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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12 UNLIMITED CIVIL JURISDICTION

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

14 Plaintiff,

15 v.

16 FORNEY INDUSTRIES, INC., *et al.*,

17 Defendants.

Case No. CGC-19-578025

**CONSENT JUDGMENT AS TO
DEFENDANT FORNEY INDUSTRIES, INC.**

(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 Forney Industries, Inc. (Forney), with Held and Forney each individually referred to as a
5 “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 Forney 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 Forney imported, sold, or distributed for sale in California goggles with
16 vinyl components that contain di(2-ethylhexyl)phthalate (DEHP) without first providing the exposure
17 warning required by Proposition 65.

18 **1.5 Listed Chemicals**

19 DEHP, a phthalate chemical used to plasticize PVC, is listed pursuant to Proposition 65 as a
20 chemical known to the State of California to cause birth defects or other reproductive harm. 27 CCR
21 § 27001(c). Other phthalate chemicals listed pursuant to Proposition 65 as chemicals known to the
22 State of California to cause birth defects or other reproductive harm are butyl benzyl phthalate (BBP),
23 di-n-butyl phthalate (DBP), Di-isodecyl phthalate (DIDP), and Di-n-hexyl Phthalate (DnHP). *Id.* In
24 addition, DEHP and Diisononyl phthalate (DINP) have been listed under Proposition 65 as chemicals
25 known to the State of California to cause cancer. 27 CCR § 27001(b). DEHP, BBP, DBP, DIDP,
26 DINP, and DnHP are collectively referred to herein as the “Listed Chemicals.”
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1.6 Product Description

The products covered by this Consent Judgment are the *Forney Dust Goggles, #55310, UPC #0 32277 55310 1* , that are distributed, sold and/or offered for sale to customers in California by Forney (Products).

1.7 Notices of Violation

On October 10, 2018, Held served Forney, and the requisite public enforcement agencies with a 60-Day Notice of Violation (Goggle Notice) alleging that Forney violated Proposition 65 by failing to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.8 Complaint

On April 24, 2019, no public enforcer having commenced prosecuting the allegations set forth in the Goggle Notice, Held filed a complaint naming Forney as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Goggle Notice. On July 22, 2019, Held dismissed the April 24, 2019 action without prejudice. On July 30, 2019, Held refiled the action (Complaint).

1.9 No Admission

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

1.10 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Forney as to the allegations in the Complaint, that venue is proper in the County of

1 San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
2 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

3 **1.11 Effective Date**

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

7 **2. INJUNCTIVE RELIEF: PRODUCT REFORMULATION AND WARNINGS**

8 **2.1 Commitment to Reformulate or Warn**

9 Commencing on the Effective Date and continuing thereafter, Forney agrees to only
10 distribute, sell or offer for sale in California, Products that are either (a) Reformulated Products as
11 defined by Section 2.2, below, or (b) Products that bear a clear and reasonable health hazard warning
12 pursuant to Section 2.3 below.

13 **2.2 Reformulation Standard**


14 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
15 that contain Listed Chemicals in concentrations that do not exceed 1,000 parts per million (0.1%).

16 For purposes of compliance with this reformulation standard, testing samples shall be prepared and
17 extracted using Consumer Product Safety Commission (CPSC) methodology CPSC-CH-C1001.09.3
18 or U.S. Environmental Protection Agency (EPA) testing methodologies 3580A and analyzed using
19 EPA methodology 8270D, or other methodologies utilized by federal or state government agencies to
20 determine phthalate content in a solid substance.

21 **2.3 Clear and Reasonable Warnings**

22 Commencing on or before the Effective Date, Forney shall provide clear and reasonable
23 warnings for all Products provided for sale to customers in California in accordance with this Section
24 pursuant to Title 27, California Code of Regulations, section 25600, *et seq.* Each warning shall be
25 prominently placed with such conspicuousness as compared with other words, statements, designs, or
26 devices as to render it likely to be read and understood by an ordinary individual under customary
27 conditions before purchase or use and shall be provided in a manner such that it is clearly associated
28 with the specific Product to which the warning applies.

1 (a) **Warning.** The warning shall consist of the following statement (Warning):

2  **WARNING:** This product can expose you to di(2-
3 ethylhexyl)phthalate (DEHP) [or other listed
4 phthalate chemical¹], which is known to the State of
5 California to cause cancer and birth defects or other
6 reproductive harm. For more information go to
7 www.P65Warnings.ca.gov.

8 (b) **Short-Form Warning.** Forney may, but is not required to, use the following
9 short-form warning as set forth in this subsection 2.3(b) (Short-Form Warning), and subject to the
10 additional requirements in Sections 2.3.2 and 2.3.3, as follows:

11  **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov

12 (c) **Foreign Language Requirement.** Where a consumer product sign, label or
13 shelf tag used to provide a warning includes consumer information in a language other than English,
14 the warning must also be provided in that language in addition to English.

15 2.3.1 Product Warnings

16 Forney shall affix a warning to the Product label or otherwise directly on each Product provided
17 for sale in retail outlets in California or sold via mail order catalog and/or the internet to customers
18 located in California. For the purpose of this agreement, “Product label” means a display of written,
19 printed or graphic material that is printed on or affixed to a Product or its immediate container or
20 wrapper. The entire warning shall appear in a type size of at least 6-point type and no smaller than the
21 largest type size used for other consumer information on the product. The warning shall consist of
22 either the Warning, or the Short-Form Warning described in subsection 2.3(a) or (b), respectively.

23 2.3.2 Mail Order Catalog Warnings

24 If, after the Effective Date, Forney prints new catalogs and sells Products via mail order
25 through such catalogs to customers located in California, Forney shall provide a warning for each
26 Product both on the Product label in accordance with Section 2.3, and in the catalog in a manner that
27 clearly associates the warning with the specific Product being purchased. Any warning provided in a

28 ¹ Forney may specify another listed phthalate chemical such as Diisononyl phthalate (DINP)
present in the Product, and agrees that any such modification will be compliant with Title 27,
California Code of Regulations, Article 6, Clear and Reasonable Warnings, Section 25603(a).

1 mail order catalog shall be in the same type size or larger than other consumer information provided
2 for the Product within the catalog and shall be provided in the catalog in a manner that clearly
3 associates it with the item being purchased.. The catalog warning may use the Short-Form Warning
4 content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-
5 Form Warning content.

6 **2.3.3 Internet Warnings**

7 If, after the Effective Date, Forney sells Products via the internet to customers located in
8 California, Forney shall provide warnings for each Product both on the Product label in accordance
9 with Section 2.3, and by prominently displaying the warning to the customer prior to completing the
10 purchase or during the purchase of the Products without requiring customers to seek out the warning.
11 The warning or a clearly marked hyperlink to the warning using the word “**WARNING**” given in
12 conjunction with the sale of the Products via the internet shall appear either: (a) on the same web
13 page on which the Product is displayed; (b) on the same web page as the order form for the Product;
14 or (c) on one or more web pages displayed to a purchaser during the checkout process. The warning
15 shall appear in any of the above instances adjacent to or immediately following the display or
16 description of the Product for which it is given. The internet warning may use the Short-Form
17 Warning content described in Section 2.3(b) if the warning provided on the Product label also uses
18 the Short-Form Warning content.

19 **3. MONETARY SETTLEMENT TERMS**

20 **3.1 Civil Penalty Payments**

21 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
22 referred to in the Goggle Notice, Complaint, and this Consent Judgment, Forney shall pay \$5,000.00
23 in civil penalties. Each civil penalty payment shall be allocated according to Health and Safety Code
24 section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California
25 Office of Environmental Health Hazard Assessment (OEHHA), and the remaining twenty-five
26 percent (25%) of the penalty retained by Held. Held’s counsel shall be responsible for delivering
27 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment.
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1 **3.1.1 Initial Civil Penalty Payment.** Forney shall pay an initial civil penalty of
2 \$5,000.00. Within five (5) days of the Effective Date, Forney shall provide its initial civil penalty
3 payment in a check made payable to “Anthony E. Held, Client Trust Account” in the amount of
4 \$1,250.00, and a check made payable to “OEHHA” in the amount of \$3,750.00 to be delivered to the
5 address provided in Section 3.4, below.

6 **3.2 Reimbursement of Attorney’s Fees and Costs**

7 The parties acknowledge that Held and his counsel offered to resolve this dispute without
8 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
9 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
10 other settlement terms had been finalized, the Parties negotiated the compensation due to Held and
11 his counsel under general contract principles and the private attorney general doctrine codified at
12 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
13 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
14 on appeal, if any. Under these legal principles, Forney shall pay \$23,200.00 for all fees and costs
15 incurred by Held investigating, bringing this matter to Forney’s attention, litigating, negotiating a
16 settlement in the public interest and obtaining court approval of this consent decree. Forney’s
17 payment shall be delivered to the address in Section 3.4 in a check payable to “The Chanler Group.”

18 **3.3 Payment Timing; Payments Held in Trust**

19 All payments due under this Consent Judgment shall be held in trust until such time as the
20 Court approves the Parties’ settlement. Within five (5) days of Forney receiving notice that this
21 Consent Judgment is fully executed by the Parties, all payments due under this agreement shall be
22 delivered to Forney’s counsel or a third-party trust account and held in trust until the Effective Date.
23 Forney’s counsel shall provide Held’s counsel with written confirmation upon its receipt of the
24 settlement payments. On the Effective Date, Forney’s counsel shall deliver the civil penalty and
25 attorneys’ fee reimbursement payments to Held’s counsel at the address provided in Section 3.4.

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1 **3.4 Payment Address**

2 The Chanler Group
3 Attn: Proposition 65 Controller
4 2550 Ninth Street, Suite 205
5 Berkeley, CA 94710

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Held’s Public Release of Proposition 65 Claims**

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

17 **4.2 Held’s Individual Release of Claims**

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

24 **4.3 Forney’s Release of Held**

25 Forney, on its own behalf, and on behalf of its past and current agents, representatives,
26 attorneys, successors, and assignees, hereby waives any and all claims against Held, and his
27 attorneys and other representatives, for any and all actions taken or statements made by Held, and
28 his attorneys and other representatives, whether in the course of investigating claims, otherwise
 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of California
11 and apply within the State of California. In the event that Proposition 65 is repealed or otherwise
12 rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment
13 are rendered inapplicable or no longer required as a result of any such repeal or preemption or
14 rendered inapplicable by reason of law generally as to the Products, then Forney may provide written
15 notice to Held of any asserted change in the law, and shall have no further injunctive obligations
16 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

17 **8. NOTICE**

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

21 For Forney: Steve Anderson, President
22 Forney Industries Inc.
23 2057 Vermont Drive
 Fort Collins, CO 80525

 For Held: Proposition 65 Coordinator
 The Chanler Group
 2550 Ninth Street, Suite 205
 Berkeley, CA 94710

24 with a copy to:

25 Scott J. Sachs, Esq.
26 Atkinson, Andelson, Loya,
27 Ruud & Romo
 12800 Center Court Dr., Suite 300
 Cerritos, CA 90703

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

8 Held agrees to comply with the reporting form requirements referenced in Health and Safety
9 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
10 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
11 motion Held shall draft and file. In furtherance of obtaining such approval, the Parties agree to
12 mutually employ their best efforts, and those of their counsel, to support the entry of this agreement
13 as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of
14 this Section, "best efforts" shall include, at a minimum, supporting the motion for approval,
15 responding to any objection that any third-party may file or lodge, and appearing at the hearing
16 before the Court if so requested.

17 **11. MODIFICATION**

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

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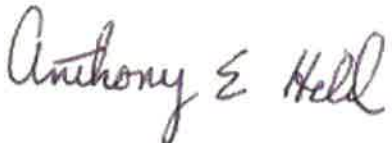
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12. AUTHORIZATION

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

IT IS SO AGREED:

Dated: August 14, 2019

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

Dated:

FORNEY INDUSTRIES, INC.

By: 
Steve Anderson, President