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

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18 Attorneys for Defendant  
19 D.M. MERCHANDISING, INC.

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
21 COUNTY OF MARIN

22 ANTHONY E. HELD, PH.D., P.E., ) Case No. CIV091884  
23 Plaintiff, ) **CONSENT JUDGMENT**  
24 v. )  
25 D.M. MERCHANDISING, INC., )  
26 Defendant. )

27 **1. INTRODUCTION**

28 **1.1 Anthony E. Held, Ph.D., P.E., and D.M. Merchandising, Inc.**

This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E. (hereinafter "Held"), and D.M. Merchandising, Inc. (hereinafter "D.M."), with Held and D.M. collectively referred to as the "Parties." Held is an individual residing in California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or

1 eliminating hazardous substances contained in consumer products. D.M. employs ten or more  
2 persons and is a person in the course of doing business for purposes of the Safe Drinking Water  
3 and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6 et seq.  
4 (hereinafter "Proposition 65").

### 5 **1.2 General Allegations**

6 Held alleges that D.M. manufactures, distributes, and/or sells in the State of California  
7 children's vinyl zipper pulls, vinyl notebooks, vinyl book marks, and bracelets with vinyl charm  
8 plugs containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") without the requisite health  
9 hazard warnings under Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical  
10 known to the State of California to cause birth defects and other reproductive harm. DEHP shall  
11 be referred to hereinafter as the "Listed Chemical."

### 12 **1.3 Product Description**

13 The products that are covered by this Consent Judgment are defined as follows: vinyl  
14 zipper pulls, including, but not limited to the *Zipper Buddies 3 Zipper Pulls*, #ZIP-BUDS (#7  
15 22950 13100 8), vinyl notebooks, including, but not limited to the *Football Notebook*, #SPT-  
16 *NBFB* (#7 22950 10443 9), vinyl book marks, including, but not limited to the *Book Buddies*  
17 *Book Marks*, #BOK-BUDS (#7 22950 12765 0), and bracelets with vinyl charm plugs, including,  
18 but not limited to the *Holiday Zig-A-Roo's Adjustable Charm Bracelet*, #YT-ZBR (#7 22950 1466  
19 8). All such items manufactured, distributed and/or sold by D.M. shall be referred to herein as the  
20 "Products."

### 21 **1.4 Notices of Violation**

22 1.4.1 On November 28, 2008, Held served D.M. and various public enforcement  
23 agencies with a document entitled "60-Day Notice of Violation" (hereinafter "Notice") that  
24 provided D.M. and such public enforcers with notice that alleged that D.M. was in violation of  
25 Proposition 65 for failing to warn consumers and customers that children's vinyl zipper pulls  
26 manufactured, distributed and/or sold by D.M. and that contained DEHP exposed users in  
27 California to the Listed Chemical.

28

1           1.4.2 On April 2, 2009, Held served D.M. and various public enforcement  
2 agencies with a document entitled "Supplemental 60-Day Notice of Violation" (hereinafter  
3 "Supplemental Notice") that provided D.M. and such public enforcers with notice that alleged  
4 that D.M. was in violation of Proposition 65 for failing to warn consumers and customers that the  
5 Products that D.M. manufactured, distributed and/or sold and that contained DEHP exposed users  
6 in California to the Listed Chemical.

7           **1.5 Complaint**

8           On April 17, 2009, Dr. Held, acting, in the interest of the general public in California,  
9 filed a complaint ("Complaint" or "Action") in the Superior Court in and for the County of Marin  
10 against D.M. and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6  
11 based on the alleged exposures to DEHP contained in the Products.

12           **1.6 No Admission**

13           D.M. denies the material, factual and legal allegations contained in Dr. Held's Notices and  
14 Complaint and maintains that all Products it has manufactured, distributed and/or sold in  
15 California have been and are in compliance with all applicable laws. Nothing in this Consent  
16 Judgment shall be construed as an admission by D.M. of any fact, finding, issue of law, or  
17 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as  
18 an admission by D.M. of any fact, finding, conclusion, issue of law, or violation of law, such  
19 being specifically denied by D.M.. However, this Section shall not diminish or otherwise affect  
20 D.M.'s obligations, responsibilities, and duties under this Consent Judgment.

21           **1.7 Consent to Jurisdiction**

22           For purposes of this Consent Judgment only, the parties stipulate that this Court has  
23 jurisdiction over D.M. as to the allegations contained in the Complaint, that venue is proper in the  
24 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this  
25 Consent Judgment.

26           **1.8 Effective Date**

27           For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this  
28 consent judgment is entered by the court.

1     **2.     INJUNCTIVE RELIEF: REFORMULATION**

2             **2.1**     In lieu of providing Proposition 65 warnings for the Products, D.M. agrees after  
3     April 30, 2009, to only ship Products that constitute Reformulated Products as defined below in  
4     Section 2.2.

5             **2.2     Reformulation Standards**

6             Reformulated Products are defined as those containing less than 1,000 parts per million  
7     (“ppm”) of DEHP, as measured by Environmental Protection Agency (“EPA”) testing  
8     methodologies 3580A and 8270C, or by any methodology accepted by a federal or state agency  
9     for establishing DEHP content in Products.

10            **2.3     Reformulation Commitment.**

11            D.M. hereby commits that one hundred percent (100%) of the Products that it  
12     manufactures, distributes and/or sells in California after April 30, 2009, shall qualify as  
13     Reformulated Products. Further, D.M., represents that, as a direct result of the Notices issued on  
14     November 28, 2008, and April 2, 2009, it began to immediately implement a process for the  
15     reformulation of the Products.

16     **3.     MONETARY PAYMENTS**

17            **3.1     Payments Pursuant to Health & Safety Code § 25249.7(b)**

18            3.1.1     In settlement of all claims related to the Products and Listed Chemical  
19     referred to in the Complaint, and this Consent Judgment pursuant to Health & Safety Code §  
20     25249.7(b), D.M. shall pay \$7,500 in civil penalties.

21            3.1.2     Civil penalties are to be apportioned in accordance with California Health  
22     & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of  
23     Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty  
24     remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). D.M.  
25     shall issue two separate checks for the penalty payment: (a) one check made payable to “Hirst &  
26     Chanler LLP in Trust for OEHHA” in the amount of \$5,625, representing 75% of the total  
27     penalty; and (b) one check to “Hirst & Chanler LLP in Trust for Anthony Held” in the amount of  
28     \$1,875, representing 25% of the total penalty. Two separate 1099s shall be issued for the above-

1 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)  
2 Anthony Held, whose information shall be provided five calendar days before the payment is due.

3 3.1.3 Counsel for D.M. shall collect the penalty payment and hold it in its Trust  
4 Account until such time as payment is due to Dr. Held's counsel. Counsel for D.M. shall certify  
5 in writing to Dr. Held's counsel, not later than July 15, 2009, that it is in receipt of such penalty  
6 payment. Payment shall be delivered to Dr. Held's counsel within 5 business days of the  
7 Effective Date, at the following address:

8 Hirst & Chanler LLP  
9 Attn: Proposition 65 Coordinator  
10 2560 Ninth Street, Suite 214  
11 Berkeley, CA 94710

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

##### 13 **4.1 Attorney Fees and Costs**

14 Pursuant to the private attorney general doctrine codified at California Code of Civil  
15 Procedure (C.C.P.) § 1021.5 and general contract principles, D.M. shall reimburse Dr. Held and  
16 his counsel a total of \$34,500 for fees and costs incurred as a result of investigating, bringing this  
17 matter to D.M.'s attention, and litigating and negotiating a settlement in the public interest.  
18 Counsel for D.M. shall collect the fee and cost payment and hold it in its Trust Account until such  
19 time as payment is due to Dr. Held's counsel. Counsel for D.M. shall certify in writing to Dr.  
20 Held's counsel, not later than July 15, 2009, that it is in receipt of such fee and cost payment.  
21 D.M. shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check  
22 payable to "Hirst & Chanler LLP" and shall be delivered within 5 business days of the Effective  
23 Date.

24 Hirst & Chanler LLP  
25 Attn: Proposition 65 Coordinator  
26 2560 Ninth Street, Suite 214  
27 Berkeley, CA 94710

#### 28 **5. CLAIMS COVERED AND RELEASE**

##### **5.1 Claims Covered**

This Consent Judgment is a full, final, and binding resolution between Dr. Held, on behalf  
of himself, his past and current agents, representatives, attorneys, successors, and/or assignees,

1 and the general public, and D.M., its parents, shareholders, divisions, subdivisions, subsidiaries,  
2 affiliates, partners, sister companies, employees, directors, insurers, and attorneys and their  
3 successors and assigns (“Defendant Releasees”), and all entities to whom they distribute or sell  
4 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,  
5 cooperative members, and licensees (“Downstream Defendant Releasees”), of any violation of  
6 Proposition 65 or any other statutory or common law claims that have been or could have been  
7 asserted by Dr. Held in the public interest against D.M., Defendant Releasees, and Downstream  
8 Defendant Releasees, regarding the presence of, or the failure to warn about exposure to, the  
9 Listed Chemical in Products manufactured, distributed, or sold by D.M. prior to the Effective  
10 Date. Compliance with the terms of this Consent Judgment by D.M. and Defendant Releasees  
11 after the Effective Date constitutes compliance with Proposition 65 regarding the presence of, and  
12 the failure to warn about exposure to, the Listed Chemical in Covered Products manufactured,  
13 distributed or sold by D.M. after the Effective Date.

## 14 **5.2 Dr. Held’s Release of D.M., and its Chain of Distribution**

15 5.2.1 In further consideration of the promises and agreements herein contained,  
16 the injunctive relief commitments set forth in Section 2, and for the payments to be made  
17 pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current agents,  
18 representatives, attorneys, successors, and/or assignees, and the general public, hereby waives  
19 with respect to Products all rights to institute or participate in, directly or indirectly, any form of  
20 legal action and releases all claims, including, without limitation, all actions, and causes of action,  
21 in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses,  
22 or expenses (including, but not limited to, investigation fees, expert fees, and attorneys’ fees) of  
23 any nature whatsoever, whether known or unknown, fixed or contingent (collectively “Claims”),  
24 against D.M., Defendant Releasees, and Downstream Defendant Releasees, resolved under this  
25 Section 5.

26 5.2.2 Dr. Held also, in his individual capacity only and not in his representative  
27 capacity, provides a general release herein which shall be effective as a full and final accord and  
28 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,

1 damages, losses, claims, liabilities and demands of Dr. Held of any nature, character or kind,  
2 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action. Dr.  
3 Held acknowledges that he is familiar with Section 1542 of the California Civil Code, which  
4 provides as follows:

5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
6 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO  
7 EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE  
8 RELEASE, WHICH IF KNOWN BY HIM MUST HAVE  
9 MATERIALLY AFFECTED HIS SETTLEMENT WITH THE  
10 DEBTOR.

11 Dr. Held, in his individual capacity only and *not* in his representative capacity, expressly waives  
12 and relinquishes any and all rights and benefits which he may have under, or which may be  
13 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under  
14 any other state or federal statute or common law principle of similar effect, to the fullest extent  
15 that he may lawfully waive such rights or benefits pertaining to the released matters. In  
16 furtherance of such intention, the release hereby given shall be and remain in effect as a full and  
17 complete release notwithstanding the discovery or existence of any such additional or different  
18 claims or facts arising out of the released matters.

19 5.2.3 Upon court approval of the Consent Judgment, the Parties waive their  
20 respective rights to a hearing or trial on the allegations of the complaint.

21 5.2.4 The parties further understand and agree that this release shall not extend  
22 upstream to any entities that manufactured the Products or any component parts thereof, or any  
23 distributors or suppliers who sold the Products or any component parts thereof to D.M..

24 **5.3 D.M.'s Release of Dr. Held**

25 D.M. waives any and all claims against Dr. Held, his attorneys, and other representatives  
26 for any and all actions taken or statements made (or those that could have been taken or made) by  
27 Dr. Held and his attorneys and other representatives, whether in the course of investigating claims  
28 or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with  
respect to the Products, as of the Effective Date.

1     **6.     COURT APPROVAL**

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

5     **7.     GOVERNING LAW**

6             The terms of this Consent Judgment shall be governed by the laws of the State of  
7 California.

8     **8.     NOTICES**

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

13                     To D.M.:  
14                     Myles Marks  
15                     Director of Purchasing  
16                     D.M. Merchandising, Inc.  
17                     835 N. Church Ct.  
18                     Elmhurst, IL 60126

19                     With a copy to:  
20                     Jeffrey B. Margulies  
21                     Fulbright & Jaworski, LLP  
22                     555 South Flower Street  
23                     41<sup>st</sup> Floor  
24                     Los Angeles, CA 90071

25                     To Dr. Held:  
26                     HIRST & CHANLER LLP  
27                     Attn: Proposition 65 Coordinator  
28                     2560 Ninth Street, Suite 214  
                      Berkeley, CA 94710

              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.



1 **9. COUNTERPARTS, FACSIMILE SIGNATURES**

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

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

6 Dr. Held will comply with the reporting form requirements referenced, in California  
7 Health & Safety Code §25249.7(f).

8 **11. MODIFICATION**

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

12 **12. ATTORNEY'S FEES**

13 **12.1** A Party who unsuccessfully brings or contests an action arising out of this Consent  
14 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs  
15 unless the unsuccessful Party has acted with substantial justification. For purposes of this  
16 Consent Judgment, the term substantial justification shall carry the same meaning as used in the  
17 Civil Discovery Act of 1986, Code of Civil Procedure §§ 2016, et seq.

18 **12.2** Except as specifically provided in the above paragraph and in Section 4.1, each  
19 Party shall bear its own costs and attorney's fees in connection with this action.

20 **12.3** Nothing in this Section 12 shall preclude a Party from seeking an award of  
21 sanctions pursuant to law.

22 **13. ENTIRE AGREEMENT**

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

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**14. 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:**

**APPROVED**  
**By Anthony E Held at 8:47 am, 6/29/09**

Date: June \_\_, 2009

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

By: \_\_\_\_\_  
Defendant, D.M. Merchandising, Inc.

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

Date: June \_\_, 2009  
**HIRST & CHANLER LLP**

Date: June \_\_, 2009  
**FULBRIGHT & JAWORSKI L.L.P.**

By: \_\_\_\_\_  
Attorneys for Plaintiff  
Anthony E. Held, Ph.D., P.E.

By: \_\_\_\_\_  
Jeffrey B. Margulies  
Attorneys for Defendant  
D.M. Merchandising, Inc.

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**14. 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: June \_\_, 2009

Date: June \_\_, 2009

By: \_\_\_\_\_  
Plaintiff, Anthony E. Held, Ph.D., P.E.

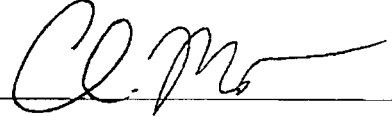
By: \_\_\_\_\_  
Defendant, D.M. Merchandising, Inc.

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

Date: June 29, 2009  
**HIRST & CHANLER LLP**

Date: June \_\_, 2009  
**FULBRIGHT & JAWORSKI L.L.P.**

By:  \_\_\_\_\_  
Attorneys for Plaintiff  
Anthony E. Held, Ph.D., P.E.

By: \_\_\_\_\_  
Jeffrey B. Margulies  
Attorneys for Defendant  
D.M. Merchandising, Inc.

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**14. 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: June \_\_, 2009

Date: June \_\_, 2009

By: \_\_\_\_\_  
Plaintiff, Anthony E. Held, Ph.D., P.E.

By: \_\_\_\_\_  
Defendant, D.M. Merchandising, Inc.

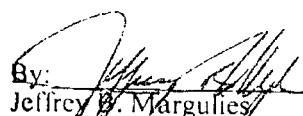
**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

Date: June \_\_, 2009  
**HIRST & CHANLER LLP**

Date: ~~June~~ <sup>July</sup> 8, 2009  
**FULBRIGHT & JAWORSKI L.L.P.**

By: \_\_\_\_\_  
Attorneys for Plaintiff  
Anthony E. Held, Ph.D., P.E.

By:  \_\_\_\_\_  
Jeffrey B. Margulies  
Attorneys for Defendant  
D.M. Merchandising, Inc.

1 14. 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:

6 Date: June \_\_, 2009

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9 By: \_\_\_\_\_  
Plaintiff, Anthony E. Held, Ph.D., P.E.

10 APPROVED AS TO FORM:

11 Date: June \_\_, 2009  
HIRST & CHANLER LLP

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14 By: \_\_\_\_\_

15 Attorneys for Plaintiff  
16 Anthony E. Held, Ph.D., P.E.

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AGREED TO:

*Sily*  
Date: June 8<sup>th</sup>, 2009 *jm*

By: *[Signature]*  
Defendant, D.M. Merchandising, Inc.

APPROVED AS TO FORM:

Date: June \_\_, 2009  
FULBRIGHT & JAWORSKI L.L.P.

By: \_\_\_\_\_  
Jeffrey B. Margulies  
Attorneys for Defendant  
D.M. Merchandising, Inc.