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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
15

16 WHITNEY LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 THE WISE CO., INC.; DOES 1-150, inclusive,

20 Defendants.
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Case No. 114CV267501

**[PROPOSED] CONSENT
JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Dr. Whitney R. Leeman, Ph.D. and The Wise Co., Inc.**

3 This Consent Judgment is entered into by and between plaintiff Whitney Leeman, Ph.D.
4 ("Leeman") and defendant The Wise Co., Inc. ("Wise"), with Leeman and Wise collectively
5 referred to as "parties" and each individually as a "party."

6 **1.2 Dr. Whitney R. Leeman, Ph.D.**

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

10 **1.3 The Wise Co., Inc.**

11 Wise 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 has alleged that Wise has manufactured, imported, distributed and/or sold seats with
16 vinyl/PVC upholstery which contain di(2-ethylhexyl)phthalate ("DEHP") without the requisite
17 Proposition 65 warnings. DEHP and other phthalates including, but not limited to, butyl benzyl
18 phthalate ("BBP"), di-n-butyl phthalate ("DBP"), di-isodecyl phthalate ("DIDP"), and di-n-hexyl
19 phthalate ("DnHP") are listed under Proposition 65 as chemicals known the State of California to
20 cause birth defects and other reproductive harm. Diisononyl phthalate ("DINP) has been listed
21 under Proposition 65 as a chemical known to the State of California to cause cancer. (Collectively,
22 DEHP, BBP, DBP, DIDP, DnHP, and DINP are referred to herein as the "Listed Chemicals.")

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are seats with vinyl/PVC
25 upholstery, including, but not limited to, *Wise Professional Seating Fishing Chair WD1062PLS-*
26 *933, CH-12-12 UPC # 0 85211 75476 8*, manufactured, imported, distributed, sold and/or offered
27 for sale by Wise, directly or through others, to consumers in California, collectively referred to
28 hereinafter as the "Covered Products."

1 **1.6 Notice of Violation**

2 On or about February 26, 2014, Leeman served Wise and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the
4 recipients with notice that Wise was in violation of Proposition 65 for failing to warn consumers
5 that its seats with vinyl/PVC upholstery exposed users in California to DEHP. No public enforcer
6 has diligently prosecuted the allegations set forth in the Notice.

7 **1.7 No Admission**

8 Wise denies the material, factual, and legal allegations contained in Leeman’s Notice and
9 maintains that all Covered Products it has sold and distributed in California have been and are in
10 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by
11 Wise of any fact, finding, issue of law, or violation of law, nor shall compliance with this
12 Settlement Agreement constitute or be construed as an admission by Wise of any fact, finding,
13 conclusion, issue of law, or violation of law, such being specifically denied by Wise. However, this
14 section shall not diminish or otherwise affect Wise’s obligations, responsibilities, and duties under
15 this Consent Judgment.

16 **1.8 Execution and Effective Dates**

17 For purposes of this Consent Judgment, the term “Execution Date” shall refer to the date on
18 which this Consent Judgment has been fully executed by the Parties. The term “Effective Date”
19 shall mean the date on which the Court approves this Consent Judgment, including any unopposed
20 Tentative Ruling.

21 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

22 **2.1 Reformulation Standards**

23 “Reformulated Products” are defined as those Covered Products that are Phthalate Free. For
24 purposes of this Consent Judgment, “Phthalate Free” shall mean Covered Products that yield less
25 than or equal to 1,000 parts per million (“ppm”) each of DEHP, BBP, DBP, DIDP, DnHP, and
26 DINP when analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent
27 methodologies utilized by federal or state agencies for the purpose of determining phthalate content
28 in a solid substance.

1 **2.2 Reformulation or Warning Commitment**

2 All Covered Products manufactured or caused to be manufactured by Wise on or after the
3 Effective Date shall either be Phthalate Free, or shall carry the appropriate Proposition 65 health
4 hazard warning as specified in Section 2.3 below.

5 **2.3 Product Warnings**

6 Wise shall provide clear and reasonable warnings for all Covered Products it manufactures
7 or causes to manufacture on or after the Effective Date as set forth in subsections 2.3(a) and (b) to
8 the extent that they do not qualify as Reformulated Products. Each warning shall be prominently
9 placed with such conspicuousness as compared with other words, statements, designs, or devices as
10 to render it likely to be read and understood by an ordinary individual under customary conditions
11 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
12 understands to which *specific* Covered Product the warning applies, so as to minimize the risk of
13 consumer confusion.

14 **(a) Product Labeling.** Wise shall affix a warning to the packaging, labeling, or
15 directly on each Covered Product provided for sale in retail outlets in California that states:

16 **WARNING:** This product contains DEHP, a chemical known to
17 the State of California to cause cancer, and birth defects and
18 other reproductive harm.

18 For Covered Products that also contain one or more other Listed Chemicals, the warning shall state:

19 **WARNING:** This product contains DEHP or other chemicals known to
20 the State of California to cause cancer, and birth defects and
21 other reproductive harm.

22 **(b) Mail Order Catalog and Internet Sales.** In the event that, after the Effective Date,
23 Wise sells Covered Products via mail order catalog and/or the internet to consumers located in
24 California that are not Reformulated Products, Wise shall provide warnings for such Covered
25 Products. Warnings given in the mail order catalog or on the internet shall identify the *specific*
26 Covered Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

27 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order
28 catalog shall be in the same type size or larger than the Covered Product description text within the

1 catalog. The following warning shall be provided on the same page and in the same location as the
2 display and/or description of the Covered Product:

3 **WARNING:** This product contains DEHP, a chemical
4 known to the State of California to cause
cancer, and birth defects and other reproductive harm.

5 For Covered Products that also contain one or more other Listed Chemicals, the warning shall state:

6 **WARNING:** This product contains DEHP or other chemicals known to
7 the State of California to cause cancer, and birth defects and
other reproductive harm.

8 Where it is impracticable to provide the warning on the same page and in the same location
9 as the display and/or description of the Covered Product, Wise may utilize a designated symbol to
10 cross reference the applicable warning and shall define the term "designated symbol" with the
11 following language on the inside of the front cover of the catalog or on the same page as any order
12 form for the Covered Product(s):

13 **WARNING:** Certain products identified with this symbol ▼
14 and offered for sale in this catalog contain DEHP,
a chemical known to the State of California to
15 cause cancer, and birth defects and other reproductive harm.

16 For Covered Products that also contain one or more other Listed Chemicals, the warning shall state:

17 **WARNING:** Certain products identified with this symbol ▼
18 and offered for sale in this catalog contain
DEHP or other chemicals known to the State of
19 California to cause cancer, and birth defects and
other reproductive harm.

20 The designated symbol must appear on the same page and in close proximity to the display
21 and/or description of the Covered Product. On each page where the designated symbol appears,
22 Wise must provide a header or footer directing the consumer to the warning language and definition
23 of the designated symbol.

24 (ii) **Internet Website Warning.** In the event that Wise sells Covered Products
25 to California consumers via the internet, a warning shall be given in conjunction with the sale of
26 such Covered Products. The warning shall appear either: (a) on the same web page on which a
27 Covered Product is displayed; (b) on the same web page as the order form for a Covered Product;
28 (c) on the same page as the price for any Covered Product; or (d) on one or more web pages

1 displayed to a purchaser during the checkout process. The following warning statement shall be
2 used and shall appear in any of the above instances adjacent to or immediately following the
3 display, description, or price of the Covered Product for which it is given in the same type size or
4 larger than the Covered Product description text:

5 **WARNING:** This product contains DEHP, a chemical known
6 to the State of California to cause cancer, and birth defects
and other reproductive harm.

7 For Covered Products that also contain one or more other Listed Chemicals, the warning shall state:

8 **WARNING:** This product contains DEHP or other chemicals
9 known to the State of California to cause cancer,
and birth defects and other reproductive harm.

10 Alternatively, the designated symbol may appear adjacent to or immediately following the
11 display, description, or price of the Covered Product for which a warning is being given, provided
12 that the following warning statement also appears elsewhere on the same web page, as follows:

13 **WARNING:** Products identified on this page with the
14 following symbol ▼ contain DEHP, a
15 chemical known to the State of California to
cause cancer, and birth defects or other
reproductive harm.

16 For Covered Products that also contain one or more other Listed Chemicals, the warning shall state:

17 **WARNING:** Products identified on this page with the
18 following symbol ▼ containing DEHP or
19 other chemicals known to the State of
California to cause cancer, and birth defects
or other reproductive harm.

20 **3. MONETARY PAYMENTS**

21 **3.1 Civil Penalty Payment**

22 In settlement of all the claims referred to in this Consent Judgment, Wise shall pay a total of
23 \$13,800 in civil penalties in accordance with this Section. The civil penalty payment will be
24 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of
25 the funds remitted to the California Office of Environmental Health Hazard Assessment
26 (“OEHHA”) and the remaining 25% of the penalty remitted to Leeman. The civil penalty payment
27 shall be made within five calendar days of the date it is due and be delivered to the addresses listed
28 in Section 3.3 below.

1 **3.1.1 Payment Schedule**

2 Within five days of the mutual execution of this Consent Judgment, Wise shall issue a check
3 for its civil penalty payment in the amount of \$13,800 to the “Morrison & Foerster LLP Client
4 Trust.” Wise or its counsel shall provide The Chanler Group with written confirmation within five
5 days of receipt that the funds have been deposited in this trust account. Within five days following
6 the date that this Consent Judgment is approved by the Court, Wise shall direct Morrison & Foerster
7 to issue and send two separate checks for the civil penalty payment to: (a) “OEHHA” in the amount
8 of \$10,350; and (b) “Whitney Leeman, Client Trust Account” in the amount of \$3,450 pursuant to
9 Section 3.3.1(a) below.

10 **3.2 Reimbursement of Fees and Costs**

11 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
13 this fee issue to be resolved after the material terms of the agreement had been settled. Leeman
14 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
15 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
16 Leeman and her counsel under general contract principles and the private attorney general doctrine
17 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
18 execution of this agreement. Under these legal principles, Wise shall reimburse Leeman’s counsel
19 for fees and costs incurred as a result of investigating, bringing this matter to its attention, and
20 negotiating a settlement and obtaining approval and entry of this Consent Judgment. More
21 specifically, as an accord and satisfaction, Wise shall, within five (5) days of the Execution Date,
22 issue a check to the “Morrison & Foerster LLP Trust Account” in the amount of \$36,000 to be held
23 in trust for The Chanler Group. Wise or its counsel shall provide The Chanler Group with written
24 confirmation within five days of receipt that the funds have been deposited in this trust account.
25 Within five calendar days of the Effective Date, Wise shall direct its trustee to issue and send a
26 check payable to “The Chanler Group” to the address found in Section 3.3.1(a) below.

1 **3.3 Payment Procedures**

2 **3.3.1 Issuance of Payments**

3 All payments shall be delivered within five (5) business days of the Effective Date
4 as follows:

5 (a) All payments owed to Leeman and her counsel shall be delivered to the
6 following address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 (b) All payments owed to OEHHA shall be delivered directly to OEHHA
13 (Memo line "Prop. 65 Penalties") at one of the following address:

14 For United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010
19 Sacramento, CA 95812-4010

20 For Non-United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 1001 I Street
25 Sacramento, CA 95814

26 **3.3.2 Proof of Payment to OEHHA.** For any payment required to be made to
27 OEHHA under Section 3, Wise agrees to have its counsel provide a copy of the checks to The
28 Chanler Group, simultaneous with when the check is mailed to OEHHA, at the address set forth
above in Section 3.3.1(a) as proof that such payment has been rendered.

3.3.3 Court Approval; Reimbursement. If the Court does not approve the
Consent Judgment within twelve (12) months of the Execution Date, all funds tendered into any

1 trust account for purposes of the settlement of this action, shall be refunded in full within thirty (30)
2 days of the Execution Date and the terms of this Consent Judgment shall be deemed null and void.

3 **4. CLAIMS COVERED AND RELEASED**

4 **4.1 Leeman's Public Release of Proposition 65 Claims**

5 In consideration of the promises and agreements herein contained, Leeman on behalf of
6 herself and in the public interest, hereby releases Wise, its directors, officers, employees, agents and
7 attorneys ("Releasees") and each of any of their downstream distributors, dealers, customers,
8 purchasers, and retailers ("Downstream Defendant Releasees") from all claims for violations of
9 Proposition 65 arising up through the Effective Date based on exposure to DEHP from Covered
10 Products as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
11 compliance with Proposition 65 with respect to exposures to DEHP in Covered Products.

12 **4.2 Leeman's Individual Release of Claims**

13 Leeman, in her individual capacity only and *not* in her representative capacity, also provides
14 a release to Wise, its Releasees, and the Downstream Defendant Releasees as to Proposition 65
15 claims relating to BBP, DBP, DIDP, DnHP, or DINP in the Covered Products. The Parties
16 understand and agree that these further releases are not being given on behalf of the public interest;
17 however, compliance with the terms of Section 2 of this Consent Judgment constitutes compliance
18 with the Court's continuing injunction with respect to the application of Proposition 65 to Listed
19 Chemicals in Covered Products. Nothing in this subsection affects Leeman's rights to commence or
20 prosecute an action under Proposition 65 against a Downstream Defendant Releasee that does not
21 involve a Wise-associated Covered Product.

22 **4.3 Wise's Release of Leeman**

23 Wise on behalf of itself, its past and current agents, representatives, attorneys, successors
24 and/or assignees, hereby waives any and all claims against Leeman, her attorneys, and other
25 representatives for any and all actions taken or statements made (or those that could have been
26 taken or made) by Leeman and her attorneys and other representatives, whether in the course of
27 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
28 and/or with respect to the Listed Chemicals in the Covered Products.

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

6 If, subsequent to the execution of this Settlement Agreement, any of the provisions of this
7 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
8 remaining shall not be adversely affected.

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of California
11 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
12 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
13 Consent Judgment are rendered inapplicable or no longer required as a result of any such repeal or
14 preemption or rendered inapplicable by reason of law generally as to the Covered Products, then
15 Wise shall provide written notice to Leeman of any asserted change in the law, and shall have no
16 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
17 Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
18 Wise from any obligation to comply with any other state or federal law.

19 **8. NOTICES**

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

24 To Wise:
25 Michael Monroe, President
26 The Wise Company, Inc.
27 5828 Shelby Oaks Drive
28 Memphis, TN 38134

1 With a copy to:

2 R. Mark Field, Esq.
3 Evans Petree, P.C.
4 1000 Ridgeway Loop Road, Suite 200
5 Memphis, Tennessee 38120

6 To Whitney Leeman, Ph.D.:

7 Proposition 65 Coordinator
8 The Chanler Group
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 This Consent Judgment may be executed in counterparts and by facsimile or .pdf signature,
16 each of which shall be deemed an original, and all of which, when taken together, shall constitute
17 one and the same document. A facsimile or .pdf signature shall be as valid as the original.

18 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

19 Leeman and her attorneys agree to comply with the requirements referenced in California
20 Health & Safety Code § 25249.7(f).

21 **11. MODIFICATION AND ADDITIONAL POST-EXECUTION ACTIVITIES**

22 This Consent Judgment may be modified only by stipulation of the parties and an order of
23 the Court or upon a motion by any party that is granted by the Court.

24 The Parties also acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed
25 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining
26 such approval, Leeman's counsel shall prepare a motion for this Consent Judgment's approval by
27 the Court, and Leeman and Wise, and their respective counsel, agree to mutually employ their best
28 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
Consent Judgment by the Court in a timely manner. For purposes of this paragraph, "best efforts"
shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
required motion for judicial approval. If any third party objection to the noticed motion is filed,

1 Leeman and Wise shall work together to file a joint reply and appear at any hearing before the
2 Court. This provision is a material component of the Consent Judgment and shall be treated as such
3 in the event of a breach.

4 **12. ENFORCEMENT**

5 Any Party may, by motion or application for an order to show cause before this Court,
6 enforce the terms and conditions contained in this Consent Judgment.

7 **13. ENTIRE AGREEMENT**

8 This Consent Judgment contains the sole and entire agreement and understanding of the
9 parties. No representations, oral or otherwise, express or implied, other than those contained herein,
10 have been made by any party hereto. No other agreements shall be deemed to exist or to bind any
11 of the parties.

12 **14. AUTHORIZATION**

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

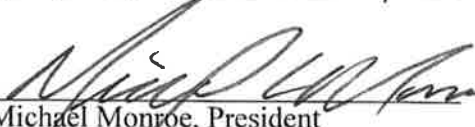
16
17 AGREED TO:

AGREED TO:

18 Date: August 14, 2014

Date: 8-14-2014

19
20 By: 
21 Whitney R. Leeman, Ph.D.

By: 
Michael Monroe, President
The Wise Co., Inc.

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