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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SANTA CLARA

14 UNLIMITED CIVIL JURISDICTION

15 WHITNEY R. LEEMAN, PH.D.,

16 Plaintiff,

17 v.

18 FREMONT DIE CONSUMER PRODUCTS,
19 INC., *et al.*,

20 Defendant.

Case No. 16CV302457

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Whitney Leeman, Ph.D.
4 (“Leeman”), and defendant Fremont Die Consumer Products, Inc. (“Fremont”), with Leeman and
5 Fremont each 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 Fremont employs ten or more individuals and is a “person in the course
12 of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Fremont manufactures, imports, sells, distributes, and/or offers for sale or
16 use in California, vinyl/PVC bar stool covers containing the phthalate chemical di(2-ethylhexyl)
17 phthalate (“DEHP”), and that it does so without first providing the exposure warning required by
18 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
19 California to cause birth defects or other reproductive harm.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment “Products” are defined as vinyl/PVC bar stool covers
22 containing DEHP that are manufactured, imported, sold, distributed, and/or offered for sale to or in
23 California by Fremont and those entities in its chain of distribution, including, but not limited to *NFL*
24 *Bar Stool Cover, B001837KFQ*.

25 **1.6 Notice of Violation**

26 On October 28, 2015, Leeman served Fremont and certain requisite public enforcement
27 agencies with a “60-Day Notice of Violation” (“Notice”). The Notice alleges that Fremont violated
28 Proposition 65 when it failed to provide “clear and reasonable” warnings to consumers in California

1 that the Products contain DEHP, a chemical known to the State of California to cause birth defects or
2 other reproductive harm. To the best of the Parties' knowledge, no public enforcer has commenced
3 and is diligently prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On November 8, 2016, Leeman filed the instant action ("Complaint"), for the violations of
6 Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Motion for Approval of the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Commitment to Reformulate or Provide Warnings**

26 Commencing on the Effective Date, and continuing thereafter, Fremont agrees to only
27 manufacture, distribute, purchase for sale, or offer for sale in or into California: (a) "Reformulated
28

1 Products”, or (b) Products that are sold with a clear and reasonable health hazard warning, pursuant
2 to Section 2.2 below.

3 **2.2 Reformulated Products Defined**


4 For purposes of this Settlement Agreement, “Reformulated Products” shall mean Products
5 containing no more than 1,000 parts per million (0.1%) DEHP in any accessible component (i.e., any
6 component that may be touched during use) when analyzed pursuant to Environmental Protection
7 Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal or
8 state agencies for the purpose of determining DEHP content in a solid substance.

9 **2.3 Clear and Reasonable Warnings Defined**

10 Freemont agrees that within 30 days of the Effective Date and continuing thereafter, all
11 Products it sells and/or distributes for sale in California which do not qualify as Reformulated
12 Products, will bear a clear and reasonable warning pursuant to this Section. Fremont further agrees
13 that the warning will be prominently placed with such conspicuousness when compared with other
14 words, statements, designs or devices as to render it likely to be read and understood by an ordinary
15 individual under customary conditions of use. For purposes of this Settlement Agreement, a clear
16 and reasonable warning for the Products shall consist of a warning affixed to the packaging, label,
17 tag, or directly to a Product sold in California and containing the following statements:

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

22 Or,

23  **WARNING:** This product can expose you to chemicals
24 including DEHP, which is known to the
25 State of California to cause cancer and
26 birth defects or other reproductive harm.
27 For more information go to
28 www.P65Warnings.ca.gov.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payment**

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
4 this Consent Judgment, Fremont shall pay \$2,500 in civil penalties. The civil penalty payment shall
5 be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five
6 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Leeman. Within five days of
8 the Effective Date, Fremont shall provide its payment in two checks for the following amount made
9 payable to (a) “OEHHA” in the amount of \$1,875; and (b) “Whitney Leeman, Client Trust Account”
10 in the amount of \$625.00. Leeman’s counsel shall be responsible for delivering the penalty payment
11 made under this Consent Judgment to OEHHA.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
15 to be resolved after the material terms of the agreement had been settled. Shortly after the other
16 settlement terms had been finalized, Fremont expressed a desire to resolve Leeman’s fees and costs.
17 The Parties then negotiated a resolution of the compensation due to Leeman and her counsel under
18 general contract principles and the private attorney general doctrine codified at California Code of
19 Civil Procedure § 1021.5. For all work performed through the mutual execution of this agreement
20 and the Court’s approval of the same, but exclusive of fees and costs on appeal, if any, Fremont shall
21 reimburse Leeman and her counsel \$18,000 to be delivered in four (4) installments according to the
22 following schedule: (1) \$4,500 due on or before March 30, 2017; (2) \$4,500 due on or before April
23 30, 2017; (3) \$4,500 on or before May 30, 2017; and (4) \$4,500 on or before June 30, 2017. Each
24 payment shall in the form of a check payable to “The Chanler Group.” The reimbursement shall
25 cover all fees and costs incurred by Leeman investigating, bringing this matter to Fremont’s
26 attention, litigating, and negotiating a settlement of the matter in the public interest
27
28

1 **3.3 Payments Held in Trust**

2 All payments required by this Consent Judgment that are tendered prior to the Effective Date
3 shall be delivered to Leeman’s counsel at the address provided in Section 3.4. Leeman’s counsel
4 shall hold such payments in their trust account until the Effective Date. Plaintiff requested that the
5 payments due prior to the Effective Date be held by the Defendants’ counsel, but the Defendant
6 agreed that these funds will be held by Plaintiff’s counsel.

7 **3.4 Payment Address**

8 All payments owed by Fremont under this Consent Judgment shall be delivered to:

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

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 Leeman’s Public Release of Proposition 65 Claims**

14 Leeman, acting on her own behalf and in the public interest, releases Fremont and its
15 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
16 shareholders and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes
17 or sells the Products including, but not limited to, its downstream distributors, wholesalers,
18 customers, retailers, franchisers, cooperative members, licensors and licensees (collectively
19 “Downstream Releasees”) for any violations arising under Proposition 65 based on any alleged
20 exposure to DEHP from Products manufactured, imported, sold, distributed, and/or offered for sale
21 or use by Fremont prior to the Effective Date. Compliance with the terms of this Consent Judgment
22 constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn
23 about exposures to DEHP from Products manufactured, imported, sold, or distributed and/or offered
24 for sale or use by Fremont after the Effective Date.

25 **4.2 Leeman’s Individual Release of Claims**

26 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
27 release to Fremont, Releasees, and Downstream Releasees that shall be effective as a full and final
28 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,

1 attorneys' fees, damages, losses, claims, liabilities, and demands of Leeman of any nature, character
2 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
3 exposures to DEHP in the Products manufactured, imported, sold, distributed and/or offered for sale
4 or use by Fremont before the Effective Date.

5 **4.3 Fremont's Release of Leeman**

6 Fremont, on its own behalf, and on behalf of its past and current agents, representatives,
7 attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her
8 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
9 her attorneys and other representatives, whether in the course of investigating claims or otherwise
10 seeking to enforce Proposition 65 against Fremont in this matter with respect to the Products,
11 through the Effective Date.

12 **4.4 Full Release & Dismissal as to Amazon.com, Inc.**

13 Compliance with the terms of this Consent Judgment by Fremont resolves any issue, now and
14 in the future, concerning compliance by Fremont, Amazon.com, Inc., Releasees, and the Downstream
15 Releasees with the requirements of Proposition 65 with respect to the Products manufactured,
16 shipped, or sold by Fremont, Amazon.com, Inc., the Releasees or the Downstream Releasees. In
17 consideration of the promises and agreements herein contained, upon approval and entry of this
18 Consent Judgment, Leeman shall file a dismissal without prejudice as to Amazon.com, Inc.

19 **5. COURT APPROVAL**

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

24 **6. SEVERABILITY**

25 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
26 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
27 adversely affected, so long as the deletion of provisions deemed unenforceable does not materially
28

1 affect, or otherwise result in the effect of the Consent Judgment being contrary to the intent of the
2 Parties.

3 **7. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the state of California
5 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
6 otherwise rendered inapplicable by reason of law generally, or if any provision of this Consent
7 Judgment is rendered inapplicable or no longer required as a result of any such repeal or preemption,
8 or rendered inapplicable by reason of law generally as to the Products, then Fremont may provide
9 written notice to Leeman of any asserted change in the law, and shall have no further injunctive
10 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
11 so affected.

12 **8. NOTICE**

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

16 For Fremont:

17 James Hotze, President
18 Fremont Die Consumer Products, Inc.
19 1709 Endeavor Drive
20 Williamsburg, VA 23185

21 For Leeman:

22 Proposition 65 Coordinator
23 The Chanler Group
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710-2565

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

29 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **10. POST EXECUTION ACTIVITIES**

2 Leeman agrees to comply with the reporting form requirements referenced in Health and
3 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
4 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent
5 Judgment, which Leeman shall take the lead to draft and file and Fremont shall support, including
6 appearing at the hearing if so required.

7 **11. MODIFICATION**

8 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
9 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
10 any party and the entry of a modified Consent Judgment by the Court thereon.

11 **12. AUTHORIZATION**

12 The undersigned are authorized to execute this Consent Judgment and have read, understood,
13 and agree to all of the terms and conditions contained herein.

14 **AGREED TO:**

15
16 Date: 3/14/2017

17 By: 
18 WHITNEY LEMAN, PH.D.

AGREED TO:

FREMONT DIE CONSUMER PRODUCTS,
INC.

19 Date: March 10, 2017

20 By: 
21 James B. Hotze

22 Its: President