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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PhD., P.E.,

Plaintiff,

v.

HOT TOPIC, INC.; et al.,

Defendants.

Case No. CGC-11-512246

CONSENT JUDGMENT
[PROPOSED] AS TO DEFENDANT
T.U.K., INC.

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, PhD., P.E. and T.U.K., Inc.**

3 This Consent Judgment is entered into by and between plaintiff, Anthony E. Held, PhD.,
4 P.E. (“Held” or “Plaintiff”), and defendant, T.U.K., Inc. (“T.U.K.” or “Defendant”), with Held
5 and T.U.K. each individually referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff.**

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

10 **1.3 Defendant.**

11 T.U.K. 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 &
13 Safety Code § 25249.5 et seq. (“Proposition 65”).

14 **1.4 General Allegations.**

15 Held alleges that T.U.K. has manufactured, distributed and/or sold footwear containing
16 di(2-ethylhexyl)phthalate (“DEHP”) in the State of California without the requisite health hazard
17 warnings. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the State of
18 California to cause birth defects and other reproductive harm.

19 **1.5 Notices of Violation.**

20 1.5.1 On April 25, 2011, Held served Hot Topic, Inc. and various public
21 enforcement agencies with a document entitled “60-Day Notice of Violation” (“Hot Topic
22 Notice”) that alleged that Hot Topic, Inc. violated Proposition 65 by failing to warn consumers
23 that footwear it sold in California exposed users to DEHP.

24 1.5.2 On December 13, 2011, Held served Hot Topic, Inc., T.U.K. and various
25 public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”)
26 that alleged that Hot Topic and T.U.K. violated Proposition 65 by failing to warn consumers that
27 footwear they sold in California exposed users to DEHP.

1 **1.6 Complaint.**

2 On July 7, 2011, Held filed the instant action naming Hot Topic, Inc. as a defendant for
3 the violations of Health & Safety Code § 25249.6 alleged in the Hot Topic Notice. On March 26,
4 2012, Held filed a First Amended Complaint, the operative pleading in this action (“Complaint”),
5 adding T.U.K. as a defendant, for the violations of Health & Safety Code § 25249.6 alleged in the
6 Notice.

7 **1.7 No Admission.**

8 The Parties enter into this Consent Judgment as a full and final settlement of all claims
9 that were raised in the Complaint or that could have been raised in the Complaint, arising out of
10 the facts or conduct alleged therein. By execution of this Consent Judgment and agreeing to
11 comply with its terms, T.U.K. does not admit any facts or conclusions of law, including, but not
12 limited to, any facts or conclusions of law suggesting or demonstrating any violations of
13 Proposition 65 or any other statutory, common law or equitable requirements relating to DEHP in
14 Covered Products. This Consent Judgment is the product of negotiation and compromise and is
15 accepted by T.U.K. for purposes of settling, compromising, and resolving issues disputed in this
16 action. However, this section shall not diminish or otherwise affect the obligations,
17 responsibilities, and duties of T.U.K. under this Consent Judgment.

18 **1.8 Consent to Jurisdiction.**

19 For purposes of this Consent Judgment only, T.U.K. stipulates that this Court has
20 jurisdiction over T.U.K. as to the allegations contained in the Complaint, that venue is proper in
21 the County of San Francisco, and that this Court has jurisdiction to enter and enforce the
22 provisions of this Consent Judgment.

23 **2. DEFINITIONS**

24 2.1 “Accessible Component” means a poly vinyl chloride or other soft plastic, vinyl,
25 or synthetic leather component of a Covered Product that could be touched by a person during
26 reasonably foreseeable use.

27 2.2 “Covered Product” means footwear imported, manufactured, sold or distributed for
28 sale in California by T.U.K.

1 2.3 “Effective Date” means the date this Consent Judgment is approved by the Court.

2 **3. INJUNCTIVE RELIEF**

3 3.1 **Reformulation Standard.**

4 Except as provided in Section 3.2, commencing on December 31, 2012, T.U.K. shall not
5 purchase, import, manufacture, or supply to an unaffiliated third party for sale in California any
6 Covered Product with any Accessible Component containing DEHP in a concentration exceeding
7 0.1 percent (1,000 parts per million (“ppm”)) when analyzed pursuant to any methodology
8 utilized by federal or state agencies for the purpose of determining DEHP content in a solid
9 substance.

10 3.2 **Warnings.**

11 T.U.K. may supply a Covered Product that does not meet the reformulation standard set
12 forth in Section 3.1 to an unaffiliated third party for sale in California on or after December 15,
13 2012, only if (a) the Covered Product was purchased or imported by T.U.K. prior to the Effective
14 Date, and (b) the Covered Product bears a warning that is affixed to the packaging of, or directly
15 on, each Covered Product. Any warning provided pursuant to this section shall be prominently
16 placed with such conspicuousness as compared with other words, statements, designs, or devices
17 as to render it likely to be read and understood by an ordinary individual under customary
18 conditions before purchase or use. Each warning shall be provided in a manner such that the
19 consumer or user understands to which specific Product the warning applies, so as to minimize
20 the risk of consumer confusion. The warning shall state:

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

23 **4. MONETARY PAYMENTS**

24 4.1 **Payments Pursuant to Health & Safety Code § 25249.7(b).**

25 Pursuant to Health & Safety Code section 25249.7(b), T.U.K. shall pay \$5,500 in civil
26 penalties. This amount reflects a penalty credit of \$4,500 agreed to by Held in response to
27 T.U.K.’s commitment to Proposition 65 compliance, including its compliance with the
28 reformulation and warning requirements established by Section 3.1.

1 The civil penalty payment shall be allocated according to Health & Safety Code §
2 25249.12(c)(1) & (d), with seventy-five percent (75%) of the penalty payment earmarked for the
3 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
4 twenty-five percent (25%) of the penalty payment earmarked for Held. T.U.K. shall deliver the
5 penalty payments to Held’s counsel on or before April 13, 2012 at the Payment Address provided
6 in Section 4.3.3.

7 **4.2 Reimbursement of Fees and Costs.**

8 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
9 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
10 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
11 other settlement terms were finalized, T.U.K. expressed a desire to resolve the fee and cost issue.
12 The Parties then attempted to (and did) reach an accord on the compensation due Held and his
13 counsel under general contract principles and the private attorney general doctrine codified at
14 California Code of Civil Procedure § 1021.5 for all work performed in this matter, exclusive of
15 fees on appeal, if any. Under these legal principles, T.U.K. shall pay \$34,500 for all fees and
16 costs incurred investigating, litigating, and enforcing this matter, including, the fees and costs
17 incurred (and to be incurred) drafting, negotiating, and obtaining the Court’s approval of this
18 Consent Judgment in the public interest. T.U.K shall deliver payment to Held’s counsel on or
19 before April 13, 2012 at the Payment address provided in Section 4.3.3.

20 **4.3 Payment Procedures.**

21 **4.3.1 Payments.**

22 On or before the April 13, 2012, T.U.K. shall deliver to Held’s counsel three checks made
23 payable as follows:

- 24 (a) one check to “The Chanler Group in Trust for OEHHA” in the
25 amount of \$4,125;
26 (b) a second check to “The Chanler Group in Trust for Anthony Held”
27 in the amount of \$1,375; and
28

1 (c) a third check to “The Chanler Group in Trust” in the amount of
2 \$34,500.

3 **4.3.2 Issuance of 1099 Forms.**

4 After the Consent Judgment has been approved, T.U.K. shall provide Held’s counsel with
5 three 1099 forms for its payments under this Consent Judgment to:

6 (a) one 1099 to “Office of Environmental Health Hazard Assessment”,
7 P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid to
8 OEHHA in the amount of \$4,125;

9 (b) a second 1099 to “Anthony Held”, whose address and tax
10 identification number shall be furnished upon request after this Consent Judgment is fully
11 executed by the Parties, for civil penalties paid in the amount of \$1,375; and

12 (c) a third 1099 to “The Chanler Group” (EIN: 94-3171522) for the
13 reimbursement of fees and costs in the amount of \$34,500.

14 **4.3.3 Payment Address.**

15 All payments and tax documents required by Sections 4.1, 4.2, and 4.3 shall be delivered
16 to Held’s counsel at the following address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 **5. ENFORCEMENT OF CONSENT JUDGMENT**

23 Any Party may, by motion or application for an order to show cause before the Superior
24 Court of the County of San Francisco, enforce the terms and conditions contained in this Consent
25 Judgment. A Party may file such a motion or application only after that Party first provides 30
26 days notice to the Party allegedly failing to comply with the terms and conditions of this Consent
27 Judgment and attempts to resolve such Party’s failure to comply in an open and good faith
28 manner for a period of no less than 30 days. This Section shall not apply to the payment
provisions of Sections 4.1, 4.2, and 4.3, which may be enforced immediately upon execution of
this Consent Judgment and for which time is of the essence.

1 **6. CLAIMS COVERED AND RELEASED**

2 **6.1 Public Interest Release of Proposition 65 Claims.**

3 This Consent Judgment is a full, final, and binding resolution between Held, acting on his
4 own behalf and in the public interest, and T.U.K. and its parents, shareholders, divisions,
5 subdivisions, subsidiaries, partners, affiliates, and sister companies and their successors and
6 assigns (“Defendant Releasees”), and each entity to whom they directly or indirectly distribute or
7 sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
8 franchisees, cooperative members, licensors, and licensees, including but not limited to Hot
9 Topic, Inc. (“Downstream Defendant Releasees”) of any violation of Proposition 65 up through
10 the Effective Date based on the failure to warn of exposures to DEHP in the Covered Products as
11 set forth in the Notices. Compliance with the terms of this Consent Judgment by T.U.K. and
12 Defendant Releasees constitutes compliance with Proposition 65 with respect to DEHP in
13 Covered Products sold by T.U.K.

14 **6.2 Held’s Individual Release of Proposition 65 Claims.**

15 Held also, in his individual capacity only and *not* in his representative capacity, provides a
16 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
17 actions and causes of action, in law and in equity, obligations, suits, costs, expenses, attorneys’
18 fees, damages, losses, claims, liabilities and demands of plaintiff of any nature, character or kind,
19 whether known or unknown, suspected or unsuspected, arising out of the subject matter of the
20 Complaint. Held acknowledges that he is familiar with Section 1542 of the California Civil
21 Code, which provides as follows:

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

28 Held, in his individual capacity only and *not* in his representative capacity, expressly
waives and relinquishes any and all rights and benefits which he may have under, or which may
be conferred on him by the provisions of Section 1542 of the California Civil Code as well as

1 under any other state or federal statute or common law principle of similar effect, to the fullest
2 extent that he may lawfully waive such rights or benefits pertaining to the released matters. In
3 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
4 complete release notwithstanding the discovery or existence of any such additional or different
5 claims or facts arising out of the released matters. This release is expressly limited to those
6 Claims that arise under Proposition 65, as such claims relate to Defendant's and Defendant
7 Releasees' alleged failure to warn about exposure to DEHP in Covered Products and to the extent
8 that any alleged violations occur prior to thirty (30) days after the Effective Date. The Parties
9 further understand and agree that this release shall not extend upstream to any entities, other than
10 Defendant and Defendant Releasees, that manufactured the Covered Products or any component
11 parts thereof, or any distributors or suppliers who sold the Covered Products or any component
12 parts thereof to Defendant.

13 The Parties further understand and agree that this release shall not extend upstream to any
14 entities that manufactured or supplied the Covered Products or any component parts thereof to
15 T.U.K., or any distributors or suppliers who sold the Covered Products or any component parts
16 thereof to T.U.K.

17 **6.3 T.U.K.'s Release of Held.**

18 T.U.K. waives any and all Claims against Held, his attorneys, and other representatives
19 for any and all actions taken or statements made (or those that could have been taken or made) by
20 Held and his attorneys and other representatives, whether in the course of investigating claims, or
21 otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect
22 to the Covered Products.

23 T.U.K. also provides a release herein which shall be effective as a full and final accord
24 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
25 fees, damages, losses, claims, liabilities and demands of Held of any nature, character or kind,
26 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint.
27 T.U.K. acknowledges that it is familiar with Section 1542 of the California Civil Code, which
28 provides as follows:

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

7 T.U.K. expressly waives and relinquishes any and all rights and benefits which it may have under,
8 or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as
9 well as under any other state or federal statute or common law principle of similar effect, to the
10 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
11 This release is expressly limited to those claims that relate to Held's actions in enforcing
12 Proposition 65 regarding T.U.K.'s alleged failure to warn about exposure to DEHP in Covered
13 Products and to the extent that any alleged Claims arise prior to thirty (30) days after the Effective
14 Date. In furtherance of such intention, the release hereby given shall be and remain in effect as a
15 full and complete release notwithstanding the discovery or existence of any such additional or
16 different claims or facts arising out of the released matters.

17 **7. COURT APPROVAL; DISMISSAL OF HOT TOPIC**

18 **7.1 Waiver of Right to Trial on the Merits.**

19 By this Consent Judgment and upon its approval, the Parties waive their right to trial on
20 the merits, and waive their respective rights to seek appellate review of any and all interim
21 rulings, including all pleading, procedural, and discovery orders.

22 **7.2 Judicial Approval; Dismissal of Hot Topic.**

23 Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to
24 California Health & Safety Code §25249.7(f), and T.U.K. shall support the entry of such motion.
25 Within 10 days of approval of this Consent Judgment, Held shall file a dismissal of the complaint
26 without prejudice as to defendant Hot Topic, Inc.

27 **7.3 Consent Judgment Void Unless Court Approves.**

28 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment shall
terminate and become null and void, and the action shall revert to the status that existed prior to
the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft

1 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
2 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
3 purpose in this action, or in any other proceeding; and (c) the parties agree to meet and confer to
4 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

5 **8. ATTORNEYS' FEES**

6 Except as specifically provided in Section 4.2, or if a third party elects to appeal the
7 approval of the Consent Judgment, each Party shall bear its own costs and attorney's fees in
8 connection with this action. However, a Party who unsuccessfully brings or contests an action
9 arising out of this Consent Judgment shall be required to pay the prevailing Party's reasonable
10 attorneys' fees and costs unless the unsuccessful Party has acted with substantial justification. For
11 purposes of this Consent Judgment, the term substantial justification shall carry the same meaning
12 as used in the Civil Discovery Act, Code of Civil Procedure § 2016.010 et seq.

13 **9. GOVERNING LAW**

14 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California, and shall apply only to Covered Products offered for sale in the State of California. In
16 the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
17 generally, or as to the Covered Products, then T.U.K. may provide written notice to Held of any
18 asserted change in the law, and shall have no further obligations pursuant to this Consent
19 Judgment with respect to, and to the extent that, the Covered Products are so affected.

20 9.2 The Parties, including their counsel, have participated in the preparation of this
21 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
22 Consent Judgment was subject to revision and modification by the Parties and has been accepted
23 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
24 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
25 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
26 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
27 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
28 this regard, the Parties hereby waive California Civil Code § 1654.

1 **10. NOTICES**

2 Unless specified herein, all correspondence and notices required to be provided pursuant
3 to this Consent Judgment shall be in writing and sent by: (a) personal delivery; (b) first-class
4 registered or certified mail, return receipt requested; or (c) a recognized overnight courier to any
5 Party by the other Party at the following addresses:

6 To T.U.K.:

7 Ian White
8 President
9 T.U.K., Inc.
10 12300 Crosthwaite Circle
11 Poway, CA 92064

12 With a copy to:

13 Jeffrey B. Margulies, Esq.
14 Fulbright & Jaworski LLP
15 555 South Flower Street
16 41st Floor
17 Los Angeles, California 90071

18 To Held:

19 Proposition 65 Coordinator
20 The Chanler Group
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710-2565

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

26 **11. MODIFICATION**

27 **11.1 Modification.**

28 This Consent Judgment may be modified by the written agreement of the Parties and upon
entry of a modified Consent Judgment by the Court, or by motion of any Party and entry of a
modified Consent Judgment by the Court.

1 **11.2 Subsequent Legislation.**

2 If, subsequent to the Effective Date, legislation or regulation is adopted that addresses the
3 DEHP content of Covered Products sold in California, any Party shall be entitled to request that
4 the Court modify this Consent Judgment for good cause shown.

5 **11.3 Meet and Confer Requirement.**

6 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet
7 and confer with the other Party prior to filing a motion to modify the Consent Judgment.

8 **12. ENTIRE AGREEMENT**

9 This Consent Judgment contains the sole and entire agreement and understanding of the
10 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
11 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
12 and therein. No supplementation, modification, waiver, or termination of this Consent Judgment
13 shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of
14 the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the
15 other provisions hereof whether or not similar, nor shall such waiver constitute a continuing
16 waiver.

17 **13. RETENTION OF JURISDICTION**

18 This Court shall retain jurisdiction of this matter to implement or modify the Consent
19 Judgment.

20 **14. COUNTERPARTS; FACSIMILE SIGNATURES**

21 This Consent Judgment may be executed in counterparts and by facsimile or portable
22 document format (pdf), each of which shall be deemed an original, and all of which, when taken
23 together, shall constitute one and the same document.

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15. AUTHORIZATION

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

AGREED TO:	AGREED TO:
Date: <u>4/7/12</u> By: <u><i>Anthony E Held</i></u> Plaintiff ANTHONY HELD	Date: _____ By: _____ Defendant T.U.K., INC.

1 **15. 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.

AGREED TO:	AGREED TO:
Date: _____	Date: <u>APRIL 6TH 2012</u>
By: _____ Plaintiff ANTHONY HELD	By:  Defendant T.U.K., INC. IAN WHITE, PRESIDENT, TUK INC.

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