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9 DR. WHITNEY R. LEEMAN

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION

13 DR. WHITNEY R. LEEMAN,
14 Plaintiff,

15 v.

16 MIDWEST PRODUCTS CO., INC.; and DOES
17 1-150, inclusive,
18 Defendants.

Case No. RG 14726431

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Dr. Whitney R. Leeman and Midwest Products Co., Inc.**

3 This Consent Judgment is entered into by and between Dr. Whitney R. Leeman
4 (“Leeman”) and Midwest Products Co., Inc. (“Midwest”), with Leeman and Midwest collectively
5 referred to as the “Parties” and each individually referred to as a “Party.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Midwest employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Midwest manufactures, distributes, sells, and/or offers for sale in
16 California tools with vinyl/PVC grips containing di(2-ethylhexyl)phthalate (“DEHP”) without the
17 requisite Proposition 65 health hazard warning. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to California to cause birth defects and other reproductive harm if human
19 exposure exceeds certain thresholds.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as tools with
22 vinyl/PVC grips containing DEHP including, but not limited to, the following: (1) the *Milestones*
23 *Amazing Mosaics Tile Nippers*, UPC # 6 01950 25157 5; (2) the *Midwest Products Easy Cutter*,
24 #1126, UPC #0 91157 01126 1; and (3) the *Bead Retreat Chain Nose Pliers*, #TH-CN, UPC #8
25 14252 01181 9, which were manufactured, distributed, sold and/or offered for sale in California
26 by Midwest, hereinafter referred to as the “Products.”

1 **1.6 Notice of Violation**

2 On or about November 15, 2013, Leeman served Midwest and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (“Notice”), alleging that
4 Midwest was in violation of Proposition 65 for failing to warn its customers and consumers in
5 California that the Products exposed users to DEHP. To the best of the Parties’ knowledge, no
6 public enforcer has commenced and is diligently prosecuting the allegations set forth in the
7 Notice.

8 **1.7 Complaint**

9 On or about May 22, 2014, Leeman, who was and is acting in the interest of the general
10 public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court in and for
11 the County of Alameda against Midwest and Does 1 through 150, alleging, *inter alia*, violations
12 of Proposition 65 based on the alleged exposures to DEHP contained in the Products sold by
13 Midwest in the State of California.

14 **1.8 No Admission**

15 Midwest denies the material, factual, and legal allegations contained in the Notice and
16 Complaint and maintains that all of the products it has manufactured, distributed, sold and/or
17 offered for sale in California, including the Products, have been, and are, in compliance with all
18 laws. Nothing in this Consent Judgment shall be construed as an admission by Midwest of any
19 fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this
20 Consent Judgment constitute or be construed as an admission by Midwest of any fact, finding,
21 conclusion of law, issue of law, or violation of law, such being specifically denied by Midwest.
22 This Section shall not, however, diminish or otherwise affect Midwest’s obligations,
23 responsibilities, and duties under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Midwest as to the allegations contained in the Complaint, that venue is proper
27
28

1 in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions
2 of this Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this
5 Consent Judgment is approved by the Court.

6 **2. INJUNCTIVE RELIEF: REFORMULATION**

7 **2.1 Reformulation Standards and Commitment**

8 Commencing on the Effective Date and continuing thereafter, Midwest shall only
9 manufacture, distribute, ship, sell, or offer to ship for sale in California Products that are
10 “Reformulated Products.” For purposes of this Consent Judgment, “Reformulated Products” shall
11 mean Products that contain no more than 1,000 parts per million (0.1%) DEHP in each Accessible
12 Component when analyzed pursuant to EPA testing methodologies 3580A and 8270C, or
13 equivalent methodologies utilized by state or federal agencies for the purpose of determining
14 DEHP content in a solid substance. For purposes of this Consent Judgment, “Accessible
15 Components” shall mean a component of a Product that can be touched by a person during
16 normal, intended and foreseeable use of the Product.

17 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

18 In settlement of all the claims referred to in this Consent Judgment, Midwest shall pay a
19 total of \$11,500 in civil penalties in accordance with this Section. Each penalty payment will be
20 allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) & (d), with 75%
21 of the funds remitted to the California Office of Environmental Health Hazard Assessment
22 (“OEHHA”) and the remaining 25% of the penalty remitted to Leeman, as follows:

23 **3.1 Initial Civil Penalty**

24 Midwest shall pay an initial civil penalty of \$3,500 on or before June 1, 2014. Midwest
25 shall issue two separate checks for the initial civil penalty payment to be held in trust for: (a)
26 “OEHHA” in the amount of \$2,625; and (b) “Dr. Whitney R. Leeman, Client Trust Account” in
27 the amount of \$875.
28

1 **3.2 Final Civil Penalty**

2 Midwest shall pay a final civil penalty of \$8,000 on or before October 15, 2014, the final
3 civil penalty shall be waived in its entirety, however, if, no later than October 1, 2014, an officer
4 of Midwest provides Leeman with written certification that, as of the date of such certification
5 and continuing into the future, (a) Midwest has met the reformulation standard specified in
6 Section 2.1 above, such that all Products manufactured, distributed, shipped, sold and/or offered
7 to ship for sale in California by Midwest are Reformulated Products or (b) Midwest has ceased
8 distributing, selling, and/or offering the Products for sale in California entirely. The certification
9 in lieu of a final civil penalty payment provided by this Section is a material term, and time is of
10 the essence. If Midwest fails to make the written certification by October 1, 2014, Midwest shall
11 issue two separate checks for its final civil penalty payments to: (a) "OEHHA" in the amount of
12 \$6,000; and (b) "Whitney R. Leeman, Client Trust Account" in the amount of \$2,000.

13 **3.3 Payment Procedures**

14 **3.3.1 Issuance of Payments.** Payments shall be delivered as follows:

15 (a) All payments owed to Leeman, pursuant to Sections 3.1 and 3.2, shall be
16 delivered to the following payment address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 (b) All payments owed to OEHHA, pursuant to Sections 3.1 and 3.2, shall
23 be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

24 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

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

7 With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address
8 set forth above in 3.3.1(a), as proof of payment to OEHHA.

9 **4. REIMBURSEMENT OF FEES AND COSTS**

10 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
11 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
12 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
13 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
14 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
15 due to Leeman and her counsel under general contract principles and the private attorney general
16 doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through
17 the mutual execution of this agreement. Midwest shall pay \$30,500 for fees and costs incurred as
18 a result of investigating, bringing this matter to Midwest's attention, and negotiating a settlement
19 in the public interest. Midwest shall issue a check to be held in trust by counsel in the amount of
20 \$30,500 on or before June 1, 2014.

21 **5. CLAIMS COVERED AND RELEASED**

22 **5.1 Leeman's Public Release of Proposition 65 Claims**

23 Leeman acting on her own behalf and in the public interest releases Midwest, its parents,
24 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
25 attorneys, and each entity to whom Midwest directly or indirectly distributes or sells Products,
26 including but not limited to downstream distributors, wholesalers, customers, retailers,
27 franchisees, cooperative members, licensors, and licensees ("Releasees") from all claims for
28 violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the

1 Products. Compliance with the terms of this Consent Judgment constitutes compliance with
2 Proposition 65 with respect to exposures to DEHP from the Products.

3 **5.2 Leeman's Individual Release of Claims**

4 Leeman also, in her individual capacity only and *not* in her representative capacity,
5 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
6 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
7 claims, liabilities and demands of Plaintiff of any nature, character or kind, whether known or
8 unknown, suspected or unsuspected, limited to and arising out of any violation of Proposition 65
9 regarding the failure to warn about exposure to DEHP in the Products manufactured, distributed,
10 sold and/or offered for sale by Releasees.

11 **5.3 Midwest's Release of Leeman**

12 Midwest on behalf of itself, its past and current agents, representatives, attorneys,
13 successors, and/or assignees, hereby waives any and all claims against Leeman, her attorneys and
14 other representatives, for any and all actions taken or statements made (or those that could have
15 been taken or made) by Leeman and her attorneys and other representatives, whether in the course
16 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter
17 with respect to the Products.

18 **6. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved and entered by the Court and
20 shall be null and void if, for any reason, it is not approved and entered by the Court within one
21 year after it has been fully executed by all Parties, in which event any monies that have been
22 provided to Leeman or her counsel pursuant to Section 3 and 4 above, shall be refunded within
23 fifteen (15) days after receiving written notice from Midwest that the one-year period has
24 expired.

1 **7. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any provision is held by a court
3 to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely
4 affected.

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of California and apply
7 within California. In the event that Proposition 65 is repealed or is otherwise rendered
8 inapplicable by reason of law generally, or as to the Products, then Midwest may provide written
9 notice to Leeman of any asserted change in the law, and shall have no further obligations pursuant
10 to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

11 **9. NOTICES**

12 Unless specified herein, all correspondence and notices required to be provided pursuant
13 to this Consent Judgment shall be sent by: (i) personal delivery; (ii) first-class, registered or
14 certified mail, return receipt requested; or (iii) overnight courier on any Party by the other Party at
15 the following addresses:

16 To Midwest:	To Leeman:
17 Jon Zaloum, President	Proposition 65 Coordinator
18 Midwest Products Co., Inc.	The Chanler Group
19 400 South Indiana Street	2560 Ninth Street
20 Hobbart, IN 46342	Parker Plaza, Suite 214
	Berkeley, CA 94710-2565

21 With a copy to:
22 Brandee L. Caswell, Esq.
23 Faegre Baker Daniels LLP
24 3200 Wells Fargo Center
25 1700 Lincoln Street
26 Denver, CO 80203

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

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

4 This Consent Judgment may be executed in counterparts and by facsimile or portable
5 document format (“ .pdf”) signature, each of which shall be deemed an original, and all of which,
6 when taken together, shall constitute one and the same document. A facsimile or .pdf signature
7 shall be as valid as the original.

8 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

9 Leeman and her attorneys agree to comply with the reporting form requirements
10 referenced in California Health & Safety Code § 25249.7(f).

11 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

12 The Parties agree to mutually employ their, and their counsel’s, reasonable best efforts to
13 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
14 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
15 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
16 Consent Judgment, which Leeman shall file, and which Midwest shall not oppose. If any third
17 party objection to the noticed motion is filed, Leeman and Midwest shall work together to file a
18 joint reply and appear at any hearing before the Court. If the Court does not approve the motion
19 to approve this Consent Judgment, and the Parties choose not to pursue a modified Consent
20 Judgment within 30 days of said denial, or in the event that the Court approves this Consent
21 Judgment and any person successfully appeals that approval, all payments made pursuant to this
22 Consent Judgment will be returned to Midwest within fifteen (15) days of an order reversing or
23 vacating the approval.

24 **13. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
26 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
27 of any Party and entry of a modified Consent Judgment by the Court.
28

1 **14. ENTIRE AGREEMENT**

2 This Consent Judgment contains the sole and entire agreement and understanding of the
3 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments, and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any Party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
7 deemed to exist or to bind any of the Parties.

8 **15. AUTHORIZATION**

9 The undersigned are authorized to execute this Consent Judgment on behalf of their
10 respective parties and have read, understood, and agree to all of the terms and conditions of this
11 Consent Judgment.

12 **AGREED TO:**

AGREED TO:

13
14 Date: 5/30/14

Date: _____

15
16 By: Whitney R. Leeman
17 Dr. Whitney R. Leeman

By: _____
Jon Zaloum, President
Midwest Products Co., Inc.

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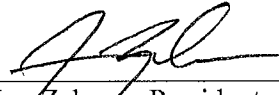
12 **AGREED TO:**

AGREED TO:

13
14 Date: _____

Date: May 16, 2014

15
16 By: _____
17 Dr. Whitney R. Leeman

By:  _____
Jon Zaloun, President
Midwest Products Co., Inc.