

1 Christopher M. Martin, State Bar No. 186021
Josh Voorhees, State Bar No. 241436
2 Troy C. Bailey, State Bar No. 277424
THE CHANLER GROUP
3 2560 Ninth Street, 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 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 UNLIMITED CIVIL JURISDICTION

11
12 ANTHONY E. HELD, Ph.D., P.E.,

13 Plaintiff,

14 v.

15 OLEM SHOE CORP.; and DOES 1-150,
16 inclusive,

17 Defendants.

Case No. RG-12612136

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E. and Olem Shoe Corp.**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. (“Dr. Held” or “Plaintiff”) and defendant Olem Shoe Corp. (“Olem Shoe” or “Defendant”),
5 with Plaintiff and Defendant collectively referred to as the “Parties” and each individually
6 referred to as a “Party.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Dr. Held alleges that Olem Shoe manufactured, imported, distributed, sold and/or
17 offered for sale footwear containing di(2-ethylhexyl)phthalate (“DEHP”) in the State of
18 California without the requisite health hazard warnings. DEHP is listed pursuant to Proposition
19 65 as known to the State of California to cause birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as flats¹ containing
22 DEHP including, but not limited to, the *Pierre Dumas Flats, EDDY-4, #81136 101 (#7 80455*
23 *25887 3)*, which Olem Shoe manufactured, imported, distributed, sold and/or offered for sale in
24 the State of California, hereinafter referred to as the “Products.”

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28 ¹ For purposes of this Consent Judgment, “flats” shall mean flat shoes having an unraised or only slightly raised heel.

1 **1.6 Notice of Violation**

2 On October 28, 2011, Dr. Held served Olem Shoe and various public enforcement
3 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the
4 recipients with notice of alleged violations of Proposition 65 for failing to warn consumers that
5 the Products exposed users in California to DEHP.

6 **1.7 Complaint**

7 On or about January 12, 2012, Dr. Held, who was and is acting in the interest of the
8 general public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court
9 in and for the County of Alameda against Olem Shoe, Inc. and Does 1 through 150, alleging,
10 *inter alia*, violations of Proposition 65 based on the alleged exposures to DEHP contained in the
11 Products.

12 **1.8 No Admission**

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

21 **1.9 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Olem Shoe as to the allegations contained in the Complaint, that venue is
24 proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the
25 provisions of this Consent Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
3 this Consent Judgment is approved by the court.

4 **2. INJUNCTIVE RELIEF: REFORMULATION**

5 After the Effective Date, Olem Shoe shall only manufacture, import, distribute, sell
6 and/or offer for sale in California Products that are “Reformulated Products.” For purposes of
7 this Consent Judgment, “Reformulated Products” shall mean Products containing less than or
8 equal to 1,000 parts per million (0.1%) DEHP when analyzed pursuant to Environmental
9 Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized
10 by federal and state agencies for the purpose of determining DEHP content in a solid substance.

11 Reformulated Products shall be deemed to comply with Proposition 65 as it relates to the
12 presence of DEHP in the Products and shall be exempt from any Proposition 65 warning
13 requirements regarding DEHP.

14 **3. MONETARY PAYMENTS**

15 **3.1 Civil Penalty Payments Pursuant to Health & Safety Code § 25249.7(b)**

16 Pursuant to Health & Safety Code § 25249.7(b), Olem Shoe shall pay \$18,000 in civil
17 penalties. Olem Shoe shall pay an initial civil penalty of \$5,000 and a final civil penalty of
18 \$13,000 on the dates provided in Section 3.3. However, the final civil penalty shall be waived in
19 its entirety if an officer of Olem Shoe provides Dr. Held with a written certification that, as of
20 October 15, 2012, and continuing on into the future, Olem Shoe has sold and will continue to sell
21 only Reformulated Products as defined by Section 2 of this Consent Judgment. Dr. Held must
22 receive any such certification no later than March 15, 2013, and time is of the essence.

23 The penalty payments will be allocated according to Health & Safety Code §§ 25249.12
24 (c)(1) & (d), with seventy-five percent (75%) of the penalty amount earmarked for the California
25 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five
26 (25%) of the penalty amount earmarked for Dr. Held.

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1 **3.2 Reimbursement of Plaintiff's Fees and Costs**

2 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
4 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
5 Olem Shoe then expressed a desire to resolve the fee and cost issue shortly after the other
6 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
7 the compensation due to Dr. Held and his counsel under general contract principles and the
8 private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all
9 work performed in this matter, except fees that may be incurred on appeal. Under these legal
10 principles, Olem Shoe shall pay the amount of \$30,000 for fees and costs incurred investigating,
11 litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred)
12 negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in the public
13 interest.

14 **3.3 Payment Procedures**

15 **3.3.1 Funds Held In Trust.** The initial civil penalty payments required by
16 Sections 3.1 and the payment required by Section 3.2 shall be delivered on or before the
17 Effective Date to either The Chanler Group or the attorneys for Olem Shoe, Burstein &
18 Associates, P.A., and shall be held in trust pending the Court's approval of this Consent
19 Judgment.

20 Payments delivered to The Chanler Group shall be made payable, as follows:

- 21 (a) One check made payable to "The Chanler Group in Trust for
22 OEHHA" in the amount of \$3,750;
23 (b) One check made payable to "The Chanler Group in Trust for
24 Anthony E. Held, Ph.D., P.E." in the amount of \$1,250; and
25 (c) One check made payable to "The Chanler Group in Trust" in the
26 amount of \$30,000.

1 Payments delivered to Burstein & Associates, P.A. shall be made payable, as follows:

- 2 (a) One check made payable to "Burstein & Associates, P.A. in Trust
3 for OEHHA" in the amount of \$3,750;
- 4 (b) One check made payable to "Burstein & Associates, P.A. in Trust
5 for Anthony E. Held, Ph.D., P.E." in the amount of \$1,250; and
- 6 (c) One check made payable to "Burstein & Associates, P.A. in Trust
7 for The Chanler Group" in the amount of \$30,000.

8 If Olem Shoe elects to deliver payments to Burstein & Associates, P.A., Burstein &
9 Associates, P.A. shall: (a) provide The Chanler Group with written confirmation within five
10 days of receipt that the funds have been deposited in a trust account; and (b) within two days of
11 the Effective Date, deliver the payment to The Chanler Group in three separate checks, as
12 follows:

- 13 (a) One check made payable to "The Chanler Group in Trust for
14 OEHHA" in the amount of \$3,750;
- 15 (b) One check made payable to "The Chanler Group in Trust for
16 Anthony E. Held, Ph.D., P.E." in the amount of \$1,250; and
- 17 (c) One check made payable to "The Chanler Group" in the amount of
18 \$30,000.

19 If the final civil penalty of \$13,000 referenced in Section 3.1 above is not waived,
20 payments shall be delivered on or before March 29, 2013, to The Chanler Group and made
21 payable, as follows:

- 22 (a) One check made payable to "The Chanler Group in Trust for
23 OEHHA" in the amount of \$9,750;
- 24 (b) One check made payable to "The Chanler Group in Trust for
25 Anthony E. Held, Ph.D., P.E." in the amount of \$3,250.

26 **3.3.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved
27 and the settlement funds have been transmitted to plaintiff's counsel, Olem Shoe shall issue
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1 separate 1099 forms, as follows:

- 2 (a) The first 1099 shall be issued to the Office of Environmental
3 Health Hazard Assessment, P.O. Box 4010, Sacramento, CA
4 95814 (EIN: 68-0284486) in the amount of \$3,750;
- 5 (b) The second 1099 shall be issued to Dr. Held in the amount of
6 \$1,250, whose address and tax identification number shall be
7 furnished upon request; and
- 8 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
9 3171522) in the amount of \$30,000.
- 10 (d) If the final civil penalty in Section 3.1 above is paid, the fourth
11 1099 shall be issued to the Office of Environmental Health Hazard
12 Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
13 0284486) in the amount of \$9,750;
- 14 (e) If the final civil penalty in Section 3.1 above is paid, the fifth 1099
15 shall be issued to Dr. Held in the amount of \$3,250, whose address
16 and tax identification number shall be furnished upon request.

17 **3.3.3 Payment Address.** All payments to the Chanler Group shall be delivered
18 to the following payment 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 Plaintiff's Public Release of Proposition 65 Claims**

26 Dr. Held acting on his own behalf and in the public interest releases Olem Shoe from all
27 claims for violations of Proposition 65 up through the Effective Date based on exposure to
28 DEHP from the Products. Compliance with the terms of this Consent Judgment constitutes
compliance with Proposition 65 with respect to exposures to DEHP from the Products.

1 **4.2 Plaintiff's Individual Release of Claims**

2 Dr. Held also, in his individual capacity only and *not* in his representative capacity,
3 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
4 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages,
5 losses, claims, liabilities and demands of plaintiff of any nature, character or kind, whether
6 known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual
7 exposures to DEHP in the Products manufactured, imported, distributed or sold by Olem Shoe.

8 **4.3 Defendant's Release of Plaintiff**

9 Olem Shoe on behalf of itself, its past and current agents, representatives, attorneys,
10 successors, and/or assignees, hereby waives any and all claims against Dr. Held, his attorneys
11 and other representatives, for any and all actions taken or statements made (or those that could
12 have been taken or made) by Dr. Held and his attorneys and other representatives, whether in
13 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in
14 this matter with respect to the Products.

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the court and
17 shall be null and void if, for any reason, it is not approved and entered by the court within one
18 year after it has been fully executed by all Parties, in which event any monies that have been
19 provided to Dr. Held or his counsel pursuant to Section 3 above, shall be refunded within fifteen
20 (15) days after receiving written notice from Olem Shoe that the one-year period has expired.

21 **6. SEVERABILITY**

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

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed
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1 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
2 Olem Shoe shall provide written notice to Dr. Held of any asserted change in the law, and shall
3 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
4 that, the Products are so affected.

5 **8. NOTICES**

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

10 To Olem Shoe Corp.:

11 Bernardo Burstein
12 Burstein & Associates, P.A.
13 744 NE 125th Street
14 North Miami, FL 33161

To Dr. Held:

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

14 With a copy to:

15 Robert Olemberg, President
16 Olem Shoe, Corp.
17 800 NW 21st Street
18 Miami, FL 33127

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

21 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

26 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

1 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

2 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to
3 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
4 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to
5 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial
6 approval of this Consent Judgment, which Dr. Held shall file, and which Olem Shoe shall not
7 oppose. If any third party objection to the noticed motion is filed, Dr. Held and Olem Shoe
8 shall work together to file a joint reply and appear at any hearing before the Court. If the Court
9 does not approve the motion to approve this Consent Judgment, and the Parties choose not to
10 pursue a modified Consent Judgment within 30 days of said denial, or in the event that the
11 Court approves this Consent Judgment and any person successfully appeals that approval, all
12 payments made pursuant to this Consent Judgment will be returned to Olem Shoe.

13 **12. MODIFICATION**

14 This Consent Judgment may be modified only: (1) by written agreement of the parties
15 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
16 motion of any Party and entry of a modified Consent Judgment by the court.

17 **13. ENTIRE AGREEMENT**

18 This Consent Judgment contains the sole and entire agreement and understanding of the
19 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
20 negotiations, commitments, and understandings related hereto. No representations, oral or
21 otherwise, express or implied, other than those contained herein have been made by any party
22 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
23 deemed to exist or to bind any of the Parties.
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1 **14. AUTHORIZATION**

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

5 **AGREED TO:**

6 **AGREED TO:**

7 Date: APPROVED
By Tony Held at 11:45 am, Sep 11, 2012

7 Date: Sept. 25, 2012

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

8 By: [Signature]
9 Defendant OLEM SHOE CORP.