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WHITNEY R. LEEMAN, PH.D.

FILED

MAY 09 2017

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Berg, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,
Plaintiff,
v.
ALMAR SALES CO., INC., *et al.*,
Defendants.

Case No. CIV 1600123

**[PROPOSED] JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: May 9, 2017
Time: 1:30 p.m.
Dept.: C
Judge: Hon. Stephen P. Freccero

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In the captioned action, plaintiff Whitney R. Leeman, Ph.D. and defendant Almar Sales Co., Inc., having agreed through their respective counsel that judgment be entered pursuant to the terms of their settlement agreement in the form of a stipulated judgment (“Consent Judgment”), and following this Court’s issuance of an Order approving this Proposition 65 settlement and Consent Judgment on May 9, 2017;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to California Health & Safety Code § 25249.7(f)(4) and California Code of Civil Procedure § 664.6, Judgment is entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit 1**. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

IT IS SO ORDERED.

Dated: MAY 09 2017

STEPHEN P. FRECCERO

JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

1 Clifford A. Chanler, State Bar No. 135534
2 Christopher F. Tuttle, State Bar No. 264545
3 THE CHANLER GROUP
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12 WHITNEY R. LEEMAN, PH.D.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF MARIN
15 UNLIMITED CIVIL JURISDICTION

16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 ALMAR SALES CO., INC., *et al.*,

20 Defendants.

Case No. CIV 1600123

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

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CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D. ("Leeman"
4 or "Plaintiff") and Almar Sales Co., Inc. ("Almar" or "Defendant"), with Leeman and Almar each
5 individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 Leeman is an individual residing in California who seeks to promote awareness of exposures
8 to toxic chemicals and to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Leeman alleges that Almar employs ten or more individuals and is a "person in the course of
12 doing business" for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
13 and Safety Code section 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Leeman alleges that Almar manufactures, imports, sells, and/or distributes for sale in
16 California, certain vinyl/PVC charms that contain di(2-ethylhexyl) phthalate ("DEHP") without first
17 providing a Proposition 65 warning. DEHP is listed pursuant to Proposition 65 as a chemical known
18 to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC charms containing DEHP that
21 are manufactured, imported, sold, and/or distributed for sale in California by Almar including, but not
22 limited to, the *Expressions 4 Pc Accessory Charms, EXV1078/4X, YC-1403-8182, UPC #0 24576*
23 *88852 7*, hereinafter the "Products."

24 **1.6 Notices of Violation**

25 On August 20, 2015, Leeman served Almar and the requisite public enforcement agencies
26 with a "60-Day Notice of Violation" ("Notice") alleging that Almar violated Proposition 65 by
27 failing to warn its customers and consumers in California that the Products expose users to DEHP.

28

To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.7 Complaint

On January 12, 2016, Leeman filed the instant action ("Complaint"), naming Almar as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

The Parties enter into this Consent Judgment as a full and final settlement of all claims that were raised in the Notice and Complaint, or that could have been raised in the Notice and Complaint, arising out of the facts and conduct alleged therein. Almar denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it has manufactured, imported, sold, and/or distributed for sale in California, including the Products, have been and are in compliance with all laws, and are completely safe for their intended use. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Almar's obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Almar as to the allegations contained in the Complaint, that venue is proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" means the date on which the Court approves this Consent Judgment, including any unopposed tentative ruling granting approval of this Consent Judgment.

2. **INJUNCTIVE RELIEF: REFORMULATION**

1 Commencing on the Effective Date and continuing thereafter, Almar shall only manufacture
2 or distribute for sale in California "Reformulated Products." For purposes of this Consent Judgment,
3 "Reformulated Products" are products whose accessible vinyl/PVC components contain less than
4 1,000 parts per million (0.1%) DEHP content when analyzed pursuant to U.S. Environmental
5 Protection Agency testing methodologies 3580A and 8270C or other equivalent methodologies
6 utilized by federal or state government agencies for the purpose of determining DEHP content in a
7 solid substance. Leeman agrees that Products meeting this reformulation standard do not require a
8 warning under Proposition 65 for DEHP.

3. **MONETARY SETTLEMENT TERMS**

3.1 **Civil Penalty Payment**

10 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
11 this Consent Judgment, Almar shall pay \$4,000 in civil penalties. The civil penalty payment shall be
12 allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five
13 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
14 ("OEHHA"), and twenty-five percent (25%) of the funds remitted to Leeman. Almar shall provide
15 its payment in two checks for the following amount made payable to: (a) "OEHHA" in the amount of
16 \$3,000; and (b) "Whitney Leeman, Client Trust Account" in the amount of \$1,000. Leeman's
17 counsel shall be solely responsible for delivering the designated penalty payment made under this
18 Consent Judgment to OEHHA.

3.2 **Reimbursement of Attorneys' Fees and Costs**

21 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
22 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
23 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
24 other settlement terms had been finalized, Almar expressed a desire to resolve Leeman's fees and
25 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Leeman
26 and her counsel under general contract principles and the private attorney general doctrine codified at
27 California Code of Civil Procedure section 1021.5 for all investigative, expert and other costs, all

1 attorney's fees, and any other work performed through the Court's approval of this Consent
2 Judgment. Almar shall deliver a check to "The Chanler Group" in the amount of \$28,000, pursuant
3 to the payment procedures in Section 3.3 below, and to the address found in Section 3.4 below.

3 **3.3 Payments Held in Trust**

4 All payments due under this Consent Judgment shall be delivered to Almar's counsel of
5 record within ten (10) days of the date that this Consent Judgment is fully executed by the Parties,
6 and held in trust by Almar's counsel until the Court grants the motion for approval of this Consent
7 Judgment. Almar's counsel shall confirm receipt of settlement funds in writing to Leeman's counsel
8 and, thereafter, hold the amounts paid in trust until the Effective Date. Within five (5) business days
9 of the Effective Date, Almar's counsel shall tender to Plaintiff's counsel the civil penalty payments
10 and attorneys' fee and costs reimbursements required by Sections 3.1. and 3.2.

11 **3.4 Payment Address**

12 All payments required by this Consent Judgment shall be delivered to:

13 The Chanler Group
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710

18 **4. CLAIMS COVERED AND RELEASED**

19 **4.1 Leeman's Public Release of Proposition 65 Claims**

20 Leeman, acting on her own behalf and in the public interest, releases Almar and its parents,
21 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
22 attorneys ("Releasees") and each entity to whom they directly or indirectly distribute or sell the
23 Products including, but not limited to, their downstream distributors, wholesalers, customers,
24 retailers, franchisers, resellers, cooperative members, licensors and licensees ("Downstream
25 Releasees") from all claims for actual or alleged violations of Proposition 65 asserted in the public
26 interest in her Notice and Complaint related to Products manufactured, distributed and/or sold by
27 Almar up through the Effective Date based on the alleged failure to provide Proposition 65
28 warnings concerning alleged exposures to DEHP. Compliance with the terms of this Consent
Judgment constitutes compliance with Proposition 65 with respect to any actual or alleged

exposures to DEHP from the Products manufactured, imported, distributed and/or sold by Almar after the Effective date.

4.2 Leeman's Individual Release of Claims

Leeman, in her individual capacity only and not in her representative capacity, also provides a release to Almar, Releasees, and Downstream Releasees which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, penalties, attorneys' fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising from the Products manufactured, distributed and/or sold by Almar before the Effective Date.

4.3 Almar's Release of Leeman

Almar, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her attorneys and other representatives, for any and all actions taken or statements made by Leeman and her attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.4 Mutual Waiver of California Civil Code Section 1542

The Parties each acknowledge that they are familiar with Section 1542 of the Civil Code, which provides as follows:

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

The Parties, each on their own behalf, and on behalf of their past and current agents, representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon them by the provisions of Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

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5. **COURT APPROVAL**

This Consent Judgment is not effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved and entered by the Court within one year after it has been fully executed by the Parties.

6. **SEVERABILITY**

If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

7. **GOVERNING LAW**

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 the Products, then Almar may provide written notice to Leeman of any asserted change in the law, and shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

8. **NOTICE**

Unless specified herein, all correspondence and notice required by this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

For Almar:

JACK Ashkenazie EVP
~~Raymond Ashkenazie, CEO~~
Almar Sales Co., Inc.
320 5th Avenue, 3rd Floor
New York, NY 10001

Copy to:

James Robert Maxwell, Esq.
Rogers Joseph O'Donnell
5311 California Street, 10th Floor
San Francisco, CA 94104

For Leeman:

The Chanler Group
Attention: Prop 65 Coordinator
2560 Ninth Street
Parker Plaza Suite 214
Berkeley CA, 94710

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

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2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 This Consent Judgment may be executed in counterparts and by facsimile or portable
4 document format (PDF) signature, each of which shall be deemed an original, and all of which,
5 when taken together, shall constitute one and the same document.

6 **10. ENTIRE AGREEMENT**

7 This Consent Judgment contains the sole and entire agreement and understanding of the
8 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
9 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein. No
10 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
11 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of
12 this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions
13 hereof whether or not similar, nor shall such waiver constitute a continuing waiver unless set forth
14 in writing between the Parties.

15 The Parties, including their counsel, have participated in the preparation of this Consent
16 Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent
17 Judgment was subject to revision and modification by the Parties and has been accepted and
18 approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
19 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
20 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
21 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
22 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
23 regard, the Parties hereby waive California Civil Code § 1654.

24 **11. POST EXECUTION ACTIVITIES**

25 Leeman agrees to comply with the reporting form requirements referenced in Health and
26 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and
27 Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the

1 settlement. Leeman and her counsel have sole responsibility for preparing and filing the motion to
2 approve this Consent Judgment. In furtherance of obtaining such approval, Leeman and Almar
3 agree to mutually employ their best efforts, and those of their counsel, to support the entry of this
4 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.

5 **12. MODIFICATION**

6 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
7 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or
8 application of any Party, and the entry of a modified consent judgment thereon by the Court.

9 **13. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and acknowledge that they have read, understood, and agree to all of the terms
12 and conditions contained herein.


13 **AGREED TO:**

14 **AGREED TO:**

15 Date: 3/7/2017

16 Date: Feb 17, 2017

17 By: 
18 WHITNEY R. LEEMAN, PH.D.

19 By: 
20 Kenneth Levine, Chief Financial Officer
21 ALMAR SALES CO., INC.