

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”) and The Burmax Company, Inc. (“Burmax”), with Held and Burmax each individually referred to as a “Party” and collectively as the “Parties.” Held is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals, and to improve human health by reducing or eliminating hazardous substances used in consumer products. Held alleges that Burmax employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Held alleges that Burmax manufactures, sells, and/or distributes for sale in California, vinyl/PVC gloves containing diisononyl phthalate (“DINP”). DINP is listed pursuant to Proposition 65 as a chemical known to cause cancer. Held alleges that Burmax failed to provide the health hazard warning allegedly required by Proposition 65 for exposures to DINP from its vinyl/PVC gloves.

1.3 Product Description

The products that are covered by this Settlement Agreement are vinyl/PVC gloves containing DINP including, but not limited to, the *Soft ‘n Style Black Disposable Vinyl Gloves, GLVB-100, UPC #0 87768 00561 4*, manufactured, sold or distributed for sale in California by Burmax (“Products”), as well as *Soft ‘n Style 2 oz. Clear Bottle Travel Set, UPC# 0 87768 80600 6* containing di(2-ethylhexyl)phthalate (“DEHP”), and the *City Lights Clear Tote Train Case, Item #, TOTE-403*, (“Additional Products”) manufactured, sold or distributed for sale in California by Burmax.¹

¹ Based on Plaintiff’s continued investigation, Held asserts that certain Additional Products contain DEHP, and the Parties agreed to include these Additional Products in this Settlement, and Burmax

1.4 Notice of Violation

On or about December 1, 2015, Held served Burmax, and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Burmax violated Proposition 65 when it failed to warn its customers and consumers in California that its Products expose users to DINP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Burmax denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, and Additional Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Burmax of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Burmax of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Burmax. However, this Section shall not diminish or otherwise affect Burmax’s obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Settlement Agreement is fully signed by the Parties.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

2.1 Reformulation Commitment

On or before December 1, 2016 and continuing thereafter, Burmax agrees to only manufacture for sale or purchase for sale in or into California, “Reformulated Products”, or Products containing appropriate health hazard warnings as described in Section 2.2.

For purposes of this Settlement Agreement, “Reformulated Products” are Products containing DINP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DINP content in a solid substance.²

2.2 Product Warnings

As of December 1, 2016, Burmax shall, for all Products and Additional Products other than Reformulated Products, provide clear and reasonable warnings as set forth in subsection 2.2(a) and (b). Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product or Additional Product the warning applies, so as to minimize the risk of consumer confusion.

(a) Retail Store Sales.

(i) Product Labeling. Burmax shall affix a warning to the packaging, labeling, or directly on each Product and Additional Product sold in retail outlets in California by Burmax or any person selling the Products or Additional Products, that states:³

WARNING: This product contains [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harm].

Or,

² “Reformulated Products” are also Additional Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DEHP content in a solid substance.

³ During the course of Held’s investigation, the Parties became aware that Additional Products may containing DEHP. Therefore, Held agrees that Burmax may tailor its warning language as provided by the bracketed terminology in Sections 2.2(a) and (b), provided Burmax has a basis for its belief.

WARNING: This product contains [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harm].

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

WARNING: This product contains [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harm].

Or,

WARNING: This product contains [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harm].

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

WARNING: The following products contain [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms]:

[list products for which warning is required]

Or,

¹For purposes of the Consent Judgment, “sold in proximity” shall mean that the Product or Additional Product and another product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

WARNING: The following products contain [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms]:

[list products for which warning is required]

(b) Mail Order Catalog and Internet Sales. In the event that Burmax sells Products and Additional Products via mail order catalog and/or the internet, to customers located in California that are not Reformulated Products, Burmax shall provide warnings for such Products or Additional Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product or Additional Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail order catalog shall be in the same type size or larger than the Product or Additional Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product or Additional Product:

WARNING: This product contains [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

Or,

WARNING: This product contains [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product or Additional Product, Burmax may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of

the front cover of the catalog or on the same page as any order form for the Product(s) or Additional Product(s):

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

Or,

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

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

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

WARNING: This product contains [a] phthalate chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

Or,

WARNING: This product contains [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

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

WARNING: Products identified on this page with the following symbol ▼ contain a phthalate chemical known to the State of California to cause cancer, birth defects, or other reproductive harms.

Or,

WARNING: Products identified on this page with the following symbol ▼ contain [a] chemical[s] known to the State of California to cause cancer [and birth defects or other reproductive harms].

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this settlement Agreement, Burmax agrees to pay \$15,000 in civil penalties. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard

Assessment (“OEHHA”) by Held. Held and his counsel will deliver the appropriate 75% portion of all civil penalties paid to OEHHA.

3.1.1 Initial Civil Penalty. Within ten (10) business days of the Effective Date, Burmax shall pay an initial civil penalty in the amount of \$5,000. Burmax will provide its payment in a check for the following amount made payable to “Anthony E. Held, Ph.D., P.E., Client Trust Account” in the amount of \$5,000.

3.1.2 Final Civil Penalty. On or before December 15, 2016, Burmax shall pay a final civil penalty of \$10,000. The final civil penalty shall be waived in its entirety, however, if, no later than December 1, 2016, an officer of Burmax provides Held’s counsel with written certification that, as of the date of the certification, all Products and Additional Products shipped, sold or distributed for sale in California are Reformulated Products, and that they will continue to provide only Reformulated Products in the future. Alternatively, Burmax may provide a declaration certifying that it no longer sells or distributes the Products and Additional Products for sale in California, and if it recommences sales of the Products or Additional Products in California in the future, it will only offer Reformulated Products. The option to provide a written certification of reformulation in lieu of warning and making the final civil penalty payment required by this Section is a material term, and time is of the essence. Burmax shall deliver its certificate, if any, to Held’s counsel at the address provided in Section 3.3, below. In the event that Burmax does not timely certify its compliance or make the final civil penalty payment required by this Section, Held may seek relief under any available legal remedy. If successful, the Parties further agree that Held shall be entitled to his reasonable attorneys’ fees and costs pursuant to general contract principles and Code of Civil Procedure section 1021.5.

3.2 Attorneys’ Fees and Costs

The Parties reached an accord on the compensation due to Held and his counsel under general contract principles and the private attorney general doctrine codified at

Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, Burmax agrees to pay \$ 18,250 to Held and his counsel in full satisfaction for all fees and costs incurred investigating, bringing this matter to the attention of Burmax’s management, and negotiating a settlement in the public interest. Burmax’s payment shall be due within 10 business days after the Effective Date, and delivered to the address in Section 3.3 in the form of a check payable to “The Chanler Group.”

3.3 Payment Address

All payments required by this Settlement Agreement shall be delivered to the following address:

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

4. CLAIMS COVERED AND RELEASED

4.1 Held’s Release of Burmax

This Settlement Agreement is a full, final and binding resolution between Held, as an individual and *not* on behalf of the public, and Burmax, of any violation of Proposition 65 that was or could have been asserted by Held, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees (“Releasers”), and Releasers hereby release any such claims, against Burmax, its parents, subsidiaries, affiliated entities under common (full or partial) ownership, directors, officers, shareholders, employees, agents, and attorneys and the predecessors, successors and assigns of each, and each entity to whom Burmax directly or indirectly distributes or sells Products and the Additional Products, including but not limited to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (“Releasees”), based on the failure to warn about alleged exposures to DINP contained in Products, and DEHP in the Additional Products,

manufactured, distributed, sold or offered for sale by Burmax in California before the date that this Settlement Agreement is fully executed by the Parties. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 by Burmax and Releasees with regard to the alleged or actual failure to warn about exposures to DINP from Products and DEHP from the Additional Products manufactured, sold or distributed for sale after the Effective Date. Releasors hereby releases any such claims to the contrary against Burmax and Releasees.

In further consideration of the promises and agreements herein contained, Held, on his own behalf and *not* on behalf of the public, and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, hereby covenants not to sue and waives any right to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect Products and Additional Products manufactured, distributed, sold and/or offered for sale by Burmax before the date that this Settlement Agreement is fully executed by the Parties.

4.2 Burmax's Release of Held

Burmax, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Held and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Held and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products and the Additional Products.

5. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

6. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or otherwise rendered inapplicable by reason of law generally, as to Burmax specifically as a result of a statutory exemption, or as to the Products, then Burmax may provide written notice to Held of any asserted change in the law, or its applicability to Burmax or the Products, or Additional Products, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, Burmax or the Products or Additional Products are so affected. To the extent that California enacts revised regulations regarding Proposition 65 safe harbor warning language for exposure to DINP or DEHP in consumer products, the Parties agree to meet and confer on appropriate revisions, if any, to the wording or means of conveying any warning provided pursuant to this Settlement Agreement,

7. NOTICE

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Burmax:

Steven Scheff, President
The Burmax Company, Inc.
28 Barrets Avenue
Holtsville, NY 11742

For Held:

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

with a copy to:
Lauren M. Michals, Esq.
Nixon Peabody, LLP
1 Embarcadero Center
San Francisco, CA 94111

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

8. COUNTERPARTS; FACSIMILE SIGNATURES

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

9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Held and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

10. MODIFICATION

This Settlement Agreement may be modified only by written agreement of the Parties.

11. AUTHORIZATION

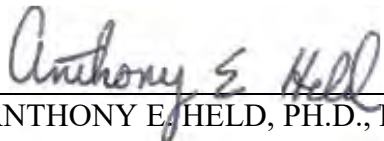
The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 7/6/2016

Date: _____

By: 
ANTHONY E. HELD, PH.D., P.E.

By: _____
Steven Scheff, President
THE BURMAX COMPANY, INC.

with a copy to:
Lauren M. Michals, Esq.
Nixon Peabody, LLP
1 Embarcadero Center
San Francisco, CA 94111

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

8. COUNTERPARTS; FACSIMILE SIGNATURES

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

9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Held and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

10. MODIFICATION

This Settlement Agreement may be modified only by written agreement of the Parties.

11. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

Date: _____

By: _____

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

AGREED TO:

Date: 7/8/16

By: J Scheff

Steven Scheff, President
THE BURMAX COMPANY, INC.