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

12 ANTHONY FERREIRO,

13 Plaintiff,

14 v.

15 TRAEGER PELLET GRILLS, LLC,

16 Defendant.

Case No.: RG17881040

CONSENT JUDGMENT

Judge: Ioana Petrou

Dept.: 15

Hearing Date: January 18, 2018

Hearing Time: 9:00 AM

Reservation #: R-1907935

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 Traeger Pellet Grills,
4 LLC (“Traeger” or “Defendant”) with Ferreiro and Defendant collectively referred to as the
5 “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California who seeks
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Traeger is a person in the course
8 of doing 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 Di(2-ethylhexyl) phthalate (DEHP) from Traeger grill covers without providing clear
11 and reasonable exposure warnings under Proposition 65. DEHP is listed under Proposition 65 as a
12 chemical known to the State of California to cause cancer and reproductive toxicity.

13 **1.3 Notices of Violation/Complaint.** On or about March 30, 2017, Ferreiro served
14 Traeger 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 flexible vinyl
17 hoses exposed users in California to DEHP. No public enforcer has brought and is diligently
18 prosecuting the claims alleged in the Notice. On November 2, 2017, Ferreiro filed a complaint in
19 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 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of

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

5 **2. DEFINITIONS**

6 2.1 **Covered Products.** The term "Covered Products" means Traeger grill covers that
7 are manufactured, distributed and/or offered for sale in California by Traeger, and that contain
8 DEHP.

9 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
10 entered as a Judgment of the Court.

11 **3. INJUNCTIVE RELIEF: WARNINGS**

12 3.1 Commencing ninety (90) days after the Effective Date, Traeger shall not
13 manufacture, import, or purchase for sale in California any Covered Product that contains more
14 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by one of the
15 following warning(s):

16 WARNING: This product contains a chemical known to the State of California to
17 cause cancer and birth defects or other reproductive harm.

18 Or

19 WARNING: This product can expose you to chemicals including Di(2-ethylhexyl)
20 phthalate (DEHP), which is known to the State of California to cause cancer and
21 birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

22 Or

23 A warning that complies with Tit. 27, Cal. Code Regs. §25601 *et seq.*

24 Traeger shall have no obligation to provide a warning on Covered Product that entered the stream
25 of commerce prior to ninety (90) days after the Effective Date.

26 3.2 The warning(s) provided pursuant to Section 3.1 shall be affixed to or printed on the
27 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
28 on the packaging or labeling and displayed with such conspicuousness, as compared with other

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.** Traeger shall pay an Civil Penalty of \$3,500.00 pursuant to Health
7 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
8 Safety 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, Traeger shall issue two
12 separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$2,625.00; and
13 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$875.00. 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.** Traeger shall pay \$30,000.00 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 Traeger’s attention, litigating and negotiating and
6 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
7 Procedure section 1021.5. Payment shall be made within ten (10) business days of the Effective
8 Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

9 **5. RELEASE OF ALL CLAIMS**

10 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
11 acting in the public interest, and Traeger, and its parents, shareholders, divisions, subdivisions,
12 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns (“Defendant
13 Releasees”), and all entities from whom they obtain and to whom they directly or indirectly
14 distribute or sell Covered Products, including but not limited to Orchard Supply Company, LLC,
15 Orchard Supply Hardware Stores Corporation, manufacturers, suppliers, distributors, wholesalers,
16 customers, licensors, licensees retailers, franchisees, and cooperative members and their parents,
17 shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, employees, agents
18 and affiliates, successors and assigns (“Downstream Defendant Releasees”), of all claims for
19 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
20 Notice, with respect to any Covered Products manufactured, distributed, or sold by Traeger prior
21 to one hundred twenty (120) days after the Effective Date. Compliance with the terms of this
22 Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

23 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
24 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
25 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
26 legal action and releases any Traeger, Defendant Releasees, and Downstream Defendant Releasees
27 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
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1 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
2 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
3 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
4 from Covered Products manufactured distributed or sold by Traeger or Defendant Releasees. With
5 respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby specifically waives
6 any and all rights and benefits which he now has, or in the future may have, conferred by virtue of
7 the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

13 5.3 Traeger waives any and all claims against Ferreiro, his attorneys and other
14 representatives, for any and all actions taken or statements made (or those that could have been
15 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
16 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
17 and/or with respect to Covered Products.

18 6. INTEGRATION

19 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
20 any and all prior negotiations and understandings related hereto shall be deemed to have been
21 merged within it. No representations or terms of agreement other than those contained herein exist
22 or have been made by any Party with respect to the other Party or the subject matter hereof.

23 7. GOVERNING LAW

24 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
25 California and apply within the State of California. In the event that Proposition 65 is repealed or
26 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
27 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
28 to the extent that, Covered Products are so affected.

1 **8. NOTICES**

2 8.1 Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
4 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
5 by the other party at the following addresses:

6 For Defendant:

7 Renee Rothauge
8 Markowitz Herbold PC
9 1211 SW Fifth Avenue, Suite 3000
 Portland, OR 97204-3730

10 and

11 For Ferreiro:

12 Evan Smith
13 Brodsky & Smith, LLC
 2 Bala Plaza, Suite 510
14 Bala Cynwyd, PA 19004

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

17 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

18 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
19 which shall be deemed an original, and all of which, when taken together, shall constitute one and
20 the same document.

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

23 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
24 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
25 and Defendant agrees it shall support approval of such Motion.

26 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
27 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
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1 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
2 30 days, the case shall proceed on its normal course.

3 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
4 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
5 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
6 its normal course on the trial court's calendar.

7 **11. MODIFICATION**

8 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
9 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
13 the unsuccessful party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certifies that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.
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AGREED TO:

AGREED TO:

Date: _____

Date: 11/1/2017

By: _____

By: 

ANTHONY FERREIRO

TRAEGER PELLET GRILLS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 11/1/17

Date: _____

By: Anthony Ferreiro
ANTHONY FERREIRO

By: _____
TRAEGER PELLET GRILLS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court