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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 UNLIMITED CIVIL JURISDICTION
11

12 WHITNEY R. LEEMAN, PH.D.,

13 Plaintiff,

14 v.

15 NSI INDUSTRIES, LLC,

16 Defendant.
17

Case No. RG16799944

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)
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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Whitney R. Leeman, Ph.D.
4 (“Leeman”), and NSi Industries, LLC (“NSi”), with Leeman and NSi each individually referred to as
5 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 NSi**

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

14 **1.4 General Allegations**

15 Leeman alleges that NSi manufactures, sells, or distributes for sale in California vinyl/PVC
16 electrical tape that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the exposure
17 warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known
18 to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 This Consent Judgment covers and applies to vinyl/PVC electrical tape containing DEHP that
21 is imported, sold, or distributed for sale in California by NSi including, including, but not limited to,
22 the *NSi PVC Electrical Tape, EWG 7060, UPC #6 62381 70600 3*, hereinafter the “Products.”

23 **1.6 Notice of Violation**

24 On August 20, 2015, Leeman served NSi, and the requisite public enforcement agencies with
25 a 60-Day Notice of Violation (“Notice”), alleging that NSi violated Proposition 65 by failing to warn
26 its customers and consumers in California of the health hazards associated with exposures to DEHP
27 from the Products. No public enforcer has commenced and is diligently prosecuting an action to
28 enforce the violations alleged in the Notice.

1 **1.7 Complaint**

2 On January 13, 2016 Leeman filed the instant action (“Complaint”), naming NSi as a
3 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
4 Notice.

5 **1.8 No Admission**

6 NSi denies the material, factual, and legal allegations contained in the Notice and Complaint,
7 and maintains that all of the products it has sold and distributed for sale in California, including the
8 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
9 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
10 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any
11 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,
12 diminish or otherwise affect NSi’s obligations, responsibilities, and duties under this Consent
13 Judgment.

14 **1.9 Jurisdiction**

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

19 **1.10 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
21 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

22 **2. INJUNCTIVE RELIEF: REFORMULATION**

23 **2.1 Reformulated Products**

24 Commencing on the Effective Date and continuing thereafter, NSi agrees to only manufacture
25 or purchase for sale in California (a) Reformulated Products; or (b) Products that are sold with a clear
26 and reasonable warning pursuant to Section 2.3.

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1 **2.2 Reformulation Standard**

2 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products
3 containing DEHP in a maximum concentration of 0.1 percent (1,000 parts per million) when
4 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
5 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of
6 determining DEHP content in a solid substance.

7 **2.3 Clear and Reasonable Warnings**

8 Commencing on the Effective Date and continuing thereafter, for any Products sold or
9 distributed for sale in California by NSi that are not Reformulated Products, NSi agrees to only offer
10 such Products for sale with a clear and reasonable warning in accordance with applicable Proposition
11 65 regulations, provided that for any such Products manufactured or purchased for sale in California
12 by NSi after the Effective Date, such warnings shall be in accordance with this Section. NSi further
13 agrees that any warning used will be prominently placed in relation to the Product with such
14 conspicuousness when compared with other words, statements, designs, or devices as to render it
15 likely to be read and understood by an ordinary individual under customary conditions of purchase or
16 use. For purposes of this Consent Judgment, a clear and reasonable warning for the Products
17 satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying
18 labeling or packaging sold in California containing the following statement:

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

22 In the event that NSi sells Products via an internet website to customers located in California, the
23 warning requirements of this section shall be satisfied if the foregoing warning appears either: (a) on
24 the same web page on which a Product is displayed and/or described; (b) on the same page as the
25 price for the Product; or (c) on one or more web pages displayed to a purchaser prior to purchase
26 during the checkout process. Alternatively, a symbol may appear adjacent to or immediately
27 following the display, description, price, or checkout listing of the Product, provided that the warning
28 statement also appears elsewhere on the same web page.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payment**

3 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims referred
4 to in the Notice and Complaint, NSi shall pay \$2,500 in civil penalties. The civil penalty payment
5 shall be allocated according to Health and Safety Code § 25249.12(c)(1) and (d), with seventy-five
6 percent (75%) of the penalty paid to the California Office of Environmental Health Hazard
7 Assessment (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty retained by
8 Leeman. Leeman’s counsel shall be responsible for delivering any penalty payment made under this
9 Consent Judgment to OEHHA.

10 **3.2 Reimbursement of Attorney’s Fees and Costs**

11 The parties acknowledge that Leeman and her counsel offered to reach preliminary agreement
12 on the material terms of this dispute before reaching terms on the amount of fees and costs to be
13 reimbursed to them. The Parties thereafter negotiated the compensation due to Leeman and her
14 counsel under general contract principles and the private attorney general doctrine codified at
15 California Code of Civil Procedure § 1021.5 for all work performed through the mutual execution of
16 this Consent Judgment, and through court approval of the same, but exclusive of fees and costs on
17 appeal, if any. NSi shall pay \$25,000 for all fees and costs incurred by Leeman investigating,
18 bringing this matter to NSi’s attention, and negotiating a settlement in the public interest.

19 **3.3 Payment Timing / Enforcement of Payment Terms**

20 All payments required by this Consent Judgment shall be delivered to Leeman’s counsel
21 within ten days of the Effective Date. In the event that any payment is untimely, the Parties agree
22 and acknowledge that (a) NSi shall pay a 10% late payment penalty on any unpaid amount(s); (b) if
23 a payment is more than 15 days late, Leeman may seek to enforce NSi’s payment obligations under
24 general contract principles and Code of Civil Procedure section 664.6; and (c) Leeman shall be
25 entitled to any fees incurred recovering unpaid or untimely payments pursuant to general contract
26 principles and Code of Civil Procedure section 1021.5.

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1 **3.4 Payment Address**

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

3 The Chanler Group
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Leeman’s Public Release of Proposition 65 Claims**

10 Leeman, acting on her own behalf and in the public interest, releases NSi and its parents,
11 subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys,
12 shareholders, agents, and successors and/or assigns (“Releasees”), and each entity to whom NSi
13 directly or indirectly distributes or sells the Products including, without limitation, its downstream
14 customers, distributors, wholesalers, and retailers, and their respective parents, subsidiaries,
15 affiliated entities under common ownership, directors, officers, employees, and attorneys,
16 shareholders, agents, and successors and/or assigns (“Downstream Releasees”) for any violation
17 arising under Proposition 65 pertaining to the failure to warn about exposures to DEHP from
18 Products sold or distributed for sale by NSi prior to the Effective Date, as set forth in the Notice.
19 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
20 with respect to exposures to DEHP from Products sold or distributed for sale by NSi after the
21 Effective Date.

22 **4.2 Leeman’s Individual Release of Claims**

23 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
24 release to NSi, Releasees, and Downstream Releasees which shall be effective as a full and final
25 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
26 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
27 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
28 exposures to DEHP in Products sold or distributed for sale by NSi before the Effective Date.

1 **4.3 NSi's Release of Leeman**

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

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court and shall
9 be null and void if it is not approved and entered by the Court within one year after it has been fully
10 executed by the Parties, or within such additional time as the Parties may agree to in writing.

11 **6. SEVERABILITY**

12 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
13 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
14 adversely affected but only to the extent the deletion of the provision deemed unenforceable does not
15 materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the
16 intent of the Parties in entering into this Settlement Agreement.

17 **7. GOVERNING LAW**

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

23 **8. NOTICE**

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

27 For NSi:

1 Tom Connotillo
2 Vice President of Finance
3 NSi Industries, LLC
4 9730 Northcross Center Court
5 Huntersville, NC 28078

6 with a copy to NSi's counsel:

7 Joshua A. Bloom, Esq.
8 Meyers Nave, PLC
9 555 12th Street, Suite #1500
10 Oakland, CA 94607

11 For Leeman:

12 Proposition 65 Coordinator
13 The Chanler Group
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
21 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
22 same document.

23 **10. POST EXECUTION ACTIVITIES**

24 Leeman agrees to comply with the reporting form requirements referenced in Health and
25 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
26 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion
27 Leeman shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
28 employ their best efforts, and those of their counsel, to support the entry of this agreement as
judgment, and to obtain judicial approval of their settlement in a timely manner.

11. MODIFICATION

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

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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: 2/8/16

Date: 2/8/16

By: Whitney Leeman
WHITNEY R. LEMAN, PH.D.

By: Tom Connotillo
Tom Connotillo
Vice President of Finance
NSI INDUSTRIES, LLC