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5
6 Attorneys for Plaintiff
Anthony E. Held, Ph.D., P.E.

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA

11 ANTHONY E. HELD, PH.D., P.E.) Case No. 114CV260279
12)
12 Plaintiff) [PROPOSED] CONSENT
13 v.) JUDGMENT
13)
14 KOLDER, INC.,)
14)
15 Defendant.)
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1 **1. INTRODUCTION**

2 **Parties.** This [Proposed] Consent Judgment (“Consent Judgment”) is entered into by and
3 between plaintiff Anthony E. Held, Ph.D., P.E. (“Plaintiff” or “Held”) and defendant Kolder, Inc.
4 (“Defendant” or “Kolder”). Plaintiff and Kolder are each individually referred to as a “Party” and
5 collectively referred to as the “Parties.”

6 **1.1 Plaintiff**

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

10 **1.2 Defendant**

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

14 **1.3 General Allegations**

15 Held alleges that Kolder sold vinyl/PVC beverage insulators containing di(2-
16 ethylhexyl)phthalate (“DEHP”) without first providing the exposure warning required by
17 Proposition 65.

18 **1.4 Listed Phthalate Chemicals**

19 DEHP is a phthalate chemical listed under Proposition 65 as a chemical known to the
20 State of California to cause birth defects or other reproductive harm. Other phthalate chemicals
21 listed under Proposition 65 as chemicals known to the State of California to cause birth defects
22 or other reproductive harm include, but are not limited to, butyl benzyl phthalate (“BBP”) and
23 di-n-butyl phthalate (“DBP”). DEHP, BBP, and DBP are collectively referred to herein as the
24 “Listed Chemicals.”

25 **1.5 Product Description**

26 The products that are covered by this Consent Judgment are: (a) beverage insulators
27 with vinyl and/or poly vinyl chloride components that are manufactured by or for Kolder and
28 sold in California including, but not limited to, the *NFL San Francisco 49ers Bottle and Can*

1 *Insulator Set, #0424-8261 UPC #0 86867 26151 8* (the “Covered Products”), and (b) other
2 products with vinyl and/or poly vinyl chloride components that contain one or more of the
3 Listed Chemicals and which are manufactured by or for Kolder and sold in California including:
4 (1) products bearing PVC/vinyl decals or logos on them; (2) soft plastic/PVC-covered bags,
5 bottles, and cases; and (3) PVC/vinyl covered technology related accessories (collectively the
6 “Additional Products”).

7 **1.6 Notice of Violation**

8 On or about October 25, 2013, Held served Kolder and certain requisite public
9 enforcement agencies with a 60-Day Notice of Violation under Proposition 65 (“Notice”)
10 alleging that Kolder violated Proposition 65 for failing to warn their customers and consumers
11 in California that the Products expose users to DEHP.

12 **1.7 Complaint**

13 As no authorized public prosecutor of Proposition 65 filed a claim against Kolder based
14 on the allegations set forth in the Notice prior to the expiration of the 60 day notice period, Held
15 filed a complaint on February 7, 2014, in the Superior Court of California for the County of
16 Santa Clara (the “Court”), *Held v. Kolder, Inc., et al.*, No. 114CV260279, alleging Proposition
17 65 violations naming Kolder as a defendant for the violations of Health and Safety Code section
18 25249.6 that are the subject of the Notice (hereinafter “Action” or “Complaint”).

19 **1.8 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
21 subject matter jurisdiction over the allegations in the Complaint and personal jurisdiction over
22 Kolder as to the allegations in the Complaint, that venue is proper in the County of Santa Clara,
23 and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

24 **1.9 No Admission**

25 Nothing in this Consent Judgment is or shall be construed as an admission by the Parties
26 of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
27 Consent Judgment constitute or be construed as an admission by Kolder of any fact, conclusion
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1 of law, issue of law, or violation of law. This section shall not, however, diminish or otherwise
2 affect Kolder's obligations, responsibilities, and duties under this Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date
5 that this Consent Judgment is approved by the Court, including via any tentative ruling that is
6 unopposed.

7 **2. INJUNCTIVE RELIEF: REFORMULATION**

8 **2.1 Reformulation Obligation**

9 As of the Effective Date, Kolder shall not manufacture, import, sell, or distribute Covered
10 Products or Additional Products unless they are "Phthalate Free." For purposes of this Consent
11 Judgment, "Phthalate Free" shall mean that the Covered Products and Additional Products shall
12 contain less than or equal to 1,000 parts per million ("ppm") of each of the Listed Chemicals
13 when analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent
14 methodologies utilized by federal or state agencies in determining compliance with phthalate
15 standards.

16 **2.2 Representation Regarding Prior Reformulation Efforts**

17 Following its receipt of Held's October 25, 2013 Notice, Kolder: (a) immediately
18 conducted an investigation concerning the potential presence of Listed Chemicals in the Covered
19 Products; (b) reviewed its records concerning its prior efforts to ensure that its Covered Products
20 and Additional Products were Phthalate Free, and (c) determined that all Covered Products and
21 Additional Products manufactured by or for Kolder in the past two years were, to its knowledge,
22 as informed by the periodic testing of component materials, Phthalate Free.

23 **3. MONETARY PAYMENTS**

24 **3.1 Civil Penalties**

25 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to
26 in this Consent Judgment, Kolder shall pay civil penalties totaling \$30,000 in two separate
27 installments. Each civil penalty payment Kolder makes shall be allocated according to Health &
28 Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty amount paid to the California

1 Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25% of the
2 penalty paid to Held.

3 **3.1.1 Initial Civil Penalty**

4 On or before five (5) days following the Effective Date, Kolder shall pay an
5 initial civil penalty of \$8,000. This penalty reflects a credit of \$25,000 in light of Kolder’s
6 representation in Section 2.2 above.

7 **3.1.2 Final Civil Penalty**

8 On or before July 15, 2014, Kolder will make a final civil penalty payment of
9 \$22,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Plaintiff agrees to
10 waive all or a pro-rata proportionate amount of the final civil penalty payment, however, if no
11 later than June 30, 2014, a duly authorized official of Kolder certifies in writing to Plaintiff that
12 the Covered Products and each category of Additional Products (as delineated in Section 1.6
13 above) that will thereafter be manufactured or distributed for sale by Kolder shall also be
14 reformulated to achieve a maximum concentration, by weight, of 1,000 parts per million or less
15 for Di-isodecyl phthalate (“DIDP”) and Di-*n*-hexyl phthalate (“DnHP”) when analyzed pursuant
16 to EPA testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal
17 or state agencies for the purpose of determining phthalate content in a solid substance. The
18 option to provide a certification of additional reformulation in lieu of making all or a pro-rata
19 portion of the final civil penalty payment under this Section is a material term, and time, relative
20 to the identified date for the certification, is of the essence.

21 **3.2 Reimbursement of Plaintiff’s Fees and Costs**

22 The Parties acknowledge that Held and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
24 leaving the issue to be resolved after the material terms of the agreement had been settled.
25 Shortly after all other settlement terms had been finalized, Kolder expressed a desire to resolve
26 the fees and costs. The Parties then attempted to (and did) reach an accord on the compensation
27 due to Held and his counsel under general contract principles and the private attorney general
28 doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this

1 matter exclusive of fees and costs incurred on appeal, if any. Under these legal principles, on or
2 before five (5) days following the Effective Date, Kolder shall pay \$35,000 for the fees and
3 costs incurred by Plaintiff in investigating, litigating, and enforcing this matter, including the
4 fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the Court's
5 approval of this Consent Judgment in the public interest.

6 **3.3 Payment Procedures.**

7 **3.3.1** Within fifteen (15) days following its execution of this Consent Judgment,
8 Kolder shall tender the full amount of funds required under Sections 3.2 and 3.4 above to its
9 counsel's trust account to be held for disbursement as specified in those Sections pending the
10 Court's approval of this Consent Judgment.

11 **3.3.2 Payment Addresses.** Payments shall be delivered as follows:

12 (a) All payments owed to Held and his counsel pursuant to Section 3 shall be
13 delivered to the following address:

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

19 (b) All payments owed to OEHHA pursuant to Section 3 shall be delivered
20 directly to OEHHA (Memo line "Prop. 65 Penalties") at the following address:

21 For United States Postal Service Delivery:

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010
26 Sacramento, CA 95812-4010

27 For Non-United States Postal Service Delivery:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

3.3.3 Proof of Payment to OEHHA. For any payment required to be made to
OEHHA under Section 3, Kolder agrees to have its counsel provide a copy of the checks to The

1 Chanler Group at the address set forth above in section 3.3.2(a) as proof that such payment has
2 been rendered.

3 **3.3.4 Tax Documentation.** For each payment made under this Consent
4 Judgment, Kolder, or its counsel’s trust account administrator, shall issue separate 1099 forms to
5 each of the following payees:

6 (a) “Anthony E. Held, Ph.D., P.E.,” whose address and tax
7 identification number will be provided after this Consent Judgment has been fully executed by
8 the Parties;

9 (b) “California Office of Environmental Health Hazard Assessment,”
10 (EIN: 68-0284486), at P.O. Box 4010, Sacramento, CA 95814; and

11 (c) “The Chanler Group” (EIN: 94-3171522) at the address provided
12 in 3.3.2(a) above.

13 **3.3.5 Court Approval; Reimbursement.** If the Court does not approve the
14 Consent Judgment, all funds tendered into any trust account, or otherwise received by The
15 Chanler Group from Kolder in settlement of this Action, shall be refunded in full as required by
16 Section 6 below.

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Plaintiff’s Public Release of Proposition 65 Claims**

19 In consideration of the promises and commitments contained herein, Plaintiff on behalf of
20 himself and his past and current agents, representatives, attorneys, successors, and/or assignees,
21 and in the public interest, hereby releases Kolder, its parents, subsidiaries, affiliated entities that
22 are under common ownership or control, directors, officers, employees, and attorneys
23 (“Releasees”); and each entity to whom they directly or indirectly distribute or sell Covered
24 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
25 cooperative members, licensors, and licensees (“Downstream Defendant Releasees”), from all
26 claims for violations of Proposition 65 based on unwarned exposure to DEHP from the Covered
27 Products sold by Kolder prior to the Effective Date. Upon entry of this Consent Judgment by the
28 Court, going forward, Kolder’s compliance with the terms of Section 2 of this Consent Judgment

1 shall be deemed to constitute compliance with Proposition 65 with respect to DEHP in the
2 Covered Products, including as to Covered Products sold in California pending full
3 implementation of the Reformulation Obligation set forth in Section 2 of this Consent Judgment.

4 **4.2 Plaintiff's Individual Release of Proposition 65 Claims**

5 Plaintiff, on behalf of himself and his past and current agents, representatives, attorneys,
6 successors, and/or assignees and *not* in his representative capacity, also agrees to release Kolder,
7 its Releasees, and its Downstream Defendant Releases as to Proposition 65 claims arising up to
8 the Effective Date relating to the Listed Chemicals, including DEHP, BBP and DBP, in the
9 Covered Products and in the Additional Products sold or distributed for sale by Kolder prior to
10 the Effective Date.

11 **4.3 Kolder' Release of Plaintiff**

12 Kolder waives any and all claims against Plaintiff, his attorneys, and other representatives
13 for any and all actions taken or statements made (or those that could have been taken or made) by
14 Plaintiff and his attorneys and other representatives, whether in the course of investigating claims
15 or otherwise seeking enforcement of Proposition 65 against Kolder in this matter.

16 **5. SEVERABILITY**

17 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
18 contained herein are held by a court to be unenforceable, the validity of the enforceable
19 provisions remaining shall not be adversely affected unless the Court finds that any unenforceable
20 provision is not severable from the remainder of the Consent Judgment.

21 **6. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and
23 shall be null and void if, for any reason, it is not approved and entered by Court within twelve
24 months of it being fully executed by the Parties, at which time, any funds being held in Trust for
25 purposes of this agreement shall be fully reimbursed to Kolder.

26 **7. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of
28 California and apply within the State of California. In the event that Proposition 65 is repealed or

1 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products or the
2 Additional Products, than Kolder shall provide written notice to Plaintiff of any asserted change
3 in the law, and shall have no further obligations pursuant to this Consent Judgment with respect
4 to, and to the extent that, the Covered Products and/or Additional Products are so affected.

5 **8. ENFORCEMENT**

6 Any Party may, by motion or application for an order to show cause before this Court,
7 enforce the terms and conditions contained in this Consent Judgment.

8 **9. NOTICE**

9 When any Party is entitled to receive any notice under this Consent Judgment, the notice
10 shall be sent by regular first class mail and/or electronic mail to the person identified below.

11 To Plaintiff:

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

15 To Kolder:

16 Jim Martin
17 Kolder, Inc.
PO Box 100
Edinburg, TX 78540

18 with a copy to

19 Robert Falk
20 Morrison & Foerster LLP
425 Market Street, 32nd Floor
21 San Francisco, CA 94105

22 Any Party may modify the person and address to whom the notice is to be sent by sending each
23 other Party notice by mail and/or other verifiable form of written communication.

24 **10. MODIFICATION**

25 Except as provided in this Section, this Consent Judgment may be modified only by a
26 written agreement of the Parties or by the Court upon motion for good cause shown. In addition,
27 upon the written request of Kolder, made within 18 months of the date on which the Consent
28 Judgment is entered by the Court and provided that there is a reasonable basis therefore, Plaintiff

1 shall issue a 60-Day Notice of Violation pursuant to Health & Safety Code §25249.7 as to BBP
2 and/or DBP in the Covered Products or as to DEHP, BBP, and/or DBP in the Additional
3 Products. Kolder shall cooperate with Plaintiff in providing additional information or
4 representations necessary to enable Plaintiff to issue such notice and a valid Certificate of Merit
5 therefore. Upon the expiration of the requisite notice period, and provided that no authorized
6 public prosecutor of Proposition 65 has filed a lawsuit based on the claims alleged in the notice,
7 Plaintiff shall file with the Court and, at least ten days prior to such filing, serve notice on the
8 Attorney General's office of, an application for an approval of an amended Consent Judgment to
9 reflect the expansion of the public interest release provisions of Section 4.1 above so as to include
10 the additional Listed Chemicals and/or Additional Products. In addition to potential additional
11 civil penalties, pursuant to Code of Civil Procedure sections 1021 and 1021.5, Plaintiff and his
12 counsel may seek from Kolder through and with appropriate support in the application, Plaintiff's
13 reasonable fees and costs incurred issuing the notice and preparing and filing the application and
14 the amended Consent Judgment. The Parties agree that this amount of additional fee and cost
15 reimbursement is not to exceed \$13,000. Any fee award associated with the modification of the
16 Consent Judgment to include additional Listed Chemicals and/or Additional Products shall not
17 offset any associated supplemental penalty award, if any. Payments of all awarded penalties and
18 fees required under this Section shall be made within fifteen (15) days of the submission of the
19 application to the Court according to the procedures set forth in Section 33 above.

20 **11. ADDITIONAL POST-EXECUTION ACTIVITIES**

21 Plaintiff agrees to comply with the reporting form requirements referenced in Health and
22 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to California
23 Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval
24 of this Consent Judgment. In furtherance of obtaining such approval, the Parties and their
25 respective counsel agree to mutually employ their best efforts to support the entry of this
26 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in
27 a timely manner. For purposes of this paragraph, "best efforts" shall include, at a minimum,
28

1 cooperating on the drafting and filing of any papers in support of the required motion for
2 judicial approval.

3 **12. ENTIRE AGREEMENT**

4 This Consent Judgment contains the sole and entire agreement and understanding of the
5 parties. No representations, oral or otherwise, express or implied, other than those contained
6 herein, have been made by any party hereto. No other agreements shall be deemed to exist or to
7 bind any of the parties.

8 **13. COUNTERPARTS, FACSIMILE SIGNATURES**

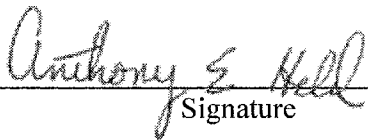
9 This Consent Judgment may be executed in counterparts and by facsimile or portable
10 document format (.pdf) signature, each of which shall be deemed an original, and all of which,
11 when taken together, shall be deemed to constitute one and the same document.

12 **14. AUTHORIZATION**

13 **14.1** Each signatory to this Consent Judgment certifies that he or she is fully authorized
14 by the Party he or she represents to stipulate to this Consent Judgment and to enter into and
15 execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

17 AGREED TO:

18 Plaintiff, ANTHONY E. HELD, PH.D., P.E.

19
20 
Signature

21
22 Date: February, 12, 2014

AGREED TO:

Defendant, KOLDER, INC.

Signature

By: _____
Print Name

Its: _____
Title

Date: _____

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17 AGREED TO:
18 Plaintiff, ANTHONY E. HELD, PH.D., P.E.

AGREED TO:
Defendant, KOLDER, INC.

20 _____
21 Signature

_____ *Jim Martin*
Signature

22 Date: _____

By: JIM MARTIN
Print Name

23 _____
24 _____
25 _____

Its: PRESIDENT
Title

26 _____
27 _____
28 _____

Date: 2/12/14