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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

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

Plaintiff,

v.

THE KROGER CO., *et al.*,

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
Parker Plaza, Suite 214
Berkeley, CA 94710

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Held's Public Release of Proposition 65 Claims**

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

23 **4.2 Held's Individual Release of Claims**

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

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

For Held:

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

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. POST EXECUTION ACTIVITIES

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

11. MODIFICATION

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

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.

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:**

6
7 Date: _____

8
9 By: _____
10 ANTHONY E. HELD, PH.D., P.E.

11 **AGREED TO:**

12 Date: 4/8/16 _____

13 By:  _____
14 Steven Prough, Senior Counsel
15 THE KROGER CO.