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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION
12

13 WHITNEY R. LEEMAN, PH.D.

14 Plaintiff,

15 v.

16 HD SUPPLY REPAIR AND REMODEL, LLC

17 Defendant.
18
19

Case No. CGC 16-551061

[PROPOSED] CONSENT JUDGMENT

Cal. Health & Safety Code § 25249.6 et seq. and
Cal. Code Civ. Proc. § 664.6

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 HD Supply Repair and Remodel, LLC (“HD”), with Leeman and HD each
5 individually referred 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 to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 HD employs ten or more individuals 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 HD manufactures, imports, sells, or distributes for sale in California,
16 knee pads with vinyl/PVC components that contain di(2-ethylhexyl) phthalate (“DEHP”) without first
17 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
18 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are knee pads with vinyl/PVC components
21 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by HD
22 including, but not limited to, the *Comfort Grip Knee Pads, SKU 446971, UPC #4 00004 46971 9*,
23 hereinafter the “Products.”

24 **1.6 Notices of Violation**

25 On December 29, 2015, Leeman served HD and the requisite public enforcement agencies
26 with a “60-Day Notice of Violation” (“Notice”) alleging that HD violated Proposition 65 by failing to
27 warn its customers and consumers in California of the health hazards associated with exposures to
28

1 DEHP from the Products. To the best of the Parties' knowledge, no public enforcer has commenced
2 and is diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On March 22, 2016, Leeman filed the instant action ("Complaint"), naming HD as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 HD denies the material, factual, and legal allegations contained in the Notice and Complaint,
9 and it maintains that all of the products that it has sold, manufactured, imported and/or distributed for
10 sale in California, including the Products, have been and are in compliance with all laws. Nothing in
11 this Consent Judgment shall be construed as an admission 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 of any fact, finding, conclusion of law, issue of law, or violation of law.
14 This Section shall not, however, diminish or otherwise affect HD's obligations, responsibilities, and
15 duties under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over HD as to the allegations contained in the Complaint, that venue is proper in the
19 County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of
20 this 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 June 15, 2017.

23 **2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS**

24 **2.1 Commitment to Reformulate or Warn**

25 Commencing on the Effective Date and continuing thereafter, HD shall only manufacture for
26 sale, purchase for sale, or import for sale in California, Products that are either: (a) Reformulated
27 Products as defined by Section 2.2, below; or (b) Products that are offered by HD with a clear and
28 reasonable warning pursuant to Section 2.3.

1 **2.2 Reformulation Standard**

2 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
3 that contain DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed
4 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
5 methodology utilized by federal or state government agencies for the purpose of determining DEHP
6 content in a solid substance.

7 **2.3 Clear and Reasonable Warning**

8 For any Products manufactured for sale, purchased for sale, or imported for sale in California
9 by HD on or after the Effective Date that are not Reformulated Products, HD agrees to only offer
10 such Products for sale with a clear and reasonable warning in accordance with this Section. HD
11 further agrees that any warning used will be prominently placed in relation to the Product with such
12 conspicuousness when compared with other words, statements, designs, or devices as to render it
13 likely to be read and understood by an ordinary individual under customary conditions of purchase or
14 use. For purposes of this Consent Judgment, a clear and reasonable warning for the Products
15 satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying
16 labeling or packaging sold in California containing one of the following statements:

17
18 **WARNING:** This product can expose you to chemicals
19 including DEHP, which is known to the
20 State of California to cause birth defects
 or other reproductive harm.

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

23 For Products that HD knows, or has reason to know, to contain an additional Proposition 65-listed
24 chemical, it may use:

25 **WARNING:** This product contains chemicals known to
26 the State of California to cause cancer and
27 birth defects or other reproductive harm.
28

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, HD shall pay \$2,000 in civil penalties. The civil penalty payment 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”) and twenty-five percent (25%) of the funds remitted to Leeman. HD shall provide its
8 payment in two checks for the following amount made payable to (a) “OEHHA” in the amount of
9 \$1,500.00; and (b) “Whitney Leeman, Client Trust Account” in the amount of \$500.00. Leeman’s
10 counsel shall be responsible for remitting HD’s payment under this Consent Judgment to OEHHA.

11 **3.2 Reimbursement of Attorney’s Fees and Costs**

12 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
13 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
14 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
15 other settlement terms had been finalized, HD expressed a desire to resolve Leeman’s fees and costs.
16 The Parties then attempted to (and did) reach an accord on the compensation due to Leeman and her
17 counsel under general contract principles and the private attorney general doctrine codified at
18 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
19 execution of this Consent Judgment. HD shall issue a check to “The Chanler Group” in the amount
20 of \$26,500, pursuant to the payment procedures in Section 3.3 below, and to the address found in
21 Section 3.4 below.

22 **3.3 Payments Held in Trust**

23 All payments due under this agreement shall be delivered within two (2) weeks of the date
24 that this Consent Judgment is fully executed by the Parties, and held in trust by HD’s counsel until
25 the Court grants the motion for approval of this Consent Judgment. HD’s counsel shall confirm
26 receipt of settlement funds in writing to Leeman’s counsel and, thereafter, hold the amounts paid in
27 trust until the date on which the Court approves this Consent Judgment, including any unopposed
28 tentative ruling granting approval of this Consent Judgment. Within two business days of the

1 Court's approval of this Consent Judgment, HD's counsel shall tender the civil penalty payment and
2 attorneys' fee and costs reimbursements required by Sections 3.1 and 3.2.

3 **3.4 Payment Address**

4 All payments required by this Consent Judgment shall be delivered to:

5 The Chanler Group
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Leeman's Public Release of Proposition 65 Claims**

10 This Consent Judgment is a full, final and binding resolution between Leeman, acting on her
11 own behalf and in the public interest, and HD and its parents, subsidiaries, affiliated entities under
12 common ownership (including but not limited to HD Supply Holdings, Inc., HDS Holding
13 Corporation, HD Supply, Inc., and HD Supply Holdings, LLC), the directors, officers, employees,
14 attorneys, and the successors and assigns of each of them ("Releasees") and each entity to whom it
15 directly or indirectly distributes or sells the Products including, but not limited to, its downstream
16 distributors, wholesalers, customers, retailers, franchisers, resellers, cooperative members, licensors
17 and licensees ("Downstream Releasees") with respect to all claims that were or could have been
18 alleged in the Notice and Complaint as to alleged violations arising under Proposition 65 for
19 unwarned exposures to DEHP from Products imported, manufactured, sold, or distributed for sale
20 by HD prior to the Effective Date, as set forth in the Notice. Leeman, acting on her own behalf and
21 in the public interest, releases HD, Releasees and Downstream Releasees for any violations arising
22 under Proposition 65 for unwarned exposures to DEHP from Products imported, manufactured,
23 sold, or distributed for sale by HD prior to the Effective Date, as set forth in the Notice and
24 Complaint. Compliance with the terms of this Consent Judgment constitutes compliance with
25 Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP from
26 Products as set forth in the Notice.

1 **4.2 Leeman’s Individual Release of Claims**

2 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
3 release to HD, Releasees, and Downstream Releasees which shall be effective as a full and final
4 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
5 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
6 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
7 exposures to DEHP in the Products imported, manufactured, sold, or distributed for sale by HD prior
8 to the Effective Date.

9 **4.3 HD’s Release of Leeman**

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

15 **4.4 Mutual Waiver of California Civil Code Section 1542**

16 The Parties each acknowledge she/it is familiar with Section 1542 of the Civil Code, which
17 provides as follows:

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

22 The Parties, each on her/its own behalf, and on behalf of hers/its past and current agents,
23 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
24 rights and benefits which they may have under, or which may be conferred upon them by the
25 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
26 law principle of similar effect, to the fullest extent she/it may lawfully waive such rights or benefits
27 pertaining to the released matters, as specifically defined by Sections 4.2 and 4.3, above.
28

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, or is otherwise
12 rendered inapplicable by reason of law generally, or as to the Products, then HD may provide written
13 notice to Leeman of any asserted change in the law, and shall have no further injunctive obligations
14 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.
15 HD may, in its sole discretion, provide warnings for the Products in accordance with Title 27,
16 California Code of Regulations, Section 25603, which was adopted on August 30, 2016.

17 **8. NOTICE**

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

21 For HD:

22 Joseph J. DeAngelo, Chairma, President and Chief Executive Officer
23 HD Supply Holdings, Inc.
24 3100 Cumberland Boulevard, Suite 1480
25 Atlanta, GA 30339

26 with a copy to HD's counsel:

27 Ann Grimaldi, Esq.
28 Grimaldi Law Offices
 50 California Street, Suite 1500
 San Francisco, CA 94111
 ann.grimaldi@grimaldilawoffices.com

1 For Leeman:

2 The Chanler Group
3 Attention: Prop 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. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

14 Leeman agrees to comply with the reporting form requirements referenced in Health and
15 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
16 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement.
17 HD shall reasonably cooperate with Leeman in connection with such noticed motion.

18 **11. MODIFICATION**

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

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12. AUTHORIZATION

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


AGREED TO:

AGREED TO:

Date: 4/21/2017

Date: April 27, 2017

By: 
WHITNEY R. LEEMAN, PH.D.

By: 
Dan S. McDevitt, Vice President and
Corporate Secretary
HD Supply Repair and Remodel, LLC