

1 Clifford A. Chanler, State Bar No. 135534  
2 Laurence D. Haveson, State Bar No. 152631  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

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

**FILED**

**MAR 28 2013**

KIM TURNER, Court Executive Officer  
MARIN COUNTY SUPERIOR COURT

*By: J. Dale, Deputy*

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

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

15 Plaintiff,

16 v.

17 KISS NAIL PRODUCTS, INC., et al.,

18 Defendants.

Case No. CIV-1101576

~~PROPOSED~~ JUDGMENT PURSUANT  
TO TERMS OF PROPOSITION 65  
SETTLEMENT AND CONSENT  
JUDGMENT

Date: March 28, 2013

Time: 8:30 a.m.

Dept. B

Judge: Hon. Roy O. Chernus

1 Plaintiff, Anthony E. Held, Ph.D., P.E., and defendants, Kiss Nail Products, Inc., and  
2 Kiss Products, Inc., having agreed through their respective counsel that Judgment be entered  
3 pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and  
4 following this Court's issuance of an Order approving this Proposition 65 settlement and  
5 Consent Judgment,

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health and  
7 Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6, judgment is  
8 hereby entered in accordance with the terms of the Consent Judgment attached hereto as Exhibit  
9 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under  
10 Code of Civil Procedure section 664.6.

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12 **IT IS SO ORDERED.**

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15 Dated: MAR 28 2013

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ROY CHERNUS  
JUDGE OF THE SUPERIOR COURT

# Exhibit 1

1 Clifford A. Chanler (State Bar No. 135534)  
2 Laurence D. Haveson (State Bar No. 152631)  
3 THE CHANLER GROUP  
4 81 Throckmorton Avenue, Suite 203  
5 Mill Valley, CA 94941  
6 Telephone: (415) 388-1128  
7 Facsimile: (415) 388-1135

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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  
FOR THE COUNTY OF MARIN

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

Plaintiff,

v.

KISS NAIL PRODUCTS, INC.; KISS  
PRODUCTS, INC.; and DOES 1-150, inclusive,

Defendants.

Case No.: CIV 1101576

**[PROPOSED] CONSENT JUDGMENT**

1       **1. INTRODUCTION**

2               **1.1 Parties to Consent Judgment.**

3               This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”  
4 or “Plaintiff”) on the one hand, and Kiss Nail Products, Inc. and Kiss Products, Inc. (collectively,  
5 “Kiss” or “Defendants”) on the other hand, with Plaintiff and Defendants collectively referred to as  
6 the “Parties.”

7               **1.2 Anthony E. Held, Ph.D., P.E.**

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

11              **1.3 Kiss Nail Products, Inc. and Kiss Products, Inc.**

12              Kiss employs ten or more persons and is a person in the course of doing business for purposes  
13 of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §  
14 25249.6, *et seq.* (“Proposition 65”).

15              **1.4 General Allegations**

16              Held alleges that Kiss has manufactured, imported, distributed, sold, and/or offered for sale  
17 cosmetic cases/bags that contain di(2-ethylhexyl)phthalate (“DEHP”), without the requisite  
18 Proposition 65 warnings.

19              **1.5 Product Description**

20              The products that are covered by this Consent Judgment are defined as cosmetic cases/bags  
21 including, but not limited to the Kiss Professional Pedicure Kit, # 51048, RPK01 (#7 31509 51048 5),  
22 manufactured, imported, distributed and/or sold by Kiss in California, hereinafter the “Covered  
23 Products.”

24              **1.6 Notices of Violations**

25              On or about December 21, 2010, Held served Kiss and various public enforcement agencies,  
26 with a document entitled “60-Day Notice of Violation” (“Notice”) that alleged violations of  
27 Proposition 65 based on Kiss’ alleged failure to warn consumers that the Covered Products exposed  
28

1 users in California to DEHP. To the best of the Parties' knowledge, no public enforcer has prosecuted  
2 the allegations set forth in the Notice.

3 On or about September 1, 2011, Held served Kiss and various public enforcement agencies,  
4 with a document entitled "Supplemental 60-Day Notice of Violation," which identified additional  
5 cosmetic cases/bags that Held claims similarly violated Proposition 65. On or about March 29, 2012,  
6 Held served Kiss and various public enforcement agencies, with a document entitled "Second  
7 Supplemental 60-Day Notice of Violation," which identified other additional cosmetic cases/bags  
8 that Held claims similarly violated Proposition 65. The products identified by the Supplemental  
9 60-Day Notice of Violation and Second Supplemental 60-Day Notice of Violation, not otherwise  
10 covered by the Notice, are referred to herein as the "Supplemental Products."

### 11 **1.7 Complaint**

12 On March 25, 2011, Held filed a Complaint in the Superior Court in and for the County of  
13 Marin against Kiss and Does 1 through 150, *Held v. Kiss Nail Products, Inc. and Kiss Products, Inc.*,  
14 Case No. CIV 1101576 ("Complaint" or "Action") alleging violations of Proposition 65 based on the  
15 alleged exposures to DEHP contained in certain cosmetic cases/bags sold by Kiss.

### 16 **1.8 No Admission**

17 Kiss denies the material, factual and legal allegations contained in the Notice, the  
18 Supplemental 60-Day Notice of Violation, the Second Supplemental 60-Day Notice of Violation, and  
19 the Complaint and maintains that all products that it has sold, manufactured, imported and/or  
20 distributed in California, including the Covered Products and the Supplemental Products, have been  
21 and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an  
22 admission by Kiss of any fact, finding, issue of law, or violation of law, nor shall compliance with this  
23 Consent Judgment constitute or be construed as an admission by Kiss of any fact, finding, conclusion,  
24 issue of law, or violation of law. However, this section shall not diminish or otherwise affect Kiss'  
25 obligations, responsibilities, and duties under this Consent Judgment.

### 26 **1.9 Consent to Jurisdiction**

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

1 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this  
2 Consent Judgment under Code of Civil Procedure, section 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean five (5) calendar  
5 days after the Court enters this Consent Judgment.

6 **2. INJUNCTIVE RELIEF: REFORMULATION**

7 **2.1 Reformulation Standard**

8 “Reformulated Products” are defined as those Covered Products containing DEHP in  
9 concentrations less than 2 percent (20,000 parts per million (“ppm”)) when analyzed pursuant to U.S.  
10 Environmental Protection Agency testing methodologies 3580A and 8270C or any other  
11 methodology utilized by federal or state agencies for the purpose of determining the DEHP content in  
12 a solid substance. For Covered Products primarily intended for use by persons ages twelve and  
13 younger, Reformulated Products are defined as those Covered Products containing DEHP in  
14 concentrations less than 0.1 percent (1,000 ppm). For settlement purposes only, the Parties agree that  
15 Covered Products are not intended for use by persons twelve years of age or younger as they are  
16 currently marketed.

17 **2.2 Reformulation Commitment**

18 Within one year after the Effective Date, all Covered Products manufactured by Kiss or at its  
19 direction that are imported, distributed, sold or offered for sale in the State of California by Kiss shall  
20 be Covered Products that qualify as Reformulated Products as defined in Section 2.1 above.

21 **2.3 Opportunities to Cure**

22 In the event that any Covered Product sold after February 1, 2014 by Kiss or at its direction is  
23 found by Held or his representatives not to comply with Section 2.2 above, Kiss may, upon 30 days’  
24 notice bring the Covered Product into compliance with section 2.2 by providing Held’s counsel with  
25 written certification from an officer of the company that Kiss has corrected the alleged violation by  
26 reformulating the Covered Product and by using its best efforts to remove the product from the retail  
27 market.

1       **3.       MONETARY PAYMENTS**

2               **3.1       Civil Penalty Payment Pursuant to Health & Safety Code § 25249.12**

3               Kiss shall pay an initial civil penalty of \$7,000 to be apportioned in accordance with Health  
4       & Safety Code § 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked for the  
5       State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the  
6       remaining 25% of these penalty monies earmarked for Held. This civil penalty reflects a credit of  
7       \$30,000 due to Kiss’ commitment to sell only Reformulated Products pursuant to Section 2.2 above.

8               Pursuant to Health & Safety Code § 25249.7(b), on or before the date two years after the  
9       Effective Date, Kiss shall pay a second civil penalty of \$14,000, apportioned in accordance with  
10      Health & Safety Code § 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked  
11      for the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and  
12      the remaining 25% of these penalty monies earmarked for Held. This second civil penalty shall be  
13      waived in its entirety if an officer of Kiss certifies to Held’s counsel in writing that, as of such date  
14      any Covered Products sold in California are reformulated to contain no more than 0.1% (1,000 ppm)  
15      DEHP.

16              **3.2       Attorneys’ Fees and Costs**

17              After resolution of all other substantive issues, the Parties reached an agreement on the  
18      attorneys’ fees due to Held and his counsel under general contract principles and the private attorney  
19      general doctrine codified at California Code of Civil Procedure section 1021.5, for all work  
20      performed in this matter, in the amount of \$50,000.

21              **3.3       Payment Procedures**

22              **3.3.1   Funds Held In Trust.** The initial civil penalty enumerated in Section 3.1 as  
23      well as the payment required pursuant to Section 3.2 shall be delivered on or before February 8, 2013  
24      to Proskauer Rose LLP and shall be held in trust pending the Court’s approval of this Consent  
25      Judgment.

26              The payments delivered to Proskauer Rose LLP shall be made payable, as follows:

- 27                      (a)     One check made payable to “Proskauer Rose LLP in Trust for  
28                                      OEHHA” in the amount of \$5,250;



- (b) One check made payable to “Proskauer Rose LLP in Trust for Anthony E. Held, Ph.D., P.E.” in the amount of \$1,750; and
- (c) One check made payable to “Proskauer Rose LLP in Trust for The Chanler Group” in the amount of \$50,000.

Proskauer Rose LLP shall: (a) confirm in writing within five days of receipt that the funds have been deposited in a trust account; and (b) within five days after the date the attorney of record receives notice that the Court entered this Consent Judgment, and assuming the Court approves and enters the Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$5,250;
- (b) One check to “The Chanler Group in Trust for Anthony E. Held, Ph.D., P.E.” in the amount of \$1,750; and
- (c) One check to “The Chanler Group” in the amount of \$50,000.

**3.3.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved and the settlement funds have been transmitted to Plaintiff’s counsel, Kiss shall issue three separate 1099 forms, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$5,250;
- (b) The second 1099 shall be issued to Anthony E. Held, Ph.D., P.E. in the amount of \$1,750, whose address and tax identification number shall be furnished upon request; and
- (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in the amount of \$50,000.

1                   **3.3.3 Payment Address:** All payments to the Chanler Group shall be delivered to  
2 the following payment address:

3                   The Chanler Group  
4                   Attn: Proposition 65 Controller  
5                   2560 Ninth Street  
6                   Parker Plaza, Suite 214  
7                   Berkeley, CA 94710

8                   **4.       CLAIMS COVERED AND RELEASED**

9                   **4.1       Held's Public Release of Proposition 65 Claims**

10                  Held acting on his own behalf and in the public interest releases Kiss, its parents, subsidiaries,  
11                  affiliated entities, directors, officers, employees, attorneys, and each entity to whom Kiss directly or  
12                  indirectly distributes or sells Covered Products, including but not limited to downstream distributors,  
13                  wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees  
14                  (collectively "Releasees") from all claims for violations of Proposition 65 up through the Effective  
15                  Date based on exposure to DEHP from the Covered Products as set forth in the Notice. Compliance  
16                  with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to  
17                  exposures to DEHP from the Covered Products as set forth in the Notice.

18                  **4.2       Held's Individual Release of Claims**

19                  Held also, in his individual capacity only and *not* in his representative capacity, provides a  
20                  release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions,  
21                  causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and  
22                  demands of Held of any nature, character or kind, whether known or unknown, suspected or  
23                  unsuspected, against Kiss and Releasees, limited to and arising out of alleged or actual exposures to  
24                  the DEHP in the Covered Products or Supplemental Products manufactured, distributed or sold by  
25                  Kiss and Releasees. In addition to the above, Held represents and agrees that he shall not file or  
26                  pursue any claims, not already addressed by this Consent Judgment, related to his September 1, 2011,  
27                  Supplemental 60-Day Notice of Violation or the March 29, 2012 Second Supplemental 60-Day  
28                  Notice of Violation, served on Kiss and various public enforcement agencies, which alleged  
                    additional potential Proposition 65 violations.

1           **4.3    Kiss' Release of Held**

2           Kiss provides a release herein to Held, his attorneys, and other representatives which shall be  
3 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,  
4 costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Kiss of any nature,  
5 character or kind, known or unknown, suspected or unsuspected, against Held, his attorneys, and  
6 other representatives, arising out of the allegations in the Notice pertaining to alleged exposure to  
7 DEHP from the Covered Products.

8           **4.4    Waiver of Civil Code Section 1542**

9           Held, in his individual capacity only and *not* in his representative capacity, and Kiss, having the  
10 specific intent to release all claims and potential claims described in Sections 4.2 and 4.3 herein,  
11 hereby acknowledge and expressly waive the provisions of § 1542 of the California Civil Code,  
12 which provides:

13                   A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS  
14                   WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT  
15                   TO EXIST IN HIS OR HER FAVOR AT THE TIME OF  
16                   EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM  
                    OR HER MUST HAVE MATERIALLY AFFECTED HIS OR  
                    HER SETTLEMENT WITH THE DEBTOR.

17 Notwithstanding the provisions of § 1542 of the California Civil Code, Held, in his individual capacity  
18 only and *not* in his representative capacity, and Kiss, intend to release all claims described in Sections  
19 4.2 and 4.3 of this Agreement, known or unknown, and asserted or not asserted as of the date hereof.

20       **5.    COURT APPROVAL**

21           This Consent Judgment is not effective until it is approved and entered by the Court and shall  
22 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
23 has been fully executed by all.

24       **6.    SEVERABILITY**

25           If, subsequent to the execution of this Consent Judgment, any of the provisions of this Consent  
26 Judgment are held by a court to be unenforceable, the validity of the enforceable provisions remaining  
27 shall not be adversely affected.

1       **7. GOVERNING LAW**

2           The terms of this Consent Judgment shall be governed by the laws of the State of California  
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or is  
4 otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Consent  
5 Judgment are rendered inapplicable or no longer require as a result of any such repeal or preemption  
6 or rendered inapplicable by reason of law generally as to the Covered Products, then Kiss shall  
7 provide written notice to Held of any asserted change in law, and shall have no further obligations  
8 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so  
9 affected.

10       **8. NOTICES**

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

15                   To Kiss:

16                   Nancy Sher Cohen, Esq.  
17                   David A. Picon, Esq.  
18                   Proskauer Rose, LLP  
19                   2049 Century Park East  
20                   Suite 3200  
21                   Los Angeles, CA 90067

                    To Held:

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

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

24       **9. COUNTERPARTS; FACSIMILE SIGNATURES**

25           This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,  
26 each of which shall be deemed an original, and all of which, when taken together, shall constitute one  
27 and the same document. A facsimile or pdf signature shall be as valid as the original.

28       **10. POST EXECUTION ACTIVITIES**

                    Held and his attorneys agree to comply with the reporting form requirements referenced in  
California Health & Safety Code § 25249.7(f).

1 Held and Kiss agree to mutually employ their best efforts to support the entry of this  
2 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a  
3 timely manner. The Parties acknowledge that, pursuant to California Health & Safety Code §  
4 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which  
5 Held shall draft and file, and Kiss shall join. If any third party objection to the noticed motion is filed,  
6 Held and Kiss shall work together to file a joint reply and appear at any hearing before the Court. This  
7 provision is a material component of the Consent Judgment and shall be treated as such in the event of  
8 a breach.

9 **11. DRAFTING**

10 Each party hereto has cooperated in the drafting and preparation of this Consent Judgment.  
11 Hence, in any construction to be made of this Consent Judgment, the same shall not be construed  
12 against any party as drafter of this Consent Judgment.

13 **12. MODIFICATION**

14 This Consent Judgment may be modified only: (1) by written agreement of the Parties and  
15 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion of  
16 any Party and entry of a modified Consent Judgment by the Court.  
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1 **13. AUTHORIZATION**

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

5 AGREED TO:

AGREED TO:

6  
7 Date: 01/23/2013

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

8  
9 By: *Anthony E Held*  
10 Plaintiff, Anthony E. Held, Ph.D., P.E.

By: \_\_\_\_\_  
Defendants, Kiss Nail Products, Inc. and  
Kiss Products, Inc.

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**13. 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: \_\_\_\_\_

Date: January 23, 2013

By: \_\_\_\_\_  
Plaintiff, Anthony E. Held, Ph.D., P.E.

By: Richard K. Kim, CFO  
Defendants, Kiss Nail Products, Inc. and  
Kiss Products, Inc.