

1 Chris Tuttle, State Bar No. 264545
2 THE CHANLER GROUP
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710
6 Telephone: (510) 848-8880
7 Facsimile: (510) 848-8118

8 Attorneys for Plaintiff
9 ANTHONY E. HELD, PH.D., P.E.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

UNLIMITED CIVIL JURISDICTION

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

Plaintiff,

v.

HBC HOLDINGS, LLC; *et al.*,

Defendants.

Case No. CIV534315

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. ("Held") and defendant Howard Berger Co., LLC ("HBC"), with Held and HBC each referred
5 to individually as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 Held is a resident of the State of California who seeks to promote awareness of exposures to
8 toxic chemicals, and to improve human health by reducing or eliminating harmful substances
9 contained in consumer and commercial products.

10 **1.3 Defendant**

11 HBC 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 and
13 Safety Code section 25249.5 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Held alleges that HBC manufactures, imports, sells and/or distributes for sale in California,
16 vinyl/PVC electrical tape containing the phthalate chemical di(2-ethylhexyl)phthalate ("DEHP")
17 and vinyl/PVC gloves containing the phthalate chemical diisononyl phthalate ("DINP"), and that it
18 does so without providing the health hazard warning that Held alleges is required by Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are: (a) vinyl/PVC electrical tape
21 containing DEHP, including, but not limited to, the *H.B. Smith Tools Vinyl Electrical Tape, No.*
22 *100/2, UPC #0 75877 15234 3* ("Tape Products"); and (b) vinyl/PVC gloves containing DINP,
23 including, but not limited to, the *GAM Plus+ 8-Vinyl Gloves, SP-98873, UPC #0 76670 98873 3*
24 ("Glove Products"). The Glove Products and Tape Products are referred to collectively as the
25 "Products."

26 **1.6 Notice of Violation**

27 On March 31, 2015, Held served HBC and HBC Holdings, LLC, and the requisite public
28 enforcement agencies with a 60-Day Notice of Violation ("Notice"), alleging that HBC violated

1 Proposition 65 when it failed to warn its customers and consumers in California that the Products
2 expose users to DEHP and DINP. No public enforcer has commenced and is diligently prosecuting
3 an action to enforce the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On June 16, 2015, Held commenced the instant action ("Complaint"), naming HBC, among
6 others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

8 HBC denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products that it has sold or 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 HBC 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 HBC of any fact, finding, conclusion of law, issue of law, or violation
14 of law. This Section shall not, however, diminish or otherwise affect HBC'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 HBC as to the allegations contained in the Complaint, that venue is proper in the
19 County of San Mateo, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
23 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

24 **2. INJUNCTIVE SETTLEMENT TERMS**

25 **2.1 Reformulated Products**

26 For purposes of this Consent Judgment, "Reformulated Products" are defined as (1) Tape
27 Products with a maximum DEHP concentration 0.1 percent (1,000 parts per million) when analyzed
28 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or

1 other methodologies utilized by state or federal agencies for the purpose of determining DEHP
2 content in a solid substance ("Reformulated Tape Products"); and (2) Glove Products with a
3 maximum DINP concentration 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.
4 Environmental Protection Agency testing methodologies 3580A and 8270C, or other methodologies
5 utilized by state or federal agencies for the purpose of determining DINP content in a solid
6 substance ("Reformulated Glove Products").

7 **2.2 Reformulation Commitment**

8 All Products manufactured for sale or purchased for sale in the State of California by HBC
9 on or after the Effective Date, shall either qualify as Reformulated Products, or otherwise shall be
10 accompanied by a Proposition 65 warning as set forth in Section 2.3 below.

11 **2.3 Product Warnings**

12 Any warning required hereunder shall be prominently placed with such conspicuousness as
13 compared with other words, statements, designs, or devices as to render it likely to be read and
14 understood by an ordinary individual under customary conditions before purchase or use. Each
15 warning shall be provided in a manner such that the consumer or user understands to which *specific*
16 Product the warning applies, so as to minimize the risk of consumer confusion.

17 **(a) Retail Store Sales**

18 **(i) Product Labeling.** HBC shall affix a warning to the packaging,
19 labeling, or directly on each Product that HBC offers for sale or sells in retail outlets in California
20 that states:

21 **WARNING:** This product contains [DEHP/DINP]¹, a
22 phthalate chemical known to the State of
23 California to cause [cancer/birth defects and
 reproductive harm]²

24 **(ii) Point-of-Sale Warnings.** Alternatively, HBC may provide
25 warning signs in the form below to its customers in California with instructions to post the

26
27 ¹ Citation, in warning language set forth in this Section 2.3, of DEHP shall apply to non-
reformulated Tape Products, and citation to DINP shall apply to non-reformulated Glove Products.

28 ² Citation, in warning language set forth in this Section 2.3, of cancer shall apply to non-
reformulated Glove Products containing DINP, and citation to birth defects and reproductive harm
shall apply to non-reformulated Tape Products containing DEHP.

1 warnings in close proximity to the point of display of the Products. Such instruction sent to
2 HBC's customers shall be sent by certified mail, return receipt requested.

3 **WARNING:** This product contains [DEHP/DINP], a
4 phthalate chemical known to the State of
5 California to cause [cancer/birth defects and
6 reproductive harm].

7 Where more than one Product is sold in proximity to other like items or to those that do not
8 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
9 must be used:³

10 **WARNING:** The following products contain [DEHP/DINP],
11 a phthalate chemical known to the State of
12 California to cause [cancer/birth defects and
13 reproductive harm]:

14 *[list products for which warning is required]*

15 **(b) Mail Order Catalog and Internet Sales.** In the event that HBC sells
16 Products via mail order catalog and/or the internet, to customers located in California, after the
17 Effective Date, that are not Reformulated Products, HBC shall provide warnings for such Products
18 sold via mail order catalog or the internet to California residents. Warnings given in the mail order
19 catalog or on the internet shall identify the *specific* Product to which the warning applies as further
20 specified in Sections 2.3(b)(i) and (ii).

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

25 **WARNING:** This product contains [DEHP/DINP], a
26 phthalate chemical known to the State of
27 California to cause [cancer/birth defects and
28 reproductive harm].

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, HBC 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

1 the Product(s):

2 **WARNING:** Certain products identified with this symbol
3 ▼ and offered for sale in this catalog contain
4 [DEHP/DINP], a phthalate chemical known
5 to the State of California to cause
6 [cancer/birth defects and reproductive harm].

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

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

19 **WARNING:** This product contains [DEHP/DINP], a
20 phthalate chemical known to the State of
21 California to cause [cancer/birth defects and
22 reproductive harm].

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

26 **WARNING:** Products identified on this page with the
27 following symbol ▼ contain [DEHP/DINP],
28 a phthalate chemical known to the State of
 California to cause [cancer/birth defects and
 reproductive harm].

3. **MONETARY SETTLEMENT TERMS**

1 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

2 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
3 claims referred to in this Consent Judgment, HBC shall pay \$12,750 in civil penalties in accordance
4 with this Section. Each penalty payment will be allocated in accordance with California Health &
5 Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
6 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
7 remitted to Held. Held's counsel shall be responsible for remitting HBC's penalty payment(s)
8 under this Consent Judgment to OEHHA.

9 **3.1.1 Initial Civil Penalty.** HBC shall make an initial civil penalty payment of
10 \$4,250. HBC shall provide its payment in a single check made payable to "Anthony E. Held,
11 Ph.D., P.E., Client Trust Account" to be delivered to the address provided in Section 3.4, below.

12 **3.1.2 Final Civil Penalty; Waiver for Accelerated Reformulation.** On April 30,
13 2016, HBC shall make a final civil penalty payment of \$8,500, provided, however, that in
14 accordance with title 11 California Code of Regulations, section 3203(c), Held agrees that (1) 50%
15 of the final civil penalty payment (i.e., \$4,250) shall be waived if, no later than April 15, 2016, an
16 officer of HBC provides Held with a signed declaration certifying that all of the Tape Products it
17 ships for sale or distributes for sale in California as of the date of its declaration are Reformulated
18 Tape Products, and that HBC will continue to offer only Reformulated Tape Products in California
19 in the future, and (2) 50% of the final civil penalty payment (i.e., \$4,250) shall be waived if, no
20 later than April 15, 2016, an officer of HBC provides Held with a signed declaration certifying that
21 all of the Glove Products it ships for sale or distributes for sale in California as of the date of its
22 declaration are Reformulated Glove Products, and that HBC will continue to offer only
23 Reformulated Glove Products in California in the future. The option to certify reformulation in lieu
24 of making the final civil penalty payment otherwise required by this Section is a material term, and
25 time is of the essence.

26 **3.2 Reimbursement of Attorneys' Fees and Costs**

27 The Parties reached accord on the compensation due to Held and his counsel under general
28 contract principles and the private attorney general doctrine codified at California Code of Civil

1 Procedure § 1021.5 for all work performed through the mutual execution of this Consent Judgment
2 and the Court's approval of the same, but exclusive of fees and costs on appeal, if any. Under
3 these legal principles, HBC agrees to reimburse Held and his counsel \$26,500. HBC's payment
4 shall be delivered to the address in Section 3.4 in the form of a check payable to "The Chanler
5 Group." The reimbursement shall cover all fees and costs incurred by Held investigating, bringing
6 this matter to HBC's attention, litigating, and negotiating a settlement of the matter in the public
7 interest.

8 **3.3 Payment Timing**

9 With the exception of the final civil penalty payment required by Section 3.1.2, HBC shall,
10 within ten (10) business days after the Effective Date, deliver all payments required by this
11 Consent Judgment to Held's counsel at the address provided in Section 3.4. In the event the final
12 civil penalty payment required by Section 3.1.2 becomes due prior to the Effective Date, then HBC
13 shall deliver the final civil penalty payment to Held's counsel at the address provided in Section
14 3.4 no later than the payment date set forth in Section 3.1.2 above.

15 **3.4 Payment Address**

16 All payments required by this Consent Judgment shall be delivered to the following
17 address:

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Held's Release of Proposition 65 Claims**

25 **4.1.1 Actions Prior to the Effective Date.** Held, acting on his own behalf and in
26 the public interest, releases HBC and its parents, subsidiaries, affiliated entities under common
27 ownership, directors, officers, employees, shareholders, investors, and attorneys ("Releasees") and
28 each entity to whom they respectively directly or indirectly distribute or sell the Products including,
but not limited to, their downstream distributors, wholesalers, customers, retailers, franchisers,

1 cooperative members, licensors and licensees ("Downstream Releasees") for any violations arising
2 under Proposition 65 for unwarned exposures to DEHP in Tape Products and DINP in Glove
3 Products manufactured, imported, distributed or sold by HBC prior to the Effective Date, as set
4 forth in the Notice.

5 **4.1.2 Actions On and Subsequent to the Effective Date.** Material compliance
6 with the terms of this Consent Judgment constitutes compliance with Proposition 65 by HBC and
7 any other Releasee or Downstream Releasee with respect to the alleged or actual failure to warn
8 about exposures to DEHP in Tape Products and DINP in Glove Products manufactured, sold or
9 distributed for sale by HBC on and after the Effective Date.

10 **4.2 Held's Individual Release of Claims**

11 Held, in his individual capacity only and *not* in his representative capacity, also provides a
12 release to HBC, Releasees, and Downstream Releasees which shall be effective as a full and final
13 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
14 attorneys' fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
15 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
16 exposures to DEHP and DINP in Products manufactured, imported, distributed or sold by HBC
17 before the Effective Date.

18 **4.3 HBC's Release of Held**

19 HBC, on its own behalf and on behalf of its past and current agents, representatives,
20 attorneys, successors and/or assignees, hereby waives any and all claims against Held and his
21 attorneys and other representatives, for any and all actions taken or statements made by Held and
22 his attorneys and other representatives in the course of investigating claims, seeking to enforce
23 Proposition 65 against it in this matter, or with respect to the Products.

24 **5. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and
26 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
27 after it has been fully executed by the Parties. Held and HBC agree to support the entry of this
28 agreement as a judgment, and to obtain the Court's approval of their settlement in a timely manner.

1 The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
2 noticed motion is required for judicial approval of this Consent Judgment, which motion Held shall
3 draft and file and HBC shall support, including by appearing at the hearing if so requested. If any
4 third-party objection to the motion is filed, Held and HBC agree to work together to file a reply and
5 appear at any hearing. This provision is a material component of the Consent Judgment and shall
6 be treated as such in the event of a breach.

7 **6. REPRESENTATION REGARDING SALES**

8 HBC represents that the sales information it provided to Held is truthful to its knowledge
9 and acknowledges it is a material factor upon which Held relied to determine the amount of civil
10 penalties assessed under this Consent Judgment in accordance with California Health & Safety
11 Code section 25249.7(b).

12 **7. SEVERABILITY**

13 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
14 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
15 remaining provisions shall not be adversely affected to the extent the deletion of the provision
16 deemed unenforceable does not materially affect, or otherwise result in the effect of the Consent
17 Judgment being contrary to, the intent of the Parties in entering into this Consent Judgment.

18 **8. GOVERNING LAW**

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

26 **9. NOTICE**

27 Unless specified herein, all correspondence and notice required by this Consent Judgment
28 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,

1 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
2 following addresses:

3 To HBC:

To Held:

4 Diane Garrity
5 Howard Berger Co., LLC
6 324A Half Acre Road
7 Cranbury, NJ 08512

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

8 with a copy to:

9 Joshua A. Bloom
10 Meyers Nave
11 555 12th Street, Suite 1500
12 Oakland, CA 94607

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

15 **10. COUNTERPARTS, FACSIMILE AND PDF 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 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

22 **12. MODIFICATION**

23 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
24 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
25 any party and the entry of a modified Consent Judgment by the Court thereon.

26 **13. AUTHORIZATION**

27 The undersigned are authorized to execute this Consent Judgment on behalf of their
28 respective Parties and have read, understood, and agree to all of the terms and conditions of this

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

AGREED TO:

HOWARD BERGER CO., LLC

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Consent Judgment.

AGREED TO:

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

Dated: _____

AGREED TO:



HOWARD BERGER CO., LLC

By: Donald C Devine

Its: Pres & CEO
(Print Name)
(Title)

Dated: _____

2556342.1