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6 ANTHONY FERREIRO

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

10

COUNTY OF ALAMEDA

11

ANTHONY FERREIRO,

Case No.: RG19005658

12

Plaintiff,

**[PROPOSED] CONSENT
JUDGMENT**

13

v.

Judge: The Hon. Ronni MacLaren

14

AUGUST THOMSEN CORP., et al.,

Dept.: 25

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Defendants.

Hearing Date: May 22, 2019

Hearing Time: 9:00 AM

Reservation #: R-2064850

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Complaint filed February 5, 2019

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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 August Thomsen Corp.
4 (“August Thomsen” 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. August Thomsen is alleged to
8 be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to bisphenol A (“BPA”) from Ateco polycarbonate baking mold/cutter sets without
12 providing clear and reasonable warnings under Proposition 65. BPA is listed under Proposition 65
13 as a chemical known to the State of California to cause reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about February 6, 2018, Ferreiro served
15 August Thomsen and various public enforcement agencies with a document entitled “60-Day
16 Notice of Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that
17 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
18 August Thomsen Ateco polycarbonate mold/cutter sets exposed users in California to BPA. No
19 public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
20 February 5, 2019, Ferreiro filed a complaint in the matter against August Thomsen and defendant
21 The Webstaurant Store, Inc.¹ (the “Complaint” or “Action”).

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 Action, that venue is proper in the
24 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
25 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
26 were or could have been raised in the Action based on the facts alleged therein and/or in the Notice.

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28 ¹ On April 3, 2019, defendant The Webstaurant Store, Inc. was dismissed from the Action.

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

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term “Covered Products” means all sizes, models and
11 packaging of August Thomsen Ateco polycarbonate baking mold/cutter sets that are either
12 manufactured, and/or distributed and/or sold or offered for sale in California by August Thomsen,
13 or any entity to whom August Thomsen directly or indirectly distributes the products.

14 2.2 **Effective Date.** The term “Effective Date” means the date Plaintiff serves notice on
15 Defendant this Consent Judgment is entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
18 thereafter, Covered Products that August Thomsen directly either manufactures, and/or imports,
19 and/or distributes, and/or sells, or offers for sale in California shall either: (a) be Reformulated
20 Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning
21 pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated
22 Product” is a Covered Product that is in compliance with the standard set forth in § 3.2 below. The
23 warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

24 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
25 that are BPA-Free when analyzed pursuant to ATS 367 Rev. 0 by LC/MS/MS or other methodology
26 utilized by federal or state government agencies for the purpose of determining BPA migration
27 from a polycarbonate food or drinkware item.
28

1 3.3 **Clear and Reasonable Warning.** As of the Effective Date, and continuing
2 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
3 provided for all Covered Products that Defendant either manufacturers, and/or imports, and/or
4 distributes, and/or sells, or offers for sale in California that is not a Reformulated Product. There
5 shall be no obligation for Defendant or any other person to provide a warning for Covered Products
6 that enter the stream of commerce prior to the Effective Date. The warning shall consist of either
7 the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively, in Defendant’s
8 sole discretion:

9 (a) **Warning.** The “Warning” shall consist of the statement:

10 ⚠ **WARNING:** This product can expose you to chemicals including bisphenol A
11 (BPA), which is known to the State of California to cause birth defects or other
12 reproductive harm. For more information go to www.P65Warnings.ca.gov.

13 (b) **Alternative Warning:** August Thomsen may, but is not required to, use the
14 alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

15 ⚠ **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

16 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
17 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
18 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
19 triangle with a black outline, except that if the sign or label for the Covered Product does not use
20 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
21 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
22 Covered Product, or on the Covered Product’s packaging or labeling, or on a placard, shelf tag,
23 sign or electronic device or automatic process, providing that the warning is displayed with such
24 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
25 read and understood by an ordinary individual under customary conditions of purchase or use. A
26 warning may be contained in the same section of the packaging, labeling, or instruction booklet
27 that states other safety warnings, if any, concerning the use of the product and shall be at least the
28 same size as those other safety warnings.

1 If August Thomsen sells Covered Products via its own proprietary internet website to
2 customers located in California, the warning requirements of this section shall be satisfied if the
3 foregoing warning appears either: (a) on the same web page on which a Covered Product is
4 displayed and/or described; (b) on the same page as the price for the Covered Product; or (c) on
5 one or more web pages displayed to a California purchaser prior to completion of the checkout
6 process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white
7 equilateral triangle may appear adjacent to or immediately following the display, description, price,
8 or checkout listing of the Covered Product, if the warning statement appears elsewhere on the same
9 web page in a manner that clearly associates it with the product(s) to which the warning applies

10 **3.5 Compliance with Warning Regulations.** Defendant and the Covered Products
11 shall be deemed to be in compliance with this Consent Judgment by either adhering to §§ 3.2, or
12 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by
13 OEHHA and in effect after the Effective Date.

14 **4. MONETARY TERMS**

15 **4.1 Civil Penalty.** August Thomsen shall pay \$2,000.00 as a Civil Penalty pursuant to
16 Health and Safety Code § 25249.7(b), to be apportioned in accordance with California Health &
17 Safety Code § 25192, with 75% of the Civil Penalty remitted to the State of California’s Office of
18 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
19 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

20 **4.1.1** Within ten (10) days of the Effective Date, August Thomsen shall issue
21 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00;
22 and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$500.00. Payment
23 owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

24 Evan J. Smith, Esquire
25 Brodsky & Smith, LLC
26 Two Bala Plaza, Suite 510
27 Bala Cynwyd, PA 19004

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

1 For United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 P.O. Box 4010
6 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

15 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, August Thomsen shall
16 pay \$20,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
17 Plaintiff Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this
18 matter to August Thomsen's attention, litigating and negotiating and obtaining judicial approval of
19 a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

20 **5. RELEASE OF ALL CLAIMS**

21 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
22 acting in the public interest, and August Thomsen, and its parents, shareholders, divisions,
23 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
24 successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to
25 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
26 The Webstaurant Store, Inc., manufacturers, suppliers, distributors, wholesalers, customers,
27 licensors, licensees, retailers, marketplace hosts, franchisees, and cooperative members
28 ("Downstream Defendant Releasees"), of all claims for violations of Proposition 65 based on
exposure to BPA from Covered Products, with respect to any Covered Product either manufactured,
distributed, sold or offered for sale by August Thomsen prior to the Effective Date. Compliance
with the terms of this Consent Judgment by Defendant constitutes compliance with Proposition 65

1 with regard to the Covered Products on and after the Effective Date. This Consent Judgment shall
2 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
3 its interests or the public interest shall be permitted to pursue and/or take any action with respect to
4 any violation of Proposition 65 that was alleged in the Notice or Complaint, or that could have been
5 brought pursuant to the Notice against August Thomsen or any Defendant Releasee or the
6 Downstream Defendant Releasees of the Covered Products.

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

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
21 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
22 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
23 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
24 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
25 DEBTOR OR RELEASED PARTY.

26 5.3 August Thomsen waives any and all claims against Ferreiro, his attorneys and other
27 representatives, for any and all actions taken or statements made by Ferreiro and his attorneys and
28 other representatives, whether in the course of investigating claims or otherwise seeking
enforcement of Proposition 65 against it in this matter, and/or with respect to Covered Products up
through the Effective Date.

1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
3 any and all prior negotiations and understandings related hereto shall be deemed to have been
4 merged within it. No representations or terms of agreement other than those contained herein exist
5 or have been made by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. In the event that Proposition 65 is repealed or
9 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
10 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
11 to the extent that, Covered Products are so affected.

12 **8. NOTICES**

13 8.1 Unless specified herein, all correspondence and notices required to be provided
14 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
15 class, or registered or certified mail return receipt requested; or (ii) overnight courier on any party
16 by the other party at the following addresses:

17 For Defendant:

18 Judith M. Praitis
19 Sidley Austin LLP
20 555 West Fifth St.
Los Angeles, CA 90013

Jeffrey Schneider and Douglas Schneider
President and Vice President
August Thomsen Corp.
36 Sea Cliff Avenue
Glen Cove, New York 11542.

21 For Ferreiro:

22 Evan Smith
23 Brodsky & Smith, LLC
2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004.

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
3 which shall be deemed an original, and all of which, when taken together, shall constitute one and
4 the same document.

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

7 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
8 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
9 and Defendant agrees it shall not oppose approval of such Motion.

10 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
11 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
12 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
13 30 days, the case shall proceed on its normal course.

14 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
15 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
16 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
17 its normal course on the trial court's calendar.

18 **11. MODIFICATION**

19 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
20 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

21 **12. ATTORNEY'S FEES**

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

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

13. RETENTION OF JURISDICTION

13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment. This Consent Judgment shall be enforced exclusively by the Parties hereto.

14. AUTHORIZATION

14.1 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 document and certifies that he or she is fully authorized by the Party he or she represents to execute 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: 4/3/19
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: April 3, 2019
By: [Signature]
AUGUST THOMSEN CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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