

1 Clifford A. Chanler, State Bar No. 135534
David Lavine, State Bar No. 166744
2 CHANLER LAW GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 ANTHONY E. HELD, Ph.D., P.E.

7
8
9
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
THE COUNTY OF SACRAMENTO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, Ph.D., P.E.,

Plaintiff,

v.

BEVERLY FABRICS, INC., and DOES 1-150,
inclusive,

Defendants.

Case No. 34-2009-00066433

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Beverly Fabrics, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter “Dr. Held”) and Beverly Fabrics, Inc. (hereinafter “Beverly Fabrics”), with Dr. Held and
5 Beverly Fabrics collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Dr. Held is an individual residing in California who seeks to promote awareness of exposures
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Beverly Fabrics employs ten or more persons and is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Dr. Held alleges that Beverly Fabrics has sold in the State of California clear plastic vinyl
16 containing di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to the Safe Drinking Water
17 and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.*
18 (“Proposition 65”), as a chemical known to the State of California to cause birth defects and other
19 reproductive harm. DEHP is referred to herein as the “Listed Chemical.”

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: clear plastic
22 vinyl containing excessive levels of the Listed Chemical including, but not limited to, *Clear Vinyl*
23 *Gauge*. All such items shall be referred to herein as the “Products.”

24 **1.6 Notice of Violation**

25 On May 22, 2009, Dr. Held served Beverly Fabrics and various public enforcement agencies
26 with a document entitled “60-Day Notice of Violation” that provided Beverly Fabrics and such public
27 enforcers with notice that alleged that Beverly Fabrics was in violation of California Health & Safety
28

1 Code § 25249.6 for failing to warn consumers and customers that the Products exposed users in
2 California to DEHP.

3 **1.7 Complaint**

4 On December 11, 2009, Dr. Held, who was and is acting in the interest of the general public
5 in California, filed a complaint in the Sacramento Superior Court, Case No. 34-2009-00066433
6 (“Complaint”), naming Beverly Fabrics as a defendant and alleging violations of Health & Safety
7 Code § 25249.6 by Beverly Fabrics based on the alleged exposures to DEHP contained in the
8 Products offered for sale in California by Beverly Fabrics.

9 **1.8 No Admission**

10 Beverly Fabrics denies the material, factual, and legal allegations contained in Dr. Held’s
11 Notice and maintains that all products that it has sold in California, including the Products, have
12 been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as
13 an admission by Beverly Fabrics of any fact, finding, issue of law, or violation of law; nor shall
14 compliance with this Consent Judgment constitute or be construed as an admission by Beverly
15 Fabrics of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
16 denied by Beverly Fabrics. However, this section shall not diminish or otherwise affect the
17 obligations, responsibilities and duties of Beverly Fabrics under this Consent Judgment.

18 **1.9 Consent to Jurisdiction**

19 For purposes of this Consent Judgment only, the parties stipulate that this Court has
20 jurisdiction over Beverly Fabrics as to the allegations contained in the Complaint, that venue is
21 proper in the City and County of San Francisco, and that this Court has jurisdiction to enter and
22 enforce the provisions of this Consent Judgment.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” shall mean April 15, 2010.
25
26
27
28

1 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

2 **2.1 Product Warnings**

3 Commencing on the Effective Date, Beverly Fabrics shall not sell, ship, or offer to be shipped
4 for sale in California any Product unless such Products are sold or shipped with one of the clear and
5 reasonable warnings set forth in subsections 2.1(a) and (b), are otherwise exempt pursuant to Section
6 2.2, or comply with the reformulation standards set forth in Sections 2.3 and 2.4.

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

12 **(a) Retail Store Sales.**

13 **(i) Product Labeling.** Beverly Fabrics may affix a warning to the
14 packaging, labeling, or directly on each Product sold in retail outlets in California by Beverly Fabrics
15 or its agents, that states:

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

19 **(ii) Point-of-Sale Warnings.** Alternatively, Beverly Fabrics may
20 provide warning signs in the form below to its customers in California with instructions to post the
21 warnings in close proximity to the point of display of the Products.

22 **WARNING:** This product contains DEHP, a phthalate
23 chemical known to the State of California to
24 cause birth defects and other reproductive harm.

25 Where more than one Product is sold in proximity to other like items or to those that do not
26 require a warning (*e.g.*, Reformulated Products as defined in Section 2.3), the following statement
27
28

1 must be used:¹

2 **WARNING:** The following products contain DEHP, a
3 phthalate chemical known to the State of
4 California to cause birth defects and other
5 reproductive harm:

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

7 **(b) Mail Order Catalog and Internet Sales.** In the event that Beverly Fabrics
8 sells Products via mail order catalog or internet to customers located in California after the Effective
9 Date that are not Reformulated Products, Beverly Fabrics shall provide a warning for Products sold
10 via mail order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on
11 the website. Warnings given in the mail order catalog or on the website shall identify the specific
12 Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

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

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

20 Where it is impracticable to provide the warning on the same page and in the same location as
21 the display and/or description of the Product, Beverly Fabrics may utilize a designated symbol to
22 cross reference the applicable warning and shall define the term “designated symbol” with the
23 following language on the inside of the front cover of the catalog or on the same page as any order
24 form for the Product(s):

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

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

2.2 Exceptions To Warning Requirements

The warning requirements set forth in Section 2.1 shall not apply to:

- (i) Any Product sold by Beverly Fabrics prior to the Effective Date; or
- (ii) Reformulated Products (as defined in Section 2.3 below).

2.3 Reformulation Standards

Reformulated Products are defined as those Products containing less than or equal to 1,000 parts per million (“ppm”) of the Listed Chemical. The warnings required pursuant to Section 2.1 above shall not be required for Reformulated Products.

3. MONETARY PAYMENTS

3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)

In settlement of all claims related to the Products and Listed Chemical referred to in the Complaint, and this Consent Judgment pursuant to Health & Safety Code § 25249.7(b), Beverly Fabrics shall pay \$12,000 in civil penalties.

Civil penalties are to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Anthony Held as provided by California Health & Safety Code § 25249.12(d). Beverly Fabrics shall issue two separate checks for the penalty payment: (a) one check made payable to “Chanler Law Group in Trust for OEHHA” in the amount of \$9,000, representing 75% of the total penalty; and (b) one check to “Chanler Law Group in Trust for Anthony Held” in the amount of \$3,000, representing 25% of the total penalty. Two separate 1099s shall be issued for the above-payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall be provided five calendar days before the payment is due.

1 Payment shall be delivered to Dr. Held's counsel on or before the Effective Date, at the
2 following address:

3 Chanler Law Group
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710

8 **4. REIMBURSEMENT OF FEES AND COSTS**

9 **4.1 Attorney Fees and Costs.**

10 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without
11 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
12 issue to be resolved after the material terms of the agreement had been settled. Beverly Fabrics then
13 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
14 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Dr.
15 Held and his counsel under general contract principles and the private attorney general doctrine
16 codified at California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed through the
17 mutual execution of this agreement. Beverly Fabrics, on behalf of itself and those in its chain of
18 distribution, shall reimburse Dr. Held and his counsel a total of \$25,500 for fees and costs incurred as
19 a result of investigating, bringing this matter to Beverly Fabrics's attention, and litigating and
20 negotiating a settlement in the public interest. Beverly Fabrics shall issue a separate 1099 for fees
21 and costs (EIN: 94-3171522) and shall make the check payable to "Chanler Law Group" and shall be
22 delivered on or before Effective Date.

23 Chanler Law Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710

28 **5. RELEASE OF ALL CLAIMS**

5.1 Dr. Held's Release of Beverly Fabrics

In further consideration of the promises and agreements herein contained, and for the
payments to be made pursuant to Sections 3 and 4 above, Dr. Held, on behalf of himself, his past and

1 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
2 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
3 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
4 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
5 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
6 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
7 Beverly Fabrics and each of its downstream distributors, wholesalers, licensors, licensees,
8 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies,
9 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
10 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This
11 release is limited to those claims that arise under Proposition 65, as such claims relate to Beverly
12 Fabrics's alleged failure to warn about exposures to or identification of DEHP contained in the
13 Products.

14 **5.2 Beverly Fabrics Release of Dr. Held**

15 Beverly Fabrics waives any and all claims against Dr. Held, his attorneys and other
16 representatives, for any and all actions taken or statements made (or those that could have been taken
17 or made) by Dr. Held and his attorneys and other representatives, whether in the course of
18 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
19 and/or with respect to the Products.

20 **6. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and shall
22 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
23 has been fully executed by all parties, in which event any monies that have been provided to Dr.
24 Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
25 (15) days after receiving written notice from Beverly Fabrics that the one-year period has expired.
26
27
28

1 **7. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
4 remaining shall not be adversely affected.

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
8 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Beverly
9 Fabrics provide written notice to Dr. Held of any asserted change in the law, and shall have no further
10 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
11 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Beverly Fabrics from
12 any obligation to comply with any pertinent state or federal toxics control laws.

13 **9. NOTICES**

14 Unless specified herein, all correspondence and notices required to be provided pursuant to
15 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
16 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the
17 other party at the following addresses:

18 For Beverly Fabrics:

19 Peg Carew Toledo
20 MENNEMEIER, GLASSMAN & STROUD LLP
21 980 9th Street, Suite 1700
21 Sacramento, CA 95814

22 For Dr. Held:

23 Proposition 65 Coordinator
24 CHANLER LAW GROUP
24 2560 Ninth Street
25 Parker Plaza, Suite 214
25 Berkeley, CA 94710

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

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

10. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

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

Dr. Held agrees to comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

12. ADDITIONAL POST EXECUTION ACTIVITIES

The parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Dr. Held and Beverly Fabrics and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall include, at a minimum, cooperating on the drafting and filing any papers in support of the required motion for judicial approval.

13. MODIFICATION

This Consent Judgment may be modified only: (1) by written agreement of the parties and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified consent judgment by the Court.

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

14. **AUTHORIZATION**

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

AGREED TO **APPROVED**
By Tony Held at 11:09 am, Apr 14, 2010

AGREED TO:
Date: 4 13 2010

By: Anthony E Held
ANTHONY E HELD, Ph.D., P.E.

By: Donald Sleeper
Donald Sleeper, President
BEVERLY FABRICS, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT