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

12 WHITNEY R. LEEMAN, PH.D.

13 Plaintiff,

14 v.

15 HOUDINI, INC., *et al.*,

16 Defendants.
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Case No. CGC16549930

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *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 Houdini, Inc. ("Houdini"), with Leeman and Houdini each individually referred to as
5 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 Houdini 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 Houdini manufactures, imports, sells, or distributes for sale in California,
16 tote bags with vinyl/PVC handles 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 and other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are tote bags with vinyl/PVC handles
21 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by
22 Houdini including, but not limited to, the *Houdini Fabric Tote Snack Basket, UPC, #09 8009 48725*
23 *0*, hereinafter the "Products."

24 **1.6 Notices of Violation**

25 On November 10, 2015, Leeman served Houdini and the requisite public enforcement
26 agencies with a "60-Day Notice of Violation" ("Notice") alleging that Houdini violated Proposition
27 65 by 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 15, 2016, Leeman filed the instant action ("Complaint"), naming Houdini 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 Houdini 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 Houdini 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 Houdini 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.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

25 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

26 **2.1 Commitment to Reformulate or Provide Warnings**

27 Commencing on the Effective Date, and continuing thereafter, Houdini agrees to only
28 manufacture, distribute, purchase for sale, or offer for sale in or into California: (a) "Reformulated

1 Products”, or (b) Products that are sold with a clear and reasonable health hazard warning, pursuant
2 to Section 2.2 below.

3 **2.2 Reformulated Products Defined**

4 For purposes of this Settlement Agreement, “Reformulated Products” shall mean Products
5 containing no more than 1,000 parts per million (0.1%) DEHP in any accessible component (i.e., any
6 component that may be touched during use) when analyzed pursuant to Environmental Protection
7 Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal or
8 state agencies for the purpose of determining DEHP content in a solid substance.

9 **2.3 Clear and Reasonable Warnings Defined**

10 Houdini agrees that within 30 days of the Effective Date and continuing thereafter, all
11 Products it sells and/or distributes for sale in California which do not qualify as Reformulated
12 Products, will bear a clear and reasonable warning pursuant to this Section. Houdini further agrees
13 that the warning will be prominently placed with such conspicuousness when compared with other
14 words, statements, designs or devices as to render it likely to be read and understood by an ordinary
15 individual under customary conditions of use. For purposes of this Settlement Agreement, a clear
16 and reasonable warning for the Products shall consist of a warning affixed to the packaging, label,
17 tag, or directly to a Product sold in California and containing the following statements:

18
19 **WARNING:** This product contains DEHP, a chemical
20 known to the State of California to cause
21 birth defects and other reproductive harm.

22 Or,

23 **WARNING:** This product contains DEHP, a chemical
24 known to the State of California to cause cancer
25 and birth defects and other reproductive harm.

26 **3. MONETARY SETTLEMENT TERMS**

27 **3.1 Civil Penalty Payments**

28 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
this Consent Judgment, Houdini shall pay \$2,000 in civil penalties. This civil penalty payment shall

1 be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five
2 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
3 (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Leeman. Houdini shall issue a
4 check for its civil penalty payment in the amount of \$2,000 to “Whitney R. Leeman, Client Trust
5 Account” pursuant to the payment procedures in Section 3.3 below and to the address found in
6 Section 3.4 below. Leeman and his counsel will ensure 75% of this initial penalty is paid to OEHHA.

7 **3.2 Reimbursement of Attorney’s Fees and Costs**

8 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
9 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
10 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
11 other settlement terms had been finalized, Houdini expressed a desire to resolve Leeman’s fees and
12 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Leeman
13 and her counsel under general contract principles and the private attorney general doctrine codified at
14 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
15 execution of this Consent Judgment. Houdini shall issue a check to “The Chanler Group” in the
16 amount of \$18,000 pursuant to the payment procedures in Section 3.3 below, and to the address
17 found in Section 3.4 below.

18 **3.3 Payments Held in Trust**

19 Houdini shall deliver all payments required by this Consent Judgment to its counsel within
20 fifteen (15) days of the date that this Agreement is fully executed by the Parties. Houdini’s counsel
21 shall confirm receipt of settlement funds in writing to Leeman’s counsel and, thereafter, hold the
22 amounts paid until the Effective Date. Within five (5) business days of receiving written notice that
23 the Court has granted the motion for approval, including any unopposed tentative ruling granting
24 approval of this Consent Judgment, Houdini’s counsel shall deliver all settlement payments it has
25 held to Leeman’s counsel at the address provided in Section 3.4.
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1 **3.4 Payment Address**

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

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

7 **4. CLAIMS COVERED AND RELEASED**

8 **4.1 Leeman’s Public Release of Proposition 65 Claims**

9 Leeman, acting on her own behalf and in the public interest, and on behalf of her past and
10 current agents, representatives, attorneys, successors and assignees, releases Houdini and its
11 shareholders, agents, successors, assigns, parents, subsidiaries, affiliated entities under common
12 ownership, directors, officers, employees, and attorneys (“Releasees”) and each entity to whom it
13 directly or indirectly distributes or sells the Products including, but not limited to, its downstream
14 distributors, wholesalers, customers, retailers, franchisers, resellers, cooperative members, licensors
15 and licensees (“Downstream Releasees”) for any violations arising under Proposition 65 for
16 unwarned exposures to DEHP from Products sold by Houdini prior to the Effective Date, as set
17 forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance
18 with Proposition 65 with respect to exposures to DEHP from the Products, as set forth in the Notice.

19 **4.2 Leeman’s Individual Release of Claims**

20 Leeman, in her individual capacity only and *not* in her representative capacity, and on behalf
21 of her past and current agents, representatives, attorneys, successors and assignees, also provides a
22 release to Houdini, Releasees, and Downstream Releasees which shall be effective as a full and final
23 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 DEHP in the Products sold or distributed for sale by Houdini before the Effective Date.

1 **4.3 Houdini’s Release of Leeman**

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

7 **4.4 Representations**

8 Houdini represents that the sales data it provided to Leeman was truthful to its
9 knowledge and a material factor upon which Leeman has relied to determine the amount of civil
10 penalties assessed pursuant to Health & Safety Code § 25249.7 in this Consent Judgment. If, within
11 twelve months of the Effective Date, Leeman discovers and presents to Houdini, evidence
12 demonstrating that the preceding representation and warranty was materially inaccurate, then Houdini
13 shall have 30 days to meet and confer regarding Leeman’s contention. Should this 30-day period
14 pass without any such resolution between Leeman and Houdini, Leeman shall be entitled to file a
15 formal legal claim including, but not limited to, a claim for damages for breach of contract.

16 **5. COURT APPROVAL**

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

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, or is otherwise
27 rendered inapplicable by reason of law generally, or as to the Products, then Houdini may provide
28 written notice to Leeman of any asserted change in the law, and shall have no further injunctive

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected. If a future revision to Title 27, California Code of Regulations section 25601 et seq.,
3 relating to the content and/or method of transmission of safe harbor warnings for exposures to
4 Proposition 65-listed chemicals from consumer products is adopted, then Houdini may use the
5 revised, adopted warning content and/or method of transmission set forth in the revised regulations to
6 warn consumers and other individuals in California about the harms associated with exposures to
7 DEHP from the Products.

8 **8. NOTICE**

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

12 To Houdini:

13 Timothy Dean, President
14 Houdini, Inc.
15 4225 North Palm Street
16 Fullerton, CA 92835

To Leeman:

Attn: Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

16 With a copy to:

17 Lauren M. Michals
18 Nixon Peabody LLP
19 One Embarcadero Center, 18th Floor
20 San Francisco, CA 94111

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

24 This Consent Judgment may be executed in counterparts and by facsimile or portable
25 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
26 taken together, shall constitute one and the same document.
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1 **10. POST EXECUTION ACTIVITIES**

2 Leeman agrees to comply with the reporting form requirements referenced in Health and
3 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
4 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
5 furtherance of obtaining such approval, Leeman and Houdini agree to mutually employ their best
6 efforts, and those of their counsel, to support the entry of this agreement as judgment, and to obtain
7 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"
8 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
9 supporting the motion, and appearing at the hearing before the Court.

10 **11. MODIFICATION**

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

14 **12. AUTHORIZATION**

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

18 **AGREED TO:**

AGREED TO:

19
20 Date: 11/8/2016

Date: 11/7/16

21 By: 
22 WHITNEY R. LEEMAN, PH.D.

By: 
23 Timothy Dean, President
24 HOUDINI, INC.