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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 DR. WHITNEY R. LEEMAN,

15 Plaintiff,

16 v.

17 KKU INCORPORATED, and DOES 1-150,
18 inclusive,

19 Defendants.

Case No. RG14733167

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Dr. Whitney R. Leeman and KKU Incorporated**

3 This Consent Judgment is entered into by and between plaintiff Dr. Whitney R. Leeman
4 ("Leeman" or "Plaintiff") and defendant KKU Incorporated ("KKU" or "Defendant"), with Leeman
5 and KKU collectively referred to as the ("Parties").

6 **1.2 Dr. Whitney R. Leeman**

7 Leeman is an individual residing in the State of California who seeks to promote awareness
8 of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 KKU**

11 KKU employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code §25249.5 et seq.("Proposition 65").

14 **1.4 General Allegations**

15 Leeman alleges that KKU has manufactured, exported, distributed and/or sold shop seats
16 with vinyl/PVC upholstery containing Di(2-ethylhexyl)phthalate ("DEHP") for use in the State of
17 California without the requisite health hazard warnings. DEHP is listed pursuant to Proposition 65
18 as a chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Notices of Violation.**

20 On November 15, 2013, Leeman served The Home Depot, Inc. and Home Depot USA, Inc.
21 ("Home Depot") and various public enforcement agencies with a document entitled "60-Day Notice
22 of Violation," that alleged that Home Depot violated Proposition 65 by failing to warn consumers
23 that shop seats with vinyl/PVC upholstery including, but not limited to, the Husky Heavy Duty
24 Rolling Shop Seat (SKU 684 351, UPC 4 56049487201 0), exposed users in California to DEHP.

25 On April 30, 2014, Leeman served Home Depot, KKU, and various public enforcement
26 agencies with a document entitled "Supplemental 60-Day Notice of Violation," that alleged that
27 Home Depot and KKU violated Proposition 65 by failing to warn consumers that shop seats with
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1 vinyl/PVC upholstery including, but not limited to, the Husky Heavy Duty Rolling Shop Seat (SKU
2 684 351, UPC 4 560494 87201 0), exposed users in California to DEHP. The “60-Day Notice of
3 Violation and the “Supplemental 60-Day Notice of Violation” are hereinafter referred to
4 collectively as the “Notices.” To the best of the Parties’ knowledge, no public enforcer has
5 commenced and is diligently prosecuting allegations set forth in the Notices.

6 **1.6 Complaint.**

7 On July 16, 2014, Leeman, acting in the interest of the general public in California, filed a
8 Complaint in the instant action (“Complaint”) naming KKU, Inc. as a defendant and alleging
9 violations of Health & Safety Code §§ 25249.6, *et seq.* based on, *inter alia*, alleged occupational
10 and consumer exposures to DEHP contained in the Covered Products sold in California without the
11 clear and reasonable warning required by Proposition 65.

12 **1.7 No Admission.**

13 By execution of this Consent Judgment and agreeing to comply with its terms, KKU does
14 not admit any facts or conclusions of law, including, but not limited to, any facts or conclusions
15 of law suggesting or demonstrating any violations of Proposition 65 or any other statutory,
16 common law or equitable requirements relating to DEHP in Covered Products. Nothing in this
17 Consent Judgment shall be construed as an admission by KKU of any fact, conclusion of law,
18 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
19 construed as an admission by KKU of any fact, conclusion of law, issue of law, or violation of
20 law. Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
21 argument or defense KKU may have in this or any other or future legal proceedings. This
22 Consent Judgment is the product of negotiation and compromise and is accepted by KKU for
23 purposes of settling, compromising, and resolving issues disputed in this action. However, this
24 section shall not diminish or otherwise affect the obligations, responsibilities and duties of KKU
25 under this Consent Judgment.

26 **1.8 Consent to Jurisdiction.** For purposes of this Consent Judgment only, KKU
27 stipulates that this Court has jurisdiction over KKU as to the allegations contained in the Complaint,
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1 that venue is proper in the County of Alameda and that this Court has jurisdiction to enter and
2 enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil
3 Procedure § 664.6.

4 **2. DEFINITIONS.**

5 2.1 "Covered Products" means seats and stools designed or intended for use in
6 workshops and garages with vinyl/PVC upholstery containing DEHP, including but not limited to
7 Husky Heavy Duty Rolling Shop Seats that are manufactured for sale or exported for sale by KKU
8 and sold or distributed for sale in California.

9 2.2 "Effective Date" means the date this Consent Judgment is approved by the court.

10 2.3 "DEHP Limits" means the maximum concentration of DEHP by weight specified in
11 Section 3.1.

12 **3. INJUNCTIVE RELIEF: REFORMULATION**

13 **3.1 DEHP Limits.**

14 Commencing on the Effective Date and continuing into the future, KKU shall not
15 manufacture, distribute, export, or ship for sale any Covered Product that will be sold or offered for
16 sale to California consumers or businesses with vinyl or PVC upholstery that contains DEHP in
17 concentrations of more than 0.1 percent (1,000 parts per million) by weight when analyzed pursuant
18 to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other
19 methodology authorized by federal or state agencies for the purpose of determining the DEHP
20 content in a solid substance ("Reformulated Covered Products").

21 **4. PAYMENTS**

22 **4.1 Payments Pursuant to Health and Safety Code § 25249.7(b)**

23 Pursuant to Health and Safety Code section 25249.7(b)(2), KKU shall pay \$23,000 in civil
24 penalties. Each Penalty payment shall be allocated according to Health and Safety Code section
25 25249.12(c)(1) and (d), with seventy-five percent of the penalty amount remitted to the California
26 Office of Environmental Health Hazard Assessment ("OEHHHA") and the remaining twenty-five
27 percent remitted to Leeman.

1 **4.1.1 Initial Civil Penalty.** Within 10 days of the Effective Date, KCU shall make
2 an initial civil penalty payment of \$7,000. It shall provide its payment in the form of two checks
3 for the following amounts made payable to: (a) "OEHHA" in the amount of \$5,250; and (b) "Dr.
4 Whitney R. Leeman, Client Trust Account" in the amount of \$1,750.

5 **4.1.2 Final Civil Penalty.** On or before April 15, 2015, KCU shall pay a final
6 civil penalty of \$16,000. The final civil penalty shall be waived in its entirety if, no later than April
7 1, 2015, an officer of KCU provides Leeman's counsel with written certification that, as of the date
8 of its certification, all Covered Products shipped for sale or distributed for sale in California are
9 Reformulated Covered Products, and that it will continue to only offer Reformulated Covered
10 Products in the future. The option to provide a written certification of reformulation in lieu of
11 making the final civil penalty payment otherwise required by this Consent Judgment is a material
12 term, and time is of the essence.

13 **4.2 Reimbursement of Attorneys' Fees and Costs**

14 The Parties acknowledge that Leeman and her counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
16 the issue to be resolved after the material terms of the agreement had been settled. Shortly after all
17 other settlement terms had been finalized, KCU expressed a desire to resolve the fees and costs.
18 The Parties then attempted to (and did) reach an accord on the compensation due to Leeman and her
19 counsel under general contract principles and the private attorney general doctrine codified at Code
20 of Civil Procedure section 1021.5 for all work performed in this matter exclusive of fees and costs
21 incurred on appeal, if any. Under these legal principles, within 10 days of the Effective Date, KCU
22 shall pay \$31,000 for the fees and costs incurred investigating, litigating, and enforcing this matter,
23 including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the
24 Court's approval of this Consent Judgment in the public interest.

1 **4.3 Payment Procedures**

2 **4.3.1 Payments**

3 The payments required by Sections 4.1 and 4.2 shall be delivered within 10 days of the
4 Effective Date according to the following subsections

5 **4.3.2 Payment Addresses**

6 (a) All payments and to Leeman and The Chanler Group shall be
7 delivered to the following address:

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

13 (b) All payments to OEHHA shall be delivered directly to OEHHA
14 (Memo line "Prop 65 Penalties") at the following address:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010
19 Sacramento, CA 95812-4010

20 With a copy of the check(s) payable to OEHHA mailed to The Chanler Group at the address
21 payment address provided in section 4.3.2(a), as proof of payment to OEHHA.

22 **5. CLAIMS COVERED AND RELEASED**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Leeman and
24 KKU and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, and
25 sister companies and their successors and assigns ("Defendant Releasees"), and their downstream
26 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
27 licensees, including, but not limited to, Home Depot, and any other person or entity to whom they
28 directly or indirectly distribute or sell Covered Products, ("Downstream Defendant Releasees"), of
any violation of Proposition 65 that has been asserted by Leeman in the public interest, through a
Proposition 65 60-Day Notice of Violation against KKU, Defendant Releasees, and Downstream

1 Defendant Releasees regarding the failure to warn about exposure to DEHP in Covered Products.
2 Defendant Releasees' compliance with this Consent Judgment shall constitute compliance with
3 Proposition 65 with respect to DEHP in Covered Products after the Effective Date.

4 5.2 Leeman on behalf of herself, her past and current agents, representatives, attorneys,
5 successors, and/or assignees, and in the interest of the general public, hereby waives all rights to
6 institute or participate in, directly or indirectly, any form of legal action and releases all claims,
7 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
8 demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not
9 limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether
10 known or unknown, fixed or contingent (collectively "Claims"), against KCU, Defendant
11 Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65
12 regarding the failure to warn about exposure to DEHP in Covered Products.

13 5.3 Leeman also, in her individual capacity only and *not* in her representative capacity,
14 provides a general release herein which shall be effective as a full and final accord and satisfaction,
15 as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages,
16 losses, claims, liabilities and demands of Leeman of any nature, character or kind, known or
17 unknown, suspected or unsuspected, arising out of the subject matter of the Complaint. Leeman
18 acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides as
19 follows:

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
21 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
22 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.

23 Leeman, in her individual capacity only and *not* in her representative capacity, expressly waives
24 and relinquishes any and all rights and benefits which she may have under, or which may be
25 conferred on her by the provisions of Section 1542 of the California Civil Code as well as under
26 any other state or federal statute or common law principle of similar effect, to the fullest extent that
27 she may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of
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1 such intention, the release hereby given shall be and remain in effect as a full and complete release
2 notwithstanding the discovery or existence of any such additional or different claims or facts arising
3 out of the released matters.

4 This release is expressly limited to those claims that arise under Proposition 65, as such
5 claims relate to Defendant's alleged failure to warn about exposures to or identification of the
6 DEHP contained in the Covered Products, as such claims are identified in the Proposition 65 60-
7 Day Notice to Defendant and to the extent that any alleged violations occur prior to thirty (30) days
8 after the Effective Date. This Release does not release any person, party or entity from any liability
9 for any violation of Proposition 65 regarding the Covered Products that occur more than thirty (30)
10 days after the Effective Date.

11 5.4 KKU waives any and all Claims against Leeman, her attorneys, and other
12 representatives for any and all actions taken or statements made (or those that could have been
13 taken or made) by Leeman and her attorneys and other representatives, whether in the course of
14 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter,
15 and/or with respect to the Covered Products.

16 5.5 KKU also provides a general release herein which shall be effective as a full and
17 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
18 attorneys' fees, damages, losses, claims, liabilities and demands of KKU of any nature, character or
19 kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Action.
20 KKU acknowledges that it is familiar with Section 1542 of the California Civil Code, which
21 provides as follows:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
23 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
24 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
OR HER SETTLEMENT WITH THE DEBTOR.

25 KKU expressly waives and relinquishes any and all rights and benefits which it may have under,
26 or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as
27 well as under any other state or federal statute or common law principle of similar effect, to the
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1 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
2 In furtherance of such intention, the release hereby given shall be and remain in effect as a full and
3 complete release notwithstanding the discovery or existence of any such additional or different
4 claims or facts arising out of the released matters.

5 **6. COURT APPROVAL**

6 6.1 The Parties acknowledge that, pursuant to California Health & Safety Code
7 §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which
8 Leeman shall draft and file with the Court. KKKU shall support the entry of this Consent Judgment,
9 including appearing at the hearing on the motion if requested.

10 6.2 If this Consent Judgment is not approved by the Court in its entirety, (a) this Consent
11 Judgment and any and all prior agreements between the Parties merged herein shall terminate and
12 become null and void, and the action shall revert to the status that existed prior to the execution date
13 of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
14 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have
15 any effect, nor shall any such matter be admissible in evidence for any purpose in this action, or in
16 any other proceeding; and (c) the Parties agree to meet and confer to determine whether to modify
17 the terms of the Consent Judgment and to resubmit it for approval.

18 **7. ATTORNEYS' FEES**

19 7.1 Except as otherwise provided in this Consent Judgment, each Party and their privies,
20 shall bear its own attorneys' fees and costs.

21 **8. ENFORCEMENT; ARBITRATION**

22 8.1 Either Party may, by motion or application for an order to show cause before this
23 Court, or by any other procedure available, enforce the terms and conditions contained in this
24 Consent Judgment. In addition, any dispute, controversy or claim arising out of or relating to this
25 Consent Judgment, including the formation, interpretation, breach or termination thereof, may, at
26 the election of the Party seeking to enforce the terms contained herein, be referred to and finally
27 determined by arbitration in accordance with the JAMS International Arbitration Rules. In such a
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case, the tribunal will consist of a sole arbitrator. The place of arbitration will be in either San Francisco, California, U.S.A. or Japan, Tokyo at the discretion of the Party alleging a breach or otherwise seeking to enforce the agreement. The language to be used in the arbitral proceedings will be English. Judgment upon the award rendered by the arbitrator may be entered by any court having jurisdiction thereof, including those in Tokyo, Japan or the United States. The prevailing party in any action pursuant to this Section 8.1 shall be entitled to reimbursement of its reasonable attorneys' fees and costs.

9. GOVERNING LAW

9.1 The terms of this Consent Judgment shall be governed by the laws of the State of California, and shall apply only to Covered Products offered for sale in the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then KKU may provide written notice to Leeman of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

9.2 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

10. NOTICES

10.1 Unless specified herein, all correspondence and notices required to be provided pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-

1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party by
2 the other Party at the following addresses:

3 To KKU:

4 Hiromi Aoki, Vice President
5 KKU Incorporated
6 Tokuei Building New Annex 5th Floor
7 5-33-7 Shiba, Minato-Ku
8 JP-108-0014 Tokyo
9 Japan

10 With a copy to:

11 Jeffrey B. Margulies, Esq.
12 Fulbright & Jaworski LLP
13 555 South Flower Street, Forty-First Floor
14 Los Angeles, California 90071
15 213-892-9286
16 213-892-9494 fax

17 To Leeman:

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

23 10.2 Any Party, from time to time, may specify in writing to the other Party a change of
24 address to which all notices and other communications shall be sent.

25 11. MODIFICATION

26 11.1 Modification.

27 This Consent Judgment may be modified by written agreement of the Parties and upon entry
28 of a modified Consent Judgment by the court, or by motion of any Party and entry of a modified
Consent Judgment by the court.

11.2 Subsequent Legislation.

If, subsequent to the Effective Date, legislation or regulation is adopted that addresses the
DEHP content of Covered Products sold in California, any Party shall be entitled to request that the
Court modify the reformulation standard of Section 3.1 of this Consent Judgment for good cause
shown.

1 **11.3 Notice; Meet and Confer.**

2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and
3 confer with the other Party prior to filing a motion to modify the Consent Judgment.

4 **12. ENTIRE AGREEMENT**

5 12.1 This Consent Judgment contains the sole and entire agreement and understanding of
6 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and
7 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
8 hereby merged herein and therein. No supplementation, modification, waiver, or termination of this
9 Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No
10 waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a
11 waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute
12 a continuing waiver.

13 **13. RETENTION OF JURISDICTION**

14 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment and shall retain jurisdiction to enforce this Consent Judgment, or any provision
16 thereof, under C.C.P §664.6.

17 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

18 14.1 This Consent Judgment may be executed in counterparts and by facsimile or portable
19 document format (pdf), each of which shall be deemed an original, and all of which, when taken
20 together, shall constitute one and the same document.

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1 15. AUTHORIZATION

2 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

5 AGREED TO:	6 AGREED TO:
7 Date: <u>December 3, 2014</u>	7 Date: <u>December 3, 2014</u>
8	8
9 By: <u>Whitney R. Leeman</u>	9 By: <u>Rhonda Cole</u>
10 Plaintiff DR. WHITNEY R. LEEMAN	10 Defendant KKU INCORPORATED
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