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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN MATEO
10 UNLIMITED CIVIL JURISDICTION
11

12 WHITNEY R. LEEMAN, PH.D.,

13 Plaintiff,

14 v.

15 NAPOLEON PERDIS COSMETICS, INC., *et*
16 *al.*,

17 Defendants.
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Case No. CIV537498

[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 Napoleon Perdis Cosmetics, Inc. (“Napoleon”) and Dillard’s, Inc. (“Dillard’s”), with
5 Leeman and Napoleon and Dillard’s each individually referred to as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 Leeman alleges, that Napoleon and Dillard’s employ ten or more individuals and are each a
13 “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).
15 Napoleon disputes this allegation.

16 **1.4 General Allegations**

17 Leeman alleges that Napoleon and Dillard’s manufacture, import, sell, or distribute for sale in
18 California, vinyl/PVC cosmetic bags that contain di(2-ethylhexyl) phthalate (“DEHP”) without first
19 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
20 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC cosmetic bags allegedly
23 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by
24 Napoleon and Dillard’s. This product includes, but is not limited to the vinyl/PVC bag offered in
25 connection with, the *Napoleon Limited-Edition Love Birds Collection White Swan, UPC #9 322111*
26 *175547* and the *Napoleon Limited-Edition Love Birds Collection Flamingo, UPC #9 322111 175530*,
27 hereinafter the “Products.”
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2 **1.6 Notice of Violation**

3 On September 15, 2015, Leeman served Napoleon and Dillard’s and the requisite public
4 enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Napoleon and
5 Dillard’s violated Proposition 65 by failing to warn its customers and consumers in California of the
6 health hazards associated with exposures to DEHP from the Products. To the best of the Parties’
7 knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the
8 violations alleged in the Notice.

9 **1.7 Complaint**

10 On February 23, 2016, Leeman filed the instant action (“Complaint”), naming Napoleon and
11 Dillard’s as defendants for the alleged violations of Health and Safety Code section 25249.6 that are
12 the subject of the Notice.

13 **1.8 No Admission**

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

22 **1.9 Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Napoleon and Dillard’s as to the allegations contained in the Complaint, that venue
25 is proper in the County of San Mateo, and that the Court has jurisdiction to enter and enforce the
26 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section
27 664.6.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
3 the Motion for Approval of the Consent Judgment is granted by the Court.

4 **2. INJUNCTIVE RELIEF: REFORMULATION**

5 **2.2 Reformulated Products**

6 Commencing on the Effective Date and continuing thereafter, Napoleon and Dillard’s shall
7 only purchase for sale, or manufacture for sale in California, “Reformulated Products.”

8 Reformulated Products are Products that contain DEHP in concentrations less than 0.1 percent (1,000
9 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing
10 methodologies 3580A and 8270C or other methodology utilized by federal or state government
11 agencies for the purpose of determining DEHP content in a solid substance.

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Payment into California Safe Drinking Water and Toxic Enforcement Fund**
14 **Pursuant to Health & Safety Code §25249.7 (b) (1).**

15 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
16 this Consent Judgment, Defendants shall pay \$ 2,900 in civil penalties. The civil penalty payment
17 will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d),
18 with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard
19 Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Plaintiff. Leeman’s
20 counsel shall be responsible for delivering any penalty payment under this Consent Judgment to
21 OEHHA.

22 Defendants will provide payment in two checks for the following amounts made payable to: (a)
23 “OEHHA” in the amount of \$2,175; and (b) “Whitney R. Leeman, Client Trust Account” in the
24 amount of \$725.

25 **3.2 Reimbursement of Attorney’s Fees and Costs**

26 The parties acknowledge that Leeman and her counsel offered to resolve this dispute without
27 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
28 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the

1 other settlement terms had been finalized, the Parties then negotiated the compensation due to
2 Leeman and her counsel under general contract principles and the private attorney general doctrine
3 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
4 mutual execution of this Consent Judgment. Defendants shall issue a check to “The Chanler Group”
5 in the amount of \$30,000,, pursuant to the payment procedures in Section 3.3 below, and to the
6 address found in Section 3.4 below.

7 **3.3 Payments Held in Trust**

8 All payments due under this agreement shall be delivered within ten (10) days of the date
9 that this Consent Judgment is fully executed by the Parties, and held in trust by Defendants’ counsel
10 until the Court grants the motion for approval of this Consent Judgment. Within two business days
11 of the Court’s approval of this Consent Judgment, Defendants’ counsel shall tender the civil penalty
12 payments and attorneys’ fee and costs reimbursements required by Sections 3.1.1 and 3.2.

13 **3.4 Payment Address**

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

15 The Chanler Group
16 Attn: Proposition 65 Controller
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Leeman’s Public Release of Proposition 65 Claims**

22 Leeman, acting on her own behalf and in the public interest, releases Napoleon and Dillard’s
23 and their parents, subsidiaries, affiliated entities under common ownership, directors, officers,
24 employees, and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes
25 or sells the Products including, but not limited to, its downstream distributors, wholesalers,
26 customers, retailers, franchisers, resellers, cooperative members, licensors and licensees, including,
27 but not limited to, Dillard’s (“Downstream Releasees”) for any violations arising under Proposition
28 65 for unwarned exposures to DEHP from Products sold by Defendants prior to the Effective Date,
as set forth in the Notice. Products at issue in this consent judgment that have been manufactured

1 and distributed for retail sale prior to the Effective Date shall be subject to the release of liability
2 pursuant to Section 4 of this Consent Judgment, without regard to when such Products were, or are
3 in the future, sold to consumers, whether by internet sales or any other means.

4 **4.2 Leeman's Individual Release of Claims**

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

12 **4.3 Defendants' Release of Leeman**

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

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

23 **4.4 Representations**

24 Defendants represent that the sales data they provided to Leeman was truthful to its
25 knowledge and a material factor upon which Leeman has relied to determine the amount of civil
26 penalties assessed pursuant to Health & Safety Code § 25249.7 in this Consent Judgment. If, within
27 twelve months of the Effective Date, Leeman discovers and presents to Defendants, evidence
28 demonstrating that the preceding representation and warranty was materially inaccurate, then

1 Defendants, and each of them, shall have 30 days to meet and confer regarding Leeman's contention.
2 Should this 30-day period pass without any such resolution between Leeman and Defendants,
3 Leeman shall be entitled to file a formal legal claim including, but not limited to, a claim for damages
4 for breach of contract.

5 **5. COURT APPROVAL**

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

9 **6. SEVERABILITY**

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

13 **7. GOVERNING LAW**

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

20 **8. NOTICE**

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

24
25 **For Napoleon:**

26 Napoleon Perdis, President
27 Napoleon Perdis Cosmetics, Inc.
28 6621 Hollywood Boulevard
Los Angeles, CA 90028

For Leeman:

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

1 **For Dillard's:**
2 Steven Duke
3 Assistant General Counsel
4 Dillard's, Inc.
5 1600 Cantrell Rd.
6 Little Rock, AR 72201

7 with a copy to:

8 Debra J. Albin-Riley, Esq.
9 Lynn Rene Fiorentino, Esq.
10 Arent Fox LLP
11 555 W 5th St, Ventura Blvd. 48th Floor
12 Los Angeles, CA 90013-1065

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

19 **10. POST-EXECUTION ACTIVITIES**

20 Leeman agrees to comply with the reporting form requirements referenced in Health and
21 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
22 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
23 furtherance of obtaining such approval, Leeman and Napoleon and Dillard's agree to mutually
24 employ their best efforts, and those of their counsel, to support the entry of this agreement as
25 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this
26 Section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the
27 necessary moving papers, supporting the motion, and appearing at the hearing before the Court.

28 **11. MODIFICATION**

This Consent Judgment 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.

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12. AUTHORIZATION

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

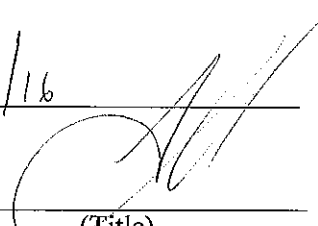
AGREED TO:

Date: 7/29/16

By: Whitney Leeman
WHITNEY R. LEEMAN, PH.D.

AGREED TO:

Date: 8/23/16

By: 
(Title)
NAPOLEON PERDIS COSMETICS, INC.

JOHN ROSIELLO
GENERAL MANAGER

AGREED TO:

Date: _____

By: _____
, (Title)
DILLARD'S, INC.

1 **12. AUTHORIZATION**

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

5 **AGREED TO:**

AGREED TO:

6 Date: 7/29/16

Date: _____

7 By: Whitney Leeman
8 WHITNEY R. LEEMAN, PH.D.

9 By: _____, (Title)
10 NAPOLEON PERDIS COSMETICS, INC.

11 **AGREED TO:**

12 Date: 8/4/16

13 By: [Signature]
14 VP, General Counsel and Secretary, (Title)
15 DILLARD'S, INC.