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11 Attorneys for Defendant  
WEAR ME APPAREL LLC dba  
12 KIDS HEADQUARTERS

13  
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 FOR THE COUNTY OF SACRAMENTO  
16 UNLIMITED CIVIL JURISDICTION  
17

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

19 Plaintiff,

20 v.

21 WEAR ME APPAREL LLC, KIDS  
HEADQUARTERS, and DOES 1-150,

22 Defendants.  
23

Case No. 34-2008-00019508 CU-MC-GDS

**STIPULATION AND [PROPOSED]  
ORDER RE: CONSENT JUDGMENT**

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27 10/31/2008 2:03 PM  
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STIPULATION AND [PROPOSED] ORDER RE:  
CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., Wear Me Apparel LLC, and Kids**  
3 **Headquarters.**

4 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,  
5 P.E. (“Dr. Held” or “Plaintiff”) and Defendant Wear Me Apparel LLC dba Kids Headquarters  
6 (“Wear Me”). Plaintiff filed a Complaint erroneously naming Defendant Kids Headquarters as a  
7 separate entity. Plaintiff Held and Wear Me are collectively referred to as the “Parties.”

8 **1.2 Plaintiff**

9 Plaintiff represents that Dr. Held is an individual residing in the State of California who  
10 seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing  
11 or eliminating hazardous substances contained in consumer products.

12 **1.3 Defendant**

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

16 **1.4 General Allegations**

17 Dr. Held alleges that Wear Me has manufactured, distributed and/or sold children’s jackets  
18 containing di(2-ethylhexyl)phthalate (hereinafter “DEHP”) in the State of California without the  
19 requisite health hazard warnings. DEHP is known to cause birth defects and other reproductive  
20 harm and is listed by its chemical nomenclature pursuant to Proposition 65. DEHP is listed by the  
21 State of California under Proposition 65 and shall be referred to hereinafter as the “Listed  
22 Chemical.”

23 **1.5 Product Description**

24 For purposes of this Consent Judgment, the term “Covered Products” shall be defined as  
25 children’s jackets containing the Listed Chemical that are (i) distributed, sold or used within the  
26 State of California, (ii) bear the Avirex trademark or other Avirex-related trademarks, and (iii) are  
27

1 manufactured, distributed or sold by or on behalf of Wear Me, including but not limited to, the  
2 Avirex 3-piece Set, #49973004T.

3 **1.6 Notice of Violation**

4 On May 23, 2008, Dr. Held served Wear Me and various public enforcement agencies with  
5 a document entitled "60-Day Notice of Violation" ("Notice") that provided Wear Me and public  
6 enforcers with notice of alleged violations of California Health & Safety Code §25249.6 for  
7 failing to warn consumers that the Covered Products exposed users in California to DEHP.

8 **1.7 Settlement Discussions**

9 The Parties have engaged in discussions since June 2008 to resolve the disputed claims,  
10 and reached the settlement described herein.

11 **1.8 Complaint**

12 On August 15, 2008, Dr. Held, who was and is acting in the interest of the general public  
13 in California, filed a complaint ("Complaint") in the Superior Court in and for the County of  
14 Sacramento against Wear Me and Kids Headquarters and Does 1-150, alleging violations of  
15 California Health & Safety Code §25249.6 based on the alleged exposures to DEHP contained in  
16 the Covered Products.

17 **1.9 No Admission**

18 Wear Me asserts that it has conducted testing of the Covered Products and responded to the  
19 Notice within the 60-day period, and denies the material, factual, and legal allegations contained  
20 in Dr. Held's Notice and Complaint and maintain that all Covered Products sold and distributed in  
21 California have been and are in compliance with all laws. Nothing in this Consent Judgment shall  
22 be construed as an admission by Wear Me of any fact, finding, issue of law, or violation of law,  
23 nor shall compliance with this Consent Judgment constitute or be construed as an admission by  
24 Wear Me of any fact, finding, conclusion, issue of law, or violation of law, such being specifically  
25 denied by Wear Me. However, this Section shall not diminish or otherwise affect Wear Me's  
26 obligations, responsibilities, and duties under this Consent Judgment.



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**(ii) Point-of-Sale Warnings.**

Wear Me may perform its warning obligations by ensuring that signs are posted at retail outlets in the State of California where the Covered Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in close proximity to the point of display of the Covered Products that states.

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Where more than one Covered Product is sold in proximity to other like items or to those that do not require a warning (e.g., Reformulated Products as defined in Section 2.3), the following statement must be used:<sup>1</sup>

**WARNING:** The following products contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

*[List products for which warning is required]*

**(b) Mail Order Catalog and Internet Sales.**

Wear Me shall satisfy its warning obligations for Covered Products sold via mail order catalog or the Internet to California residents by providing a warning: (i) in the mail order catalog; or (ii) on the website. Warnings given in the mail order catalog or on the website shall identify the specific Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

**(i) Mail Order Catalog Warning.**

Any warning provided in a mail order catalog must be in the same type size or larger than

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<sup>1</sup> For purposes of the Consent Judgment, "sold in proximity" shall mean that the Covered Product and another product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 the Product description text within the catalog. The following warning shall be provided on the  
2 same page and in the same location as the display and/or description of the Product:

3           **WARNING:** This product contains DEHP, a phthalate  
4                           chemical known to the State of  
5                           California to cause birth defects and  
6                           other reproductive harm.

7           Where it is impracticable to provide the warning on the same page and in the same location  
8           as the display and/or description of the Product, Wear Me may utilize a designated symbol to cross  
9           reference the applicable warning and shall define the term “designated symbol” with the following  
10          language on the inside of the front cover of the catalog or on the same page as any order form for  
11          the Product(s):

12           **WARNING:** Certain products identified with this  
13                           symbol ▼ and offered for sale in this  
14                           catalog contain DEHP, a phthalate  
15                           chemical known to the State of  
16                           California to cause birth defects and  
17                           other reproductive harm.

18          The designated symbol must appear on the same page and in close proximity to the display  
19          and/or description of the Product. On each page where the designated symbol appears, Wear Me  
20          must provide a header or footer directing the consumer to the warning language and definition of  
21          the designated symbol.

22          If Wear Me elects to provide warnings in the mail order catalog, then the warnings must be  
23          included in all catalogs offering to sell one or more Covered Products printed after October 31,  
24          2008.

25                           (ii)    **Internet Website Warning.**

26          A warning may be given in conjunction with the sale of the Product via the Internet,  
27          provided it appears either: (a) on the same web page on which the Product is displayed; (b) on the  
28          same web page as the order form for the Product; (c) on the same page as the price for any  
29          Product; or (d) on one or more web pages displayed to a purchaser during the checkout process.  
30          The following warning statement shall be used and shall appear in any of the above instances  
31          adjacent to or immediately following the display, description, or price of the Product for which it

1 is given in the same type size or larger than the Product description text:

2                   **WARNING:** This product contains DEHP, a phthalate  
3   chemical known to the State of  
4   California to cause birth defects and  
5   other reproductive harm.

6                   Alternatively, the designated symbol may appear adjacent to or immediately following the  
7                   display, description, or price of the Product for which a warning is being given, provided that the  
8                   following warning statement also appears elsewhere on the same web page, as follows:

9                   **WARNING:** Products identified on this page with the  
10   following symbol contain DEHP, a  
11   phthalate chemical known to the State of  
12   California to cause birth defects and  
13   other reproductive harm: ▼.

14                   **2.2 Exceptions To Warning Requirements**

15                   The warning requirements set forth in Section 2.1 shall not apply to: Reformulated  
16                   Products (as defined in Section 2.3 below).

17                   **2.3 Reformulation Standards**

18                   Reformulated Products are defined as those Covered Products containing less than 1000  
19                   ppm of the Listed Chemical (DEHP), as measured by Environmental Protection Agency (“EPA”)  
20                   testing methodologies 3580A, 3550C and/or 8270C. The warnings required pursuant to Section  
21                   2.1 above shall not be required for such Reformulated Products. Further, the Parties agree that the  
22                   reformulation standard described in this section applies only to the Covered Products and not to  
23                   any other children’s apparel item.

24                   **2.4 Reformulation and/or Discontinuation of Products**

25                   Wear Me hereby commits that, effective as of October 31, 2008, one hundred percent  
26                   (100%) of the Covered Products manufactured for sale in California shall qualify as Reformulated  
27                   Products. Wear Me also represents that, as a direct result of the Notice issued on May 23, 2008, it  
28                   took steps to implement a process for the reformulation of the Avirex 3 Piece Set # 49973004T to  
29                   eliminate the presence of DEHP and/or discontinue the sale of the Avirex 3 Piece Set #  
30                   49973004T in California.

1 **3. MONETARY PAYMENTS**

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

3 Pursuant to Health & Safety Code §25249.7(b), Wear Me shall pay \$3,600 in civil  
4 penalties. The civil penalties to be apportioned in accordance with California Health & Safety  
5 Code §25192, with 75% of these funds remitted to the State of California's Office of  
6 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty  
7 remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). Wear  
8 Me shall issue two separate checks for the penalty payment: (a) one check made payable to "Hirst  
9 & Chanler LLP in Trust For OEHHA" in the amount of \$2,700 representing 75% of the total  
10 penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of  
11 \$900, representing 25% of the total penalty. Two separate 1099s shall be issued for the above  
12 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)  
13 Anthony Held, whose information shall be provided five calendar days before the payment is due.

14 Payment shall be delivered on or before November 14, 2008, to Dr. Held's counsel at the  
15 following address:

16 Hirst & Chanler LLP  
17 Attn: Proposition 65 Controller  
18 Capitol Mall Complex  
19 455 Capitol Mall, Suite 605  
20 Sacramento, CA 95814

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

22 **4.1 Attorney Fees and Costs**

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

1 court approval. Wear Me shall reimburse Dr. Held and his counsel for fees and costs incurred as a  
2 result of investigating, bringing this matter to Wear Me's attention, and litigating and negotiating a  
3 settlement in the public interest. Wear Me shall pay Dr. Held and his counsel \$16,400 for fees and  
4 costs incurred as a result of investigating, bringing this matter to Wear Me's attention, and  
5 litigating and negotiating a settlement in the public interest. Wear Me shall issue a separate 1099  
6 for fees and costs (EIN: 20-3929984) and shall make the check payable to "Hirst & Chanler LLP"  
7 and shall be delivered on or before November 14, 2008, to the following address:

8 Hirst & Chanler LLP  
9 Attn: Proposition 65 Controller  
10 Capitol Mall Complex  
11 455 Capitol Mall, Suite 605  
12 Sacramento, CA 95814

13 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

14 Pursuant to CCP §§1021 and 1021.5, the Parties further agree that Wear Me will reimburse  
15 Dr. Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval  
16 of this settlement agreement in the trial court and completing other necessary tasks after the  
17 execution of the Consent Judgment in an amount not to exceed \$6,500. Such additional fees and  
18 costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are  
19 not limited to, drafting and filing of the motion to approve papers, fulfilling the reporting  
20 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party  
21 objections, filing of notice of entry of the judgment, corresponding with opposing counsel and  
22 appearing before the Court related to the approval process.

23 Reimbursement of such additional fees and costs shall be due within ten calendar days  
24 after receipt of a billing statement from Dr. Held ("Additional Fee Claim"). Payment of the  
25 Additional Fee Claim shall be made to "Hirst & Chanler LLP," and the payment shall be  
26 delivered, at the following address:

27 HIRST & CHANLER LLP  
28 Attn: Proposition 65 Controller  
Capitol Mall Complex  
455 Capitol Mall, Suite 605  
Sacramento, CA 95814

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Wear Me has the right to object to such reimbursement and may submit the resolution of this issue to the American Arbitration Association (AAA) in Northern California to determine the reasonableness of the additional fees and costs sought, provided that an arbitration such notice of objection or decision to arbitrate is received by Dr. Held by the end of the ten calendar days. If an arbitration notice is not filed with AAA in a timely manner, Dr. Held may file a motion with the Court pursuant to both CCP §1021.5 and this consent judgment to recover additional attorney fees and costs incurred as set forth in this paragraph. In the event Wear Me submits the matter to arbitration, Dr. Held may seek, pursuant to CCP §1021.5, reasonable attorney fees and costs incurred for the arbitration.

**5. RELEASE OF ALL CLAIMS**

**5.1 Dr. Held's Release of Wear Me**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), that were brought or could have been brought against Wear Me Apparel LLC dba Kids Headquarters or its parents, subsidiaries or affiliates, and all of their customers, distributors, wholesalers, retailers, licensors, licensees, including without limitation Flight Club THC, LLC, and Flight Club, LLC (the owner and licensee, respectively, of the Avirex trademark and Avirex-related trademarks) and Mervyn's, or any other person in the course of doing business, and the successors and assigns of any of them, who may use, maintain, manufacture, distribute, advertise, market or sell Covered Products, and the officers, directors, managers, employees, members,

1 shareholders, agents, insurers and representatives of each of them (collectively "Releasees") in this  
2 Action. This release is limited to those Claims that arise under Proposition 65, as such Claims  
3 relate to Wear Me's alleged failure to warn about exposures to the Listed Chemical contained in  
4 the Covered Products.

5 The Parties further understand and agree that this release shall not extend upstream to any  
6 entities that manufactured the Covered Products for Wear Me (except for Covered Products  
7 manufactured by Wear Me) or any component parts thereof or to any distributors or suppliers who  
8 sold the Covered Products or any component parts thereof to Wear Me.

9 **5.2 Wear Me's Release of Dr. Held**

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

15 **6. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and  
17 shall be null and void if, for any reason, it is not approved and entered by the Court within one  
18 year after it has been fully executed by all Parties. If the Court does not approve the Consent  
19 Judgment, the Parties shall meet and confer as to (and jointly agree on) whether to modify the  
20 language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then  
21 the case shall proceed in its normal course on the Court's calendar. In the event that this Consent  
22 Judgment is entered by the Court and subsequently overturned by any appellate court or the  
23 motion to approve is not ultimately granted, any monies that have been provided to Plaintiff, or his  
24 counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen days of the  
25 appellate decision becoming final. If the Court's approval is ultimately overturned by an appellate  
26 court, the Parties shall meet and confer as to (and jointly agree on) whether to modify the terms of  
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1 the Consent Judgment. If the Parties do not jointly agree on a course of action to take, then the  
2 case shall proceed in its normal course on the trial court's calendar.

3 **7. SEVERABILITY**

4 If, subsequent to the execution of this Consent Judgment, any of the provisions of this  
5 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable  
6 provisions remaining shall not be adversely affected.

7 **8. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of  
9 California and apply within the State of California.

10 **9. NOTICES**

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

15 To Wear Me:

16 Eric Gul, Esq.  
17 WEAR ME APPAREL LLC  
31 West 34th Street, 4th Floor  
18 New York, NY 10001

19 With a copy to:

20 Ruth Ann Castro, Esq.  
FARELLA BRAUN & MARTEL, LLP  
235 Montgomery Street, 30<sup>th</sup> Floor  
21 San Francisco, California 94104

22 To Dr. Held:

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

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

3 **10. 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  
6 same document.

7 **11. 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 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

11 Dr. Held and Wear Me agree to mutually employ their best efforts to support the entry of  
12 this agreement as a Consent Judgment to obtain approval of the Consent Judgment by the trial  
13 court in a timely manner and defend the agreement against any appellate review. The Parties  
14 acknowledge that, pursuant to California Health & Safety Code §25249.7, a noticed motion is  
15 required to obtain judicial approval of this Consent Judgment. Accordingly, Dr. Held agrees to  
16 file a Motion to Approve the Consent Judgment.

17 **13. MODIFICATION**

18 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
19 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion  
20 of any party and entry of a modified Consent Judgment by the Court.

21 **14. AUTHORIZATION**

22 The undersigned are authorized to execute this Consent Judgment on behalf of their  
23 respective Parties and have read, understood, and agree to all of the terms and conditions of this  
24 Consent Judgment.

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**AGREED TO:**

**APPROVED**

*By Anthony E Held at 7:25 pm, 11/3/08*

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

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

**AGREED TO:**

Date: *10/31/08*

By: *[Signature]*  
Cory Silverstein  
Executive Vice President  
Defendant, WEAR ME APPAREL LLC

Date: *10/31/08*

By: *[Signature]*  
Cory Silverstein  
Executive Vice President  
Defendant, KIDS HEADQUARTERS

**APPROVED AS TO FORM:**

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

HIRST & CHANLER LLP  
By: David Bush  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.

**APPROVED AS TO FORM:**

Date: *10/31/08*

FARELLA BRAUN & MARTEL, LLP  
By: *[Signature]*  
Ruth Ann Castro  
Attorneys for Defendant  
WEAR ME APPAREL LLC

**IT IS SO ORDERED.**

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

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

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**AGREED TO:**

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

**APPROVED AS TO FORM:**

Date: Nov. 4, 2008  
HIRST & CHANLER LLP  
By: [Signature]  
David Bush  
Attorneys for Plaintiff  
ANTHONY E. HELD, Ph.D., P.E.

IT IS SO ORDERED.

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

**AGREED TO:**

Date: 10/31/08  
By: [Signature]  
Cory Silverstein  
Executive Vice President  
Defendant, WEAR ME APPAREL LLC

**APPROVED AS TO FORM:**

Date: 10/31/08  
FARELLA BRAUN & MARTEL, LLP  
By: [Signature]  
Beth Ann Castro  
Attorneys for Defendant  
WEAR ME APPAREL LLC

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