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

16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiffs,

18 v.

19 HOUGHTON MIFFLIN HARCOURT
20 COMPANY, et al.

21 Defendants.

Case No. CGC15547346

**CONSENT JUDGMENT AS TO
DEFENDANT HOUGHTON MIFFLIN
HARCOURT COMPANY**

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Whitney R. Leeman, Ph.D.
4 (“Leeman”) and defendant Houghton Mifflin Harcourt Company (“Houghton”), with Leeman and
5 Houghton each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Leeman is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Houghton 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, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Houghton manufactures, imports, sells and/or distributes, for sale in
16 California, books with vinyl/PVC covers that contain lead without providing the health hazard
17 warning required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical that is
18 known to cause cancer.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are books with vinyl/PVC covers
21 containing Lead including, but not limited to, the *Webster’s New World Pocket Dictionary Fourth*
22 *Edition, ISBN 978-0-7645-6147-4* (collectively, “Products”).

23 **1.6 Notices of Violation**

24 On February 27, 2015, Leeman served Houghton and the requisite public enforcement
25 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Houghton violated Proposition
26 65 when it failed to warn its customers and consumers in California of the health hazards associated
27 with exposures to lead in the Products. To the best of the Parties’ knowledge, no public enforcer
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1 has commenced and is diligently prosecuting an action to enforce the allegations set forth in the
2 Notice.

3 **1.7 Complaint**

4 On August 13, 2015, Leeman commenced the instant action (“Complaint”), naming
5 Houghton as a defendant for the alleged violations of Proposition 65 that are the subject of the
6 Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Houghton as to the allegations in the Complaint, that venue is proper in San
19 Francisco County, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
23 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

24 **2. INJUNCTIVE SETTLEMENT TERMS**

25 Commencing on the Effective Date and continuing thereafter, Houghton shall only
26 manufacture for sale, or purchase for sale in California, “Reformulated Products”. For purposes of
27 this Consent Judgment, “Reformulated Products” are Products that contain a maximum of 90 parts
28 per million lead content by weight when analyzed pursuant to EPA testing methodologies 3050B

1 and 6010B. In addition to the above methodology, the Parties may use equivalent methodologies
2 utilized by federal or state agencies for the purpose of determining Lead content in a solid
3 substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

6 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
7 claims referred to in this Consent Judgment, Houghton shall pay \$21,000 in civil penalties in
8 accordance with this Section. Each penalty payment will be allocated in accordance with California
9 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
10 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
11 penalty remitted to Leeman. Leeman’s counsel shall be responsible for remitting Houghton’s
12 penalty payment(s) under this Consent Judgment to OEHHA.

13 **3.1.1 Initial Civil Penalty.** Houghton shall make an initial civil penalty payment
14 of \$6,000. Houghton shall provide its payment in a single check made payable to “Whitney R.
15 Leeman, Client Trust Account” to be delivered to the address provided in Section 3.4, below.

16 **3.1.2 Final Civil Penalty; Waiver for Early Reformulation.** On June 15, 2016,
17 Houghton shall make a final civil penalty payment of \$15,000. Pursuant to title 11 California Code
18 of Regulations, section 3203(c), Leeman agrees that the final civil penalty payment shall be waived
19 in its entirety if, no later than June 1, 2016, an officer of Houghton provides Leeman with a signed
20 declaration certifying that all of the Products it ships for sale or distributes for sale in California as
21 of the date of its certification are Reformulated Products, and that Houghton will continue to offer
22 only Reformulated Products in California in the future. The option to provide a declaration
23 certifying its complete early reformulation of the Products in lieu of making the final civil penalty
24 payment otherwise required by this Section is a material term, and time is of the essence.

25 **3.2 Reimbursement of Attorneys’ Fees and Costs**

26 The Parties acknowledge that Leeman and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
28 the issue to be resolved after the material terms of the agreement had been settled. After finalizing

1 the other settlement terms the Parties then negotiated a resolution of the compensation due to
2 Leeman and his counsel under general contract principles and the private attorney general doctrine
3 codified at California Code of Civil Procedure § 1021.5. For all work performed through the
4 mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees and
5 costs on appeal, if any, Houghton shall reimburse Leeman and his counsel \$26,000. Houghton’s
6 payment shall be in the form of a check payable to “The Chanler Group.” The reimbursement
7 covers all fees and costs incurred by Leeman investigating, bringing this matter to Houghton’s
8 attention, litigating, and negotiating a settlement of the matter in the public interest and obtaining
9 court approval of the same.

10 **3.3 Payments Held In Trust**

11 With the exception of the final civil penalty payment required by Section 3.1.2, Houghton
12 shall deliver all payments required by this Consent Judgment to its counsel within ten business
13 days of the date that this agreement is fully executed by the Parties. Houghton’s counsel shall
14 confirm receipt of settlement funds in writing to Leeman’s counsel and, thereafter, hold the
15 amounts paid in trust until such time as the Court grants the motion for approval of the Parties’
16 settlement. Within two days of the Effective Date, Houghton’s counsel shall deliver all settlement
17 payments it has held in trust to Leeman’s counsel at the address provided in Section 3.4. In the
18 event the final civil penalty payment required by Section 3.1.2 becomes due prior to the Effective
19 Date, then Houghton shall deliver the final civil penalty payment to its attorney to be held in trust
20 until, and disbursed within two days after, the Effective Date.

21 **3.4 Payment Address**

22 All payments required by this Consent Judgment shall be delivered to the following
23 address:

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Leeman’s Release of Proposition 65 Claims**

3 Leeman, acting on his own behalf and in the public interest, releases Houghton and its
4 parents, subsidiaries, affiliated entities under common ownership directors, officers, employees, and
5 attorneys (“Releasees”) and each entity to whom Houghton directly or indirectly distributes or sells
6 the Products including, but not limited to, its downstream distributors, wholesalers, customers,
7 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
8 any violations arising under Proposition 65 for unwarned exposures to Lead from the Products
9 manufactured, imported, distributed or sold by Houghton prior to the Effective Date, as set forth in
10 the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
11 Proposition 65 by Houghton with respect to exposures to Lead from Products manufactured, sold or
12 distributed for sale by Houghton after the Effective Date.

13 **4.2 Leeman’s Individual Release of Claims**

14 Leeman, in his individual capacity only and *not* in his representative capacity, also provides
15 a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
16 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
17 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
18 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
19 exposures to lead in Products manufactured, imported, distributed or sold by Houghton before the
20 Effective Date.

21 **4.3 Houghton’s Release of Leeman**

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

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1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
4 after it has been fully executed by all Parties. Leeman and Houghton agree to support the entry of
5 this agreement as a judgment, and to obtain the Court’s approval of their settlement in a timely
6 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
7 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
8 motion Leeman shall draft and file and Houghton shall support, appearing at the hearing if so
9 requested. If any third-party objection to the motion is filed, Leeman and Houghton agree to work
10 together to file a reply and appear at any hearing. This provision is a material component of the
11 Consent Judgment and shall be treated as such in the event of a breach.

12 **6. SEVERABILITY**

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

16 **7. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of California
18 and apply within the State of California. In the event that Proposition 65 is repealed, pre-empted, or
19 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Houghton
20 may provide Leeman with written notice of any asserted change in the law, and shall have no
21 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
22 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
23 Houghton from its obligation to comply with any pertinent state or federal law or regulation.

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1 **8. NOTICE**

2 Unless specified herein, all correspondence and notice required by this Consent Judgment
3 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
4 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
5 following addresses:

6 To Houghton:

7 Attn: General Counsel
8 Houghton Mifflin Harcourt Company
9 222 Berkeley Street
10 Boston, MA 02116

To Leeman:

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

11 with a copy to:

12 William F. Tarantino, Esq.
13 Morrison & Foerster LLP
14 425 Market Street
15 San Francisco, CA 94105-2406

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

18 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

19 This Consent Judgment may be executed in counterparts and by facsimile or portable
20 document format (pdf) signature, each of which shall be deemed an original and, all of which, when
21 taken together, shall constitute one and the same document.

22 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

23 Leeman and his counsel agree to comply with the reporting form requirements referenced in
24 California Health and Safety Code section 25249.7(f).

25 **11. MODIFICATION**

26 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
27 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion or
28 application of any party and the entry of a modified Consent Judgment by the Court thereon.

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12. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 3/18/16

Date: _____

By: *Whitney Leeman*
WHITNEY R. LEEMAN, PH.D.

HOUGHTON MIFFLIN HARCOURT
COMPANY

By: _____

Its: _____

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5
6 **AGREED TO:**

7
8 Date: _____

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

11 **AGREED TO:**

12 Date: 3/18/16
13 HOUGHTON MIFFLIN HARCOURT
14 COMPANY

15 By: [Signature]

16 Its: VP, Assoc. General Counsel

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