Cliff A. Chanler, State Bar No. 135534
Warren M. Klein, State Bar No. 303958
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D., Plaintiff, v. DISSTON COMPANY; *et al.*, Defendants.	Case No. 16CV2908724 **[PROPOSED] CONSENT JUDGMENT** (Health & Safety Code § 25249.5 *et seq.*)

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between Whitney R. Leeman, Ph.D. ("Leeman") and Disston Company ("Disston"), with Leeman and Disston each individually referred to as a "Party" and collectively as the "Parties."

1.2 Plaintiff

Leeman is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.3 Defendant

Disston 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").

1.4 General Allegations

Leeman alleges that Disston manufactures, imports, sells, or distributes for sale in California, vinyl/PVC extension cords containing di(2-ethylhexyl)phthalate ("DEHP"), without first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.5 Product Description

The Disston products that are covered by this Consent Judgment are defined as vinyl/PVC extension cords containing DEHP, specifically, *Capewell 12 Foot Auto Extension Cord, #0100, E0130100, UPC #0 35781 30100 8*, which are manufactured, imported, distributed, sold and/or offered for sale by Disston in the State of California, hereinafter the "Products."

1.6 Notice of Violation

On or about September 15, 2015, Leeman served Disston, others, and certain requisite public enforcement agencies with a 60-Day Notice of Violation ("Notice") alleging that Disston 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 January 25, 2016, Leeman filed the instant action ("Complaint"), naming Disston as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

1.8 No Admission

Disston denies the material, factual, and legal allegations contained in the Notice and Complaint, and 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 laws. 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 Disston'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 Disston as to the allegations in the Complaint, that venue is proper in the County of Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" means the date which this Court approves the Consent Judgment, including any unopposed tentative rulings.

2. <u>INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS</u>

2.1 Reformulated Products

Commencing on the Effective Date, and continuing thereafter, Disston shall only purchase for sale, manufacture for sale, import, sell, or distribute for sale in California "Reformulated Products,"

or Products that are sold with a clear and reasonable warning pursuant to Section 2.2 below. For purposes of this Consent Judgment, "Reformulated Products" are products that contain 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 utilized by federal or state agencies for the purpose of determining the DEHP content in a solid substance. In addition to the EPA test methods authorized above, the Parties may utilize equivalent methodologies employed by state or federal agencies to determine DEHP content in a solid substance.

2.2 Product Warnings

Commencing on the Effective Date, Disston shall provide clear and reasonable warnings for all Products as set forth in subsections 2.2(a) and (b) for all products that do not currently have warnings and that do not qualify as Reformulated Products. Each 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 before purchase or use. Each warning 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 consumer confusion.

(a) Retail Store Sales.

(i) Product Labeling. Disston shall affix a warning to the packaging, labeling, or directly on each Product provided for sale in retail outlets in California that states:

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

Or,

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

(ii) Point-of-Sale Warnings. Alternatively, Disston may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity

to the point of display of the Products. Such instruction sent to Disston customers shall be sent by certified mail, return receipt requested.

> **WARNING:** This product contains DEHP, a chemical known to the State of California to cause birth defects and other reproductive harm.

Or,

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

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.,* Reformulated Products as defined in Section 2.1), the following statement shall be used:[1]

> **WARNING:** The following products contain DEHP, a chemical known to the State of California to cause birth defects and other reproductive harm:
>
> [*list products for which warning is required*]

Or,

> **WARNING:** The following products contain a chemical known to the State of California to cause cancer and birth defects and other reproductive harm.
>
> [*list products for which warning is required]*

(b) Mail Order Catalog and Internet Sales. In the event that Disston sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, Disston shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the

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[1]For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

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

Or,

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

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Disston may utilize a designated symbol to cross reference the applicable warning and shall define the term "designated symbol" with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain DEHP, a chemical known to the State of California to cause birth defects and other reproductive harm.

Or,

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain a chemical known to the State of California to cause cancer and birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the designated symbol appears, Disston must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(ii) Internet Website Warning. A warning shall be given in conjunction with the sale of the Products via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Product for which it is given in the same type size or larger than the Product description text:

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

Or,

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

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

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

Or,

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

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred to in this Consent Judgment, Disston shall pay $27,500 in civil penalties. Each civil penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-

five percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and twenty-five percent (25%) of the funds remitted to Leeman.

3.1.1 Initial Civil Penalty

Within fifteen (15) days of the date that this Consent Judgment is mutually executed, Disston shall issue a check for its initial civil penalty payment in the amount of $7,500 to its counsel of record, John L. Sun, Esq. John L. Sun, Esq. shall provide The Chanler Group with written confirmation within five days of receipt that the funds have been deposited in a trust account. Within five (5) days of the Effective Date by the Court, Counselor Sun shall issue a check for the initial civil penalty payment to "Whitney R. Leeman, Client Trust Account." Leeman and her counsel will ensure that the appropriate 75% is delivered to OEHHA.

3.1.2 Final Civil Penalty

On or before October 1, 2016, Disston shall make a final civil penalty payment of $20,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Leeman agrees that the final civil penalty payment shall be waived in its entirety if, no later than September 15, 2016, an officer of Disston provides Leeman with written certification that all of the Products purchased for sale or manufactured for sale in California as of the date of such certification are Reformulated Products as defined by Section 2.1, and that Disston will continue to offer only Reformulated Products in California in the future. The option to certify reformulation in lieu of making the final civil penalty payment required by this Section is a material term and time is of the essence.

3.2 Reimbursement of 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 the issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after the other settlement terms had been finalized, Disston expressed a desire to resolve Leeman's fees and costs. 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 Consent Judgment. Disston shall, within fifteen (15) days of the date that this Consent Judgment is mutually executed, issue a check payable to John L. Sun, Esq., in the amount of fees and costs of $26,000 to be held in trust by John L. Sun, Esq. for The Chanler Group. John L. Sun, Esq. shall provide The Chanler Group with written confirmation within five days of receipt that the funds have been deposited in a trust account. Within five (5) days of the Effective Date, John L. Sun, Esq., shall issue a check payable to "The Chanler Group" to the address found in Section 3.3.1 below.

3.3 Payment Procedures

Except for the final civil penalty payment required by Section 3.1.2, all payments due under this Consent Judgment are to be delivered within fifteen (15) days of the date that this Consent Judgment is mutually executed, to John L. Sun, Esq., and released to The Chanler Group and Leeman within five (5) days of the Effective Date according to the following subsections.

3.3.1 Payment Addresses

(a) All payments and tax documentation for Leeman and her counsel shall be delivered to:

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

4. CLAIMS COVERED AND RELEASED

4.1 Leeman's Public Release of Proposition 65 Claims

Leeman, acting on her own behalf and in the public interest, releases Disston and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees. and attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the Products, including but not limited to its downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors, and licensees, ("Downstream Releasees") for violations arising under Proposition 65 for unwarned exposures to DEHP from the Products sold by Disston prior to the Effective Date, as set forth in the Notice.

4.2 Leeman's Individual Release of Claims

Leeman, in her individual capacity only and *not* in her representative capacity, also provides a release to Disston, Releasees, and Downstream Releasees 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, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP from the Products sold or distributed for sale by Disston before the Effective Date.

4.3 Disston's Release of Leeman

Disston, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims 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, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

5. COURT APPROVAL

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

6. SEVERABILITY

If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any provision 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 Consent Judgment 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, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Disston may provide written notice to Leeman of any asserted change in the law, and shall have no further

obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Disston from any obligation to comply with any pertinent state or federal toxics control laws.

8. NOTICE

Unless specified herein, all correspondence and notice required by this Consent Judgment 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 to the following addresses:

For Disston:

John L. Sun, Esq.
Law Offices of John L. Sun
10724 Bridger Way
Tustin, CA 92782

For Leeman:

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

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment 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). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, Leeman and Disston agree to mutually employ their best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"

shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers and supporting the motion for judicial approval.

11. MODIFICATION

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

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:

Date: 3/24/16

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

AGREED TO:

Date: _____

By: _____
Stephen Chen, Chief Executive Officer
DISSTON COMPANY

shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers, and supporting the motion for judicial approval.

11. MODIFICATION

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

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:_____	Date: 3-29-16
By:_____ WHITNEY R. LEEMAN, PH.D.	By:_____ Stephen Chen, Chief Executive Officer DISSTON COMPANY