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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 UNLIMITED CIVIL JURISDICTION

12
13 WHITNEY R. LEEMAN, PH.D.,

14 Plaintiff,

15 v.

16 STARBUCKS CORPORATION, *et al.*,

17 Defendants.

Case No. CGC-16-555322

**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT UPTON TEA
IMPORTS, LLC**

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

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 defendant Upton Tea Imports, LLC (“Upton”), with Leeman and Upton each
5 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 Upton employed ten or more individuals and was a “person in the course of doing business”
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Upton sold or distributed for sale in California dried teas containing lead,
16 and that it did so without providing the warning required by Proposition 65. Lead is listed pursuant
17 to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Upton
18 denies Leeman’s allegations.

19 **1.5 Covered Products**

20 For purposes of this Consent Judgment, “Covered Products” are defined as all dried teas
21 (loose leaf and bagged) sold or distributed for sale in California by Upton including, but not limited
22 to, the *Upton Tea China Imperial Grade Lapsang Souchong, #122-F, ZS80, #86168*.

23 **1.6 Notice of Violation**

24 On August 19, 2016, Leeman served Upton, the California Attorney General, and all other
25 requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The Notice
26 alleges that Upton violated Proposition 65 by failing to warn its customers and consumers in
27 California of the health hazards associated with exposures to lead from the Covered Products. No
28

1 public enforcer has commenced and is diligently prosecuting an action to enforce the violations
2 alleged in the Notice.

3 **1.7 Complaint**

4 On November 10, 2016, Leeman filed the instant action. On December 6, 2016, Leeman filed
5 a first amended complaint (“Complaint”), the operative pleading in this action. The first amended
6 complaint names Upton, among others, as a defendant in the action.

7 **1.8 No Admission**

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

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

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing on the Effective Date and continuing thereafter, Upton agrees to only import for
28 sale, manufacture for sale, or purchase for sale in or into California Covered Products that are either:

1 (i) Reformulated Products as defined by Section 2.2; or (ii) sold with clear and reasonable warnings
2 pursuant to Section 2.3.

3 **2.2 Reformulated Products Defined**

4 “Reformulated Products” are defined as Covered Products that:

5 **2.2.1** yield an average infusion test result of “no reportable amount” of lead when a
6 domestic laboratory evaluates, and averages the results of, three (3) independent infusion samples of
7 the Product taken from a single lot or batch using a validated preparation method and analyzes the
8 sample according to an infusion sample of the Product using a validated preparation method, and
9 analyzes the sample according to U.S. Environmental Protection Agency (“EPA”) testing
10 methodology 6020 using inductively coupled plasma mass spectrometry (ICP-MS). The sample shall
11 be prepared by placing one prepackaged tea bag or, for loose leaf teas, two grams of dried tea leaves,
12 in 200 milliliters (mL) of boiling ultra-pure water for five minutes, and after five minutes decanting a
13 representative sample of the resulting infusion for analysis. For purposes of this Section, “no
14 reportable amount” is defined as an amount of lead that does not exceed a reporting limit of 0.8
15 micrograms per liter ($\mu\text{g/L}$); or

16 **2.2.2** yield a content test result of “no reportable amount” of lead when a domestic
17 laboratory evaluates a representative sample of the dried tea Covered Product using a validated
18 preparation method and analyzes the sample according to EPA testing methodology 6020 using ICP-
19 MS. For purposes of this Section, “no reportable amount” is defined as an amount of lead that does
20 not exceed 0.25 milligrams/kilogram (mg/kg).

21 **2.3 Warnings**

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

1 accordance with Title 27, Article 6 § 25602 or 25607.1. The following warning statement shall be
2 deemed clear:

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

7 **2.4 Modification of Reformulation Standards**

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

10 **2.4.1 Alternative Standards Adopted by The State of California.** Defendant may
11 utilize any lead reformulation standard or level for the Covered Products that is, after the Effective
12 Date: (i) adopted by The State of California, either by statute or regulation; or (ii) agreed to by the
13 California Attorney General, on behalf of the People of the State of California, in a consent judgment
14 entered by a Superior Court of the State of California. In the event Defendant intends to utilize a
15 reformulation standard permitted by this subsection, Defendant shall provide Leeman with written
16 notice of the proposed change and the basis therefor.

17 **2.4.2 Alternative Standards Adopted by Leeman.** Defendant may utilize any lead
18 reformulation standard or level for the Covered Products that is, after the Effective Date, agreed to by
19 Leeman in a consent judgment entered by the California Superior Court. In the event Defendant
20 intends to utilize a reformulation standard permitted by this subsection, Defendant shall provide
21 Leeman with written notice of the proposed change and the agreement entered by Leeman supporting
22 the proposed new standard.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Civil Penalty Payment**

25 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims
26 referred to in the Notices, Complaint, and this Consent Judgment, Upton agrees to pay \$2,500 in civil
27 penalties. Upton’s civil penalty payment will be allocated according to Health and Safety Code
28 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

1 percent (25%) of the penalty payment retained by Leeman. Upton 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. Upton agrees to pay \$16,000 by a check made payable to “The Chanler
14 Group” for all fees and costs incurred investigating, bringing this matter to Upton’s 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 Court
18 approves the Parties’ settlement. Upton shall deliver its civil penalty and attorneys’ fee
19 reimbursement payments to its counsel within fifteen (15) days of the date that this Consent
20 Judgment is fully executed by the Parties. Upton’s counsel shall provide Leeman’s counsel with
21 written confirmation following its receipt of the settlement funds. Thereafter, Upton’s counsel shall
22 hold the settlement funds in trust until, and disburse the funds to Leeman’s counsel within two (2)
23 days of the Effective Date.

24 **3.4 Payment Address**

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

26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Leeman’s Public Release of Proposition 65 Claims**

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

14 **4.2 Leeman’s Individual Release of Claims**

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

23 **4.3 Upton’s Release of Leeman**

24 Upton, on its own behalf, and on behalf of its past and current agents, representatives,
25 attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her
26 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
27 her attorneys and other representatives, whether in the course of investigating claims, seeking to
28 enforce Proposition 65 against Upton in this matter, or with respect to the Covered Products.

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

6 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
7 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
8 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, or is otherwise
12 rendered inapplicable by reason of law generally or as to the Covered Products, then Upton may
13 provide written notice to Leeman of any asserted change in the law, and shall have no further
14 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
15 Covered Products are so affected.

16 **8. NOTICE**

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

21 For Upton Tea Imports, LLC:

22 Thomas Eck, President
23 Upton Tea Imports, LLC
24 69 Eogastow Brooke Rd.
 Sherborne, MA 01770

 Mark J. D’Argenio, Esq.
 Brenda K. Radmacher, Esq.
 Wood Smith Henning & Berman, LLP
 1401 Willow Pass Road, Suite 700
 Concord, CA 94520

25 For Leeman:

26 The Chanler Group
27 Attn: Proposition 65 Coordinator
28 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

8 Leeman agrees to comply with the reporting form requirements referenced in Health and
9 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
10 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
11 which Leeman shall draft and file. In furtherance of obtaining such approval, the Parties agree to
12 mutually employ their best efforts, and those of their counsel, to support the entry of this agreement
13 as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of
14 this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
15 responding to any opposition or objection any third-party may file, and appearing at the hearing
16 before the Court if so requested.

17 **11. MODIFICATION**

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

21 **12. AUTHORIZATION**

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


24 **AGREED TO:**

25 Date: 5/22/2017

26
27 By: 
28 WHITNEY R. LEEMAN, PH.D.

AGREED TO:

Date: 5/16/2017

By: 
Thomas Eck, President
UPTON TEA IMPORTS, LLC