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10 MARK MOORBERG

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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION
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19 ANTHONY E. HELD, PH.D., P.E. and
20 MARK MOORBERG

21 Plaintiffs,

22 v.

23 AMERICAN CRAFTS, L.C., *et al*,

24 Defendants.

Case No. RG14733570

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiffs Anthony E. Held (“Held”) and Mark Moorberg (“Moorberg” and, collectively with Held, “Plaintiffs”) and defendant American
4 Crafts, L.C. (“American Crafts”), with Plaintiffs and American Crafts each referred to individually
5 as a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Plaintiffs is a resident of the State of California who seeks to promote awareness of
9 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
10 substances contained in consumer and commercial products.

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Plaintiffs allege that American Crafts manufactures, imports, sells and/or distributes for sale
17 in California, vinyl/PVC craft embellishments and vinyl/PVC pen pouches containing di(2-
18 ethylhexyl)phthalate (“DEHP”), and that it does so without providing the health hazard warning as
19 required by Proposition 65.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are: (a) vinyl/PVC craft embellishments
22 containing DEHP, including, but not limited to, the *Dear Lizzy+American Crafts Adhesive*
23 *Layered Embellishments Honeysuckle*, #78040, (UPC No. 7 18813 78040 7); and (b) vinyl/PVC
24 pen pouches containing DEHP, including, but not limited to the *Artist’s Loft Illustration Pens*, #
25 179838 #86955-2011-03, (UPC No. 4 00100 83113 7) (collectively, “Products”).

26 **1.6 Notices of Violation**

27 On April 30, 2014, Held served American Crafts and the requisite public enforcement
28 agencies with a 60-Day Notice of Violation (“Held Notice”), alleging that American Crafts violated

1 Proposition 65 when it failed to warn its customers and consumers in California that its vinyl/PVC
2 craft embellishments expose users to DEHP. On October 24, 2014, Moorberg served American
3 Crafts and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Moorberg
4 Notice”), alleging that American Crafts violated Proposition 65 when it failed to warn its customers
5 and consumers in California that its vinyl/PVC pen pouches expose users to DEHP. The Held
6 Notice and the Moorberg Notice are referred to collectively hereinafter as the “Notices.” To the
7 best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an
8 action to enforce the allegations set forth in either of the Notices.

9 **1.7 Complaint**

10 On July 17, 2014, Held commenced the instant action, naming American Crafts as a
11 defendant for the alleged violations of Proposition 65 that are the subject of the Held Notice. On
12 April 1, 2015, Plaintiffs filed a First Amended Complaint, the operative pleading in this action
13 (“Complaint”), for the alleged violations of Proposition 65 that are the subject of the Notices.

14 **1.8 No Admission**

15 American Crafts denies the material, factual, and legal allegations contained in the Notices
16 and Complaint, and maintains that all of the products that it has sold or distributed for sale in
17 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
18 Consent Judgment shall be construed as an admission by American Crafts of any fact, finding,
19 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
20 Judgment constitute or be construed as an admission by American Crafts of any fact, finding,
21 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
22 otherwise affect American Crafts’ obligations, responsibilities, and duties under this Consent
23 Judgment.

24 **1.9 Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over American Crafts as to the allegations contained in the Complaint, that venue is
27 proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the
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1 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
2 section 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
5 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

6 **2. INJUNCTIVE SETTLEMENT TERMS**

7 Commencing on the Effective Date and continuing thereafter, American Crafts shall only
8 manufacture for sale, or purchase for sale in California, Reformulated Products. For purposes of
9 this Consent Judgment, “Reformulated Products” are defined as Products with a maximum DEHP
10 concentration 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
11 Protection Agency testing methodologies 3580A and 8270C, or other methodologies utilized by
12 state or federal agencies for the purpose of determining DEHP content in a solid substance.

13 **3. MONETARY SETTLEMENT TERMS**

14 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

15 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
16 claims referred to in this Consent Judgment, American Crafts shall pay \$5,000 in civil penalties in
17 accordance with this Section. Each penalty payment will be allocated in accordance with California
18 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
19 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
20 penalty remitted to Plaintiffs to be divided equally between them. Plaintiffs’ counsel shall be
21 responsible for remitting American Crafts’ penalty payment(s) under this Consent Judgment to
22 OEHHA.

23 **3.1.1 Initial Civil Penalty.** Within ten business days of the Effective Date,
24 American Crafts shall make an initial civil penalty payment of \$2,000. American Crafts shall
25 provide its payment in a single check made payable to “Plaintiffs Client Trust Account” to be
26 delivered to the address provided in Section 3.4, below.

27 **3.1.2 Final Civil Penalty; Waiver for Accelerated Reformulation.** On or before
28 February 15, 2016, American Crafts shall make a final civil penalty payment of \$3,000. Pursuant

1 to title 11 California Code of Regulations, section 3203(c), Plaintiffs agrees that the final civil
2 penalty payment shall be waived in its entirety if, no later than February 1, 2016, an officer of
3 American Crafts provides Plaintiffs with a signed declaration certifying that all of the Products it
4 ships for sale or distributes for sale in California as of the date if its declaration are Reformulated
5 Products, and that American Crafts will continue to offer only Reformulated Products in California
6 in the future. The option to certify early reformulation in lieu of making the final civil penalty
7 payment otherwise required by this Section is a material term, and time is of the essence. To obtain
8 a waiver of the final civil penalty, American Crafts must deliver its declaration certifying
9 reformulation to Plaintiffs' counsel at the address provided in Section 8, below. In the event that
10 American Crafts does not timely certify its compliance or make the final civil penalty payment
11 required by this Section, the Parties agree that Plaintiffs may file a motion or application seeking an
12 order compelling American Crafts' compliance with this Section. If successful, the Parties further
13 agree that Plaintiffs shall be entitled to their reasonable attorneys' fees and costs pursuant to general
14 contract principles and Code of Civil Procedure section 1021.5.

15 **3.2 Reimbursement of Attorneys' Fees and Costs**

16 The Parties acknowledge that Plaintiffs and their counsel offered to resolve this dispute
17 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
18 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
19 the other settlement terms had been finalized, American Crafts expressed a desire to resolve
20 Plaintiffs' fees and costs. The Parties then negotiated a resolution of the compensation due to
21 Plaintiffs and their counsel under general contract principles and the private attorney general
22 doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through
23 the mutual execution of this agreement and the Court's approval of the same, but exclusive of fees
24 and costs on appeal, if any, American Crafts shall reimburse Plaintiffs and their counsel \$27,500.
25 American Crafts' payment shall be delivered to the address in Section 3.4 in the form of a check
26 payable to "The Chanler Group." The reimbursement shall cover all fees and costs incurred by
27 Plaintiffs investigating, bringing this matter to American Crafts' attention, litigating, and
28 negotiating a settlement of the matter in the public interest.

1 **3.3 Payment Timing; Payments Held In Trust**

2 With the exception of the final civil penalty payment required by Section 3.1.2, American
3 Crafts shall deliver all payments required by this Consent Judgment to its counsel within ten (10)
4 business days of the date that this agreement is fully executed by the Parties. American Crafts’
5 counsel shall confirm receipt of settlement funds in writing to Plaintiffs’ counsel and, thereafter,
6 hold the amounts paid in trust until such time as the Court grants the motion for approval of the
7 Parties’ settlement contemplated by Section 5. Within two days of the Effective Date, American
8 Crafts’ counsel shall deliver all settlement payments it has held in trust to Plaintiffs’ counsel at the
9 address provided in Section 3.4. In the event the final civil penalty payment required by Section
10 3.1.2 becomes due prior to the Effective Date, then American Crafts shall deliver the final civil
11 penalty payment to its attorney to be held in trust until, and disbursed within two days after, the
12 Effective Date.

13 **3.4 Payment Address**

14 All payments required by this Consent Judgment shall be delivered to the following
15 address:

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

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Plaintiffs’ Release of Proposition 65 Claims**

23 Plaintiffs, acting on their own behalf and in the public interest, releases American Crafts and
24 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
25 and attorneys (“Releasees”) and each entity to whom American Crafts directly or indirectly
26 distributes or sells the Products including, but not limited to, its downstream distributors,
27 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
28 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
to DEHP from the Products manufactured, imported, distributed or sold by American Crafts prior to

1 the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
2 constitutes compliance with Proposition 65 by American Crafts with respect to the alleged or actual
3 failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale
4 by American Crafts after the Effective Date.

5 **4.2 Plaintiffs' Individual Release of Claims**

6 Plaintiffs, in their individual capacities only and *not* in their representative capacities, also
7 provide a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a
8 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
9 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Plaintiffs of any
10 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
11 alleged or actual exposures to DEHP in Products manufactured, imported, distributed or sold by
12 American Crafts before the Effective Date.

13 **4.3 American Crafts' Release of Plaintiffs**

14 American Crafts, on its own behalf and on behalf of its past and current agents,
15 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
16 Plaintiffs and their attorneys and other representatives, for any and all actions taken or statements
17 made (or those that could have been taken or made) by Plaintiffs and their attorneys and other
18 representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in
19 this matter, or with respect to the Products.

20 **5. COURT APPROVAL**

21 This Consent Judgment is not effective until it is approved and entered by the Court and
22 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
23 after it has been fully executed by all Parties. Plaintiffs and American Crafts agree to support the
24 entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a
25 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
26 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,
27 which motion Plaintiffs shall draft and file and American Crafts shall support, appearing at the
28 hearing if so requested. If any third-party objection to the motion is filed, Plaintiffs and American

1 Crafts agree to work together to file a reply and appear at any hearing. This provision is a material
2 component of the Consent Judgment and shall be treated as such in the event of a breach.

3 **6. SEVERABILITY**

4 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
5 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
6 remaining provisions shall not be adversely affected.

7 **7. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of California
9 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
10 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then American
11 Crafts may provide Plaintiffs with written notice of any asserted change in the law, and shall have
12 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
13 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve American
14 Crafts from its obligation to comply with any pertinent state or federal law or regulation.

15 **8. NOTICE**

16 Unless specified herein, all correspondence and notice required by this Consent Judgment
17 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
18 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
19 following addresses:

20 To American Crafts:

21 Richard McNeil, Esq.
22 Snell & Wilmer
23 600 Anton Blvd., Suite 1400
24 Costa Mesa, CA 92626

To Plaintiffs:

Attn: Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

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1 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

6 Plaintiffs and their counsel agree to comply with the reporting form requirements referenced
7 in California Health and Safety Code section 25249.7(f).

8 **11. MODIFICATION**

9 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
10 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
11 any party and the entry of a modified Consent Judgment by the Court thereon.

12 **12. AUTHORIZATION**

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

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17 **AGREED TO:**

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19 ANTHONY E. HELD, PH.D., P.E.

20 Dated: 10/29/2015

AGREED TO:


AMERICAN CRAFTS, INC.

By: Sarah DeValle
(Print Name)

Its: CEO
(Title)

Dated: 10/16/15

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23 **AGREED TO:**

24 
25 MARK MOORBERG

26 Dated: 10.29.15

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