

1 **CHANLER LAW GROUP**
Clifford A. Chanler, State Bar No. 135534
2 Laurence D. Haveson, State Bar No. 152631
David Lavine, State Bar No. 166744
3 Daniel Bornstein, State Bar No. 181711
2560 Ninth Street
4 Parker Plaza, Suite 214
Berkeley, CA 94710
5 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

6 Attorneys for Plaintiffs
7 ANTHONY E. HELD, Ph.D., P.E. and RUSSELL
BRIMER

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11
12 ANTHONY E. HELD, PH.D., P.E., and
RUSSELL BRIMER)

13 Plaintiffs,)

14 v.)

15 TOYS "R" US, INC.; and DOES 1 through 150,)
16 inclusive,)

17 Defendants.)
18)

Lead Case No. RG 07-350981

Assigned For All Purposes To The
Honorable Robert B. Freedman

**CONSENT JUDGMENT AS TO
DEFENDANT NATIONWIDE
TRADING CORPORATION**

19 **1. INTRODUCTION**

20 **1.1 The Parties**

21 This Consent Judgment is entered into by and between Plaintiffs Anthony E. Held, Ph.D.,
22 P.E. ("Held") and Russell Brimer ("Brimer") and Defendant Nationwide Trading Corporation
23 ("Nationwide"), with Held, Brimer, and Nationwide collectively referred to as the "Parties."

24 **1.2 Plaintiffs**

25 Held and Brimer are individuals residing in California who seek to promote awareness of
26 exposure to toxic chemicals and improve human health by reducing or eliminating hazardous
27 substances contained in consumer products.
28

1 **1.3 Nationwide**

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

5 **1.4 General Allegations**

6 1.4.1 Held alleges that Nationwide has manufactured, distributed and/or sold, in
7 the State of California, feeding bottle nipples that expose users to di(2-ethylhexyl)phthalate
8 (“DEHP”) without first providing “clear and reasonable warning” under Proposition 65. DEHP is
9 listed as a chemical known to the State of California to cause birth defects and other reproductive
10 harm.

11 1.4.2 Brimer alleges that Nationwide has manufactured, distributed and/or sold,
12 in the State of California, colored, vinyl-coated paper fasteners that expose users to lead, without
13 first providing “clear and reasonable warning” under Proposition 65. Lead is listed as a chemical
14 known to the State of California to cause birth defects and other reproductive harm.

15 1.4.3 Lead and DEHP shall be referred to hereinafter as the “Listed Chemicals.”

16 **1.5 Notices of Violation**

17 1.5.1 On November 7, 2008, Held served Nationwide and various public
18 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “November 7
19 Notice”) that provided Nationwide and such public enforcers with notice that alleged that
20 Nationwide was in violation of Proposition 65 for failing to warn consumers and customers that
21 feeding bottle nipples manufactured, distributed and/or sold by Nationwide exposed users in
22 California to DEHP.

23 1.5.2 On December 23, 2008, Brimer served Nationwide and various public
24 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “December 23
25 Notice”) that provided Nationwide and such public enforcers with notice that alleged that
26 Nationwide was in violation of Proposition 65 for failing to warn consumers and customers that
27 colored, vinyl-coated paper fasteners manufactured, distributed and/or sold by Nationwide
28 exposed users in California to Lead.

1 **1.6 Complaints**

2 1.6.1 On March 13, 2009, Held, acting, in the interest of the general public in
3 California, filed his fourth amended complaint in this action, alleging violations of Health &
4 Safety Code § 25249.6 by Nationwide based on the alleged exposure to DEHP contained in
5 feeding bottle nipples.

6 1.6.2 On March 12, 2009, Brimer, acting, in the interest of the general public in
7 California, filed a first amended complaint in the Superior Court in and for the City and County
8 of San Francisco, Case No. CGC-09-485784, alleging violations of Health & Safety Code §
9 25249.6 based on the alleged exposures to lead contained in vinyl coated paper fasteners
10 manufactured, distributed and/or sold by Nationwide.

11 1.6.3 On December 29, 2009, plaintiffs filed a fifth amended complaint in this
12 action, incorporating Brimer's allegations in the complaint in San Francisco Superior Court No.
13 CGC-09-485784.

14 **1.7 No Admission**

15 The Parties enter into this Consent Judgment pursuant to a full and final settlement of any
16 and all claims between the Parties for the purpose of avoiding prolonged litigation. Nationwide
17 denies the material factual and legal allegations contained in the Notices and Complaints and
18 maintains that all Covered Products it has manufactured, distributed and/or sold in California
19 have been and are in compliance with all applicable laws. Nothing in this Consent Judgment
20 shall be construed as an admission by Nationwide of any fact, finding, issue of law, or violation
21 of law, nor shall compliance with this Consent Judgment constitute or be construed as an
22 admission by Nationwide of any fact, finding, conclusion, issue of law, or violation of law, such
23 being specifically denied by Nationwide. However, this Section shall not diminish or otherwise
24 affect Nationwide's obligations, responsibilities, and duties under this Consent Judgment.

25 **1.8 Consent to Jurisdiction**

26 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over Nationwide as to the allegations contained in the Complaints, that venue is
28

1 proper in the County of Alameda and that this Court has jurisdiction to enter and enforce the
2 provisions of this Consent Judgment.

3 **2. DEFINITIONS**

4 2.1 The term "Complaints" means the complaints identified in Section 1.6.

5 2.2 The term "Covered Products" means feeding bottle nipples and colored, vinyl-
6 coated paper fasteners.

7 2.3 The term "Compliance Date" means October 1, 2009.

8 2.4 The term "Effective Date" means the date that the court enters this consent
9 judgment.

10 2.5 The term "Notices" means the 60-Day Notices identified in Section 1.5.

11 **3. INJUNCTIVE RELIEF**

12 3.1 **Feeding Bottle Nipple.** After the Compliance Date, Nationwide shall not sell,
13 ship, or offer to be shipped for sale in California any feeding bottle nipples that contain DEHP in
14 excess of 1,000 parts per million ("ppm") by weight.

15 3.2 **Colored, Vinyl-Coated Paper Fasteners.** After the Compliance Date,
16 Nationwide shall not sell, ship, or offer to be shipped for sale in California any colored, vinyl-
17 coated paper fasteners that contain lead in excess of 300 parts per million ("ppm") by weight.

18 3.3 **Previously-Distributed Colored, Vinyl-Coated Paper Fasteners.**

19 3.3.1 Within ten days of the entry of this Consent Judgment, Nationwide shall
20 send a letter or electronic communication, which letter or electronic communication shall include
21 a request for receipt of delivery, to each customer in California to whom it supplied, on or after
22 July 1, 2008, any colored, vinyl-coated paper fasteners that did not meet the reformulation
23 standard of Section 3.2, requesting that the customer either provide Proposition 65 warnings for
24 such Covered Product(s) remaining in its inventory, or return any such Covered Product(s) to
25 Nationwide at no cost to the customer.

26 3.3.2 If Nationwide elects to instruct the customer to provide a Proposition 65
27 warning, it shall include in the letter a sufficient number of warning stickers containing the
28 following language:

1 4.1.3 Payments shall be delivered to plaintiffs' counsel on or before April 30,
2 2010, at the following address:

3 Chanler Law Group
4 Attn: Proposition 65 Coordinator
5 2560 Ninth Street, Suite 214
6 Berkeley, CA 94710

7 **5. REIMBURSEMENT OF FEES AND COSTS**

8 5.1 Pursuant to the private attorney general doctrine codified at California Code of
9 Civil Procedure (C.C.P.) § 1021.5 and general contract principles, Nationwide shall reimburse
10 plaintiffs and their counsel a total of \$23,000 for fees and costs incurred as a result of
11 investigating, bringing these matters to Nationwide's attention, and litigating and negotiating a
12 settlement in the public interest. The first payment of \$500 shall be delivered to plaintiffs'
13 counsel on or before April 30, 2010. The remaining \$22,500 shall be payable in nine equal
14 monthly installments of \$2,500, commencing on or before March 31, 2010

15 5.2 Nationwide shall issue a separate 1099 for fees and costs (EIN: 94-3171522) and
16 shall make checks issued pursuant to Section 5.1 payable to "Chanler Law Group" and delivered
17 to plaintiff's counsel at the following address:

18 Chanler Law Group
19 Attn: Proposition 65 Coordinator
20 2560 Ninth Street, Suite 214
21 Berkeley, CA 94710

22 **6. CLAIMS COVERED AND RELEASE**

23 **6.1 Claims Covered**

24 This Consent Judgment is a full, final, and binding resolution between Held and Brimer,
25 on behalf of themselves, their past and current agents, representatives, attorneys, successors,
26 and/or assignees, and the general public, as to the Covered Products each plaintiff identified in the
27 Notices, and Nationwide, its parents, shareholders, divisions, subdivisions, subsidiaries, affiliates,
28 partners, sister companies, employees, directors, insurers, and attorneys and their successors and
assigns ("Defendant Releasees"), and all entities to whom Defendant Releasees distribute or sell
Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
franchisees, cooperative members, and licensees ("Downstream Defendant Releasees"), of any

1 violation of Proposition 65 that has been or could have been asserted in the Complaints against
2 Nationwide, Defendant Releasees, and Downstream Defendant Releasees, regarding the failure to
3 warn about exposure to the Listed Chemicals in Covered Products manufactured, sourced,
4 distributed, or sold by Nationwide prior to the Effective Date. Defendant Releasees' compliance
5 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect
6 to the Listed Chemicals in Covered Products manufactured, distributed or sold by Nationwide
7 after the Effective Date.

8 6.2 Held and Brimer's Release of Nationwide, and its Chain of Distribution

9 6.2.1 Held and Brimer, on behalf of themselves, their past and current agents,
10 representatives, attorneys, successors, and/or assignees, and in the interest of the general public,
11 hereby waive with respect to Covered Products all rights to institute or participate in, directly or
12 indirectly, any form of legal action and releases all claims, including, without limitation, all
13 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
14 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
15 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or
16 contingent (collectively "claims"), against Defendant Releasees and Downstream Defendant
17 Releasees that arise under Proposition 65 or any other statutory or common law claims that were
18 or could have been asserted in the public interest, as such claims relate to Defendant Releasees'
19 and Downstream Defendant Releasees' alleged failure to warn about exposures to the Listed
20 Chemicals contained in the Covered Products.

21 6.2.2 Held and Brimer also, in their individual capacities only and not in their
22 representative capacities, each provide a general release herein which shall be effective as a full
23 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
24 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Held and/or Brimer
25 of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the
26 subject matter of the Complaints and Notices. Held and Brimer each acknowledges that he is
27 familiar with Section 1542 of the California Civil Code, which provides as follows:
28

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

7 Held and Brimer, in their individual capacities only and *not* in their representative capacities,
8 expressly waive and relinquish any and all rights and benefits which they may have under, or
9 which may be conferred on them by the provisions of Section 1542 of the California Civil Code
10 as well as under any other state or federal statute or common law principle of similar effect, to the
11 fullest extent that they may lawfully waive such rights or benefits pertaining to the released
12 matters. In furtherance of such intention, the release hereby given shall be and remain in effect as
13 a full and complete release notwithstanding the discovery or existence of any such additional or
14 different claims or facts arising out of the released matters.

15 6.2.3 Upon court approval of the Consent Judgment, the Parties waive their
16 respective rights to a hearing or trial on the allegations of the complaint.

17 6.2.4 The parties further understand and agree that this release shall not extend
18 upstream to any entities that manufactured the Covered Products or any component parts thereof,
19 or any distributors or suppliers who sold the Covered Products or any component parts thereof to
20 Nationwide.

21 6.3 Nationwide's Release of Held and Brimer

22 6.3.1 Nationwide waives any and all claims against Brimer and Held, their
23 attorneys, and other representatives for any and all actions taken or statements made (or those that
24 could have been taken or made) by plaintiffs and their attorneys and other representatives,
25 whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65
26 against them in this matter, and/or with respect to the Covered Products.

27 6.3.2 Nationwide also provides a general release herein which shall be effective
28 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,
costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Nationwide of
any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the

1 subject matter of the action. Nationwide acknowledges that it is familiar with Section 1542 of the
2 California Civil Code, which provides as follows:

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

9 Nationwide expressly waives and relinquishes any and all rights and benefits which it may
10 have under, or which may be conferred on it by the provisions of Section 1542 of the California
11 Civil Code as well as under any other state or federal statute or common law principle of similar
12 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the
13 released matters. In furtherance of such intention, the release hereby given shall be and remain in
14 effect as a full and complete release notwithstanding the discovery or existence of any such
15 additional or different claims or facts arising out of the released matters.

16 **7. SEVERABILITY**

17 If, subsequent to court approval of this Consent Judgment, any of the provisions of this
18 Consent Judgment 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
20 unenforceable provision is not severable from the remainder of the Consent Judgment.

21 **8. 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 the Court within nine
24 months after it has been fully executed by all parties. If this Consent Judgment is not approved
25 by the Court within nine months after it has been fully executed, or if the Court declines to
26 approve this Consent Judgment, plaintiff's counsel shall refund any monetary payments that have
27 been paid by Nationwide pursuant to Sections 4 and 5, and this action shall resume the status that
28 it had prior to the date that this Consent Judgment was executed.

9. GOVERNING LAW

1 The terms of this Consent Judgment shall be governed by the laws of the State of
2 California.

3 **10. NOTICES**

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

8 To Nationwide:

9 Joseph Kohan
10 Nationwide Trading Corporation
11 3100 East 44th Street
12 Vernon, CA 90058

13 With a copy to:

14 Jeffrey B. Margulies
15 Fulbright & Jaworski L.L.P.
16 555 South Flower Street, 41st Floor
17 Los Angeles, CA 90071

18 To Brimer and Held:

19 Chanler Law Group
20 Attn: Proposition 65 Coordinator
21 2560 Ninth Street, Suite 214
22 Berkeley, CA 94710

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

25 **11. COUNTERPARTS, FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile, each of which
27 shall be deemed an original, and all of which, when taken together, shall constitute one and the
28 same documents.

12. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)

Plaintiffs will comply with the reporting form requirements referenced, in California
Health & Safety Code §25249.7(f).

1 **13. MODIFICATION**

2 This Consent Judgment may be modified only: (1) by written agreement of the parties; or
3 (2) upon a successful motion of any party and entry of a modified Consent Judgment by the
4 Court.

5 **14. ADDITIONAL POST-EXECUTION ACTIVITIES**

6 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed
7 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
8 obtaining such approval, Held, Brimer and Nationwide and their respective counsel agree to
9 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
10 and obtain approval of the Consent Judgment by the Court in a timely manner.

11 **15. ATTORNEY'S FEES**

12 15.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
13 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs
14 unless the unsuccessful Party has acted with substantial justification. For purposes of this
15 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
16 Civil Discovery Act of 1986, Code of Civil Procedure §§2016, *et seq.*

17 15.2 Except as specifically provided in the above paragraph and in Section 5, each
18 Party shall bear its own costs and attorney's fees in connection with this action.

19 15.3 Nothing in this Section 14 shall preclude a Party from seeking an award of
20 sanctions pursuant to law.

21 **16. ENTIRE AGREEMENT**

22 This Settlement Agreement contains the sole and entire agreement and understanding of
23 the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
24 negotiations, commitments, and understandings related hereto. No representations, oral or
25 otherwise, express or implied, other than those contained herein have been made by any Party
26 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
27 deemed to exist or to bind any of the Parties.

28 **17. AUTHORIZATION**

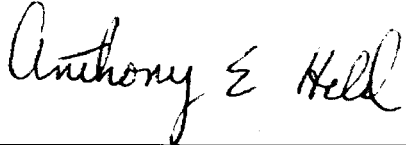
1 The undersigned are authorized to execute this Consent Judgment on behalf of their
2 respective parties and have read, understood, and agree to all of the terms and conditions of this
3 Consent Judgment.

4 **18. COUNTERPARTS, FACSIMILE SIGNATURES**

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

8
9 **AGREED TO:**

10 Date: April 14, 2009

11 

12
13 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

AGREED TO:

Date: April __, 2009

By: _____
Defendant, Nationwide Trading Corporation

14 **AGREED TO:**

15 Date: April __, 2009

16
17
18 By: _____
Plaintiff, Russell Brimer

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

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7 together, shall constitute one and the same documents.

8
9 **AGREED TO:**

10 Date: April __, 2009

AGREED TO:

Date: April __, 2009

11
12
13 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

By: _____
Defendant, Nationwide Trading Corporation

14 **AGREED TO:**

15 Date: April 23, 2009
2010

16
17
18 By:  _____
Plaintiff, Russell Brimer

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

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6 document format (PDF), each of which shall be deemed an original, and all of which, when taken
7 together, shall constitute one and the same documents.

8
9 **AGREED TO:**

10 Date: April __, 2009

11
12
13 By: _____
Plaintiff, Anthony E. Held, Ph.D., P.E.

AGREED TO:

Date: April 23 2009

14 By:  _____
Defendant, Nationwide Trading Corporation

15 **AGREED TO:**

16 Date: April __, 2009

17
18 By: _____
Plaintiff, Russell Brimer