

1 Clifford A. Chanler, State Bar No. 135534
2 Brian C. Johnson, State Bar No. 235965
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 cliff@chanler.com
10 brian@chanler.com

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

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,

Plaintiff,

v.

FRANKFORD CANDY LLC; *et al.*,

Defendants.

Case No. CGC-16-551104

[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 Frankford Candy LLC (“Frankford”) with Leeman and Frankford each individually
5 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 Frankford Candy LLC**

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

14 **1.4 General Allegations**

15 Leeman alleges that Frankford manufactures, imports, sells, or distributes for sale in
16 California, mugs with exterior designs that contain lead without first providing the exposure warning
17 required by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to the
18 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 ceramic mugs with exterior designs
21 containing lead that are manufactured, imported, sold, or distributed for sale in California by
22 Frankford including, but not limited to, *Nickelodeon Teenage Mutant Ninja Turtles Hot Cocoa Mug*
23 *Set, Item# 40109, UPC #0 41376 40109 1*, hereinafter the “Products.”

24 **1.6 Notice of Violation**

25 On December 1, 2015, Leeman served Frankford, and certain requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”). The Notice alleges that Frankford violated
27 Proposition 65 by failing to warn its customers and consumers in California that the Products expose
28

1 users to lead. To the best of the Parties' knowledge, no public enforcer has commenced and is
2 diligently prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On March 23, 2016, Leeman filed the captioned action ("Complaint"), naming Frankford 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 Frankford denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect Frankford's obligations, responsibilities, and duties under
15 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 Frankford as to the allegations contained in the Complaint, that venue is proper in
19 the 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 the date the
23 Court grants the motion for approval of the Parties settlement contemplated by Section 5.

24 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

25 **2.1 Commitment to Reformulate or Provide Warnings**

26 Commencing on the Effective Date, and continuing thereafter, Frankford agrees to only
27 manufacture for sale or purchase for sale in California "Reformulated Products," as defined by
28

1 Section 2.2 below, or manufacture for sale or purchase for sale in California Products that carry
2 Proposition 65 warnings in accordance with Section 2.3, below.

3 **2.2 Reformulated Products Defined**

4 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products
5 that: (a) contain no more than to 90 parts per million Lead content by weight when analyzed pursuant
6 to U.S. Environmental Protection Agency ("EPA") testing methodologies 3050B and 6010B; (b) that
7 yield a result of no more than 1.0 micrograms of lead when sampled and analyzed according to the
8 NIOSH 9100 testing protocol and analyzed pursuant to EPA testing methodologies 3050B and 6010B
9 and (c) that yield a result of no detectable lead in the "Lip and Rim Area," when analyzed according
10 to any test methodology authorized under Proposition 65. "Lip and Rim Area" is defined as the
11 exterior upper 20 millimeters of a Product. In addition to the test methodologies set forth above,
12 equivalent methodologies utilized by federal or state agencies for the purpose of determining lead
13 content in a solid substance may also be used.

14 **2.3 Clear and Reasonable Warnings**

15 Commencing on the Effective Date and continuing thereafter, for any Products sold or
16 distributed for sale in California by Frankford that are not Reformulated Products, Frankford will
17 only offer such Products for sale with a clear and reasonable warning in accordance with this
18 Section. Frankford further agrees that any warning used will be prominently placed in relation to
19 the Product with such conspicuousness when compared with other words, statements, designs, or
20 devices as to render it likely to be read and understood by an ordinary individual under customary
21 conditions of purchase or use. For purposes of this Consent Judgment, a clear and reasonable
22 warning for the Products satisfying these criteria shall consist of a warning affixed directly to a
23 Product or its accompanying labeling or packaging sold in California containing the following
24 statement:

25 **WARNING:** This product contains a chemical known to
26 the State of California to cause birth defects
27 or other reproductive harm.

28 In the event that Frankford sells Products via an internet website to customers located in
California, the warning requirements of this section shall be satisfied if the foregoing warning

1 appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on
2 the same page as the price for the Product; or (c) on one or more web pages displayed to a
3 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
4 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
5 immediately following the display, description, price, or checkout listing of the Product, provided
6 that the warning statement appears elsewhere on the same web page in a manner that clearly
7 associates it with the product(s) to which the warning applies.

8 Frankford further agrees that as to any Products manufactured after August 30, 2018 that are
9 not Reformulated Products, it shall affix warnings bearing the following language:

10 **WARNING:** This product can expose you to lead, which is
11 known to the State of California to cause birth
12 defects or other reproductive harm. For more
information go to www.P65Warnings.ca.gov.

13 **3. MONETARY SETTLEMENT TERMS**

14 **3.1 Civil Penalty Payments**

15 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
16 alleged in the Notice and referred to in this Consent Judgment, Frankford agrees to pay \$15,000 in
17 civil penalties. The penalty payment will be allocated in accordance with California Health and
18 Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California
19 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
20 penalty amount paid to Leeman. Frankford shall deliver its payment in two checks for the following
21 amounts made payable to (a) “OEHHA” in the amount of \$11,250; and (b) “Whitney Leeman, Client
22 Trust Account” in the amount of \$3,750. Leeman’s counsel shall be responsible for delivering
23 OEHHA’s portion of the penalty payment made under this Consent Judgment.

24 **3.2 Reimbursement of Attorneys’ Fees and Costs**

25 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
26 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be
27 resolved after the material terms of this Consent Judgment had been settled. Shortly after finalizing
28 the other settlement terms, the Parties negotiated the compensation due to Leeman and her counsel
under general contract principles and the private attorney general doctrine codified at California Code

1 of Civil Procedure section 1021.5 for all work performed through the mutual execution of this
2 Consent Judgment, and obtaining court approval of the same. Under these legal principles, Frankford
3 shall pay \$32,000 for all fees and costs incurred by Leeman investigating, bringing this matter to
4 Frankford's attention, litigating and negotiating a settlement in the public interest.

5 **3.3 Payment Timing; Funds Held in Trust**

6 All payments due under this Consent Judgment shall be held in trust until such time as the
7 Court approves the Parties' settlement. Frankford shall deliver its settlement payments to its counsel
8 within fifteen (15) days of the date that this Consent Judgment is fully executed by the Parties.
9 Frankford's counsel shall provide Leeman's counsel with confirmation following its receipt of the
10 settlement funds. Frankford's counsel shall hold the settlement funds in trust until, and disburse the
11 payments to Leeman's counsel within five (5) days of the Effective Date.

12 **3.4 Payment Address**

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

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Leeman's Public Release of Proposition 65 Claims**

19 Leeman, acting on her own behalf and in the public interest, releases Frankford and its
20 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
21 licensors, licensees, and attorneys ("Releasees"), and each entity to whom Frankford directly or
22 indirectly distributes or sells the Products including, without limitation, its downstream customers,
23 distributors, wholesalers, and retailers ("Downstream Releasees") for any violation arising under
24 Proposition 65 alleging a failure to warn about exposures to lead in Products manufactured for sale,
25 purchased for sale, sold, or distributed for sale by Frankford prior to the Effective Date, as set forth
26 in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
27 Proposition 65 with respect to exposures to lead from Products sold or distributed for sale by
28 Frankford after the Effective Date.

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

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

9 **4.3 Frankford’s Release of Leeman**

10 Frankford, 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, seeking to
14 enforce Proposition 65 against it, or with respect to the Products.

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and shall
17 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
18 has been fully executed by the Parties, or by such additional time to which the Parties agree in
19 writing.

20 **6. SEVERABILITY**

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

24 **7 GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
27 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Frankford may
28 provide written notice to Leeman of any asserted change in the law, and shall have no further

1 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
2 Products are so affected.

3 **8. NOTICE**

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

7 For Frankford:

8 Nathan Hoffman
9 Frankford Candy, LLC
10 9300 Ashton Road
11 Philadelphia, PA 19114

12 with a copy to:

13 Thomas A. Evans, Esq.
14 Reed Smith LLP
15 101 Second Street, Suite 1800
16 San Francisco, CA 94105

17 For Leeman:

18 Proposition 65 Coordinator
19 The Chanler Group
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710-2565

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Leeman and her attorneys agree to comply with the reporting form requirements referenced in
California Health and Safety Code section 25249.7(f).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

11. MODIFICATION

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

12. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

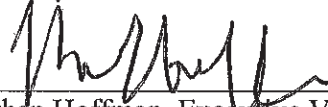
AGREED TO:

AGREED TO:

Date: 1/25/2017

Date: 1/25/2017

By: 
WHITNEY R. LEEMAN, PH.D.

By: 
Nathan Hoffman, Executive Vice President
FRANKFORD CANDY LLC