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ENDORSED
FILED
ALAMEDA COUNTY
MAY 11 2018
CLERK OF THE SUPERIOR COURT
By DIANNE HYATT
Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,
12 Plaintiff,
13 v.
14 THUNDER GROUP, INC.,
15 Defendant.

16 Case No.: RG17880128
17 **CONSENT JUDGMENT**
18 Judge: Dennis Hayashi
19 Dept.: 518
20 Hearing Date: April 12, 2018
21 Hearing Time: 2:30 PM
22 Reservation #: R-1925710

FEB 22 2018

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 Thunder Group, Inc.
4 (“Thunder” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties”
5 and each of them as a “Party.” Ferreiro is an individual residing in California who seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. Thunder is a person in the course of doing
8 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
10 individuals to Bisphenol A (BPA) from polycarbonate tumblers and spoons without providing clear
11 and reasonable warnings under Proposition 65. BPA is listed under Proposition 65 as a chemical
12 known to the State of California to cause reproductive toxicity.

13 1.3 **Notices of Violation/Complaint.** On or about November 1, 2016, Ferreiro served
14 Thunder and various public enforcement agencies with a document entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Defendant
16 was in violation of Proposition 65 for failing to warn consumers and customers that the
17 polycarbonate tumblers exposed users in California to BPA. No public enforcer has brought and
18 is diligently prosecuting the claims alleged in the Notice. On October 26, 2017, Ferreiro filed a
19 complaint in the matter (the “Complaint”).

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
23 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
24 claims which were or could have been raised in the Complaint based on the facts alleged therein
25 and/or in the Notice.

26 1.5 Defendant denies the material allegations contained in Ferreiro’s Notice and
27 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
28

1 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
2 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
3 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
4 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
5 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term “Covered Products” means Thunder polycarbonate
8 tumblers and spoons that are manufactured, distributed and/or offered for sale in California by
9 Thunder, and that contain BPA.

10 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
11 entered as a Judgment of the Court.

12 **3. INJUNCTIVE RELIEF: WARNINGS**

13 3.1 Commencing ninety (90) days after the Effective Date, Thunder agrees to
14 manufacture, import, or purchase for sale in California only (a) reformulated Covered Products
15 pursuant to Section 3.2, or (b) Covered Products that are accompanied by either of the following
16 warnings:

17 “WARNING: This product contains a chemical known to the State of California to cause
18 [cancer,] birth defects or other reproductive harm.”

19 Or

20 “WARNING: This product can expose you to chemicals including Bisphenol A (BPA),
21 which is known to the State of California to cause [cancer and] birth defects or other
22 reproductive harm. For more information go to www.P65Warnings.ca.gov.”

23 The bracketed text may, but is not required to be used. Thunder and its downstream retailers shall
24 have no obligation to reformulate or label Covered Product that entered the stream of commerce
25 prior to the Effective Date or within ninety (90) days after the Effective Date. For purposes of this
26 Settlement Agreement, a “Reformulated Covered Product” is Covered Product that meets the
27 standard set forth in Section 3.2, below.
28

1 3.2 "Reformulated Covered Product" shall mean Covered Product that is BPA-Free
2 when analyzed pursuant to ATS 367 Rev. 0 by LC/MS/MS.

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

10 **4. MONETARY TERMS**

11 4.1 **Civil Penalty.** Thunder shall pay a Civil Penalty of \$3,000.00 pursuant to Health
12 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
13 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
14 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
15 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

16 4.1.1 Within ten (10) business days of the Effective Date, Thunder shall issue
17 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00;
18 and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$750.00. Payment owed
19 to Ferreiro pursuant to this Section shall be delivered to the following payment address:

20 Evan J. Smith, Esquire
21 Brodsky & Smith, LLC
22 Two Bala Plaza, Suite 510
 Bala Cynwyd, PA 19004

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

25 For United States Postal Service Delivery:

26 Mike Gyurics
27 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
28 P.O. Box 4010
 Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

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

9 4.2 **Attorney Fees.** Thunder shall pay \$27,000.00 to Brodsky & Smith, LLC (“Brodsky
10 Smith”) as complete reimbursement for Plaintiff Ferreiro’s attorneys’ fees and costs incurred as a
11 result of investigating, bringing this matter to Thunder’s attention, litigating and negotiating and
12 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
13 Procedure § 1021.5. Payment shall be made within ten (10) business days of the Effective Date
14 and sent to the address for Brodsky & Smith set forth in § 4.1.1, above.

15 4.3 Thunder shall pay the Civil Penalty and attorney fees in §§ 4.1 and 4.2 within ten
16 (10) days of the Effective Date.

17 **5. RELEASE OF ALL CLAIMS**

18 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
19 acting in the public interest, and Thunder, and its parents, shareholders, divisions, subdivisions,
20 subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and
21 assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they directly
22 or indirectly distribute or sell Covered Products, including but not limited to Sears Holdings Corp.,
23 Sears Holding Management Corp., Amazon.com, Inc., manufacturers, suppliers, distributors,
24 wholesalers, customers, licensors, licensees retailers, marketplace hosts, franchisees, and
25 cooperative members (“Downstream Defendant Releasees”), of all claims for violations of
26 Proposition 65 based on exposure to BPA from Covered Products as set forth in the Notice, with
27 respect to any Covered Products manufactured, distributed, or sold by Thunder prior to ninety (90)
28 days after the Effective Date. Compliance with the terms of this Consent Judgment constitutes
compliance with Proposition 65 with regard to the Covered Products.

1 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
2 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
3 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
4 legal action and releases any Thunder, Defendant Releasees, and Downstream Defendant Releasees
5 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
6 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
7 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
8 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
9 from Covered Products manufactured distributed or sold by Thunder or Defendant Releasees. With
10 respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby specifically waives
11 any and all rights and benefits which she now has, or in the future may have, conferred by virtue
12 of the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

17 5.3 Thunder waives any and all claims against Ferreiro, his attorneys and other
18 representatives, for any and all actions taken or statements made (or those that could have been
19 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
20 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
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.
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27
28

1 **7. GOVERNING LAW**

2 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is repealed or
4 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
5 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
6 to the extent that, Covered Products are so affected.

7 **8. NOTICES**

8 8.1 Unless specified herein, all correspondence and notices required to be provided
9 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
10 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
11 by the other party at the following addresses:

12 For Defendant:

13 Gary A. Wexler
14 Thompson Coburn LLP
15 2029 Century Park East
16 19th Floor
Los Angeles, CA 90067

17 And

18 For Ferreiro:

19 Evan Smith
20 Brodsky & Smith, LLC
2 Bala Plaza, Suite 510
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.

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

3 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
4 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
5 and Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
20 the unsuccessful party has acted with substantial justification. For purposes of this Consent
21 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
22 Discovery Act of 1986, Code of Civil Procedure § 2016, et seq.

23 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **13. RETENTION OF JURISDICTION**

26 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.
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1 **14. AUTHORIZATION.**

2 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood and agree to all of the terms and conditions of this
4 document and certifies that he or she is fully authorized by the Party he or she represents to execute
5 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
6 explicitly provided herein each Party is to bear its own fees and costs.
7

8 **AGREED TO:**

AGREED TO:

9
10 Date: 11/6/2018

Date: 11/12/2018

11 By: Anthony Ferrero
12 ANTHONY FERRERO

By: [Signature]
THUNDER GROUP, INC.

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

15
16 Dated: 5-11-18

[Signature]
Judge of Superior Court