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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF ALAMEDA
12

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

14 Plaintiff,

15 v.

16 NATIONAL PEN CO. LLC.; NATIONAL
17 DESIGN LLC; and DOES 1-150, inclusive,

18 Defendants.

Case No. RG09451980

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

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Defendants**

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 defendants
5 National Pen Co. LLC (“National Pen”) and National Design LLC (“National Design”).
6 Defendants National Pen and National Design are collectively referred to herein as “National” or
7 “Defendants.” Plaintiff Held and Defendants are collectively referred to herein as the “Parties.”

8 **1.2 Plaintiff Dr. Anthony Held**

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

12 **1.3 Defendants**

13 National Pen and National Design each employs ten or more persons, and each is a person in
14 the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
15 1986, California Health & Safety Code § 25249.5 *et seq.* (“Proposition 65”).

16 **1.4 General Allegations**

17 Dr. Held alleges that National has manufactured, distributed and/or sold children’s vinyl
18 bags and vinyl erasers containing di(2-ethylhexyl)phthalate (hereinafter “DEHP”) in the State of
19 California without required Proposition 65 warnings. DEHP is listed pursuant to Proposition 65 as
20 a carcinogen and reproductive toxicant.

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows: (a)
23 children’s vinyl bags containing DEHP, including, but not limited to, *Pooh Die-Cut Pad & Pen in*
24 *Pouch, Item 5791D (#0 79568 20890 6)*; and (b) vinyl erasers containing DEHP, including, but not
25 limited to, *Disney 4 Pack Erasers, Item 5065B (0 79568 18981 6)*. All such children’s vinyl bags
26 and vinyl erasers containing DEHP are referred to hereinafter as the “Products.”

1 **1.6 Notices of Violation**

2 Dr. Held asserts that on February 24, 2009, he served National and the Office of the
3 California Attorney General of the State of California, all California counties' District Attorneys
4 and all City Attorneys of California cities with populations exceeding 750,000, (collectively,
5 "Public Enforcers") with a document entitled "60-Day Notice of Violation" ("Notice") that
6 provided National and Public Enforcers with notice of alleged violations of Proposition 65 for
7 failing to warn consumers that the children's vinyl bags containing DEHP that National sold
8 allegedly exposed users in California to DEHP. Dr. Held further asserts that on June 30, 2009, he
9 served National and the Office of the California Attorney General of the State of California, all
10 California counties' District Attorneys and all City Attorneys of California cities with populations
11 exceeding 750,000, (collectively, "Public Enforcers") with a Supplemental 60-Day Notice of
12 Violation ("Supplemental Notice") that provided National and Public Enforcers with notice of
13 alleged violations of Proposition 65 for failing to warn consumers that the vinyl erasers containing
14 DEHP that National sold allegedly exposed users in California to DEHP. To the best of Parties'
15 knowledge, no Public Enforcer has diligently prosecuted any of the allegations set forth in the
16 Notice and Supplemental Notice.

17 **1.7 Complaint**

18 On May 12, 2009, Dr. Held, who was and is acting in the interest of the general public in
19 California, filed a complaint ("Complaint" or "Action") in the Superior Court in the County of
20 Alameda against National Pen, National Design, and Does 1 through 150, alleging violations of
21 Proposition 65 based on the allegations in the Notice. The Complaint shall be deemed amended by
22 this Consent Judgment to include the allegations set forth in the Supplemental Notice on the
23 seventy-first (71st) day following the service of each of the Supplemental Notices on National Pen,
24 National Design, and all required Public Enforcers if no authorized Public Enforcer has, before that
25 date, filed a Proposition 65 enforcement action based on the allegations in the Supplemental Notice.

26 **1.8 No Admission**

27 National denies that any Products it has sold or distributed in California do not comply with
28 Proposition 65 or any other law. Nothing in this Consent Judgment shall be construed as an

1 admission by National Pen or National Design of any fact, finding, issue of law, or violation of law,
2 nor shall compliance with this Consent Judgment constitute or be construed as an admission by
3 National Pen or National Design of any fact, finding, conclusion, issue of law, or violation of law,
4 such being specifically denied by National. In order to avoid the costs and expenses of litigation
5 and without admitting liability or wrongdoing, National has elected to resolve this matter by
6 settlement and on the terms set forth herein. However, this section shall not diminish or otherwise
7 affect National's obligations, responsibilities, and duties under this Consent Judgment.

8 **1.9 Consent to Jurisdiction**

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

14 **1.10 Effective Date**

15 For purposes of this Consent Judgment, the term "Effective Date" shall mean October 7,
16 2009.

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

18 **2.1 Reformulation and Commitment Standards**

19 National hereby commits that 100% of the children's vinyl bags that they purchase and offer
20 for sale in California after the Effective Date, shall qualify as Phthalate-Free. For purposes of this
21 Consent Judgment, Reformulated, or "Phthalate-Free" shall mean those Products that contain less
22 than or equal to 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to
23 Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C, or equivalent
24 methods allowed by, and that comply with, any state or federal agency used to establish DEHP
25 content in consumer products. No later than 15 days after the Consent Judgment is signed by the
26 parties, National will contact each of its customers to which it sold Products after receiving the
27 relevant Notice or Supplemental Notice for Products that neither meet the reformulation standard
28

1 nor contained a Proposition 65 warning. Nothing in this Consent Judgment shall be interpreted to
2 relieve National from any obligation to comply with any pertinent state or federal toxics control
3 laws (e.g., the federal ban on selling childcare items and certain children's toys containing more
4 than 1,000 ppm of DEHP).

5
6 **2.2 Product Warnings**

7 After the Effective Date, National Pen shall not sell, ship, or offer to be shipped for sale in
8 California, Products containing DEHP unless such Products are shipped with the clear and
9 reasonable warnings set out in Section 2.3 and 2.4, or comply with the reformulation requirements
10 of Phthalate-Free Products set out in Section 2.1.

11 Any warning issued for Products pursuant to Section 2.3 or 2.4, below, shall be prominently
12 placed with such conspicuousness as compared with other words, statements, designs or devices as
13 to render it likely to be read and understood by an ordinary individual under customary conditions
14 before purchase or, for Products shipped directly to an individual in California, before use.

15 **2.3 Warnings For Retail Store Sales**

16 (a) **Product Labeling.** National may perform its warning obligation by
17 affixing a warning to the packaging of, labeling to, or, if no label exists, directly on each Product
18 sold in retail outlets in California that states:

19 **WARNING:** This product contains a chemical known to the
20 State of California to cause birth defects or
other reproductive harm.

21 (b) **Point-of-Sale Warnings.** National may perform its warning
22 obligations by ensuring that signs are posted at retail outlets in the State of California where the
23 Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in
24 close proximity to the point of display of the Products that states:

25 **WARNING:** This product contains a chemical known to the
26 State of California to cause birth defects or
other reproductive harm.

27 Where more than one Product is sold in proximity to other like items or to those that do not
28 require a warning (e.g., Phthalate-Free as defined in Section 2.1), the following statement must be

1 used:¹

2 **WARNING:** The following products contain a chemical
3 known to the State of California to cause birth
4 defects or other reproductive harm:

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

6 The forgoing warnings may be modified to include reference to chemicals that cause
7 cancer if they are present in detectable amounts as follows:

8 **WARNING:** This product [or the following products] contain[s] a
9 chemical known to the State of California to cause
10 cancer and birth defects or other reproductive harm.

11 **2.4 Warnings For Mail Order Catalog and Internet Sales.**

12 National shall satisfy its warning obligations for Products sold via mail order catalog or the
13 Internet to California residents by providing a warning: (i) in the mail order catalog; or (ii) on the
14 website. Warnings given in the mail order catalog or on the website shall identify the specific
15 Product to which the warning applies as further specified in subsections (a) and (b) below.

16 **(a) Mail Order Catalog Warning.** Any warning provided in a mail
17 order catalog must be in the same type size or larger than the Product description text within the
18 catalog. The following warning shall be provided on the same page and in the same location as
19 each display of the Product:

20 **WARNING:** This product contains a chemical known to the
21 State of California to cause birth defects or other
22 reproductive harm.

23 Where it is impracticable to provide the warning on the same page and in the same location
24 as the display of the Product, National Pen may utilize a designated symbol (▲) to cross reference
25 the applicable warning and shall define the term “designated symbol” with the following language
26 on the inside of the front cover of the catalog and on the same page as any order form for the
27 Product(s):

28 ¹ For purposes of this Consent Judgment, “sold in proximity to other like items” shall mean that the Product and another product are offered for sale close enough to each other so that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 **WARNING:** Certain products identified with this symbol ▲
2 and offered for sale in this catalog contain a
3 chemical known to the State of California to
4 cause birth defects or other reproductive harm.

5 The designated symbol must appear on the same page and in close proximity to the display
6 or description of the Product on such page. On each page where the designated symbol appears,
7 National must provide a reference directing the consumer to the warning language and definition of
8 the designated symbol.

9 If National elects to sell one or more Products to consumers via mail order catalog after the
10 Effective Date, then the warnings must be included in all catalogs containing the Products which are
11 distributed in California as of the Effective Date.

12 **(b) Internet Website Warning.** A warning may be given in conjunction with
13 the sale of the Product to a California consumer via the Internet, provided it appears either: (i) on
14 the same web page on which the Product is displayed; (ii) on the same web page as the order form
15 for the Product; (iii) on the same page as the price for any Product; or (iv) on one or more web
16 pages displayed to a purchaser during the checkout process. The following warning statement shall
17 be used and shall appear in any of the above instances adjacent to or immediately following the
18 display, description, or price of the Product for which it is given in the same type size or larger than
19 the Product description text:

20 **WARNING:** This product contains a chemical known to the
21 State of California to cause birth defects and
22 other reproductive harm.

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

26 **WARNING:** Products identified on this page with the
27 following symbol ▲ contain DEHP, a phthalate
28 chemical known to the State of California to
 cause birth defects and other reproductive harm.

(c) The forgoing warnings may be modified to include reference to
 chemicals that cause cancer if they are present in detectable amounts as follows:

1 **WARNING:** This product [or the following products] contain[s]
2 a chemical known to the State of California to cause
3 cancer and birth defects or other reproductive harm.

4 Or

5 **WARNING:** Certain products identified with this symbol ▲ and
6 offered for sale in this catalog [or on this page]
7 contain a chemical known to the State of California
8 to cause cancer and birth defects or other
9 reproductive harm.

10 **2.5 Exceptions To Warning Requirements**

11 The warning requirements set forth in Sections 2.2 through 2.4 shall not apply to:

- 12 (i) any Products received by National prior to receipt of the Notice, provided
13 that National does not have actual knowledge, or reason from communications with
14 its suppliers of the Products to believe, that DEHP is present in such Products in
15 concentrations exceeding 1,000 ppm (0.1%) each;
- 16 (ii) Phthalate-Free Products (as defined in Section 2.1).

17 **3. MONETARY PAYMENTS**

18 In settlement of all the claims referred to in this Consent Judgment
19 against it, National Pen shall pay \$70,000 in civil penalties to be apportioned in accordance with
20 California Health & Safety Code §25249.12, with 75% of these funds remitted to the State of
21 California's Office of Environmental Health Hazard Assessment and the remaining 25% of these
22 penalty monies remitted to Dr. Held as provided by California Health & Safety Code §25249.12(d).
23 National Pen shall issue two separate checks for the penalty payment: (a) one check made payable
24 to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental Health
25 Hazard Assessment ("Hirst & Chanler LLP in Trust for OEHHA") in the amount of \$52,500
26 representing 75% of the total penalty and (b) one check to "Hirst & Chanler LLP in Trust for A. Dr.
27 Held" in the amount of \$17,500, representing 25% of the total penalty. Two separate 1099s shall be
28 issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010,
 Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$52,500. The second 1099 shall be
 issued to Dr. Held in the amount of \$17,500, whose address and tax identification number shall be

1 furnished at least fifteen calendar days before payment is due. The payments shall be delivered on
2 or before thirty days after the Effective Date, at the following address:

3 Hirst & Chanler LLP
4 Attn: Proposition 65 Coordinator
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710

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

9 **4.1 Attorney Fees and Costs**

10 The parties reached an accord on the compensation due to Dr. Held and his counsel under
11 the private attorney general doctrine and principles of contract law. Under these legal principles,
12 National shall reimburse Dr. Held's counsel for fees and costs, incurred as a result of investigating,
13 bringing this matter to National's attention, and negotiating a settlement in the public interest.
14 National shall pay Dr. Held and his counsel \$112,500 for all attorneys' fees, expert and
15 investigation fees, and related costs. The payment shall be issued in a third separate check made
16 payable to "Hirst & Chanler LLP" and shall be delivered on or before thirty days after the Effective
17 Date, at the following address:

18 Hirst & Chanler LLP
19 Attn: Proposition 65 Coordinator
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710

23 National shall issue a separate 1099 for fees and cost paid in the amount of \$112,500 to Hirst &
24 Chanler LLP, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-
25 3929984).

26 **5. RELEASE OF ALL CLAIMS**

27 **5.1 Dr. Held's Release of Defendants**

28 In further consideration of the promises and agreements herein contained, and for the
payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current
agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general
public only as to the Products, hereby waives all rights to institute or participate in, directly or
indirectly, any form of legal action and releases all claims including, without limitation, all actions,

1 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
2 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
3 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
4 (collectively "Claims"), that were brought or could have been brought against National Pen or
5 National Design, or either of their parents, subsidiaries or affiliates, and all of their customers,
6 suppliers, distributors, wholesalers, retailers, licensors, licensees, or any other person in the course of
7 doing business, and the successors and assigns of any of them, who may use, maintain, manufacture,
8 distribute, advertise, market or sell Products, and the officers, directors, managers, employees,
9 members, shareholders, agents, insurers and representatives of each of them (collectively "Defendant
10 Releasees"). This release is intended to be a full, final, and binding resolution of, those Claims that
11 arise from or relate to facts alleged in the Notice and the Complaint, as against National Pen, National
12 Design and Defendant Releasees, concerning the presence of DEHP in the Products and alleged
13 failures to warn about exposures to DEHP contained in the Products.

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

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
21 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
22 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR.

23 It is expressly agreed and understood that the general release by Dr. Held of National Pen and
24 National Design is a determinative consideration of National Pen and National Design's willingness
25 and decision to enter into this Consent Judgment.

26 **5.2 Effect of Consent Judgment**

27 Compliance with the terms of this Consent Judgment resolves any issue, now and in the
28 future, concerning compliance by National Pen, National Design and Defendant Releasees with the

1 requirements of Proposition 65 with respect to alleged exposure to DEHP from the Products
2 distributed or sold by National Pen.

3 **5.3 National Pen's Release of Dr. Held**

4 National Pen waives any and all claims against Dr. Held, his attorneys and other
5 representatives, for any and all actions taken or statements made (or those that could have been
6 taken or made) by Dr. Held and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to the Products.

9 **6. COURT APPROVAL**

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

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the State of California
27 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
28 rendered inapplicable by reason of state or federal law generally, or as to the Products, then

1 National Pen or National Design shall provide written notice to Dr. Held of any asserted change in
2 the law, and shall have no further obligations pursuant to this Consent Judgment with respect to,
3 and to the extent that, the Products are so affected.

4 **8. NOTICES**

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

9 To National Pen:

10 Gary M. Roberts, Esq.
11 Sonnenschein Nath & Rosenthal LLP
12 601 S. Figueroa Street, Suite 2500
13 Los Angeles, CA 90017

14 To Dr. Held:

15 Proposition 65 Controller
16 HIRST & CHANLER LLP
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710-2565

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

22 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

11. ADDITIONAL POST EXECUTION ACTIVITIES

The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a
noticed motion is required to obtain judicial approval of this Consent Judgment. Dr. Held and

1 Defendants agree to mutually employ their best efforts to support the entry of this agreement as a
2 Consent Judgment by the trial court and defend the agreement against any appellate review.
3 Accordingly, Dr. Held agrees to file a motion to approve the Consent Judgment, and Defendants
4 agree to support it.

5 **12. MODIFICATION AND ENFORCEMENT**

6 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
7 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
8 any Party and entry of a modified consent judgment by the Court. In the event that, after the
9 Parties' execution of this Consent Judgment: (1) a dispute arises with respect to any provisions of
10 this Consent Judgment; or (2) either Party seeks to enforce the terms of this Consent Judgment, the
11 prevailing Party shall be entitled to reasonable attorneys' fees and costs.

12 **13. EFFECT OF CONSENT JUDGMENT**

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

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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:**

AGREED TO:

6 **APPROVED**
By Tony Held at 2:27 pm, Oct 05, 2009

7 Date: _____

Date: Oct 5, 2009

8 By: _____

9 Anthony E. Held
10 ANTHONY E. HELD, Ph.D., P.E.

By: _____

Dave Thompson
11 Dave Thompson, Chief Executive Officer
12 NATIONAL PEN CO. LLC.

13 Date: Oct 5, 2009

14 By: _____

Eric Hyde
15 Eric Hyde, President
16 NATIONAL DESIGN LLC

17 **IT IS SO ORDERED.**

18 Date: _____

19 _____
20 JUDGE OF THE SUPERIOR COURT