

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

Josh Voorhees, State Bar No. 241436
Troy C. Bailey, State Bar No. 277424
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

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

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

ANTHONY E. HELD, PH.D., P.E.,
Plaintiff,
v.
LEVLAD, LLC; *et al.*,
Defendants.

) Case No. CIV 1402798
)
) [PROPOSED] CONSENT JUDGMENT
)
)
) Action Filed: July 21, 2014
)
)
)

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E. and Levlad, LLC**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. ("Held" or "Plaintiff") and defendant Levlad, LLC ("Levlad" or "Defendant") with Plaintiff
5 and Defendant collectively referred to as the "parties."

6 **1.2 Anthony E. Held, Ph.D., P.E.**

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

10 **1.3 Levlad, LLC**

11 Levlad 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, California Health &
13 Safety Code § 25249.6, *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Held alleges that Levlad manufactured, imported, distributed and/or sold in the State of
16 California sunscreen containing benzophenone. Benzophenone is listed pursuant to Proposition 65
17 as a chemical known to the State of California to cause cancer.

18 **1.5 Product Description**

19 The products that are covered by this Consent Judgment are defined as all sunscreen
20 products containing benzophenone including, but not limited to, *Nature's Gate Kids Broad*
21 *Spectrum SPF 50 Sunscreen Lotion, UPC # 0 78347 30044 2*, which are manufactured, imported,
22 distributed, sold and/or offered for sale by Levlad in the State of California, hereinafter the
23 "Products."

24 **1.6 Notice of Violation**

25 On March 26, 2014, Held served Levlad, LLC, others and various public enforcement
26 agencies with a document entitled "60-Day Notice of Violation" that provided the recipients with
27 notice that Levlad was in violation of California Health & Safety Code § 25249.6 for failing to warn
28 consumers that their sunscreen exposed users in California to benzophenone ("Notice"). To the best

1 of the parties' knowledge, no public enforcer has commenced and is diligently prosecuting the
2 allegations set forth in the Notice.

3 **1.7 Complaint**

4 On July 21, 2014, Held filed a complaint in the Superior Court in and for the County of
5 Marin against Levlad, LLC, et al., *Held v. Levlad, LLC, et al.*, Case No. 1402798 (the "Levlad
6 Complaint"), alleging violations of California Health & Safety Code § 25249.6, based on alleged
7 exposures to benzophenone contained in certain sunscreen sold by Levlad, LLC, et al. in the State
8 of California ("Levlad Action").

9 On August 4, 2014, Held filed a complaint in the Superior Court in and for the County of
10 Marin against L'Oreal USA, Inc., et al., *Held v. L'Oreal USA, Inc., et al.*, Case No. 1402967 (the
11 "L'Oreal Complaint"), alleging violations of California Health & Safety Code § 25249.6, based on
12 alleged exposures to benzophenone contained in certain sunscreen sold by L'Oreal USA, Inc., et al.
13 in the State of California ("L'Oreal Action").

14 On October 3, 2014, Held filed a complaint in the Superior Court in and for the County of
15 Marin against Drugstore.com, Inc. et al., *Held v. Drugstore.com, Inc., et al.*, Case No. 1403766
16 ("Drugstore.com Complaint"), alleging violations of California Health and Safety Code § 25249.6,
17 based on alleged exposures of benzophenone contained in certain sunscreen sold by Defendant, and
18 others, in the State of California ("Drugstore.com Action").

19 On October 9, 2014, Levlad filed a demurrer to the Levlad Complaint moving the Court to
20 dismiss the matter. The demurrer was ordered overruled without prejudice by the Court on
21 December 5, 2014.

22 On December 19, 2014, the Superior Court in and for the County of Marin ordered the
23 Levlad Action, L'Oreal Action and the Drugstore.com Action consolidated. The Levlad Action,
24 L'Oreal Action and the Drugstore.com Action shall hereinafter collectively be referred to as the
25 "Action."

26 On March 25, 2015, the Superior Court in and for the County of Marin designated the
27 Action complex.
28

1 **1.8 No Admission**

2 Levlad denies the material, factual and legal allegations contained in Held's Notice and the
3 Levlad Complaint and maintains that all products that it has sold, manufactured, imported and/or
4 distributed in California, including the Products, have been and are in compliance with all
5 applicable laws. Nothing in this Consent Judgment shall be construed as an admission by
6 Levlad of any fact, finding, issue of law or violation of law, nor shall compliance with this Consent
7 Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion,
8 issue of law or violation of law. However, this section shall not diminish or otherwise affect
9 Defendant's obligations, responsibilities and duties under this Consent Judgment.

10 **1.9 Consent to Jurisdiction**

11 For purposes of this Consent Judgment only, the parties stipulate that this Court has
12 jurisdiction over Levlad as to the allegations contained in the Levlad Complaint, that venue is
13 proper in the County of Marin and that this Court has jurisdiction to enter and enforce the
14 provisions of this Consent Judgment.

15 **1.10 Effective Date**

16 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date the
17 Court approves this Consent Judgment, including any tentative rulings not opposed by the parties.

18 **2. INJUNCTIVE RELIEF: REFORMULATION**

19 **2.1 Reformulation Standards**

20 "Reformulated Products" are defined as those Products containing benzophenone: (i) in
21 concentrations less than or equal to 12.5 parts per million ("ppm") when they are analyzed pursuant
22 to a scientifically appropriate application of U.S. Environmental Protection Agency testing
23 methodologies 3580A and 8270C or any other scientifically appropriate methodology for
24 determining the benzophenone content in a substance of the form of the Products herein; or, (ii) in
25 the raw material octocrylene in less than or equal to 200 ppm when analyzed by scientifically
26 appropriate methodology for determining the benzophenone content in the octocrylene used in the
27
28

1 formulation of the Products herein. As of the date of execution of this Agreement, Levlad
2 represents that it has actively engaged its suppliers of octocrylene to comply with its reformulation
3 efforts.

4 **2.2 Raw Ingredients**

5 Commencing on March 30, 2015, and continuing thereafter, Levlad shall not order, or cause
6 to be ordered, the raw ingredient octocrylene, used to manufacture the Products distributed, sold
7 and/or offered for sale in California, unless the octocrylene meets the reformulation standards
8 pursuant to Section 2.1 above. In order to ensure that the process for verifying that the octocrylene
9 suppliers meet Levlad's standards, Levlad shall obtain an initial COA from each supplier, and
10 thereafter obtain a Certificate of Analysis ("COA") from each supplier for each subsequent
11 shipment, and keep for a period of two (2) years. Copies of these certifications shall be provided to
12 Held upon request. In addition, and in accordance with 21 C.F.R. § 211.84, the federal regulation
13 which provides for the "Testing and approval or rejection of components" for sunscreen products,
14 Levlad shall conduct at least one test per year for benzophenone for the octocrylene for a period of
15 two (2) years. Test results obtained by Levlad shall be provided to counsel for Held. If Held
16 contends that Levlad has failed to comply with any portion of Section 2.1, then any test results
17 conducted by Held or his counsel, giving rise to said contention, shall be provided to Levlad, upon
18 request.

19 **2.3 Reformulation Commitment**

20 Commencing on September 30, 2015, and continuing thereafter, Levlad shall not
21 manufacture, import, distribute, sell and/or offer for wholesale sale, Products unless they are
22 Reformulated Products pursuant to Section 2.1(i) above.

23 **2.4 Non-Reformulated Products**

24 No later than October 31, 2016, Levlad shall ensure that all non-reformulated Products are
25 removed from the stream of commerce including all units of the Products offered for sale by
26 downstream retailers.
27
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

3. MONETARY PAYMENTS

3.1 Civil Penalty

Pursuant to Health and Safety Code section 25249.7(b), Levlad shall pay civil penalties in the amount of \$20,000. This assessment reflects a significant reduction from the original assessment of \$60,000, due to Levlad's representation that (i) as of March 30, 2015, all octocrylene that it orders, or causes to be ordered, to be used to manufacture the Products distributed, sold and/or offered for sale in California, shall meet the reformulation standards pursuant to Section 2.1.; and, (ii) it has already commenced the process to eliminate benzophenone from one hundred percent (100%) of its Products within the next 24 months. The penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty paid to Held. Within seven (7) business days of the Effective Date, Levlad shall issue and send a check payable to "Anthony E. Held, Ph.D., P.E., Client Trust Account" to the address found in Section 3.3 below.

3.2 Reimbursement of Fees and Costs

The parties acknowledge that Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Held then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to Held and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Defendant shall pay \$64,400 for fees and costs incurred as a result of investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the public interest. Within seven (7) business days of the Effective Date, Levlad shall issue and send a check payable to "The Chanler Group" to the address found in Section 3.3 below.

1 **3.3 Payment Procedures**

2 All payments under this Settlement Agreement are due within seven (7) business days of
3 the Effective Date, and shall be delivered to the following address:

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

9 **4. CLAIMS COVERED AND RELEASED**

10 **4.1 Held's Public Release of Proposition 65 Claims**

11 This Consent Judgment is a full, final and binding resolution of all claims that were or could
12 have been asserted in the Action arising out of Defendant's alleged failure to provide Proposition 65
13 warnings for the Products. Held, acting on his own behalf and in the public interest, releases
14 Defendant and their respective parents, subsidiaries, affiliated entities under common ownership,
15 directors, officers, employees, and attorneys ("Releasees") and each entity to whom they directly or
16 indirectly distribute or sell the Products including, but not limited to, their downstream distributors,
17 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees,
18 including but not limited to Sprouts Farmers Market, Inc. ("Downstream Releasees") for violations
19 arising under Proposition 65 for unwarned exposures to benzophenone from the Products sold by
20 Defendant prior to the Effective Date, as set forth in the Notice.

21 **4.2 Held's Individual Release of Claims**

22 Held, in his individual capacity only and *not* in his representative capacity, also provides a
23 release to Levlad, Releasees, and Downstream Releasees, including but not limited to Sprouts
24 Farmers Market, Inc., which shall be effective as a full and final accord and satisfaction, as a bar to
25 all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
26 liabilities and demands of Held of any nature, character or kind, whether known or unknown,
27 suspected or unsuspected, arising out of alleged or actual exposures to benzophenone in the
28 Products sold or distributed for sale by Defendant before the Effective Date.

1 **4.3 Levlad's Release of Held**

2 Levlad on behalf of itself, its past and current agents, representatives, attorneys, successors
3 and/or assignees, hereby waives any and all claims against Held, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Held and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Products.

8 **5. COURT APPROVAL**

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

12 **6. SEVERABILITY**

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

16 **7. GOVERNING LAW**

17 The terms of this Settlement Agreement shall be governed by the laws of the state of
18 California and apply within the state of California. Benzophenone is listed pursuant to Proposition
19 65 as a chemical that is known to the State of California to cause cancer. In the event that: (1)
20 Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to
21 the Products, including the delisting of benzophenone; (2) the FDA or other federal regulatory body
22 should promulgate a final rule which preempts the reformulation standard set forth in Section 2.1
23 above and/or injunctive terms set forth herein; or (3) a court approved settlement is reached with a
24 client of The Chanler Group, and an entity that manufactures, distributes, or sells sunscreen
25 products, that allows for the benzophenone content to exceed the reformulation standard set forth in
26 Section 2.1, then Levlad may provide written notice to Held of any asserted change in the law or
27 facts. The parties shall then meet and confer regarding the basis for the written notice. In the event
28 that notice pertains to subsections 1 or 2 above, then with the exception of sections 3.1 and 3.2

1 above, Levlad will have no further obligations pursuant to this Consent Judgment, with respect to,
2 and to the extent that, the Products are so affected. In the event that, under subsection 3 above, a
3 client of The Chanler Group has entered into a court approved settlement with a higher
4 reformulation level than currently found in Section 2.1, Levlad shall be entitled to comply with said
5 new reformulation standard.

6 **8. NOTICES**

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

11 To Levlad:

12 Elizabeth V. McNulty, Esq.
13 Archer Norris PLC
14 4695 MacArthur Court, Suite 350,
Newport Beach, CA 92660

To Anthony E. Held, Ph.D., P.E.:

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

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

17 **9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

18 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
19 each of which shall be deemed an original, and all of which, when taken together, shall constitute
20 one and the same document. A facsimile or pdf signature shall be as valid as the original.

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

22 Held and his attorneys agree to comply with the reporting form requirements referenced in
23 California Health & Safety Code § 25249.7(f).

24 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

25 Held and Levlad agree to mutually employ their best efforts to support the entry of this
26 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
27 timely manner. The parties acknowledge that, pursuant to California Health & Safety Code
28 § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which

1 Held shall draft and file, and Levlad shall join. If any third party objection to the noticed motion is
2 filed, Held and Levlad shall work together to file a joint reply and appear at any hearing before the
3 Court. This provision is a material component of the Consent Judgment and shall be treated as such
4 in the event of a breach.

5 **12. MODIFICATION**

6 In the event OEHHA designates a No-Significant Risk Level ("NSRL") for benzophenone,
7 according to which Levlad asserts would allow for the Products to contain levels of benzophenone
8 in amounts greater than those set forth above in Section 2.1, Levlad may provide written notice to
9 Held of any assertion and the parties shall confer within 30 days to attempt to agree upon
10 modification of this Consent Judgment. Any modification(s) made pursuant to this section shall be
11 submitted to the Court for approval in a timely manner. This Consent Judgment may be modified
12 only by a written agreement of the parties.

13 **13. DISPUTE RESOLUTION**

14 If Held determines at a future date that a violation of this agreement has occurred, Held shall
15 provide notice to Levlad. Prior to bringing any action to enforce any requirement of this Consent
16 Judgment, the party alleging a violation of this settlement agreement shall provide the other party
17 with written notice of the grounds for such allegation together with all supporting information as
18 well as a complete demand for the relief sought. The parties shall then meet and confer regarding
19 the basis for the allegation in an attempt to resolve the matter informally, including providing the
20 party alleged to be in violation with a reasonable opportunity of at least thirty (30) days to cure any
21 alleged violation. Should such attempts at informal resolution fail, the party alleging a violation
22 may file its lawsuit seeking the proposed relief. In the event that an alleged violation is the result of
23 a Product that contains more than 12.5 ppm, but less than 40 ppm of benzophenone in the finished
24 Product, or more than 200 ppm, but less than 400 ppm of benzophenone in the octocrylene used in
25 the manufacture of such Product, Levlad shall have ten days after receiving written notice, to
26 provide the initial COA from the supplier of the specific Product batch, to Held for review. In the event that the
27 COA indicates benzophenone levels in the octocrylene material that complies with the reformulation standard
28 pursuant to Section 2.1, no further action shall be taken by Held provided Levlad issues written

1 notice to the supplier that furnished the COA, advising the supplier of the alleged violation and
2 demanding that quality control and quality assurance standards are strictly adhered to at all times.
3 No further action shall be required of Levlad, and no violation shall be deemed to have occurred as
4 against Levlad, provided Levlad is otherwise in compliance with the terms of this Consent
5 Judgment. Any COA that is provided to Held pursuant to this Consent Judgment shall be deemed
6 confidential in accordance with the Confidentiality Agreement that was executed by the parties on,
7 or about, August 4, 2014. ~~Should such attempts at informal resolution fail, the party alleging a~~
8 ~~violation may file its lawsuit seeking the proposed relief.~~ *A.E.H.*

9 **14. AUTHORIZATION**

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

13
14 AGREED TO:

AGREED TO:

15
16 Date: April 7, 2015

Date: _____

17
18 By: *Anthony E. Held*
Anthony E. Held, Ph.D., P.E.

By: _____
Levlad, LLC

1 notice to the supplier that furnished the COA, advising the supplier of the alleged violation and
2 demanding that quality control and quality assurance standards are strictly adhered to at all times.
3 No further action shall be required of Levlad, and no violation shall be deemed to have occurred as
4 against Levlad, provided Levlad is otherwise in compliance with the terms of this Consent
5 Judgment. Any COA that is provided to Held pursuant to this Consent Judgment shall be deemed
6 confidential in accordance with the Confidentiality Agreement that was executed by the parties on,
7 or about, August 4, 2014. ~~Should such attempts at informal resolution fail, the party alleging a~~
8 ~~violation may file its lawsuit seeking the proposed relief.~~ *GNM*

9 **14. AUTHORIZATION**

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

13
14 **AGREED TO:**

AGREED TO:

15
16 Date: _____

Date: April 7, 2015

17
18 By: _____
Anthony E. Held, Ph.D., P.E.

By: *K. S. Kojan*
Levlad, LLC

21
22
23
24
25
26
27
28