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

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SANTA CLARA  
UNLIMITED CIVIL JURISDICTION

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

13 Plaintiff,

14 v.

15 THE KROGER CO., *et al.*,

16 Defendants.

Case No. 115CV288689

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*, and  
Cal. Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.  
4 (“Held”), and defendant The Kroger Co. (“Kroger”), with Held and Kroger each individually referred  
5 to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Held alleges that Kroger manufactures, imports, sells, and distributes for sale in California,  
16 vinyl/PVC gloves that contain diisononyl phthalate (“DINP”), and that it does so without first  
17 providing the exposure warning required by Proposition 65. DINP is listed pursuant to Proposition  
18 65 as a chemical known to the State of California to cause cancer.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC gloves containing DINP that  
21 are manufactured, imported, sold, or distributed for sale in California by Kroger, and sold under the  
22 brand name Everyday Living (“Products”) including, but not limited to, the *Everyday Living*  
23 *Disposable Multi-Purpose Vinyl Gloves, Model: GSI-EDL10-G7NM-090415, UPC # 0 11110 36958*

24 *1.*

25 **1.6 Notice of Violation**

26 On July 13, 2015, Held served Kroger, the California Attorney General, and all other requisite  
27 public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Kroger  
28 violated Proposition 65 when it failed to warn its customers and consumers in California of the health

1 hazards associated with exposures to DINP from the Products. No public enforcer has commenced  
2 and is diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On December 3, 2015, Held filed the instant action (“Complaint”), for the violations of  
5 Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 Kroger denies the material, factual, and legal allegations contained in the Notice and  
8 Complaint, and maintains that all of the Products it has sold and distributed for sale in California,  
9 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be  
10 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law,  
11 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any  
12 fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however,  
13 diminish or otherwise affect Kroger’s obligations, responsibilities, and duties under this Consent  
14 Judgment.

15 **1.9 Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
17 jurisdiction over Kroger as to the allegations in the Complaint, that venue is proper in Santa Clara  
18 County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent  
19 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” means the date on which  
22 the motion for approval of the Consent Judgment contemplated by Section 5 is granted by the Court.

23 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

24 Commencing on the August 1, 2016, and continuing thereafter, Kroger agrees either to  
25 discontinue the sale of the Products, or to only manufacture for sale or purchase for sale in California  
26 the Products as “Reformulated Products.” For purposes of this Consent Judgment, “Reformulated  
27 Products” are defined as Products with a maximum DINP concentration of 1,000 parts per million  
28 (0.1 %) in any component analyzed pursuant to U.S. Environmental Protection Agency testing

1 methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies  
2 for the purpose of determining DINP content in a solid substance.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Civil Penalty Payments**

5 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred  
6 to in this Consent Judgment, Kroger shall pay \$10,000 in civil penalties. If Kroger certifies by June 1,  
7 2016 that it has met the reformulation standards set forth by Section 2 of this Consent Judgment, an  
8 \$8,000 credit shall be applied to the total civil penalty amount, and Kroger will be responsible for  
9 paying the remaining \$2,000 in civil penalties. The civil penalty payment shall be allocated  
10 according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%)  
11 of the funds paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”),  
12 and twenty-five percent (25%) of the funds remitted to Held. Kroger shall provide its payment in a  
13 single check made payable to “Anthony E. Held, Client Trust Account.” Held’s counsel shall be  
14 responsible for delivering any penalty paid under this Consent Judgment to OEHHA.

15 **3.2 Reimbursement of Attorney’s Fees and Costs**

16 The parties acknowledge that Held and his counsel offered to resolve this dispute without  
17 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to  
18 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the  
19 other settlement terms had been finalized, Kroger expressed a desire to resolve Held’s fees and costs.  
20 The Parties then attempted to (and did) reach an accord on the compensation due to Held and his  
21 counsel under general contract principles and the private attorney general doctrine codified at Code  
22 of Civil Procedure section 1021.5 for all work performed through the mutual execution of this  
23 Consent Judgment. Kroger shall pay \$15,000 for the fees and costs incurred by Held investigating,  
24 bringing this matter to the attention of Kroger’s management, litigating, and negotiating a settlement  
25 in the public interest.

26 **3.3 Payments Held in Trust**

27 All payments due under this Consent Judgment shall be delivered within ten (10) business  
28 days of the date this Consent Judgment is fully executed by the Parties, and held in trust by Kroger’s

1 counsel until the Court approves the Parties' settlement. Kroger's counsel shall confirm in writing  
2 to Held's counsel upon its receipt of the settlement funds from Kroger and, thereafter, hold the funds  
3 in trust until the Effective Date, and deliver the payments to Held's counsel within five (5) business  
4 days of the Court's approval of this Consent Judgment.

### 5 **3.4 Payment Address**

6 All payments required by this Consent Judgment shall be delivered to:

7 The Chanler Group  
8 Attn: Proposition 65 Controller  
9 2560 Ninth Street  
10 Parker Plaza, Suite 214  
11 Berkeley, CA 94710

## 12 **4. CLAIMS COVERED AND RELEASED**

### 13 **4.1 Held's Public Release of Proposition 65 Claims**

14 Held, acting on his own behalf and in his representative capacity acting in the public  
15 interest, releases all actions, causes of action, claims, damages, liabilities, obligations, costs,  
16 expenses, and attorney fees against Kroger and its parents, subsidiaries, affiliated entities under  
17 common ownership, directors, officers, employees, and attorneys ("Releasees") and each entity to  
18 whom it directly or indirectly distributes or sells the Products including, but not limited to, it's  
19 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,  
20 licensors and licensees ("Downstream Releasees") for any violations arising under Proposition 65  
21 for the failure to warn about exposures to DINP from Products sold by Kroger prior to the Effective  
22 Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes  
23 compliance with Proposition 65 with respect to the failure to warn about exposures to DINP in  
24 Products sold by Kroger, the Releasees, and Downstream Releasees after the Effective Date.

### 25 **4.2 Held's Individual Release of Claims**

26 Held, in his individual capacity only and *not* in his representative capacity, also provides a  
27 release to Kroger, Releasees, and Downstream Releasees which shall be effective as a full and final  
28 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,  
attorneys' fees, damages, losses, claims, liabilities and demands of Held of any nature, character or

1 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual  
2 exposures to DINP in Products sold or distributed for sale by Kroger before the Effective Date.

3 Held, acknowledges that he is familiar with California Civil Code §1542, which provides as  
4 follows:

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

11 Held understands and acknowledges the significance and consequence of this waiver of California  
12 Civil Code § 1542 is that if Held hereafter discovers facts different from or in addition to those that  
13 he now believes to be true with respect to the matters released herein, he will not be able to assert any  
14 claims arising from such facts. Held acknowledges that he intends these consequences even as to any  
15 claims that may exist as of the date of his execution of this Consent Judgment but which he does not  
16 know exist, and which, if known, would materially affect his decision to execute this Consent  
17 Judgment, regardless of whether his lack of knowledge is the result of ignorance, oversight, error,  
18 negligence, or any other cause. Held, in his individual capacity only, and on behalf of himself, his  
19 past and current agents, representatives, attorneys, successors, and assigns expressly waives and  
20 relinquishes any and all rights and benefits which he may have under California Civil Code § 1542.

21 4.3 Kroger's Release of Held

22 Kroger, on its own behalf, and on behalf of its past and current agents, representatives,  
23 attorneys, successors, and assignees, hereby waives any and all claims against Held and his  
24 attorneys and other representatives, for any and all actions taken or statements made by Held and  
25 his attorneys and other representatives, whether in the course of investigating claims, otherwise  
26 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

1 **5. COURT APPROVAL**

2 This Consent Judgment is not Effective until it is approved and entered by the Court and shall  
3 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
4 has been fully executed by the Parties, or by such additional time as the Parties may agree to in  
5 writing.

6 **6. SEVERABILITY**

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

10 **7. GOVERNING LAW**

11 The terms of this Consent Judgment shall be governed by the laws of the state of California  
12 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is  
13 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Kroger may  
14 provide written notice to Held of any asserted change in the law, and shall have no further injunctive  
15 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
16 so affected.

17 **8. NOTICE**

18 All correspondence and notice required by this Consent Judgment shall be in writing and sent  
19 by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a  
20 recognized overnight courier to the following addresses:

21 For Kroger:

22 Steven Prough, Senior Counsel  
23 The Kroger Co.  
24 P.O. Box 54143  
25 Los Angeles, CA 90054

26 with a copy to:

27 Frederick W. Kosmo, Jr., Esq.  
28 Wilson Turner Kosmo LLP  
550 W. C Street,  
#1050  
San Diego, CA 92101

1 For Held:

2 Proposition 65 Coordinator  
3 The Chanler Group  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **10. POST EXECUTION ACTIVITIES**

14 Held agrees to comply with the reporting form requirements referenced in Health and Safety  
15 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code  
16 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In  
17 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and  
18 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial  
19 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall  
20 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,  
21 supporting the motion, and appearing at the hearing before the Court.

22 **11. MODIFICATION**

23 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and  
24 entry of a modified consent judgment by the Court thereon; or (ii) a successful motion or application  
25 of any Party, and the entry of a modified consent judgment by the Court thereon.  
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1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,  
3 and agree to all of the terms and conditions contained herein.  
4

5 **AGREED TO:**

**AGREED TO:**

6  
7 Date: 4/12/2016

Date: \_\_\_\_\_

8 By: *Anthony E. Held*  
9 ANTHONY E. HELD, PH.D., P.E.

By: \_\_\_\_\_  
Steven Prough, Senior Counsel  
THE KROGER CO.

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3 and agree to all of the terms and conditions contained herein.


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5 **AGREED TO:**

6  
7 Date: \_\_\_\_\_

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9 By: \_\_\_\_\_  
ANTHONY E. HELD, PH.D., P.E.

**AGREED TO:**

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7 Date: 4/8/16 \_\_\_\_\_

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9 By:  \_\_\_\_\_  
Steven Prough, Senior Counsel  
THE KROGER CO.

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