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

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR MARIN COUNTY
14 UNLIMITED CIVIL JURISDICTION
15

16 WHITNEY R. LEEMAN, PH.D.,

17 Plaintiff,

18 v.

19 LOWE'S COMPANIES, INC.; KRISTUS,
20 INC.; & DOES 1-150,

21 Defendants.
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Case No. CIV1600122

[PROPOSED] CONSENT JUDGMENT

(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 Kristus, Inc. DBA Air Power America (“Kristus”), with Leeman and
5 Kristus 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 Leeman alleges that Kristus employs ten or more individuals and is a person in the course of
12 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 California Health and Safety Code §25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Kristus manufactures, imports, sells, distributes and/or offers for sale or
16 use in California, or implies by its conduct that it manufactures, imports, sells, distributes and/or
17 offers for sale or use in California, vinyl/PVC oil suction hoses that contain di(2-
18 ethylhexyl)phthalate (“DEHP”), and that it does so without providing the health hazard warning
19 that Leeman alleges is required by Proposition 65. DEHP is a chemical listed pursuant to
20 Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC oil suction hoses containing
23 DEHP including, but not limited to, *LiquiVac Oil Change System (Suction Hose)*, UPC #0 26137
24 02005 6 (collectively, the “Products”).

25 **1.6 Notice of Violation**

26 On or about August 20, 2015, Leeman served Lowe’s Companies, Inc. (“Lowe’s”), Kristus,
27 others, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”),
28 alleging that Lowe’s and Kristus violated Proposition 65 when they failed to provide a “clear and

1 reasonable warning” to consumers in California of the health hazards associated with exposures to
2 DEHP from the Products. To the best of the Parties’ knowledge, no public enforcer has
3 commenced and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On January 12, 2016, Leeman filed a complaint in the Superior Court of Marin County
6 against Lowe’s and Does 1-150, *Leeman v. Lowe’s Companies, Inc.*, Case No. CIV1600122
7 (“Complaint”), alleging violations of Proposition 65. On July 15, 2016, Leeman filed an
8 amendment to the Complaint, naming Kristus as a defendant (“First Amended Complaint”).

9 **1.8 No Admission**

10 Lowe’s and Kristus deny the material, factual, and legal allegations contained in the Notice
11 and First Amended Complaint, and maintain that all of the products that they have manufactured,
12 imported, sold, distributed, and/or offered for sale or use in California, including the Products, have
13 at all times been, and currently are, in compliance with all laws. Nothing in this Consent Judgment
14 shall be construed as an admission by Lowe’s or Kristus of any fact, finding, conclusion of law,
15 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
16 construed as an admission by Lowe’s or Kristus of any fact, finding, conclusion of law, issue of
17 law, or violation of law. This Section shall not, however, diminish or otherwise affect Kristus’
18 obligations, responsibilities, and duties under this Consent Judgment.

19 **1.9 Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Kristus as to the allegations in the Complaint, that venue is proper in Marin
22 County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
23 Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
26 the Court grants the Motion for Approval of the Consent Judgment.

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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Reformulated Products**

3 Commencing on the Effective Date, and continuing thereafter, any Products imported, sold,
4 manufactured for sale, and/or distributed for sale in California by Kristus shall be "Reformulated
5 Products." For purposes of this Consent Judgment, "Reformulated Products" are Products that
6 contain DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed
7 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or any
8 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
9 content in a solid substance. Compliance with this Agreement does not require Kristus to recall or
10 otherwise remove from the commercial marketplace any Products, sold, and/or distributed for sale
11 in California by Kristus prior to the Effective Date.

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Payment Pursuant to Health and Safety Code § 25249.7(b)(2)**

14 Pursuant to Health and Safety Code §25249.7(b)(2), and in settlement of all the claims
15 referred to in this Consent Judgment, Kristus shall pay \$3,000 in civil penalties in accordance with
16 this Section. The penalty payment will be allocated in accordance with California Health & Safety
17 Code §§ 25249.12(c)(1) & (d), with 75% of the funds paid to the California Office of
18 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
19 remitted to Leeman. Payment will be made, as described in Section 3.3 below, and will be
20 delivered to the address provided in Section 3.4. below. Leeman's counsel shall be responsible for
21 remitting the allocated portion of the penalty payment to OEHHA.

22 **3.2 Reimbursement of Attorneys' Fees and Costs**

23 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
24 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
25 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
26 finalizing the other settlement terms, the Parties expressed a desire to resolve Leeman's fees and
27 costs. The Parties then negotiated a resolution of the compensation due to Leeman and her counsel
28 pursuant to general contract principles and the private attorney general doctrine codified at

1 California Code of Civil Procedure §1021.5. As provided for in Section 3.3 below, for all work
2 performed through the mutual execution of this agreement and the Court's approval of the same,
3 but exclusive of fees and costs on appeal, if any, Kristus shall reimburse Leeman and her counsel
4 shall be reimbursed in the amount of \$28,500. Payment will be made, as described in Section 3.3
5 below and will be delivered to the address provided in Section 3.4, below. The reimbursement
6 shall cover all fees and costs incurred by Leeman through the Effective Date in investigating,
7 bringing this matter to Kristus' attention, litigating, and obtaining a settlement of the matter in the
8 public interest.

9 **3.3 Payment Timing; Payments Held In Trust**

10 Payments required by this Consent Judgment will be made in two installments. The first
11 installment will be made in two checks in the following amounts: \$3,000 in penalty payments in a
12 check made payable to "Whitney R. Leeman, Ph.D, Client Trust Account," and \$12,750 in
13 attorneys' fees and costs, made payable to "The Chanler Group," and will be delivered to Kristus'
14 counsel, Robb Krueger, within ten (10) business days of the date that this Consent Judgment is fully
15 executed by the Parties. Within five (5) business days following receipt by Kristus' counsel of
16 written notice of the Court's approval of this Consent Judgment, Kristus' counsel shall deliver the
17 first payment installment it has held in trust to Leeman's counsel at the address provided in Section
18 3.4. A second payment in the amount of \$15,750, for the remainder of fees and costs provided for
19 in Section 3.2, in a check made payable to "The Chanler Group" will be delivered to Leeman's
20 counsel at the address provided in Section 3.4 no later than January 15, 2017. If the Court does not
21 approve the Consent Judgment, all payments made pursuant to Sections 3.1 and 3.2 will be returned
22 to Kristus.

23 **3.4 Payment Address**

24 All payments to Leeman or her counsel owed by Kristus under this Consent Judgment shall
25 be delivered to the following address:

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

1 **4. CLAIMS COVERED AND RELEASED**

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

3 Leeman, acting on her own behalf and in the public interest, releases Kristus and its parents,
4 subsidiaries, affiliated entities under common ownership including without limitation Air Power
5 America, directors, officers, employees, shareholders and attorneys (collectively, "Releasees") and
6 each entity to whom Releasees directly or indirectly distribute or sell the Products including, but not
7 limited to, downstream distributors, wholesalers, customers, retailers, franchisers, cooperative
8 members, licensors and licensees, including without limitation Lowe's Companies, Inc., Lowe's
9 Home Centers, LLC, their respective parents, subsidiaries, affiliates, employees, agents, and assigns
10 (collectively, "Downstream Releasees") for any violations arising under Proposition 65 based on
11 any alleged exposure to DEHP from Products manufactured, imported, distributed, sold, and/or
12 offered for sale or use by Releasees or Downstream Releasees prior to the Effective Date, as set
13 forth in the Notice.

14 Compliance with the terms of this Consent Judgment constitutes compliance with
15 Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP from
16 Products manufactured, imported, distributed, sold, and/or offered for sale or use by Releasees or
17 Downstream Releasees.

18 **4.2 Leeman's Individual Release of Claims**

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

26 **4.3 Kristus' Release of Leeman**

27 Kristus, on its own behalf and on behalf of its past and current agents, representatives,
28 attorneys, successors and/or assignees, hereby waives any and all claims against Leeman and her

1 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
2 her attorneys and other representatives in the course of investigating claims, seeking to enforce
3 Proposition 65 against it in this matter, or with respect to the Products.

4 **4.4 Mutual Waiver of California Civil Code Section 1542**

5 The Parties each acknowledge that she/they is/are familiar with Section 1542 of
6 the Civil Code, which provides as follows:

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

12 The Parties, each on their own behalf (and Leeman in her individual capacity only and not in any
13 representative capacity), and on behalf of their past and current agents, representatives, counsel,
14 successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which
15 they may have under, or which may be conferred upon them by the provisions of Civil Code section
16 1542 as well as under any other state or federal statute or common law principle of similar effect, to
17 the fullest extent they may lawfully waive such rights or benefits pertaining to the released matters,
18 as defined by Sections 4.2 and 4.3, above.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court and
21 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
22 after it has been fully executed by the Parties, or within such additional time as the Parties may
23 agree to in writing. Leeman and Kristus agree to support the entry of this agreement as a judgment,
24 and to obtain the Court's approval of their settlement in a timely manner, or within such additional
25 time as the Parties may agree to in writing. The Parties acknowledge that, pursuant to California
26 Health and Safety Code §25249.7(f), a noticed motion is required to obtain judicial approval of this
27 Consent Judgment, which motion Leeman shall draft and file and Kristus shall support, including
28 by appearing at the hearing if so requested. If any third-party objection to the motion is filed,

1 Leeman and Kristus agree to work together to file a reply and appear at any hearing. This provision
2 is a material component of the Consent Judgment and shall be treated as such in the event of a
3 breach.

4 **6. SEVERABILITY**

5 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
6 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
7 remaining provisions shall not be adversely affected, so long as the deletion of provisions deemed
8 unenforceable does not materially affect, or otherwise result in the effect of the Consent Judgment
9 being contrary to the intent of the Parties.

10 **7. GOVERNING LAW**

11 The terms of this Consent Judgment shall be governed by the laws of the State of California
12 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
13 is otherwise rendered inapplicable by reason of law generally, or if any provision of this Consent
14 Judgment is rendered inapplicable or no longer required as a result of any such repeal or
15 preemption, or rendered inapplicable by reason of law generally as to the Products, then Kristus
16 may provide Leeman with written notice of any asserted change in the law, and shall have no
17 further injunctive obligations pursuant to this Consent Judgment, with respect to, and to the extent
18 that, the Products are so affected.

19 **8. NOTICE**

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

24 To Kristus:

25 Barry Kearns
26 Air Power America
27 2050 Stanley Ave.
28 Portage, MI 49002

To Leeman:

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

1 With courtesy copies to:

2 Robb S. Krueger
3 Kreis Enderle
4 P.O. Box 4010
5 Kalamazoo, MI 49003-4010

6 Stuart Block, Esq.
7 Stice Block, LLP
8 2335 Broadway, Suite 201
9 Oakland, CA 94612

10 James Mills
11 Law Office of James Mills
12 1300 Clay Street, Suite 600
13 Oakland, CA 94612-1427

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

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

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

20 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

21 Leeman and her counsel agree to comply with the reporting form requirements referenced in
22 California Health and Safety Code §25249.7(f).

23 **11. MODIFICATION**

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

27 **11.1 Notice, Meet and Confer**

28 Any party seeking to modify this Consent Judgment or allege a violation thereof shall first
attempt in good faith to meet and confer with the other party prior to filing a motion to modify the
Consent Judgment, for a period of at least thirty (30) days.

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 **13. DISMISSAL OF CO-DEFENDANTS WITHOUT PREJUDICE**

6 Within five (5) days after notice of entry of the Consent Judgment, Leeman shall dismiss
7 without prejudice Lowe's Companies, Inc. from this action.

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AGREED TO:


WHITNEY V. LEEMAN, PH.D.

Dated: 7/21/2016

AGREED TO:

KRISTUS, INC. DBA AIR POWER
AMERICA

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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Within five (5) days after notice of entry of the Consent Judgment, Leeman shall dismiss without prejudice Lowe's Companies, Inc. from this action.

AGREED TO:

WHITNEY R. LEEMAN, PH.D.

Dated: _____

AGREED TO:



KRISTUS, INC. DBA AIR POWER AMERICA

By: BARRY KEARNS
(Print Name)

Its: President
(Title)

Dated: 8/11/16