

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

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

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA
13 UNLIMITED CIVIL JURISDICTION

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

15 Plaintiff,

16 v.

17 COST PLUS, INC.; MR. BAR-B-Q, INC.; *et*
18 *al.*,

19 Defendants.

Case No. 112CV230785

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Anthony E. Held, Ph.D., P.E.
4 ("Held"), and defendant, Mr. Bar-B-Q, Inc. ("Mr. Bar-B-Q"), with Held and Mr. Bar-B-Q
5 collectively referred to as the "Parties" and individually as a "Party."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Mr. Bar-B-Q 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, Health & Safety Code
13 § 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Held alleges that Mr. Bar-B-Q sold gauges with brass components containing lead without
16 first providing the clear and reasonable warning required by Proposition 65. Lead is listed pursuant to
17 Proposition 65 as a chemical known to the state of California to cause birth defects or other
18 reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are gauges with brass components
21 containing lead including, but not limited to, the *World Grill Propane Tank Gauge, #2429 0104*,
22 distributed or sold by Mr. Bar-B-Q, directly or through others, to consumers in California
23 (collectively, "Products").

24 **1.6 Notices of Violation**

25 On or about October 28, 2011, Held served Cost Plus, Inc. ("Cost Plus") and various public
26 enforcement agencies with a "Supplemental 60-Day Notice of Violation" ("Supplemental Notice"), a
27 document that informed the recipients of Held's allegation that Cost Plus was in violation of
28

1 Proposition 65 for failing to warn its customers and consumers in California that the Products expose
2 users to lead.

3 Thereafter, on or about March 29, 2012, Held served a “Second Supplemental 60-Day Notice
4 of Violation” (“Second Supplemental Notice”), to Mr. Bar-B-Q, Cost Plus, and the requisite public
5 enforcement agencies. In addition to the allegations regarding Cost Plus stated in the Notice, the
6 Second Supplemental Notice included the additional allegation that Mr. Bar-B-Q also violated
7 Proposition 65 when it failed to warn its customers and consumers in California that the Products
8 expose users to lead.

9 The Supplemental Notice and the Second Supplemental Notice are referred to collectively as
10 the “Notices.”

11 **1.7 Complaint**

12 On August 21, 2012, Held filed the instant action against Cost Plus and Mr. Bar-B-Q
13 (“Complaint”) for the violations of Health & Safety Code § 25249.6 that are the subject of the
14 Notices.

15 **1.8 No Admission**

16 Mr. Bar-B-Q denies the material, factual, and legal allegations contained in the Notices and
17 Complaint, and it maintains that all of the products that it has sold and distributed in California,
18 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
19 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
20 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
21 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
22 not, however, diminish or otherwise affect Mr. Bar-B-Q’s obligations, responsibilities, and duties
23 under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Mr. Bar-B-Q as to the allegations in the Complaint, that venue is proper in Santa
27 Clara County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
28 Judgment.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean September 15,
3 2012.

4 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

5 **2.1 Reformulated Products**

6 Commencing on the Effective Date and continuing thereafter, Mr. Bar-B-Q shall only ship,
7 sell, or offer to ship for sale in California Products that are Reformulated Products, or that are sold
8 with a clear and reasonable warning pursuant to section 2.2. For purposes of this Settlement
9 Agreement, “Reformulated Products” are Products containing a maximum of 100 parts per million
10 (“ppm”) of lead in any accessible component (i.e., any component that may be touched or handled
11 during reasonably foreseeable use) analyzed pursuant to Environmental Protection Agency testing
12 methodologies 3050B and/or 6010B, and that yields a maximum result 1.0 microgram of lead when
13 analyzed pursuant to the NIOSH 9100 testing protocol, unless such product is sold with a clear and
14 reasonable consumer warning pursuant to section 2.2.

15 **2.2 Product Warnings**

16 Commencing on the Effective Date and continuing thereafter, Mr. Bar-B-Q shall, for all
17 Products that are not Reformulated Products as defined by section 2.1, provide a clear and reasonable
18 warning in compliance with this section. Each warning shall be prominently placed with such
19 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
20 to be read and understood by an ordinary individual under customary conditions before purchase or
21 use. Each warning shall be provided in a manner such that the consumer or user understands to
22 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

23 Mr. Bar-B-Q shall affix the warning to the Product packaging, labeling, or, if no packaging or
24 labeling exists, directly on each Product sold in California that states:

25 **WARNING:** This product contains chemicals, including lead,
26 known to the State of California to cause cancer
27 and birth defects or other reproductive harm.
28 Handling this Product will expose you to lead.
 Wash hands after handling.

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalty Payment**

3 Pursuant to Health & Safety Code § 25249.7(b), Mr. Bar-B-Q shall pay civil penalties totaling
4 \$3,000 in civil penalties. On or before the Effective Date, Mr. Bar-B-Q shall pay a initial civil
5 penalty of \$3,000. The penalty payments will be allocated according to Health & Safety Code §
6 25249.12 (c)(1) and (d), with seventy-five percent (75%) of the penalty amount earmarked for the
7 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
8 twenty-five (25%) of the penalty amount earmarked for Held.

9 **3.2 Reimbursement of Held’s Fees and Costs**

10 The Parties acknowledge that 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 the issue
12 to be resolved after the material terms of the agreement had been settled. Shortly after all other
13 settlement terms had been finalized, Mr. Bar-B-Q expressed a desire to resolve the fee and costs
14 issue. The Parties then attempted to (and did) reach an accord on the compensation due Held and his
15 counsel under general contract principles and the private attorney general doctrine codified at Code
16 of Civil Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs
17 incurred on appeal, if any. Under these legal principles, on or before the Effective Date, Mr. Bar-B-
18 Q shall pay \$23,500 for fees and costs incurred investigating, litigating, and enforcing this matter,
19 including the fees and costs incurred (and yet to be incurred) drafting, negotiating, and obtaining the
20 Court’s approval of this Consent Judgment in the public interest.

21 **3.3 Payment Procedures**

22 **3.3.1 Payments Held in Trust**

23 All payments made under this Consent Judgment shall be held in trust until the Court
24 approves the settlement. The Parties acknowledge that Held’s counsel gave Mr. Bar-B-Q the option
25 of depositing the funds into its attorney’s trust account, but that Mr. Bar-B-Q elected to have The
26 Chanler Group hold the settlement funds in trust until such time as the hearing of the motion for
27 judicial approval. Settlement funds delivered to The Chanler Group shall be in the form of three
28 checks for the following amounts, made payable to:

- 1 (a) The Chanler Group in Trust for OEHHA” in the amount of \$2,250;
2 (b) “The Chanler Group in Trust for Anthony Held” in the amount of \$750; and
3 (c) “The Chanler Group in Trust” in the amount of \$23,500.

4 **3.3.2 Issuance of 1099 Forms**

5 After the Consent Judgment has been approved, Mr. Bar-B-Q shall provide Held’s
6 counsel with a separate 1099 form for each of its payments to:

- 7 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,
8 Sacramento, CA 95814 (EIN: 68-0284486) for the civil penalty payment in the 2012
9 calendar year;
10 (b) Anthony Held”, whose address and tax identification number shall be
11 furnished upon request after this Consent Judgment has been fully executed by the
12 Parties, for the civil penalty payment in the 2012 calendar year and
13 (c) “The Chanler Group” (EIN: 94-3171522) for the reimbursement of Held’s
14 fees and costs pursuant to Section 3.2.

15 **3.3.3 Payment Address**

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

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

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Held’s Public Release of Proposition 65 Claims**

23 Held, acting on his own behalf and in the public interest, releases Mr. Bar-B-Q and its parents,
24 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and attorneys
25 (“Defendant Releasees”) and each entity to whom they directly or indirectly distribute or sell the
26 Products, including but not limited to Cost Plus, distributors, wholesalers, customers, retailers,
27 franchisers, cooperative members, licensors and licensees (“Downstream Defendant Releasees”) of
28 any violation of Proposition 65 that was or could have been asserted in the Complaint against Mr.

1 Bar-B-Q, Cost Plus, Defendant Releasees and Downstream Defendant Releasees arising under
2 Proposition 65 for unwarned exposures to lead contained in the Products sold by Mr. Bar-B-Q prior
3 to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
4 constitutes compliance with Proposition 65 with respect to exposures to lead from the Products sold
5 by Mr. Bar-B-Q before the Effective Date, as set forth in the Notice.

6 **4.2 Held's Individual Release of Claims**

7 Held, in his individual capacity only and *not* in his representative capacity, also provides a
8 release to Mr. Bar-B-Q, Cost Plus, Defendant Releasees and Downstream Defenant Releasees
9 which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
10 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands
11 of Held of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
12 arising out of alleged or actual exposures to lead in the Products imported, manufactured, sold or
13 distributed for sale by Mr. Bar-B-Q before the Effective Date.

14 **4.3 Mr. Bar-B-Q's Release of Held**

15 Mr. Bar-B-Q on behalf of itself and on behalf of its past and current agents, representatives,
16 attorneys, successors, and/or assignees, hereby waives any and all claims against Held and his
17 attorneys and other representatives, for any and all actions taken or statements made (or those that
18 could have been taken or made) by Held and his attorneys and other representatives, whether in the
19 course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter,
20 or with respect to the Products.

21 **5. COURT APPROVAL**

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

25 **6. SEVERABILITY**

26 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
27 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
28 adversely affected.

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the state of California
3 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
4 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Mr. Bar-B-Q
5 may provide written notice to Held of any asserted change in the law, and shall have no further
6 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
7 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Mr. Bar-B-Q from any
8 obligation to comply with any pertinent state or federal toxics control laws.

9 **8. NOTICES**

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

13 For Mr. Bar-B-Q:

14 Marc Zemel, President
15 Mr. Bar-B-Q, Inc.
16 445 Winding Road
 Old Bethpage, NY 11804

17 with a copy to:

18 Charles N. Internicola, Esq.
19 The Internicola Law Firm
 1000 South Avenue, Suite 104
20 Staten Island, NY 10314

21 For Held:

22 Proposition 65 Coordinator
23 The Chanler Group
 2560 Ninth Street
24 Parker Plaza, Suite 214
 Berkeley, CA 94710

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

27
28

1 **9. COUNTERPARTS; FACSIMILE 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. POST EXECUTION ACTIVITIES**

6 Held agrees to comply with the reporting form requirements referenced in Health & Safety
7 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
8 § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement. In
9 furtherance of obtaining such approval, Held and Mr. Bar-B-Q and their respective counsel agree to
10 mutually employ their best efforts to support the entry of their settlement as a Consent Judgment and
11 to obtain judicial approval of the same in a timely manner. For purposes of this Section, “best efforts”
12 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers
13 and supporting the motion for judicial approval.

14 **11. DISMISSAL OF COST PLUS, INC.**

15 Within five calendar days of an order issued by the Court approving this Consent Judgment
16 and entering judgment pursuant to the terms contained herein, Held shall file a request for dismissal
17 without prejudice as to defendant Cost Plus, Inc.

18 **12. MODIFICATION**

19 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
20 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
21 application of any Party and the entry of a modified consent judgment by the Court.

22 **13. AUTHORIZATION**

23 The undersigned are authorized to execute this Consent Judgment and have read, understood,
24 and agree to all of the terms and conditions contained herein.

25 ///

26

27 ///

28

[Signatures on Following Page]

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:

APPROVED
By Tony Held at 11:16 am, Sep 19, 2012

Date: _____

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

AGREED TO:

Date: 9-19-12

By: Marc Zemel
Marc Zemel, President
MR. BAR-B-Q, INC.