

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and UPD, Inc.**

3 This Consent Judgment is entered into by and between Plaintiff Anthony E. Held, Ph.D.,
4 P.E. (“Dr. Held” or “Plaintiff”) and Defendant UPD, Inc. (“UPD” or “Defendant”), with Plaintiff
5 and Defendant collectively referred to as the “parties.”

6 **1.2 Plaintiff**

7 Dr. Held is an individual residing in the State of California 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 UPD employs 10 or more persons and is a person in the course of doing business for
12 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 UPD has manufactured, distributed and/or sold certain backpacks,
16 including but not limited to a Pooh PVC Drawstring Mini Sling Backpack containing di(2-
17 ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is a
18 phthalate that is listed as a reproductive and developmental toxicant pursuant to Proposition 65
19 and is referred to hereinafter as the “Listed Chemical.”

20 **1.5 Product Description**

21 The term “Covered Products” means PVC plastic backpacks, including but not limited to
22 the Pooh backpack described above, manufactured, distributed, and/or sold by UPD.

23 **1.6 Notice of Violation**

24 On May 23, 2008, Dr. Held served UPD, and National Stores, Inc. and Fallas-Paredes (the
25 “Retailer Defendants”), and various public enforcement agencies with a document entitled “60-
26 Day Notice of Violation” (the “Notice”) that provided public enforcers and these entities with
27 notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers that
28 the Covered Products that UPD and the Retailer Defendants manufactured, distributed and/or sold

1 exposed users in California to DEHP. To the best of the parties' knowledge, no public enforcer
2 has commenced and is diligently prosecuting the allegations set forth in the Notices.

3 **1.7 Complaint**

4 On August 4, 2008, Dr. Held, acting, in the interest of the general public in California,
5 filed a complaint ("Complaint" or "Action") in the Superior Court in and for the County of
6 Sacramento against UPD, the Retailer Defendants, and Does 1 through 150, alleging violations of
7 Health & Safety Code § 25249.6 based on the alleged exposures to DEHP contained in Covered
8 Products manufactured, distributed and/or sold by UPD and the Retailer Defendants.

9 **1.8 No Admission**

10 UPD denies the material, factual and legal allegations contained in Dr. Held's Notice and
11 Complaint and maintains that all Covered Products it has manufactured, distributed and/or sold in
12 California have been and are in compliance with all applicable laws. Nothing in this Consent
13 Judgment shall be construed as an admission by UPD of any fact, finding, issue of law, or
14 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
15 an admission by UPD of any fact, finding, conclusion, issue of law, or violation of law, such
16 being specifically denied by UPD. However, this Section shall not diminish or otherwise affect
17 UPD's 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 UPD as to the allegations contained in the Complaint, that venue is proper in the
21 County of Sacramento and that this Court has jurisdiction to enter and enforce the provisions of
22 this Consent Judgment.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
25 Consent Judgment is entered by the court.

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

2 **2.1 Reformulation Requirement**

3 2.1.1 Commencing on January 1, 2010, UPD shall not sell, ship, or offer to be
4 shipped for sale in California any Covered Product that contains more than 1,000 parts per
5 million (“ppm”) of DEHP.

6 2.1.2 Defendant may employ any methodology accepted by a federal or state
7 agency for establishing DEHP content in Covered Products.

8 **2.2 Interim Warning Requirement**

9 2.2.1 Commencing on April 30, 2009, and prior to January 1, 2010, UPD shall
10 not sell, ship, or offer to be shipped for sale in California any Covered Product that does not meet
11 the Reformulation Requirement of Section 2.1 without a clear and reasonable warning as required
12 in Section 2.2.2.

13 **2.2.2 Warning Methods.**

14 2.2.2.1 **Product Labeling.** UPD shall affix to the packaging, labeling,
15 or directly on each Covered Product that states:

16 **WARNING:** This product contains a chemical known to the State
17 of California to cause birth defects and other
18 reproductive harm.

19 2.2.2.2 **Point-of-Sale Warnings.** UPD may provide warning signs in
20 the form below to its customers in California with instructions to post the warnings in close
21 proximity to the point of display of the Covered Products and in a manner such that the consumer
22 understands to which specific Covered Product the warning applies.

23 **WARNING:** This product contains a chemical known to the State
24 of California to cause birth defects and other
25 reproductive harm.

26 2.2.3 Warnings shall be prominently placed with such conspicuousness as
27 compared with other words, statements, designs, or devices as to render it likely to be read and
28 understood by an ordinary individual under customary conditions of purchase or use.

1 **3. MONETARY PAYMENTS**

2 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

3 3.1.1 In settlement of all claims related to the Covered Products and Listed
4 Chemical referred to in the Complaint, and this Consent Judgment pursuant to Health & Safety
5 Code § 25249.7(b), UPD shall pay \$5,000.00 in civil penalties.

6 3.1.2 Civil penalties are to be apportioned in accordance with California Health
7 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
8 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
9 remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). UPD
10 shall issue two separate checks for the penalty payment: (a) one check made payable to "Hirst &
11 Chanler LLP in Trust for OEHHA" in the amount of \$3,750.00, representing 75% of the total
12 penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of
13 \$1,250.00, representing 25% of the total penalty. Two separate 1099s shall be issued for the
14 above-payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and
15 (b) Anthony Held, whose information shall be provided five calendar days before the payment is
16 due.

17 3.1.3 Counsel for UPD shall collect the penalty payment and hold it in its Trust
18 Account until such time as payment is due to Dr. Held's counsel. Counsel for UPD shall certify,
19 in writing to Dr. Held's counsel, not later than May 31, 2009, that it is in receipt of such penalty
20 payment. Payment shall be delivered to Dr. Held's counsel within 5 business days of the
21 Effective Date, at the following address:

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

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

26 **4.1 Attorney Fees and Costs**

27 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
28 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving

1 this fee issue to be resolved after the material terms of the agreement had been settled. UPD then
2 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
3 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
4 to Dr. Held and his counsel under general contract principles and the private attorney general
5 doctrine codified at California Code of Civil Procedure (C.C.P.) § 1021.5. UPD shall reimburse
6 Dr. Held and his counsel a total of \$40,000.00 for fees and costs incurred as a result of
7 investigating, bringing this matter to UPD's attention, and litigating and negotiating a settlement
8 in the public interest. Counsel for UPD shall collect the fee and cost payment and hold it in its
9 Trust Account until such time as payment is due to Dr. Held's counsel. Counsel for UPD shall
10 certify, in writing to Dr. Held's counsel, not later than May 31, 2009, that it is in receipt of such
11 fee and cost payment. UPD shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and
12 shall make the check payable to "Hirst & Chanler LLP" and shall be delivered within 5 days of
13 the Effective Date.

14 Hirst & Chanler LLP
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710

17 **5. CLAIMS COVERED AND RELEASE**

18 **5.1 Dr. Held's Release of UPD, and its Chain of Distribution**

19 5.1.1 In further consideration of the promises and agreements herein contained,
20 the injunctive relief commitments set forth in Section 2, and for the payments to be made
21 pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current agents,
22 representatives, attorneys, successors, and/or assignees, and the general public, hereby waives
23 with respect to Covered Products all rights to institute or participate in, directly or indirectly, any
24 form of legal action and releases all claims, including, without limitation, all actions, and causes
25 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
26 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
27 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
28 (collectively "claims"), against UPD and each of its wholesalers, licensors, licensees, import

1 partners, auctioneers, retailers (including, without limitation, the Retailer Defendants and any
2 other retailer in its chain of distribution in California), franchisees, dealers, customers, owners,
3 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective
4 officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and
5 parent entities (collectively "Releasees") that arise under Proposition 65 or any other statutory or
6 common law claims that could have been asserted in the public interest, as such claims relate to
7 the Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the
8 Covered Products. UPD's compliance with this Consent Judgment shall constitute compliance
9 with Proposition 65 with respect to the Listed Chemical in Covered Products after the Effective
10 Date.

11 5.1.2 Dr. Held also, in his individual capacity only and *not* in his representative
12 capacity, and on behalf of himself, his past and current agents, representatives, attorneys,
13 successors, and/or assignees, provides a general release herein which shall be effective as a full
14 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
15 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Dr. Held of any
16 nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject
17 matter of the Action or related to alleged exposure to DEHP from children's products
18 manufactured, distributed, or sold by UPD. Dr. Held acknowledges that he is familiar with
19 Section 1542 of the California Civil Code, which provides as follows:

20 A general release does not extend to claims which the creditor does
21 not know or suspect to exist in his favor at the time of executing the
22 release, which if known by him must have materially affected his
23 settlement with the debtor.

24 Dr. Held, in his individual capacity only and *not* in his representative capacity, expressly waives
25 and relinquishes any and all rights and benefits which he may have under, or which may be
26 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
27 any other state or federal statute or common law principle of similar effect, to the fullest extent
28 that he may lawfully waive such rights or benefits pertaining to the released matters. In
furtherance of such intention, the release hereby given shall be and remain in effect as a full and

1 complete release notwithstanding the discovery or existence of any such additional or different
2 claims or facts arising out of the released matters.

3 5.1.3 Upon final court approval of the Consent Judgment, the Parties waive their
4 respective rights to a hearing or trial on the allegations of the complaint and Dr. Held shall file a
5 dismissal of the complaint as to the Retailer Defendants without prejudice.

6 5.1.4 The parties further understand and agree that this release shall not extend
7 upstream to any entities that manufactured the Covered Products or any component parts thereof,
8 or any distributors or suppliers who sold the Covered Products or any component parts thereof to
9 UPD.

10 **5.2 UPD's Release of Dr. Held**

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

16 **6. COURT APPROVAL**

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

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California.

23 **8. NOTICES**

24 Unless specified herein, all correspondence and notices required to be provided pursuant
25 to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
26 (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the
27 other party at the following addresses:
28

1 To UPD:

2 Shahin Dardashty
3 UPD, Inc.
4 4507 S. Maywood Ave.
5 Vernon, CA 90058

6 With a copy to:

7 Jeffrey Margulies, Esq.
8 FULBRIGHT & JAWORSKI, LLP
9 555 South Flower Street
10 41st Floor
11 Los Angeles, CA 90071

12 To Dr. Held:

13 HIRST & CHANLER LLP
14 Attn: Proposition 65 Coordinator
15 2560 Ninth Street, Suite 214
16 Berkeley, CA 94710

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

19 **9. COUNTERPARTS, FACSIMILE SIGNATURES**

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

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

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

26 **11. MODIFICATION**

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

12. ATTORNEY'S FEES

12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
unless the unsuccessful Party has acted with substantial justification. For purposes of this

1 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
2 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

3 **12.2** Except as specifically provided in the above paragraph and in Section 4.1, each
4 Party shall bear its own costs and attorney's fees in connection with this action.

5 **12.3** Nothing in this Section 12 shall preclude a Party from seeking an award of
6 sanctions pursuant to law.

7 **13. AUTHORIZATION**

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

11 **AGREED TO:**

AGREED TO:

12 Date: May __, 2009

Date: May __, 2009

13 **APPROVED**
14 By Anthony E Held at 4:37 pm, 5/5/09

15
16 By: Anthony E Held
17 Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: _____
Defendant, UPD, Inc.

18 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

19 Date: May 6, 2009

Date: May __, 2009

20 **HIRST & CHANLER LLP**

FULBRIGHT & JAWORSKI L.L.P.

21
22 By: Daniel Bornstein
23 Daniel Bornstein
24 Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

By: _____
Jeffrey B. Margulies
Attorneys for Defendant
UPD, Inc.

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6 sanctions pursuant to law.

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9 respective parties and have read, understood, and agree to all of the terms and conditions of this
10 Consent Judgment.

11 **AGREED TO:**

AGREED TO:

12 Date: May __, 2009

Date: May 1, 2009

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

By: 
Defendant, UPD, Inc.

18 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

19 Date: May __, 2009

Date: May 2, 2009

20 **HIRST & CHANLER LLP**

FULBRIGHT & JAWORSKI LLP.

22 By: _____
23 Daniel Bornstein
24 Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

By: 
Jeffrey B. Margulies
Attorneys for Defendant
UPD, Inc.