

# 2008-2009 Proposition 65 Settlement Reporting Form

Attorney: D. LAVINE

Case Name: HELD v BIG LOTS

Case No.: CGC-08-480730

Case Type: DEHP

Date of Execution: 8.18.09

Effective Date: 9.15.09

## PENALTIES

TOTAL NUMBER OF PAYMENTS: 2

\$ 60,000 DUE: 9.15.09 (OEHHA)

\$ 20,000 DUE: 9.15.09 (CLIENT)

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

COMMENTS:

TOTALING \$ 80,000

## FEES & COSTS

TOTAL NUMBER OF PAYMENTS: 1

\$ 133,500 DUE: 9.15.09

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

\$ \_\_\_\_\_ DUE: \_\_\_\_\_

COMMENTS:

IS THE CJ ATTACHED TO THIS FORM?

YES  NO

HAS THE CJ BEEN REPORTED?

YES  NO

HAS CASE BEEN MOVED TO SCL?

YES  NO

SUPPLEMENTAL NOTICE TO BE ISSUED?

YES  NO

DATE: \_\_\_\_\_

COMMENTS:

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

SEND W-9 TO:

(Contact Info)

Michael Delehunt

FOLEY & LARDNER

mdelehunt@foley.com

BACK END FEE(S) \$ N/A

COMMENTS:

\_\_\_\_\_

\_\_\_\_\_

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SRF Executed By: RC

Date: 8.19.09



1       **1. INTRODUCTION**

2               **1.1 Anthony E. Held, Ph.D., P.E., and Big Lots**

3               This consent judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.  
4               (“Dr. Held” or “Plaintiff”) and defendant Big Lots Stores, Inc. (“Big Lots” or “Defendant”), with  
5               Plaintiff and Defendant collectively referred to as the “parties.”

6               **1.2 Plaintiff**

7               Dr. Held is an individual residing in the County of Sacramento who seeks to promote  
8               awareness of exposure to toxic chemicals and improve human health by reducing or eliminating  
9               hazardous substances contained in consumer Products.

10              **1.3 Defendant**

11              Big Lots employs ten or more persons who are each a person in the course of doing business  
12              for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &  
13              Safety Code §25249.6 *et seq.* (“Proposition 65”).

14              **1.4 General Allegations**

15              Dr. Held alleges that Big Lots has manufactured, distributed and/or sold vinyl smocks, vinyl  
16              bathroom toys, sporting toys and other children’s items containing the chemicals known as di(2-  
17              ethylhexyl)phthalate (hereinafter “DEHP”) and/or lead in the State of California without the  
18              requisite health hazard warnings. DEHP and lead are listed pursuant to Proposition 65, and are  
19              known to cause birth defects and other reproductive harm. DEHP and lead shall be referred to  
20              hereinafter as the “listed chemicals.”

21              **1.5 Products Description**

22              The Products that are covered by this consent judgment are defined as follows: (1) vinyl  
23              smocks and other children’s art items and accessories containing DEHP, including but not limited  
24              to (1) vinyl smocks and other children’s art items and accessories containing DEHP, including but  
25              not limited to *Bridgeport Art Smock, Item #C68K0928*; (2) vinyl bathroom toys containing DEHP,  
26              including but not limited to *Duckies (3 Ducks), Item #13570*; (3) sporting toys containing DEHP  
27              and/or lead, including but not limited to *Little Pro Baseball Sports Bag with Bat, Balls and Glove*,  
28

1 No. 1105 (#0 75656 01105 2); *Soft Sports Ball, Item #6866; World Champ Jr. Play Boxing Gloves*  
2 *Soft Touch, Item #19150; World Champ Play Boxing Gloves & Punching Bag Set Soft Touch, Item*  
3 *#19151; Grand Slam Easy Catch Baseball & Glove, Item #22377C; and Grand Slam 5 Piece Base*  
4 *Set, Item #66034; (4) gloves with vinyl components containing DEHP, including but not limited to*  
5 *Winnie The Pooh Hat & Gloves Set, RN #87429; (5) vinyl bags containing DEHP, including but not*  
6 *limited to Baby in Bath Tub, Item #63968 (#0 4 42607 63968); Bath Time Kids Bath Tote, Item*  
7 *#99441 (#77610 2); Halloween Treat Bag, Item #363002962; Scooby-Doo! Bag, (#8 13274*  
8 *0080005); and Disney's Winnie the Pooh Lunch Bag, (#8 13274 00257 7); (6) children's vinyl*  
9 *placemats containing DEHP, including but not limited to Happy Halloween Placemat, Item #63482;*  
10 *(7) children's vinyl zipper pulls containing DEHP, including but not limited to Soccer Insulated*  
11 *Lunch Cooler, BFK000413 (#0 93177 40606 4); and (8) children's vinyl wallets containing DEHP,*  
12 *including but not limited to Hot Wheels Cinch Sack & Wallet Set, (#0 93177 70668 4). Such vinyl*  
13 *smocks, vinyl bathroom toys, soft vinyl sporting toys, gloves with vinyl components, vinyl bags,*  
14 *vinyl placemats, vinyl zipper pulls, and vinyl wallets containing DEHP and/or lead sold by Big Lots*  
15 *are referred to hereinafter as the "Products."*

#### 16 **1.6 Notices of Violation**

17 On January 11, 2008, April 22, 2008, July 10, 2008, January 26, 2009, March 13, 2009, and  
18 April 2, 2009, Dr. Held served Big Lots and various public enforcer agencies with documents  
19 entitled "60-Day Notice of Violation" (the "Notices") that provided Big Lots and Public Enforcers  
20 with notice of alleged violations of California Health & Safety Code §25249.6 for failing to warn  
21 consumers that the Products manufactured, distributed or sold by Big Lots exposed users in  
22 California to the listed chemicals, while the items were handled or chewed. To the best of parties'  
23 knowledge, no Public Enforcer has filed a Proposition 65 enforcement action to prosecute, or  
24 diligently prosecuted, any of the allegations set forth in the Notices.

#### 25 **1.7 Complaint**

26 On October 8, 2008, Dr. Held, who asserts that he was and is acting in the interest of the  
27 general public in California, filed a complaint ("Complaint") in the Superior Court in and for the  
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1 County of San Francisco against Big Lots and Does 1 through 150, alleging violations of California  
2 Health & Safety Code §25249.6 based on the alleged exposures to the listed chemicals contained in  
3 certain vinyl bath toys and soft vinyl sporting toys manufactured, distributed or sold by Big Lots.  
4 As no public enforcer has begun to diligently prosecute the allegations related to the most recent  
5 Notices during the sixty-day period following each, the Complaint shall be deemed amended to  
6 include the corresponding allegations.

7 **1.8 No Admission**

8 Big Lots denies the material, factual, and legal allegations contained in Dr. Held's Notices  
9 and Complaint, and maintains that all Products that it has manufactured, distributed, and/or sold in  
10 California have been and are in compliance with Proposition 65 and all other relevant laws.  
11 Nothing in this consent judgment shall be construed as an admission by Big Lots of any fact,  
12 finding, issue of law, or violation of law; nor shall compliance with this consent judgment constitute  
13 or be construed as an admission by Big Lots of any fact, finding, conclusion, issue of law, or  
14 violation of law, such being specifically denied by Big Lots. In order to avoid the costs and  
15 expenses of litigation and without admitting liability or wrongdoing, Big Lots has elected to resolve  
16 this matter by settlement and on the terms set forth herein. However, this section shall not diminish  
17 or otherwise affect Big Lots' obligations, responsibilities, and duties under this consent judgment.

18 **1.9 Consent to Jurisdiction**

19 For purposes of this consent judgment only, the parties stipulate that this Court has  
20 jurisdiction over Big Lots as to the allegations contained in the Complaint, that venue is proper in  
21 the County of San Francisco and that this Court has jurisdiction to enter and enforce the provisions  
22 of this consent judgment.

23 **1.10 Effective Date**

24 For purposes of this consent judgment, the term "effective date" shall mean September 15,  
25 2009.

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

2               **2.1       Reformulation Commitment in Lieu of Warnings**

3               After the effective date, Big Lots shall not sell or offer to be shipped for sale in California  
4 any Products containing the listed chemicals unless such Products comply with the reformulation  
5 provisions set forth in Sections 2.2 and 2.3.

6               **2.2       Reformulation Standards**

7               For purposes of this Consent Judgment, “Phthalate Free” Products shall mean Products  
8 containing less than or equal to 1000 parts per million (ppm), or 0.1 %, of DEHP when analyzed  
9 pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C,  
10 Consumer Product Safety Improvement Act of 2008 methodologies CPSD-AN-00095-MTHD and  
11 CPSD-AN-00143-MTHD or equivalent methods as may be allowed under Proposition 65; and  
12 “Lead Free” shall mean Products containing less than or equal to 300 parts per million, or .03%, of  
13 lead, when analyzed pursuant to EPA testing methodologies, 3050B and 6010B, CPSD-AN-  
14 00007-MTHD and CPSD-AN-00008-MTHD for lead or equivalent methods as may be allowed  
15 under Proposition 65. These reformulation standards shall only apply to materials that are  
16 accessible and not to those materials that are not accessible through reasonably foreseeable use and  
17 abuse.

18               **2.3       Reformulation Commitment**

19               Big Lots hereby commits that one hundred percent (100%) of the Products that it offers for  
20 sale in California after the effective date shall qualify as Reformulated Products.

21       **3.       MONETARY PAYMENTS**

22               **3.1       Payments Pursuant to Health & Safety Code §25249.7(b)**

23               Pursuant to Health & Safety Code §25249.7(b), the total civil penalty assessed shall be  
24 \$80,000. Civil penalties are to be apportioned in accordance with California Health & Safety  
25 Code §25192, with 75% of these funds remitted to the State of California’s Office of  
26 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty  
27 remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). Big  
28

1 Lots shall issue two separate checks for the penalty payment: (a) one check made payable to  
2 "Hirst & Chanler LLP in Trust For OEHHA" in the amount of \$60,000 representing 75% of the  
3 total penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the  
4 amount of \$20,000 representing 25% of the total penalty. Two separate 1099s shall be issued for  
5 the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486);  
6 and (b) Anthony Held, whose information shall be provided confidentially to counsel for Big Lots  
7 five calendar days before the payment is due. Payment shall be delivered to Dr. Held's counsel  
8 on or before September 15, 2009, at the following address:

9  
10 HIRST & CHANLER LLP  
11 Attn: Proposition 65 Controller  
12 2560 Ninth Street  
13 Parker Plaza, Suite 214  
14 Berkeley, CA 94710

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

14 **4.1 Attorney Fees and Costs.**

15 The parties acknowledge that Dr. Held and his counsel offered to resolve this dispute  
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
17 this fee issue to be resolved after the material terms of the agreement had been settled. Big Lots  
18 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had  
19 been finalized. The parties then attempted to (and did) reach an accord on the compensation due to  
20 Dr. Held and his counsel under general contract principles and the private attorney general doctrine  
21 codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the  
22 mutual execution of this agreement. Big Lots shall reimburse Dr. Held and his counsel the total of  
23 \$133,500 for fees and costs incurred as a result of investigating, bringing this matter to Big Lots'  
24 attention, and litigating and negotiating a settlement in the public interest, as well as the post  
25 execution activities described in paragraph 13 below. Big Lots shall issue a separate 1099 for fees  
26 and costs (EIN: 20-3929984) and shall make the check payable to "Hirst & Chanler LLP" and shall  
27 be delivered on or before September 15, 2009 to the following address:  
28

1 HIRST & CHANLER LLP  
2 Attn: Proposition 65 Controller  
3 2560 Ninth Street  
4 Parker Plaza, Suite 214  
5 Berkeley, CA 94710

6 **5. RELEASE OF ALL CLAIMS**

7 **5.1 Dr. Held's Release of Big Lots**

8 In further consideration of the promises and agreements herein contained, and for the  
9 payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and  
10 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the  
11 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form  
12 of legal action and releases all claims, including, without limitation, all actions, and causes of  
13 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,  
14 losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees)  
15 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),  
16 against Big Lots and each of its downstream wholesalers, licensors, licensees, auctioneers, retailers,  
17 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,  
18 subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents,  
19 and employees, and sister and parent entities (collectively "Defendant Releasees"). This release is  
20 limited to those claims that arise under Proposition 65 that were or could have been asserted in the  
21 Complaint against Defendant (including any claims that could be asserted in connection with any of  
22 the Products covered by this consent judgment) or Defendant Releasees, based on failure to warn  
23 about alleged exposures to the listed chemicals contained in the Products, as to vinyl smocks, vinyl  
24 bathroom toys, soft vinyl sporting toys, vinyl boxing gloves, gloves with vinyl components, vinyl  
25 bags and vinyl placemats sold by Defendant. Dr. Held further hereby personally releases Defendant  
26 Releasees from any other claims he personally could have brought against Defendant or Defendant  
27 Releasees under any other California laws or regulations relating to the regulation of phthalates or  
28 lead content with respect to the Products.

1           The parties further understand and agree that this release shall not extend upstream to any  
2 entities that manufactured the Products or any component parts thereof, or any distributors or  
3 suppliers who sold the Products or any component parts thereof to Big Lots.

4           **5.2    Big Lots' Release of Dr. Held**

5           Big Lots waives any and all claims against Dr. Held, his attorneys, and other representatives  
6 for any and all actions taken or statements made (or those that could have been taken or made) by  
7 Dr. Held and his attorneys and other representatives, whether in the course of investigating claims  
8 or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect  
9 to the Products.

10          **6.    COURT APPROVAL**

11           This consent judgment shall be null and void if, for any reason, it is not approved and  
12 entered by the Court within one year after it has been fully executed by all parties, in which event  
13 any monies that have been provided to Plaintiff, or his counsel pursuant to Section 3 and/or Section  
14 4 above, shall be refunded within fifteen days after receiving written notice from Big Lots that the  
15 one-year period has expired.

16          **7.    SEVERABILITY**

17           If, subsequent to the execution of this consent judgment, any of the provisions of this  
18 consent judgment are held by a court to be unenforceable, the validity of the enforceable provisions  
19 remaining shall not be adversely affected.

20          **8.    ENTIRE AGREEMENT**

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

1       **9. GOVERNING LAW**

2           The terms of this consent judgment shall be governed by the laws of the State of California  
3 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise  
4 rendered inapplicable by reason of law generally, or as to the Products, then Big Lots shall have no  
5 further obligations pursuant to this consent judgment with respect to, and to the extent that, the  
6 Products are so affected.

7       **10. NOTICES**

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

12       To Big Lots:

13           William H. Macbeth III  
14           Senior Counsel  
15           Big Lots!  
16           300 Phillipi Road  
17           Columbus, OH 43228

18           Michael E. Delehunt, Esq.  
19           FOLEY & LARDNER LLP  
20           One Maritime Plaza, Suite 600  
21           San Francisco, CA 94111

22       To Dr. Held:

23           Proposition 65 Coordinator  
24           HIRST & CHANLER LLP  
25           2560 Ninth Street  
26           Parker Plaza, Suite 214  
27           Berkeley, CA 94710-2565

28           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.

29       **11. COUNTERPARTS; FACSIMILE SIGNATURES**

30           This consent judgment may be executed in counterparts and by facsimile, each of which  
31 shall be deemed an original, and all of which, when taken together, shall constitute one and the  
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1 same document.

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

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

5 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

6 The parties acknowledge that, pursuant to California Health & Safety Code §25249.7, a  
7 noticed motion is required to obtain judicial approval of this consent judgment. Accordingly,  
8 Plaintiff agrees to file a motion to approve the settlement. Defendant agrees to support the motion  
9 to approve this consent judgment in full and shall take all reasonable measures to ensure that it is  
10 entered without delay and support any defense to an appeal by a third party after court approval.  
11 The support referenced in this paragraph shall be limited to Defendant's entry into a joinder in the  
12 motion to approve the settlement and a joinder in any brief or briefs filed by Plaintiff in defense of  
13 an appeal, as well as refraining from making oral or written comments to the Court or the Attorney  
14 General that are inconsistent with this Consent Judgment.

15 **14. MODIFICATION**

16 This consent judgment may be modified only: (1) by written agreement of the parties and  
17 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of  
18 any party and entry of a modified consent judgment by the Court. The Attorney General shall be  
19 served with notice of any proposed modification to this consent judgment at least fifteen days in  
20 advance of its consideration by the Court.

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**15. AUTHORIZATION**

The undersigned are authorized to execute this consent judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions of this consent judgment.

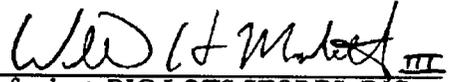
**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 8/18/09

By: \_\_\_\_\_  
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By:   
Defendant, BIG LOTS STORES, INC.

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

Date: \_\_\_\_\_

Date: 8/18/09

HIRST & CHANLER LLP

FOLEY & LARDNER LLP

By: \_\_\_\_\_  
David Lavine  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.

By:   
Michael Delehunt  
Attorneys for Defendant  
BIG LOTS STORES, INC.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

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**15. AUTHORIZATION**

The undersigned are authorized to execute this consent judgment on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions of this consent judgment.

**AGREED TO:**

**APPROVED**

Date: By Anthony E Held at 12:52 pm, 8/18/09

**AGREED TO:**

Date: 8/18/09

By: Anthony E Held  
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: Walter H. Mahoney III  
Defendant, BIG LOTS STORES, INC.

**APPROVED AS TO FORM:**

Date: August 18, 2009

HIRST & CHANLER LLP

By: David Lavine  
David Lavine  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.

**APPROVED AS TO FORM:**

Date: 8/18/09

FOLEY & LARDNER LLP

By: Michael Delehunt  
Michael Delehunt  
Attorneys for Defendant  
BIG LOTS STORES, INC.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT