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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 STILLWATER DESIGNS AND AUDIO,
20 INC.; and DOES 1-150, inclusive,

21 Defendants.

22 Case No.: RG14730701

23 **[PROPOSED] CONSENT DECREE**

1 **1. INTRODUCTION**

2 **1.1 Whitney R. Leeman and Stillwater Designs and Audio, Inc.**

3 This Consent Decree is entered into by and between Whitney R. Leeman, Ph.D. (“Leeman”
4 or “Plaintiff”), and Stillwater Designs and Audio, Inc. (“Stillwater” or “Defendant”), with Plaintiff
5 and Defendant collectively referred to as the “Parties.”

6 **1.2 Whitney R. Leeman**

7 Leeman is an individual residing in the State of California who seeks to promote awareness
8 of exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 Stillwater Designs and Audio, Inc.**

11 Leeman alleges that Stillwater employs ten or more persons and is a person in the course of
12 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Stillwater has manufactured, imported, distributed and/or sold
16 vinyl/PVC keychains containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite
17 Proposition 65 warnings. DEHP is listed under Proposition 65 a chemical known to cause birth
18 defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Decree are vinyl/PVC Keychains, including,
21 but not limited to the *KICKER Key Chain, Item 12KEYCHAIN* manufactured, imported, distributed
22 and/or sold by Stillwater, hereinafter specifically defined as “Covered Products.”

23 **1.6 Notice of Violation**

24 On December 30, 2013, Leeman served Stillwater and various public enforcement agencies,
25 with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients
26 with notice of alleged violations of Proposition 65 based on Stillwater’s alleged failure to warn
27 consumers that the Covered Products exposed users in California to DEHP. To the best of the
28 Parties’ knowledge, no public enforcer has prosecuted the allegations set forth in the Notice.

1 **1.7 Complaint**

2 On June 26, 2014, Leeman filed a complaint in the Superior Court in and for the County of
3 Alameda against Stillwater and Does 1 through 150, *Leeman v. Stillwater Designs and Audio, Inc.,*
4 *et al.*, Case No. RG14730701 (“Complaint” or “Action”), alleging violations of Proposition 65,
5 based on the alleged exposures to DEHP contained in Covered Products sold by Stillwater.

6 **1.8 No Admission**

7 Stillwater denies the material, factual and legal allegations contained in Leeman’s Notice
8 and Complaint and maintains that all products that it has sold, manufactured, imported and/or
9 distributed in California, including the Covered Products, have been and are in compliance with all
10 laws. Nothing in this Consent Decree shall be construed as an admission by Stillwater of any fact,
11 finding, issue of law, or violation of law, nor shall compliance with this Consent Decree constitute
12 or be construed as an admission by Stillwater of any fact, finding, conclusion, issue of law, or
13 violation of law. However, this section shall not diminish or otherwise affect Stillwater’s
14 obligations, responsibilities, and duties under this Consent Decree as to Covered Products.

15 **1.9 Consent to Jurisdiction**

16 For purposes of this Consent Decree only, the Parties stipulate that this Court has
17 jurisdiction over Stillwater as to the allegations contained in the Complaint, that venue is proper in
18 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
19 this Consent Decree.

20 **1.10 Effective Date**

21 For purposes of this Consent Decree, the term “Effective Date” shall mean April 20, 2015.

22 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNING**

23 **2.1 Reformulated Products**

24 With regard to Stillwater’s sale, offer for sale, or distribution of Covered Products,
25 commencing on the Effective Date, and continuing thereafter, Stillwater shall only sell, offer for
26 sale, or distribute for sale in California, Reformulated Products or Covered Products that contain a
27 clear and reasonable warning pursuant to Section 2.2. For purposes of this Consent Decree,
28 “Reformulated Products” are defined as Covered Products that contain DEHP in concentrations less

1 than 0.1 percent (1,000 parts per million) in each accessible component when analyzed pursuant to
2 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or any other
3 methodology utilized by federal or state agencies for the purpose of determining the DEHP content
4 in a solid substance.

5 **2.2 Clear and Reasonable Warnings**

6 Commencing on the Effective Date, with regard to all Covered Products that do not qualify
7 as Reformulated Products, Stillwater agrees that it will only offer such Covered Products for sale or
8 shipment in California with a clear and reasonable warning pursuant to this Section. Stillwater
9 further agrees that the warning will be prominently placed with such conspicuousness as compared
10 with other words, statements, designs, or devices as to render it likely to be read and understood by
11 an ordinary individual under customary conditions before purchase or use. Each warning shall be
12 provided in a manner such that the consumer or user understands which *specific* item constitutes
13 Covered Products not qualifying as Reformulated Products, so as to minimize the risk of consumer
14 confusion. For purposes of this Consent Decree, a clear and reasonable warning shall consist of a
15 warning affixed to the packaging, label, tag, or directly to the Covered Products not qualifying as a
16 Reformulated Products, or, for internet or mail order catalogue sales, in accordance with Section
17 2.2(a), and such warnings shall contain the following statement:

18
19 **WARNING:** This product contains DEHP, a chemical
20 known to the State of California to cause birth
21 defects and other reproductive harm.

22 **(a) Mail Order Catalog and Internet Sales.** In the event that Stillwater sells Covered
23 Products not qualifying as Reformulated Products via mail order catalog and/or the internet, to
24 customers located in California, after the Effective Date, Stillwater shall provide warnings for such
25 Covered Products sold via mail order catalog or the internet to California residents that are
26 compliant with this Section 2.2.

27 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order
28

1 catalog shall be in the same type size or larger than the Covered Products' description text
2 within the catalog. The following warning shall be provided on the same page and in the
3 same location as the display and/or description of the Covered Products not qualifying as
4 Reformulated Products:

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 Where it is impracticable to provide the warning on the same page and in the same location
9 as the display and/or description of the Covered Products not qualifying as a Reformulated
10 Products, Stillwater may utilize a designated symbol to cross reference the applicable warning and
11 shall define the term "designated symbol" with the following language on the inside of the front
12 cover of the catalog or on the same page as any order form for the Covered Products:

13 WARNING: Certain products identified with this symbol ▼
14 and offered for sale in this catalog contain DEHP,
15 a chemical known to the State of California to cause
16 birth defects and other reproductive harm.

17 The designated symbol must appear on the same page and in close proximity to the display
18 and/or description of the Covered Products not qualifying as Reformulated Products. On each page
19 where the designated symbol appears, Stillwater must provide a header or footer directing the
20 consumer to the warning language and definition of the designated symbol.

21 **(ii) Internet Website Warning.** A warning shall be given in conjunction
22 with the sale of Covered Products not qualifying as Reformulated Products via the internet, which
23 warning shall appear either: (a) on the same web page on which the Covered Products are
24 displayed; (b) on the same web page as the order form for the Covered Products; (c) on the same
25 page as the price for the Covered Products; or (d) on one or more web pages displayed to a
26 purchaser during the checkout process. The following warning statement shall be used and shall
27 appear in any of the above instances adjacent to or immediately following the display, description,
28 or price of the Covered Products and in the same type size as such text:

1
2 WARNING: This product contains DEHP, a chemical
3 known to the State of California to cause
4 birth defects and other reproductive harm.

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

8 WARNING: This product contains DEHP, a chemical
9 known to the State of California to cause
10 birth defects and other reproductive harm.

11 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

12 In settlement of all the claims referred to in this Consent Decree, Stillwater shall pay up to a
13 total of \$14,000 in civil penalties in accordance with this Section. Each penalty payment will be
14 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of
15 the funds remitted to the California Office of Environmental Health Hazard Assessment
16 (“OEHHA”) by Leeman. Stillwater shall issue the above payments as follows:

17 **3.1 Initial Civil Penalty**

18 On or before the Effective Date, Stillwater shall make an initial civil penalty payment of
19 \$4,000 to be apportioned in accordance with Section 3 above. Stillwater shall issue a check for its
20 initial civil penalty payment to: “Whitney R. Leeman, Client Trust Account” in the amount of
21 \$4,000. Such payment shall be made, in the manner detailed in Section 3.4 below, on or before the
22 Effective Date.

23
24 **3.2 Final Civil Penalty**

25 Stillwater shall pay a final civil penalty of \$10,000 on or before September 15, 2015. The
26 final civil penalty shall be waived in its entirety, however, if, no later than September 1, 2015, an
27 officer of Stillwater provides Leeman with written certification that, as of the date of such
28 certification and continuing into the future, Stillwater has met the reformulation standard specified

1 in Section 2.1 above, such that all Covered Products it sells, offers for sale, or distributes for sale in
2 California by Stillwater qualify as Reformulated Products, and that Stillwater will continue to sell,
3 offer for sale, or distribute for sale in California only Covered Products that qualify as Reformulated
4 Products. Leeman must receive any such certification on or before September 1, 2015. The
5 certification in lieu of a final civil penalty payment provided by this Section is a material term, and
6 time is of the essence. Stillwater shall issue a check for its final civil penalty payments to:
7 “Whitney R. Leeman, Client Trust Account” in the amount of \$10,000. Unless waived, this
8 payment shall be made in the manner detailed in Section 3.4 below.

9 **3.3 Reimbursement of Plaintiff’s Fees and Costs**

10 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
11 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
12 the fee issue to be resolved after the material terms of the agreement had been settled. Stillwater
13 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
14 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
15 Leeman and her counsel under general contract principles and the private attorney general doctrine
16 codified at California Code of Civil Procedure section 1021.5, for all work performed (and to be
17 performed) in this matter, except fees that may be incurred in connection with a third-party,
18 including the Office of the Attorney General, appeal (if any). Under these legal principles,
19 Stillwater shall pay the amount of \$27,000 to reimburse Leeman’s fees and costs incurred
20 investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to
21 be incurred) negotiating, drafting, and obtaining the Court’s approval of this Consent Decree in the
22 public interest. This payment shall be made in the manner detailed in Section 3.4 below, on or
23 before the Effective Date.

24 **3.4 Payment Procedures**

25 **3.4.1. Issuance of Payments.** Payments shall be delivered as follows:

- 26 (a) All payments owed to Leeman pursuant to Sections 3.1 and 3.3, shall be
27 delivered to the attorney of record for Stillwater on or before the
28 Effective Date, and shall be held in trust pending the Court’s approval

1 of this Consent Decree, including any tentative rulings not opposed by
2 either of the Parties. Such counsel shall confirm, in writing within 5
3 days of deposit, that the funds have been received. Within five (5) days
4 of the date on which the Court approves the Consent Decree, including
5 any tentative rulings not opposed by the Parties, the payments being
6 held by the attorney of record for Stillwater shall be delivered to The
7 Chanler Group in two separate checks payable to: (i) “Whitney R.
8 Leeman, Client Trust Account” in the amount of \$4,000; and (ii) “The
9 Chanler Group” in the amount of \$27,000, to the following payment
10 address:

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

16 (b) If the penalty payment owed to Leeman as required by Section 3.2 above
17 is not waived, payment shall be delivered directly to The Chanler Group
18 at the following address:

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

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Leeman’s Release of Proposition 65 Claims**

26 Leeman acting on her own behalf and in the public interest releases Stillwater, its parents,
27 subsidiaries, affiliated entities under common ownership, directors, officers, stockholders,
28 employees, attorneys, and each entity to whom Stillwater directly or indirectly distributes or sells
Covered Products, including, but not limited, to downstream distributors, wholesalers, customers,
retailers, franchisees, cooperative members, and licensees (“Releasees”), from all claims for

1 violations of Proposition 65 based on their failure to warn about alleged exposures to DEHP
2 contained in the Covered Products that were manufactured, distributed, or sold by Stillwater prior to
3 the Effective Date, including but not limited to all claims that were actually raised, or could have
4 been raised, by Leeman in the Action. Compliance with the terms of this Consent Decree
5 constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Covered
6 Products as set forth in the Notice.

7 **4.2 Leeman's Individual Release of Claims**

8 Leeman also, in her individual capacity only and *not* in her representative capacity, provides
9 a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
10 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
11 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
12 suspected or unsuspected, limited to and arising out of alleged or actual exposures to Proposition 65
13 Listed Chemicals in Covered Products manufactured, distributed or sold by Stillwater.

14 **4.3 Stillwater's Release of Leeman**

15 Stillwater on behalf of itself, its past and current agents, representatives, attorneys,
16 successors, and/or assignees, hereby waives any and all claims against Leeman, her attorneys and
17 other representatives, for any and all actions taken or statements made (or those that could have
18 been taken or made) by Leeman and her attorneys and other representatives prior to the Effective
19 Date, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65
20 against it in this matter with respect to Covered Products.

21 **5. COURT APPROVAL**

22 This Consent Decree is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
24 after it has been fully executed by all Parties.

25 **6. SEVERABILITY**

26 If, subsequent to the execution of this Consent Decree, any of the provisions of this Consent
27 Decree are held by a court to be unenforceable, the validity of the enforceable provisions remaining
28 shall not be adversely affected.

1 **7. GOVERNING LAW**

2 The terms of this Consent Decree shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
4 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
5 Consent Decree are rendered inapplicable by preemption or reason of law generally as to Covered
6 Products, then Stillwater shall have no further obligations pursuant to this Consent Decree with
7 respect to, and to the extent that, Covered Products are so affected.

8 **8. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant to
10 this Consent Decree shall be in writing and personally delivered or sent by: (i) first-class,
11 (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by the
12 other Party at the following addresses:

13
14 To Stillwater:

15 Steve Irby, President
16 Stillwater Designs and Audio, Inc.
17 3100 North Husband Street
18 Stillwater, OK 74075

19 To Leeman:

20 Proposition 65
21 Coordinator
22 The Chanler Group
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710-2565

26 With copies to:

27 Melissa A. Jones, Esq.
28 Bao M. Vu, Esq.
 Stoel Rives LLP
 500 Capitol Mall, Suite 1600
 Sacramento, CA 95814

 G. Michael Solomon, Esq.
 The Law Offices of Michael Solomon
 609 Deep Valley Drive, Suite 200
 Rolling Hills Estates, CA 90274

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 This Consent Decree may be executed in counterparts and by facsimile or pdf signature,
5 each of which shall be deemed an original, and all of which, when taken together, shall constitute
6 one and the same document. A facsimile or pdf signature shall be as valid as the original.

7 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

8 Leeman and her attorneys agree to comply with the reporting form requirements referenced
9 in California Health & Safety Code § 25249.7(f).

10 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

11 Leeman and Stillwater agree to mutually employ their best efforts to support the entry of this
12 agreement as a Consent Decree and obtain approval of the Consent Decree by the Court in a timely
13 manner. The Parties acknowledge that, pursuant to California Health & Safety Code §
14 25249.7, a noticed motion is required to obtain judicial approval of this Consent Decree, which
15 Leeman shall draft and file, and Stillwater shall join. If any third party objection to the noticed
16 motion is filed, Leeman and Stillwater shall work together to file a joint reply and appear at any
17 hearing before the Court. This provision is a material component of the Consent Decree and shall
18 be treated as such in the event of a breach.

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21 **12. MODIFICATION**

22 This Consent Decree may be modified only: (1) by written agreement of the Parties and
23 upon entry of a modified Consent Decree by the Court thereon; or (2) upon a successful motion
24 of any Party and entry of a modified Consent Decree by the Court.

25 **13. AUTHORIZATION**

26 The undersigned are authorized to execute this Consent Decree on behalf of their respective
27 Parties and have read, understood, and agree to all of the terms and conditions of this Consent
28 Decree.

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AGREED TO:

AGREED TO:

Date: April 20, 2015

Date: 4/17/2015

By: *Whitney R. Leeman*
Plaintiff, Whitney R. Leeman

By: *Steve Irby*
Steve Irby, President
Stillwater Designs and Audio, Inc.