

1 Laralei Paras, State Bar No. 203319
2 Kimberly Gates, State Bar No. 282369
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 Email: laralei@chanler.com
10 Email: kimberly@chanler.com

11 Attorneys for Plaintiff
12 ANTHONY E. HELD, PH.D., P.E.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

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

17 Plaintiff,

18 v.

19 FIMCO, INC.; *et al.*,

20 Defendants.

Case No. CGC-18-566165

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.
4 (“Held”) and FIMCO, Inc. (“FIMCO”), with Held and FIMCO each individually referred to as a
5 “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 to improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 FIMCO 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 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Held alleges that FIMCO manufactures, imports, sells, or distributes for sale, in California,
16 vinyl/PVC sprayer hoses containing di(2-ethylhexyl)phthalate (“DEHP”) without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as vinyl/PVC sprayer hoses
21 containing DEHP that are manufactured, imported, sold or distributed for sale, in California, by
22 FIMCO, including, but not limited to, the *Fimco Industries 15 Gallon Spot Sprayer, TS-15-EC-SPPP,*
23 *Model #2138134, UPC #7 33029 11622 2* (the “Products”).

24 **1.6 Notice of Violation**

25 On December 13, 2017, Held served FIMCO, the California Attorney General, and the
26 requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that
27 FIMCO violated Proposition 65 when it failed to warn its customers and consumers in California of
28 the health hazards associated with exposures to DEHP from the Products. At the time this proposed

1 Consent Judgment is executed by the Parties, no public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On April 30, 2018, Held filed the instant action (“Complaint”), naming FIMCO as a
5 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
6 Notice.

7 **1.8 No Admission**

8 FIMCO denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission by FIMCO of any fact, finding, conclusion of law, issue
12 of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
13 construed as an admission by FIMCO of any fact, finding, conclusion of law, issue of law, or
14 violation of law. This Section shall not, however, diminish or otherwise affect FIMCO’s obligations,
15 responsibilities, and 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 FIMCO as to the allegations in the Complaint, that venue is proper in the County of
19 San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court grants the motion for approval of the Consent Judgment as contemplated by Section 5.

24 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

25 **2.1 Commitment to Reformulate or Provide Warnings**

26 Commencing on the Effective Date and continuing thereafter, FIMCO shall only manufacture
27 for sale, import for sale, sell or distribute for sale, in California, Products that are either: (a)
28

1 Reformulated Products, as defined in Section 2.2; or (b) Products bearing a clear and reasonable
2 health hazard warning, as detailed in Sections 2.3 and 2.4, below.


3 **2.2 Reformulated Products Defined**

4 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products
5 containing DEHP in a maximum concentration of 1,000 parts per million in any accessible
6 component (i.e., any component that may be touched during a reasonably foreseeable use) when
7 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
8 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of
9 determining DEHP content in a solid substance.

10 **2.3 Clear and Reasonable Warnings**

11 Commencing on the Effective Date and continuing thereafter, FIMCO shall provide clear and
12 reasonable warnings as set forth in this section for all Products manufactured, imported, sold or
13 distributed for sale in California that do not qualify as Reformulated Products. Each warning shall be
14 prominently placed with such conspicuousness as compared with other words, statements, designs, or
15 devices as to render it likely to be read and understood by an ordinary individual under customary
16 conditions *before* purchase or use. Each warning shall be provided in a manner such that the
17 consumer or user understands to which *specific* Product the warning applies, so as to minimize the
18 risk of consumer confusion. For purposes of this Consent Judgment, a clear and reasonable warning
19 displayed or transmitted according the above criteria, and containing the following statement, shall
20 satisfy these requirements:


21 For Products:

22  **WARNING:** This product can expose you to chemicals, including
23 DEHP, which is known to the State of California to cause
24 cancer and birth defects or other reproductive harm. For more
information go to www.P65Warnings.ca.gov

25 Or, if placed directly on a Product or the Product's packaging and/or labeling, FIMCO
26 may use the following short-form warning statement, provided it appears in a type size no smaller
27

28

1 than the largest type size used for other consumer information on the Product's label and in no case
2 smaller than 6-point type:

3
4  **WARNING:** Cancer and Reproductive Harm -
5 www.P65Warnings.ca.gov/product

6 **2.4 Internet Product Warnings**

7 In the event FIMCO sells Products that do not qualify as Reformulated Products via the
8 internet to customers located in California, the warning requirements of this Section shall be satisfied
9 if, prior to purchase: (a) one of the foregoing warnings, described in Section 2.3, appears on the same
10 page, in the same type size or larger than the Product description text, as the Product; (b) a warning
11 appears on the same web page as the price for the Product, in the same type size or larger than the
12 Product description text; (c) a warning appears on one or more web pages displayed to the consumer
13 prior to purchase, in the same type size or larger than the Product description text; or (d) a hyperlink,
14 clearly marked "WARNING," appears on the Product display page, in type large enough so that the
15 consumer does not have to search for it, and a prominently placed warning appears elsewhere, such
16 as on the Product description page, in a manner that clearly associates it with the Product to which the
17 warning applies, prior to checkout or purchase.

18 **3. MONETARY SETTLEMENT TERMS**

19 **3.1 Civil Penalty Payments**

20 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims referred to in
21 the Notice, Complaint, and this Consent Judgment, FIMCO shall pay \$3,500 in civil penalties. The
22 civil penalty payment shall be allocated according to Health and Safety Code §§ 25249.12(c)(1) and
23 (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental
24 Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty
25 retained by Held. FIMCO shall provide its payment in two checks for the following amounts: (a)
26 "OEHHA" in the amount of \$2,625; and (b) "Anthony E. Held, Client Trust Account" in the amount
27 of \$875. Held's counsel shall be responsible for delivering OEHHA's portion of any penalty
28 payment made under this Consent Judgment.

1 **3.2 Reimbursement of Attorney’s Fees and Costs**

2 The parties acknowledge that Held and his counsel offered to resolve this dispute without
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
4 be resolved after the parties settled the material terms of this Consent Judgment. After the Parties
5 reached an agreement as to all other terms, the Parties then reached an accord on the compensation
6 due to Held and his counsel, under general contract principles and the private attorney general
7 doctrine, codified at California Code of Civil Procedure § 1021.5, for all work performed through the
8 mutual execution of this Consent Judgment, and court approval of the same, but exclusive of fees and
9 costs on appeal, if any. Under these legal principles, FIMCO shall pay \$26,000 to Held and his
10 counsel for all fees and costs incurred in investigating, bringing this matter to FIMCO’s attention, and
11 litigating and negotiating a settlement in the public interest. FIMCO’s payment shall be delivered in
12 the form of a check payable to “The Chanler Group.”

13 **3.3 Payment Timing; Payments Held in Trust**

14 All payments due under this Consent Judgment shall be held in trust until such time as the
15 Court approves the Parties’ settlement. Within five (5) days of the date that this Consent Judgment is
16 fully executed by the Parties, FIMCO shall arrange for remittance of the amounts to be paid, as set
17 forth in Sections 3.1 and 3.2, above, and deliver same to its counsel’s client trust account, with
18 instructions to remit payment to Held’s counsel within five days after the Court grants the motion for
19 approval of this Consent Judgment, as contemplated by Section 5. FIMCO’s counsel shall provide
20 Held’s counsel with written confirmation upon its receipt of the settlement payments. If the Court
21 does not grant the motion to approve this Consent Judgment, as contemplated by Section 5, below,
22 the Parties agree to meet and confer, within thirty (30) days of the Court’s ruling, to address the
23 reasons given by the Court for its ruling, in an effort to revise the Consent Judgment as necessary to
24 attain approval. If the Court does not grant approval of the Consent Judgment after the Parties meet
25 and confer as described, then the money shall be returned to FIMCO.

26 **3.4 Payment Address**

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

28 The Chanler Group
 Attn: Proposition 65 Controller

2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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3 **4. CLAIMS COVERED AND RELEASED**

4 **4.1 Held's Public Release of Proposition 65 Claims**

5 Held, acting on his own behalf and in the public interest, releases FIMCO and its parents,
6 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
7 attorneys ("Releasees"), and each entity to whom FIMCO directly or indirectly distributes or sells
8 the Products including, without limitation, its downstream customers, distributors, wholesalers, and
9 retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to the
10 failure to warn about exposures to DEHP from Products sold or distributed for sale by FIMCO prior
11 to the Effective Date, as set forth in the Notice.

12 **4.2 Held's Individual Release of Claims**

13 Held, in his individual capacity only and *not* in any representative capacity, also provides a
14 release to FIMCO, Releasees, and Downstream Releasees, which shall be effective as a full and final
15 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
16 attorneys' fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
17 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
18 exposures to DEHP in Products sold or distributed for sale by FIMCO before the Effective Date.
19 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
20 with respect to exposures to DEHP from Products sold or distributed for sale by FIMCO after the
21 Effective Date.

22 **4.3 FIMCO's Release of Held**

23 FIMCO, on its own behalf, and on behalf of its past and current agents, representatives,
24 attorneys, successors, and assignees, hereby waives any and all claims against Held, and his
25 attorneys and other representatives, for any and all actions taken or statements made by Held, and
26 his attorneys and other representatives, whether in the course of investigating claims, otherwise
27 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.
28

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if it is not approved and entered by the Court within one year after it has been fully
4 executed by the Parties, or by such additional time as the Parties may agree to in writing.

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the state of California
11 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
12 rendered inapplicable by reason of law generally or as to the Products, then FIMCO may provide
13 written notice to Held of any asserted change in the law, and shall have no further injunctive
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected.

16 **8. NOTICE**

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

20 For FIMCO:

21 Kevin Vaughan, President
22 FIMCO, Inc.
23 800 Stevens Port Drive, SuiteDD836
24 Dakota Dunes, SD 57049

24 with copies to:

25 Mark Kaster, Esq.
26 Dorsey & Whitney LLP
27 50 South Sixth Street, Suite 1500
28 Minneapolis, MN 55402-1498

 Kirk W. Schuler
 Dorsey & Whitney LLP
 801 Grand Ave., Suite 1400
 Des Moines, Iowa 50309

1 For Held:

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **10. POST EXECUTION ACTIVITIES**

14 Held agrees to comply with the reporting form requirements referenced in Health and Safety
15 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
16 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion
17 Held shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
18 employ their best efforts, and those of their counsel, to support the entry of this agreement as
19 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this
20 Section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to
21 any objection that any third-party may file or lodge, and appearing at the hearing before the Court if
22 so requested.

23 **11. MODIFICATION**

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

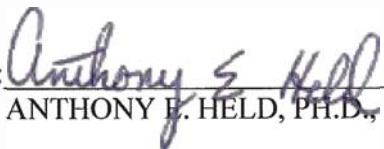
The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.


AGREED TO:

AGREED TO:

Date: 9/21/2018

Date: 9/17/18

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

By: 
Kevin Vaughan, President
FIMCO, INC.