

1 Clifford A. Chanler, State Bar No. 135534  
David Lavine, State Bar No. 166744  
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 Michael J. Van Zandt, State Bar No. 96777  
8 Warren R. Webster, State, Bar No. 209540  
HANSON BRIDGETT LLP  
9 425 Market Street, 26 Floor  
San Francisco, CA 94105  
10 Telephone: (415) 777-3200  
Facsimile: (415) 541-9366

11 Attorneys for Defendant  
12 SCHOOL SPECIALTY, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF ALAMEDA  
15 UNLIMITED CIVIL JURISDICTION

16 ANTHONY E. HELD, Ph.D., P.E.,  
17 Plaintiff,  
18 v.  
19 SCHOOL SPECIALTY, INC.; *et al.*,  
20 Defendants.  
21

Case No. RG07350981

**[PROPOSED] CONSENT  
JUDGMENT**

Health & Safety Code §25249.6

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**1. INTRODUCTION**

**1.1 Anthony E. Held, Ph.D., P.E., and School Specialty, Inc.**

This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E (hereinafter “Dr. Held”) and School Specialty, Inc. (hereinafter “School Specialty”), with Dr. Held and School Specialty collectively referred to as the “Parties.”

**1.2 Plaintiff**

Dr. Held is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products.

**1.3 Defendants**

School Specialty employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5 *et seq.* (“Proposition 65”).

**1.4 General Allegations**

Dr. Held alleges that School Specialty has manufactured, distributed and/or sold in the State of California children’s soft vinyl sporting toys and inflatable vinyl toys containing the di(2ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm and shall be referred to herein as the “Listed Chemical.”

**1.5 Product Description**

The products that are covered by this Consent Judgment are (a) children’s soft vinyl sporting toys manufactured, imported, distributed and/or sold in California by School Specialty that contain the Listed Chemical, including, but not limited to, *Sportime Sof-Stuf Balls – 4” Softball, Item #1008801171*; and (b) children’s inflatable vinyl toys manufactured, imported, distributed and/or sold in California by School Specialty that contain the Listed Chemical, including, but not limited to, *Beach Ball 16”, Item #11268772171*). All such items shall be referred to herein as the “Products.”

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**1.6 Notice of Violation**

On or about November 7, 2008, Dr. Held served School Specialty and various public enforcement agencies with a “60-Day Notice of Violation” (the “Notice”) that provided School Specialty and such public enforcers with notice that alleged that School Specialty was in violation of California Health & Safety Code §25249.6 for failing to warn consumers and customers that the Products exposed users in California to the Listed Chemical. No public enforcer has diligently prosecuted the allegations set forth in the Notice. As a direct result of the Notice, School Specialty immediately began to implement a process for the reformulation of the Products at issue.

**1.7 Complaint**

On March 13, 2009, Dr. Held, who was and is acting in the interest of the general public in California, in the Superior Court in and for the County of Alameda, filed a fourth amended complaint in the case of *Held v. Toys “R” Us, Inc., et al.*, adding School Specialty as a defendant and alleging violations of Health & Safety Code §25249.6 by School Specialty based on the alleged exposures to the Listed Chemical contained in the Products manufactured, distributed and/or offered for sale in California by School Specialty (“Complaint”).

**1.8 No Admission**

School Specialty denies the material factual and legal allegations contained in Dr. Held’s Notice, and maintains that all products that it has manufactured, distributed and/or sold in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by School Specialty of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by School Specialty of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by School Specialty. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of School Specialty under this Consent Judgment.

**1.9 Consent to Jurisdiction**

For purposes of this Consent Judgment only, the parties stipulate that this Court has jurisdiction over School Specialty as to the allegations contained in the Complaint, that venue is

1 proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the  
2 provisions of this Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 15, 2009.

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

6 **2.1 Reformulation Commitment**

7 As of the Effective Date, School Specialty shall only manufacture, or cause to be  
8 manufactured, Products for sale in California that are Phthalate Free, as set forth below. For purposes  
9 of this Consent Judgment, "Phthalate-Free" Products shall mean Products containing less than or  
10 equal to 1,000 parts per million ("ppm") of the Listed Chemical, when analyzed pursuant to  
11 Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C or other  
12 comparable methodologies accepted by one or more federal and/or state agencies. School Specialty  
13 hereby commits that, on or before September 1, 2009, 100% of the Products that it sells in California  
14 shall qualify as Reformulated Products or shall otherwise be exempt from the warning requirements  
15 of Section 2.2.

16 **2.2 Product Warnings**

17 School Specialty shall not sell, ship, or offer to be shipped for sale in California, Products  
18 containing the Listed Chemical unless such Products are shipped with the clear and reasonable  
19 warning set out below, or comply with the reformulation requirements of Phthalate-Free Products set  
20 out in Section 2.1.

21 School Specialty shall perform its warning obligation by affixing a warning to the packaging  
22 of, labeling to, or, if no label exists, directly on each Product sold to customers in California by  
23 School Specialty or its agents, that reads:

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

26 Any warning issued for Products 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

1 understood by an ordinary and competent individual under customary conditions before purchase or,  
2 for Products shipped directly to customers in California, before use.

3 **2.3 Exceptions To Warning Requirements**

4 The warning requirements set forth in Sections 2.2 shall not apply to:

- 5 (i) Products shipped to customers in California prior to the Effective Date,  
6 provided that School Specialty does not have actual knowledge, or reason from  
7 communication with its suppliers of the Product(s), to believe that the Listed Chemical  
8 in such Product(s) exceeds 1,000 ppm;  
9 (ii) Phthalate-Free Products (as defined in Section 2.1).

10 **3. MONETARY PAYMENTS**

11 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

12 In settlement of all the claims referred to in this Consent Judgment against it, School  
13 Specialty shall pay \$2,500 in civil penalties to be apportioned in accordance with California Health &  
14 Safety Code §25192, with 75% of these funds remitted to the State of California's Office of  
15 Environmental Health Hazard Assessment and the remaining 25% of these penalty monies remitted  
16 to Dr. Held as provided by California Health & Safety Code §25249.12(d). School Specialty shall  
17 issue two separate checks for the penalty payment: (a) one check made payable to Hirst & Chanler  
18 LLP in Trust for the State of California's Office of Environmental Health Hazard Assessment ("Hirst  
19 & Chanler LLP in Trust for OEHHA") in the amount of \$1,875, representing 75% of the total penalty  
20 and (b) one check to "Hirst & Chanler LLP in Trust for A. Dr. Held" in the amount of \$625,  
21 representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments:  
22 The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-  
23 0284486) in the amount of \$1,875. The second 1099 shall be issued to Dr. Held in the amount of  
24 \$625, whose address and tax identification number shall be furnished, upon request, at least five  
25 calendar days before payment is due. The payments shall be delivered on or before the Effective  
26 Date, at the following address:

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

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

5           **4.1 Attorney Fees and Costs.**

6           The Parties acknowledge that Held and his counsel offered to resolve this dispute without  
7           reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee  
8           issue to be resolved after the material terms of the agreement had been settled. After the other  
9           settlement terms had been finalized, the Parties attempted to (and did) reach an accord on the  
10          compensation due to Held and his counsel under general contract principles and the private attorney  
11          general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all work  
12          performed through the mutual execution of this agreement. Under these legal principles, School  
13          Specialty shall reimburse Dr. Held's counsel for fees and costs, incurred as a result of investigating,  
14          bringing this matter to School Specialty attention, and negotiating a settlement in the public interest.  
15          School Specialty shall pay Dr. Held and his counsel \$27,000 for all attorneys' fees, expert and  
16          investigation fees, and related costs. The payment shall be issued in a third separate check made  
17          payable to "Hirst & Chanler LLP" and shall be delivered on or before the Effective Date, at the  
18          following address:

19           HIRST & CHANLER LLP  
20           Attn: Proposition 65 Controller  
21           2560 Ninth Street  
22           Parker Plaza, Suite 214  
23           Berkeley, CA 94710

22          School Specialty shall issue a separate 1099 for fees and cost paid in the amount of \$27,000 to Hirst  
23          & Chanler LLP, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-  
24          3929984).

25           **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

26          Pursuant to CCP §§1021 and 1021.5, the Parties agree that School Specialty will reimburse  
27          Dr. Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of  
28

1 this settlement in the trial court, in an amount not to exceed \$4,250. Such additional fees and costs,  
2 exclusive of fees and costs that may be incurred in the event of an appeal include, but are not limited  
3 to, drafting and filing of the motion to approve papers, fulfilling the reporting requirements  
4 referenced in Health & Safety Code §25249.7(f), responding to any third party objections,  
5 corresponding with opposing counsel, and appearing before the Court related to the approval process.

6 Reimbursement of such additional fees and costs shall be due within fifteen days after receipt  
7 of a billing statement from Dr. Held ("Additional Fee Claim"). Payment of the Additional Fee Claim  
8 shall be made to "Hirst & Chanler LLP," and the payment shall be delivered, at the following  
9 address:

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

15 School Specialty has the right to object to such reimbursement and may submit the resolution  
16 of this issue to the American Arbitration Association (AAA) in Northern California to determine the  
17 reasonableness of the additional fees and costs sought, provided that an arbitration such notice of  
18 objection or decision to arbitrate is received by Dr. Held by the end of the fifteen calendar days  
19 provided for payment following receipt of the Additional Fee Claim. If an arbitration notice is not  
20 filed with AAA in a timely manner, Dr. Held may file a motion with the Court pursuant to both CCP  
21 §1021.5 and this settlement to recover additional attorney fees and costs incurred as set forth in this  
22 paragraph. In the event School Specialty submits the matter to arbitration, the prevailing party may  
23 seek reasonable attorney fees and costs incurred for the arbitration.

## 24 5. RELEASE OF ALL CLAIMS

### 25 5.1 Dr. Held's Release of School Specialty

26 In further consideration of the promises and agreements herein contained, and for the  
27 payments to be made pursuant to Sections 3 and 4 above, Dr. Held, on behalf of himself, his past and  
28 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

1 legal action and releases all claims, including, without limitation, all actions, and causes of action, in  
2 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or  
3 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any  
4 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against  
5 School Specialty and each of its downstream distributors, wholesalers, licensors, licensees,  
6 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies,  
7 corporate affiliates, subsidiaries (including, but not limited to, Sportime LLC), and their respective  
8 officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and  
9 parent entities (collectively "Releasees"). This release is limited to those claims that arise under  
10 Proposition 65, as such claims relate to School Specialty's alleged failure to warn about exposures to  
11 or identification of the Listed Chemical contained in the Products.

12 The Parties further understand and agree that the above releases shall not extend upstream to  
13 any entities that manufactured the Products or any component parts thereof, or any distributors or  
14 suppliers who sold the Products or any component parts thereof to School Specialty.

15 **5.2 School Specialty's Release of Dr. Held**

16 School Specialty waives any and all claims against Dr. Held, his attorneys and other  
17 representatives, for any and all actions taken or statements made (or those that could have been taken  
18 or made) by Dr. Held and his attorneys and other representatives, whether in the course of  
19 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
20 and/or with respect to the Products.

21 **5.3 Civil Code §1542 Waiver**

22 All parties acknowledge and agree that they are aware of and understand the provisions of  
23 Code of Civil Procedure Section 1542 and hereby knowingly and voluntarily waive the benefits of  
24 that section which provides, "A general release does not extend to claims which the creditor does not  
25 know or suspect to exist in his or her favor at the time of executing the release, which if known by  
26 him or her must have materially affected his or her settlement with the debtor."  
27  
28

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
3 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
4 has been fully executed by all parties, in which event any monies that have been provided to Dr.  
5 Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen  
6 (15) days after receiving written notice from School Specialty that the one year period has expired.

7 **7. SEVERABILITY**

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

11 **8. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of California  
13 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is  
14 otherwise rendered inapplicable by reason of law generally, or as to the Products, then School  
15 Specialty shall have no further obligations pursuant to this Consent Judgment with respect to, and to  
16 the extent that, the Products are so affected.

17 **9. NOTICES**

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

22 For School Specialty:

23 Karen Riching  
24 Corporate Administration  
25 School Specialty, Inc.  
26 W6316 Design Drive  
27 Greenville, WI 54942

28 *with copy to:*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Michael J. Van Zandt, Esq.  
Warren R. Webster, Esq.  
Hanson Bridgett LLP  
425 Market Street, 26 Floor  
San Francisco, CA 94105

For Dr. Held:

Proposition 65 Coordinator  
Hirst & Chanler, LLP  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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.

**10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

**12. ADDITIONAL POST EXECUTION ACTIVITIES**

The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Dr. Held and School Specialty and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall include, at a minimum, cooperating on the drafting and filing any papers in support of the required motion for judicial approval.

**13. MODIFICATION**

This Consent Judgment may be modified only: (1) by written agreement of the parties and upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of

1 any party and entry of a modified consent judgment by the Court. The Attorney General shall be  
2 served with notice of any proposed modification to this Consent Judgment at least fifteen days in  
3 advance of its consideration by the Court.

4 **14. AUTHORIZATION**

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

8 **AGREED TO:** APPROVED  
9 Date: \_\_\_\_\_  
By Anthony E Held at 11:04 am, 6/17/09

**AGREED TO:**  
Date: 6/12/09

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

By: Peter Savits  
Defendant, SCHOOL SPECIALTY, INC.

13 **APPROVED AS TO FORM:**  
14 Date: June 17, 2009  
15 HIRST & CHANLER LLP  
16 By: [Signature]  
17 David Lavine  
18 Attorneys for Plaintiff  
19 ANTHONY E. HELD, Ph.D., P.E.

**APPROVED AS TO FORM:**  
Date: 6/15/09  
HANSON BRIDGETT LLP  
By: [Signature]  
Warren R. Webster  
Attorneys for Defendant  
SCHOOL SPECIALTY, INC.

20 **IT IS SO ORDERED.**

21  
22 Date: \_\_\_\_\_  
23 JUDGE OF THE SUPERIOR COURT