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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 DIAL INDUSTRIES, INCORPORATED; *et al.*,)

16 Defendants.)

Case No. RG15778874

[PROPOSED] CONSENT JUDGMENT

Action Filed: July 22, 2015

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, Dial Industries, Incorporated and Dial Manufacturing, Inc.
5 (collectively, “Dial”), with Held and Dial each individually referred to as a “Party” and collectively
6 as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Dial employs ten or more persons and is a “person in the course of doing business” for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
14 Safety Code §§ 25249.5 et seq. (“Proposition 65”).

15 **1.4 General Allegations**

16 Held alleges that Dial manufactured, imported, distributed or sold vinyl/PVC tubing
17 containing Di(2-ethylhexyl)phthalate (“DEHP”) without first providing the clear and reasonable
18 warning required by Proposition 65 thereby causing consumer and occupational exposures to
19 DEHP. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to
20 cause birth defects and other reproductive harm.

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as vinyl/PVC tubing
23 manufactured, distributed and/or sold in California by Dial including, for example only and not
24 limited to, *Standard ½” Pump Hose, PN 4372, B13-254, Form 97662-093, UPC #0 26529 43720 2*
25 (hereinafter referred to as “Covered Products”).

1 **1.6 Notice of Violation**

2 Held provided Dial and certain requisite public enforcement agencies with a 60-Day Notice
3 of Violation dated June 20, 2014 (“Notice”) alleging that Dial was in violation of Proposition 65 for
4 failing to warn consumers in California that the Covered Products expose users to DEHP. No
5 public enforcer has diligently prosecuted the allegations set forth in the Notice.

6 **1.7 Complaint**

7 On July 22, 2015, Held filed a complaint in the Superior Court in and for the County of
8 Alameda against Dial and Does 1 through 150, *Held v. Dial Industries, Incorporated, et al.*, Case
9 No. RG15778874 (the “Action”), alleging violations of California Health & Safety Code § 25249.6,
10 based on the alleged exposures to DEHP contained in vinyl/PVC tubing manufactured, distributed
11 and/or sold by Dial in the State of California.

12 **1.8 No Admission**

13 Dial denies the material, factual and legal allegations contained in the Notice and maintains
14 that all of the products it has sold and distributed for sale in California, including the Covered
15 Products, have been and are in compliance with all laws. Nothing in this Consent Judgment shall be
16 construed as an admission by Dial of any fact, finding, conclusion of law, issue of law, or violation
17 of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission
18 by Dial of any fact, finding, conclusion of law, issue of law or violation of law, such being
19 specifically denied by Dial. However, this section shall not diminish or otherwise affect the
20 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 Dial as to the allegations contained in the Complaint, that venue is proper in the
24 County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment.

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” shall mean the day that
28 this Consent Judgment is entered by the Court.

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

2 **2.1 Reformulated Covered Products**

3 Commencing on the Effective Date, and continuing thereafter, Dial shall only manufacture,
4 sell, or distribute for sale in California: i) Reformulated Covered Products; or ii) Covered Products
5 which have a compliant Proposition 65 warning pursuant to Section 2.2 or Section 12 below. For
6 purposes of this Consent Judgment, “Reformulated Covered Products” are Covered Products
7 containing a maximum concentration of 1,000 parts per million (0.1%) of each DEHP and
8 Diisononyl phthalate (“DINP”) when sampled and analyzed pursuant to U.S. Environmental
9 Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized
10 by federal or state agencies for the purpose of determining the DEHP and DINP content in a solid
11 substance.

12 **2.2 Clear and Reasonable Warning**

13 Within five (5) days of the Effective Date, Dial shall not manufacture, import, distribute, sell
14 or offer the Products for sale in the State of California unless they are Reformulated Covered
15 Products pursuant to Section 2.1 above, or carry the Proposition 65 warnings specified in this
16 Section. However, Dial represents that it has implemented a warning program, in advance of
17 approval of this Consent Judgment. As such, any Covered Product that is or was ordered for
18 distribution or sale in California prior to the Effective Date, may contain the warning currently
19 provided by Dial. Any Covered Product that does not contain Dial’s current warning or that is
20 ordered for distribution or sale in California after December 31, 2015, shall contain warnings as per
21 the below.

22 **(a) Product Warning:** Commencing on the Effective Date, for all Covered Products that are
23 not Reformulated Covered Products, Dial agrees that it will only offer such Covered Products for
24 sale in California with a clear and reasonable Proposition 65 warning. A clear and reasonable
25 warning may consist of a warning affixed to the packaging, label, tag, or directly to the Covered
26 Product as follows:

1 **California Proposition 65 Warning:** This product contains chemicals
2 known to the State of California to cause cancer and birth defects and other
3 reproductive harm.

4 **(b) Mail Order Catalog Warning.** As of the Effective Date, any warning
5 provided in a Dial mail order catalog available on Dial’s website shall be in the same type size or
6 larger than the Covered Product description text within the catalog. The warning shall contain
7 language consistent with the following statement and be provided on the same page and in the same
8 general location as the display and/or description of the Covered Product:

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

12 Where Dial determines it is impracticable to provide the warning on the same page and in
13 the same general location as the display and/or description of the Covered Product, Dial may utilize
14 a designated symbol to cross reference the applicable warning and shall define the term “designated
15 symbol” with language consistent with the following statement on the inside of the front cover of
16 the catalog or on the same page as any order form for the Covered Product:

17 WARNING: Certain products identified with this symbol ▼ and offered for
18 sale in this catalog contain chemicals known to the State of
19 California to cause cancer and birth defects and other
20 reproductive harm.

21 The designated symbol must appear on the same page and in close proximity to the display
22 and/or description of the Covered Product. On each page where the designated symbol appears,
23 Dial must provide a header or footer directing the consumer to the warning language and definition
24 of the designated symbol.

25 **(c) Internet Website Warning.** As of the Effective Date, a warning shall be
26 given in conjunction with internet sales of the Covered Product by Dial or a third-party that Dial
27 directly sells Covered Products to and which Dial has knowledge of, which warning shall appear
28 either: (a) on the same web page on which a Covered Product is displayed; (b) on the same web
29 page as the order form for a Covered Product; (c) on the same page as the price for any Covered
30 Product; or (d) on one or more web pages displayed to a purchaser during the checkout process.
31 The warning shall contain language consistent with the following statement and shall appear in any

1 of the above instances adjacent to or immediately following the display, description, or price of the
2 Covered Product for which it is given in the same type size or larger than the Covered Product
3 description text:

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

7 Alternatively, the designated symbol may appear adjacent to or immediately following the
8 display, description, or price of the Covered Product for which a warning is being given, provided
9 that language consistent with the following statement also appears elsewhere on the same web page:

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

13 **3. MONETARY SETTLEMENT TERMS**

14 Pursuant to Health & Safety Code § 25249.7(b), Dial has been assessed a total of \$20,000 in
15 civil penalties in accordance with this Section. Each penalty payment will be allocated in
16 accordance with Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
17 the California Office of Environmental Health Hazard Assessment (“OEHHA”) by Held. All
18 penalty payments shall be delivered to the address listed in Section 3.3 below.

19 **3.1 Initial Civil Penalty**

20 Within five days of the Effective Date, Dial shall make an initial civil penalty payment of
21 \$10,000. Dial shall provide its payment in a single check made payable to “Anthony E. Held,
22 Client Trust Account” to be delivered to the address provided in Section 3.3, below.

23 **3.2 Final Civil Penalty**

24 Within 30 days of the Effective Date, Dial shall pay a final civil penalty of \$10,000, to Held.
25 The final civil penalty shall be waived in its entirety, however, if, within 30 days of the Effective
26 Date, an officer of Dial provides Held’s counsel with written certification that, as of the date of such
27 certification and continuing into the future, all Covered Products manufactured by Dial for sale in
28 California after the certification date are Reformulated Covered Products as defined by Section 2.1.
The certification in lieu of a final civil penalty payment provided by this Section constitutes a
material term of this Consent Judgment, and with regard to such term, time is of the essence.

1 **3.3 Payment Procedures**

2 All payments owed to Held, pursuant to Sections 3.1 through 3.2, shall be delivered to the
3 following payment address:

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

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

8 The parties acknowledge that Held and his counsel offered to resolve this dispute without
9 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
10 issue to be resolved after the material terms of this Consent Judgment had been settled. The parties
11 then reached an accord on the compensation due to Held and his counsel under general contract
12 principles and the private attorney general doctrine codified at California Code of Civil Procedure
13 § 1021.5, for all work performed related to this matter. Under these legal principles, Dial shall
14 reimburse Held and his counsel \$30,000 for fees and costs incurred, and yet to be incurred, as a
15 result of, among other things, investigating, bringing this matter to the attention of Dial’s
16 management, negotiating a settlement in the public interest, complying with all reporting
17 obligations, and securing the approval of this Consent Judgment in court. Dial shall issue a check
18 to “The Chanler Group” on or before the Effective Date, to the address listed in Section 3.3 above.

19 **5. CLAIMS COVERED AND RELEASED**

20 **5.1 Release of Proposition 65 Claims**

21 Held, acting on his own behalf, and in the public interest, releases Dial, its parents,
22 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
23 attorneys, and each entity to whom Dial directly or indirectly distributes or sells Covered Products,
24 including, but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees,
25 cooperative members, licensors and licensees, and any other person or entity to whom they directly
26 or indirectly distribute, distributed, sell, or sold Covered Product to (collectively, “Releasees”),
27 from any alleged or actual violation arising under Proposition 65 for unwarned exposures to DEHP
28

1 from the Covered Products sold by Dial prior to the Effective Date, as set forth in the Notice and/or
2 Complaint. Compliance with the terms of this Consent Judgment constitutes compliance with
3 Proposition 65 with respect to exposures to DEHP from the Covered Products.

4 **5.2 Held's Individual Releases of Claims**

5 Held, on his own behalf and on behalf of his past and current agents, representatives,
6 attorneys, successors, and/or assignees, and *not* in his representative capacity, hereby waives all
7 rights to institute or participate in, directly or indirectly, any form of legal action, and releases all
8 claims that he may have against the Releasees, including, without limitation, all actions, causes of
9 action, suits, obligations, costs, fines, penalties, losses, expenses, attorneys' fees, investigation fees,
10 damages, claims, liabilities, and demands of Held of any nature, character, or kind, whether known
11 or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
12 DEHP and/or DINP in the Covered Products manufactured, imported, distributed, or sold by Dial
13 prior to the Effective Date. Nothing in this Section affects Held's right to commence or prosecute
14 an action under Proposition 65 against a Releasee that does not involve Dial's Covered Products.

15 **5.3 Mutual California Civil Code section 1542 Waiver**

16 Held and Dial, each on his/its own behalf, and on behalf of his/its past and current agents,
17 representatives, attorneys, successors, and assignees, in his individual capacity only and not in the
18 public interest, also provides a general release which shall be effective as a full and final accord and
19 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
20 damages, losses, claims, liabilities, and demands of Held and Dial of any nature, character or kind,
21 known or unknown, suspected or unsuspected, arising out of alleged violations of Proposition 65
22 with respect to alleged exposures to DEHP and DINP in the Covered Products, as set forth in the
23 Notice, manufactured, sold or distributed by Dial prior to the Effective Date, or those matters
24 released by Dial in Section 5.4. Held and Dial each acknowledge that he/it is familiar with Section
25 1542 of the California Civil Code, which provides as follows:
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27
28

1 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH**
2 **THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN**
3 **HIS OR HER FAVOR AT THE TIME OF EXECUTING THE**
4 **RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE**
5 **MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
6 **THE DEBTOR.**

7 **5.4 Dial's Release of Held**

8 Dial hereby waives any and all claims against Held and his attorneys and other
9 representatives, for any and all actions taken or statements made (or those that could have been
10 taken or made) by Held and his attorneys and other representatives, whether in the course of
11 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
12 respect to the Covered Products.

13 **6. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court.

15 The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a
16 noticed motion is required to obtain judicial approval of this Consent Judgment, which Held shall
17 file and which Dial shall reasonably support. If this Consent Judgment is not approved by the Court
18 within nine months after submission to the Court by Held, then: (a) this Consent Judgment and any
19 and all prior agreements between the Parties shall terminate and become null and void, and the
20 action shall revert to the status that existed prior to the execution date of this Consent Judgment; (b)
21 no term of this Consent Judgment or any draft thereof, or of the negotiation, documentation, or
22 other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such
23 matter be admissible in evidence for any purpose in this action, or in any other proceeding; and (c)
24 the Parties agree to meet and confer to determine whether to modify the terms of the Consent
25 Judgment and to resubmit it for approval.

26 **7. SEVERABILITY**

27 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
28 Consent Judgment are deemed by a court to be unenforceable, the validity of the enforceable
 provisions remaining shall not be adversely affected.

1 **8. 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 or is otherwise
4 rendered inapplicable by reason of law generally, or if any of the provisions of this Consent
5 Judgment are rendered inapplicable or no longer required as a result of any such repeal or
6 preemption or rendered inapplicable by reason of law generally as to the Covered Products, then
7 Dial shall provide written notice to Held of any asserted change in the law and shall have no further
8 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
9 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Dial from
10 any obligation to comply with any pertinent state or federal toxics control law.

11 **9. NOTICES**

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

16 For Dial:

17 Duane Johnson, President
18 Dial Industries, Incorporated
19 Dial Manufacturing, Inc.
20 25 South 51st Avenue
21 Phoenix, AZ 85043

22 With a copy to:

23 Malcolm C. Weiss, Esq.
24 Stephanie Chen, Esq.
25 Hunton & Williams LLP
26 550 South Hope Street, Suite 2000
27 Los Angeles, CA 90071

28 For Held:

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

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

3 **10. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

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

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

8 Held agrees to comply with all the reporting requirements referenced in Health & Safety
9 Code § 25249.7(f).

10 **12. REGULATORY CHANGES**

11 If the requirements of Proposition 65 are modified, changed or amended, compliance with
12 either the warning provisions in section 2.2 above, or compliance with the modified, changed, or
13 amended rules or regulations will be deemed as compliance with Proposition 65.

14 **13. MODIFICATION**

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

18 **14. AUTHORIZATION**

19 This Consent Judgment may be modified only by a written agreement of the Parties.
20

21 AGREED TO:

AGREED TO:

22
23 Date: 7/15/2015

Date: 7/20/2015

24
25 By: 

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

By: 

Duane Johnston, President
Dial Industries, Incorporated
Dial Manufacturing, Inc.