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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 FOR THE CITY AND COUNTY OF SAN FRANCISCO
22 UNLIMITED CIVIL JURISDICTION

23 ANTHONY HELD, Ph.D., P.E.,)

24 Plaintiff,)

25 v.)

26 SWIBCO, INC.; and DOES 1 through 150,)
27 inclusive,)

28 Defendants.)

Case No. CGC-09-488636

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

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1. INTRODUCTION

1.1 Anthony E. Held, Ph.D., P.E., and Swibco, Inc.

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

1.2 Plaintiff

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

1.3 Swibco

Swibco employs ten or more persons who are each 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 §25249.6, *et seq.* (Proposition 65).

1.4 General Allegations

Dr. Held alleges that Swibco has manufactured, distributed and/or sold vinyl zipper pulls and key rings containing phthalates, including di(2-ethylhexyl)phthalate (hereinafter the “Listed Chemical”), without Proposition 65 warnings. The Listed Chemical is on the Proposition 65 list as known to cause cancer as well as birth defects and other reproductive harm.

1.5 Product Description

The products that are covered by this Consent Judgment are defined as follows: vinyl zipper pulls and key rings containing Listed Chemical such as, but not limited to, *Shoobies Zipper Pull, Blue with “W” Plug Charm*. All such vinyl zipper pulls and key rings containing the Listed Chemical are referred to hereinafter as the “Products.”

1.6 Notice of Violation

On February 24, 2009, Dr. Held served Swibco and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided Swibco and public enforcers with notice of alleged violations of California Health & Safety Code §25249.6 for

1 failing to warn consumers that the Products that Swibco sold exposed users in California to the
2 Listed Chemical. To the best of the parties' knowledge, no public enforcer has diligently
3 prosecuted the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On May 22, 2009, Dr. Held, acting in the interest of the general public in California, filed a
6 complaint ("Complaint" or "Action") in the Superior Court in and for the County of San Francisco
7 against Swibco and Does 1 through 150, alleging violations of California Health & Safety Code
8 §25249.6 based on the alleged exposures to the Listed Chemical contained in the Products sold by
9 Swibco.

10 **1.8 No Admission**

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

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Swibco as to the allegations contained in the Complaint, that venue is proper in the
22 County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of this
23 Consent Judgment.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean July 31, 2009.
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1 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

2 **2.1 Product Warnings**

3 Commencing on the Effective Date, Swibco shall not sell, ship, or offer to be shipped for
4 sale in California any Product unless such Product is sold or shipped with one of the clear and
5 reasonable warnings set forth in subsections 2.1(a) and (b), are otherwise exempt pursuant to
6 Section 2.2, or comply with the reformulation standards set forth in Section 2.3.

7 Each warning shall be prominently placed with such conspicuousness as compared with
8 other words, statements, designs, or devices as to render it likely to be read and understood by an
9 ordinary individual under customary conditions before purchase or use. Each warning shall be
10 provided in a manner such that the consumer or user understands to which *specific* Product the
11 warning applies, so as to minimize if not eliminate the chance that an overwarning situation will
12 arise.

13 **(a) Retail Store Sales.**

14 **(i) Product Labeling.** Swibco may affix a warning to the packaging,
15 labeling, or directly on each Product sold in retail outlets in California by Swibco or its agents, that
16 states:

17 **WARNING:** This product contains phthalates, chemicals
18 known to the State of California to cause birth
19 defects and other reproductive harm.

20 **(ii) Point-of-Sale Warnings.** Alternatively, Swibco may provide
21 warning signs in the form below to its customers in California with instructions to post the warnings
22 in close proximity to the point of display of the Products.

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

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

¹For purposes of the consent judgment, “sold in proximity” shall mean that the Product and another product are

1 **WARNING:** This product contains phthalates, chemicals
2 known to the State of California to cause birth
 defects and other reproductive harm.

3 *[list products for which warning is required]*

4 **(b) Mail Order Catalog and Internet Sales.** In the event that Swibco sells
5 Products via mail order catalog or internet to customers located in California after the Effective
6 Date that are not Reformulated Products, Swibco shall provide a warning for Products sold via mail
7 order catalog or the Internet to California residents: (i) in the mail order catalog; or (ii) on the
8 website. Warnings given in the mail order catalog or on the website shall identify the specific
9 Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

10 **(i) Mail Order Catalog Warning.** Any warning provided in a mail
11 order catalog must be in the same type size or larger than the Product description text within the
12 catalog. The following warning shall be provided on the same page and in the same location as the
13 display and/or description of the Product:

14 **WARNING:** This product contains phthalates, chemicals
15 known to the State of California to cause birth
 defects and other reproductive harm.

16 Where it is impracticable to provide the warning on the same page and in the same location
17 as the display and/or description of the Product, Swibco may utilize a designated symbol to cross
18 reference the applicable warning and shall define the term “designated symbol” with the following
19 language on the inside of the front cover of the catalog or on the same page as any order form for
20 the Product(s):

21 **WARNING:** Certain products identified with this symbol
22 ▼ and offered for sale in this catalog contain
23 phthalates, chemicals known to the State of
 California to cause birth defects and other
 reproductive harm.

24 The designated symbol must appear on the same page and in close proximity to the display
25 and/or description of the Product. On each page where the designated symbol appears, Swibco

26 offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not
27 reasonably determine which of the two products is subject to the warning sign.

1 must provide a header or footer directing the consumer to the warning language and definition of
2 the designated symbol.

3 If Swibco elects to provide warnings in the mail order catalog, then the warnings must be
4 included in all catalogs offering to sell one or more Products printed after the Effective Date.

5 (ii) **Internet Website Warning.** A warning may be given in conjunction
6 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page
7 on which the Product is displayed; (b) on the same web page as the order form for the Product; (c)
8 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
9 purchaser during the checkout process. The following warning statement shall be used and shall
10 appear in any of the above instances adjacent to or immediately following the display, description,
11 or price of the Product for which it is given in the same type size or larger than the Product
12 description text:

13 **WARNING:** This product contain phthalates, chemicals
14 known to the State of California to cause birth
defects and other reproductive harm.

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

18 **WARNING:** Products identified on this page with the
19 following symbol contain phthalates,
20 chemicals known to the State of California to
cause birth defects and other reproductive
harm: ▼.

21 **2.2 Exceptions To Warning Requirements**

22 The warning requirements set forth in Section 2.1 shall not apply to:

- 23 (i) Any Product manufactured by Swibco prior to the Effective Date; or
- 24 (ii) Reformulated Products (as defined in Section 2.3 below).

25 **2.3 Reformulation Standards**

26 Reformulated Products are defined as those Products containing less than or equal to 1,000
27 parts per million (“ppm”) of the Listed Chemical. The warnings required pursuant to Section 2.1
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1 above shall not be required for Reformulated Products.

2 **2.4 Past and Future Reformulation Steps**

3 Swibco hereby commits that one hundred percent (100%) of the Products that it
4 manufactures after September 30, 2009 for sale in California, shall qualify as Reformulated
5 Products. Swibco also represents that, as a direct result of the Notice issued on February 24, 2009,
6 the company began to immediately implement a process for the reformulation of the products at
7 issue.

8 **3. MONETARY PAYMENTS**

9 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

10 In settlement of all the claims referred to in this Consent Judgment, Swibco shall pay \$4,000
11 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192,
12 with 75% of these funds remitted to the State of California's Office of Environmental Health
13 Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony Held as
14 provided by California Health & Safety Code §25249.12(d). Swibco shall issue two separate
15 checks for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in Trust For
16 OEHHA" in the amount of \$3,000, representing 75% of the total penalty; and (b) one check to
17 "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of \$1,000, representing 25% of the
18 total penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box
19 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall
20 be provided five calendar days before the payment is due.

21 Payment shall be delivered to Dr. Held's counsel on or before July 31, 2009, at the
22 following address:

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

28 The sums paid pursuant to this section 3.1 shall be held by Hirst & Chanler LLP in its established
client trust account until entry of this Consent Judgment by the Court.

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

2 **4.1 Attorney Fees and Costs.**

3 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
4 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
5 this fee issue to be resolved after the material terms of the Consent Judgment had been settled.
6 Swibco then expressed a desire to resolve the fee and cost issue shortly after the other settlement
7 terms had been finalized. The Parties then attempted to (and did) reach an accord on the
8 compensation due to Dr. Held and his counsel under general contract principles and the private
9 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
10 work performed through the mutual execution of this agreement. Swibco shall reimburse Dr. Held
11 and his counsel a total of \$26,000 for fees and costs incurred as a result of investigating, bringing
12 this matter to Swibco's attention, and litigating and negotiating a settlement in the public interest.
13 This figure includes Dr. Held's future fees and costs including attorneys' fees to be incurred in
14 seeking judicial approval of this Consent Judgment as well as any other legal work performed after
15 the execution of this Consent Judgment incurred in an effort to obtain finality of the case. This
16 fixed fee, which Swibco acknowledges is significantly less than its own legal fees and costs already
17 billed to it by defense counsel in this matter, does not include any attorney fees that Dr. Held may
18 incur in responding to any motion to modify this Consent Judgment brought by Swibco. Swibco
19 shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check payable
20 to "Hirst & Chanler LLP" and to be delivered on or before July 31, 2009, to the following address:

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

26 The sums paid pursuant to this section 4.1 shall be held by Hirst & Chanler in its established
27 client trust account until entry of this Consent Judgment by the Court.
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1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Dr. Held's Release of Swibco**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and
5 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
6 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form
7 of legal action and releases all claims, including, without limitation, all actions, and causes of
8 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
9 losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees)
10 of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"),
11 against Swibco and each of its wholesalers, licensors, licensees, auctioneers, retailers, distributors,
12 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,
13 subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents,
14 and employees, and sister and parent entities (collectively "Releasees") that arise under Proposition
15 65, as such claims relate to Swibco's alleged failure to warn about exposures to the Listed Chemical
16 contained in the Products.

17 Dr. Held in his individual capacity and *not* his representative capacity hereby releases all
18 claims which he now has or may have in the future against Swibco, irrespective of the subject
19 matter, of all character, kind and nature, whether said claims are known or unknown or are
20 suspected or unsuspected and Dr. Held expressly waives any and all rights and benefits which he
21 now has, or in the future may have, under California Civil Code Section 1542, which provides as
22 follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
25 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
26 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
27 DEBTOR.

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1 It is expressly agreed and understood that the general release by Dr. Held of Swibco is a
2 determinative consideration of Swibco's willingness and decision to enter into this Consent
3 Judgment.

4 **5.2 Swibco's Release of Dr. Held**

5 Swibco waives any and all claims against Dr. Held, his attorneys, and other representatives
6 for any and all actions taken by Dr. Held and his attorneys and other representatives, whether in the
7 course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in
8 this matter, and/or with respect to the Products.

9 **6. COURT APPROVAL**

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

23 **7. SEVERABILITY**

24 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
25 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
26 provisions remaining shall not be adversely affected.
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1 **8. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
4 rendered inapplicable by reason of law generally, or as to the Products, then Swibco may provide
5 written notice to Dr. Held of any asserted change in the law, and shall have no further obligations
6 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so
7 affected.

8 **9. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant to
10 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 Swibco:

14 Malcolm Weiss
15 Catherine Allen
16 HUNTON & WILLIAMS, LLP
17 550 South Hope Street, Suite 2000
18 Los Angeles, CA 90071

19 To Dr. Held:

20 Proposition 65 Coordinator
21 HIRST & CHANLER LLP
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710-2565

25 Any party, from time to time, may specify in writing to the other party a change of address
26 to which all notices and other communications shall be sent. Should Dr. Held become aware of any
27 vinyl zipper pulls or key rings manufactured, distributed or sold by Swibco in California that Dr.
28 Held believes violates Section 2.4 of this Consent Judgment, Dr. Held agrees to provide Swibco
with written notice which identifies the products at issue by model and style number and shall
include relevant test data showing the presence of DEHP. Within 30 days following Swibco's
receipt of such notice, Swibco shall have the option to provide Dr. Held, at the addresses listed in

1 this Section, with testing information demonstrating its compliance with Section 2.4. If such testing
2 information is satisfactory to Dr. Held, no further action shall be taken by Dr. Held. If such testing
3 information is not satisfactory to Dr. Held, then within 60 days of Dr. Held informing Swibco in
4 writing that the testing information is not satisfactory and reasons for such determination, Dr. Held
5 and Swibco agree to mediate any alleged violation of Section 2.4 before the American Arbitration
6 Association. If such mediation is unsuccessful, then Dr. Held may bring any action allowable by
7 law to enforce the provisions of Section 2.4. Swibco agrees to use its best efforts to cure any
8 alleged breach of Section 2.4 during the exchange of information and mediation procedures.

9 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

10 This Consent Judgment may be executed in counterparts and by facsimile or, pdf signature,
11 each of which shall be deemed an original, and all of which, when taken together, shall constitute
12 one and the same document. A facsimile or, pdf signature shall be as valid as the original.

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

14 Dr. Held and his attorneys agree to comply with the reporting form requirements referenced
15 in California Health & Safety Code §25249.7(f).

16 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

17 Dr. Held and Swibco agree to mutually employ their and their counsel's best efforts to
18 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
19 Judgment by the Court in a timely manner and defend any appellate review of the Court's approval.
20 The parties acknowledge that, pursuant to California Health & Safety Code §25249.7, a noticed
21 motion is required to obtain judicial approval of this Consent Judgment which Dr. Held shall draft
22 and file, and Swibco shall join. If any third party objection is filed to the noticed motion, Dr. Held
23 and Swibco shall work together to file a joint reply and appear at any hearing before the Court.
24 This provision is a material component of the Consent Judgment and shall be treated as such in the
25 event of a breach.
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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 any party and entry of a modified consent judgment by the Court.

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.

<p>AGREED TO:</p> <p>Date: <u>7/21/2009</u></p> <p>By: <u>Anthony E. Held</u> Plaintiff, ANTHONY E. HELD, P.R.D., P.E.</p>	<p>AGREED TO:</p> <p>Date: <u>7/22/09</u></p> <p>By: <u>R. Bolthouse SEC/Treas</u> Defendant, SWIBCO, INC.</p>
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IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT