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Rosemary T. McGuire, Esq. Bar No.172549
Michael R. Linden, Esq. Bar No. 192485
THE LAW FIRM OF
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ARENDT & MCGUIRE, LLP
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Facsimile: (559) 221-5262

Attorneys for Defendant, Gottschalks, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA, UNLIMITED CIVIL JURISDICTION**

WHITNEY R. LEEMAN, Ph.D.
Plaintiff
vs.
THE POMEROY COLLECTION, INC.;
GOTTSHALKS, INC., and DOES 1 through
150,
Defendants.

) CASE NO. HG04147323
)
)
) **CONSENT JUDGMENT**
)
)
)

This Consent Judgment ("Agreement" or "Consent Judgment") is entered into by and between Whitney R. Leeman, Ph.D., an individual ("Dr. Leeman" or "Leeman"), and The Pomeroy Collection, Inc., and Gottschalks, Inc. (collectively, "Settling Defendants"), which are persons doing business within the meaning of Health & Safety Code §25249.11 and also are persons, firms, corporations or associations within the meaning of Business & Professions Code §17201 and/or §17500 as of September 10, 2004 (the "Effective Date"). The parties agree to the following terms and conditions:

WHEREAS:

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

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B. Dr. Leeman alleges that SETTLING DEFENDANTS are companies that currently manufacture, distribute and/or otherwise sell certain glassware and metal products that contain lead or lead compounds, a substance known to the State of California to cause cancer and birth defects (or other reproductive harm);

C. The product at issue that contains lead (or lead compounds) (the "Listed Chemical"), and which is covered by this Agreement, is provided in Exhibit A.

D. On April 25, 2003, Dr. Leeman first served SETTLING DEFENDANTS and other public enforcement agencies with a document entitled "60-Day Notice of Violation" that provided SETTLING DEFENDANTS, and such public enforcers, with notice that SETTLING DEFENDANTS were allegedly in violation of Health & Safety Code §25249.6 for failing to warn purchasers that certain products sold in California expose users to the Listed Chemical; and

E. On March 24, 2004, Dr. Leeman filed a complaint entitled *Whitney R. Leeman v. The Pomeroy Collection, et al.* in the Alameda County Superior Court, naming The Pomeroy Collection, Inc., and Gottschalks Inc. as defendants and alleging violations of Business & Professions Code §§17200 and 17500, and Health & Safety Code §25249.6 on behalf of individuals in California who allegedly have been exposed to one or more chemicals, listed pursuant to Proposition 65, contained in the Products.

F. Nothing in this Agreement shall be construed as an admission by SETTLING DEFENDANTS of any fact, finding, issue of law or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by SETTLING DEFENDANTS of any fact, finding, conclusion, issue of law or violation of law. However, this paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of SETTLING DEFENDANTS under this Agreement.

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1 **NOW THEREFORE, WHITNEY R. LEEMAN AND SETTLING DEFENDANTS**
2 **AGREE AS FOLLOWS:**

3 **1.0 Product Warnings.**

4 (a) SETTLING DEFENDANTS shall not offer any of the Products for sale in
5 California after the Effective Date unless they are reformulated to eliminate the presence of lead
6 or bear the following warning statement:

7
8 **"WARNING: This product contains LEAD, a chemical known to**
9 **the State of California to cause birth defects (or other**
10 **reproductive harm)."**

11 (b) In no event shall SETTLING DEFENDANTS offer any of the Products for
12 sale in California after the Effective Date unless they are reformulated to eliminate the presence
13 of lead or bear the warning statement listed in Paragraph 1.0(a), subject to the exception set
14 forth in Paragraph 1.0(c). The warning stated above may be placed on: (1) a product label; (2)
15 the accompanying packaging as a sticker; or (3) a store sign sufficiently near the Products' point
16 of sale so that it is likely to be read by an ordinary individual under customary conditions of
17 purchase for the Products. For purposes of this Consent Judgment, a warning sticker placed on
18 product packaging that is not available to the consumer before purchase, or on product
19 packaging that does not accompany the Products when purchased, is not reasonably calculated
20 to transmit the requisite warning and, thus, may not be used to comply with this paragraph.

21 (c) Notwithstanding any other provision of this Agreement, no warning for
22 exposure to lead shall or need be provided by SETTLING DEFENDANTS for: (1) any Product
23 containing 0.1 percent (.1%) lead or less (by weight) in each material used in the Products (such
24 as solder or came); (2) any Product, for which the reasonably foreseeable exposure to the Listed
25 Chemical from the product is indirect, that yields a result of less than 1 micrograms (ugs) of lead
26 by a Ghost Wipe™ test conducted on all metal portions of the perimeter or other surface area of
27 the Product, performed as outlined in NIOSH method of detection 9100; or (3) any Product, for
28 which the reasonably foreseeable exposure to the Listed Chemical from the product is direct,

1 that yields a result of less than .25 micrograms (ugs) of lead by a Ghost Wipe™ test conducted
2 on all metal portions of the perimeter or other surface area of the Product, performed as outlined
3 in NIOSH method of detection 9100.

4 **2. Payment Pursuant To Health & Safety Code §25249.7(b).** Pursuant to
5 Health & Safety Code §25249.7(b), SETTLING DEFENDANTS shall pay \$20,000 in civil
6 penalties in two equal installments. The first payment of \$10,000 is due within five (5) calendar
7 days of the Effective Date. The second payment of \$10,000 is due on September 11, 2005 but
8 shall be waived if the SETTLING DEFENDANTS certify in writing by August 15, 2005 that
9 they each have met the reformulation commitments set forth in paragraph 1.0 and have sold only
10 lead-free Products during the period September 1, 2004 through July 31, 2005. Payment shall
11 be made to "Chanler Law Group In Trust For Whitney R. Leeman". If the Consent Judgment is
12 not ultimately approved by the Court, Dr. Leeman will return all funds within five (5) calendar
13 days of notice of the Court's decision. Those penalty monies received shall be apportioned by
14 Dr. Leeman in accordance with Health & Safety Code § 25192, with 75% of these funds
15 remitted to the State of California's Office of Environmental Health Hazard Assessment and the
16 remaining 25% of these penalty monies retained by Plaintiff as provided by Health and Safety
17 Code § 25249.12(d). The Parties agree that SETTLING DEFENDANTS' commitment to
18 market reformulated products has been accounted for in establishing the amount of penalties to
19 be paid pursuant to this paragraph and that reformulation is not otherwise a remedy provided for
20 by law.

21 **3. Reimbursement of Fees and Costs.** The parties acknowledge that Dr.
22 Leeman and her counsel offered to resolve this dispute without reaching terms on the amount of
23 fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the
24 material terms of the agreement had been settled. SETTLING DEFENDANTS then expressed a
25 desire to resolve the fee and cost issue shortly after the other settlement terms had been
26 finalized. The parties then attempted to (and did) reach an accord on the compensation due to
27 Leeman and her counsel under the Private Attorney General doctrine codified at C.C.P. §1021.5
28 for all work performed through the Effective Date of the Agreement. Under the Private

1 Attorney General doctrine, SETTLING DEFENDANTS shall reimburse Dr. Leeman and her
2 counsel for their fees and costs, incurred as a result of investigating, bringing this matter to
3 SETTLING DEFENDANTS' attention, litigating, and negotiating a settlement in the public
4 interest. SETTLING DEFENDANTS shall pay Dr. Leeman and her counsel \$31,500 for all
5 attorneys' fees, expert and investigation fees, and litigation costs. The payment shall be made
6 payable to the "Chanler Law Group" in three installments as follows: \$10,000 on September 15,
7 2004; \$10,000 on October 10, 2004; and \$11,500 on November 10, 2004.

8 **4. Post-Execution Activities.** The Parties acknowledge that, pursuant to
9 Health & Safety Code §25249.7, a noticed motion is required to obtain judicial approval of this
10 Agreement. Accordingly, the Parties agree to use their best efforts to file a *Joint Motion to*
11 *Approve the Agreement* ("Joint Motion"), the first draft of which SETTLING DEFENDANTS
12 shall prepare, within a reasonable period of time after execution of this Agreement (i.e., not to
13 exceed fourteen (14) days unless otherwise agreed to by Dr. Leeman's counsel based on
14 unanticipated circumstances). Dr. Leeman's counsel shall prepare a declaration in support of
15 the Joint Motion which shall, *inter alia*, set forth support for the fees and costs to be reimbursed
16 pursuant to Paragraph 3. SETTLING DEFENDANTS shall have no additional responsibility to
17 Leeman or Leeman's counsel pursuant to C.C.P. §1021.5 or otherwise with regard to
18 reimbursement of any fees and costs incurred with respect to the preparation and filing of the
19 Joint Motion and its supporting declaration or with regard to Leeman's counsel appearing for a
20 hearing or related proceedings thereon.

21 **5. Whitney R. Leeman's Release of SETTLING DEFENDANTS.** Dr.
22 Leeman, by this Agreement, on behalf of herself, her agents, representatives, attorneys, assigns
23 and in the interest of the general public, waives all rights to institute or participate in, directly or
24 indirectly, any form of legal action, and releases all claims, liabilities, obligations, losses, costs,
25 expenses, fines and damages, against SETTLING DEFENDANTS whether under Proposition
26 65 based on the alleged failure to warn about exposure to lead (or lead compounds) contained
27 in any of the Products. Dr. Leeman, by this Agreement, on behalf of herself, her agents,
28 representatives, attorneys, and assigns, also waives all rights to institute or participate in,

1 directly or indirectly, any form of legal action, and releases all claims, liabilities, obligations,
2 losses, costs, expenses, fines and damages, against SETTLING DEFENDANTS, and each of
3 their owners, customers, purchasers, users, parent companies, corporate affiliates, subsidiaries,
4 officers, directors, attorney, representatives, shareholders, agents and employees, under
5 Proposition 65 and under Business & Professions Code §§17200 and 17500 based on the
6 alleged failure to warn about exposure to Listed Chemical in association with the Products
7 (identified as Exhibit A hereto). The Parties agree, however, that any and all statutes of
8 limitation on the claims encompassed by Dr. Leeman's Complaint are hereby tolled from the
9 date of the filing of the Complaint through the date of any breach of this Agreement by any
10 Settling Defendant.

11 **6. SETTLING DEFENDANTS' Release of Whitney R. Leeman.**
12 SETTLING DEFENDANTS, by this Agreement, waive all rights to institute any form of legal
13 action against Whitney R. Leeman or her attorneys or representatives, for all actions or
14 statements made by Whitney R. Leeman, and her attorneys or representatives, in the course of
15 seeking enforcement of Proposition 65 or Business & Profession Code §§17200 and 17500
16 against SETTLING DEFENDANTS.

17 **7. Court Approval.** If, for any reason, this Consent Judgment is not
18 ultimately approved by the Court within the next twelve months, this Agreement shall be
19 deemed null and void.

20 **8. SETTLING DEFENDANTS' Sales Data.** SETTLING
21 DEFENDANTS understand that the sales data provided to counsel for Dr. Leeman by
22 SETTLING DEFENDANTS was a material factor upon which Dr. Leeman has relied to
23 determine the amount of payments made pursuant to Health & Safety Code §25249.7(b) in this
24 Agreement. To the best of SETTLING DEFENDANTS' knowledge, the sales data provided is
25 true and accurate. In the event that Dr. Leeman discovers facts that demonstrate to a reasonable
26 degree of certainty that the sales data is materially inaccurate, the parties shall meet in a good
27 faith attempt to resolve the matter within ten (10) days of SETTLING DEFENDANTS' receipt
28 of notice from Dr. Leeman of her intent to challenge the accuracy of the sales data. If this good

1 faith attempt fails to resolve Leeman's concerns, Leeman shall have the right to re-institute an
 2 enforcement action against SETTLING DEFENDANTS, for those additional Products, based
 3 upon any existing 60 Day Notices of violation served on SETTLING DEFENDANTS. In such
 4 case, all applicable statutes of limitation shall be deemed tolled for the period between the date
 5 Leeman filed the instant action and the date Leeman notifies SETTLING DEFENDANTS that
 6 she is re-instituting the action for the additional Products. Provided, however, that SETTLING
 7 DEFENDANTS shall have no additional liability, and Dr. Leeman waives any claims that
 8 might otherwise be asserted, from the Effective Date until the date that Leeman provides notice
 9 under this Paragraph 8, so long as SETTLING DEFENDANTS have complied with the
 10 requirements of Section 1.0 for all of the Products, including those numbers of Products
 11 additionally discovered.

12 **9. Severability.** In the event that any of the provisions of this Agreement
 13 are held by a court to be unenforceable, the validity of the enforceable provisions shall not be
 14 adversely affected.

15 **10. Attorney's Fees.** In the event that a dispute arises with respect to any
 16 provision(s) of this Agreement (including, but not limited to, disputes arising from payments to
 17 be made under this Agreement), reasonable attorneys' fees incurred from the resolution of such
 18 dispute shall be available to the prevailing party.

19 **11. Governing Law.** The terms of this Agreement shall be governed by the
 20 laws of the State of California.

21 **12. Notices.** All correspondence to Whitney R. Leeman shall be mailed to:
 22 Stephen S. Sayad
 23 CHANLER LAW GROUP
 24 655 Redwood Highway, Suite 216
 25 Mill Valley, CA 94941
 26 Tel: (415) 380-9222

27 All correspondence to SETTLING DEFENDANTS shall be mailed to:

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SEP. 13. 2004 10:20AM
SEP. 10. 2004 2:55PM

ER KAPLA COLLECTION
WEYCER KAPLA

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Attorney for Pomeroy
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Representative for Gottschalks
Greg Ambro
Senior Vice President
Gottschalks Inc.
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Fresno, CA 93720
Tel: (559) 434-4800

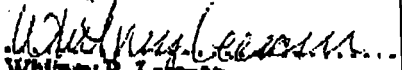
13. **Complies With Reporting Requirements (Health & Safety Code §25249.7(b)).** The parties acknowledge that the reporting provisions of Health & Safety Code § 25249.7(b) apply to this Consent Judgment. Counsel for Dr. Lecman shall comply with that section by submitting the required reporting form to, and serving a copy of this Consent Judgment on, the California Attorney General's Office when noticing the Motion to Approve hearing, if one is required by law.

14. **Counterparts and Facsimile.** This Agreement may be executed in counterparts and facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

15. **Authorization.** The undersigned are authorized to execute this Agreement on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Agreement.

AGREED TO:

DATE: 9/13/04


Whitney R. Lecman
PLAINTIFF

AGREED TO:

DATE: 9/10/04


The Pomeroy Collection, Inc.
DEFENDANT VICE PRESIDENT

DATE:

Gottschalks Inc.
DEFENDANT

Consent Judgment

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Attorney for Pomeroy
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Representative for Gottschalks
Greg Ambro
Senior Vice President
Gottschalks Inc.
7 River Park Place East
Fresno, CA 93720
Tel: (559) 434-4800

13. **Compliance With Reporting Requirements (Health & Safety Code §25249.7(f)).** The parties acknowledge that the reporting provisions of Health & Safety Code § 25249.7(f) apply to this Consent Judgment. Counsel for Dr. Leeman shall comply with that section by submitting the required reporting form to, and serving a copy of this Consent Judgment on, the California Attorney General's Office when noticing the Motion to Approve hearing, if one is required by law.

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AGREED TO:

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DATE:

.....
Whitney R. Leeman
PLAINTIFF

The Pomeroy Collection, Inc.
DEFENDANT

DATE:

Gottschalks Inc.
DEFENDANT

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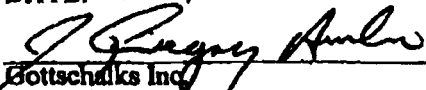
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Whitney R. Leeman
PLAINTIFF

The Pomeroy Collection, Inc.
DEFENDANT

DATE: 9/10/04



Gottschalks Inc.
DEFENDANT

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CL. IV. 2004 2:55PM

WEYCER KAPLAN COLLECTION
WEYCEK KAPLAN (ATTORNEY)

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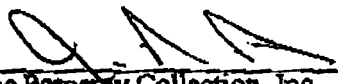
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AGREED TO:
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DATE: 9/10/04

.....
Whitney R. Leeman
PLAINTIFF


The Pomeroy Collection, Inc.
DEPENDANT VICE PRESIDENT

DATE:

Gottschalks Inc.
DEFENDANT

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APPROVED AS TO FORM:

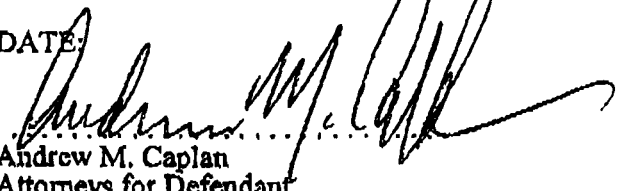
DATE: 9/10/04



.....
Stephen S. Sayad
Attorneys for Plaintiff
WHITNEY R. LEEMAN

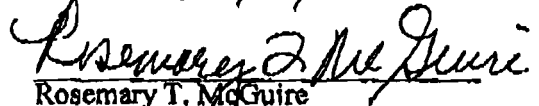
APPROVED AS TO FORM:

DATE:



.....
Andrew M. Caplan
Attorneys for Defendant
THE POMEROY COLLECTION, INC.

DATE: 9/10/04



.....
Rosemary T. McGuire
Attorneys for Defendant
GOTTSCHALKS INC.

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EXHIBIT A

**Tiffany-Style Votive Holders and other Glass and Metal Votive Holders, limited to:
Votive Holder Tiffany by San Miguel Candle Lamps (#408601 / #769072408601).**