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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 HSIN TUNG
YANG FOODS COMPANY**

(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 Hsin Tung Yang Foods Company (“Hsin Tung”), with Leeman and Hsin
5 Tung 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 to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Hsin Tung 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 Hsin Tung sells or distributes for sale in California dried Oolong 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. Hsin Tung denies Leeman’s allegations.

19 **1.5 Covered Products**

20 For purposes of this Consent Judgment, “Covered Products” are defined as dried oolong teas
21 that are sold in California by Hsin Tung, including but not limited to the *Ti Kuan Yi Tea* and *Hsin*
22 *Tung Yang Taiwan Famous Tea*.

23 **1.6 Notice of Violation**

24 On November 7, 2016, Leeman served Hsin Tung, the California Attorney General, and all
25 other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The
26 Notice alleges that Hsin Tung violated Proposition 65 by failing to warn its customers and consumers
27 in 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. On January 23, 2017,
6 Leeman filed a Doe Amendment to First Amended Complaint, naming Hsin Tung as a defendant.

7 **1.8 No Admission**

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

1 are either: (i) Reformulated Products as defined by Section 2.2; or (ii) sold with clear and reasonable
2 warnings 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 per 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 directly by Hsin Tung that are not Reformulated
24 Products, shall be accompanied by a clear and reasonable warning, in accordance with this section.
25 Sale or distribution “directly” to California consumers as described in Section 2.3 means
26 distribution or sale to California customers without the involvement, participation, or assistance of
27 any downstream retailers, distributors, or wholesalers. The warning required by this section shall be
28 prominently placed in relation to the Covered Product with such conspicuousness when compared

1 with other words, statements, designs, or devises as to render it likely to be read and understood by an
2 ordinary individual under customary conditions of purchase or use. A clear warning specified in this
3 section shall be deemed reasonable if transmitted in accordance with Title 27, Article 6 § 25602 or
4 25607.1. The following warning statement shall be deemed clear:

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

9 **2.4 Notification of Warning Requirement in Case of Indirect Sales**

10 Defendant shall notify all downstream retailers, downstream distributors, and downstream
11 wholesalers with whom Defendant has a direct contract by first-class or certified mail, email,
12 facsimile, or equivalent means, that any Covered Products that are not reformulated pursuant to
13 Section 2.1 or labeled with a Proposition 65 warning pursuant to Section 2.3 may not be sold in
14 California stores or online to California consumers without providing a clear and reasonable warning
15 that complies with Section 2.3. Such notification by Defendant shall include an instruction that the
16 downstream party provide a notification consistent with this section to all downstream parties with
17 whom it has a direct contract to sell Covered Products to California consumers. “Indirect” sale or
18 distribution to California consumers as described in this Section 2.4 means sale or distribution to
19 California customers with the involvement, participation, or assistance of any downstream retailer,
20 distributor, or wholesaler.

21 **2.5 Modification of Reformulation Standards**

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

24 **2.5.1 Alternative Standards Adopted by The State of California.** Hsin Tung may

25 utilize any lead reformulation standard or level for the Covered Products that is, after the Effective
26 Date: (i) adopted by The State of California, either by statute or regulation; or (ii) agreed to by the
27 California Attorney General, on behalf of the People of the State of California, in a consent judgment
28 entered by a Superior Court of the State of California. In the event Hsin Tung intends to utilize a
 reformulation standard permitted by this subsection, Hsin Tung shall provide Leeman with written

1 notice of the proposed change and the basis therefor.

2 **2.5.2 Alternative Standards Adopted by Leeman.** Hsin Tung may utilize any lead
3 reformulation standard or level for the Covered Products that is, after the Effective Date, agreed to by
4 Leeman in a consent judgment entered by the California Superior Court. In the event Hsin Tung
5 intends to utilize a reformulation standard permitted by this subsection, Hsin Tung shall provide
6 Leeman with written notice of the proposed change and the agreement entered by Leeman supporting
7 the proposed new standard.

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, Hsin Tung agrees to pay \$3,000 in
12 civil penalties. Hsin Tung's civil penalty payment will be allocated according to Health and Safety
13 Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the
14 California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining
15 twenty-five percent (25%) of the penalty payment retained by Leeman. Hsin Tung shall issue its
16 payment in two checks for the following amounts made payable to (a) "OEHHA" in the amount of
17 \$2,250; and (b) "Whitney R. Leeman, Client Trust Account" in the amount of \$750. Leeman's
18 counsel shall be responsible for delivering OEHHA's portion of the civil penalty paid under this
19 Consent Judgment.

20 **3.2 Reimbursement of Attorney's Fees and Costs**

21 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
22 reaching terms on the fees and costs to be reimbursed to them, thereby leaving the issue to be
23 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
24 settlement terms had been finalized, the Parties negotiated the compensation due to Leeman and her
25 counsel under general contract principles and the private attorney general doctrine codified at
26 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
27 execution of this Consent Judgment, and through court approval of the same, but exclusive of fees
28 and costs on appeal, if any. Hsin Tung agrees to pay \$21,000 by a check made payable to "The

1 Chanler Group” for all fees and costs incurred investigating, bringing this matter to Hsin Tung’s
2 attention, litigating, and negotiating a settlement in the public interest.

3 **3.3 Payment Timing; Payments Held in Trust**

4 All payments due under this Consent Judgment shall be held in trust until such time as the
5 Court approves the Parties’ settlement. Hsin Tung shall deliver its civil penalty and attorneys’ fee
6 reimbursement payments to its counsel within fifteen (15) days of the date that this Consent
7 Judgment is fully executed by the Parties. Hsin Tung’s counsel shall provide Leeman’s counsel
8 with written confirmation following its receipt of the settlement funds. Thereafter, Hsin Tung’s
9 counsel shall hold the settlement funds in trust until, and disburse the funds to Leeman’s counsel
10 within three (3) business days of the Effective Date.

11 **3.4 Payment Address**

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

13 The Chanler Group
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710

18 **4. CLAIMS COVERED AND RELEASED**

19 **4.1 Leeman’s Public Release of Proposition 65 Claims**

20 Leeman acting in the public interest hereby releases Hsin Tung and its parents, subsidiaries,
21 affiliated entities under common ownership, directors, officers, employees, and attorneys
22 (“Releasees”), and each entity to whom Hsin Tung directly or indirectly distributes or sells the
23 Covered Products including, but not limited to, Hsin Tung’s downstream distributors, wholesalers,
24 customers, retailers, franchisees, cooperative members, licensors, and licensees (“Downstream
25 Releasees”), based on the alleged or actual failure to warn about exposures to lead in Covered
26 Products imported, manufactured, sold, or distributed for sale by Hsin Tung before the Effective
27 Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
28 compliance with Proposition 65 by Hsin Tung with respect to the failure to warn about exposures to
lead in Covered Products sold after the Effective Date.

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

2 Leeman, acting in her individual capacity only, on her own behalf and on behalf of her past
3 and current agents, representatives, attorneys, successors, and assignees, also provides a release to
4 Hsin Tung, Releasees, and Downstream Releasees which shall be effective as a full and final accord
5 and satisfaction, as a bar to all suits, actions, and causes of action in law or in equity, obligations,
6 costs, expenses, attorneys’ fees, damages, losses, claims, liabilities, and demands of any nature,
7 character, or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
8 actual exposures to lead in Covered Products imported, manufactured, sold, or distributed for sale by
9 Hsin Tung before the Effective Date.

10 **4.3 Hsin Tung’s Release of Leeman**

11 Hsin Tung, on its own behalf, and on behalf of its past and current agents, representatives,
12 attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her
13 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
14 her attorneys and other representatives, whether in the course of investigating claims, seeking to
15 enforce Proposition 65 against Hsin Tung in this matter, or with respect to the Covered 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 Products, then Hsin Tung may
28 provide written notice to Leeman of any asserted change in the law, and shall have no further

1 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
2 Covered 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 Hsin Tung:

9 Kaiyen Mai, Chief Executive Officer
10 Hsin Tung Yang Foods Company
405 South Airport Boulevard
11 South San Francisco, CA 94080

12 Julia R. Graeser, Esq.
Barg Coffin Lewis & Trapp, LLP
13 350 California Street, 22nd Floor
San Francisco, CA 94104-1435

14 For Leeman:

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

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

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **10. POST EXECUTION ACTIVITIES**

25 Leeman agrees to comply with the reporting form requirements referenced in Health and
26 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
27 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
28 which Leeman shall draft and file. In furtherance of obtaining such approval, the Parties agree to

1 mutually employ their best efforts, and those of their counsel, to support the entry of this agreement
2 as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of
3 this Section, “best efforts” shall include, at a minimum, supporting the motion for approval,
4 responding to any opposition or objection any third-party may file, and appearing at the hearing
5 before the Court if so requested.

6 **11. MODIFICATION**

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

10 **12. ENFORCEMENT**

11 **12.1 Future Sales of Products Alleged to Violate this Consent Judgment.**

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

20 Hsin Tung and Leeman shall, within thirty days of Hsin Tung’s receipt of the Notice of
21 Breach, meet and confer regarding the alleged violation. During this time, Leeman shall not file any
22 motion, application, action, or pleading regarding the violation(s) alleged in the Notice of Breach.

23 For the first alleged violation for which Leeman provides Hsin Tung with a Notice of Breach,
24 Hsin Tung may demonstrate compliance by providing verified results for lead testing performed in
25 three samples of the Covered Product that shows the average level of lead content measured meets
26 the Reformulation Standard. If Hsin Tung cannot demonstrate compliance, it must pay a stipulated
27 civil penalty of \$2,500.00 to be allocated according to Section 3.1.

28

1 In the event that, thereafter, Leeman provides a Notice of Breach alleging a second violation
2 of the Consent Judgment by Hsin Tung, she must do so in accordance with this Section. For the
3 second alleged violation, Hsin Tung may demonstrate compliance with the Consent Judgment by
4 providing test results obtained using the test methodologies established by subsections 2.2.1 and/or
5 2.2.2, conducted on five samples of the Covered Product, indicating that the average of any three
6 such results complies with the Reformulation Standard (i.e., even taking the highest three results),
7 such a showing shall constitute compliance.

8 In the event that Hsin Tung cannot demonstrate compliance in the manner set forth above
9 after receipt of a second Notice of Breach for a Covered Product, Hsin Tung shall pay a stipulated
10 penalty of \$5,000.00 for the second, and each subsequent, violation(s).

11 **12.2 Future Sales of Additional Non-Covered Products**

12 In order to assert a potential violation of Proposition 65 that alleges exposure to lead from an
13 Hsin Tung tea product, that is not a Covered Product (“Non-Covered Products”), Leeman shall
14 provide notice to Hsin Tung of the alleged violation that includes: (a) all test results conducted on a
15 specific Non-Covered Product during the three month period for which a violation is alleged; (b) such
16 testing must be of no less than three of the same Non-Covered Product collected within the same
17 three month period; (c) the average of all test results for that period must exceed the Reformulation
18 Standard; and (d) Leeman shall provide Hsin Tung with a copy of the (i) purchase information for the
19 accused Non-Covered Product and (ii) a digital image of the Non-Covered Product packaging or
20 labeling showing the SKU, UPC, Lot, and Batch number(s), if any.

21 Thereafter, Hsin Tung and Leeman shall, within thirty days of Hsin Tung’s receipt of the
22 notice, meet and confer regarding the Non-Covered Product(s). During this time Leeman shall not
23 serve a 60-Day Notice of Violation regarding the alleged violation(s).

24 For the first alleged violation as to any specific Non-Covered Product for which Leeman
25 provides notice of a violation, Hsin Tung may demonstrate compliance by providing verified lead test
26 results for testing performed in accordance with the methodologies established by subsections 2.2.1
27 and/or 2.2.2 for three samples of the Non-Covered Product that show that the average level of lead
28 content meets the Reformulation Standard. If Hsin Tung cannot demonstrate compliance, it shall

1 have a right to cure the initial alleged violation and shall demonstrate that the violation has been
2 cured by providing verified lead test results for the three samples of the Non-Covered Product,
3 showing that the average level meets the Reformulation Standard.

4 In the event that, thereafter, Leeman provides Hsin Tung with notice pertaining to a second
5 (or subsequent) alleged violation for the same Non-Covered Product, she must do so in accordance
6 with this Section. For any second (or subsequent) alleged violation noticed by Leeman regarding the
7 same Non-Covered Product, Hsin Tung may demonstrate compliance by providing test results, using
8 those test methodologies established by subsections 2.2.1 and/or 2.2.2, conducted on five samples of
9 the Non-Covered Product indicating that the average of any three such results comply with the
10 Reformulation Standard (i.e., even taking the highest three results), such a showing shall constitute
11 compliance.

12 In the event that Hsin Tung cannot demonstrate compliance in the manner set forth above
13 after receipt of a second (or subsequent) notice for the same Non-Covered Product, Leeman may
14 issue a 60-Day Notice of Violation for the Non-Covered Product or otherwise seek to remedy the
15 alleged violations under the law.

16 **13. AUTHORIZATION**

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

19
20 **AGREED TO:**

21 Date: April 25, 2017

22
23 By: 
24 WHITNEY R. LEEMAN, PH.D.

AGREED TO:

25 Date: 4/21/17

26
27 By: 
28 Kaiyen Mai, Chief Executive Officer
HSIN TUNG YANG FOODS COMPANY