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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 DILLARD'S, INC., *et al.*,

17 Defendants.
18
19

Case No. CGC-16-549754

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)
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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 Dillard’s, Inc. (“Dillard’s”), with Leeman and Dillard’s each individually referred to
5 as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Dillard’s employs ten or more individuals and Leeman contends it is a “person in the course
12 of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Leeman alleges that Dillard’s manufactures, imports, sells, or distributes for sale in
16 California, vinyl/PVC manicure cases 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 vinyl/PVC manicure cases containing
21 DEHP that are manufactured, imported, sold, or distributed for sale in California by Dillard’s
22 including, but not limited to, the *D4-Piece Manicure Set, Style 4PC-MAN-4, #0406942239834*,
23 hereinafter the “Products.”

24 **1.6 Notices of Violation**

25 On October 28, 2015, Leeman served Dillard’s and the requisite public enforcement agencies
26 with a “60-Day Notice of Violation” (“Notice”) alleging that Dillard’s violated Proposition 65 by
27 failing to warn its customers and consumers in California of the health hazards associated with
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1 exposures to DEHP from the Products. To the best of the Parties' knowledge, no public enforcer has
2 commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On January 7, 2016, Leeman filed the instant action ("Complaint"), naming Dillard's 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 Dillard's denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and it maintains that all of the products that it has sold and distributed for sale in
10 California, including the Products, have been and are in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
12 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
13 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
14 Section shall not, however, diminish or otherwise affect Dillard's obligations, responsibilities, and
15 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 Dillard's 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" means the date on which
23 the Motion for Approval of the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date and continuing thereafter, Dillard's shall only purchase
27 for sale, manufacture for sale and sell in California, "Reformulated Products." Reformulated
28 Products are Products that contain DEHP in concentrations less than 0.1 percent (1,000 parts per

1 million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies
2 3580A and 8270C or other methodology utilized by federal or state government agencies for the
3 purpose of determining DEHP content in a solid substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payments**

6 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
7 this Consent Judgment, Dillard's shall pay \$16,000 in civil penalties, as set forth in section 3.1.1 and
8 3.1.2 below. Each civil penalty payment shall be allocated according to Health and Safety Code
9 section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the California
10 Office of Environmental Health Hazard Assessment ("OEHHA") and twenty-five percent (25%) of
11 the funds remitted to Leeman.

12 **3.1.1 Initial Civil Penalty**

13 Dillard's shall make an initial civil penalty payment of \$4,000. Dillard's shall issue
14 two checks for its initial civil penalty payment. Civil penalties are to be paid payable as follows:

15 (i) a check payable to "OEHHA" in the amount of \$3000;

16 (ii) a check payable to "Whitney R. Leeman, Ph.D., Client Trust Account" in the
17 amount of \$1000.

18 **3.1.2 Final Civil Penalty**

19 On or before June 15, 2016, Dillard's shall make a final civil penalty payment of
20 \$12,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Leeman agrees that the
21 final civil penalty payment shall be waived in its entirety if, no later than June 15, 2016, an officer of
22 Dillard's provides Leeman with written certification that all of the Products it is selling or distributing
23 for sale in California as of the date of such certification are Reformulated Products as defined by
24 Section 2.1, and that Dillard's will continue to offer only Reformulated Products for sale in California
25 in the future. The option to certify reformulation in lieu of making the final civil penalty payment
26 required by this Section is a material term and time is of the essence. Dillard's shall deliver its
27 certificate, if any, to Leeman's counsel at the address provided in Section 3.4, below. In the event
28 that Dillard's does not timely certify its compliance or make the final civil penalty payment required

1 by this Section, the Parties agree that Leeman may file a motion or application seeking an order
2 compelling Dillard's' compliance with this Section and may seek her reasonable attorneys' fees and
3 costs pursuant to general contract principles and Code of Civil Procedure section 1021.5.

4 **3.2 Reimbursement of Attorney's Fees and Costs**

5 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
6 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
7 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
8 other settlement terms had been finalized, Dillard's expressed a desire to resolve Leeman's fees and
9 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Leeman
10 and her counsel under general contract principles and the private attorney general doctrine codified at
11 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
12 execution of this Consent Judgment. Dillard's shall issue a check to "The Chanler Group" in the
13 amount of \$30,000 pursuant to the payment procedures in Section 3.3 below, and to the address
14 found in Section 3.4 below.

15 **3.3 Payments Held in Trust**

16 Except the final civil penalty payment required by Section 3.1.2, all payments due under this
17 agreement shall be delivered within five (5) business days from receipt of the Court Order granting
18 the motion for approval of this Consent Judgment.

19 **3.4 Payment Address**

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

21 The Chanler Group
22 Attn: Proposition 65 Controller
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Leeman's Public Release of Proposition 65 Claims**

26 Leeman, acting on her own behalf and in the public interest, releases Dillard's and its
27 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
28 and attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells or

1 sold the Products including, but not limited to, its downstream distributors, wholesalers, customers,
2 retailers, franchisers, resellers, cooperative members, licensors and licensees (“Downstream
3 Releasees”) for any violations arising under Proposition 65 for unwarned exposures to DEHP from
4 Products sold by Dillard’s prior to the Effective Date, as set forth in the Notice.

5 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition
6 65 with respect to the failure to warn about exposures to DEHP in Products sold or distributed by
7 Dillard’s after the Effective Date.

8 **4.2 Leeman’s Individual Release of Claims**

9 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
10 release to Dillard’s, Releasees, and Downstream Releasees which shall be effective as a full and final
11 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
12 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
13 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
14 exposures to DEHP in the Products sold or distributed for sale by Dillard’s before the Effective Date.

15 **4.3 Dillard’s’ Release of Leeman**

16 Dillard’s, on its own behalf, and on behalf of its past and current agents, representatives,
17 attorneys, successors, and assignees, hereby waives any and all claims against Leeman and her
18 attorneys and other representatives, for any and all actions taken or statements made by Leeman and
19 her attorneys and other representatives, whether in the course of investigating claims, otherwise
20 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

21 **4.4 Representations**

22 Dillard’s represents that the sales data it provided to Leeman was truthful to its knowledge
23 and a material factor upon which Leeman has relied to determine the amount of civil penalties
24 assessed pursuant to Health & Safety Code § 25249.7 in this Consent Judgment.

25 If, within twelve months of the Effective Date, Leeman discovers and presents to Dillard’s,
26 evidence demonstrating that the preceding representation and warranty was materially inaccurate,
27 then Dillard’s shall have 30 days to meet and confer regarding Leeman’s contention. Should this 30
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1 day period pass without any such resolution between Leeman and Dillard's, Leeman shall be entitled
2 to file a formal legal claim including, but not limited to, a claim for damages for breach of contract.

3 **5. COURT APPROVAL**

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

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the state of California and apply
13 within the state of California. In the event that Proposition 65 is repealed, or is otherwise rendered
14 inapplicable by reason of law generally, or as to the Products, then Dillard's may provide written
15 notice to Leeman of any asserted change in the law, and shall have no further injunctive obligations
16 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

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 Dillard's:

22 Dean Worley, General Counsel
23 Dillard's, Inc.
24 1600 Cantrell Road
25 Little Rock, AR 72201

26 with a copy to Dillard's' counsel:

27 Jay Connolly, Esq.
28 Seyfarth Shaw LLP
560 Mission Street, 31st Floor
San Francisco, CA 94105-2930

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. POST EXECUTION ACTIVITIES**

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. In
17 furtherance of obtaining such approval, Leeman and Dillard's agree to mutually employ their best
18 efforts, and those of their counsel, to support the entry of this agreement as judgment, and to obtain
19 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"
20 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
21 supporting the motion, and appearing at the hearing before the Court, if required by the Court.

22 **11. MODIFICATION**

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

26 **12. AUTHORIZATION**

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

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AGREED TO:

Date: 5/24/2016

By: 
DR. WHITNEY R. LEEMAN

AGREED TO:

Date: 5-27-16

By: 
Dean Worley, General Counsel
DILLARD'S, INC.