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

11 ANTHONY FERREIRO,
12 Plaintiff,
13 v.
14 WEBER-STEPHEN PRODUCTS, LLC,
15 Defendant.

Case No.: RG18906799
CONSENT JUDGMENT
Judge: Dennis Hayashi
Dept.: 518
Hearing Date:
Hearing Time:
Reservation #:

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 Weber-Stephen
4 Products, LLC (“Weber” or “Defendant”) with Ferreiro and Defendant collectively referred to as
5 the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. Weber is a Delaware limited
8 liability company that is alleged to be a person in the course of doing business for purposes of
9 Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq. Weber manufactures, distributes,
10 and/or sells Weber Lighter Cubes (“Lighters Cubes” or “Covered Products”).

11 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
12 individuals to carbon monoxide from its sales of Weber Lighter Cubes without providing clear and
13 reasonable warnings under Proposition 65. Carbon monoxide is listed under Proposition 65 as a
14 chemical known to the State of California to cause reproductive toxicity.

15 1.3 **Notice of Violation/Complaint.** On or about January 8, 2018, Ferreiro served
16 Weber and various public enforcement agencies with documents entitled “60-Day Notice of
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
18 was in violation of Proposition 65 for failing to warn consumers and customers that Weber Lighter
19 Cubes exposed users in California to carbon monoxide. No public enforcer has brought and is
20 diligently prosecuting the claims alleged in the Notices. On May 30, 2018, Ferreiro filed a
21 complaint (the “Complaint”) in the matter.

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

1 1.5 This Consent Judgment resolves claims that are denied and disputed. Defendant
2 denies the material allegations contained in Ferreiro’s Notice and Complaint and maintains that it
3 has not violated Proposition 65. The Parties enter into this Consent Judgment pursuant to a full and
4 final settlement of any and all claims between the Parties for the purpose of avoiding prolonged
5 litigation. Nothing in this Consent Judgment, nor compliance with its terms, shall be construed as
6 an admission by Defendant, or any of its respective officers, directors, shareholders, employees,
7 agents, parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensees,
8 distributors, wholesalers, or retailers, of any fact, finding, issue of law, conclusion of law, violation
9 of law, fault, wrongdoing, or liability, including without limitation, any admission concerning any
10 alleged violation of Proposition 65 or any other material allegation of the Complaint, each and
11 every allegation of which Weber denies, nor may this Consent Judgment, or compliance with it, be
12 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of Weber.
13 However, this section shall not diminish or otherwise affect the obligations, responsibilities, and
14 duties of Defendant under this Consent Judgment.

15 **2. DEFINITIONS**

16 2.1 **Covered Products.** The term “Covered Products” means Weber Lighter Cubes that
17 are manufactured, distributed and/or offered for sale in California by Weber-Stephen Products

18 2.2 **Effective Date.** The term “Effective Date” means the date that Defendant receives
19 notice that this Consent Judgment was entered as a Judgment of the Court.

20 **3. INJUNCTIVE RELIEF: WARNINGS**

21 3.1 No later than ten (10) days after the Effective Date, Covered Products offered for
22 sale in California shall include one of the following warning statements:

- 23 (a) A symbol consisting of a black exclamation point in a yellow equilateral triangle
24 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
25 by the statement “This product can expose you to chemicals including combustion by-
26 products (including soot and carbon monoxide), which are known to the State of California
27 to cause cancer and birth defects or other reproductive harm. For more information, go to
28

1 www.P65Warnings.ca.gov.”; or (b) a warning consisting of a symbol that is a black
2 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
3 word “warning” in bold all capital letters, followed by the statement “Reproductive Harm -
4 www.P65Warnings.ca.gov.”¹

5 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
6 Covered Product’s packaging or labeling, and shall be displayed with such conspicuousness, as
7 compared with other words, statements, or designs as to render it likely to be read and understood
8 by an ordinary individual under customary conditions of purchase or use. A warning may be
9 contained in the same section of the packaging, labeling, or instruction booklet that states other
10 safety warnings, if any, concerning the use of the product and shall be at least the same size as those
11 other safety warnings. Provided, however, that all Covered Products that have been or will have
12 been distributed, shipped, or sold, or otherwise placed in the stream of commerce through and
13 including ten (10) days after the Effective Date of this Consent Judgment are exempt from the
14 provisions of Section 3.1 and are included in the release in Section 5. Further provided that Weber
15 may manufacture or package and sell Covered Products without providing a Proposition 65
16 compliant warning so long as such products are only for sale to consumers located outside of
17 California and Weber does not distribute them into California.

18 3.3 The warning statement exemplar and graphic, attached hereto as Exhibit A, is hereby
19 deemed to be a clear and reasonable warning under, and to fully comply with, Health & Safety
20 §25249.6 and the implementing regulations. Defendant may comply with Section 3.1 by either
21 using the form of warning and graphic in Exhibit A or another form of warning statement that
22 complies with the requirements of Section 3.1.

23 3.4 For internet or catalog sales where Defendant is the retailer selling directly to
24 consumers (the “Retail Seller”), by ten (10) days after the Effective Date, Defendant will provide
25 a clear and reasonable warning in such a manner that it is likely to be read and understood by an
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27 ¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other
28 transmission format is being printed in color for purposes of other language, symbols or designs,
and is printed using the color yellow.

1 ordinary individual prior to the authorization of or actual payment. For internet purchases, if a
2 warning is provided by a clearly marked hyperlink using the word "WARNING" on the product
3 display page or by otherwise prominently displaying the warning to the purchaser prior to
4 completing the purchase, it shall be deemed to have been provided in a manner that is likely to be
5 read and understood by an ordinary individual prior to the authorization of or actual payment,
6 although these are not the only methods for reasonably notifying a consumer before authorization
7 of or actual payment.

8 3.5 For internet or catalog sales, where Defendant is not the retail seller, by September
9 30, 2018 or ten (10) days after the Effective Date (whichever is later), and at least once a year
10 thereafter, Defendant will provide a written notice to each of its direct customers (i.e., distributors,
11 wholesalers and other customers purchasing directly from Defendant) that it knows or reasonably
12 should know are selling the Covered Product via the internet or catalogs, which: (a) states that
13 consumption of the Covered Products may result in an exposure to carbon monoxide; (b) includes
14 the exact name or description of the Covered Product(s) requiring a Clear and Reasonable Warning
15 or specific identifying information for the Covered Product(s) requiring a Clear and Reasonable
16 Warning (such as a Universal Product Code or other identifying designation); (c) includes all
17 necessary warning materials; and (d) informs them of the requirement that a Clear and Reasonable
18 Warning be provided to internet or catalog sales consumers prior to the authorization of or actual
19 payment. Defendant shall obtain written or electronic confirmation from its direct customers of
20 their receipt of the written notice required by this Section 3.5. Acceptable forms of written or
21 electronic confirmation include but are not limited to: return receipt from USPS; proof of delivery
22 from federal express or other overnight delivery service; and the retailer seller's admission of receipt
23 such as by email, regular mail, or other written or electronic means. As long as Defendant complies
24 with this Section 3.5, Defendant and Defendant Releasees (except for any particular Retail Seller[s]
25 who do[es] not provide a Clear and Reasonable Warning to an internet or catalog consumer prior
26 to authorization of or actual payment on or after October 31, 2018 or forty (40) days after the
27 Effective Date, whichever is later), shall be in compliance with this Consent Judgment and shall
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1 not be subject to any penalties for violations of this Consent Judgment if a different Retail Seller
2 does not provide such a Clear and Reasonable Warning to an internet or catalog consumer.

3 **4. MONETARY TERMS**

4 4.1 Within ten (10) days of the Effective Date, Defendant shall pay the total sum of
5 \$27,000 as a settlement payment as further set forth in this Section.

6 4.2 **Civil Penalty.** As a Civil Penalty pursuant to Health and Safety Code section
7 25249.7(b), and in settlement of all claims contained in or referred to in the 60-day Notice,
8 Complaint, and this Consent Judgment, Weber shall pay \$2,000.00 to be apportioned in accordance
9 with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of
10 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
11 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
12 § 25249.12(d).

13 4.1.1 Within ten (10) days of the Effective Date, Weber-Stephen Products shall
14 issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
15 \$1,500.00; and to (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00.
16 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
17 address:

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

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

23 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery:

28 Mike Gyurics

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

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

7 4.3 **Attorneys' Fees.** Within ten (10) days of the Effective Date, and in settlement of all
8 claims that are alleged, or could have been alleged in the Complaint concerning the Covered
9 Products, Weber shall pay \$25,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete
10 reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing
11 this matter to Weber-Stephen Products' attention, litigating and negotiating and obtaining judicial
12 approval of a settlement in the public interest, pursuant to Code of Civil Procedure section 1021.5.

13 **5. RELEASE OF ALL CLAIMS**

14 5.1 As to the Covered Products, this Consent Judgment is a full, final, and binding
15 resolution between Ferreiro acting on his own behalf, and on behalf of the public interest, and
16 Weber and Defendant Releasees (as defined below). Ferreiro, acting on his own behalf, and on
17 behalf of the public interest, forever releases and discharges Weber and its past and present officers,
18 directors, owners, shareholders, employees, agents, attorneys, parent companies, subsidiaries,
19 divisions, affiliates, suppliers, franchisees, licensees, licensors, customers, distributors,
20 wholesalers, retailers, partners, sister companies, and all entities from whom they obtain, and to
21 whom they directly or indirectly distribute or sell, Covered Products, and the predecessors,
22 successors, assigns, affiliates, parent companies and subsidiaries of any of them, including but not
23 limited to Orchard Supply Company, LLC, their parent, and all subsidiaries and affiliates thereof
24 and their respective employees, agents, and assigns ("Defendant Releasees") from all claims and
25 causes of action for any (1) violation of Proposition 65 (including but not limited to the claims
26 made in the Complaint) based on exposure to carbon monoxide from Covered Products as set forth
27 in the Notice, or (2) any other statutory or common law claim based on failure to provide clear and
28 reasonable warnings for exposure to carbon monoxide from the Covered Products, with respect to
any Covered Products manufactured, distributed, or sold by Weber prior to the Effective Date. This

1 Consent Judgment shall have preclusive effect such that no other person or entity, whether
2 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or
3 take any action with respect to any violation of Proposition 65 that was alleged in the Complaint,
4 or that could have been brought pursuant to the Notice against Weber or the Defendant Releasees,
5 including but not limited to (“Proposition 65 Claims”). As to actual or alleged exposures to carbon
6 monoxide from the Covered Products, compliance with the terms of this Consent Judgment resolves
7 any issue now and in the future concerning compliance by Weber and the Defendant Releasees
8 with the requirements of Proposition 65 and constitutes compliance with Proposition 65 with regard
9 to the Covered Products.

10 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
11 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
12 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
13 legal action and releases Weber and Defendant Releasees from any and all manner of actions,
14 causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises,
15 liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature whatsoever,
16 known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to any
17 alleged violations of Proposition 65 related to or arising from Covered Products manufactured,
18 distributed, or sold by Weber or Defendant Releasees. It is possible that other claims not known to
19 the parties, arising out of facts alleged in the 60-Day Notice or the Complaint and relating to the
20 Covered Products will develop or be discovered. Ferreiro on behalf of himself only, and Weber on
21 behalf of itself only, acknowledge that this Consent Judgment is expressly intended to cover and
22 include all such claims up through and including the Effective Date, including all rights of action
23 therefor. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
24 specifically waives any and all rights and benefits which he now has, or in the future may have,
25 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
26 as follows:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
28 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
2 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
3 SETTLEMENT WITH THE DEBTOR.

4 5.3 Weber waives any and all claims against Ferreiro, his attorneys and other
5 representatives, for any and all actions taken or statements made (or those that could have been
6 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to Covered Products.

9 **6. INTEGRATION**

10 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
11 any and all prior negotiations and understandings related hereto shall be deemed to have been
12 merged within it. No representations or terms of agreement other than those contained herein exist
13 or have been made by any Party with respect to the other Party or the subject matter hereof.

14 **7. GOVERNING LAW**

15 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. In the event that Proposition 65 is repealed or
17 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
18 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
19 to the extent that, Covered Products are so affected.

20 **8. NOTICES**

21 8.1 Unless specified herein, all correspondence and notices required to be provided
22 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
23 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
24 by the other party at the following addresses:

25 For Defendant:

26 Scott Hall
27 Coblenz Patch Duffy & Bass LLP
28 One Montgomery Street, Suite 3000
San Francisco, CA 94104

And

1 For Ferreiro:

2 Evan Smith
3 Brodsky & Smith, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

12 **10. SERVICE ON THE ATTORNEY GENERAL**

13 10.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
14 California Attorney General on behalf of the Parties so that the Attorney General may review this
15 Consent Judgment prior to its submittal to the Court for approval. No sooner than forty-five (45)
16 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
17 and in the absence of any written objection by the Attorney General to the terms of the Consent
18 Judgments, the Parties may then submit it to the Court for approval.

19 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
20 **APPROVAL**

21 11.1 Ferreiro agrees to comply with the requirements set forth in California Health &
22 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
23 Defendant agrees it shall support approval of such Motion. Upon entry of the Consent Judgment,
24 Weber and Ferreiro waive their respective rights to a hearing or trial on the allegations of the
25 Complaint.

26 11.2 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,
28 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
30 days, the case shall proceed on its normal course.

1 11.3 If the California Attorney General objects to any term in this Consent Judgment, the
2 Parties shall use their reasonable and diligent best efforts to resolve the concern in a timely manner,
3 and if possible prior to the hearing on the motion.

4 11.4 If the Court approves this Consent Judgment and is reversed or vacated by an
5 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
6 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
7 its normal course on the trial court's calendar.

8 **12. ENFORCEMENT OF JUDGMENT**

9 12.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
10 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
11 Alameda County, giving the notice required by law, enforce the terms and conditions contained
12 herein.

13 12.2 Before filing a motion or order to show cause under Section 12.1, Ferreiro shall
14 provide Weber with at least thirty (30) days written notice of any alleged violations of the terms
15 and conditions contained in this Consent Judgment, and the parties shall meet and confer in good
16 faith in an effort to resolve any such alleged violations. As long as Weber cures any such alleged
17 violations within the thirty (30) day period (or if any such violation cannot practicably be cured
18 within 30 days, it expeditiously initiates a cure within 30 days and completes it as soon as
19 practicable) and Weber provides proof to Plaintiff that the alleged violation(s) was the result of
20 good faith mistake or accident, then Weber shall not be in violation of the Consent Judgment.
21 Weber shall have the ability to avail itself of the benefits of this Section two (2) times per three-
22 year (3-year) period following the Effective Date.

23 **13. MODIFICATION**

24 13.1 This Consent Judgment may be modified only by further stipulation of the Parties
25 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
26 If either party requests or initiates a modification, then it shall meet and confer with the other Party
27 in good faith before filing a motion with the Court seeking to modify it.
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AGREED TO:

AGREED TO:

Date: 8/5/18
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 7/31/2018
By: [Signature]
WEBER-STEPHEN PRODUCTS LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court