

FILED

SEP - 4 2009

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Dale, Deputy

1 Clifford A. Chanler, State Bar No. 135534
2 Christopher Martin, State Bar No. 186021.
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
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9 Attorneys for Plaintiff
10 ANTHONY E. HELD, Ph.D., P.E.

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION
15

16 ANTHONY E. HELD, Ph.D., P.E.,

17 Plaintiff,

18 v.

19 D.M. MERCHANDISING, INC.; and DOES
20 1 through 150, inclusive,

21 Defendants.

Case No. CIV091884

**~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF CONSENT JUDGMENT**

Date: September 3, 2009

Time: 9:00 a.m.

Dept.: B

Judge: Hon. Michael B. Dufficy

1 In the above-entitled action, Plaintiff ANTHONY E. HELD, Ph.D., P.E. and Defendant
2 D.M. MERCHANDISING, INC., having agreed through their respective counsel that judgment be
3 entered pursuant to the terms of the Consent Judgment entered into by the parties, and after
4 issuing an order approving this Proposition 65 settlement agreement and entering the Consent
5 Judgment on September 3, 2009.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil
7 Procedure §664.6, judgment is entered in accordance with the terms of the Consent Judgment
8 attached hereto as **Exhibit 1**.

9
10 **IT IS SO ORDERED.**

11
12 Dated: SEP - 3 2009

MICHAEL B. DUFFICY
JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
Christopher M. Martin, State Bar No. 186021
2 HIRST & CHANLER LLP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 ANTHONY E. HELD, Ph.D., P.E.

7 Jeffrey B. Margulies, State Bar No. 126002
FULBRIGHT & JAWORSKI LLP
8 555 South Flower Street
Forty-First Floor
9 Los Angeles, CA 90071
Telephone: (213) 892-9200
10 Facsimile: (213) 892-9494

11 Attorneys for Defendant
D.M. MERCHANDISING, INC.

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF MARIN

14
15
16 ANTHONY E. HELD, PH.D., P.E.,
17 Plaintiff,

18 v.

19 D.M. MERCHANDISING, INC.,
20 Defendant.

) Case No. CIV091884
)
) **CONSENT JUDGMENT**
)
)
)

21
22
23 **1. INTRODUCTION**

24 **1.1 Anthony E. Held, Ph.D., P.E., and D.M. Merchandising, Inc.**

25 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
26 (hereinafter "Held"), and D.M. Merchandising, Inc. (hereinafter "D.M."), with Held and D.M.
27 collectively referred to as the "Parties." Held is an individual residing in California who seeks to
28 promote awareness of exposure to toxic chemicals and improve human health by reducing or

1 eliminating hazardous substances contained in consumer products. D.M. employs ten or more
2 persons and is a person in the course of doing business for purposes of the Safe Drinking Water
3 and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6 et seq.
4 (hereinafter "Proposition 65").

5 **1.2 General Allegations**

6 Held alleges that D.M. manufactures, distributes, and/or sells in the State of California
7 children's vinyl zipper pulls, vinyl notebooks, vinyl book marks, and bracelets with vinyl charm
8 plugs containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") without the requisite health
9 hazard warnings under Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical
10 known to the State of California to cause birth defects and other reproductive harm. DEHP shall
11 be referred to hereinafter as the "Listed Chemical."

12 **1.3 Product Description**

13 The products that are covered by this Consent Judgment are defined as follows: vinyl
14 zipper pulls, including, but not limited to the *Zipper Buddies 3 Zipper Pulls*, #ZIP-BUDS (#7
15 22950 13100 8), vinyl notebooks, including, but not limited to the *Football Notebook*, #SPT-
16 *NBFB* (#7 22950 10443 9), vinyl book marks, including, but not limited to the *Book Buddies*
17 *Book Marks*, #BOK-BUDS (#7 22950 12765 0), and bracelets with vinyl charm plugs, including,
18 but not limited to the *Holiday Zig-A-Roo's Adjustable Charm Bracelet*, #YT-ZBR (#7 22950 1466
19 8). All such items manufactured, distributed and/or sold by D.M. shall be referred to herein as the
20 "Products."

21 **1.4 Notices of Violation**

22 1.4.1 On November 28, 2008, Held served D.M. and various public enforcement
23 agencies with a document entitled "60-Day Notice of Violation" (hereinafter "Notice") that
24 provided D.M. and such public enforcers with notice that alleged that D.M. was in violation of
25 Proposition 65 for failing to warn consumers and customers that children's vinyl zipper pulls
26 manufactured, distributed and/or sold by D.M. and that contained DEHP exposed users in
27 California to the Listed Chemical.

28

1 1.4.2 On April 2, 2009, Held served D.M. and various public enforcement
2 agencies with a document entitled "Supplemental 60-Day Notice of Violation" (hereinafter
3 "Supplemental Notice") that provided D.M. and such public enforcers with notice that alleged
4 that D.M. was in violation of Proposition 65 for failing to warn consumers and customers that the
5 Products that D.M. manufactured, distributed and/or sold and that contained DEHP exposed users
6 in California to the Listed Chemical.

7 **1.5 Complaint**

8 On April 17, 2009, Dr. Held, acting, in the interest of the general public in California,
9 filed a complaint ("Complaint" or "Action") in the Superior Court in and for the County of Marin
10 against D.M. and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6
11 based on the alleged exposures to DEHP contained in the Products.

12 **1.6 No Admission**

13 D.M. denies the material, factual and legal allegations contained in Dr. Held's Notices and
14 Complaint and maintains that all Products it has manufactured, distributed and/or sold in
15 California have been and are in compliance with all applicable laws. Nothing in this Consent
16 Judgment shall be construed as an admission by D.M. of any fact, finding, issue of law, or
17 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
18 an admission by D.M. of any fact, finding, conclusion, issue of law, or violation of law, such
19 being specifically denied by D.M.. However, this Section shall not diminish or otherwise affect
20 D.M.'s obligations, responsibilities, and duties under this Consent Judgment.

21 **1.7 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the parties stipulate that this Court has
23 jurisdiction over D.M. as to the allegations contained in the Complaint, that venue is proper in the
24 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment.

26 **1.8 Effective Date**

27 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
28 consent judgment is entered by the court.

1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1** In lieu of providing Proposition 65 warnings for the Products, D.M. agrees after
3 April 30, 2009, to only ship Products that constitute Reformulated Products as defined below in
4 Section 2.2.

5 **2.2 Reformulation Standards**

6 Reformulated Products are defined as those containing less than 1,000 parts per million
7 (“ppm”) of DEHP, as measured by Environmental Protection Agency (“EPA”) testing
8 methodologies 3580A and 8270C, or by any methodology accepted by a federal or state agency
9 for establishing DEHP content in Products.

10 **2.3 Reformulation Commitment.**

11 D.M. hereby commits that one hundred percent (100%) of the Products that it
12 manufactures, distributes and/or sells in California after April 30, 2009, shall qualify as
13 Reformulated Products. Further, D.M., represents that, as a direct result of the Notices issued on
14 November 28, 2008, and April 2, 2009, it began to immediately implement a process for the
15 reformulation of the Products.

16 **3. MONETARY PAYMENTS**

17 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

18 3.1.1 In settlement of all claims related to the Products and Listed Chemical
19 referred to in the Complaint, and this Consent Judgment pursuant to Health & Safety Code §
20 25249.7(b), D.M. shall pay \$7,500 in civil penalties.

21 3.1.2 Civil penalties are to be apportioned in accordance with California Health
22 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
23 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
24 remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). D.M.
25 shall issue two separate checks for the penalty payment: (a) one check made payable to “Hirst &
26 Chanler LLP in Trust for OEHHA” in the amount of \$5,625, representing 75% of the total
27 penalty; and (b) one check to “Hirst & Chanler LLP in Trust for Anthony Held” in the amount of
28 \$1,875, representing 25% of the total penalty. Two separate 1099s shall be issued for the above-

1 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)
2 Anthony Held, whose information shall be provided five calendar days before the payment is due.

3 3.1.3 Counsel for D.M. shall collect the penalty payment and hold it in its Trust
4 Account until such time as payment is due to Dr. Held's counsel. Counsel for D.M. shall certify
5 in writing to Dr. Held's counsel, not later than July 15, 2009, that it is in receipt of such penalty
6 payment. Payment shall be delivered to Dr. Held's counsel within 5 business days of the
7 Effective Date, at the following address:

8 Hirst & Chanler LLP
9 Attn: Proposition 65 Coordinator
2560 Ninth Street, Suite 214
Berkeley, CA 94710

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

11 **4.1 Attorney Fees and Costs**

12 Pursuant to the private attorney general doctrine codified at California Code of Civil
13 Procedure (C.C.P.) § 1021.5 and general contract principles, D.M. shall reimburse Dr. Held and
14 his counsel a total of \$34,500 for fees and costs incurred as a result of investigating, bringing this
15 matter to D.M.'s attention, and litigating and negotiating a settlement in the public interest.
16 Counsel for D.M. shall collect the fee and cost payment and hold it in its Trust Account until such
17 time as payment is due to Dr. Held's counsel. Counsel for D.M. shall certify in writing to Dr.
18 Held's counsel, not later than July 15, 2009, that it is in receipt of such fee and cost payment.
19 D.M. shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check
20 payable to "Hirst & Chanler LLP" and shall be delivered within 5 business days of the Effective
21 Date.

22 Hirst & Chanler LLP
23 Attn: Proposition 65 Coordinator
2560 Ninth Street, Suite 214
24 Berkeley, CA 94710

25 **5. CLAIMS COVERED AND RELEASE**

26 **5.1 Claims Covered**

27 This Consent Judgment is a full, final, and binding resolution between Dr. Held, on behalf
28 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees,

1 and the general public, and D.M., its parents, shareholders, divisions, subdivisions, subsidiaries,
2 affiliates, partners, sister companies, employees, directors, insurers, and attorneys and their
3 successors and assigns (“Defendant Releasees”), and all entities to whom they distribute or sell
4 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
5 cooperative members, and licensees (“Downstream Defendant Releasees”), of any violation of
6 Proposition 65 or any other statutory or common law claims that have been or could have been
7 asserted by Dr. Held in the public interest against D.M., Defendant Releasees, and Downstream
8 Defendant Releasees, regarding the presence of, or the failure to warn about exposure to, the
9 Listed Chemical in Products manufactured, distributed, or sold by D.M. prior to the Effective
10 Date. Compliance with the terms of this Consent Judgment by D.M. and Defendant Releasees
11 after the Effective Date constitutes compliance with Proposition 65 regarding the presence of, and
12 the failure to warn about exposure to, the Listed Chemical in Covered Products manufactured,
13 distributed or sold by D.M. after the Effective Date.

14 **5.2 Dr. Held’s Release of D.M., and its Chain of Distribution**

15 5.2.1 In further consideration of the promises and agreements herein contained,
16 the injunctive relief commitments set forth in Section 2, and for the payments to be made
17 pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current agents,
18 representatives, attorneys, successors, and/or assignees, and the general public, hereby waives
19 with respect to Products all rights to institute or participate in, directly or indirectly, any form of
20 legal action and releases all claims, including, without limitation, all actions, and causes of action,
21 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,
22 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys’ fees) of
23 any nature whatsoever, whether known or unknown, fixed or contingent (collectively “Claims”),
24 against D.M., Defendant Releasees, and Downstream Defendant Releasees, resolved under this
25 Section 5.

26 5.2.2 Dr. Held also, in his individual capacity only and not in his representative
27 capacity, provides a general release herein which shall be effective as a full and final accord and
28 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,

1 damages, losses, claims, liabilities and demands of Dr. Held of any nature, character or kind,
2 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action. Dr.
3 Held acknowledges that he is familiar with Section 1542 of the California Civil Code, which
4 provides as follows:

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

11 Dr. Held, in his individual capacity only and *not* in his representative capacity, expressly waives
12 and relinquishes any and all rights and benefits which he may have under, or which may be
13 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
14 any other state or federal statute or common law principle of similar effect, to the fullest extent
15 that he may lawfully waive such rights or benefits pertaining to the released matters. In
16 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
17 complete release notwithstanding the discovery or existence of any such additional or different
18 claims or facts arising out of the released matters.

19 5.2.3 Upon court approval of the Consent Judgment, the Parties waive their
20 respective rights to a hearing or trial on the allegations of the complaint.

21 5.2.4 The parties further understand and agree that this release shall not extend
22 upstream to any entities that manufactured the Products or any component parts thereof, or any
23 distributors or suppliers who sold the Products or any component parts thereof to D.M..

24 **5.3 D.M.'s Release of Dr. Held**

25 D.M. waives any and all claims against Dr. Held, his attorneys, and other representatives
26 for any and all actions taken or statements made (or those that could have been taken or made) by
27 Dr. Held and his attorneys and other representatives, whether in the course of investigating claims
28 or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with
respect to the Products, as of the Effective Date.

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within nine
4 months after it has been fully executed by all parties.

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of
7 California.

8 **8. NOTICES**

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

13 To D.M.:

14 Myles Marks
15 Director of Purchasing
16 D.M. Merchandising, Inc.
17 835 N. Church Ct.
18 Elmhurst, IL 60126

19 With a copy to:

20 Jeffrey B. Margulies
21 Fulbright & Jaworski, LLP
22 555 South Flower Street
23 41st Floor
24 Los Angeles, CA 90071

25 To Dr. Held:

26 HIRST & CHANLER LLP
27 Attn: Proposition 65 Coordinator
28 2560 Ninth Street, Suite 214
 Berkeley, CA 94710

 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.

1 **9. COUNTERPARTS, FACSIMILE SIGNATURES**

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

5 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

6 Dr. Held will comply with the reporting form requirements referenced, in California
7 Health & Safety Code §25249.7(f).

8 **11. MODIFICATION**

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

12 **12. ATTORNEY'S FEES**

13 **12.1** A Party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
15 unless the unsuccessful Party has acted with substantial justification. For purposes of this
16 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
17 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

18 **12.2** Except as specifically provided in the above paragraph and in Section 4.1, each
19 Party shall bear its own costs and attorney's fees in connection with this action.

20 **12.3** Nothing in this Section 12 shall preclude a Party from seeking an award of
21 sanctions pursuant to law.

22 **13. ENTIRE AGREEMENT**

23 This Settlement Agreement contains the sole and entire agreement and understanding of
24 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
25 negotiations, commitments, and understandings related hereto. No representations, oral or
26 otherwise, express or implied, other than those contained herein have been made by any Party
27 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
28 deemed to exist or to bind any of the Parties.

1 **14. AUTHORIZATION**

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

5 **AGREED TO:**

AGREED TO:

6 **APPROVED**

7 **By Anthony E Held at 8:47 am, 6/29/09**

Date: June __, 2009

8 By: Anthony E Held
9 Plaintiff, Anthony E. Held, Ph.D., P.E.

By: _____
Defendant, D.M. Merchandising, Inc.

10 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

11 Date: June __, 2009
12 **HIRST & CHANLER LLP**

Date: June __, 2009
FULBRIGHT & JAWORSKI L.L.P.

14 By: _____
15 Attorneys for Plaintiff
16 Anthony E. Held, Ph.D., P.E.

By: _____
Jeffrey B. Margulies
Attorneys for Defendant
D.M. Merchandising, Inc.

1 **14. AUTHORIZATION**

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

5 **AGREED TO:**

6 Date: June __, 2009

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9 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

10 **APPROVED AS TO FORM:**

11 Date: June 29, 2009
12 **HIRST & CHANLER LLP**

13
14 By:  _____

15 Attorneys for Plaintiff
16 Anthony E. Held, Ph.D., P.E.

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AGREED TO:

Date: June __, 2009

By: _____
Defendant, D.M. Merchandising, Inc.

APPROVED AS TO FORM:

Date: June __, 2009
FULBRIGHT & JAWORSKI L.L.P.

By: _____
Jeffrey B. Margulies
Attorneys for Defendant
D.M. Merchandising, Inc.

1 14. AUTHORIZATION

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

5 AGREED TO:

6 Date: June __, 2009

7
8

9 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

AGREED TO:

Date: June __, 2009

By: _____
Defendant, D.M. Merchandising, Inc.

10 APPROVED AS TO FORM:

11 Date: June __, 2009
12 HIRST & CHANLER LLP

13
14

15 By: _____
16 Attorneys for Plaintiff
17 Anthony E. Held, Ph.D., P.E.

APPROVED AS TO FORM:

11 Date: ~~June~~^{July} 8, 2009
12 FULBRIGHT & JAWORSKI L.L.P.

14 By:  _____
15 Jeffrey B. Margulies
16 Attorneys for Defendant
17 D.M. Merchandising, Inc.

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1 14. AUTHORIZATION

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

5 AGREED TO:

6 Date: June __, 2009

7

8

9 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

10 APPROVED AS TO FORM:

11 Date: June __, 2009
12 HIRST & CHANLER LLP

13

14 By: _____
15 Attorneys for Plaintiff
16 Anthony E. Held, Ph.D., P.E.

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AGREED TO:

Jely
Date: June 8th, 2009 *jm*

By: *[Signature]*
Defendant, D.M. Merchandising, Inc.

APPROVED AS TO FORM:

Date: June __, 2009
FULBRIGHT & JAWORSKI L.L.P.

By: _____
Jeffrey B. Margulies
Attorneys for Defendant
D.M. Merchandising, Inc.