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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN FRANCISCO

15 UNLIMITED CIVIL JURISDICTION

16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 FORTY FOUR GROUP LLC, *et al.*,

20 Defendant.

Case No. CGC-16-549931

[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 Forty Four Group LLC (“Forty Four”), with Leeman and Forty Four 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 Forty Four employs ten or more individuals and is 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 Forty Four manufactures, imports, sells, or distributes for sale in
16 California, headphones with vinyl/PVC components that contain di(2-ethylhexyl) phthalate
17 (“DEHP”) without first providing the exposure warning required by Proposition 65. DEHP is listed
18 pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth
19 defects or other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are headphones with vinyl/PVC components
22 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by Forty
23 Four including, but not limited to, the *OrigAudio Lagunitas Brewing Company Headphones, OA-LH*,
24 hereinafter the “Products.”

25 **1.6 Notices of Violation**

26 On October 28, 2015, Leeman served Forty Four and the requisite public enforcement
27 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Forty Four violated
28 Proposition 65 by failing to warn its customers and consumers in California of the health hazards

1 associated with exposures to DEHP from the Products. No public enforcer has commenced and is
2 diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On January 15, 2016, Leeman filed the instant action (“Complaint”), naming Forty Four as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 Forty Four denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and it maintains that all of the products that it has sold and distributed for sale in
10 California, including the Products, have been and are in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
12 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
13 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
14 Section shall not, however, diminish or otherwise affect Forty Four’s obligations, responsibilities,
15 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 Forty Four as to the allegations contained in the Complaint, that venue is proper in
19 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
20 this 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 Court approves this Consent Judgment, including any unopposed tentative rulings.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Reformulation Standards**

3 Commencing on the Effective Date, Forty Four shall not manufacture, import, distribute, sell
4 or offer the Products for sale in California unless they are Reformulated Products, or contain
5 appropriate health hazard warnings, per Section 2.2. For purposes of this Consent Judgment,
6 “Reformulated Products” are products that contain DEHP in concentrations of less than 0.1 percent
7 (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing
8 methodologies 3580A and 8270C, or any other methodology utilized by federal or state agencies for
9 the purpose of determining the DEHP content in a solid substance.

10 **2.2 Product Warnings**

11 Commencing within five (5) business days of the Effective Date, Forty Four shall provide
12 clear and reasonable warnings for all Products as set forth in subsections 2.2(a) and (b) for all
13 Products that do not currently have warnings and that do not qualify as Reformulated Products. Each
14 warning shall be prominently placed with such conspicuousness as compared with other words,
15 statements, designs, or devices as to render it likely to be read and understood by an ordinary
16 individual under customary conditions before purchase or use. Each warning shall be provided in a
17 manner such that the consumer or user understands to which *specific* Product the warning applies, so
18 as to minimize the risk of consumer confusion.

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

20 **(i) Product Labeling.** Forty Four shall affix a warning to the packaging,
21 labeling, or directly on each Product provided for sale in retail outlets in California that states:

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

24 Or,

25 **WARNING:** This product contains a chemical
26 known to the State of California to cause cancer
 and birth defects and other reproductive harm.

1 (ii) **Point-of-Sale Warnings.** Alternatively, Forty Four may provide warning
2 signs in the form below to its customers in California with instructions to post the warnings in close
3 proximity to the point of display of the Products. Such instruction sent to Forty Four’s customers
4 shall be sent by certified mail, return receipt requested.

5 **WARNING:** This product contains DEHP, a chemical
6 known to the State of California to cause
7 birth defects and other reproductive harm.

8 Or,

9 **WARNING:** This product contains a chemical known
10 to the State of California to cause cancer
11 and birth defects and other reproductive harm.

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

15 **WARNING:** The following products contain DEHP, a chemical
16 known to the State of California to cause birth defects
17 and other reproductive harm:

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

19 Or,

20 **WARNING:** The following products contain a chemical
21 known to the State of California to cause cancer
22 and birth defects and other reproductive harm.

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

24 **(b) Mail Order Catalog and Internet Sales.** In the event that Forty Four sells Products
25 via mail order catalog and/or the internet, to customers located in California, after the Effective Date,
26 that are not Reformulated Products, Forty Four shall provide warnings for such Products sold via
27 mail order catalog or the internet to California residents. Warnings given in the mail order catalog or
28 on the internet shall identify the *specific* Product to which the warning applies as further specified in
Sections 2.2(b)(i) and (ii).

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

5 **WARNING:** This product contains DEHP, a chemical
6 known to the State of California to cause
7 birth defects and other reproductive harm.

8 Or,

9 **WARNING:** This product contains a chemical
10 known to the State of California to cause cancer
11 and birth defects and other reproductive harm.

12 Where it is impracticable to provide the warning on the same page and in the same location as
13 the display and/or description of the Product, Forty Four may utilize a designated symbol to cross
14 reference the applicable warning and shall define the term “designated symbol” with the following
15 language on the inside of the front cover of the catalog or on the same page as any order form for the
16 Product(s):

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

21 Or,

22 **WARNING:** Certain products identified with this symbol ▼
23 and offered for sale in this catalog contain
24 a chemical known to the State of California to cause
25 cancer and birth defects and other reproductive harm.

26 The designated symbol must appear on the same page and in close proximity to the display
27 and/or description of the Product. On each page where the designated symbol appears, Forty Four
28 must provide a header or footer directing the consumer to the warning language and definition of the
designated symbol.

(ii) Internet Website Warning. A warning shall be given in conjunction with the
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
same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
during the checkout process. The following warning statement shall be used and shall appear in any

1 of the above instances adjacent to or immediately following the display, description, or price of the
2 Product for which it is given in the same type size or larger than the Product description text:

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

5 Or,

6 **WARNING:** This product contains a chemical
7 known to the State of California to cause
8 cancer and birth defects and other reproductive harm.

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

11 **WARNING:** This product contains DEHP, a chemical
12 known to the State of California to cause
13 birth defects and other reproductive harm.

14 Or,

15 **WARNING:** This product contains a chemical
16 known to the State of California to cause
17 cancer and birth defects and other reproductive harm.

18 **3. MONETARY SETTLEMENT TERMS**

19 **3.1 Civil Penalty Payments**

20 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
21 this Consent Judgment, Forty Four shall pay \$8,000 in civil penalties, as set forth in section 3.1.1 and
22 3.1.2 below. Each civil penalty payment shall be allocated according to Health and Safety Code
23 section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the California
24 Office of Environmental Health Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of
the funds remitted to Leeman.

25 **3.1.1 Initial Civil Penalty**

26 Forty Four shall issue a check for its initial civil penalty payment in the amount of
27 \$3,000 to “Whitney R. Leeman, Client Trust Account” pursuant to the payment procedures in Section
28 3.3 below and to the address found in Section 3.4 below. Leeman and her counsel will ensure 75% of
this initial penalty is paid to OEHHA.

1 **3.1.2 Final Civil Penalty**

2 On or before April 30, 2017, Forty Four shall make a final civil penalty payment of
3 \$5,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Leeman agrees that the
4 final civil penalty payment shall be waived in its entirety if, no later than April 15, 2017, an officer of
5 Forty Four provides Leeman with written certification that all of the Products it is selling or
6 distributing for sale in California as of the date of such certification are Reformulated Products as
7 defined by Section 2.1, and that Forty Four will continue to offer only Reformulated Products for sale
8 in California in the future. The option to certify reformulation in lieu of making the final civil
9 penalty payment required by this Section is a material term and time is of the essence. Forty Four
10 shall deliver its certificate, if any, to Leeman’s counsel at the address provided in Section 3.4, below.
11 In the event that Forty Four does not timely certify its compliance or make the final civil penalty
12 payment required by this Section, the Parties agree that Leeman may file a motion or application
13 seeking an order compelling Forty Four’s compliance with this Section. If successful, the Parties
14 further agree that Leeman shall be entitled to her reasonable attorneys’ fees and costs pursuant to
15 general contract principles and Code of Civil Procedure section 1021.5.

16 **3.2 Reimbursement of Attorney’s Fees and Costs**

17 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
18 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
19 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
20 other settlement terms had been finalized, Forty Four expressed a desire to resolve Leeman’s fees and
21 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Leeman
22 and her counsel under general contract principles and the private attorney general doctrine codified at
23 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
24 execution of this Consent Judgment. Forty Four shall issue a check to “The Chanler Group” in the
25 amount of \$29,000, pursuant to the payment procedures in Section 3.3 below, and to the address
26 found in Section 3.4 below.

1 **3.3 Payments Held in Trust**

2 Except the final civil penalty payment required by Section 3.1.2, all payments due under this
3 agreement shall be delivered within five (5) days of the date that this Consent Judgment is fully
4 executed by the Parties, and held in trust by Forty Four’s counsel until the Court grants the motion
5 for approval of this Consent Judgment. Within two business days of the Court’s approval of this
6 Consent Judgment, Forty Four’s counsel shall tender the initial civil penalty payments and
7 attorneys’ fee and costs reimbursements required by Sections 3.1.1 and 3.2.

8 **3.4 Payment Address**

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

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Leeman’s Public Release of Proposition 65 Claims**

15 Leeman, acting on her own behalf and in the public interest, releases Forty Four and its
16 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
17 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
18 Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers,
19 franchisers, resellers, cooperative members, licensors and licensees (“Downstream Releasees”) for
20 any violations arising under Proposition 65 for unwarned exposures to DEHP from Products sold by
21 Forty Four prior to the Effective Date, as set forth in the Notice.

22 **4.2 Leeman’s Individual Release of Claims**

23 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
24 release to Forty Four, Releasees, and Downstream Releasees which shall be effective as a full and
25 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
26 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
27 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
28

1 exposures to DEHP in the Products sold or distributed for sale by Forty Four before the Effective
2 Date.

3 **4.3 Forty Four's Release of Leeman**

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

9 **4.4 Mutual Waiver of California Civil Code Section 1542**

10 The Parties each acknowledge she/it is familiar with Section 1542 of the Civil Code, which
11 provides as follows:

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

16 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
17 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
18 rights and benefits which they may have under, or which may be conferred upon them by the
19 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
20 law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
21 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

22 **4.5 Representations**

23 Forty Four represents that the sales data for the Products and other information it provided to
24 Leeman is truthful to the best of its knowledge and a material factor upon which Leeman has relied to
25 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this
26 Settlement Agreement. If, within twelve months of the Effective Date, Leeman discovers and
27 presents to Forty Four, evidence demonstrating that the preceding representation was materially
28 inaccurate, then Forty Four shall have 30 days to meet and confer regarding Leeman's contention.

1 Should this 30-day period pass without any such resolution between Leeman and Forty Four, Leeman
2 shall be entitled to file a formal legal claim including, but not limited to, a claim for damages for
3 breach of contract.

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, for any reason, it is not approved and entered by the Court within one year after it
7 has been fully executed by the Parties.

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 Products, then Forty Four may provide
16 written notice to Leeman of any asserted change in the law, and shall have no further injunctive
17 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
18 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: (i) personal delivery; (ii) first-class, registered, or certified mail,
22 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

23 For Forty Four:

24
25 Michael Szymczak, President
26 Forty Four Group LLC
27 2120 Placentia Avenue
28 Costa Mesa, CA 92627

1 with a copy to Forty Four’s counsel:

2 Stephen T. Holzer, Esq.
3 Lewitt Hackman
4 16633 Ventura Blvd., 11th Floor
5 Encino, CA 91436

6 For Leeman:

7 The Chanler Group
8 Attention: Prop 65 Coordinator
9 2560 Ninth Street
10 Parker Plaza Suite 214
11 Berkeley CA, 94710

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

18 **10. POST EXECUTION ACTIVITIES**

19 Leeman agrees to comply with the reporting form requirements referenced in Health and
20 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
21 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
22 which motion Leeman shall draft and file. In furtherance of obtaining such approval, Leeman and
23 Forty Four agree to mutually employ their best efforts, and those of their counsel, to support the entry
24 of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner.
25 For purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion, and if
26 necessary, appearing at the hearing before the Court.

27 **11. MODIFICATION**

28 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. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
3 Parties and acknowledge that they have read, understood, and agree to all of the terms and conditions
4 contained herein.

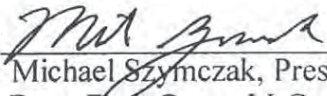
5 **AGREED TO:**

AGREED TO:

6
7 Date: September 30, 2016

8 Date: 9/29/16

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

11 By: 
12 Michael Szymczak, President
13 Forty Four Group LLC