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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

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

13 Plaintiff,

14 v.

15 J.T. POSEY COMPANY; and
16 & DOES 1-150, inclusive

17 Defendants.

Case No. RG15779827

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 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.,
4 P.E. ("Held") and defendant J.T. Posey Company ("Posey"), with Held and Posey each referred to
5 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 Posey employs ten or more persons and Held contends that Posey is a person in the course
12 of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 California Health and Safety Code section 25249.5 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

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

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are vinyl/PVC covered lap cushions and/or
20 supports and pads containing DEHP, including, but not limited to, the *Posey Lap Hugger, #6515*,
21 (collectively, "Products"), which are manufactured, distributed, sold and/or offered for sale by
22 Posey in California.

23 **1.6 Notice of Violation**

24 On April 29, 2015, Held served Posey and the requisite public enforcement agencies with a
25 60-Day Notice of Violation ("Notice"), alleging that Posey violated Proposition 65 when it failed to
26 warn its customers and consumers in California that the Products expose users in California to
27 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
28 prosecuting an action to enforce the allegations set forth in the Notice.

1 **1.7 Complaint**

2 On July 29, 2015, Held filed a complaint commencing the instant action, naming Posey,
3 among others, as a defendant for the alleged violations of Proposition 65 that are the subject of the
4 Notice.

5 **1.8 No Admission**

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

14 **1.9 Jurisdiction**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over Posey as to the allegations contained in the Complaint, that venue is proper in the
17 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
18 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

19 **1.10 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
21 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

22 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

23 Commencing by September 1, 2016, or the Effective Date, whichever is later, and
24 continuing thereafter, Posey agrees to only manufacture, distribute, or offer for sale in or into
25 California: (a) “Reformulated Products”, or (b) Products that are sold with a clear and reasonable
26 health hazard warning, pursuant to Section 2.2 below.

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1 **2.1 Commitment to Reformulate or Warn**

2 For purposes of this Settlement Agreement, "Reformulated Products" shall mean Products
3 containing no more than 1,000 parts per million (0.1%) DEHP in any accessible component (i.e.,
4 any component that may be touched during use) when analyzed pursuant to Environmental
5 Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized
6 by federal or state agencies for the purpose of determining DEHP content in a solid substance.

7 **2.2 Clear and Reasonable Warnings**

8 Posey agrees that as of the Effective Date or September 1, 2016, whichever is later, all
9 Products it sells and/or distributes for sale in California which do not qualify as Reformulated
10 Products, will bear a clear and reasonable warning pursuant to this Section. Posey further agrees
11 that the warning will be prominently placed with such conspicuousness when compared with other
12 words, statements, designs or devices as to render it likely to be read and understood by an ordinary
13 individual under customary conditions of use. For purposes of this Settlement Agreement, a clear
14 and reasonable warning for the Products shall consist of a warning affixed to the packaging, label,
15 tag, or directly to a Product sold in California and containing one of the following statements:

16 WARNING: This product contains DEHP, a chemical
17 known to the State of California to cause
18 birth defects or other reproductive harm.

19 Or

20 WARNING: This product contains a chemical known
21 to the State of California to cause cancer
22 and birth defects or other reproductive harm.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

25 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
26 claims referred to in this Consent Judgment, Posey shall pay \$ 9,800 in civil penalties in accordance
27 with this Section. Each penalty payment will be allocated in accordance with California Health &
28 Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty

1 remitted to Held. Held's counsel shall be responsible for remitting Posey's penalty payment(s)
2 under this Consent Judgment to OEHHA.

3 **3.1.1 Initial Civil Penalty.**

4 Posey shall make an initial civil penalty payment of \$2,800. Posey shall provide its
5 payment in a single check made payable to "Anthony E. Held, Ph.D., P.E., Client Trust Account" to
6 be delivered to the address provided in Section 3.4, below.

7 **3.1.2 Final Civil Penalty; Waiver for Accelerated Reformulation.**

8 On September 15, 2016, or 45 days after the Effective Date, whichever is later, Posey shall
9 make a final civil penalty payment of \$7,000. Pursuant to title 11 California Code of Regulations,
10 section 3203(c), Held agrees that the final civil penalty payment shall be waived in its entirety if, no
11 later than September 1, 2016, or 30 days after the Effective Date, whichever is later, an officer of
12 Posey provides Held with a signed declaration certifying that all of the Products it ships for sale or
13 distributes for sale in California as of the date of its declaration are Reformulated Products, and that
14 Posey will continue to offer only Reformulated Products in California in the future. In the alternate,
15 Posey may provide a declaration by this date certifying that it has discontinued the distribution for
16 sale in California of the Products. The option to certify reformulation or discontinuance of the
17 Products in California in lieu of making the final civil penalty payment otherwise required by this
18 Section is a material term, and time is of the essence. To obtain a waiver of the final civil penalty,
19 Posey must deliver its declaration certifying reformulation to Held's counsel at the address
20 provided in Section 3.4, below.

21 **3.2 Reimbursement of Attorneys' Fees and Costs**

22 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
23 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
24 to be resolved after the material terms of the agreement had been settled. The Parties then
25 negotiated a resolution of the compensation due to Held and his counsel under general contract
26 principles and the private attorney general doctrine codified at California Code of Civil Procedure
27 § 1021.5. For all work performed through the mutual execution of this agreement and the Court's
28 approval of the same, but exclusive of fees and costs on appeal, if any, Posey shall reimburse Held

1 and his counsel \$ 27,000.00. Posey's payment shall be delivered to the address in Section 3.4 in
2 the form of a check payable to "The Chanler Group." The reimbursement shall cover all fees and
3 costs incurred by Held investigating, bringing this matter to Posey's attention, litigating, and
4 negotiating a settlement of the matter in the public interest. The Chanler Group will cooperate
5 with Posey by providing such taxpayer information as is necessary to process payments within five
6 days of the date that this Agreement is fully executed by the Parties.

7 **3.3 Payment Timing; Payments Held In Trust**

8 With the exception of the final civil penalty payment required by Section 3.1.2, Posey shall
9 deliver all payments required by this Consent Judgment to its counsel within thirty days of the date
10 that this Agreement is fully executed by the Parties. Posey's counsel shall confirm receipt of
11 settlement funds in writing to Held's counsel and, thereafter, hold the amounts paid until such time
12 as the Court grants the motion for approval of the Parties' settlement contemplated by Section 5.
13 Within five (5) business days of receiving written notice that the Court has granted the motion for
14 approval, Posey's counsel shall deliver all settlement payments it has held to Held's counsel at the
15 address provided in Section 3.4.

16 **3.4 Payment Address**

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

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

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Held's Release of Proposition 65 Claims**

26 This Consent Judgment is a full, final and binding resolution of all claims that were or could
27 have been asserted in the Complaint arising out of Posey's alleged failure to provide Proposition 65
28 warnings for exposure to DEHP in the Products. Held, acting on his own behalf and in the public
interest, and on behalf of his past and current agents, representatives, attorneys, successors and/or

1 assignees, releases Posey and its parents, subsidiaries, affiliated entities under (full or partial)
2 common ownership, directors, officers, employees, shareholders, agents, and attorneys and
3 predecessors, successors or assigns of each ("Releasees") and each entity to whom they directly or
4 indirectly distribute or sell the Products including, but not limited to, their downstream distributors,
5 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees and
6 their subsidiaries, parents and marketplace retailers ("Downstream Releasees") for any violations
7 arising under Proposition 65 for unwarned exposures to DEHP from the Products manufactured,
8 imported, distributed or sold by Posey prior to the Effective Date, as set forth in the Notice.
9 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
10 with respect to the alleged or actual failure to warn about exposures to DEHP from Products as set
11 forth in the Notice.

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

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

21 **4.3 Posey's Release of Held**

22 Posey, on its own behalf and on behalf of its past and current agents, representatives,
23 attorneys, successors and/or assignees, hereby waives any and all claims against Held and his
24 attorneys and other representatives, for any and all actions taken or statements made (or those that
25 could have been taken or made) by Held and his attorneys and other representatives in the course of
26 investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to
27 the Products sold or distributed for sale by Posey before the Effective Date.
28

1 **4.4 Representations**

2 Posey represents that the sales data it provided to Held was truthful to its knowledge and a
3 material factor upon which Held has relied to determine the amount of civil penalties assessed
4 pursuant to Health & Safety Code § 25249.7 in this Consent Judgment.

5 If, within twelve months of the Effective Date, Held discovers and presents to Posey,
6 evidence demonstrating that the preceding representation concerning sales data was materially
7 inaccurate, then Posey shall have 30 days to meet and confer regarding Held's contention. Should
8 this 30 day period pass without any such resolution between Held and Posey, Held shall be entitled
9 to file a formal legal claim including, but not limited to, a claim for damages for breach of contract.

10 **5. COURT APPROVAL**

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

14 Held and Posey agree to support the entry of this agreement as a judgment, and to obtain the
15 Court's approval of their settlement in a timely manner. The Parties acknowledge that, pursuant to
16 California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial
17 approval of this Consent Judgment, which motion Held shall draft and file and Posey shall support,
18 including by appearing at the hearing if so requested. If any third-party objection to the motion is
19 filed, Held and Posey agree to work together to the extent appropriate to file a reply and appear at
20 any hearing. This provision is a material component of the Consent Judgment and shall be treated
21 as such in the event of a breach.

22 **6. SEVERABILITY**

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

26 **7. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of California
28 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or

1 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Posey may
2 provide Held with written notice of any asserted change in the law, and shall have no further
3 obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products
4 are so affected. To the extent that California enacts revised regulations regarding Proposition 65
5 safe harbor warning language for exposures to DEHP from the Products, the Parties agree to meet
6 and confer on appropriate revisions, if any, to the wording of any warning provided pursuant to this
7 section.

8 **8. NOTICE**

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

13 To Posey:

14 *Bob Kelleher*
~~Date Clendon~~, President
15 J.T. Posey Company
16 5635 Peck Road
Arcadia, CA 91006

To Held:

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

17 With a copy to:

18 Lauren M. Michals
19 Nixon Peabody LLP
20 One Embarcadero Center, 18th Floor
San Francisco, CA 94111

21
22 Any Party may, from time to time, specify in writing to the other Party a change of address
23 to which all notices and other communications shall be sent.

24 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

28

1 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

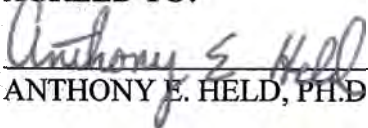
2 Held and his counsel agree to comply with the reporting form requirements referenced in
3 California Health and Safety Code section 25249.7(f).

4 **11. MODIFICATION**

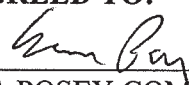
5 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
6 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
7 any party and the entry of a modified Consent Judgment by the Court thereon.

8 **12. AUTHORIZATION**

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

13 **AGREED TO:**
14 
15 ANTHONY E. HELD, PH.D., P.E.

16 Dated: 5/26/2016

AGREED TO:


J.T. POSEY COMPANY

By: Ernest Posey
(Print Name)

Its: CEO
(Title)

Dated: 5/24/16

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