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WHITNEY R. LEEMAN, PH.D.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,

Plaintiff,

v.

STARBUCKS CORPORATION, *et al.*,

Defendants.

Case No. CGC-16-555322

**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT PEERLESS
COFFEE COMPANY, INC.**

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

1. **INTRODUCTION**

1.1 **Parties**

This Consent Judgment is entered into by and between plaintiff Whitney R. Leeman, Ph.D. (“Leeman”), and defendant Peerless Coffee Company, Inc. (“Peerless”), with Leeman and Peerless each individually referred to as a “Party” and collectively as the “Parties.”

1.2 **Plaintiff**

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

1.3 **Defendant**

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

1.4 **General Allegations**

Leeman alleges that Peerless sells or distributes for sale in California dried Lapsang Souchong teas containing lead, and that it does so without providing the warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Peerless denies Leeman’s allegations.

1.5 **Covered Products**

For purposes of this Consent Judgment, “Covered Products” are defined as, and specifically limited to, the *Peerless Coffee & Tea Lapsang Souchong Tea* that is or was until recently sold in California by Peerless.

1.6 **Notice of Violation**

On August 19, 2016, Leeman served Peerless, the California Attorney General, and all other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The Notice alleges that Peerless violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures to lead from the Covered Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the violations

alleged in the Notice.

1.7 Complaint

On November 10, 2016, Leeman filed the instant action. On December 6, 2016, Leeman filed a first amended complaint (“Complaint”), the operative pleading in this action. On January 23, 2017, Leeman filed a Doe Amendment to First Amended Complaint, naming Peerless as a defendant.

1.8 No Admission

Peerless denies the material, factual, and legal allegations made in the Notice and Complaint, and maintains that all of the products it has sold or distributed for sale in California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Peerless of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Peerless of any fact, finding, conclusion, issue of law, or violation of law, the same being specifically denied by Peerless. This Section shall not, however, diminish or otherwise affect Peerless’ 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 Peerless as to the allegations in the Complaint, that venue is proper in the County of San Francisco, 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 motion for approval of this Consent Judgment is granted by the Court, including the date of any unopposed tentative ruling granting the approval motion.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Commitment to Reformulate or Warn

Commencing on the Effective Date and continuing thereafter, Peerless agrees to only import for sale, manufacture for sale, distribute for sale or purchase for sale in or into California Covered

Products that are either: (i) Reformulated Products as defined by Section 2.2; or (ii) sold with clear and reasonable warnings pursuant to Section 2.3.

2.2 Reformulated Products Defined

“Reformulated Products” are defined as Covered Products that:

2.2.1 yield an average infusion test result of “no reportable amount” of lead when a domestic laboratory evaluates, and averages the results of, three (3) independent infusion samples of the Product taken from a single lot or batch using a validated preparation method and analyzes the sample according to an infusion sample of the Product using a validated preparation method, and analyzes the sample according to U.S. Environmental Protection Agency (“EPA”) testing methodology 6020 using inductively coupled plasma mass spectrometry (ICP-MS). The sample shall be prepared by placing one prepackaged tea bag or, for loose leaf teas, two grams of dried tea leaves, in 200 milliliters (mL) of boiling ultra-pure water for five minutes, and after five minutes decanting a representative sample of the resulting infusion for analysis. For purposes of this Section, “no reportable amount” is defined as an amount of lead that does not exceed a reporting limit of 0.8 micrograms per liter (µg/L); or

2.2.2 yield a content test result of “no reportable amount” of lead when a domestic laboratory evaluates a representative sample of the dried tea Covered Product using a validated preparation method and analyzes the sample according to EPA testing methodology 6020 using ICP-MS. For purposes of this Section, “no reportable amount” is defined as an amount of lead that does not exceed 0.25 milligrams/kilogram (mg/kg).

2.3 Warnings

Commencing on the Effective Date and continuing thereafter, those Covered Products sold, offered for sale, or distributed for sale in California by Peerless that are not Reformulated Products, shall be accompanied by a clear and reasonable warning, in accordance with this section. The warning required by this section shall be prominently placed in relation to the Covered Product with such conspicuousness when compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A clear warning specified in this section shall be deemed reasonable if transmitted in

accordance with Title 27, Article 6 §§ 25600.2, 25602 or 25607.1, which were approved on August 30, 2016, effective as of August 30, 2018. The following warning statement shall be deemed clear:

WARNING: Consuming this product can expose you to chemicals including lead, which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov/food

2.4 Modification of Reformulation Standards

The reformulation standards set forth in Section 2.2, above, shall not be modified unless the conditions and procedures set forth in Sections 2.4.1 or 2.4.2, below, are satisfied.

2.4.1 Alternative Standards Adopted by The State of California. Defendant may utilize any lead reformulation standard or level for the Covered Products that is, after the Effective Date: (i) adopted by The State of California, either by statute or regulation; or (ii) agreed to by the California Attorney General, on behalf of the People of the State of California, in a consent judgment entered by a Superior Court of the State of California. In the event Defendant intends to utilize a reformulation standard permitted by this subsection, Defendant shall provide Leeman with written notice of the proposed change and the basis therefor.

2.4.2 Alternative Standards Adopted by Leeman. Defendant may utilize any lead reformulation standard or level for the Covered Products that is, after the Effective Date, agreed to by Leeman in a consent judgment entered by the California Superior Court. In the event Defendant intends to utilize a reformulation standard permitted by this subsection, Defendant shall provide Leeman with written notice of the proposed change and the agreement entered by Leeman supporting the proposed new standard.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims referred to in the Notices, Complaint, and this Consent Judgment, Peerless agrees to pay \$2,500 in civil penalties. Peerless' civil penalty payment will be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California

Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five

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1 percent (25%) of the penalty payment retained by Leeman. Peerless shall issue its payment in two
2 checks for the following amounts made payable to (a) “OEHHA” in the amount of \$1,875; and (b)
3 “Whitney R. Leeman, Client Trust Account” in the amount of \$625. Leeman’s counsel shall be
4 responsible for delivering OEHHA’s portion of the civil penalty paid under this Consent Judgment.

5 **3.2 Reimbursement of Attorney’s Fees and Costs**

6 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
7 reaching terms on the fees and costs to be reimbursed to them, thereby leaving the issue to be
8 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
9 settlement terms had been finalized, the Parties negotiated the compensation due to Leeman and her
10 counsel under general contract principles and the private attorney general doctrine codified at
11 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
12 execution of this Consent Judgment, and through court approval of the same, but exclusive of fees
13 and costs on appeal, if any. Peerless agrees to pay \$19,500 by a check made payable to “The Chanler
14 Group” for all fees and costs incurred investigating, bringing this matter to Peerless’ attention,
15 litigating, and negotiating a settlement in the public interest.

16 **3.3 Payment Timing; Payments Held in Trust**

17 All payments due under this Consent Judgment shall be held in trust until such time as the
18 Court approves the Parties’ settlement. Peerless shall deliver its civil penalty and attorneys’ fee
19 reimbursement payments to its counsel within fifteen (15) days of the date that Leeman’s counsel
20 files the motion to approve this Consent Judgment with the Court. Peerless’ counsel shall provide
21 Leeman’s counsel with written confirmation following its receipt of the settlement funds.
22 Thereafter, Peerless’ counsel shall hold the settlement funds in trust until, and disburse the funds to
23 Leeman’s counsel within five (5) days of the Effective Date.

24 **3.4 Payment Address**

25 All payments required by this Consent Judgment shall be delivered to:
26
27
28

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

4. CLAIMS COVERED AND RELEASED

4.1 Leeman's Public Release of Proposition 65 Claims

Leeman, acting on her own behalf and on behalf of her past and current agents, representatives, attorneys, successors, and assignees hereby releases Peerless and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and attorneys ("Releasees"), and each entity to whom Peerless directly or indirectly distributes or sells the Covered Products including, but not limited to, Peerless' downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees ("Downstream Releasees"), based on the alleged or actual failure to warn about exposures to lead in Covered Products imported, manufactured, sold, or distributed for sale by Peerless before the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 by Peerless with respect to the failure to warn about exposures to lead in Covered Products sold by Peerless after the Effective Date.

4.2 Leeman's Individual Release of Claims

Leeman, in her individual capacity only and *not* in her representative capacity, on her own behalf and on behalf of her past and current agents, representatives, attorneys, successors, and assignees, also provides a release to Peerless, Releasees, and Downstream Releasees which shall be effective as a full and final accord and satisfaction, as a bar to all suits, actions, and causes of action in law or in equity, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to lead in Covered Products imported, manufactured, sold, or distributed for sale by Peerless before the Effective Date.

4.3 Peerless' Release of Leeman

Peerless, 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

1 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
2 her attorneys and other representatives, whether in the course of investigating claims, seeking to
3 enforce Proposition 65 against Peerless in this matter, or with respect to the Covered Products.

4 **5. COURT APPROVAL**

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

8 **6. SEVERABILITY**

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

12 **7. GOVERNING LAW**

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

19 **8. NOTICE**

20 Unless specified herein, all correspondence and notice required by this Consent Judgment
21 shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return
22 receipt requested; or (c) a recognized overnight courier on any Party by the other at the following
23 addresses:

24 For Peerless:

25 Kristina Brouhard, Executive Vice President
26 Peerless Coffee & Tea
27 260 Oak St.
28 Oakland, CA 94607

James A. Geocaris, Esq.
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626

For Leeman:

The Chanler Group
Attn: Proposition 65 Coordinator
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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.

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. POST EXECUTION ACTIVITIES

Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which Leeman shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually 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. For purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to any opposition or objection any third-party may file, and appearing at the hearing before the Court if so requested.

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.

1 **12. ENFORCEMENT**

2 In order to assert a potential violation of this Consent Judgment, Leeman shall provide written
3 notice to Peerless of the alleged violation in accordance with this Section (“Notice of Breach”). The
4 Notice of Breach shall include: (a) copies of all test results conducted on a specific Covered Product
5 during the three month period for which the violation is alleged; (b) such test results must be of no
6 less than three of the same Covered Product collected within the three month period; (c) the average
7 of all test results for the period must exceed the Reformulation Standard; and (d) copies of (i)
8 purchase information for the allegedly violating Covered Product(s), and (ii) a digital image of the
9 allegedly violating Covered Product showing the SKU, UPC, Lot, and Batch number(s), if any.

10 Peerless and Leeman shall, within thirty days of Peerless’ receipt of the Notice of Breach,
11 meet and confer regarding the alleged violation. During this time, Leeman shall not file any motion,
12 application, action, or pleading regarding the violation(s) alleged in the Notice of Breach.

13 For the first alleged violation for which Leeman provides Peerless with a Notice of Breach,
14 Peerless may demonstrate compliance by: a) providing verified results for lead testing performed in
15 three samples of the Covered Product that shows the average level of lead content measured meets
16 the Reformulation Standard; or b) showing that the Covered Products were sold with clear and
17 reasonable warnings pursuant to Section 2.3 of this Consent Judgment. If Peerless cannot
18 demonstrate compliance, it must pay a stipulated civil penalty of \$2,500.00 to be allocated according
19 to Section 3.1 of this Judgment.

20 In the event that, thereafter, Leeman provides a Notice of Breach alleging a second violation
21 of the Consent Judgment by Peerless, she must do so in accordance with this Section. For the second
22 alleged violation, Peerless may demonstrate compliance with the Consent Judgment by: a) providing
23 test results obtained using the test methodologies established by subsections 2.2.1 and/or 2.2.2,
24 conducted on five samples of the Covered Product, indicating that the average of any three such
25 results complies with the Reformulation Standard; or b) showing that the Covered Products were sold
26 with clear and reasonable warnings pursuant to section 3.2 of this Consent Judgment.

27 In the event that Peerless cannot demonstrate compliance in the manner set forth above after
28 receipt of a second Notice of Breach for a Covered Product, Peerless shall pay a stipulated penalty of

1 \$5,000.00 for the second, and each subsequent, violation(s), to be allocated according to Section 3.1
2 of this Judgment.

3 **13. AUTHORIZATION**

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

6
7 **AGREED TO:**

AGREED TO:

8 Date: 7/20/2017

Date: _____

9
10 By: 
11 WHITNEY R. LEEMAN, PH.D.

By: _____
Kristina Brouhard, Executive Vice President
PEERLESS COFFEE COMPANY, INC.

1 \$5,000.00 for the second, and each subsequent, violation(s), to be allocated according to Section 3.1
2 of this Judgment.

3 **13. AUTHORIZATION**

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


6
7 **AGREED TO:**

AGREED TO:

8 Date: _____

Date: 7/20/17

9
10 By: _____
11 WHITNEY R. LEEMAN, PH.D.

By:  _____
Kristina Brouhard, Executive Vice President
PEERLESS COFFEE COMPANY, INC.