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

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

16 ANTHONY E. HELD, PH.D., P.E.
17 Plaintiff,
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19 v.
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21 SMARTHEALTH, INC.; *et al.*,
22
23 Defendants.
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25 Case No. RG16803925
26 **[PROPOSED] CONSENT JUDGMENT**
27 (Health & Safety Code § 25249.6 *et seq.* and
28 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 SmartHealth, Inc. (“SmartHealth”), with Held and SmartHealth each
5 referred 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 SmartHealth employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Held alleges that SmartHealth manufactures, imports, sells, and/or distributes for sale in
16 California, vinyl/PVC gloves containing Diisononyl phthalate (“DINP”) without first providing the
17 exposure warning required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are vinyl/PVC gloves containing DINP,
20 including, but not limited to, the *Dr.Recommended.com Allerderm PF Vinyl Gloves, AL1013C*
21 (collectively, “Products”).

22 **1.6 Notice of Violation**

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

On February 16, 2016, Held commenced the instant action, naming SmartHealth, among others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

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

1.9 Consent to Jurisdiction

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

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean within ten (10) days after Moore’s counsel serves written notice on SmarthHealth’s counsel that this Consent Judgment has been approved by and entered by the Court as provided by Section 5.

2. INJUNCTIVE SETTLEMENT TERMS

2.1 Commitment to Provide Reformulated Products or Warnings

Commencing on the Effective Date, and continuing thereafter, SmartHealth shall only sell, offer for sale, or distribute for sale in California Products that are either (a) Reformulated Products as defined by Section 2.2, below; or (b) Products that are offered by SmartHealth with a clear and reasonable warning pursuant to Section 2.3.

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2.2 Reformulation Standards

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

2.3 Clear and Reasonable Warnings

Commencing on or before the Effective Date and continuing thereafter, for any Products offered for sale in California by SmartHealth that are not Reformulated Products, SmartHealth agrees to only offer such Products for sale with a clear and reasonable warning in accordance with subsections 2.3(a). SmartHealth further agrees that any warning used shall be prominently placed in relation to the Product 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 the warning applies, so as to minimize the risk of consumer confusion.

(a) Retail Store Sales. SmartHealth shall affix a warning to the packaging, labeling, or directly on each Product provided for sale in retail outlets in California that states:

WARNING: This product contains a chemical known to the State of California to cause cancer.

Or,

If the Product contains a Proposition 65-listed chemical in addition to DINP, that is known to cause birth defects and other reproductive harm:

WARNING: This product contains chemicals that are known to the State of California to cause cancer and birth defects and other reproductive harm.

1 **3. MONETARY SETTLEMENT TERMS**

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

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to
4 in this Consent Judgment, SmartHealth shall pay \$3,000 in civil penalties. The civil penalty
5 payment will be allocated in accordance with California Health and Safety Code section
6 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of
7 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
8 amount paid to Plaintiff. On or before the Effective Date, SmarthHealth shall make a civil penalty
9 payment of \$3,000, in two checks for the following amounts made payable to (a) “OEHHA” in the
10 amount of \$2,250; and (b) “Anthony E. Held, Client Trust Account” in the amount of \$750.”

11 **3.2 Reimbursement of Attorneys’ Fees and Costs**

12 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
13 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
14 to be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
15 other settlement terms had been finalized, the Parties negotiated SmartHealth’s reimbursement of
16 the compensation due to Held and his counsel under general contract principles and the private
17 attorney general doctrine codified at California Code of Civil Procedure § 1021.5 For all work
18 performed through the mutual execution of this agreement and the Court’s approval of the same,
19 but exclusive of fees and costs on appeal, if any, SmartHealth shall reimburse Held and his counsel
20 \$19,000. On or before the Effective Date, SmartHealth shall deliver payment to the address in
21 Section 3.4 in the form of a check payable to “The Chanler Group.” The reimbursement shall
22 cover all fees and costs incurred by Held investigating, bringing this matter to SmartHealth’s
23 attention, litigating, and negotiating a settlement of the matter in the public interest.

24 **3.3 Payment Timing**

25 In the event that any payment required by this Consent Judgment is untimely, the Parties
26 agree and acknowledge that (a) SmartHealth shall be liable to Held for 10% simple interest on any
27 unpaid amount(s); (b) Held may seek to enforce SmarthHealth’s payment obligations under
28 general contract principles and Code of Civil Procedure section 664.6; and (c) Held shall be

1 entitled to reasonable fees incurred recovering such settlement payments pursuant to general
2 contract principles and Code of Civil Procedure section 1021.5.

3 **3.4 Payment Address**

4 All payments required by this Consent Judgment shall be delivered to the following
5 address:

6 The Chanler Group
7 Attn: Proposition 65 Controller
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Held’s Public Release of Proposition 65 Claims**

13 Held, acting on his own behalf and in the public interest, releases SmartHealth and its
14 parents, subsidiaries, , affiliated entities under common ownership, directors, officers, employees,
15 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distribute or sell the
16 Products including, but not limited to, their downstream distributors, wholesalers, customers,
17 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
18 any violations arising under Proposition 65 for unwarned exposures to DINP from the Products
19 manufactured, imported, distributed or sold by SmartHealth prior to the Effective Date, as set forth
20 in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
21 Proposition 65 by SmartHealth with respect to the alleged or actual failure to warn about exposures
22 to DINP from Products manufactured, sold or distributed for sale by SmartHealth after the
23 Effective Date.

24 **4.2 Held’s Individual Release of Claims**

25 Held, in his individual capacity only and *not* in his representative capacity, also provides a
26 release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
27 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
28 attorneys’ fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual

1 exposures to DINP in Products manufactured, imported, distributed and/or sold by SmartHealth
2 before the Effective Date.

3 **4.3 SmartHealth’s Release of Held**

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

9 **5. COURT APPROVAL**

10 This Consent Judgment is not effective until it is approved and entered by the Court and
11 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
12 after it has been fully executed by the Parties. Held and SmartHealth agree to support the entry of
13 this agreement as a judgment, and to obtain the Court’s approval of their settlement in a timely
14 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
15 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
16 motion Held shall draft and file and SmartHealth shall support, including by appearing at the
17 hearing if so requested. If any third-party objection to the motion is filed, Held and SmartHealth
18 agree to work together to file a reply and appear at any hearing. This provision is a material
19 component of the Consent Judgment and shall be treated as such in the event of a breach.

20 **6. SEVERABILITY**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of California
26 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
27 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
28 SmartHealth may provide Held with written notice of any asserted change in the law, and shall have

1 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
2 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
3 SmartHealth from its obligation to comply with any pertinent state or federal law or regulation.

4 **8. NOTICE**

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

9 To SmartHealth:

10 Allen C. Schlinsog, Esq.
11 Reinhart Boerner van Deuren s.c.
12 1000 North Water Street, Suite 1700
Milwaukee, WI 53202

13 Celeste M. Brecht, Esq.
14 Jennifer Levin, Esq.
15 VENABLE LLP
2049 Century Park East, Suite 2100
Los Angeles, CA 90067

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17 Kim Sullivan
18 Vice President, Regulatory R&D
SmartHealth, Inc.
19 3400 East McDowell Road
Phoenix AZ 85008

To Held:

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

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

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

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

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

8 **11. MODIFICATION**

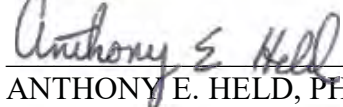
9 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
10 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
11 any party and the entry of a modified Consent Judgment by the Court thereon.

12 **12. AUTHORIZATION**

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

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AGREED TO:



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

Dated: 10/19/2016

AGREED TO:

SMARTHEALTH, INC.

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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15 Consent Judgment.

16
17 **AGREED TO:**

18 _____
19 ANTHONY E. HELD, PH.D., P.E.

20 Dated: _____

AGREED TO:

Kim M. Sullivan
SMARthealth, INC.

By: *Kim M. Sullivan*
(Print Name)

Its: *V.P. Regulatory/Research*
(Title)

Dated: *11/21/2016*

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