effective
4 Date, as set forth in the Notice and Complaint.

5 **5.2 DiPirro's Individual Release of Claims**

6 1.1 DiPirro, in his individual capacity only and *not* in his representative capacity,
7 also provides a release herein which shall be effective as a full and final accord and
8 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
9 fees, damages, losses, claims, liabilities and demands of DiPirro of any nature, character or
10 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
11 exposures to DINP from the use of the Products manufactured sold, or distributed for sale by
12 Defendant in the State of California before the Effective Date. With respect to the foregoing
13 waivers and releases in this paragraph, Plaintiff hereby specifically waives any and all rights
14 and benefits he now has, or in the future may have, conferred by virtue of the provisions of
15 § 1542 of the California Civil Code, which provides as follows:

16 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
17 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
18 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
19 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
20 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
21 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

20 DiPirro, on behalf of himself, his past and current agents, representatives, attorneys, and
21 successors and/or assignees, expressly waives and relinquishes any and all rights and benefits
22 that she or they may have under, or that may be conferred upon them by, the provisions of
23 California Civil Code § 1542 as well as under any other state or federal statute or common
24 law principle of similar effect, to the fullest extent they may lawfully waive such rights or
25 benefits pertaining to the released matters.

26 Compliance with the terms of this Consent Judgment constitutes compliance
27 with Proposition 65 with respect to exposures to DINP from the use of the Products
28 sold by Defendant after the Effective Date, as set forth in the Notice and Complaint.

1 **5.3 Defendant's Release of DiPirro**

2 1.2 Defendant, on its own behalf and on behalf of its past and current agents,
3 representatives, attorneys, successors, and assignees, hereby waives any and all claims that it
4 may have against DiPirro and his attorneys and other representatives, for any and all actions
5 taken or statements made (or those that could have been taken or made) by DiPirro and his
6 attorneys and other representatives, whether in the course of investigating claims, otherwise
7 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

8 With respect to the foregoing waivers and releases in this paragraph, Defendant hereby
9 specifically waives any and all rights and benefits he now has, or in the future may have,
10 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides
11 as follows:

12 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT**
13 **THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR**
14 **SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**
15 **EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR**
 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

16 Defendant, on behalf of itself, its past and current agents, representatives, attorneys, and
17 successors and/or assignees, expressly waives and relinquishes any and all rights and benefits
18 that she or they may have under, or that may be conferred upon them by, the provisions of
19 California Civil Code § 1542 as well as under any other state or federal statute or common
20 law principle of similar effect, to the fullest extent they may lawfully waive such rights or
21 benefits pertaining to the released matters.

22 **6. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the
24 Court and shall be null and void if, for any reason, it is not approved and entered by the
25 Court within one year after it has been fully executed by all Parties.

26 **7. INTEGRATION**

27 1.3 This Consent Judgment contains the sole and entire agreement of the Parties
28 and any and all prior negotiations and understandings related hereto shall be deemed to have

1 been merged within it. No representations or terms of agreement other than those contained
2 herein exist or have been made by any Party with respect to the other Party or the subject
3 matter hereof.

4 **8. SEVERABILITY**

5 8.1 If, subsequent to the execution of this Consent Judgment, any provision of
6 this Consent Judgment is held by a court to be unenforceable, the validity of the
7 remaining provisions shall not be adversely affected.

8 **9. GOVERNING LAW**

9 The terms of this Consent Judgment shall be governed by the laws of the State
10 of California and apply within the State of California. In the event that Proposition
11 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or
12 as to the Products, then Defendant may provide written notice to DiPirro of any
13 asserted change in the law and have no further obligations pursuant to this Consent
14 Judgment, with respect to, and to the extent that, the Products are so affected.
15 Nothing in this Consent Judgment shall be interpreted to relieve Defendant from
16 any obligation to comply with any pertinent state or federal toxics control laws.

17 **10. NOTICES**

18 Unless specified herein, all correspondence and notices required to be
19 provided pursuant to this Consent Judgment shall be both by email and in writing
20 and sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return
21 receipt requested; or (iii) a recognized overnight courier on any party by the other
22 party at the following addresses:

23 For Defendant:

24 President
25 Viking Range, LLC
26 111 W. Front Street
27 Greenwood, MS 38930

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1 For Plaintiff DiPirro:

2 Jeremy Fietz, Attorney-at-Law
3 1510 Fourth Street
4 Santa Rosa CA 95404
5 Jeremy@superawesomelawyer.com

6 Any party may, from time to time, specify in writing to the other party a change of
7 address to which all notices and other communications shall besent.

8 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

9 This Consent Judgment may be executed in counterparts, and by facsimile or
10 portable document format (PDF) signature, each of which shall be deemed an
11 original, and all of which, when taken together, shall constitute one and the same
12 document.

13 **12. POST EXECUTION ACTIVITIES**

14 DiPirro agrees to comply with the reporting form requirements referenced in
15 Health & Safety Code§ 25249.7(f). The Parties further acknowledge that, pursuant
16 to Health & Safety Code § 25249.7(t), a noticed motion is required to obtain
17 judicial approval of the settlement. In furtherance of obtaining such approval,
18 DiPirro and Defendant agree to mutually employ their best efforts, and that of their
19 counsel, to support the entry of this agreement as a Consent Judgment, and to
20 obtain judicial approval of the settlement in a timely manner.

21 **12. JOINT PREPARATION**

22 12.1 The Parties have jointly participated in the preparation of this Consent Judgment
23 and this Consent Judgment is the result of the joint efforts of the Parties. Accordingly, any
24 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
25 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
26 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
27 be resolved against the drafting Party shall not be employed in the interpretation of this Consent
28 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

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1 **14 ENFORCEMENT**

2 **14.1** The only persons who may enforce this Consent Judgment are the Parties
3 hereto. No Party shall bring a motion to enforce the terms of this Consent Judgment without
4 first providing notice to the other party and meeting and conferring in good faith about the
5 alleged violation for a period of at least thirty (30) days.

6 **15. MODIFICATION**

7 This Consent Judgment may be modified only by: (i) a written agreement of
8 the Parties and upon entry of a modified consent judgment by the Court thereon; or
9 (ii) upon a successful motion or application of any Party and the entry of a
10 modified consent judgment by the Court.

11 **16. AUTHORIZATION**


12 The undersigned are authorized to execute this Consent Judgment on behalf
13 of their respective Parties and have read, understood and agree to all of the terms
14 and conditions of this Consent Judgment.

15 **AGREED TO:**

AGREED TO:

16
17 Date: 2/13/23

Date: _____

18 By: 

By: _____

19 Michael Dipirro

Viking Range, LLC

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12 The undersigned are authorized to execute this Consent Judgment on behalf
13 of their respective Parties and have read, understood and agree to all of the terms
14 and conditions of this Consent Judgment.

15 **AGREED TO:**

AGREED TO:

17 Date: _____

Date: February 22, 2023

18 By: _____
19 Michael Dipirro

By: 
Viking Range, LLC

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