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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION
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15 WHITNEY R. LEEMAN, PH.D.,

16 Plaintiff,

17 v.

18 GREAT LAKES DART MFG., INC.; *et al.*,

19 Defendants.
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Case No. CIV-1401941

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 ("Leeman") and Great Lakes Dart Mfg. Co., Inc., dba GLD Products ("Great Lakes"), with Leeman
5 and Great Lakes 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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Great Lakes employs ten or more persons 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 section 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Leeman alleges that Great Lakes manufactures, imports, sells, or distributes for sale in
16 California, vinyl/PVC game cases, including, game kits, accessories and components containing di(2-
17 ethylhexyl)phthalate ("DEHP") without first providing the exposure warning required by Proposition
18 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause
19 birth defects or other reproductive harm.

20 **1.5 Product Description**

21 The Great Lakes products that are covered by this Consent Judgment are defined as
22 vinyl/PVC game cases, including game kits, accessories and components containing DEHP,
23 specifically including, but not limited to, *Fat Cat 6 in 1 Game Set, Item: 55-0203, UPC #7 19265*
24 *52592 9*, which are manufactured, imported, distributed, sold and/or offered for sale by Great Lakes
25 in the State of California, hereinafter the "Products."

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1 **1.6 Notice of Violation**

2 On or about February 26, 2014, Leeman served Great Lakes and certain requisite public
3 enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Great Lakes was in
4 violation of Proposition 65 for failing to warn its customers and consumers in California that the
5 vinyl/PVC game cases, including, but not limited to *Fat Cat 6 in 1 Game Set, Item: 55-0203, UPC #7*
6 *19265 52592 9*, expose users to DEHP.

7 **1.7 Complaint**

8 On May 21, 2014 Leeman filed the instant action (“Complaint”), naming Great Lakes as a
9 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
10 the Notice. To the Parties knowledge no public enforcer has commenced and is diligently
11 prosecuting the allegations contained in the Notice.

12 **1.8 No Admission**

13 Great Lakes denies the material, factual, and legal allegations contained in the Notice and
14 Complaint, and maintains that all of the products that it has sold and distributed for sale in California,
15 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
16 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
17 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
18 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
19 not, however, diminish or otherwise affect Great Lakes’ obligations, responsibilities, and duties under
20 this Consent Judgment.

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Great Lakes as to the allegations in the Complaint, that venue is proper in the
24 County of Marin, and that this Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment.

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
3 the Court approves and enters this Consent Judgment.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

5 **2.1 Reformulated Products**

6 Commencing on the Effective Date, and continuing thereafter, Great Lakes shall only
7 manufacture, import, sell, or distribute for sale in California Products that are sold with a clear and
8 reasonable warning pursuant to Section 2.2 below, or Products that are “Reformulated Products” as
9 provided herein. For purposes of this Consent Judgment, Reformulated Products are products that
10 contain DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed
11 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
12 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
13 content in a solid substance. In addition to the EPA test methods authorized above, the Parties may
14 utilize equivalent methodologies employed by state or federal agencies to determine DEHP content in
15 a solid substance.

16 **2.2 Product Warnings**

17 Commencing on the Effective Date, Great Lakes shall provide clear and reasonable warnings
18 as set forth in subsections 2.2(a) and (b) for all Products that do not currently have warnings and that
19 do not qualify as Reformulated Products. Each warning shall be prominently placed with such
20 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
21 to be read and understood by an ordinary individual under customary conditions before purchase or
22 use. Each warning shall be provided in a manner such that the consumer or user understands to
23 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

24 The parties understand that Great Lakes has instituted a warning program. Great Lakes may
25 continue to use the warning on all Products already labeled, in production and inventory as of the
26 Effective Date. Any Products not already containing a warning prior to the Effective Date that do not
27 qualify as Reformulated Products shall contain warnings compliant with subsections 2.2(a) and (b)
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1 below. Great Lakes agrees to ensure all Products that contain a warning are compliant with
2 subsections 2.2(a) and (b) by December 31, 2014.

3 **(a) Retail Store Sales.**

4 **(i) Product Labeling.** Great Lakes shall affix a warning to the packaging,
5 labeling, or directly on each Product provided for sale in retail outlets in California that states:

6 CALIFORNIA PROP 65 WARNING: This Product contains DEHP, a chemical known
7 to the State of California to cause cancer, birth
8 defects and other reproductive harm.

9 **(ii) Point-of-Sale Warnings.** Alternatively, Great Lakes may provide warning
10 signs in the form below to its customers in California with instructions to post the warnings in close
11 proximity to the point of display of the Products. Such instruction sent to Great Lake's customers
12 shall be sent by certified mail, return receipt requested.

13 CALIFORNIA PROP 65 WARNING: This Product contains DEHP, a chemical known
14 to the State of California to cause cancer, birth
15 defects and other reproductive harm.

16 Where more than one Product is sold in proximity to other like items or to those that do not require a
17 warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be
18 used:¹

19 CALIFORNIA PROP 65 WARNING: The following products contain DEHP, a
20 chemical known to the State of California to
21 cause cancer, birth defects and other
22 reproductive harm.

23 *[list products for which warning is required]*

24 **(b) Mail Order Catalog and Internet Sales.**

25 In the event that Great Lakes sells Products via mail order catalog and/or the internet, to
26 customers located in California, after the Effective Date, that are not Reformulated Products, Great
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28 ¹For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 Lakes shall provide warnings for such Products sold via mail order catalog or the internet to
2 California residents, and/or shall advise distributors and retailers to provide warnings for such
3 Products sold via mail order catalog or the internet to California residents by distributors and retailers
4 whose website or mail order catalog is not controlled by Great Lakes. Warnings given in the mail
5 order catalog or on the internet shall identify the *specific* Product to which the warning applies as
6 further specified in Sections 2.2(b)(i) and (ii).

7 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order catalog
8 shall be in the same type size or larger than the Product description text within the catalog. The
9 following warning shall be provided on the same page and in the same location as the display and/or
10 description of the Product:

11 CALIFORNIA PROP 65 WARNING: This Product contains DEHP, a chemical known
12 to the State of California to cause cancer, birth
13 defects and other reproductive harm.

14 Where it is impracticable to provide the warning on the same page and in the same location as
15 the display and/or description of the Product, a designated symbol may be utilized to cross referencé
16 the applicable warning and shall define the term "designated symbol" with the following language on
17 the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

18 CALIFORNIA PROP 65 WARNING: Certain products identified with this symbol ▼
19 and offered for sale in this catalog contain
20 DEHP, a chemical known to the State of
21 California to cause cancer, birth defects and
22 other reproductive harm.

23 The designated symbol must appear on the same page and in close proximity to the display
24 and/or description of the Product. On each page where the designated symbol appears, a header or
25 footer must be provided directing the consumer to the warning language and definition of the
26 designated symbol.

27 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
28 sale of the Products via the internet, which warning shall appear either: (a) on the same web page on
which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the

1 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
2 during the checkout process. The following warning statement shall be used and shall appear in any
3 of the above instances adjacent to or immediately following the display, description, or price of the
4 Product for which it is given in the same type size or larger than the Product description text:

5 CALIFORNIA PROP 65 WARNING: This Product contains DEHP, a chemical known
6 to the State of California to cause cancer, birth
7 defects and other reproductive harm.

8 Alternatively, the designated symbol may appear adjacent to or immediately following the
9 display, description, or price of the Product for which a warning is being given, provided that the
10 following warning statement also appears elsewhere on the same web page, as follows:

11 CALIFORNIA PROP 65 WARNING: This Product contains DEHP, a chemical known
12 to the State of California to cause cancer, birth
13 defects and other reproductive harm.

14 **(c) Modification of Warnings**

15 The parties acknowledge that, in addition to DEHP, Leeman's product testing results
16 identified Diisononyl phthalate ("DINP") in Products, and that DINP was listed pursuant to
17 Proposition 65 as a chemical known to the State of California to cause cancer, effective December
18 20, 2014. Great Lakes may revise the warnings provided herein to add DINP, after the Effective
19 Date. The warning shall specify which listed chemical is being addressed, or both, as applicable. For
20 both DEHP and DINP the warning shall state:

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22 CALIFORNIA PROP 65 WARNING: This Product contains DEHP and DINP,
23 chemicals known to the State of California to
24 cause cancer, birth defects and other
reproductive harm.

25 For only DINP only:

26 CALIFORNIA PROP 65 WARNING: This Product contains DINP, a
27 chemical known to the State of California to
28 cause cancer, birth defects and other
reproductive harm.

1 **2.3 Reformulation**

2 No warnings are required for Products that are Reformulated Products.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Civil Penalty Payment**

5 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
6 to in this Consent Judgment, Great Lakes shall pay a total of \$7,500.00 in civil penalties, subject to
7 Sections 3.1.1-3.1.2 below. Each civil penalty payment shall be allocated according to Health and
8 Safety Code section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the
9 California Office of Environmental Health Hazard Assessment (“OEHHA”) and twenty-five percent
10 (25%) of the funds remitted to Leeman.

11 **3.1.1 Initial Civil Penalty**

12 Within ten (10) days of the Effective Date, Great Lakes shall pay an initial penalty of
13 \$2,500.00. Great Lakes shall issue two separate checks for its initial civil penalty payment,
14 payable (a) in the amount of \$1,875.00 to “OEHHA;” and (b) in the amount of \$625.00 to
15 “Whitney R. Leeman, Ph.D., Client Trust Account,” for delivery as provided in Section 3.3
16 below.

17 **3.1.2 Final Civil Penalty**

18 On July 30, 2015 Great Lakes shall pay a Final Penalty of \$5,000.00. Great Lakes
19 shall issue two separate checks for the final civil penalty payment, payable (a) in the amount
20 of \$3,750.00 to “OEHHA;” and (b) in the amount of \$1,250.00 to “Whitney R. Leeman,
21 Ph.D., Client Trust Account,” for delivery as provided in Section 3.3 below. Pursuant to title
22 11 California Code of Regulations, section 3203(c), Leeman agrees that the final civil penalty
23 payment shall be waived in its entirety if, no later than July 15, 2015, an officer of Great
24 Lakes provides Leeman with written certification that all of the Products manufactured for
25 sale in California as of the date of such certification are Reformulated Products as defined by
26 Section 2.1, and that Great Lakes will continue to offer only Reformulated Products in
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1 California in the future. The option to certify reformulation in lieu of making the final civil
2 penalty payment required by this Section is a material term and time is of the essence.

3 **3.2 Reimbursement of Fees and Costs**

4 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
5 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
6 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
7 other settlement terms had been finalized, Great Lakes expressed a desire to resolve Leeman's fees
8 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
9 Leeman and her counsel under general contract principles and the private attorney general doctrine
10 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
11 mutual execution of this Consent Judgment. Within ten (10) days of the Effective Date, Great Lakes
12 shall issue a check in the amount of \$29,500.00 for reimbursement of Leeman's attorney's fees and
13 costs, payable to "The Chanler Group," as provided in Section 3.3.1 below.

14 **3.3 Payment Procedures**

15 Payments due under this Consent Judgment are to be delivered as follows.

16 **3.3.1 Payment Addresses**

17 (a) The payments and any tax documentation for Leeman and her counsel shall be
18 delivered to:

19 The Chanler Group
20 Attn: Proposition 65 Controller
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

24 (b) The payment and any tax documentation for OEHHA shall be delivered to
25 OEHHA (Checks with memo line "Prop 65 Penalties") at one of the following addresses, as
26 appropriate:
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For United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery or Courier:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812-4010

3.3.2 Proof of Payment to OEHHA

Great Lakes shall provide, or shall direct its counsel to provide, Leeman’s counsel with a copy of the checks sent to OEHHA enclosed with the payments to Leeman and her counsel sent to the address in Section 3.3.1(a).

4. CLAIMS COVERED AND RELEASED

4.1 Leeman’s Public Release of Proposition 65 Claims

Leeman, acting on her own behalf and in the public interest, releases Great Lakes and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, owners, shareholders, agents and attorneys (“Releasees”), and each entity to whom it directly or indirectly distributes or sells the Products, including but not limited to its downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors, and licensees (“Downstream Releasees”) for violations arising under Proposition 65 for unwarned exposures to DEHP relating to the Products manufactured and distributed by Great Lakes prior to the Effective Date. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products manufactured and distributed by Great Lakes, as set forth in the Notice of Violation.

4.2 Leeman’s Individual Release of Claims

Leeman, in her individual capacity only and *not* in her representative capacity, also provides a release to Great Lakes, Releasees, and Downstream Releasees which shall be effective as a full and

1 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
2 attorneys' fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
3 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
4 exposures to DEHP from the Products manufactured and distributed by Great Lakes before the
5 Effective Date. Leeman further acknowledges that compliance with the terms of this Consent
6 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from the
7 Products manufactured and distributed by Great Lakes after the Effective Date.

8 **4.3 Great Lakes' Release of Leeman**

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

15 **4.4 Civil Code §1542 Waiver**

16 Leeman, her past and current agents, representatives and attorneys acknowledge that they are
17 familiar with Section 1542 of California Civil Code, which provides as follows:

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
19 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
20 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
21 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
22 SETTLEMENT WITH THE DEBTOR.

23 Leeman, on behalf of herself and her past and current agents, representatives, attorneys, successors,
24 and/or assignees expressly waive and relinquish any and all rights and benefits which they may have
25 under, or which may be conferred on them it by the provisions of Civil Code § 1542.

26 Great Lakes, its past and current agents, representatives and attorneys acknowledge that they
27 are familiar with Section 1542 of California Civil Code, which provides as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN

1 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
2 SETTLEMENT WITH THE DEBTOR.

3 Great Lakes, on behalf of itself and its past and current agents, representatives, attorneys, successors,
4 and/or assignees expressly waive and relinquish any and all rights and benefits which they may have
5 under, or which may be conferred on them it by the provisions of Civil Code § 1542.

6 **5. COURT APPROVAL**

7 This Consent Judgment is not effective until it is approved and entered by the Court and shall
8 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
9 has been fully executed by the Parties.

10 **6. SEVERABILITY**

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

14 **7. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the state of California
16 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
17 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Great Lakes
18 may provide written notice to Leeman of any asserted change in the law, and shall have no further
19 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
20 so affected; except that no such notice is required for modification of warnings as provided in Section
21 2.2(c) above. Nothing in this Consent Judgment shall be interpreted to relieve Great Lakes from any
22 obligation to comply with any pertinent state or federal toxics control laws.

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 Great Lakes:

28 Chris Locke, Esq.
Farella, Braun and Martel, LLP

1 235 Montgomery Street
San Francisco, CA 94104

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3 For Leeman:

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

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **10. POST EXECUTION ACTIVITIES**

14 Leeman agrees to comply with the reporting form requirements referenced in Health and
15 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
16 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
17 and that such motions shall be prepared by Leeman's counsel. In furtherance of obtaining such
18 approval, Leeman and Great Lakes agree to mutually employ their best efforts, and that of their
19 counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their
20 settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a
21 minimum, cooperating with the drafting and filing of the necessary moving papers, and supporting
22 the motion for judicial approval.

23 **11. ATTORNEYS' FEES AND COSTS**

24 Except as provided in Section 3.2 above, each Party shall bear their own attorneys' fees and
25 costs in this matter, except as otherwise provided by law in an action for enforcement of this Consent
26 Judgment.

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12. MODIFICATION

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

13. AUTHORIZATION

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

14. FULL SETTLEMENT

The Parties intend for this Consent Judgment to constitute a full and final settlement of this matter, and that it should be entered as a final judgment.


AGREED TO:

AGREED TO:

Date: 9/19/14

Date: 9-10-14

By: 
WHITNEY R. LEEMAN, PH.D.

By: 
Nicholas Voden, President
Great Lakes Dart Mfg. Inc.