

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 WHITNEY R. LEEMAN, PH.D.

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

14 WHITNEY R. LEEMAN, PH.D.,

15 Plaintiff,

16 v.

17 CUSTOM ACCESSORIES, INC., *et al.*,

18 Defendants.

Case No. RG14727357

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D.
4 ("Leeman") and Custom Accessories, Inc. ("CAI"), with Leeman and CAI each individually referred
5 to as a "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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 CAI employs ten or more persons 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 CAI manufactures, imports, sells, and/or distributes for sale in California,
16 tools with vinyl/PVC grips and tape measures with vinyl/PVC grips that contain the phthalate
17 chemical di(2-ethylhexyl)phthalate ("DEHP") without first providing the exposure warning required
18 by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
19 California to cause birth defects or other reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are: (a) tools with vinyl/PVC grips
22 containing DEHP that are sold or distributed for sale in California by CAI including, but not limited
23 to, those offered in connection with the *Duratest 2pc. Pliers Set, #87666F UPC #0 77341 11914 2*;
24 and (b) tape measures with vinyl/PVC grips containing DEHP including, but not limited to, the
25 *Duratest Locking Tape Measure, #83444F UPC #0 77341 10959 4*. All such tape measures and tools
26 with components containing DEHP are referred to collectively herein as the "Products."
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1.6 Notice of Violation

On or about December 30, 2013, Leeman served CAI and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that CAI was in violation of Proposition 65 for failing to warn its customers and consumers in California that the Products expose users to DEHP.

1.7 Complaint

On May 30, 2014, Leeman filed the instant action (“Complaint”), naming CAI as a defendant for the violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

1.8 No Admission

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

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over CAI as to the allegations in the Complaint, that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment as a judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” means the date that the Court grants the motion for approval of this Consent Judgment contemplated by Section 10.

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2. **INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2.1 Reformulated Products

Commencing on the Effective Date, and continuing thereafter, CAI shall only purchase for sale, manufacture for sale, or distribute for sale in California "Reformulated Products," or Products that are sold with a clear and reasonable warning pursuant to Section 2.2. For purposes of this Consent Judgment, Reformulated Products contain a maximum of 1,000 parts per million (0.1%) DEHP content in any component when analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a solid substance.

2.2 Clear and Reasonable Warnings

Commencing on the Effective Date, for all Products other than Reformulated Products, CAI agrees that it will only sell or distribute such Products for sale in California with a clear and reasonable warning in accordance with this Section. CAI further agrees that any warning utilized will 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 before purchase or use. Any warning CAI elects to employ shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of confusion.

A warning provided under this Consent Judgment shall contain one of the following statements:

WARNING: This product contains chemicals, including phthalates, known to the State of California to cause cancer and birth defects or other reproductive harm.

Or, for Products that CAI knows to contain DEHP and Lead, CAI may employ the following warning statement:

WARNING: This product contains chemicals, including lead and/or phthalates, known to the State of California to cause cancer and birth defects or other reproductive harm.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
4 this Consent Judgment, CAI shall pay \$10,000 in civil penalties. The civil penalty payments shall be
5 allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five
6 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”), payable to “OEHHA,” and twenty-five percent (25%) of the funds remitted to Leeman,
8 payable to “Whitney Leeman, Client Trust Account.”

9 **3.1.1 Initial Civil Penalty**

10 Within five days of the Effective Date, CAI shall make an initial civil penalty payment
11 of \$2,500. CAI shall provide its payment in two checks for the following amounts made payable to:
12 (a) “OEHHA” in the amount of \$1,875; and (b) “Whitney Leeman, Client Trust Account” in the
13 amount of \$625.

14 **3.1.2 Final Civil Penalty**

15 On June 15, 2015, CAI shall make a final civil penalty payment of \$7,500. Pursuant
16 to title 11 California Code of Regulations, section 3203(c), Leeman agrees that the final civil penalty
17 payment shall be waived in its entirety if, no later than June 1, 2015, an officer of CAI provides
18 Leeman with written certification that all of the Products purchased for sale or manufactured for sale
19 in California as of the date of the certification are Reformulated Products as defined by Section 2.1,
20 and that CAI will continue to offer only Reformulated Products in California in the future. The
21 option to issue such certification in lieu of making the final civil penalty payment required by this
22 Section is a material term, and time is of the essence.

23 **3.2 Reimbursement of Fees and Costs**

24 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
25 reaching terms on the amount of fees and costs to be reimbursed, leaving the issue to be resolved
26 after the material terms of this Consent Judgment had been settled. Shortly after the other settlement
27 terms had been finalized, CAI expressed a desire to resolve the fee and cost issue. The Parties then
28 attempted to (and did) reach an accord on the compensation due to Leeman and her counsel under

1 general contract principles and the private attorney general doctrine codified at California Code of
2 Civil Procedure section 1021.5 for all work performed through the mutual execution of this Consent
3 Judgment. Under these legal principles, within five days of the Effective Date, CAI shall pay
4 \$30,500 in the form of a check made payable to "The Chanler Group" for the fees and costs incurred
5 investigating, bringing this matter to the attention of CAI's management, and negotiating a settlement
6 in the public interest.

7 **3.3 Payment Procedures**

8 **3.3.1 Payment Addresses**

9 Payments shall be delivered as follows:

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11 (a) All payments for Leeman and her counsel under this Consent Judgment shall
12 be delivered to:

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

18 (b) All payments for OEHHA under this Consent Judgment shall be delivered
19 directly to OEHHA (Checks with memo line "Prop 65 Penalties") at one of the following addresses,
20 as appropriate:

21 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery or Courier:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812-4010

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2 **3.3.2 Proof of Payment to OEHHA**

3 CAI shall provide Leeman's counsel with a copy of the checks sent to OEHHA
4 enclosed with the payments to Leeman and her counsel sent to the address in Section 3.3.1(a).

5 **4. CLAIMS COVERED AND RELEASED**

6 **4.1 Leeman's Release of Proposition 65 Claims**

7 Leeman, acting on her own behalf and in the public interest, releases CAI and its parents,
8 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
9 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the
10 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,
11 franchisers, cooperative members, licensors and licensees ("Downstream Releasees") for any
12 violations arising under Proposition 65 for unwarned exposures to DEHP from the Products sold by
13 CAI prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
14 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
15 from the Products.

16 **4.2 Leeman's Individual Release of Claims**

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

23 **4.3 CAI's Release of Leeman**

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

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
4 has been fully executed by the Parties.

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

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

16 **8. NOTICE**

17 Unless specified herein, all correspondence and notice required by this Consent Judgment
18 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
19 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
20 For CAI:

21 Edward Matthews, President
22 Custom Accessories, Inc.
23 5900 Ami Drive
24 Richmond, IL 60071

24 with a copy to:

25 Alejandro Bras, Esq.
26 Morrison & Foerster LLP
27 425 Market Street
28 San Francisco, CA 94105

1 For Leeman:

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

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 or portable
11 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
12 taken together, shall constitute one and the same document.

13 **10. POST EXECUTION ACTIVITIES**

14 Leeman and her attorneys agree to comply with the reporting form requirements referenced in
15 Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health
16 and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the
17 settlement. In furtherance of obtaining such approval, Leeman and CAI agree to mutually employ
18 their best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to
19 obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best
20 efforts" shall include, at a minimum, cooperating with the drafting and filing of the necessary moving
21 papers, and supporting the motion for judicial approval.

22 **11. MODIFICATION**

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

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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: 12/9/14

Date: December 9, 2014

By: Whitney R. Jeeman
WHITNEY R. JEEMAN, PH.D.

By: Edward Matthew
Edward Matthew, President
CUSTOM ACCESSORIES, INC.