

1 Clifford A. Chanler, State Bar No. 135534
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 ANTHONY E. HELD, Ph.D., P.E.

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

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

16 v.

17 BEST BRANDS CONSUMER PRODUCTS,
18 INC.,
19 Defendant.

Case No. RG10527039

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., Defendant Best Brands Consumer Products**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter “Dr. Held”) and Best Brands Consumer Products, Inc. (“Best Brands”). Dr. Held and
5 Best Brands are collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant Best Brands**

11 Best Brands employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Dr. Held alleges that Best Brands has sold in the State of California children’s back packs
16 containing di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a
17 chemical known to the State of California to cause birth defects and other reproductive harm. DEHP
18 is referred to herein as the “Listed Chemical.”

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as follows: all children’s
21 back packs containing the Listed Chemical including, but not limited to, *Iron Man Card Game Set*
22 (#0 42887 91721 7). All such items marketed or sold by Best Brands shall be referred to herein as
23 the “Products.”

24 **1.6 Notice of Violation**

25 On March 19, 2010, Dr. Held served Best Brands and the required public enforcement
26 agencies with a document entitled “60-Day Notice of Violation” that provided Best Brands and such
27 public enforcers with notice that alleged that Best Brands was in violation of California Health &
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1 Safety Code § 25249.6 for failing to warn consumers and customers that the Products exposed users
2 in California to DEHP.

3 **1.7 Complaint**

4 On July 22, 2010, Dr. Held, who was and is acting in the interest of the general public in
5 California, filed a Complaint in the Superior Court in and for the County of Alameda naming Best
6 Brands and alleging violations of Health & Safety Code § 25249.6 based on, *inter alia*, the alleged
7 exposures to DEHP contained in the Products offered for sale in California by Best Brands (the
8 “Complaint”).

9 **1.8 No Admission**

10 This Consent Judgment resolves claims that are denied and disputed by Best Brands. The
11 Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
12 between the Parties for the purpose of avoiding prolonged litigation. Best Brands denies the material,
13 factual, and legal allegations contained in Dr. Held’s Notice and Complaint, and maintains that all
14 products that it has sold in California, including the Products, have been, and are, in compliance with
15 all laws. Nothing in this Consent Judgment shall be construed as an admission by Best Brands of any
16 fact, finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
17 constitute or be construed as an admission by Best Brands of any fact, finding, conclusion, issue of
18 law, or violation of law, such being specifically denied by Best Brands. However, this section shall
19 not diminish or otherwise affect the obligations, responsibilities and duties of Best Brands under this
20 Consent Judgment.

21 **1.9 Consent to Jurisdiction**

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

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean September 1,
3 2010.

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

5 **2.1 Reformulation Commitment**

6 After November 8, 2010, Best Brands shall not ship, sell or offer to be shipped for sale in
7 California any Product unless it is a “Reformulated Product”. For purposes of this Consent
8 Judgment, Reformulated Product shall mean Products containing DEHP in concentrations less than
9 0.1 percent (1,000 parts per million) when analyzed pursuant to any methodology utilized by federal
10 or state agencies for the purpose of determining DEHP content in a solid substance.

11 **2.2 Interim Warnings**

12 Between the Effective Date and November 8, 2010, Best Brands shall, for all Products other
13 than Reformulated Products, provide clear and reasonable warnings as set forth in subsections 2.2(a)
14 and (b).

15 Each warning shall be prominently placed with such conspicuousness as compared with other
16 words, statements, designs, or devices as to render it likely to be read and understood by an ordinary
17 individual under customary conditions before purchase or use. Each warning shall be provided in a
18 manner such that the consumer or user understands to which *specific* Product the warning applies, so
19 as to minimize the risk of consumer confusion.

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

21 **(i) Product Labeling.** Best Brands may affix a warning to the packaging,
22 labeling, or directly on each Product sold in retail outlets in California by Best Brands or any person
23 selling its Products, that states:

24 **WARNING:** This product contains DEHP, a phthalate
25 chemical known to the State of California to
26 cause birth defects and other reproductive harm.
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1 (ii) **Point-of-Sale Warnings.** Alternatively, Best Brands may provide
2 warning signs in the form below to its customers in California with instructions to post the
3 warnings in close proximity to the point of display of the Products.

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

7 Where more than one Product is sold in proximity to other like items or to those that do not
8 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
9 must be used:¹

10 **WARNING:** The following products contain DEHP, a
11 phthalate chemical known to the State of
12 California to cause birth defects and other
13 reproductive harm:

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

15 **(b) Mail Order Catalog and Internet Sales.** In the event that Best Brands sells
16 Products via mail order catalog or internet to customers located in California after the Effective Date
17 that are not Reformulated Products, Best Brands shall provide a warning for Products sold via mail
18 order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the
19 website. Warnings given in the mail order catalog or on the website shall identify the *specific*
20 Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

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

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

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

1 Where it is impracticable to provide the warning on the same page and in the same location as
2 the display and/or description of the Product, Best Brands may utilize a designated symbol to cross
3 reference the applicable warning and shall define the term “designated symbol” with the following
4 language on the inside of the front cover of the catalog or on the same page as any order form for the
5 Product(s):

6 **WARNING:** Certain products identified with this symbol
7 ▼ and offered for sale in this catalog contain
8 DEHP, a phthalate chemical known to the
 State of California to cause birth defects and
 other reproductive harm.

9 The designated symbol must appear on the same page and in close proximity to the display
10 and/or description of the Product. On each page where the designated symbol appears, Best Brands
11 must provide a header or footer directing the consumer to the warning language and definition of the
12 designated symbol.

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

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

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

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

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2 **WARNING:** Products identified on this page
3 with the following symbol ▼ contain DEHP, a
4 phthalate chemical known to the State of
5 California to cause birth defects and other
6 reproductive harm.

7
8 **3. MONETARY PAYMENTS**

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

10 In settlement of all claims related to the Products and Listed Chemical referred to in the
11 Complaint, and this Consent Judgment pursuant to Health & Safety Code § 25249.7(b), Best Brands
12 shall pay \$2,000 in civil penalties. These civil penalties are to be apportioned in accordance with
13 California Health & Safety Code § 25192, with 75% of these funds remitted to the State of
14 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25%
15 of the penalty remitted to Anthony Held as provided by California Health & Safety Code §
16 25249.12(d). Best Brands shall issue two separate checks for the penalty payment: (a) one check
17 made payable to "The Chanler Group in Trust for OEHHA" in the amount of \$1,500, representing
18 75% of the total penalty; and (b) one check to "The Chanler Group in Trust for Anthony Held" in the
19 amount of \$500, representing 25% of the total penalty. Two separate 1099s shall be issued for the
20 above-payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)
21 Anthony Held, whose information shall be provided five calendar days before the payment is due.
22 Payment shall be delivered to Dr. Held's counsel on or before the Effective Date, at the following
23 address:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Attorney Fees and Costs

The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Best

1 Brands then expressed a desire to resolve the fee and cost issue shortly after the other
2 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord
3 on the compensation due to Dr. Held and his counsel under general contract principles and the
4 private attorney general doctrine codified at California Code of Civil Procedure (C.C.P.) §
5 1021.5, for all work performed through the mutual execution of this agreement. Best Brands,
6 on behalf of itself and those in its chain of distribution, shall reimburse Dr. Held and his
7 counsel a total of \$23,000 for fees and costs incurred as a result of investigating, bringing this
8 matter to Best Brands' attention, and litigating and negotiating a settlement in the public
9 interest. Best Brands shall issue a separate 1099 for fees and costs (EIN: 94-3171522) and
10 shall make the check payable to "The Chanler Group" which shall be delivered on or before
11 the Effective Date to the following address.

12 The Chanler Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710

15 **5. RELEASE OF ALL CLAIMS**

16 **5.1 Dr. Held's Release of Best Brands**

17 In further consideration of the promises and agreements herein contained, and for the
18 payments to be made pursuant to Sections 3 and 4 above, Dr. Held, on behalf of himself, his past and
19 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
20 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
21 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
22 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
23 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
24 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
25 Best Brands and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers,
26 retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
27 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
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1 shareholders, agents, and employees, and sister, affiliated and parent entities (collectively
2 “Releasees”). Without limiting the foregoing, Dr. Held expressly releases all Claims against all
3 corporate affiliates who procured, marketed, distributed, offered for sale or sold the Products. The
4 releases in this Consent Judgment are limited to those claims that arise under Proposition 65, as such
5 claims relate to Best Brands’ or any Releasee’s alleged failure to warn about exposures to or
6 identification of DEHP contained in the Products.

7 **5.2 Best Brands’ Release of Dr. Held**

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

13 **6. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and shall
15 be null and void if, for any reason, it is not approved and entered by the Court within nine months
16 after it has been fully executed by all parties, in which event any monies that have been provided to
17 Dr. Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
18 (15) days after receiving written notice from Best Brands that the nine month period has expired.

19 **7. SEVERABILITY**

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

23 **8. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of California
25 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
26 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Best Brands
27 shall provide written notice to Dr. Held of any asserted change in the law, and shall have no further
28

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Best Brands from any
3 obligation to comply with any applicable state or federal toxics control laws other than Proposition
4 65. Compliance with this Consent Judgment by Best Brands shall constitute compliance with
5 Proposition 65 for the Products with respect to the Listed Chemical.

6 **9. NOTICES**

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

11 For Best Brands:

12 Jack Albert
13 Best Brands Consumer Products, Inc.
14 20 West 33rd Street, 5th Floor
New York, NY 10001

with a copy to:

James Robert Maxwell, Esq.
Rogers Joseph O'Donnell
311 California Street
San Francisco, CA 94104

15 For Dr. Held:

16 Proposition 65 Coordinator
17 The Chanler Group
18 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

21 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

26 Dr. Held agrees to comply with the reporting form requirements referenced in California
27 Health & Safety Code § 25249.7(f).
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1 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

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

9 **13. MODIFICATION**

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

13 **14. AUTHORIZATION**

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

16
17
18 **AGREED TO:** **APPROVED**
By Tony Held at 11:12 am, Sep 02, 2010

19 Date: _____
20 By: Anthony E Held
21 ANTHONY E. HELD, Ph.D., P.E.

AGREED TO:
Date: 8/26/2010

22 By: Albert
23 Jack Albert, President
24 BEST BRANDS CONSUMER PRODUCTS,
25 INC.

26 **IT IS SO ORDERED.**

27 Date: _____

28 _____
JUDGE OF THE SUPERIOR COURT