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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 WALMART, INC.,

15 Defendant.

Case No.: RG19034483

CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: January 7, 2020

Hearing Time: 3:00 PM

Reservation #: R-2131397

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

10 **1.2 Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to carbon monoxide from its sales of Expert Grill charcoal grills without providing a
12 clear and reasonable exposure warning pursuant to Proposition 65.

13 **1.3 Notice of Violation/Complaint.** On or about May 21, 2019, Ferreiro served
14 Walmart, and various public enforcement agencies with documents entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
16 violated Proposition 65 for failing to warn consumers and customers that use of Expert Grill
17 charcoal grills expose users in California to carbon monoxide. No public enforcer has brought and
18 is diligently prosecuting the claims alleged in the Notice. On September 10, 2019, Ferreiro filed a
19 complaint (the “Complaint”) in the matter.

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

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means Expert Grill charcoal grills
10 that are distributed and/or offered for sale in California by Walmart.

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

13 **3. INJUNCTIVE RELIEF: WARNINGS**


14 3.1 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
15 by both Parties, and continuing thereafter, Covered Products that Walmart directly imports,
16 distributes, sells, or offers for sale in California shall be labeled with a clear and reasonable
17 exposure warning pursuant to §§ 3.2 and 3.3, below.

18 3.2 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
19 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
20 this §§ 3.2 and 3.3 must be provided for all Covered Products that Defendant imports, distributes,
21 sells, or offers for sale in California. There shall be no obligation for Defendant to provide a warning
22 for Covered Products that enter the stream of commerce prior to the date this Consent Judgment is
23 signed by both Parties. The warning shall consist of either the **Warning** (although named chemicals
24 may vary) or **Alternative Warning** described in §§ 3.2(a) or (b), respectively:

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

26 ⚠ **WARNING:** This product can expose you to chemicals including carbon black,
27 which is known to the State of California to cause cancer. For more information,
28 go to www.P65Warnings.ca.gov.

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

3  **WARNING:** Cancer - www.P65Warnings.ca.gov.

4 3.3 A **Warning** or **Alternative Warning** provided pursuant to § 3.2 must print the word
5 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
6 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
7 triangle with a black outline, except that if the sign or label for the Covered Product does not use
8 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
9 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
10 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
11 automatic process, providing that the warning is displayed with such conspicuousness, as compared
12 with other words, statements, or designs as to render it likely to be read and understood by an
13 ordinary individual under customary conditions of purchase or use. A warning may be contained
14 in the same section of the packaging, labeling, or instruction booklet that states other safety
15 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
16 those other safety warnings.

17 If Walmart sells Covered Products via an internet website to customers located in
18 California, the warning requirements of this section shall be satisfied if the foregoing warning
19 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
20 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
21 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
22 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
23 to or immediately following the display, description, price, or checkout listing of the Covered
24 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
25 associates it with the product(s) to which the warning applies.

26 3.4 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
27 compliance with this Consent Judgment by either adhering to §§ 3.2 and 3.3 of this Consent
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Judgment or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

3.5 Sell Through Period. Although the Product is now appropriately warned, some older stock may remain in inventory. The parties agree that Products manufactured, distributed, shipped sold or that are otherwise in the stream of commerce prior to the Effective Date shall be subject to the release of liability pursuant to Section 5 of this Consent Judgment, without regard to when the Products were, or are in the future, sold to consumers. As a result, the obligations of Walmart as set forth in this Consent Judgment, including but not limited to Section 3.1-3.4, do not apply to these Products.

4. MONETARY TERMS

4.1 Civil Penalty. Walmart shall pay \$4,500.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within ten (10) business days of the Effective Date, Walmart shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,375.00; and to (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$1,125.00. Ferreiro agrees to provide IRS W-9 forms for each of the following payees under this Consent Judgment within five (5) days after this Consent Judgment is fully executed by the Parties. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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):

For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1 P.O. Box 4010
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 1001 I Street
8 Sacramento, CA 95814

9 shall be mailed to Brodsky & Smith, LLC at the address set forth above as proof of payment to
10 OEHHA.

11 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Walmart shall
12 pay \$33,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
13 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
14 Walmart's attention, litigating and negotiating and obtaining judicial approval of a settlement in
15 the public interest, pursuant to Code of Civil Procedure § 1021.5.

16 **5. RELEASE OF ALL CLAIMS**

17 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
18 acting on his own behalf, and on behalf of the public interest, and Walmart, and its parents,
19 shareholders, members, directors, officers, managers, employees, representatives, agents,
20 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
21 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
22 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
23 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
24 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
25 violations of Proposition 65 based on exposure to carbon monoxide from Covered Products as set
26 forth in the Notice, with respect to any Covered Products distributed, or sold by Walmart prior to
27 the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
28 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
the Complaint, or that could have been brought pursuant to the Notice against Walmart and/or the

1 Downstream Releasees of the Covered Products (“Proposition 65 Claims”). Compliance with the
2 terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
3 Covered Products.

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

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

22 5.3 Walmart waives any and all claims against Ferreiro, his attorneys and other
23 representatives, for any and all actions taken or statements made (or those that could have been
24 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
25 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
26 and/or with respect to Covered Products.

27 6. INTEGRATION

28 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
any and all prior negotiations and understandings related hereto shall be deemed to have been

merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

7. GOVERNING LAW

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of 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 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

8. NOTICES

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

For Defendant:

Thomas L. Van Wyngarden
Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406

And

For Ferreiro:

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

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and 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 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, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 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.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

26 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood and agree to all of the terms and conditions of this
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1 document and certify that he or she is fully authorized by the Party he or she represents to execute
2 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
3 explicitly provided herein each Party is to bear its own fees and costs:
4

5 **AGREED TO:**

AGREED TO:

6 Date: 11/19/19

Date: 10/30/19

7 By: Anthony Ferraro
8 ANTHONY FERRARO

By: Dan J. [Signature]
9 WALMART INC.

10
11 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

12
13 Dated: _____

Judge of Superior Court