

1 Clifford A. Chanler, State Bar No. 135534
2 Troy C. Bailey, State Bar No. 277424
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
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION
15

16 IN RE CONSOLIDATED PROPOSITION 65)
17 SUNSCREEN CASES)

Lead Case No. CIV 1402798

18 ANTHONY E. HELD, PH.D., P.E.,)

[PROPOSED] CONSENT JUDGMENT

19 Plaintiff,)

20 v.)

Action Filed: July 21, 2014

21 LEVLAD, LLC; *et al.*,)

22 Defendants.)
23
24
25
26
27
28

29 WHEREAS Plaintiff has issued Notices and filed Complaints against Settling Defendants
30 regarding the presence of benzophenone in Covered Products, as further described in this Consent
31 Judgment; and

32 WHEREAS the Parties acknowledge that the Notices to each Settling Defendant were
33 intended to cover all of that Defendants' Covered Products; and

34 WHEREAS the Parties have litigated the claims accordingly, including the formal and
35 informal exchange of scientific information regarding and risk assessments of benzophenone
36 relevant to a wider range of products; and

1 WHEREAS the Parties, therefore, wish to resolve all Proposition 65 claims regarding
2 benzophenone in Settling Defendants' products that are labeled as having a Sun Protection Factor
3 Value¹ ("SPF Products"), they hereby agree as follows:

4 **1. INTRODUCTION**

5 **1.1 Parties**

6 This consent judgment ("**Consent Judgment**") is entered into by and between plaintiff
7 Anthony E. Held, Ph.D., P.E. ("**Dr. Held**" or "**Plaintiff**") and the defendants identified in the
8 attached Exhibit A (individually, "**Settling Defendant**" and, collectively, "**Settling Defendants**"),
9 with Dr. Held and Settling Defendants collectively referred to as the "**Parties**" and individually as a
10 "**Party**." The substantive terms contained in this Consent Judgment, including the injunctive relief
11 and monetary terms, were negotiated by the Parties with the involvement of the Hon. James Warren
12 (Ret.) of the alternative dispute resolution firm JAMS, Inc.

13 **1.2 Plaintiff**

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

17 **1.3 Defendants and Listed Chemical**

18 Defendants manufacture, and/or distribute, and/or sell SPF Products, including sunscreen
19 products, and products such as face creams, body lotions, lip balms, cosmetics (including lipsticks
20 and foundation make up), hair products and other sun protection creams, sprays, foams, gels, oils,
21 sticks and lotions. One ingredient used in such products to enhance their ability to provide
22 protection from the sun is octocrylene, an active ingredient approved for use in sunscreens by the
23 Federal Food & Drug Administration ("**FDA**").² Octocrylene can at times contain benzophenone.
24 Benzophenone (CAS # 119-61-9) is a chemical listed under The Safe Drinking Water and Toxic
25 Enforcement Act of 1986, California Health & Safety Code § 25249.5 *et seq.* (commonly known as
26 "**Proposition 65**") as a chemical "known to the state to cause cancer" as Proposition 65 defines that
27 phrase. 27 Cal. Code Reg. § 25000.

28 ¹ This term as used herein is defined at 21 C.F.R. § 352.3.

² See 76 Fed. Reg. 35620; 21 C.F.R. §§ 352.10, 352.20 (stayed).

1 **1.4 Products Covered**

2 This Consent Judgment covers and applies to all SPF Products, including but not limited to
3 the categories described in Section 1.3, that are manufactured and/or distributed for sale in
4 California and/or sold in California and that contain benzophenone. All sizes, types, brands,
5 packaging, formulations, delivery forms (e.g., sprays or lotions applied by hand), intended uses
6 (e.g., “faces,” children’s products, “sport,” “moisturizing,” cosmetic purposes) are included. The
7 brands of each Settling Defendant and examples of the product categories subject to this Consent
8 Judgment for each Settling Defendant are set forth in the Exhibit A for that Settling Defendant
9 (“Covered Products”). The Parties agree that the Notices to each Settling Defendant cover all of
10 that Defendants’ Covered Products. This Consent Judgment, and all of its terms, applies to all
11 Covered Products, including without limitation new products and brands introduced, developed, or
12 acquired in the future by any Settling Defendant which would today meet the definition of Covered
13 Products if they currently were being manufactured or distributed for sale, or being sold, in
14 California. The term Covered Product, as used hereafter in this Consent Judgment, includes such
15 future products and brands.

16 **1.5 General Allegations**

17 Plaintiff alleges in the Complaints that each Settling Defendant manufactured, and/or
18 distributed for sale in California, and/or sold in California, Covered Products containing
19 benzophenone without “a clear and reasonable warning” as Proposition 65 defines that phrase, and
20 continues to do so. Plaintiff asserts this settlement is necessary to assure compliance with
21 Proposition 65 now and in the future and to settle Plaintiff’s alleged claims.

22 **1.6 Notices of Violation**

23 In February of 2014, Plaintiff began serving Settling Defendants and the requisite public
24 enforcement agencies with 60-Day Notices of Violation (“Notices”), alleging that Settling
25 Defendants were in violation of Proposition 65 for failing to warn consumers in California that their
26 Sunscreens exposed users to benzophenone. The most recent of such Notices were issued on or
27 about April 18, 2016. Examples of such Notices applicable to the Settling Defendants or their
28

1 Covered Products are attached at Exhibit B. To the best of the Parties' knowledge, no public
2 enforcer has commenced and is diligently prosecuting the allegations set forth in any of the Notices.

3 **1.7 Complaint**

4 On July 21, 2014, Plaintiff filed a complaint in the Superior Court in and for the County of
5 Marin against Levlad, LLC, Sprouts Farmers Market, Inc. and DOES 1-150, alleging violations of
6 California Health & Safety Code § 25249.6, based on exposures to benzophenone contained in
7 certain sunscreens sold by Settling Defendants in the State of California. Since then, Plaintiff has
8 filed six additional complaints which have been consolidated by the Court into the instant action:
9 *Held v. L'Oreal USA, Inc.*, Case No. CIV1402967; *Held v. Drugstore.com, Inc.*, Case No. CIV
10 1403766; *Held v. CCA Industries, Inc.*, Case No. CIV1500403; *Held v. The Kroger Co.*, Case No.
11 CIV1500959; *Held v. MSD Consumer Care, Inc.*, Case No. CIV1503149; and *Held v. Johnson &*
12 *Johnson Consumer Companies, Inc.*, Case No. CIV1502839 (collectively, the "Complaints").

13 **1.8 No Admission**

14 Each Settling Defendant denies all the respective material, factual, and legal allegations
15 contained in the Notices and Complaints. Each Settling Defendant maintains that all of its Covered
16 Products have been and are in compliance with all laws. Nothing in this Consent Judgment shall be
17 construed as an admission against interest by a Settling Defendant of any fact, finding, conclusion,
18 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
19 construed as an admission against interest by any Settling Defendant of any fact, finding,
20 conclusion, issue of law, or violation of law. This section shall not, however, diminish or otherwise
21 affect any Settling Defendant's obligations, responsibilities, and duties under this Consent
22 Judgment.

23 **1.9 Consent to Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Settling Defendants as to the allegations in the Complaints, that venue is proper in
26 the County of Marin, each Settling Defendant agrees that it employs or has employed ten or more
27 persons during time periods relevant to the Complaints and that this Court has jurisdiction over the
28

1 Parties to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and
2 Code of Civil Procedure § 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
5 Plaintiff serves notice on Settling Defendants that this Consent Judgment is approved and entered
6 by the Court.

7 **2. INJUNCTIVE RELIEF: REFORMULATION STANDARD; NOTIFICATION**

8 **2.1 Reformulation Standard**

9 (a) Whereas, each Settling Defendant, based on inquiry for purposes of this Consent
10 Judgment, has not identified any ingredient in its respective Covered Products other than
11 octocrylene that is a source of detectable benzophenone in such Covered Products. Further, based
12 upon inquiry for purposes of this Consent Judgment, each Settling Defendant represents that it has
13 investigated and concluded that there are only a few major suppliers of octocrylene for the domestic
14 market and that time and phasing is needed for the marketplace of octocrylene suppliers to make the
15 adjustments necessary to deliver octocrylene with benzophenone meeting the Octocrylene
16 Reformulation Standards.

17 (b) As of June 1, 2018, Settling Defendants shall only manufacture, or cause to be
18 manufactured, either Covered Products containing no more than (i) 50 parts per million ("ppm")
19 benzophenone in the finished Covered Products; or (ii) 500 ppm of benzophenone in the ingredient
20 octocrylene used in the finished Covered Products. These first standards are interim standards.

21 (c) As of June 1, 2020, Settling Defendants shall only manufacture or cause to be
22 manufactured, either Covered Products containing no more than (i) 35 ppm benzophenone in the
23 finished Covered Product; or (ii) 350 ppm of benzophenone in the ingredient octocrylene used in
24 the finished Covered Products. These second standards are the "Final Reformulation Standards."

25 (d) The dates and reformulations of the Covered Products as listed in Section 2.1 (b) and
26 (c) shall be referred to collectively as the "Reformulation Standards," consisting of either the
27 Sections 2.1 (b)(i) and (c)(i) (the "Finished Product Reformulation Standards") or Sections 2.1
28 (b)(ii) and (c)(ii) (the "Octocrylene Reformulation Standards"). Each Settling Defendant may at

1 any time, at its own election, comply with either, both, or any combination of the applicable
2 Finished Product Reformulation Standard or the Octocrylene Reformulation Standard with respect
3 to any Covered Product.

4 (e) The Reformulation Standards shall apply to Covered Products which are
5 manufactured by or on behalf of Settling Defendant on or after the applicable Reformulation
6 Standard dates.

7 **2.2. Notifications**

8 Each Settling Defendant shall provide, no later than April 30, 2016, written notice (the
9 "Octocrylene Supplier Letter") to its current respective octocrylene supplier or suppliers,
10 informing said supplier or suppliers of the Octocrylene Reformulation Standard and urging each
11 supplier to use reasonable efforts to provide expeditiously only octocrylene which complies with the
12 Octocrylene Reformulation Standard. Settling Defendants shall not include statements in the
13 Octocrylene Supplier Letter that will encourage a supplier to delay compliance with the Octocrylene
14 Reformulation Standard.

15 **2.3 Compliance with Reformulation Standard**

16 (a) A Settling Defendant electing to meet the Finished Product Reformulation Standard
17 may, at its option, either (i) test the Covered Product pursuant to a scientifically appropriate
18 application of U.S. Environmental Protection Agency testing methodologies 3580A, 8270C, or any
19 other scientifically appropriate methodology for determining the benzophenone content in a
20 substance of the form of the specific Covered Product being tested, or (ii) may use the appropriate
21 mathematical calculation based on octocrylene percentage in the Covered Product and the
22 benzophenone concentration in the lot of octocrylene used in the finished Covered Product, based
23 either on testing of the octocrylene lot or on a certificate of analysis documenting benzophenone
24 content from the octocrylene supplier (the "Certificate of Analysis") at the option of the Settling
25 Defendant.

26 (b) Settling Defendants electing to meet the Octocrylene Reformulation Standard shall
27 obtain a Certificate of Analysis or analytical testing report for each lot of octocrylene used in the
28 manufacture of Covered Products. If, after a Settling Defendant has advised its octocrylene

1 suppliers to include a Certificate of Analysis with each lot of delivered octocrylene, an octocrylene
2 supplier fails to include a Certificate of Analysis, a Settling Defendant may correct the lapse upon
3 discovery.

4 (c) A Settling Defendant may, absent grounds to question the accuracy, demonstrate
5 compliance with either Reformulation Standard by relying in good faith on an octocrylene
6 supplier's Certificate of Analysis or comparable verified quantitative benzophenone content
7 information. Such good faith reliance establishes compliance with the Octocrylene Reformulation
8 Standard. Octocrylene suppliers shall rely on any scientifically appropriate testing methodology for
9 determining the benzophenone content of octocrylene.

10 (d) A Settling Defendant shall retain compliance documentation for three years after
11 delivery of a lot of octocrylene and compliance documentation shall be made available within 30
12 days of a written request by Plaintiff, who may make no more than two such requests annually per
13 Settling Defendant.

14 3. MONETARY PAYMENTS

15 3.1 Civil Penalty

16 Pursuant to Health and Safety Code section 25249.7(b), each Settling Defendant shall pay
17 initial civil penalties and, if applicable, final civil penalties in the amounts identified on its
18 respective Exhibit A. The penalty payments shall be allocated according to Health and Safety Code
19 section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of
20 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty paid
21 to Dr. Held. Dr. Held's counsel shall be responsible for remitting Settling Defendant's penalty
22 payment(s) under this Settlement Agreement to OEHHA. Each penalty payment shall be made to
23 "The Chanler Group, ~~Anthony E. Held~~" and remitted to the address indicated
24 in Section 3.3 below. *KS*

25 3.1.1 **Initial Civil Penalty.** Within five (5) business days of the Effective Date
26 each Settling Defendant shall issue a check payable to "The Chanler Group, ~~Anthony E. Held~~"
27 ~~Trust Account~~" in the amount of the initial civil penalty. *KS*

28 3.1.2 **Final Civil Penalty.** On or before June 30, 2018, each Settling Defendant

1 shall pay a final civil penalty (the "Final Civil Penalty") in the amount identified on the Settling
2 Defendant's Exhibit A. However, the Final Civil Penalty shall be waived in its entirety if the
3 Settling Defendant certifies that all Covered Products subject to this Consent Judgment
4 manufactured by or on behalf of that Settling Defendant on or after June 1, 2018, meets a Final
5 Reformulation Standard. A responsible official with personal knowledge, after due inquiry, of a
6 Settling Defendant that has exercised this election shall provide Plaintiff with a written certification
7 confirming compliance with the above conditions on or before June 15, 2018.

8 **3.1.3 Octocrylene Supplier Letter Content.** Any Settling Defendant that does
9 not include a statement in its Octocrylene Supplier Letter requesting that its supplier use
10 commercially reasonable efforts to achieve an Octocrylene Reformulation Standard of 200 ppm by
11 June 1, 2020, shall owe an additional \$10,000.00 in civil penalties, due within five (5) business days
12 of the Effective Date, to be allocated and paid as set forth in Section 3.1 of this Consent Judgment.
13 Each Settling Defendant shall remit a copy of its Octocrylene Supplier Letter to Dr. Held no later
14 than May 15, 2016, to the address provided in Section 3.3 below, in order for Dr. Held to ascertain
15 whether or not the \$10,000.00 penalty shall be waived for each Settling Defendant.

16 **3.2 Reimbursement of Fees and Costs**

17 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without
18 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
19 to be resolved after the material terms of the agreement had been settled. Shortly after the other
20 settlement terms had been finalized, Settling Defendants expressed a desire to resolve Dr. Held's
21 fees and costs. Each Settling Defendant agrees to pay Dr. Held and his counsel under the private
22 attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work
23 performed through the mutual execution of this agreement, including without limitation the fees and
24 costs incurred as a result of investigating, bringing this matter to the Settling Defendant's attention,
25 negotiating a settlement, and seeking court approval of the same. Each Settling Defendant agrees to
26 pay the amount of fees and costs indicated on that Settling Defendant's Exhibit A within five (5)
27 business days of the Effective Date.
28

1 **3.3 Payment Procedures**

2 All payments under this Consent Judgment shall be delivered to:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

10 This Consent Judgment is a full, final and binding resolution of all claims that were or could
11 have been asserted in the Complaints arising out of Settling Defendants' alleged failure to provide
12 Proposition 65 warnings for exposures to benzophenone in their respective Covered Products.
13 Plaintiff, acting on his own behalf and in the public interest, releases each Settling Defendant and its
14 respective parents, subsidiaries, affiliated entities under (full or partial) common ownership,
15 manufacturers, suppliers and the directors, officers, employees, attorneys, and predecessors,
16 successors or assigns of each of them ("Releasees") and each entity to whom a Settling Defendant
17 directly or indirectly distributes or sells the Covered Products including, but not limited to, its
18 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
19 licensors and licensees, and including, without limitation, the retailers CVS Health Corporation,
20 CVS Pharmacy, Kiehl's, Kroger Co., Walgreen Company, Sears Holdings Corporation, Kmart
21 Corporation, Nordstrom.com, Inc., Macy's, Inc., Ulta Salon, Cosmetics & Fragrance, Inc., Wal-
22 Mart Stores, Inc., Walmart.com USA LLC, Rite Aid Corporation, Target Corporation, and
23 Drugstore.com, and including any and all subsidiaries, parents, marketplace retailers and/or
24 affiliates of the foregoing retailers (collectively, the "Distribution Chain Releasees") for
25 violations arising under Proposition 65 for unwarned exposures to benzophenone from the Covered
26 Products by each Settling Defendant prior to the Effective Date. Plaintiff's release of claims applies
27 to all Covered Products which a Settling Defendant (or its manufacturer) either manufactured,
28 and/or distributed and/or sold prior to the Effective Date, regardless of the date any person
 distributes or sells the subject Covered Products.

1 Upon entry of this Consent Judgment by the Court, going forward, a Settling Defendant's
2 compliance with the terms of this Consent Judgment shall be deemed to constitute compliance with
3 Proposition 65 with respect to benzophenone in that Settling Defendant's prior, current and future
4 Covered Products.

5 **4.2 Plaintiff's Individual Release of Claims**

6 Plaintiff, in his individual capacity only and *not* in his representative capacity, also provides
7 a release to each Settling Defendant, Releasee, and Distribution Chain Releasee, which release shall
8 be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
9 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
10 Plaintiff of any nature, character or kind, whether known or unknown, suspected or unsuspected,
11 arising out of alleged or actual exposures to benzophenone in each Settling Defendants' Covered
12 Products prior to the Effective Date.

13 **4.3 Settling Defendants' Release of Dr. Held**

14 Each Settling Defendant, on behalf of itself, its past and current agents, representatives,
15 attorneys, successors and assignees, hereby waives any and all claims against Dr. Held and his
16 attorneys and other representatives, for any and all actions taken or statements made by Dr. Held
17 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
18 seeking to enforce Proposition 65 against it in this matter, or with respect to the Covered Products
19 up through the Effective Date.

20 **4.4 Release and Dismissal of Retailer Defendants**

21 This Consent Judgment provides a "downstream" release which resolves all claims in the
22 Complaints for all Covered Products manufactured by, or on behalf of, distributed, or sold by a
23 Settling Defendant. Any retailer who has been named in one or more Complaints (a "Retailer
24 Defendant") due to its sale of one or more such Covered Products shall be dismissed without
25 prejudice unless, prior to the Effective Date that Retailer Defendant had also received a Notice that
26 identified an exemplar product not manufactured or supplied by either a Settling Defendant or an
27 entity that has previously resolved Plaintiff's claims with a downstream release.
28

1 **5. FORCE MAJEURE**

2 In the event that it is not feasible for a Settling Defendant to obtain conforming octocrylene
3 necessary so as to comply with any Reformulation Standard due to an Act of God (including fire,
4 flood, earthquake, storm, hurricane or other natural disaster) or loss of adequate supplier ability to
5 supply octocrylene on an uninterrupted basis compliant with the applicable Octocrylene
6 Reformulation Standard, the provisions of this paragraph will dictate whether the applicable dates
7 for meeting the Reformulation Standards for that Settling Defendant shall be extended. The criteria
8 for determining whether it is feasible to obtain conforming octocrylene shall include the following
9 factors: availability and reliability of supply that meets the applicable Octocrylene Reformulation
10 Standard, cost of such conforming octocrylene and resulting increase in manufacturers' prices
11 resulting from the use of conforming octocrylene, performance characteristics of conforming
12 octocrylene and of the resulting Covered Products, including but not limited to formulation,
13 performance, safety, efficacy, consumer acceptance, and stability.

14 The affected Settling Defendant(s) shall provide notice to Plaintiff and to Judge Warren, or
15 if he is not available, another mediator from JAMS mutually agreed to by the Parties or, if
16 necessary, as referred by the Court. Included in the notice shall be the specific reason or reasons for
17 invoking the Force Majeure clause, along with a reasonable estimate of the time period during
18 which the Settling Defendant will be unable to comply with the applicable Reformulation Standard.
19 During the time invoked by the Settling Defendant, the Reformulation Standard shall be revised to
20 100 ppm for the Finished Product Reformulation Standard and 1,000 ppm for the Octocrylene
21 Reformulation Standard.

22 If the Parties disagree as to whether a Settling Defendant has a valid reason to invoke the
23 Force Majeure clause or disagree as to the length of time necessary for such Settling Defendant to
24 comply with the Reformulation Standard, they shall attempt to resolve their differences through one
25 or more sessions with Judge Warren, or if he is not available, another mediator from JAMS
26 mutually agreed to by the Parties or, if necessary, as referred by the Court. Dr. Held's reasonable
27 fees and costs of the mediation sessions under this Section shall be borne solely by the participating
28 Settling Defendants unless otherwise allocated by Judge Warren or other mediator from JAMS, who

1 shall consider whether mediation was necessary and/or whether a Party asserted unreasonable or
2 extreme positions. If the Parties cannot reach resolution via a meet and confer or the JAMS
3 process, an aggrieved Party may move the Court via a noticed motion on all Parties, with a copy to
4 the Office of the Attorney General, for such additional relief as that Party deems necessary.

5 **6. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and
7 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
8 after it has been fully executed by the Parties, or by such additional time as the Parties may agree in
9 writing.

10 **7. SEVERABILITY**

11 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
12 Judgment is held by a court to be void or unenforceable, or any Parties agree to modify any terms
13 due to input from the Office of the Attorney General or after a hearing before the Court in
14 connection with Dr. Held's Motion to Approve, or for other good cause, each Party to be bound by
15 any such modified terms must re-execute the modified Consent Judgment and such modified
16 Consent Judgment then shall be presented to the Court for approval by Dr. Held; provided,
17 however, that if a provision of this Consent Judgment declared void or unenforceable is material to
18 the Party for whom such term provided a benefit or protection, that Party can seek other remedies,
19 including, without limitation, rescission or reformation, based on the provision being declared void
20 or unenforceable.

21 **8. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of California
23 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
24 rendered inapplicable by reason of law generally, or as to the Covered Products, including without
25 limitation the delisting of benzophenone, then Settling Defendants may provide written notice to
26 Plaintiff of any asserted change in the law, and with the exception of Sections 3.1 and 3.2 above,
27 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
28

1 that, the Covered Products are so affected. None of the terms of this Consent Judgment shall have
2 any application to Covered Products sold outside of the State of California.

3 **9. FUTURE FEDERAL REGULATION OF OCTOCRYLENE OR BENZOPHENONE**

4 If FDA adopts new regulations or Congress enacts new laws governing octocrylene and/or
5 benzophenone content in any Covered Products, then the Parties shall meet and confer regarding the
6 effect of such changes in the law on the obligations of this Consent Judgment. If necessary to reach
7 agreement, the Parties may refer any specific issue for consideration by Judge Warren or other
8 JAMS mediator agreed to by the Parties or, if necessary, as appointed by the Court.

9 Notwithstanding the foregoing, if FDA authorizes the percentage of octocrylene to increase above
10 the current limit of 10% in Covered Products, then this Consent Judgment shall by operation of law
11 be amended to allow benzophenone in finished Covered Products to rise in proportion to the
12 percentage increase. A Settling Defendant shall notify Plaintiff of the date this Section operates to
13 change any Finished Product Reformulation Standard. This notice obligation shall sunset on June
14 1, 2023. Even if FDA changes the level of permissible octocrylene prior to June 1, 2018, the civil
15 penalty provisions of Section 3.1.2 shall apply as written, not to any standards as modified by this
16 Section 9. The Settling Defendants represent that other than as described in the proceedings and
17 papers referenced in their briefs in these consolidated cases, they are not aware that the FDA
18 currently has published or made public plans to raise the allowable levels of octocrylene in the
19 Covered Products.

20 **10. NOTICE**

21 Unless specified herein, all correspondence and notice required to be provided pursuant to
22 this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class
23 registered or certified mail, return receipt requested; or (iii) overnight courier on any party by the
24 other at the following addresses:

25 To Settling Defendants:

26 At address(es) shown on Exhibit A

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

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

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

11. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES

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

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

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

13. ADDITIONAL POST EXECUTION ACTIVITIES

The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7(f), Dr. Held is obligated to file a noticed motion to obtain judicial approval of this Consent Judgment. Settling Defendants agree to urge the Court to approve this Consent Judgment. If any third party objection to the noticed motion is filed, Plaintiff and Settling Defendants agree to work together to the extent appropriate, and shall appear at any hearing before the Court to urge the Court to approve the Consent Judgment.

14. MODIFICATION

This Consent Judgment may only be modified by a written instrument executed by the Party or Parties to be bound thereby, and after approval by the Court upon a noticed motion. Any motion to modify shall be served on all Parties and the Office of the Attorney General.

15. ENFORCEMENT

15.1 Settling Defendants

In order to assert a potential violation of the Consent Judgment, Plaintiff shall provide notice to the allegedly violating Settling Defendant as set forth in this paragraph ("Notice of Breach"): (a) Plaintiff shall provide all results of testing conducted on a specific Covered Product during the three month period for which the violation is alleged; (b) such testing must be of no less than five (5) of the same Covered Product (irrespective of the volume size of the container) collected within the three (3) month period, from five different retail vendors; (c) the average of all test results for that

1 period exceed the finished Product Reformulation Standard; and (d) Plaintiff shall provide the
2 alleged violator a copy of (i) the purchase information for the allegedly violating Covered Product
3 and (ii) a digital image of the allegedly violating Covered Product showing the SKU/UPC and, if
4 present on the container, the Lot/Batch number(s).

5 The allegedly violating Settling Defendant and Plaintiff shall, within thirty days of receipt of
6 the Notice of Breach, meet and confer regarding the alleged violation, during which time Plaintiff
7 shall not file any motion, application, action, or pleading regarding the alleged violation.

8 For the first alleged violation as to any specific Covered Product for which Plaintiff provides
9 Notice of Breach, the Settling Defendant whose Covered Product is alleged to be in violation may
10 demonstrate compliance by providing (1) a Certificate of Analysis or comparable verified
11 quantitative benzophenone content information for five (5) units of the Covered Product or for the
12 lot(s) of octocrylene from the supplier(s) of the octocrylene in the Covered Product at issue showing
13 levels of benzophenone meeting the Octocrylene Reformulation Standard, or (2) a prior test result,
14 using scientifically appropriate test methodologies, of the lot(s) of octocrylene used in the finished
15 product which is the subject of the Notice of Breach, showing levels of benzophenone meeting the
16 Octocrylene Reformulation Standard. If the Settling Defendant cannot demonstrate compliance, it
17 must pay a stipulated civil penalty of \$25,000.00 to be allocated according to Section 3.1.

18 In the event that, thereafter, Plaintiff provides a Notice of Breach pertaining to a second
19 alleged violation for the same Covered Product, he must do so in accordance with this section. For
20 the second alleged violation noticed by Plaintiff of the same Covered Product, the Settling
21 Defendant may demonstrate compliance with the terms of the Consent Judgment by providing test
22 results, using scientifically appropriate test methodologies, conducted on five (5) units of the
23 Covered Product or on the first three (3) lots of octocrylene received more than 30 days after receipt
24 of the written response showing compliance with the Octocrylene Reformulation Standard received
25 from the supplier of the octocrylene used to make the finished product which was the subject of the
26 first Notice of Breach, and used to manufacture that finished product. If fewer than three (3) lots
27 are received during the relevant time period, testing is required only for such lots as were received.
28 Such a showing shall constitute compliance.

1 In the event that a Settling Defendant cannot demonstrate compliance in the manner set forth
2 above after receipt of a second Notice of Breach for the same Covered Product, and Plaintiff
3 thereafter provides notice in accordance with the provisions in this Section of a third alleged
4 violation for the same Covered Product, Settling Defendant shall pay a stipulated penalty of
5 \$50,000.00 for each such second or subsequent violation.

6 **15.2 Retailer Defendants**

7 If Plaintiff sends a Notice of Breach to a Retailer Defendant, that Retailer Defendant shall be
8 allowed to tender such notice to the manufacturer, distributor or seller of the subject Covered
9 Product who is a Settling Defendant. Thereafter, Plaintiff shall proceed with such Settling
10 Defendant in accordance with Section 15.1 in lieu of the Retailer Defendant.

11 **16. AUTHORIZATION**

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

15
16
17
18 **AGREED TO:**

19 **APPROVED**

By Anthony Held at 11:03 am, May 04, 2016

20 **Date:**

21 **By:** Anthony E. Held

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

AGREED TO:

Date: May 4, 2016

By: Gray G. Spauld

Settling Defendant: Bayer HealthCare LLC

EXHIBIT A

I. Name of Settling Defendant (Mandatory): **Bayer HealthCare LLC.**

II. Type of Settling Defendant (select one):

☒ Settling Defendant

☐ Retailer Defendant

☐ Both (if making this selection, Settling Defendant must list the Products for which it is a Settling Defendant and for which it is a Retailer Defendant in Section IV below).

III. Names of Releasees (Optional; May be Partial): MSD Consumer Care, Inc., Bayer Consumer Care Holdings LLC, Bayer Consumer Care Holdings LLC, f/k/a MSD Consumer Care, Inc., Bayer Corporation, Bayer AG, Bayer East Coast LLC, Coppertone LLC, The Coppertone Corporation, Dr. Scholl's LLC, Miralax LLC, Schering Plough del Caribe, Inc., Bayer Retail Ventures LLC, Merck Retail Ventures, Inc., Merck & Co., Inc., Walgreen Company, Drugstore.com, Target Corporation.

IV. Illustrative list of Brand Names of Products Manufactured or Distributed for sale in California, or sold in California by Settling Defendant (Mandatory for all Settling Defendants):

By way of illustration and without being exhaustive:

All Coppertone SPF Products

All Bain de Soleil SPF Products.

V. Settling Defendant's Required Settlement Payments: (TBD for Each Settling Defendant)

A. Initial Civil Penalty: \$36,500.00.

B. Final Civil Penalty: \$47,000.00 (Unless waived pursuant to Section 3.1.2).

C. Reimbursement of attorneys' fees and costs to The Chanler Group: \$150,000.00.

VI. Recipients of any Notices pursuant to Section 9:

Jeremy Jessen, Esq.

Bayer HealthCare LLC

100 Bayer Boulevard, Building B100, 1B3110

Whippany, NJ 07981

Tel: 1 862 404-4914

E-mail: jeremy.jessen@bayer.com

Malini Moorthy, Esq.

Bayer Corporation

Corporate Litigation

100 Bayer Road, Building #14

Pittsburgh, PA 15205
Tel: 1 412-777-8309
Fax: 1 412-777-8323
E-mail: malini.moorthy@bayer.com

With a Copy To:

Judith M. Praitis, Esq.
Sidley Austin LLP
555 West Fifth Street, 39th Floor
Los Angeles, California 90013
213 896 6637 (ph)
213 896 6600 (fax)
jpraitis@sidley.com