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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

AUG 03 2017

CLERK OF THE SUPERIOR COURT
By *Kelle Clarke*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
DKB HOUSEHOLD USA CORP.,
Defendant.

Case No.: RG17859873
CONSENT JUDGMENT
Judge: Stephen M. Pulido
Dept.: 16
Hearing Date: July 27, 2017
Hearing Time: 3:00 PM
Reservation #: R-1857652

BY FAX

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Anthony
3 Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and DKB Household USA
4 Corp., f/k/a/ Zyliss USA Corporation (“DKB” or “Defendant”) with Ferreiro and Defendant
5 collectively referred to as the “Parties” and each of them as a “Party.” Ferreiro is an individual
6 residing in California who seeks to promote awareness of exposures to toxic chemicals and improve
7 human health by reducing or eliminating hazardous substances contained in consumer products.
8 DKB is a person in the course of doing business for purposes of Proposition 65, Cal. Health &
9 Safety Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to Bisphenol A (BPA) from polycarbonate *Zyliss Mix 'n Measure Measuring Cup Sets*
12 without providing clear and reasonable warnings under Proposition 65. BPA is listed under
13 Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

14 1.3 **Notices of Violation/Complaint.** On or about October 31, 2016, Ferreiro served
15 DKB and various public enforcement agencies with a document entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that the *Zyliss Mix 'n*
18 *Measure Measuring Cup Sets* exposed users in California to BPA. No public enforcer has brought
19 and is diligently prosecuting the claims alleged in the Notice. On May 11, 2017, Ferreiro filed a
20 complaint in the matter (the “Complaint”).

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.

1 1.5 Defendant denies the material allegations contained in Ferreiro's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means *Zyliss* polycarbonate
10 cookware, including but not limited to SKU No. 0 54067 13850 3, that is manufactured, distributed
11 and/or offered for sale in California by DKB, and that contains BPA.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, DKB agrees to manufacture,
16 import, or purchase for sale in California only (a) reformulated Covered Products pursuant to
17 Section 3.2, or (b) Covered Products that are accompanied by the following warning: "WARNING:
18 This product contains a chemical known to the State of California to cause cancer, birth defects and
19 other reproductive harm." DKB and its downstream retailers shall have no obligation to
20 reformulate or label Covered Product that entered the stream of commerce prior to the Effective
21 Date. For purposes of this Settlement Agreement, a "Reformulated Covered Product" is Product
22 that meets the standard set forth in Section 3.2 below.,

23 3.2 "Reformulated Covered Product" shall mean Covered Product that is BPA-Free
24 when analyzed pursuant to ATS 367 Rev. 0 by LC/MS/MS.

25 3.3 The warning provided pursuant to § 3.1 above shall be affixed to or printed on the
26 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
27 on the packaging or labeling and displayed with such conspicuousness, as compared with other
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1 words, statements, or designs as to render it likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use. A warning may be contained in the same
3 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
4 concerning the use of the product and shall be at least the same size as those other safety warnings.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** DKB shall pay a civil penalty of \$3,000.00 pursuant to Health and
7 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
8 Code § 25192, with 75% of these funds remitted to the State of California's Office of
9 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
10 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within ten (10) business days of the Effective Date, DKB shall issue two
12 separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and
13 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$750.00. Payment owed to
14 Ferreiro pursuant to this Section shall be delivered to the following payment address:

15 Evan J. Smith, Esquire
16 Brodsky & Smith, LLC
17 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

18 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
19 to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

20 For United States Postal Service Delivery:

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

24 For Non-United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
27 1001 I Street
Sacramento, CA 95814

1 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
2 address set forth above as proof of payment to OEHHA.

3 4.2 **Attorney Fees.** DKB shall pay \$27,000.00 to Brodsky & Smith, LLC (“Brodsky
4 Smith”) as complete reimbursement for Plaintiff Ferreiro’s attorneys’ fees and costs incurred as a
5 result of investigating, bringing this matter to DKB’s attention, litigating and negotiating and
6 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
7 Procedure § 1021.5. Payment shall be made within ten (10) business days of the Effective Date
8 and sent to the address for Brodsky & Smith set forth in § 4.1.1, above.

9 4.3 DKB shall pay the civil penalty and attorney fees in §§ 4.1 and 4.2 within ten (10)
10 days of the Effective Date.

11 **5. RELEASE OF ALL CLAIMS**

12 5.1 This consent judgment is a full, final, and binding resolution between Ferreiro acting
13 in the public interest, and DKB, and its parents, shareholders, divisions, subdivisions, subsidiaries,
14 partners, sister companies, and affiliates, and their predecessors, successors and assigns
15 (“Defendant Releasees”), and all entities from whom they obtain and to whom they directly or
16 indirectly distribute or sell Covered Products, including but not limited to Zyliss USA Corporation,
17 Diethelm Holding USA Limited, Diethelm Keller Brands AG, Diethelm Keller Holding AG, DKB
18 Household Switzerland AG, DKB Household UK Limited, Hold N Storage, Walmart.com USA,
19 LLC, Wal-Mart Stores, Inc., Farm City & Supply, manufacturers, suppliers, distributors,
20 wholesalers, customers, licensors, licensees retailers, marketplace hosts, franchisees, and
21 cooperative members (“Downstream Defendant Releasees”), of all claims for violations of
22 Proposition 65 based on exposure to BPA from Covered Products as set forth in the Notice, with
23 respect to any Covered Products manufactured, distributed, or sold by DKB prior to ninety (90)
24 days after the Effective Date. Compliance with the terms of this Consent Judgment constitutes
25 compliance with Proposition 65 with regard to the Covered Products.

26 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
27 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
28

1 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
2 legal action and releases any DKB, Defendant Releasees, and Downstream Defendant Releasees
3 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
4 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
5 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
6 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
7 from Covered Products manufactured distributed or sold by DKB or Defendant Releasees. With
8 respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby specifically waives
9 any and all rights and benefits which she now has, or in the future may have, conferred by virtue
10 of the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

16 5.3 DKB waives any and all claims against Ferreiro, his attorneys and other
17 representatives, for any and all actions taken or statements made (or those that could have been
18 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
19 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
20 and/or with respect to Covered Products.

21 6. INTEGRATION

22 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
23 any and all prior negotiations and understandings related hereto shall be deemed to have been
24 merged within it. No representations or terms of agreement other than those contained herein exist
25 or have been made by any Party with respect to the other Party or the subject matter hereof.

26 7. GOVERNING LAW

27 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
28 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 as to Covered Products, then

1 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
2 to the extent that, Covered Products are so affected.

3 **8. NOTICES**

4 8.1 Unless specified herein, all correspondence and notices required to be provided
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
6 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
7 by the other party at the following addresses:

8 For Defendant:

9
10 Trey Marshall
11 Schiff Hardin LLP
12 One Market, Spear Street Tower
13 Thirty-First Floor
14 San Francisco, CA 94105

15 And

16 For Ferreiro:

17 Evan Smith
18 Brodsky & Smith, LLC
19 2 Bala Plaza, Suite 510
20 Bala Cynwyd, PA 19004

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

24 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
25 which shall be deemed an original, and all of which, when taken together, shall constitute one and
26 the same document.

27 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**

28 **APPROVAL**

10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
and Defendant agrees it shall support approval of such Motion.

1 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
3 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
4 30 days, the case shall proceed on its normal course.

5 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
7 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
8 its normal course on the trial court's calendar.

9 **11. MODIFICATION**

10 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
15 the unsuccessful party has acted with substantial justification. For purposes of this Consent
16 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
17 Discovery Act of 1986, Code of Civil Procedure § 2016, et seq.

18 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
19 pursuant to law.

20 **13. RETENTION OF JURISDICTION**

21 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
22 Consent Judgment.

23 **14. AUTHORIZATION**

24 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
25 respective Parties and have read, understood and agree to all of the terms and conditions of this
26 document and certifies that he or she is fully authorized by the Party he or she represents to execute
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the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: 5/19/17

Date: 5/17/17

By: Anthony Ferreira
ANTHONY FERREIRO

By: [Signature]
DKB HOUSEHOLD USA CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 8-3-2017

[Signature]
Judge of Superior Court
Stephen Pulido