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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 UNLIMITED CIVIL JURISDICTION
11

12 WHITNEY R. LEEMAN, PH.D.,
13 Plaintiff,
14 v.
15 R.C. BIGELOW, INC., *et al.*,
16 Defendants.

Case No. CGC-17-560176

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT R.C. BIGELOW, INC.**

(Health and 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 by plaintiff Whitney R. Leeman, Ph.D. (“Leeman”), and
4 defendant R.C. Bigelow, Inc. (“R.C. Bigelow”), with Leeman and R.C. Bigelow each individually
5 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 R.C. Bigelow employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
13 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

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

19 **1.5 Covered Tea Products**

20 For purposes of this Consent Judgment, “Covered Tea Products” are defined as all teas
21 (herbal and/or non-herbal) that are sold or distributed for sale in California by R.C. Bigelow
22 including, but not limited to, the *Bigelow Oolong Tea Classic*, UPC #0 72310 00199 2, identified in
23 Leeman’s Notice.

24 **1.6 Notices of Violation**

25 On December 28, 2016, Leeman served R.C. Bigelow, the California Attorney General, and
26 all other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The
27 Notice alleges that R.C. Bigelow violated Proposition 65 by failing to warn its customers and
28 consumers in California of the health hazards associated with exposures to lead from dried packaged

1 Oolong teas. On November 20, 2017, Dr. Leeman served R.C. Bigelow, the California Attorney
2 General, and all other requisite public enforcers with a Supplemental 60-Day Notice of Violation
3 (“Supplemental Notice”). The Supplemental Notice alleges that R.C. Bigelow violated Proposition
4 65 by failing to warn its customers and consumers in California of the health hazards associated with
5 exposures to lead from the Covered Tea Products.

6 The Notice and Supplemental Notice shall be referred to collectively as the “Notices.” No
7 public enforcer has commenced and is diligently prosecuting an action to enforce the violations
8 alleged in either of the Notices.

9 **1.7 Complaint**

10 On July 17, 2017, Leeman filed the instant action, naming R.C. Bigelow as a defendant for
11 the alleged violations that are the subject of the Notice. The Parties stipulate and agree that, on the
12 date that is sixty-six (66) days after Leeman’s service of the Supplemental Notice, or the Court’s
13 approval and entry of this Consent Judgment, whichever is later, the complaint shall be deemed
14 amended *nunc pro tunc* to include the products, product categories, and alleged violations that are the
15 subject of the Supplemental Notice (hereinafter “Complaint”).

16 **1.8 No Admission**

17 R.C. Bigelow denies the material, factual, and legal allegations made in the Notices and
18 Complaint, and maintains that all of the products it has sold or distributed for sale in California,
19 including the Covered Tea Products, have been, and are, in compliance with all laws. Nothing in this
20 Consent Judgment shall be construed as an admission by R.C. Bigelow of any fact, finding,
21 conclusion, issue of law, or violation of law, nor shall compliance with this Consent Judgment
22 constitute or be construed as an admission by R.C. Bigelow of any fact, finding, conclusion, issue of
23 law, or violation of law, the same being specifically denied by R.C. Bigelow. This Section shall not,
24 however, diminish or otherwise affect R.C. Bigelow’s obligations, responsibilities, and duties under
25 this Consent Judgment.

26 **1.9 Jurisdiction**

27 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over R.C. Bigelow as to the allegations in the Complaint, that venue is proper in the

1 County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
2 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
5 the motion for approval of this Consent Judgment is granted by the Court, including the date of any
6 unopposed tentative ruling granting the approval motion.

7 **2. INJUNCTIVE RELIEF: BREWED TEA STANDARD, WARNING REQUIREMENTS**

8 **2.1 Commitment to Comply with Brewed Tea Standard or Provide Warnings**

9 Commencing on the Effective Date and continuing thereafter, any Covered Tea Products that
10 R.C. Bigelow sells in California or distributes for sale in California shall either: (a) meet the “Brewed
11 Tea Standard” set forth in Section 2.2; or (b) comply with the warning requirements of Section 2.3.

12 **2.2 Brewed Tea Standard**

13 Covered Tea Products containing no more than ten (10) parts per billion (micrograms/liter) of
14 lead (“Brewed Tea Standard”) are exempt from the warning requirements of Section 2.3, when
15 brewed in accordance with the following protocol (“Brewed Tea Protocol”): The brewing
16 instructions provided to the consumer or preparer by R.C. Bigelow, or by placing one prepackaged
17 tea bag, or for loose leaf teas, two grams of dried tea leaves in 200 milliliters (mL) of boiling ultra-
18 pure water, steeping for five minutes and, after five minutes, decanting a representative sample of the
19 resulting infusion for analysis. The sample shall be analyzed according to U.S. Environmental
20 Protection Agency testing methodology 6020 using inductively coupled plasma mass spectrometry
21 (ICP-MS).

22 **2.3 Warnings**

23 Commencing on the Effective Date and continuing thereafter, those Covered Tea Products
24 sold or distributed for sale in California by R.C. Bigelow that do not meet the Brewed Tea Standard,
25 shall be accompanied by a clear and reasonable warning, in accordance with this Section. Any
26 warning used for a non-exempt Covered Tea Product shall be prominently placed in relation to the
27 Covered Tea Product with such conspicuousness when compared with other words, statements,
28 designs, or devices as to render it likely to be read and understood by an ordinary individual under

1 customary conditions of purchase or use. A warning shall be deemed reasonable if transmitted in
2 accordance with Title 27 California Code of Regulations §§ 25607.1 and 25607.2. The following
3 warning statement shall be deemed clear:

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

8 **3. MONETARY SETTLEMENT TERMS**

9 **3.1 Civil Penalty Payment**

10 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all claims
11 referred to in the Notices, Complaint, and this Consent Judgment, R.C. Bigelow agrees to pay
12 \$10,500 in civil penalties. R.C. Bigelow’s civil penalty payment will be allocated according to
13 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
14 penalty paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and
15 the remaining twenty-five percent (25%) of the penalty retained by Leeman. R.C. Bigelow shall
16 issue its payment in two checks for the following amounts made payable to (a) “OEHHA” in the
17 amount of \$7,875; and (b) “Whitney R. Leeman, Client Trust Account” in the amount of \$2,625.
18 Leeman’s counsel shall be responsible for delivering OEHHA’s portion of the penalty payment.

19 **3.2 Reimbursement of Attorneys’ Fees and Costs**

20 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
21 reaching terms on their fees and costs. Shortly after the other settlement terms had been finalized, the
22 Parties negotiated the compensation to be paid to Leeman and her counsel under general contract
23 principles and the private attorney general doctrine codified at California Code of Civil Procedure
24 section 1021.5 for all work performed through the mutual execution of this Consent Judgment and
25 court approval of the same, but exclusive of fees and costs on appeal, if any. R.C. Bigelow agrees to
26 pay \$48,000 in a check payable to “The Chanler Group” for all fees and costs incurred investigating,
27 bringing this matter to R.C. Bigelow’s attention, litigating, negotiating a settlement in the public
28 interest, and seeking and obtaining approval of this Consent Judgment.

1 **3.3 Payment Timing**

2 All payments due under this Consent Judgment shall be delivered within five (5) days of the
3 Effective Date to the address in Section 3.4. Leeman shall have responsibility for remitting the
4 payment owed to OEHHA under Section 3.1.

5 **3.4 Payment Address**

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

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

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Leeman’s Public Release of Proposition 65 Claims**

12 Leeman, acting on her own behalf and on behalf of her past and current agents,
13 representatives, attorneys, successors, and assignees, and on behalf of the public interest, hereby
14 discharges and releases all actions, causes of action, obligations, costs, expenses, fees (including,
15 but not limited to, attorneys’ fees, investigation fees, and expert fees), damages, losses, penalties,
16 claims, liabilities, rights, judgments, obligations, duties, and demands (collectively, “Claims”), and
17 waives all rights to institute or participate in (directly or indirectly) any form of legal action, against
18 R.C. Bigelow and its parents, subsidiaries, affiliated entities under common ownership, directors,
19 officers, employees, and attorneys (“Releasees”), and each entity to whom R.C. Bigelow directly or
20 indirectly distributes or sells the Covered Tea Products including, but not limited to, R.C. Bigelow’s
21 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
22 licensors, and licensees (“Downstream Releasees”), based on alleged exposures to lead in Covered
23 Tea Products imported, manufactured, sold, or distributed for sale by R.C. Bigelow before the
24 Effective Date, as set forth in the Notices. Compliance with the terms of this Consent Judgment
25 constitutes compliance with Proposition 65 with respect to any exposures to lead in Covered Tea
26 Products after the Effective Date.
27
28

1 **4.2 Leeman’s Individual Release of Claims**

2 Leeman, in her individual capacity only and *not* in her representative capacity, on her own
3 behalf and on behalf of her past and current agents, representatives, attorneys, successors, and
4 assignees, also provides a release to R.C. Bigelow, Releasees, and Downstream Releasees which
5 shall be effective as a full and final accord and satisfaction, as a bar to all Claims of any nature,
6 character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged
7 exposures to lead in Covered Tea Products imported, manufactured, sold, or distributed for sale by
8 R.C. Bigelow before the Effective Date.

9 **4.3 R.C. Bigelow’s Release of Leeman**

10 R.C. Bigelow, on its own behalf, and on behalf of its past and current agents,
11 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
12 Leeman and her attorneys and other representatives, for any and all actions taken or statements
13 made by Leeman and her attorneys and other representatives, whether in the course of investigating
14 claims, seeking to enforce Proposition 65 against R.C. Bigelow in this matter, or with respect to the
15 Covered Tea Products.

16 **5. COURT APPROVAL**

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

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
27 rendered inapplicable by reason of law generally or as to the Covered Tea Products, then R.C.
28 Bigelow may provide written notice to Leeman of any asserted change in the law, and shall have no

1 further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent
2 that, the Covered Tea Products are so affected.

3 **8. NOTICE**

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

8 For R.C. Bigelow:

9 Cynthia Bigelow, President
10 R.C. Bigelow, Inc.
201 Black Rock Tpke
11 Fairfield, CT 06825

Sarah Esmaili, Esq.
Arnold & Porter Kaye Scholer LLP
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111

12 For Dr. Leeman:

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

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

22 **10. POST EXECUTION ACTIVITIES**

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

1 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
2 approval (with the exception of the amount of plaintiff’s attorneys fees and costs which Plaintiff shall
3 support), filing a response to any opposition or objection any third-party may file, and appearing at
4 the hearing before the Court if so requested.

5 **11. MODIFICATION**

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

9 **12. ENFORCEMENT**

10 **12.1 First Notice of Breach**

11 To allege a violation of this Consent Judgment, Plaintiff shall provide written notice to R.C.
12 Bigelow in accordance with this section (“Notice of Breach”). The Notice of Breach shall include:
13 (a) a declaration that the specific Covered Tea Product alleged to be in violation of the Consent
14 Judgment was purchased in California and tested in excess of the Brewed Tea Standard, when tested
15 in accordance with the Brewed Tea Protocol, within three months of the Notice of Breach and that no
16 warning was provided for the specific Covered Tea Product; (b) any and all test results that support
17 the allegation that the Covered Tea Product violates this Consent Judgment; (c) copies of (i) relevant
18 purchase information for the allegedly violating Covered Tea Product; (ii) images of the packaging or
19 labeling of the allegedly violating Covered Tea Product showing the SKU, UPC, Lot, and/or Batch
20 number(s), if any; and (iii) all other test results conducted on the same Covered Tea Product
21 performed within three months of the Notice of Breach. Upon receipt of the Notice of Breach, R.C.
22 Bigelow and Plaintiff shall meet and confer for not less than thirty days in an effort to resolve the
23 alleged violation informally. During this time, Plaintiff shall not file any motion, application, action,
24 or pleading regarding the violation(s) alleged in the Notice of Breach.

25 R.C. Bigelow may rebut the Notice of Breach and demonstrate compliance with the Consent
26 Judgment to avoid additional civil fines by: (1) if the identity of the supplier of the finished Covered
27 Tea Product is known to R.C. Bigelow and additional Covered Tea Product can be readily obtained
28 from such supplier, showing that the average of all verified lead test results performed on samples of

1 the same Covered Tea Product obtained from such supplier, and collected within three months of the
2 Notice of Breach, complies with the Brewed Tea Standard, or (2) if the identity of the supplier of the
3 finished Covered Tea Product is not known to the R.C. Bigelow or additional Covered Tea Product
4 cannot be readily obtained from such supplier, showing that the average of all verified lead test
5 results performed on samples of the same Covered Tea Product, and collected within three months of
6 the Notice of Breach, complies with the Brewed Tea Standard, or 3) providing the most recent
7 certificate of analysis or other proof, from R.C. Bigelow or its supplier of the Covered Tea Product in
8 question, as evidence that the Covered Tea Product meets either the Brewed Tea Standard or that the
9 dried leaves of such Covered Tea Product do not exceed six (6) parts per million
10 (milligrams/kilograms) before brewing when prepared using a scientifically validated preparation
11 method and analyzed according to EPA testing methodology 6020 using ICP-MS, or alternative
12 methodologies utilized by federal or state agencies for the purpose of measuring lead concentration of
13 6 ppm in food.

14 If R.C. Bigelow cannot demonstrate compliance within ninety (90) days of receiving
15 Plaintiff's Notice of Breach, it must pay a stipulated civil penalty of \$2,500 to be allocated according
16 to Section 3.1.

17 **12.2 Subsequent Notice(s) of Breach**

18 If Defendant rebuts Plaintiff's first Notice of Breach and demonstrates compliance other than
19 by reliance on its supplier's representations, a subsequent Notice of Breach on the same specific
20 Covered Tea Product shall be deemed to be a First Notice of Breach, subject to the same procedures,
21 showings and penalties set forth in Section 12.1.

22 To allege a subsequent or additional violation of this Consent Judgment by R.C. Bigelow,
23 Plaintiff must follow the procedures set forth in Section 12.1. R.C. Bigelow may rebut the
24 subsequent Notice(s) of Breach and demonstrate compliance with the Consent Judgment following
25 the procedures set forth in Section 12.1, except that if Defendant rebutted a first Notice of Breach by
26 providing a certificate of analysis or other proof from the supplier(s) of the Covered Tea Product in
27 question, it may not respond to any subsequent or additional Notice of Breach issued on the same
28 Covered Tea Product more than four months after the first Notice of Breach by relying on a

1 certificate of analysis or other proof from the same supplier for the same Covered Tea Product.
2 Instead, to demonstrate compliance, R.C. Bigelow must show compliance with the Brewed Tea
3 Standard in subsequent Notices of Breach on the same Covered Tea Product, using the testing
4 protocols set forth in Section 2.1 and 2.2 of this Consent Judgment.

5 If R.C. Bigelow cannot rebut the subsequent Notice of Breach and demonstrate compliance
6 within ninety (90) days of receiving Plaintiff's subsequent Notice(s) of Breach, it must pay a
7 stipulated civil penalty of \$5,000 for the second, and each subsequent, Notice of Breach as to which it
8 cannot demonstrate compliance.

9 **12.3 Notice of Significant Exceedance**

10 Notwithstanding the forgoing, if Plaintiff's Notice of Breach includes three or more test
11 results for the same product, each of which 1) exceeds 25 ppb and 2) is accompanied by the
12 information set forth in the second sentence of Section 12.1 of this Consent Judgment, then the
13 Defendant may rebut the Notice of Breach and demonstrate compliance with the Consent Judgment
14 only by showing that the average of all verified lead test results performed on samples of the same
15 Covered Tea Product collected within two months of the Notice of Breach, complies with the Brewed
16 Tea Standard.

17 Absent agreement to the contrary, the Parties shall maintain the confidentiality of test results
18 exchanged among them pursuant to this Section 12, whether as regards a First Notice of Breach or a
19 Subsequent Notice of Breach, except to the extent that disclosure is required in an enforcement action
20 or is otherwise required by law.

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13. 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: 2/2/2018

Date: 2/1/18

By: *Whitney R. Leeman*
WHITNEY R. LEEMAN, PH.D.

By: *Cynthia Bigelow*
CYNTHIA BIGELOW, PRESIDENT
R.C. BIGELOW, INC.