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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN MATEO
16 UNLIMITED CIVIL JURISDICTION
17

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

19 Plaintiff,

20 v.

21 MORRIS ROTHENBERG & SON, INC., *et*
22 *al.*,

23 Defendants.
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Case No. 17CIV02735

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

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 Morris Rothenberg & Son, Inc. (“Morris”), with Held and Morris each individually
5 referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Morris employs ten or more individuals 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 and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Held alleges that Morris imports, sells, or distributes for sale in California, camp showers with
16 vinyl/PVC tubing that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as camp showers with
21 vinyl/PVC tubing containing DEHP that are imported, sold, or distributed for sale in California by
22 Morris, including, but not limited to, the *Rothco Camp Shower, Item No. 540, UPC #6 13902 05400*
23 4.

24 **1.6 Notice of Violation**

25 On January 27, 2017, Held served Morris, and the requisite public enforcement agencies with
26 a 60-Day Notice of Violation (“Notice”) alleging that Morris violated Proposition 65 by failing to
27 warn its customers and consumers in California of the health hazards associated with exposures to
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1 DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action
2 to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On June 20, 2017, Held filed the instant action (“Complaint”), naming Morris as a defendant
5 for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the
6 Notice.

7 **1.8 No Admission**

8 Morris denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect Morris’s obligations, responsibilities, and duties under this
15 Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Morris as to the allegations in the Complaint, that venue is proper in the County of
19 San Mateo, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

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

2 **2.1 Commitment to Reformulate or Warn**

3 Commencing within 60 days of the Effective Date and continuing thereafter, Morris shall only
4 manufacture for sale, purchase for sale, or import for sale in California, Products that are either: (a)
5 Reformulated Products as defined by Section 2.2, below; or (b) Products that are offered by Morris
6 with a clear and reasonable warning pursuant to Section 2.3.

7 **2.2 Reformulation Standard**


8 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
9 that contain DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed
10 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
11 methodology utilized by federal or state government agencies for the purpose of determining DEHP
12 content in a solid substance.

13 **2.3 Clear and Reasonable Warnings**

14 Commencing within 60 days of the Effective Date and continuing thereafter, for any Products
15 sold or offered for sale in California by Morris that are not Reformulated Products, Morris agrees to
16 only offer such Products for sale with a clear and reasonable warning in accordance with this Section.
17 Morris further agrees that any warning used will be prominently placed in relation to the Product with
18 such conspicuousness when compared with other words, statements, designs, or devices as to render
19 it likely to be read and understood by an ordinary individual under customary conditions of purchase
20 or use. For purposes of this Consent Judgment, a clear and reasonable warning for the Products
21 satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying
22 labeling or packaging sold in California containing one of the following statements:


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 **WARNING:** Reproductive Harm-[www.P65 Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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 **WARNING:** This product can expose you to chemicals including DEHP, which is known to the State of California to cause birth defects or other reproductive harm.

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1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
4 referred to in the Notice, Complaint, and this Consent Judgment, Morris shall pay \$2,000 in civil
5 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section
6 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
7 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
8 (25%) of the penalty retained by Held. Morris shall provide its payment in two checks for the
9 following amount made payable to (a) “OEHHA” in the amount of \$1,500; and (b) “Anthony E.
10 Held, Client Trust Account” in the amount of \$500. Held’s counsel shall be responsible for
11 delivering OEHHA’s portion of any penalty payment(s) made under this Consent Judgment.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Held and his counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
15 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
16 other settlement terms had been finalized, the Parties negotiated the compensation due to Held and
17 his counsel under the private attorney general doctrine codified at California Code of Civil Procedure
18 section 1021.5 for all work performed through the mutual execution of this Consent Judgment, and
19 court approval of the same, Morris shall issue a check to “The Chanler Group” in the amount of
20 \$24,000, pursuant to the payment procedures in Section 3.3 below, and to the address found in
21 Section 3.4 below.

22 **3.3 Payment Timing**

23 In the event that any payment required by this Consent Judgment is untimely, the Parties
24 agree and acknowledge that (a) Morris shall be liable to Held for 10% simple interest per annum on
25 any unpaid amount(s); (b) Held may seek to enforce Morris’ payment obligations under general
26 contract principles and Code of Civil Procedure section 664.6; and (c) Held shall be entitled to
27 reasonable fees incurred recovering such settlement payments pursuant to general contract principles
28 and Code of Civil Procedure section 1021.5.

1 **3.4 Payment Address**

2 Within ten days of the Effective Date, all payments required by this Consent Judgment shall
3 be delivered to:

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

7 **4. CLAIMS COVERED AND RELEASED**

8 **4.1 Held’s Public Release of Proposition 65 Claims**

9 Held, acting on his own behalf and in the public interest, releases Morris and its parents,
10 subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys,
11 and other agents (“Releasees”), and each entity to whom Morris directly or indirectly distributes or
12 sells the Products including, without limitation, its downstream customers, distributors, wholesalers,
13 and retailers (“Downstream Releasees”) for any violation arising under Proposition 65 pertaining to
14 the failure to warn about exposures to DEHP from Products sold or distributed for sale by Morris
15 prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent
16 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from
17 Products sold or distributed for sale by Morris after the Effective Date.

18 **4.2 Held’s Individual Release of Claims**

19 Held, in his individual capacity only and *not* in any representative capacity, also provides a
20 release to Morris, Releasees, and Downstream Releasees, which shall be effective as a full and final
21 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
22 attorneys’ fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
23 kind, whether known or unknown, suspected or unsuspected, arising out of Products sold or
24 distributed for sale by Morris before the Effective Date.

25 **4.3 Morris’s Release of Held**

26 Morris, on its own behalf, and on behalf of its past and current agents, representatives,
27 attorneys, successors, and assignees, hereby waives any and all claims against Held, and his
28 attorneys and other representatives, for any and all actions taken or statements made by Held, and

1 his attorneys and other representatives, whether in the course of investigating claims, otherwise
2 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

3 **4.4 Mutual Waiver of California Civil Code Section 1542**

4 The Parties each acknowledge she/it is familiar with Section 1542 of the Civil Code, which
5 provides as follows:

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

10 The Parties, each on her/its own behalf, and on behalf of hers/its past and current agents,
11 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
12 rights and benefits which they may have under, or which may be conferred upon them by the
13 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
14 law principle of similar effect, to the fullest extent she/it may lawfully waive such rights or benefits
15 pertaining to the released matters, as specifically defined by Sections 4.2 and 4.3, above.

16 **5. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and shall
18 be null and void if it is not approved and entered by the Court within one year after it has been fully
19 executed by the Parties, or by such additional time as the Parties may agree in writing.

20 **6. SEVERABILITY**

21 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
22 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
23 adversely affected.

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. Morris may, in its sole discretion, provide warnings for the
27 Products in accordance with Title 27, California Code of Regulations, Sections 25603, which was
28 adopted on August 30, 2016. In the event that Proposition 65 is repealed, or is otherwise rendered

1 inapplicable by reason of law generally or as to the Products, then Morris may provide written notice
2 to Held of any asserted change in the law, and shall have no further injunctive obligations pursuant to
3 this Consent Judgment with respect to, and to the extent that, the Products are so affected.

4 **8. NOTICE**

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

8 For Morris:

9 Howard Somberg, President
10 Morris Rothenberg & Son, Inc.
11 3015 Veterans Memorial Highway
12 Ronkonkoma, NY 11779

12 with a copy to:

13 Meredith Jones-McKeown, Esq.
14 Perkins Coie LLP
15 505 Howard Street, Suite 1000
16 San Francisco, CA 94105

15 For Held:

16 Proposition 65 Coordinator
17 The Chanler Group
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710-2565

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

22 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

23 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
24 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
25 same document.

26 **10. POST EXECUTION ACTIVITIES**

27 Held agrees to comply with the reporting form requirements referenced in Health and Safety
28 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
2 motion Held shall draft and file. Morris shall reasonably cooperate with Held in connection with
3 such noticed motion.

4 **11. MODIFICATION**

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

8 **12. AUTHORIZATION**


9 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
10 have read, understand, and agree to all of the terms and conditions contained herein.

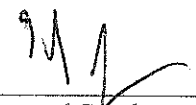
11 **AGREED TO:**

AGREED TO:

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13 Date: 1/17/2018

Date: 1/18/18

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15 By: 
16 ANTHONY E. HELD, PH.D., P.E.

By: 
Howard Somberg, President
MORRIS ROTHENBERG & SON, INC.

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