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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
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16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 THE UPPER DECK COMPANY LLC, *et al.*,

20 Defendants.
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Case No. 16CV293481

[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 Leeman Whitney R. Leeman, Ph.D.
4 ("Leeman"), and The Upper Deck Company, a Nevada Corporation, erroneously sued herein as The
5 Upper Deck Company LLC ("Upper Deck"), with Leeman and Upper Deck each individually
6 referred to as a "Party" and collectively as the "Parties."

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Upper Deck employs ten or more individuals and is a "person in the course of doing business"
13 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
14 Code section 25249.6 *et seq.* ("Proposition 65").

15 **1.4 General Allegations**

16 Leeman alleges that Upper Deck imports, sells, and distributes for sale in California
17 vinyl/PVC portfolios with covers that contain di(2-ethylhexyl) phthalate ("DEHP"), and that it does
18 so without first providing the health hazard warning required by Proposition 65. DEHP is listed
19 pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm.
20 Upper Deck denies and refutes Leeman's allegations in their entirety and maintains that it properly
21 tested the products at issue prior to their public release.

22 **1.5 Product Description**

23 For purposes of this Consent Judgment "Products" are defined as vinyl/PVC portfolios with
24 covers or other components containing DEHP and all other products that are sold, or distributed for
25 sale in California by Upper Deck, including, but not limited to, the *World of Warcraft Trading Card*
26 *Game Official World of Warcraft Portfolio, UPC No. 0 53334 57171 5.*

1 **1.6 Notices of Violation**

2 On September 15, 2015, Leeman served The Upper Deck Company, LLC, the California
3 Attorney General, and all other requisite public enforcement agencies with a 60-Day Notice of
4 Violation (“Notice”), alleging that Upper Deck violated Proposition 65 when it failed to warn its
5 customers and consumers in California of the health hazards associated with exposures to DEHP
6 from the Products.

7 On June 30, 2016, Leeman served The Upper Deck Company, LLC and the requisite public
8 enforcement agencies with a Supplemental 60-Day Notice of Violation (“Supplemental Notice”),
9 alleging that, in addition to The Upper Deck Company, LLC, The Upper Deck Company also
10 violated Proposition 65 by failing to warn its customers and consumers in California of the health
11 hazards associated with exposures to DEHP from the Products.

12 The Notice and Supplemental Notice are referred to collectively as the “Notices.” No public
13 enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in
14 the Notices.

15 **1.7 Complaint**

16 On April 4, 2016, Leeman filed the captioned action (“Complaint”), naming Upper Deck as a
17 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
18 the Notice.

19 **1.8 No Admission**

20 Upper Deck denies the material, factual, and legal allegations in the Notices and Complaint,
21 and maintains that all of the products it has sold and distributed for sale in California, including the
22 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
23 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,
24 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any
25 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,
26 diminish or otherwise affect Upper Deck’s obligations, responsibilities, and duties under this Consent
27 Judgment.

1 **1.9 Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Upper Deck as to the allegations in the Complaint, that venue is proper in the
4 County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
8 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

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

10 Commencing on the Effective Date and continuing thereafter, Upper Deck agrees to only
11 manufacture for sale, import for sale, or purchase Products for sale in California, Reformulated
12 Products. “Reformulated Products” are defined as products containing no more than 1,000 parts per
13 million (0.1%) DEHP content when analyzed pursuant to U.S. Environmental Protection Agency
14 testing methodologies 3580A and 8270C or equivalent methodologies used by federal or state
15 agencies for the purpose of determining DEHP content in a solid substance.

16 **3. MONETARY SETTLEMENT TERMS**

17 **3.1 Civil Penalty Payment**

18 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
19 referred to in the Notices, Complaint, and this Consent Judgment, Upper Deck shall pay \$2,500 in
20 civil penalties. The civil penalty payment shall be allocated according to Health and Safety Code
21 section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California
22 Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five
23 percent (25%) of the penalty retained by Leeman. Upper Deck shall provide its payment in two
24 checks for the following amounts made payable to (a) “OEHHA” in the amount of \$1,875; and (b)
25 “Whitney R. Leeman, Ph.D., Client Trust Account” in the amount of \$625. Leeman’s counsel shall
26 be responsible for delivering OEHHA’s portion of the penalty paid under this Consent Judgment.
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1 **3.2 Reimbursement of Attorney's Fees and Costs**

2 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
4 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
5 other settlement terms had been finalized, the Parties negotiated the compensation due to Leeman and
6 her counsel under general contract principles and the private attorney general doctrine codified at
7 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
8 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
9 on appeal, if any. Under these legal principles, Upper Deck shall pay \$23,000 for all fees and costs
10 incurred by Leeman investigating, bringing this matter to Upper Deck's attention, litigating and
11 negotiating a settlement in the public interest.

12 **3.3 Payment Timing; Payments Held in Trust**

13 All payments due under this Consent Judgment shall be held in trust until the Court approves
14 the Parties' settlement. Within fifteen (15) days of the Parties' mutual execution of this agreement,
15 the civil penalty and fee reimbursement payments required by Sections 3.1 and 3.2, above, shall be
16 remitted to Upper Deck's counsel to hold in trust until the Effective Date. Upper Deck's counsel
17 shall provide Leeman's counsel with written confirmation following its receipt of these funds.
18 Thereafter, within five days of the Effective Date, Upper Deck's counsel shall mail via first class
19 mail the settlement payments to Leeman's counsel.

20 **3.4 Payment Address**

21 All payments required by this Consent Judgment shall be mailed via first class mail to:

22 The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710

27 **4. CLAIMS COVERED AND RELEASED**

28 **4.1 Leeman's Public Release of Proposition 65 Claims**

 Leeman, acting on her own behalf and in the public interest, releases Upper Deck and its
 parents, subsidiaries, affiliated entities (including, without limitation, The Upper Deck Company,

1 LLC and The Upper Deck Company and their successors and assigns), its directors, officers,
2 employees, and attorneys ("Releasees"), and each entity to whom Upper Deck directly or indirectly
3 distributes or sells the Products including, without limitation, its downstream customers,
4 distributors, wholesalers, licensors, agents, manufacturers, suppliers, test firms, and retailers
5 ("Downstream Releasees") for any violation arising under Proposition 65 alleging a failure to warn
6 about exposures to DEHP from Products sold or distributed for sale by Upper Deck prior to the
7 Effective Date, as set forth in the Notices. Compliance with the terms of this Consent Judgment
8 constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn
9 about exposures to DEHP from Products sold or distributed for sale by Upper Deck after the
10 Effective Date.

11 **4.2 Leeman's Individual Release of Claims**

12 Leeman, in her individual capacity only and *not* in any representative capacity, also provides
13 a release to Upper Deck, Releasees, and Downstream Releasees, which shall be effective as a full and
14 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
15 attorneys' fees, damages, losses, claims, liabilities and demands by Leeman of any nature, character
16 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
17 exposures to DEHP in Products sold or distributed for sale by Upper Deck before the Effective Date.

18 **4.3 Upper Deck's Release of Leeman**

19 Upper Deck, on its own behalf, and on behalf of its past and current agents, representatives,
20 attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her
21 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
22 her attorneys and other representatives, whether in the course of investigating claims, seeking to
23 enforce Proposition 65 against it in this matter, or with respect to the Products.

24 **5. COURT APPROVAL**

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

1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

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

12 **8. NOTICE**

13 Unless specified herein, all correspondence and notice required by this Consent Judgment
14 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
15 return receipt requested; or (iii) a recognized overnight courier to the following addresses and shall be
16 deemed effective (x) on the same day as personal delivery, (y) one (1) day following deposit via
17 overnight courier, and (z) five (5) days following deposit via first class mail.

18 For Upper Deck:

19 Brittany Hysni
20 General Counsel
21 The Upper Deck Company
22 2251 Rutherford Road
23 Carlsbad, CA 92008

24 with a copy to:

25 Craig M. Nicholas, Esq.
26 Nicholas & Tomasevic LLP
27 225 Broadway, 19th Floor
28 San Diego, CA 92101

1 For Leeman:

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565

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 signature, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
12 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 which motion Leeman shall draft and file. In furtherance of obtaining such approval, the Parties
18 agree to mutually employ their best efforts, and those of their counsel, to support the entry of this
19 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
20 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
21 approval, responding to any objection that any third-party may make, and appearing at the hearing
22 before the Court if so requested.

23 **11. MODIFICATION**

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

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

4
5 **AGREED TO:**

AGREED TO:

6 Date: 3/22/2017

Date: _____

7
8 By: 
9 WHITNEY R. LEEMAN, PH.D.

By: _____
Vivianne McWilliam
On behalf of THE UPPER DECK COMPANY,
a Nevada Corporation, and THE UPPER DECK
COMPANY LLC

1 **12. AUTHORIZATION**

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

4
5 **AGREED TO:**

AGREED TO:

6 Date: _____

7 Date: 3/23/17

8 By: _____
9 WHITNEY R. LEEMAN, PH.D.

10 By: 
11 Vivianne McWilliam
12 On behalf of THE UPPER DECK COMPANY,
13 a Nevada Corporation, and THE UPPER DECK
14 COMPANY LLC
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