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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SANTA CLARA
14 UNLIMITED CIVIL JURISDICTION
15

16 ANTHONY E. HELD, PH.D., P.E.,

17 Plaintiff,

18 v.

19 JIMCO LAMP & MANUFACTURING
20 COMPANY; *et al.*,

21 Defendants.
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Case No. 114CV268685

[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 Anthony E. Held, Ph.D., P.E.
4 (“Held”) and Jimco Lamp & Manufacturing Company (“Jimco”), with Held and Jimco each
5 individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Jimco 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, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Held alleges that Jimco manufactures, sells, and/or distributes for sale in California, lamps
16 with vinyl/PVC components (cords and decorations) that contain the chemical di(2-
17 ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to
18 cause birth defects or other reproductive harm. Held alleges that Jimco failed to provide the health
19 hazard warning required by Proposition 65 for exposures to DEHP from the lamps.

20 **1.5 Product Description**

21 The term “Products,” as used herein, shall refer to any lamps with vinyl/PVC components
22 containing DEHP that are distributed for sale in California by Jimco, or an Authorized Retailer of
23 Jimco, including the lamp designated *Lamp, T-17007, #3546132-2, #19 17007 (UPC #0 82803*
24 *10475 8)*. For purposes of this Consent Judgment, “Authorized Retailer” is any customer of Jimco’s
25 with retail stores, warehouses, or distribution centers in California, or who Jimco reasonably believes
26 to conduct online sales via the internet in or into California, and to whom Jimco either (a) directly
27 sells the Products, or (b) has authorized as a reseller of the Products.

1 **1.6 Notice of Violation**

2 On or about September 26, 2013, Held served Jimco and various public enforcement agencies
3 with a 60-Day Notice of Violation (“Notice”), alleging that Jimco violated Proposition 65 when it
4 failed to warn its customers and consumers in California that the Products expose users to DEHP in
5 levels that Held believes require labeling under the relevant law. To the best of the Parties’
6 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth
7 in the Notice.

8 **1.7 Complaint**

9 On July 31, 2014, Held filed the instant action (“Complaint”), naming Jimco as a defendant
10 for the violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

11 **1.8 No Admission**

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

20 **1.9 Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Jimco as to the allegations in the Complaint, that venue is proper in the County of
23 Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
24 Judgment pursuant to Proposition 65 and California Code of Civil Procedure section 664.6.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term “Effective Date” means October 31, 2014.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Reformulation Standard**

3 Subject to Section 2.3 of this Agreement, Jimco agrees, commencing on or before the date
4 that is thirty days after the Effective Date, that it will only purchase for sale, or manufacture for sale
5 in California, (1) "Reformulated Products"; or (2) Products to be purchased for sale with a clear and
6 reasonable warning pursuant to Section 2.2. For purposes of this Consent Judgment, the term
7 "Reformulated Products" shall refer to Products (as that term is defined in Section 1.5) that contain
8 no more than 1,000 ppm (0.1%) DEHP content in any component analyzed pursuant to EPA testing
9 methodologies 3580A and 8270C, or equivalent methodologies used by state or federal agencies for
10 purposes of determining DEHP content in a solid substance.

11 **2.2 Clear and Reasonable Warnings**

12 Commencing on or before the date that is thirty days after the Effective Date, for all Products
13 that are not Reformulated Products (i.e. contain more than 1,000 parts per million ("ppm") DEHP
14 content), Jimco agrees that it will only purchase such Products for sale or shipment in California with
15 a clear and reasonable warning utilized pursuant to this Section. Jimco further agrees that the
16 warning will be prominently placed with such conspicuousness as compared with other words,
17 statements, designs, or devices as to render it likely to be read and understood by an ordinary
18 individual under customary conditions before purchase or use. For purposes of this Consent
19 Judgment, a clear and reasonable warning shall consist of a warning affixed to the packaging, label,
20 tag or directly to a Product sold in California containing language similar to the following examples:

21 **WARNING:** This product contains DEHP, a chemical known
22 to the State of California to cause birth defects or
23 other reproductive harm.

24 For Products that Jimco knows to contain both a Proposition 65-listed carcinogen and a chemical
25 known to cause reproductive harm or birth defects, Jimco may use the following warning statement:

26 **WARNING:** This product contains chemicals known to the
27 State of California to cause cancer and birth
28 defects or other reproductive harm.

1 **2.3 Actions in Event of Alleged Breach**

2 In the event Held believes Jimco has breached Section 2 of this Consent Judgment, Held shall
3 provide written notice to Jimco setting forth the details of the alleged breach, including the name and
4 model number of the Product involved, the date of its purchase, the specific location of its purchase,
5 and the ppm DEHP content Held alleges to exist within the Product. Jimco shall have the
6 opportunity to respond to Held's notice within 30 days after receipt of such written notice.
7 Thereafter, the Parties agree to reasonably cooperate, to meet and confer for a period of not less than
8 30 days, and to use their best efforts, and that of their counsel, to resolve any dispute, prior to any
9 Party filing a civil complaint, a motion to enforce this Agreement, or any other court or
10 administrative filing related to the dispute.

11 **3. MONETARY SETTLEMENT TERMS**

12 **3.1 Civil Penalty Payments**

13 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
14 this Consent Judgment, Jimco shall pay \$12,000 in civil penalties pursuant to this Section 3.1. Each
15 civil penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1)
16 and (d) with seventy-five percent (75%) of the funds paid to the California Office of Environmental
17 Health Hazard Assessment ("OEHHA") and twenty-five percent (25%) of the funds remitted to Held.

18 **3.1.1 Initial Civil Penalty**

19 Within thirty days of the Effective Date, Jimco shall make an initial civil penalty
20 payment of \$4,000. Jimco shall provide its payment in two checks for the following amounts made
21 payable to: (a) "OEHHA" in the amount of \$3,000; and (b) "Anthony E. Held, Ph.D., P.E., Client
22 Trust Account" in the amount of \$1,000.

23 **3.1.2 Final Civil Penalty**

24 On or before December 31, 2014, Jimco shall make a final civil penalty payment of
25 \$8,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Held agrees that the
26 final civil penalty payment shall be waived in its entirety if, no later than December 15, 2014, an
27 officer of Jimco provides Held with written certification that all of the Products sold or purchased for
28 sale in California as of the date if its certification are being sold in Compliance with the reformulation

1 and warning requirements of Sections 2.1 and 2.2., and that Jimco will continue to offer only
2 Reformulated Products in California in the future. The option to certify reformulation in lieu of
3 making the final civil penalty payment required by this Section is a material term, and with regard to
4 such term, time is of the essence.

5 **3.2 Reimbursement of Fees and Costs**

6 The parties acknowledge that Held and his counsel offered to resolve this dispute without
7 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
8 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
9 other settlement terms had been finalized, Jimco expressed a desire to resolve Held's fees and costs.
10 The Parties then attempted to (and did) reach an accord on the compensation due to Held and his
11 counsel under general contract principles and the private attorney general doctrine codified at
12 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
13 execution of this Consent Judgment. On or before the Effective Date, Jimco shall pay \$33,500 for
14 the fees and costs incurred by Held investigating, bringing this matter to Jimco's attention, and
15 negotiating a settlement in the public interest.

16 **3.3 Payment Procedures**

17 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
18 this Consent Judgment are to be held in trust by Jimco's counsel until such time as the Court
19 approves the Consent Judgment. Within five days of an order from the Court approving the Consent
20 Judgment, all payments shall be delivered OEHHA, Held, and Held's counsel at the addresses
21 provided below.

22 **3.3.1 Payment Addresses**

23 (a) All payments for Held and his counsel shall be delivered to:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710

(b) All payments for OEHHA shall be delivered directly to OEHHA (Checks

1 with memo line "Prop 65 Penalties") at one of the following addresses, as appropriate:

2 For United States Postal Service Delivery:

3 Mike Gyurics
4 Fiscal Operations Branch Chief
5 Office of Environmental Health Hazard Assessment
6 P.O. Box 4010
7 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery or Courier:

9 Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 1001 I Street
13 Sacramento, CA 95812-4010

14 **3.3.2 Proof of Payment to OEHHA**

15 Jimco shall provide Held's counsel with a copy of the checks sent to OEHHA
16 enclosed with the payments to Held and his counsel sent to the address in Section 3.3.1(a).

17 **4. CLAIMS COVERED AND RELEASED**

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

19 Held, acting on his own behalf and in the public interest, releases Jimco and its parents,
20 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
21 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the
22 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,
23 franchisers, cooperative members, licensors and licensees ("Downstream Releasees") for any
24 violations arising under Proposition 65 for unwarned exposures to DEHP from the Products
25 purchased for sale by Jimco prior to the date that is thirty days after 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 DEHP from the Products sold by Jimco before the
28 Effective Date, as set forth in the Notice.

4.2 Held's Individual Release of Claims

Held, in his individual capacity only and *not* in his representative capacity, also provides a
release to Jimco, Releasees, and Downstream Releasees which shall be effective as a full and final
accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,

1 attorneys' fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
2 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
3 exposures to DEHP in the Products purchased for sale by Jimco prior to the date that is thirty days
4 after the Effective Date.

5 **4.3 Jimco's Release of Held**

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

11 **5. COURT APPROVAL**

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

15 **6. SEVERABILITY**

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

19 **7. GOVERNING LAW**

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

1 **8. NOTICE**

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

5 For Jimco:

6 Mark Biggers, President
7 Jimco Lamp & Manufacturing Company
8 11759 Hwy 63B
9 Bono, AR 72416

10 with a copy to:

11 Jeffrey J. Lauderdale, Esq.
12 Calfee, Halter & Griswold LLP
13 1405 East Sixth Street
14 Cleveland, Ohio 44114

15 For Held:

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

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.

27 **10. POST EXECUTION ACTIVITIES**

28 Held agrees to comply with the reporting form requirements referenced in Health and Safety
Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
furtherance of obtaining such approval, Held and Jimco agree to mutually employ their best efforts,
and that of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall

1 include, at a minimum, cooperating with the drafting and filing of the necessary moving papers, and
2 supporting the motion for judicial approval.

3 **11. MODIFICATION**

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

7 **12. AUTHORIZATION**

8 The undersigned are authorized to execute this Consent Judgment and have read, understood,
9 and agree to all of the terms and conditions contained herein.

10 **AGREED TO:**

AGREED TO:

11 **APPROVED**
12 *By Tony Held at 2:01 pm, Sep 29, 2014*

12 Date: _____

Date: 9/22/14

13 By: *Anthony E Held*
14 ANTHONY E. HELD, PH.D., P.E.

By: *Mark Biggers*
Mark Biggers, President
JIMCO LAMP & MANUFACTURING
COMPANY

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