

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Dr. Whitney R. Leeman ("Leeman") and E. Mishan & Sons, Inc. ("Mishan"), with Leeman and Mishan individually referred to as a "Party" and collectively as the "Parties." Leeman is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Mishan employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* ("Proposition 65").

1.2 General Allegations

Leeman alleges that Mishan manufactures, imports, sells, or distributes for sale in the state of California, exercise equipment with vinyl/PVC seats that contain di(2-ethylhexyl)phthalate ("DEHP") without first providing the clear and reasonable exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the state of California to cause birth defects and other reproductive harm.

1.3 Product Description

The products covered by this Settlement Agreement are defined as exercise equipment with vinyl/PVC seats containing DEHP that are manufactured, sold, or distributed for sale in California by Mishan, including, but not limited to, the *Ab Rocket Twister*, Style# 8332, SKU# 0004450524 (#0 80313 08332 7). The exercise equipment with vinyl/PVC seats containing DEHP shall, where appropriate, be referred to as the "Products."

1.4 Notice of Violation

On or about May 31, 2013, Leeman served Mishan, Big 5 Corp. ("Big 5"), and certain requisite public enforcement agencies with a "60-Day Notice of Violation" ("Notice") alleging that Mishan, among others, violated Proposition 65 by failing to warn its customers and

consumers in California that the Products expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Mishan denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, sold, or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Mishan of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Mishan of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Mishan. This Section shall not, however, diminish or otherwise affect Mishan's obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean October 1, 2013.

2. INJUNCTIVE RELIEF: REFORMULATION

2.1 Reformulation Standards

Reformulated Products are defined as those Products containing DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other methodology authorized under Proposition 65 by federal or state agencies for the purpose of determining DEHP content in a solid substance.

2.2 Reformulation Commitment

As of December 15, 2013, all Products manufactured or imported to the State of California by Mishan shall qualify as Reformulated Products as defined in Section 2.1 above. Notwithstanding the foregoing, Products sold and shall be sold by Mishan (which have not been

reformulated and were manufactured prior to December 15, 2013) to its downstream distributors, wholesalers, customers, retailers (including without limitation Big 5), franchisees, cooperative members, and licensees may be sold in California by such downstream distributors, wholesalers, customers, retailers (including without limitation Big 5), franchisees, cooperative members, and licensees, provided such Products sold or offered have a clear and reasonable warning affixed to the packaging or labeling, or directly to a Product, with the following statement or a substantially similar statement:

WARNING: This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

The warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use.

3. MONETARY PAYMENTS

3.1 Payments Pursuant to Health & Safety Code Section 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, Mishan shall pay a total of \$20,000.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code section 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Leeman, as follows:

3.1.1 Initial Civil Penalty

Mishan shall pay an initial civil penalty in the amount of \$3,000.00 on or before the Effective Date. Mishan shall issue two separate checks to: (a) OEHHA in the amount of \$2,250.00; and (b) “The Chanler Group in Trust for Dr. Whitney R. Leeman” in the amount of \$750.00. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

3.1.2 Final Civil Penalty

Mishan shall pay a final civil penalty of \$17,000.00 on or before February 15, 2014. The final civil penalty shall be automatically waived in its entirety, however, if, no later than February 1, 2014, an officer of Mishan provides Leeman with written certification that, as of the date of such certification and continuing into the future, Mishan has met the reformulation standard specified in Section 2 above, such that all Products manufactured, imported, distributed, sold and offered for sale in California by Mishan are Reformulated or have the warning set forth in section 2 above. Leeman must receive any such certification on or before February 1, 2014. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence. Mishan shall issue two separate checks for its final civil penalty payments, should it fail to comply with this section, to: (a) OEHHA in the amount of \$12,750.00; and (b) "The Chanler Group in Trust for Dr. Whitney R. Leeman" in the amount of \$4,250.00.

3.2 Reimbursement of Attorney Fees and Costs

The parties acknowledge that Leeman and her counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Mishan then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to Leeman and her counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed through the mutual execution of this agreement. Mishan shall pay \$27,000.00 for fees and costs incurred as a result of investigating, bringing this matter to Mishan's attention, and negotiating a settlement in the public interest. Mishan shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "The Chanler Group" and shall deliver payment on or before the Effective Date, to the address listed in Section 3.3.1(a) below.

3.3 Payment Procedures

3.3.1 Issuance of Payments. Payments shall be delivered as follows:

- (a) All payments owed to Leeman, pursuant to Sections 3.1.1 through 3.1.2, shall be delivered to the following payment address:

The Chanler Group
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

- (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections 3.1.1 through 3.1.2, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following addresses:

For United States Postal Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of the Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

With a copy of the checks payable to OEHHA mailed to The Chanler Group at the address set forth above in Section 3.3.1(a), as proof of payment to OEHHA.

3.3.2 Issuance of 1099 Forms. After each penalty payment, Mishan shall issue separate 1099 forms for each payment to, (a) Leeman, whose address and tax identification number will be provided upon request after this Settlement Agreement is fully executed by the Parties, and, (b) OEHHA at the addresses listed in Section 3.3.1(b) above.

4. CLAIMS COVERED AND RELEASED

4.1 Leeman's Release of Mishan and Big 5

This Settlement Agreement is a full, final, and binding resolution between Leeman and Mishan of any violation of Proposition 65 that was or could have been asserted by Leeman, on behalf of herself, or on behalf of her past and current agents, representatives, attorneys, successors, and assignees, against Mishan or Big 5, their respective parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Mishan directly or indirectly distributes or sells the Products, including, without limitation, its downstream distributors, wholesalers, customers, retailers (including without limitation Big 5), franchisees, cooperative members, and licensees (collectively, "Releasees"), based on unwarned exposures to DEHP contained in Products sold or distributed for sale by Mishan in California prior to the Effective Date.

In further consideration of the promises and agreements herein contained, Leeman, on her own behalf and on behalf of her past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that she may have against Mishan, Big 5 and Releasees, including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 for unwarned exposures to DEHP in Products manufactured, sold, or distributed for sale in California by Mishan prior to the Effective Date.

Leeman provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Leeman, of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Notice as to Products manufactured, distributed or sold by Mishan and Releasees. Leeman

acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Leeman expressly waives and relinquishes any and all rights and benefits which she may have under, or which may be conferred on her by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that she may lawfully waive such rights or benefits pertaining to the released matters.

4.2 Mishan's Release of Leeman

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

Mishan acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Mishan expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar

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effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

5. POST-EXECUTION CONVERSION TO CONSENT JUDGMENT

Within twelve months after the Effective Date, Mishan may request in writing that Leeman draft and file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment providing a release for the Products in the public interest, and seek court approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If requested, Leeman and Mishan agree to reasonably cooperate and to use their best efforts, and those of their counsel, to obtain an entry of judgment in accordance with the terms of this Settlement Agreement by a superior court in California in a timely manner.

Pursuant to Code of Civil Procedure sections 1021 and 1021.5, if so requested, Mishan agrees to reimburse Leeman and her counsel for the reasonable fees and costs incurred in connection with work performed pursuant to this Section in an amount not to exceed \$10,000, exclusive of fees and costs on appeal, if any. Within thirty (30) days of receiving an invoice from Leeman's counsel for work performed under this Section, Mishan will remit payment to the address provided in Section 3.3.1(a)

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Mishan may provide written notice to Leeman of any asserted change in the law, and have no

further obligations pursuant to this Settlement Agreement, with respect to, and to the extent that, the Products are so affected.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the other party at the following addresses:

For Mishan:

E. Mishan & Sons, Inc.
230 5th Avenue, Suite 800
New York, NY 10001
Attn: Steven Mishan

With a copy to:

Kaye Scholer LLP
1999 Avenue of the Stars, Suite 1600
Los Angeles, CA 90067-6048
Attn: Aton Arbisser

For Leeman:

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

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts, and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

10. **POST-EXECUTION ACTIVITIES**

Leeman agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

11. **MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 9/24/13

Date: _____

By: Whitney Leeman
Dr. Whitney R. Leeman

By: _____
Steven Mishan
E. Mishan & Sons, Inc.

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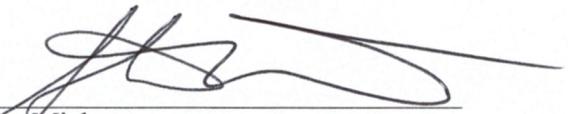
AGREED TO:

AGREED TO:

Date: _____

Date: Sept 30 13

By: _____
Dr. Whitney R. Leeman

By: 
Steven Mishan
E. Mishan & Sons, Inc.