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11 Attorneys for Defendant
12 HOT TOPIC, INC.

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR THE COUNTY OF MARIN

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

17 Plaintiff,

18 v.

19 HOT TOPIC, INC.; *et al.*

20 Defendants.

Case No. CIV 093326

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

Complaint filed: July 2, 2009

1 **1. INTRODUCTION**

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

3 This Stipulation and Proposed Consent Judgment (“Consent Judgment”) is entered into by
4 and between plaintiff Anthony E. Held, Ph.D., P.E. (“Dr. Held” or “Plaintiff”) and defendant Hot
5 Topic, Inc. (“Hot Topic” or “Defendant”), with Dr. Held and Hot Topic collectively referred to
6 herein as the “Parties” and individually as a “Party.”

7 **1.2 Plaintiff**

8 Dr. Held represents he is an individual residing in the County of Sacramento who seeks to
9 promote awareness of exposure to toxic chemicals and improve human health by reducing or
10 eliminating hazardous substances contained in consumer products.

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Dr. Held alleges that Hot Topic has manufactured, distributed and/or sold children’s shoes
17 and zipper pulls containing di(2-ethylhexyl)phthalate (hereinafter “DEHP”) in the State of
18 California without required Proposition 65 warnings. DEHP is listed pursuant to Proposition 65,
19 and is known to cause cancer as well as birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: children’s
22 apparel containing excessive levels of DEHP including, but not limited to, the *Checker-Shoe*
23 #979156-003 and zipper pulls containing excessive levels of DEHP including, but not limited to,
24 *Teenage Mutant Ninja Turtles Zipper Pull #168864-000*. All such products containing DEHP are
25 referred to hereinafter as the “Products.”

26 **1.6 Notices of Violation**

27 Dr. Held asserts that on February 24, 2009, he served Hot Topic and the Office of the
28 California Attorney General of the State of California, all California counties’ District Attorneys

1 and all City Attorneys of California cities with populations exceeding 750,000, (collectively,
2 “Public Enforcers”) with a document entitled “60-Day Notice of Violation” (the “Notice”) that
3 provided Hot Topic and Public Enforcers with notice of alleged violations of Proposition 65 for
4 failing to warn consumers children’s shoes containing DEHP that Hot Topic sold allegedly exposed
5 users in California to DEHP. To the best of Parties’ knowledge, no Public Enforcer has diligently
6 prosecuted any of the allegations set forth in the Notice. On May 22, 2009, Held served Hot Topic
7 and the Office of the California Attorney General of the State of California, all California counties’
8 District Attorneys and all City Attorneys of California cities with populations exceeding 750,000,
9 (collectively, “Public Enforcers”) with another document entitled “60-Day Notice of Violation” (the
10 “Notice”) that provided Hot Topic and Public Enforcers with notice of alleged violations of
11 Proposition 65 for failing to warn consumers zipper pulls containing DEHP that Hot Topic sold
12 allegedly exposed users in California to DEHP. If no Public Enforcer has diligently prosecuted any
13 of the allegations set forth in the Notice as of the effective date, the zipper pull products shall be
14 included in the definition of “Products” pursuant to this Consent Judgment. On August 14, 2009,
15 Held served Hot Topic and the Office of the California Attorney General of the State of California,
16 all California counties’ District Attorneys and all City Attorneys of California cities with
17 populations exceeding 750,000, (collectively, “Public Enforcers”) with another document entitled
18 “Supplemental 60-Day Notice of Violation” (the “Supplemental Notice”) that provided Hot Topic
19 and Public Enforcers with notice of alleged violations of Proposition 65 for failing to warn
20 consumers children’s clothing containing DEHP that Hot Topic sold allegedly exposed users in
21 California to DEHP. On September 19, 2009, if no Public Enforcer has diligently prosecuted any of
22 the allegations set forth in the Notice the children’s clothing products shall be included in the
23 definition of “Products” pursuant to this Consent Judgment.

24 **1.7 Complaint**

25 On July 2, 2009, Dr. Held, who was and is acting in the interest of the general public in
26 California, filed a complaint (“Complaint” or “Action”) in the Superior Court for the County of
27 Marin against Hot Topic and Does 1 through 150, alleging violations of Proposition 65 based on the
28 allegations in the Notice.

1 **1.8 No Admission**

2 Hot Topic denies that any Products that it has sold and distributed in California do not
3 comply with Proposition 65 or any other law. Nothing in this Consent Judgment shall be construed
4 as an admission by Hot Topic of any fact, finding, issue of law, or violation of law, nor shall
5 compliance with this Consent Judgment constitute or be construed as an admission by Hot Topic of
6 any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Hot
7 Topic. In order to avoid the costs and expenses of litigation and without admitting liability or
8 wrongdoing, Hot Topic has elected to resolve this matter by settlement and on the terms set forth
9 herein. However, this section shall not diminish or otherwise affect Hot Topic's obligations,
10 responsibilities, and duties under this Consent Judgment.

11 **1.9 Consent to Jurisdiction**

12 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
13 jurisdiction over Hot Topic as to the allegations contained in the Complaint, that venue is proper in
14 the County of Marin and this Court has jurisdiction to enter and enforce this Consent Judgment as a
15 full and final binding resolution of all claims which were or could have been raised in the
16 Complaint against Hot Topic based on the facts alleged therein and in the Notice.

17 **1.10 Effective Date**

18 For purposes of this Consent Judgment, the term "Effective Date" shall mean September 15,
19 2009.

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

21 **2.1 Reformulation**

22 Except as provided in Section 2.2, beginning on November 30, 2009, Hot Topic shall not
23 sell, ship, or offer to be shipped, any Products for sale in California, containing DEHP unless such
24 Products contain less than 1,000 (one thousand) parts per million ("ppm") of DEHP when analyzed
25 pursuant to: Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C,
26 or other comparable methodologies recognized and accepted by one or more federal and/or state
27 agencies, including the Consumer Product Safety Commission.

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2.2 Interim Warnings

(a) Commencing on September 30, 2009, Hot Topic shall not sell, ship, or offer to be shipped for sale in California any Product that does not meet the Reformulation Requirement of Section 2.1 without a clear and reasonable warning as required in Section (b).

(b) Warning Methods.

(i) **Product Labeling.** Hot Topic shall affix to the packaging, labeling, or directly on each Product that states:

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

(ii) **Point-of-Sale Warnings.** Hot Topic may provide warning signs in the form below to its customers in California with instructions to its outlets to post the warnings in close proximity to the point of display of the Products and in a manner such that the consumer understands to which specific Product the warning applies.

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

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

3. MONETARY PAYMENTS

In full and final settlement of Plaintiff's claims, the total monetary settlement payments to be paid by Hot Topic are set forth in Sections 3 and 4.

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

Civil penalties are to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony Held as provided by California Health & Safety Code § 25249.12(d).

Pursuant to Health & Safety Code § 25249.7(b), Hot Topic shall pay civil penalties, as set forth below:

1 Hot Topic shall issue two separate checks for the penalty payment: (a) one check made
2 payable to "Hirst & Chanler LLP in Trust For OEHHA" in the amount of \$7,500 representing 75%
3 of the total penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the
4 amount of \$2,500 representing 25% of the total penalty. Two separate 1099s shall be issued for the
5 above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)
6 Anthony Held, whose information shall be provided five calendar days before the payment is due.
7 Payment shall be delivered to Dr. Held's counsel on or before fifteen (15) days after the Effective
8 Date, as follows:

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

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

13 **4.1 Attorney Fees and Costs**

14 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
16 this fee issue to be resolved after the material terms of the agreement had been settled. Hot Topic
17 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
18 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
19 Dr. Held and his counsel under general contract principles and the private attorney general doctrine
20 codified at California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the
21 mutual execution of this agreement. The reimbursement of attorneys' fees and costs under Section
22 4.1 shall be paid, as follows:

23 Hot Topic shall reimburse Dr. Held and his counsel the total of \$60,000 for fees and costs incurred
24 as a result of investigating, bringing this matter to Hot Topic's attention, and litigating and
25 negotiating a settlement in the public interest. Hot Topic shall issue a separate 1099 for fees and
26 costs (EIN: 20-3929984) and shall make the check payable to "Hirst & Chanler LLP" and shall be
27 delivered on or before fifteen (15) days after the Effective Date, as follows:
28

1 Hirst & Chanler LLP
2 Attn: Proposition 65 Coordinator
3 2560 Ninth Street, Suite 214
4 Berkeley, California 94710

4 **4.2 Post-Execution Attorney Fees and Costs**

5 Pursuant to CCP §§ 1021 and 1021.5, the parties further agree that Hot Topic will reimburse
6 Dr. Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
7 this settlement in the trial court and completing other necessary tasks after the execution of the
8 Consent Judgment, in an amount not to exceed Eleven Thousand Dollars (\$11,000). Such
9 additional fees and costs, exclusive of fees and costs that may be incurred in the event of an appeal
10 (in which case, Section 6 shall apply) include, but are not limited to, drafting and filing of the
11 motion to approve papers, fulfilling the reporting requirements referenced in Health & Safety Code
12 § 25249.7(f), responding to any third party objections, filing of the notice of entry of the Consent
13 Judgment, corresponding with opposing counsel and appearing before the Court related to the
14 approval process.

15 Reimbursement of such additional fees and costs shall be invoiced on a billing statement
16 from Dr. Held ("Additional Fee Claim") to counsel for Hot Topic following the approval and entry
17 of this Consent Judgment by the Court, and payment shall be due within ten (10) calendar days after
18 notice of entry thereof. Payment of the Additional Fee Claim shall be made to "Hirst & Chanler
19 LLP," and the payment shall be delivered, at the following address:

20 Hirst & Chanler LLP
21 Attn: Proposition 65 Coordinator
22 2560 Ninth Street, Suite 214
23 Berkeley, California 94710

23 **5. RELEASE OF ALL CLAIMS**

24 **5.1 Dr. Held's Release of Hot Topic**

25 In further consideration of the promises and agreements herein contained, and for the
26 payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current
27 agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general
28 public only as to the Products, hereby waives all rights to institute or participate in, directly or

1 indirectly, any form of legal action and releases all claims including, without limitation, all actions,
2 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
3 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
4 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
5 (collectively "Claims"), that were brought or could have been brought against Hot Topic or its
6 parents, subsidiaries or affiliates, and all of their customers, distributors, wholesalers, retailers,
7 licensors, licensees, or any other person in the course of doing business, and the successors and
8 assigns of any of them, who may use, maintain, manufacture, distribute, advertise, market or sell
9 Products, and the officers, directors, managers, employees, members, shareholders, agents, insurers
10 and representatives of each of them (collectively "Defendant Releasees") in this Action. This release
11 is limited to, but is intended to be a full, final, and binding resolution of, those Claims that arise from
12 or relate to facts alleged in the Notice and the Complaint, as against Hot Topic and Defendant
13 Releasees, concerning Hot Topic's alleged failure to warn about exposures to DEHP contained in the
14 Products.

15 Dr. Held also, on behalf of himself, his past and current agents, representatives, attorneys,
16 successors, and/or assignees, and in his individual capacity only, provides a general release herein
17 which shall be effective as a full and final accord and satisfaction, as a bar to all Claims of Dr. Held
18 against Hot Topic and Defendant Releasees of any nature, character or kind, known or unknown,
19 suspected or unsuspected, arising under Proposition 65 or an alleged failure to provide warnings for
20 exposures to DEHP from the Products manufactured, distributed or sold by Hot Topic. Dr. Held
21 acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as
22 follows:

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

26 Dr. Held, in his individual capacity only, expressly waives and relinquishes any and all
27 rights and benefits which he may have under, or which may be conferred on him by the provisions
28 of Section 1542 of the California Civil Code as well as under any other state or federal statute or

1 common law principle of similar effect, to the fullest extent that he may lawfully waive such rights
2 or benefits pertaining to the released matters. In furtherance of such intention, the release hereby
3 given shall be and remain in effect as a full and complete release notwithstanding the discovery or
4 existence of any such additional or different claims or facts arising out of the released matters.

5 Notwithstanding the foregoing, this release shall not limit or affect Dr. Held's right to
6 enforce the terms of the Consent Judgment.

7 **5.2 Effect of Consent Judgment**

8 Compliance with the terms of this Consent Judgment resolves any issue, now and in the
9 future, concerning compliance by Hot Topic and Defendant Releasees with the requirements of
10 Proposition 65 with respect to alleged exposure to DEHP from the Products distributed or sold by
11 Hot Topic.

12 **5.3 Hot Topic's Release of Dr. Held**

13 Hot Topic waives any and all Claims against Dr. Held, his attorneys, and other
14 representatives for any and all actions taken or statements made (or those that could have been
15 taken or made) by Dr. Held and his attorneys and other representatives, whether in the course of
16 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter,
17 and/or with respect to the Products. Hot Topic provides a general release herein which shall be
18 effective as a full and final accord and satisfaction, as a bar to all released Claims described herein
19 that it may have against Dr. Held, of any nature, character or kind, known or unknown, and
20 suspected or unsuspected. Hot Topic acknowledges that it is familiar with Section 1542 of the
21 California Civil Code, which provides as follows:

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

25 Hot Topic expressly waives and relinquishes any and all rights and benefits which it may
26 have under, or which may be conferred on it by the provisions of Section 1542 of the California
27 Civil Code as well as under any other state or federal statute or common law principle of similar
28 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the

1 released matters. In furtherance of such intention, the release hereby given shall be and remain in
2 effect as a full and complete release notwithstanding the discovery or existence of any such
3 additional or different claims or facts arising out of the released matters.

4 Notwithstanding the foregoing, this release shall not limit or affect Hot Topic's right to
5 enforce the terms of this Consent Judgment.

6 **6. COURT APPROVAL**

7 Notwithstanding Section 1.10, this Consent Judgment is not effective until it is approved and
8 entered by the Court and shall be null and void if, for any reason, it is not approved and entered by
9 the Court within one year after it has been fully executed by all Parties. If the Court does not
10 approve the Consent Judgment, the Parties shall meet and confer as to (and jointly agree on)
11 whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course
12 of action to take, then the case shall proceed in its normal course on the trial court's calendar, and
13 any monies that have been provided to Plaintiff, or his counsel, pursuant to Section 3 and/or Section
14 4 above, shall be refunded within thirty (30) days of Hot Topic providing written notice thereof. In
15 the event that this Consent Judgment is entered by the Court and subsequently overturned by any
16 appellate court, any monies that have been provided to Plaintiff, or his counsel pursuant to Section 3
17 and/or Section 4 above, shall be refunded within fifteen (15) days of the appellate decision
18 becoming final. If the Court's approval is ultimately overturned by an appellate court, the Parties
19 shall meet and confer as to (and jointly agree on) whether to modify the terms of the Consent
20 Judgment. If the Parties do not jointly agree on a course of action to take, then the case shall
21 proceed in its normal course on the trial court's calendar.

22 **7. SEVERABILITY**

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

26 **8. ENTIRE AGREEMENT**

27 This Consent Judgment contains the sole and entire agreement and understanding of the
28 Parties with respect to the entire subject matter hereof, and any and all prior discussions,

1 negotiations, commitments, and understandings related hereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any Party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the Parties.

5 **9. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
8 rendered inapplicable by reason of state or federal law generally, or as to the Products, then Hot
9 Topic shall provide written notice to Dr. Held of any asserted change in the law, and shall have no
10 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
11 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Hot
12 Topic from any obligation to comply with any pertinent state or federal toxics control laws (e.g., the
13 federal ban on selling childcare items and certain children's toys containing more than 1,000 ppm of
14 DEHP).

15 **10. NOTICES**

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

20 To Hot Topic:

21 Elizabeth A. Cason, (State Bar No. 205441)
22 FOLEY & LARDNER
23 402 W. Broadway, Suite 2100
San Diego, CA 92101-3542

24 To Dr. Held:

25 Proposition 65 Controller
26 HIRST & CHANLER LLP
27 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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 **11. 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 **12. 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 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

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

17 **14. MODIFICATION AND ENFORCEMENT**

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 of
20 any Party and entry of a modified consent judgment by the Court. In the event that, after the
21 Parties' execution of this Consent Judgment: (1) a dispute arises with respect to any provisions of
22 this Consent Judgment; or (2) either Party seeks to enforce the terms of this Consent Judgment, the
23 prevailing Party shall be entitled to reasonable attorneys' fees and costs.

24 **15. EFFECT OF CONSENT JUDGMENT**

25 This Consent Judgment shall apply to, be binding upon, and inure to the benefit of, the
26 Parties and their respective successors and assigns.

1 **16. 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:**

AGREED TO:

6
7 Date: September 22, 2009

Date: 9.21.2009

8
9 By: Anthony E. Held

By: [Signature]

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

Jerry Cook, Chief Operations Officer,
HOT TOPIC, INC.

11 **APPROVED AS TO FORM:**

APPROVED AS TO FORM:

12
13 Date: September 22, 2009

Date: September 22, 2009

14
15 By: [Signature]

By: [Signature]

HIRST & CHANLER LLP
Daniel Bornstein
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

FOLEY & LARDNER
Elizabeth A. Cason
Attorneys for Defendant
HOT TOPIC, INC.

17
18 **IT IS SO ORDERED.**

19
20 Date: _____

JUDGE OF THE SUPERIOR COURT