

1 **1. INTRODUCTION**

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

3 This proposed consent judgment is entered into by and between plaintiff Anthony E. Held,
4 Ph.D., P.E. (“Dr. Held” or “Plaintiff”) and defendant Big Lots Stores, Inc. (“Big Lots” or
5 “Defendant”), with Plaintiff and Defendant collectively referred to as the “parties.” This proposed
6 consent judgment is intended to supersede an earlier proposed consent judgment executed by the
7 parties on August 18, 2008.

8 **1.2 Plaintiff**

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

12 **1.3 Defendant**

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

16 **1.4 General Allegations**

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

23 **1.5 Products Description**

24 The Products that are covered by this consent judgment are defined as follows: (1) watch
25 sets with handbags containing lead, including but not limited to *Tempreaux Watch Gift Set*,
26 #410020786, # 410020156 (2) vinyl smocks and other children’s art items and accessories
27 containing DEHP, including but not limited to *Bridgeport Art Smock*, #520017786, #520026074,
28

1 *Item #C68K0928; (3) vinyl bags containing DEHP, including but not limited to Baby in Bath Tub,*
2 *#510011360, #510018025, #510019987, Item #63968 (#0 42607 63968 9); Bath Time Kids Bath*
3 *Tote – Mango, #99441 (#7 09225 77610 2); and Halloween Treat Bag, #363002962; (4) children’s*
4 *vinyl placemats containing DEHP, including but not limited to Happy Halloween Placemat,*
5 *#350043209, Item #63482; (5) vinyl zipper pulls and bags with vinyl zipper pulls containing DEHP,*
6 *including but not limited to Cheeky Chimp Mini Pouchette, #120085323, #120085327 (#5 060081*
7 *141165); (6) vinyl bathroom toys containing DEHP, including but not limited to Duckies (3 Ducks),*
8 *#510017614, #510017611, Item #13570; (7) sporting toys containing DEHP and/or lead, including*
9 *but not limited to Soft Sports Ball, #510019331, #6866, WK41756N; World Champ Jr. Play Boxing*
10 *Gloves Soft Touch, #510003242, #510015587, #19150; World Champ Play Boxing Gloves &*
11 *Punching Bag Set Soft Touch, #19151; Grand Slam Easy Catch Baseball & Glove, #510008548,*
12 *#510017039, Item #22377C; and Grand Slam 5 Piece Base Set, #510007244, Item #66034; (8)*
13 *stuffed toys with accessories containing lead, including but not limited to Animated Friend,*
14 *#510020216, #MD080070D; and (9) tape measures containing lead, including but not limited to*
15 *Pro-Source 3 Pk Tape Measure, #230020121, Item #7396-3. Such items containing DEHP and/or*
16 *lead sold by Big Lots are referred to hereinafter as the “Products.”*

17 **1.6 Notices of Violation**

18 On each of January 11, 2008, April 22, 2008, July 10, 2008, January 26, 2009, March 13,
19 2009, April 2, 2009, August 14, 2009, September 15, 2009, and September 30, 2009, Dr. Held
20 served Big Lots and various public enforcer agencies with one or more documents entitled “60-Day
21 Notice of Violation” (together, “Notices”) that provided Big Lots and Public Enforcers with notice
22 of alleged violations of California Health & Safety Code §25249.6 for failing to warn consumers
23 that the Products manufactured, distributed or sold by Big Lots exposed users in California to the
24 listed chemicals, while the items were handled or chewed. To the best of parties’ knowledge, no
25 Public Enforcer has filed a Proposition 65 enforcement action to prosecute, or diligently prosecuted,
26 any of the allegations set forth in the Notices.

1 **1.7 Complaint**

2 On October 8, 2008, Dr. Held, who asserts that he was and is acting in the interest of the
3 general public in California, filed a complaint (“Complaint”) in the Superior Court in and for the
4 County of San Francisco against Big Lots and Does 1 through 150, alleging violations of California
5 Health & Safety Code §25249.6 based on the alleged exposures to the listed chemicals contained in
6 certain vinyl smocks, vinyl bathroom toys and sporting toys manufactured, distributed or sold by
7 Big Lots, as set out in the April 22, 2008 and July 10, 2008 Notices. As no public enforcer has
8 begun to diligently prosecute the allegations related to the more recent Notices during the sixty-day
9 period following each, the Complaint shall be deemed amended to include the corresponding
10 allegations.

11 **1.8 No Admission**

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

22 **1.9 Consent to Jurisdiction**

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

1 **1.10 Effective Date**

2 For purposes of this consent judgment, the term “effective date” shall mean September 15,
3 2009 with respect to all Products except for the handbags, vinyl zipper pulls, stuffed toys, and tape
4 measures, for which the effective date shall mean February 1, 2010.

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

6 **2.1 Reformulation Commitment in Lieu of Warnings**

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

10 **2.2 Reformulation Standards**

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

21 **2.3 Reformulation Commitment**

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

24 **3. MONETARY PAYMENTS**

25 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

26 Pursuant to Health & Safety Code §25249.7(b), the total civil penalty assessed shall be
27 \$86,450. Civil penalties are to be apportioned in accordance with California Health & Safety Code
28

1 §25192, with 75% of these funds remitted to the State of California's Office of Environmental
2 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony
3 Held as provided by California Health & Safety Code §25249.12(d). Big Lots has already issued
4 two separate checks, totaling \$80,000, toward the penalty payment: (1) one check made payable to
5 "Hirst & Chanler LLP in Trust For OEHHA" in the amount of \$60,000; and (2) a second check to
6 "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of \$20,000.

7 For the outstanding portion of the penalty amount, Big Lots shall issue two additional
8 checks: (1) a check payable to "Chanler Law Group in Trust for OEHHA" in the amount of
9 \$4,837.50; and (2) a separate check to "Chanler Law Group in Trust for Anthony Held" in the
10 amount of \$1,612.50. Two separate 1099s shall be issued for the above payments: (a) OEHHA,
11 P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) Anthony Held, whose
12 information shall be provided confidentially to counsel for Big Lots five calendar days before the
13 payment is due. The \$4,837.50 and \$1,612.50 payments shall be delivered to Dr. Held's counsel on
14 or before February 1, 2010, at the following address:

15 CHANLER LAW GROUP
16 Attn: Proposition 65 Controller
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710

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

21 **4.1 Attorney Fees and Costs**

22 The parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
24 this fee issue to be resolved after the material terms of the agreement had been settled. Big Lots
25 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
26 been finalized. The parties then attempted to (and did) reach an accord on the compensation due to
27 Dr. Held and his counsel under general contract principles and the private attorney general doctrine
28 codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the
mutual execution of this agreement. Big Lots shall reimburse Dr. Held and his counsel a total of

1 \$162,000 for fees and costs incurred as a result of investigating, bringing this matter to Big Lots'
2 attention, and litigating and negotiating a settlement in the public interest, as well as for the post-
3 execution activities described in paragraph 13 below. Big Lots has already issued a check in the
4 amount of \$133,500 payable to "Hirst & Chanler LLP." Big Lots shall issue a second check in the
5 amount of \$28,500 payable to "Chanler Law Group." Big Lots shall issue separate 1099s for fees
6 and costs payment (Hirst & Chanler LLP: EIN 20-3929984; Chanler Law Group: EIN 94-3171522).

7 The \$28,500 payment shall be delivered to Dr. Held's counsel on or before February 1, 2010, at the
8 following address:

9 CHANLER LAW GROUP
10 Attn: Proposition 65 Controller
11 2560 Ninth Street
12 Parker Plaza, Suite 214
13 Berkeley, CA 94710

14 **5. RELEASE OF ALL CLAIMS**

15 **5.1 Dr. Held's Release of Big Lots**

16 In further consideration of the promises and agreements herein contained, and for the
17 payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and
18 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
19 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form
20 of legal action and releases all claims, including, without limitation, all actions, and causes of
21 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
22 losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees)
23 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
24 against Big Lots and each of its downstream wholesalers, licensors, licensees, auctioneers, retailers,
25 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,
26 subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents,
27 and employees, and sister and parent entities (collectively "Defendant Releasees"). This release is
28 limited to those claims that arise under Proposition 65 that were or could have been asserted in the
Complaint against Defendant (including any claims that could be asserted in connection with any of

1 the Products covered by this consent judgment) or Defendant Releasees, based on failure to warn
2 about alleged exposures to the listed chemicals contained in the Products sold by Defendant. Dr.
3 Held further hereby personally releases Defendant Releasees from any other claims he personally
4 could have brought against Defendant or Defendant Releasees under any other California laws or
5 regulations relating to the regulation of phthalates or lead content with respect to the Products.

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

9 **5.2 Big Lots' Release of Dr. Held**

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

15 **6. COURT APPROVAL**

16 This consent judgment shall be null and void if, for any reason, it is not approved and
17 entered by the Court within one year after it has been fully executed by all parties, in which event
18 any monies that have been provided to Plaintiff, or his counsel pursuant to Section 3 and/or Section
19 4 above, shall be refunded within fifteen days after receiving written notice from Big Lots that the
20 one-year period has expired.

21 **7. SEVERABILITY**

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

25 **8. ENTIRE AGREEMENT**

26 This consent judgment contains the sole and entire agreement and understanding of the
27 parties with respect to the entire subject matter hereof, and any and all prior discussions.

1 negotiations, commitments, and understandings related hereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the parties.

5 **9. GOVERNING LAW**

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

11 **10. NOTICES**

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

16 To Big Lots:

17 William H. Macbeth III
18 Senior Counsel
19 Big Lots!
300 Phillipi Road
Columbus, OH 43228

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

23 To Dr. Held:

24 Proposition 65 Coordinator
25 CHANLER LAW GROUP
2560 Ninth Street
26 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
27
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1 Any party, from time to time, may specify in writing to the other party a change of address to
2 which all notices and other communications shall be sent.

3 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

10 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

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

20 **14. MODIFICATION**

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

1 **15. 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 Date: By Tony Held at 5:30 pm, Jan 12, 2010

Date: 1-8-10

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

By: Michael A. Schlund
Defendant, BIG LOTS STORES, INC.

11 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

12 Date: _____

Date: _____

13 CHANLER LAW GROUP

FOLEY & LARDNER LLP

14
15 By: _____
16 David Lavine
17 Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

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

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19 **IT IS SO ORDERED.**

20 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:

AGREED TO:

Date: _____

Date: _____

By: _____
Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: _____
Defendant, BIG LOTS STORES, INC.

APPROVED AS TO FORM:

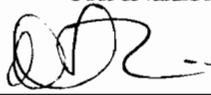
APPROVED AS TO FORM:

Date: January 13, 2010

Date: January 12, 2010

CHANLER LAW GROUP

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