

1 Brian Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
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 Attorneys for Plaintiff
10 WHITNEY R. LEEMAN, PH.D.

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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA
15 UNLIMITED CIVIL JURISDICTION
16
17

18 WHITNEY R. LEEMAN, PH.D.,

19 Plaintiff,

20 v.

21 HOME ESSENTIALS & BEYOND, INC.; *et*
22 *al.*,

23 Defendants.
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Case No. 16CV291329

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5 *et seq.*)

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 Home Essentials & Beyond, Inc. (“Home Essentials”), with Leeman and Home
5 Essentials each 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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 For the purposes of this Consent Judgment only, Home Essentials employs ten or more
12 persons and is a “person in the course of doing business” for purposes of the Safe Drinking Water
13 and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition
14 65”).

15 **1.4 General Allegations**

16 Leeman alleges that Home Essentials manufactures, imports, sells, or distributes for sale in
17 California, glass canisters, glass jars, and glass mugs, with exterior designs containing lead, without
18 first providing the exposure warning required by Proposition 65. Lead is listed pursuant to
19 Proposition 65 as a chemical known to the State of California to cause birth defects and other
20 reproductive harm.

21 **1.5 Product Description**

22 The Home Essentials products that are covered by this Consent Judgment are defined as (1)
23 glass canisters containing lead, specifically, *Chalk It Up! Canister 44 oz., Item # 9801, UPC #7*
24 *86460 09801 5*, and *Chalk It Up! Canister 54 oz., Item # 9802, UPC #7 86460 09802 2*, (2) glass jars
25 with exterior designs containing lead, specifically, *Chalk It Up! By Home Essentials Set of Four 15*
26 *oz. Jars With Straws, #9804, UPC #7 86460 09804 6*, and (3), glass mugs with exterior designs
27 containing lead, specifically, *Chalk It Up! By Home Essentials Set of Four 16 oz. Glass Mugs, #9750*,
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1 *UPC #7 86460 09750 6*, which are manufactured, imported, distributed, sold and/or offered for sale
2 by Home Essentials in the State of California, hereinafter the “Products.”

3 **1.6 Notice of Violation**

4 On or about December 1, 2015, Leeman served Home Essentials, and certain requisite public
5 enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Home Essentials
6 was in violation of Proposition 65 for failing to warn its customers and consumers in California that
7 the Products expose users to lead.

8 **1.7 Complaint**

9 On February 8, 2016, Leeman filed the instant action (“Complaint”), naming Home Essentials
10 as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the
11 subject of the Notice.

12 **1.8 No Admission**

13 Home Essentials denies the material, factual, and legal allegations contained in the Notice and
14 Complaint, and maintains that all of the products that it has sold and distributed for sale in California,
15 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
16 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
17 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
18 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
19 not, however, diminish or otherwise affect Home Essential’s obligations, responsibilities, and duties
20 under this Consent Judgment.

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Home Essentials as to the allegations in the Complaint, that venue is proper in the
24 County of Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment.

1 **1.10 Effective Date**

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

4 **2. INJUNCTIVE RELIEF: REFORMULATION**

5 **2.1 Reformulated Products**

6 Commencing on the Effective Date, and continuing thereafter, Home Essentials shall only
7 purchase for sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated
8 Products,” or Products that contain appropriate health hazard warnings, as set forth in section 2.2,
9 below. For purposes of this Consent Judgment, Reformulated Products are the Products, as defined
10 in Section 1.5, that yield a maximum result of 1.0 microgram (“µg”) residual lead content by weight
11 on any surface, with exterior decorations sampled pursuant to the NIOSH 9100 sampling protocol,
12 *and* shall contain a maximum of 100 parts per million (“ppm”) (0.01%) lead by weight as measured
13 either before or after the material is fired onto (or otherwise affixed to) the Product when analyzed
14 pursuant to EPA Analytical Methods 3050B and/or 6010B.¹


15 **2.2 Product Warnings**

16 Commencing on the Effective Date, Home Essentials shall provide clear and reasonable
17 warnings for all Products as set forth in subsections 2.2(a) and (b) that do not qualify as Reformulated
18 Products. Each warning shall be prominently placed with such conspicuousness as compared with
19 other words, statements, designs, or devices as to render it likely to be read and understood by an
20 ordinary individual under customary conditions before purchase or use. Each warning shall be
21 provided in a manner such that the consumer or user understands to which specific Product the
22 warning applies, so as to minimize the risk of consumer confusion.


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27 ¹ If the exterior decoration is tested after it is affixed to the Product, the percentage of lead by weight must relate
28 only to the decorating material and must not include any quantity attributable to any non-non-decorating material (e.g.,
the ceramicware or glassware substrate).

1 **(a) Retail Store Sales.**


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

5  **WARNING:** This product contains lead, a chemical
6 known to the State of California to cause birth defects
7 and other reproductive harm.

8 **(ii) Point-of-Sale Warnings.** Alternatively, Home Essentials may
9 provide warning signs in the form below to its customers in California with instructions to post the
10 warnings in close proximity to the point of display of the Products. Such instruction sent to Home
11 Essentials customers shall be sent by certified mail, return receipt requested.


12  **WARNING:** This product contains lead, a chemical
13 known to the State of California to cause birth defects
14 and other reproductive harm.

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


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

21 **(b) Mail Order Catalog and Internet Sales.** In the event that Home
22 Essentials sells Products via mail order catalog and/or the internet, to customers located in California,
23 after the Effective Date, that are not Reformulated Products, Home Essentials shall provide warnings
24 for such Products sold via mail order catalog or the internet to California residents. Warnings given
25 in the mail order catalog or on the internet shall identify the specific Product to which the warning
26 applies as further specified in Sections 2.2(b)(i) and (ii).
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1 (i) **Mail Order Catalog Warning.** Any warning provided in a
2 mail order catalog shall be in the same type size or larger than the Product description text within the
3 catalog. The following warning shall be provided on the same page and in the same location as the
4 display and/or description of the Product:


5
6  **WARNING:** This product contains lead, a chemical
7 known to the State of California to cause birth defects
8 and other reproductive harm.

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


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

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

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

1  **WARNING:** This product contains lead, a chemical
2 known to the State of California to cause birth
3 defects and other reproductive harm.

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

7  **WARNING:** This product contains lead, a chemical
8 known to the State of California to cause birth defects
9 and other reproductive harm.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Civil Penalty Payments**

12 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
13 to in this Consent Judgment, Home Essentials shall pay \$27,000 in civil penalties. Each civil penalty
14 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with
15 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
16 Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Leeman.

17 **3.1.1 Initial Civil Penalty**

18 Within ten (10) days of the mutual execution of this Consent Judgment, Home
19 Essentials shall issue a check for its initial civil penalty payment in the amount of \$7,000 to its
20 counsel of record, Avrom Vann, Esq. Avrom Vann, Esq. shall provide The Chanler Group with
21 written confirmation within five days of receipt that the funds have been deposited in a trust account.
22 Within five (5) business days of written notice of this Consent Judgment being entered, Counselor
23 Vann shall issue two checks for the initial civil penalty payment as follows: (1) a check in the amount
24 \$1,750 made payable to “Whitney R. Leeman, Client Trust Account,” and (2) a check in the amount
25 \$5,250 made payable to “OEHHA.” Leeman and her counsel will ensure that the appropriate check
26 is delivered to OEHHA.

27 **3.1.2 Final Civil Penalty**

28 On or before February 1, 2018, Home Essentials shall make a final civil penalty

1 payment of \$20,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Leeman
2 agrees that the final civil penalty payment shall be waived in its entirety if, no later than January 15,
3 2018, an officer of Home Essentials provides Leeman with written certification that all of the
4 Products purchased for sale or manufactured for sale in California as of the date of such certification
5 are Reformulated Products as defined by Section 2.1, and that Home Essentials will continue to offer
6 only Products that are Reformulated Products in California in the future. The option to certify
7 reformulation in lieu of making the final civil penalty payment required by this Section is a material
8 term and time is of the essence.

9 **3.2 Reimbursement of Fees and Costs**

10 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
11 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
12 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
13 other settlement terms had been finalized, Home Essentials expressed a desire to resolve Leeman's
14 fees and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
15 Leeman and his counsel under general contract principles and the private attorney general doctrine
16 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
17 mutual execution of this Consent Judgment. Home Essentials shall, within ten (10) days on the
18 mutual execution of this Consent Judgment, issue a check payable to Avrom Vann, Esq., in the
19 amount of fees and costs of \$40,500 to be held in trust by Avrom Vann, Esq. for The Chanler Group.
20 Avrom Vann, Esq. shall provide The Chanler Group with written confirmation within five days of
21 receipt that the funds have been deposited in a trust account. Within five (5) business days of the of
22 written notice to counsel for Home Essentials that this Consent Judgment being entered, Avrom
23 Vann, Esq., shall issue a check payable to "The Chanler Group" to the address found in Section 3.3.1
24 below.

25 **3.3 Payment Procedures**

26 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
27 this Consent Judgment are to be delivered within ten (10) days of the mutual execution of this
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1 Consent Judgment, to Avrom Vann, Esq., and released to The Chanler Group and Leeman within
2 five (5) days of the Effective Date according to the following subsections.

3 **3.3.1 Payment Addresses**

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

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

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Leeman’s Public Release of Proposition 65 Claims**

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

20 **4.2 Leeman’s Individual Release of Claims**

21 Leeman, in her individual capacity only and *not* in her representative capacity, also provides a
22 release to Home Essentials, Releasees, and Downstream Releasees which shall be effective as a full
23 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
24 attorneys’ fees, damages, losses, claims, liabilities and demands of Leeman of any nature, character
25 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
26 exposures to lead from the Products sold or distributed for sale by Home Essentials before the
27 Effective Date.
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2 **4.3 Home Essentials’ Release of Leeman**

3 Home Essentials, on its own behalf, and on behalf of its past and current agents,
4 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
5 Leeman and his attorneys and other representatives, for any and all actions taken or statements
6 made by Leeman and his attorneys and other representatives, whether in the course of investigating
7 claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
8 Products.

9 **5. COURT APPROVAL**

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

13 **6. SEVERABILITY**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the state of California
19 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
20 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Home
21 Essentials may provide written notice to Leeman of any asserted change in the law, and shall have no
22 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
23 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Home
24 Essentials from any obligation to comply with any pertinent state or federal toxics control laws.

25 **8. NOTICE**

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

2 For Home Essentials:

3 Avrom Vann, Esq.
4 1211 Avenue of the Americas, 40th Floor
5 New York, New York
6 10036-8718

6 For Leeman:

7 The Chanler Group
8 Attn: Proposition 65 Coordinator
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

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

12 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

16 **10. POST EXECUTION ACTIVITIES**

17 Leeman agrees to comply with the reporting form requirements referenced in Health and
18 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
19 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
20 furtherance of obtaining such approval, Leeman and Home Essentials agree to mutually employ their
21 best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to
22 obtain judicial approval of their settlement in a timely manner. For purposes of this Section, “best
23 efforts” shall include, at a minimum, cooperating with the drafting and filing of the necessary moving
24 papers, and supporting the motion for judicial approval. Leeman and her counsel will prepare the
25 noticed motion to approve this Consent Judgment, and contingent on Home Essentials support or
26 non-opposition of said motion, Leeman will not seek further fee reimbursement.

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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: 1/24/2017

Date: 3/2/2017

By: 
WHITNEY R. LEEMAN, PH.D.

By: 
Izidore Godinger, President
HOME ESSENTIALS & BEYOND, INC.