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May 23, 2007

D. Joshua Vorhees
Hirst & Chanler LLP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

Clifford Chanler
Hirst & Chanler LLP
71 Elm Street, Suite 8
New Canaan, CT 06840

RE: *Leeman v. Dan-Dee International* (S.F. Superior Ct. No. CGC-04-436843)
Leeman v. Precidio, Inc. (S.F. Superior Ct. No. CGC-04-436841)
Brimer v. Ganz, Inc. (S.F. Superior Ct. No. CGC-05-43990)

Dear Messrs. Vorhees and Chanler:

The Public Health Trust has provided us with correspondence concerning the use of funds provided under settlements in the three matters listed above. In your letter of May 8, 2007, you advised the Public Health Trust that you will seek to modify the settlements to change the uses of the funds, state that this process "may take several months," and ask the Public Health Trust to hold the funds in the interim. The Public Health Trust has identified appropriate recipients of the funds, and the funds should be expended. As we understand it, the basis for seeking a modification is simply that the Public Health Trust declined to spend the funds on testing of beef products that would be used in other cases brought by your firm. We do not think that modification, or your request for the Public Health Trust to delay disbursing the funds in accordance with the settlements, are justified under the terms of the settlements or applicable law. Accordingly, if you seek a modification of the settlements (which will require notice to the Attorney General), we will oppose the request.

These are the facts as we understand them. In 2005, Mr. Chanler approached Ms. Brenda Drake, Director of the Public Health Trust, and asked if funds provided to the Public Health Trust from a Proposition 65 settlement could be provided to a laboratory to test ground beef for certain chemicals. Ground beef products, of course, have been a subject of investigation and litigation by your clients. Ms. Drake informed you that no such assurance could be made, and

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that any funds provided to the Public Health Trust would be spent in accordance with the terms of the settlement and the Public Health Trust's open process. She told you that parties to the litigation would *not* have ultimate approval of how the funds are spent. You indicated that you understood this process.

On January 4, 2006, your firm provided the Public Health Trust with \$62,000 from three settlements as follows:

Brimer v. Ganz, entered August 23, 2005: \$12,000 "to the Public Health Trust in lieu of a civil penalty pursuant to 11 CCR § 3203(b) to test consumer products for the presence of one or more reproductive toxicants and carcinogens listed by the State of California pursuant to 22 CCR § 12000." (Consent Judgment, Par. 3.1.)

Leeman v. Dan-Dee International, entered July 14, 2005: \$18,000 "to the Public Health Trust in lieu of a civil penalty pursuant to 11 CCR § 3203(b) to test consumer products for the presence of one or more reproductive toxicants and carcinogens listed by the State of California pursuant at 22 CCR § 12000." (Consent Judgment, Par. 3.1.)

Leeman v. Precidio, Inc., entered September 15, 2005: \$32,000 "to the Public Health Trust in lieu of a civil penalty pursuant to California Code Regulations, tit. 11, section 3203 subd. (b) to provide grants to national, statewide and local health protection and promotion programs. The method of selection of the ultimate recipient of the settlement funds is set forth in the 'Policy Guidelines for the Public Health Trust' available at <http://www.publichealthtrust.org>."

The letter conveying those funds requested that the Public Health Trust make the funds available "to a program that tests ground beef products" for various chemicals subject to Proposition 65.

The Public Health Trust then solicited proposals for the use of the funds, and concluded that the two proposals with the potential for the greatest immediate positive impact on the public health had been received from Environment California, which proposed testing certain products for the presence of phthalates, and from Center for Environmental Health, which also proposed that various products be tested for phthalates. The Public Health Trust solicited your input on these proposals (although it was not required to do so), and indicated that it wanted to move forward with expenditure of the funds, since it had held them for over a year.

On May 8, 2007, you responded with a letter stating that your client, Dr. Leeman "does

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not support” either proposal, and that “she believes the funds may be better suited elsewhere.” You then advised the Public Health Trust that you “will seek the Court’s permission to reallocate the *cy pres* payments[.]” You further stated that the “process may take several months” and asked the Public Health Trust to continue to hold the \$62,000.

Under the circumstances of these cases, there is no legal or factual justification for these requests. Courts retains inherent authority to modify a judgment or injunction in response to a *change* in controlling facts or law. (*Sontag Chain Stores co. v. Superior Court* (1941) 18 Cal.2d 92, at p. 94-95, *United Food & Commercial Workers Union v. Superior Court* (2000) 83 Cal.App.4th 566, at p. 575-57.) No change has occurred here, however. Moreover, where a party who consented to an injunction seeks to modify the injunction over the objection of the other parties, “[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [the court] to change what was decreed after years of litigation with the consent of all concerned.” (*United States v. Swift & Co.* (1932) 286 U.S. 106, 119.) In addition, the provision is similar to the creation of a charitable trust, under which the *cy pres* doctrine would permit a modification only if the terms of the trust have become “impossible, or impractical” to fulfill. (*Estate of Puckett* (1980) 111 Cal.App.3d 46, 50.)

Finally, as the Court of Appeal has held, private Proposition 65 settlements must be in the public interest. (*Consumer Advocacy Group v. Kintetsu Enterprises of America* (2006) 141 Cal.App.4th 46, 64.) As that court noted, provisions of settlements that allow defendants to unilaterally opt-out of the agreement may be against the public interest, because they can render the terms of the settlement “illusory” and the public benefit of the settlement “precarious.” If the plaintiff here can obtain a modification on the very thin ground suggested, this would appear to render the original provisions of the judgment in part illusory.

While some settlements specifically provide that certain funds may be used by the plaintiff to fund other litigation, these settlements do not. The funds were provided to the Public Health Trust for it to spend in accordance with the terms of the agreement, and you have not suggested that the proposed uses of the funds are in any way inconsistent with the terms of the settlements. You were advised that the Public Health Trust would not give you or your clients final control over the use of the funds. Nor do we see any change in any other circumstances that would justify changing the use of the funds. Finally, your request that the Public Health Trust hold the funds for several months while you seek a modification is not appropriate.

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The Public Health Trust remains free to expend the funds in accordance with the judgments, notwithstanding your request. If you do file a motion to modify the judgments, you should do so promptly, and should serve the motion on the Attorney General.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. G. Weil', with a long horizontal stroke extending to the right.

EDWARD G. WEIL
Supervising Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc:

Brenda Drake, Director, Public Health Trust
Robert Falk, Attorney for Dan-Dee International, Precidio, Inc., and Ganz, International.
Angela Agrusa, Attorney for Ganz, Inc.