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

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

14 Plaintiff,

15 v.

16 KAO USA INC., *et al.*,

17 Defendants.
18

Case No. CIV1600391

[PROPOSED] CONSENT JUDGMENT

(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 Kao USA Inc. (“Kao”), with Leeman and Kao each individually referred to as a
5 “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 Kao employs ten or more individuals 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 Kao imports, sells, or distributes for sale in California vinyl/PVC toiletry
16 cases that contain di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as vinyl/PVC toiletry bags or
21 cases containing DEHP that are imported, sold, or distributed for sale in California by Kao, including,
22 but not limited to, the bag/case component of the *John Freida Frizz Ease Kit, UPC No. 7 17226*
23 *21015 0*.

24 **1.6 Notice of Violation**

25 On August 20, 2015, Leeman served Kao, and the requisite public enforcement agencies with
26 a 60-Day Notice of Violation (“Notice”), alleging that Kao violated Proposition 65 by failing to warn
27 its customers and consumers in California of the health hazards associated with exposures to DEHP
28

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

3 **1.7 Complaint**

4 On February 1, 2016, Leeman filed the instant action (“Complaint”), naming Kao 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 Kao denies the material, factual, and legal allegations contained in the Notice and Complaint,
9 and maintains that all of the products it has sold and distributed for sale in California, including the
10 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
11 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
12 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any
13 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,
14 diminish or otherwise affect Kao’s obligations, responsibilities, and duties under this Consent
15 Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Kao as to the allegations in the Complaint, that venue is proper in the County of
19 Marin, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court or Plaintiff serves Notice of Entry of the Consent Judgment on Kao.

24 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

25 Commencing on the Effective Date and continuing thereafter, Kao agrees to only sell or
26 distribute for sale in California, Reformulated Products. For purposes of this Consent Judgment,
27 "Reformulated Products" are defined as Products containing DEHP in a maximum concentration of
28 1,000 parts per million (0.1%) in any accessible component when analyzed pursuant to U.S.

1 Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent
2 methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a
3 solid substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payment**

6 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
7 referred to in the Notice, Complaint, and this Consent Judgment, Kao shall pay \$2,500 in civil
8 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section
9 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
10 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
11 (25%) of the penalty retained by Leeman. Kao shall provide its payment in a single check made
12 payable to “Whitney R. Leeman, Ph.D., Client Trust Account.” Leeman’s counsel shall be
13 responsible for delivering OEHHA’s portion of any penalty payment(s) made under this Consent
14 Judgment.

15 **3.2 Reimbursement of Attorney’s Fees and Costs**

16 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
17 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
18 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
19 other settlement terms had been finalized, the Parties negotiated the compensation due to Leeman and
20 her counsel under general contract principles and the private attorney general doctrine codified at
21 California Code of Civil Procedure section 1021.5. For all work performed through the mutual
22 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
23 on appeal, if any, Kao shall pay \$23,500 in a check made payable to “The Chanler Group” covering
24 all fees and costs incurred by Leeman investigating, bringing this matter to Kao’s attention, litigating
25 and negotiating a settlement in the public interest.

26 **3.3 Payment Timing; Payments Held in Trust**

27 All payments due under this Consent Judgment shall be held in trust until such time as the
28 Court approves the Parties’ settlement. Within fifteen (15) days of the date that this Consent

1 Judgment is fully executed by the Parties, Kao shall deliver all payments due under this agreement
2 to its counsel to be held in trust until the Effective Date. Kao's counsel shall provide Leeman's
3 counsel with written confirmation upon its receipt of the settlement payments. Within five (5)
4 business days of the Effective Date, Kao's counsel shall deliver the civil penalty and attorneys' fee
5 reimbursement payments to Leeman's counsel.

6 **3.4 Payment Address**

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

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

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Leeman's Public Release of Proposition 65 Claims**

13 Leeman, acting on her own behalf and in the public interest, releases Kao and its parents,
14 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
15 attorneys ("Releasees"), and each entity to whom Kao directly or indirectly distributes or sells the
16 Products including, without limitation, its downstream customers, distributors, wholesalers, and
17 retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to the
18 failure to warn about exposures to DEHP in Products manufactured, sold, or distributed for sale by
19 Kao prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
20 Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual
21 failure to warn about exposures to DEHP in Products sold or distributed for sale by Kao after the
22 Effective Date.

23 **4.2 Leeman's Individual Release of Claims**

24 Leeman, in her individual capacity only and *not* in any representative capacity, also provides
25 a release to Kao, Releasees, and Downstream Releasees, which shall be effective as a full and final
26 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
27 attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind,
28

1 whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to
2 DEHP in Products sold or distributed for sale by Kao before the Effective Date.

3 **4.3 Kao's Release of Leeman**

4 Kao, 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, whether in the
7 course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter,
8 or with respect to the Products.

9 **5. COURT APPROVAL**

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

13 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the state of California
19 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
20 rendered inapplicable by reason of law generally or as to the Products, then Kao may provide written
21 notice to Leeman of any asserted change in the law, and shall have no further injunctive obligations
22 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

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
28

1 For Kao

2 Walter S. Wood, General Counsel
3 Kao USA Inc.
4 312 Plum Street Building
5 Cincinnati, OH 45202

6 with a copy to:

7 Greg Sperla, Esq.
8 Greenberg Traurig, LLP
9 1201 K Street, Suite 1100
10 Sacramento, CA 95814

11 For Leeman:

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

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

23 **10. POST EXECUTION ACTIVITIES**

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

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

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

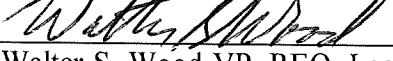
8 **AGREED TO:**

AGREED TO:

9
10 Date: 8/23/2016

Date: 8/24/16

11 By: 
12 WHITNEY R. LEEMAN, PH.D.

11 By: 
12 Walter S. Wood VP, REO, Legal and General
13 Counsel, Americas
14 KAO USA INC.