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11 Attorneys for Plaintiff MICHAEL
12 DIPIRRO

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA

15 MICHAEL DIPIRRO,

16 Plaintiff,

17 vs.

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

19 Defendants.

20 Case No. 22CV021224

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

23 [PROPOSED] CONSENT JUDGMENT
24 [AMENDED]

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

27 **1. INTRODUCTION**

28 **1.1 Parties**

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

1.2 Plaintiff

DiPirro is an individual residing in California who seeks to promote awareness

1 of exposures to toxic chemicals and improve human health by reducing or eliminating
2 hazardous substances contained in consumer products.

3 **1.3 Defendant**

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

7 **1.4 General Allegations**

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

14 **1.5 Product Description**

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

19 **1.6 Notice of Violation**

20 On or about April 21, 2022, DiPirro served Settling Defendant, the Middleby
21 Corporation (“Middleby”) and certain requisite public enforcement agencies with a
22 “60-Day Notice of Violation,” a document that informed the recipients of DiPirro’s
23 allegation that Settling Defendant violated Proposition 65 by failing to warn its
24 customers and consumers in California that the Products expose users to DINP. On
25 May 12, 2022 Plaintiff served an amended notice making the same allegations
26 (collectively the “Notice”). To the best of the Parties’ knowledge, no public enforcer
27 has commenced 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 Settling 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. Settling 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 Settling 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 Settling Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Settling 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 Settling 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 Settling 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 Settling Defendant, or any agent, distributor, or affiliated company
5 working on behalf of the Settling Defendant, Settling Defendant shall provide a clear and
6 reasonable warning on each Product as set forth below in Section 2.3, unless the Products
7 are reformulated as set forth in Section 2.4 below. The warning shall be affixed to or
8 printed on the Product itself, or on the Product’s packaging, container, labeling, or on a
9 placard, shelf tag, sign or electronic device or automatic process, provided that the warning is
10 displayed with such conspicuousness, as compared with other words, statements, or designs
11 as to render it reasonably likely to be read and understood by an ordinary individual under
12 customary conditions of purchase or use. Each warning shall be provided in a manner
13 such that the consumer or user understands to which specific Product the warning applies
14 so as to minimize the risk of consumer confusion.

15 **2.2 Internet Warnings.** In addition to the warning specified in Section 2.1
16 above, for all Products that Settling Defendant offers for sale directly to consumers in
17 California via the internet, Settling Defendant shall provide a warning for such Products
18 by including the warning set forth below in Section 2.3 on one or more of the
19 following:(a) on the same web page on which a Covered Product is displayed; (b) on the
20 same web page as the order form for a Covered Product; (c) on the same web page as the
21 price for any Covered Product; or (d) on one or more web pages displayed to a purchaser
22 during the checkout process. The internet warning described above can also be delivered
23 through a hyperlink using the word “[California Prop 65] WARNING” (language in brackets
24 optional).

25 **2.3 Text of the Warning.** The text of the warning shall be printed in black ink
26 on a light background, in a font that is easy to read and legible, but in no case less than a
27 size 12 font. The warning triangle shall be the same height or larger than the font for the
28 word “**WARNING.**” Settling Defendant shall use one of the two warnings set forth

1 below if the warning is for DINP, which shall include a symbol consisting of a black
2 exclamation point in a yellow equilateral triangle with a bold black outline as shown
3 below (the symbol may be black or white if the color yellow is otherwise not used on the
4 Product's packaging).



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

7 Or



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

9 Or, if Settling Defendant has reason to believe that the Covered Products cause an exposure
10 to other listed chemicals it may use one of the following warnings:



11 [California Prop. 65] **WARNING:** This product can expose
12 you to chemical[s] including [name of one or more chemicals],
13 which [is] [are] known to the state of California to cause
14 [cancer] and [birth defects or other reproductive harm.] For
more information go to www.P65Warnings.ca.gov.

15 For this warning, the brackets must be filled in based on the chemical exposure(s) caused
16 by the Covered Product and must be consistent with 27 CCR 25603.



17 [California Prop. 65] **WARNING:** [Cancer] [and] [birth
18 defects or other reproductive harm].
www.P65Warnings.ca.gov.

19 For this warning, the brackets must be filled in based on the chemical exposure(s) caused
20 by the Covered Product and must be consistent with 27 CCR 25603.

21 For all warnings listed above the “[California Prop 65]” language is optional. In lieu
22 of the preceding warning content and methods set forth above, Viking may use any specific
23 safe-harbor warning content and method applicable to the Covered Products set forth in Title
24 27, California Code of Regulations, section 25600 *et seq.*, as amended August 30, 2018, and
25 subsequently thereafter.

26 2.4 Reformulation Standard. “Reformulated Products” shall mean Products that
27 contain concentrations less than or equal to 0.1% (1,000 parts per million (“ppm”)) each of
28 DEHP, dibutyl phthalate (“DBP”), diisononyl phthalate (“DINP”), diisodecyl phthalate

1 (“DIDP”), di-n-hexyl phthalate (“DnHP”), and butyl benzyl phthalate (“BBP”), in any
2 accessible components when analyzed pursuant to U.S. Environmental Protection Agency
3 testing methodologies 3580A and 8270C, or other methodologies utilized by federal or state
4 government agencies for the purpose of determining the phthalate content in a solid
5 substance. Reformulated Products do not require a Proposition 65 warning for DINP, DEHP,
6 DIDP, BBP, DBP, or DnHP

7 **3. MONETARY PAYMENTS**

8 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).**

9 In complete resolution of any claim for monetary relief of any kind related to the Notices, the
10 Action, and this Consent Judgment (except Plaintiff’s attorney’s fees as set forth in § 4
11 below) Settling Defendant shall make a civil penalty payment of \$1,500 (one thousand
12 five hundred dollars), in accordance with this section, on or before the Effective Date.
13 The penalty payment will be allocated in accordance with California Health & Safety
14 Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
15 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
16 penalty remitted to DiPirro in accordance with Section 3.2 below. The penalty payment
17 shall be remitted in accordance with the procedure set out in Section 3.2.

18 **3.2 Payments.** All payments shall be delivered within five business days of the
19 Effective Date by ACH payment, Zelle, or wire transfer to the account of Jeremy Fietz
20 (bank information given upon settlement) or in the alternative to Jeremy Fietz, Attorney
21 at Law, 1510 Fourth Street, Santa Rosa CA 95404, and shall be in the form of three
22 checks for the following amounts made payable to:

- 23 (a) “Jeremy Fietz, Attorney at Law” in the amount of \$1,175 (one
24 thousand one hundred seventy-five dollars) for payment of 75% of
25 the civil penalty to OEHHA. Counsel for DiPirro agrees that it
26 shall be its sole responsibility to forward such funds to OEHHA in
27 a timely manner once received from Settling Defendant.

28 Alternatively, at Settling Defendant’s option, it can choose to

1 deliver a certified or cashier's check made payable to "Office of
2 Environmental Health Hazard Assessment."

3 (b) "Jeremy Fietz, Attorney at Law" in the amount of \$375 (three
4 hundred seventy five dollars), as payment of 25% of the civil
5 penalty to Michael DiPirro. Counsel for DiPirro agrees that it
6 shall be its sole responsibility to forward such funds to DiPirro in a
7 timely manner once received. Alternatively, at Settling
8 Defendant's option, it can choose to deliver a certified or cashier's
9 check made payable to "Michael DiPirro."

10 (c) "Jeremy Fietz, Attorney at Law" in the amount of \$66,000 (sixty
11 six thousand dollars) as payment for DiPirro's attorneys' fees and
12 costs pursuant to Section 4 below.

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

18 **3.3 Issuance of 1099 Forms.** The Noticed Parties shall provide DiPirro's
19 counsel with a separate 1099 form for each of its payments under this Agreement to:

- 20 (a) "Office of Environmental Health Hazard Assessment", P.O.
21 Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil
22 penalties paid;
- 23 (b) "Michael DiPirro," whose address and tax identification
24 number shall be furnished upon request after this Agreement
25 has been fully executed by the Parties for his portion of the civil
26 penalties paid; and
- 27 (c) "Jeremy Fietz, Attorney at Law" whose address and tax
28 identification number shall be furnished upon request after this

1 Agreement has been fully executed by the Parties, for fees and
2 costs reimbursed pursuant to Section 4.

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

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

6 The parties acknowledge that DiPirro and his counsel offered to resolve this
7 dispute without reaching terms on the amount of fees and costs to be reimbursed to
8 them, thereby leaving this fee issue to be resolved after the material terms of the
9 agreement had been settled. Settling Defendant then expressed a desire to resolve the
10 fee and cost issue shortly after the other settlement terms had been finalized. The
11 parties then attempted to (and did) reach an accord on the compensation due to
12 OEHHA, DiPirro and his counsel under general contract principles and the private
13 attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for
14 all work performed through the mutual execution of this agreement and entry by the
15 court of this consent judgment. Settling Defendant shall pay \$66,000 (sixty six
16 thousand dollars) as complete reimbursement and resolution of any claim for
17 Plaintiff’s attorneys’ fees and costs and/or other expenses of any kind incurred in
18 connection with the Notice, the Action, and this Consent Judgment, as a result of
19 activities including but not limited to investigating, testing, consulting with experts,
20 bringing this matter to Settling Defendant’s attention, litigating, negotiating, and
21 obtaining judicial approval of this Consent Judgment in the public interest pursuant to
22 Code of Civil Procedure § 1021.5, and any other statute or common law of similar
23 effect. Settling Defendant shall deliver payments as described in Section 3, above.

24 **5. CLAIMS COVERED AND RELEASED**

25 **5.1 DiPirro’s Public Release of Proposition 65 Claims**

26 DiPirro, acting on his own behalf and in the public interest, releases Settling
27 Defendant and its parents, affiliates (including but not limited to Middleby),
28 shareholders, members, directors, officers, managers, employees, representatives,

1 agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies,
2 and affiliates, and their predecessors, successors and assigns (“Settling Defendant
3 Releasees”), and all entities from whom they obtain and to whom they directly or
4 indirectly distribute or sell the Products, including but not limited to manufacturers,
5 suppliers, distributors, wholesalers, customers, retailers, licensors, and licensee, from
6 all claims for actual or alleged violations of Proposition 65 for Products manufactured,
7 distributed, or sold up through the Effective Date based on actual or alleged exposures
8 to DINP from use of the Products, as set forth in the Notice and the Complaint. It is
9 the Parties’ intent that this Consent Judgment shall have preclusive effect such that
10 no other person or entity, whether purporting to act in his, her, or its interests, or in
11 the public interest, shall be permitted to pursue and/or take any action with respect to
12 any violation of Proposition 65 based on exposure to DINP in the Products that were
13 alleged in the Notices and/or the Complaint. Compliance with the terms of this
14 Consent Judgment constitutes compliance with Proposition 65 with respect to
15 exposures to DINP from the use of the Products sold by Settling Defendant after the
16 Effective Date, as set forth in the Notice and Complaint.

17 **5.2 DiPirro’s Individual Release of Claims**

18 1.1 DiPirro, in his individual capacity only and *not* in his representative capacity,
19 also provides a release herein which shall be effective as a full and final accord and
20 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’
21 fees, damages, losses, claims, liabilities and demands of DiPirro of any nature, character or
22 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
23 exposures to DINP from the use of the Products manufactured sold, or distributed for sale by
24 Settling Defendant in the State of California before the Effective Date. With respect to the
25 foregoing waivers and releases in this paragraph, Plaintiff hereby specifically waives any and
26 all rights and benefits he now has, or in the future may have, conferred by virtue of the
27 provisions of § 1542 of the California Civil Code, which provides as follows:

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1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
2 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
3 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
4 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
5 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
6 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

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

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

17 **5.3 Settling Defendant's Release of DiPirro**

18 1.2 Settling Defendant, on its own behalf and on behalf of its past and current
19 agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims
20 that it may have against DiPirro and his attorneys and other representatives, for any and all
21 actions taken or statements made (or those that could have been taken or made) by DiPirro and
22 his attorneys and other representatives, whether in the course of investigating claims,
23 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
24 Products. With respect to the foregoing waivers and releases in this paragraph, Settling
25 Defendant hereby specifically waives any and all rights and benefits he now has, or in the
26 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
27 which provides as follows:

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1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT
2 THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR
3 SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
4 EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR
5 HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER
6 SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

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

13 **6. COURT APPROVAL**

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

17 **7. INTEGRATION**

18 This Consent Judgment contains the sole and entire agreement of the Parties and
19 any and all prior negotiations and understandings related hereto shall be deemed to
20 have been merged within it. No representations or terms of agreement other than those
21 contained herein exist or have been made by any Party with respect to the other Party
22 or the subject matter hereof.

23 **8. SEVERABILITY**

24 If, subsequent to the execution of this Consent Judgment, any provision of this
25 Consent Judgment is held by a court to be unenforceable, the validity of the remaining
26 provisions shall not be adversely affected.

27 **9. GOVERNING LAW**

28 The terms of this Consent Judgment shall be governed by the laws of the State
of California and apply within the State of California. In the event that Proposition
65 is repealed or is otherwise rendered inapplicable by reason of law generally, or

1 as to the Products, then Settling Defendant may provide written notice to DiPirro of
2 any asserted change in the law and have no further obligations pursuant to this
3 Consent Judgment, with respect to, and to the extent that, the Products are so
4 affected. Nothing in this Consent Judgment shall be interpreted to relieve Settling
5 Defendant from any obligation to comply with any pertinent state or federal toxics
6 control laws.

7 **10. NOTICES**

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

13 For Settling Defendant:

14 President
15 Viking Range, LLC
16 111 W. Front Street
17 Greenwood, MS 38930

18 For Plaintiff DiPirro:

19 Jeremy Fietz, Attorney-at-Law
20 1510 Fourth Street
21 Santa Rosa CA 95404
22 Jeremy@superawesomelawyer.com

23 Any party may, from time to time, specify in writing to the other party a change of
24 address to which all notices and other communications shall be sent.

25 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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1 **12. POST EXECUTION ACTIVITIES**

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

9 **13. JOINT PREPARATION**

10 13.1 The Parties have jointly participated in the preparation of this Consent Judgment
11 and this Consent Judgment is the result of the joint efforts of the Parties. Accordingly, any
12 uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any
13 Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this
14 Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to
15 be resolved against the drafting Party shall not be employed in the interpretation of this Consent
16 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

17 **14 ENFORCEMENT**

18 14.1 The only persons who may enforce this Consent Judgment are the Parties
19 hereto. No Party shall bring a motion to enforce the terms of this Consent Judgment without
20 first providing notice to the other party and meeting and conferring in good faith about the
21 alleged violation for a period of at least thirty (30) days.

22 **15. MODIFICATION**

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

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16. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 04/05/2023

Date: 4/5/23

By: 
Michael Dipirro

By: 
Viking Range, LLC