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ANTHONY E. HELD, Ph.D., P.E.

(ENDORSED)
FILED
DEC 23 2008

DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY J. Alvarez DEPUTY
J. ALVAREZ

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

ANTHONY E. HELD, Ph.D., P.E.

Plaintiff,

v.

AQUA-LEISURE INDUSTRIES, INC.;
WALGREEN CO.; and DOES 1 through 150,
inclusive,

Defendants.

Case No. 108CV113505

**[PROPOSED] JUDGMENT PURSUANT
TO TERMS OF STIPULATION AND
ORDER RE: CONSENT JUDGMENT**

Date: December 23, 2008
Time: 9:00 a.m.
Dept.: 8
Judge: Hon. Joseph Huber

1 In the above-entitled action, Plaintiff ANTHONY E. HELD, Ph.D., P.E. and Defendant
2 AQUA-LEISURE INDUSTRIES, INC., having agreed through their respective counsel that
3 judgment be entered pursuant to the terms of the Proposition 65 settlement agreement in the form
4 of a Stipulation and [Proposed] Order Re: Consent Judgment entered into by the parties, and
5 following issuance of an order approving this Proposition 65 settlement agreement and entry of
6 the Stipulation and Order Re: Consent Judgment on December 23, 2008,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of Civil
8 Procedure §664.6, judgment is entered in accordance with the terms of the Stipulation and Order
9 Re: Consent Judgment attached hereto as **Exhibit 1** and lodged concurrently herewith.

10 **IT IS SO ORDERED.**

11
12 Dated: 12/23/08

Joseph M. Huber
JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
2 David Lavine, State Bar No. 166744
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
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10 ANTHONY E. HELD, Ph.D., P.E.

11 Kevin C. Mayer, State Bar No. 118177
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13 REGENSTREIF LLP
14 1100 Glendon Avenue, 14th Floor
15 Los Angeles, California 90024
16 Telephone: (310) 500-3500
17 Facsimile: (310) 500-3501

18 Attorneys for Defendant
19 AQUA LEISURE INDUSTRIES, INC.

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 FOR THE COUNTY OF SANTA CLARA
22 UNLIMITED CIVIL JURISDICTION

23 ANTHONY HELD, Ph.D., P.E.,

24 Plaintiff,

25 v.

26 AQUA LEISURE INDUSTRIES, INC.; and
27 DOES 1 through 150, inclusive,

28 Defendants.

Case No. 108CV113505

**STIPULATION AND [PROPOSED]
ORDER RE: CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Aqua Leisure Industries, Inc.**

3 This consent judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.
4 ("Dr. Held" or "Plaintiff"), on behalf of the public interest for the People of the State of California,
5 pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
6 Safety Code section 25249.6, et seq. (aka, "Proposition 65"), and Aqua Leisure Industries, Inc.
7 ("Defendant" or "Aqua Leisure"), with Plaintiff and Aqua Leisure collectively referred to
8 hereinafter as the "Parties."

9 **1.2 Plaintiff**

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

13 **1.3 Defendant**

14 Aqua Leisure employs ten or more persons who are each a person in the course of doing
15 business for purposes of Proposition 65.

16 **1.4 General Allegations**

17 Dr. Held alleges that Aqua Leisure has manufactured, distributed and/or sold toys or other
18 children's items containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") in the State of
19 California without the requisite health hazard warnings. DEHP is known to cause birth defects and
20 other reproductive harm and is listed by its chemical nomenclature pursuant to Proposition 65.
21 DEHP shall be referred to hereinafter as the "Listed Chemical." Aqua Leisure denies all of Dr.
22 Held's allegations against it, and contends it is not violating any aspect of Proposition 65 with
23 respect to its products.

24 **1.5 Product Description**

25 The products that are covered by this Consent Judgment are defined as follows: inflatable
26 vinyl toys/children's items containing DEHP, such as the *Deluxe Baby Boat, Model ET-9110WG,*
27 *Item 852241 (#0 44194 09110 9).* All such inflatable vinyl toys/children's items containing DEHP
28

1 are referred to hereinafter as the "Products".

2 **1.6 Notice of Violation**

3 On November 20, 2007, Dr. Held served Aqua Leisure, Walgreen Co. and various public
4 enforcement agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that
5 provided Aqua Leisure, Walgreen Co. and public enforcers with notice of alleged violations of
6 Proposition 65 for failing to warn consumers that the Products that Aqua Leisure sold exposed users
7 in California to the Listed Chemical. To the best of the Parties' knowledge, no public enforcer has
8 responded to or diligently prosecuted the allegations set forth in the Notice.

9 **1.7 Complaint**

10 On May 27, 2008, Dr. Held, acting in the interest of the general public in California, filed a
11 complaint ("Complaint" or "Action") in the Superior Court in and for the County of Santa Clara
12 against Aqua Leisure, Walgreen Co. and Does 1 through 150, alleging violations of Proposition 65
13 based on the alleged exposures to the Listed Chemical contained in the Products sold by Aqua
14 Leisure.

15 **1.8 No Admission**

16 Aqua Leisure denies each and all of the material, factual and legal allegations contained in
17 Dr. Held's Notice and Complaint, and maintains that all Products it has sold and distributed in
18 California have been and are in compliance with all laws, statutes and regulations. Nothing in this
19 Consent Judgment shall be construed as an admission by Aqua Leisure of any fact, finding, issue of
20 law, or alleged violation of law, nor shall compliance with this Consent Judgment constitute or be
21 construed as an admission by Aqua Leisure of any fact, finding, conclusion, issue of law, or alleged
22 violation of law, such being specifically denied by Aqua Leisure. However, this section shall not
23 diminish or otherwise affect Aqua Leisure's obligations, responsibilities, and duties under this
24 Consent Judgment.

25 **1.9 Consent to Jurisdiction**

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

1 in the County of Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions
2 of this Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 30, 2008.

5 **2. INJUNCTIVE RELIEF: REFORMULATION**

6 **2.1 Reformulation Standards**

7 Reformulated Products are defined as those Products containing less than or equal to 1,000
8 parts per million ("ppm") of the Listed Chemical.

9 Aqua Leisure shall use Environmental Protection Agency ("EPA") testing methodologies
10 3580A and 8270C, or other comparable methodologies recognized and accepted by one or more
11 federal and/or state agencies, including the Consumer Product Safety Commission, to determine
12 whether the respective levels have been exceeded in its Products.

13 **2.2 Reformulation Commitment**

14 Aqua Leisure hereby commits that one hundred percent (100%) of the Products that it offers
15 for sale in California after June 30, 2008 shall qualify as Reformulated Products, and thus no longer
16 subject to the warning requirements of Proposition 65.

17 **3. MONETARY PAYMENTS**

18 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

19 In settlement of all the claims referred to in the Complaint and in this Consent Judgment,
20 Aqua Leisure shall pay \$9,000 in civil penalties to be apportioned in accordance with California
21 Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office
22 of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
23 remitted to Dr. Held as provided by California Health & Safety Code §25249.12(d). Aqua Leisure
24 shall issue two separate checks for the penalty payment: (a) one check made payable to "Hirst &
25 Chanler LLP in Trust For OEHHA" in the amount of \$6,750, representing 75% of the total penalty;
26 and (b) one check to "Hirst & Chanler LLP in Trust for Dr. Anthony Held" in the amount of
27 \$2,250, representing 25% of the total penalty. Two separate 1099s shall be issued for the above
28

1 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Dr.
2 Anthony Held, whose information shall be provided five calendar days before the payment is due.

3 Payment shall be delivered to Dr. Held's counsel by the Effective Date, and shall be held in
4 trust until such time as the Court enters an Order approving this Consent Judgment, at the following
5 address:

6 HIRST & CHANLER LLP
7 Attn: Proposition 65 Controller
8 455 Capitol Mall, Suite 605
9 Sacramento, CA 95814

10 **4. REIMBURSEMENT OF FEES AND COSTS**

11 **4.1 Attorney Fees and Costs.**

12 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
13 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
14 this fee issue to be resolved after the material terms of the agreement had been settled. Aqua
15 Leisure then expressed a desire to resolve the fee and cost issue shortly after the other settlement
16 terms had been finalized. The Parties then attempted to (and did) reach an accord on the
17 compensation due to Dr. Held and his counsel under general contract principles and the private
18 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
19 work performed through the mutual execution of this agreement. Aqua Leisure shall reimburse Dr.
20 Held and his counsel a total of \$29,000 for fees and costs incurred as a result of investigating,
21 bringing this matter to Aqua Leisure's attention, and litigating and negotiating a settlement in the
22 public interest. Aqua Leisure shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and
23 shall make the check payable to "Hirst & Chanler LLP" to be delivered by the Effective Date, and
24 which shall be held in trust until such time as the Court enters an Order approving this Consent
25 Judgment, to the following address:

26 HIRST & CHANLER LLP
27 Attn: Proposition 65 Controller
28 455 Capitol Mall, Suite 605
Sacramento, CA 95814

1 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

2 Pursuant to CCP §§1021 and 1021.5, the Parties agree that Aqua Leisure will reimburse Dr.
3 Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of this
4 settlement agreement in the Court, in an amount not to exceed \$5,000. Such additional fees and
5 costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are not
6 limited to, drafting and filing of the motion to approve papers, fulfilling the reporting requirements
7 referenced in Health & Safety Code §25249.7(f), responding to any third party objections,
8 corresponding with opposing counsel and appearing before the Court related to the approval
9 process.

10 Reimbursement of such additional fees and costs shall be due within ten days after receipt of
11 a billing statement from Dr. Held (“Additional Fee Claim”). Payment of the Additional Fee Claim
12 shall be made to “Hirst & Chanler LLP,” and the payment shall be delivered, at the following
13 address:

14 HIRST & CHANLER LLP
15 Attn: Proposition 65 Controller
16 Capitol Mall Complex
17 455 Capitol Mall, Suite 605
18 Sacramento, CA 95814

19 Aqua Leisure has the right to object to such reimbursement and may submit the resolution of
20 this issue to the American Arbitration Association (AAA) in Northern California to determine the
21 reasonableness of the additional fees and costs sought, provided that such notice of objection or
22 decision to arbitrate is received by Dr. Held's attorneys by the end of the ten calendar days. If an
23 arbitration notice is not filed with AAA in a timely manner, Dr. Held may file a motion with the
24 Court pursuant to both CCP §1021.5 and this settlement agreement to recover additional attorney
25 fees and costs incurred as set forth in this paragraph. In the event Aqua Leisure submits the matter
26 to arbitration, Dr. Held may seek, pursuant to CCP §1021.5, and in the discretion of the arbitrator,
27 reasonable attorney fees and costs incurred for the arbitration.
28

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Dr. Held's Release of Aqua Leisure**

3 In further consideration of the promises and agreements herein contained, and for the
4 payments to be made pursuant to Sections 3 and 4, and other good and valuable consideration, Dr.
5 Held, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
6 assignees, and in the interest of the general public, hereby waives all rights to institute or participate
7 in, directly or indirectly, any form of legal action and hereby releases all claims, including, without
8 limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
9 obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to,
10 investigation fees, expert fees, and attorneys' fees), of any nature whatsoever, whether known or
11 unknown, fixed or contingent (collectively "Claims"), against Aqua Leisure and each and all of its
12 downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (including, but not
13 limited to, Walgreen Co.), franchisees, dealers, customers, owners, purchasers, users, parent
14 companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,
15 representatives, shareholders, agents, insurers, and employees, and their respective sister and parent
16 entities (collectively "Releasees") that arise under Proposition 65, as such claims relate to
17 Releasees' alleged failure to warn about exposures to the Listed Chemical contained in the Products.
18 This release shall apply specifically without limitation to any of the Products sold or first offered
19 for sale by Aqua Leisure and/or Walgreen Co., and any other Releasees, for sale of Aqua Leisure
20 Products only, in the State of California on or prior to June 30, 2008, but shall not act to restrict
21 prospective enforcement actions as to any other products, as to Products not originating from Aqua
22 Leisure, or as to any other Proposition 65-listed chemicals (other than the Listed Chemical), if any,
23 within the covered Products.

24 The Parties further understand and agree that this release shall not extend upstream of Aqua
25 Leisure to any entities that manufactured the Products, or any component parts thereof, or any
26 distributors or suppliers who sold the Products, or any component parts thereof.

1 **5.2 Aqua Leisure's Release of Dr. Held**

2 Aqua Leisure waives any and all claims against Dr. Held, his attorneys, and other
3 representatives for any and all actions taken or statements made (or those that could have been
4 taken or made) by Dr. Held and his attorneys and other representatives, whether in the course of
5 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter,
6 and/or with respect to the Products.

7 **6. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court, and
9 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
10 after it has been fully executed by the Parties. In the event that this Consent Judgment is entered by
11 the Court and subsequently overturned by any appellate court, any monies that have been provided
12 to Dr. Held and/or his attorneys pursuant to Section 3 and/or Section 4 above, shall be refunded in
13 full within fifteen days of the appellate decision becoming final.

14 Upon entry of this Consent Judgment, Dr. Held and his attorneys shall cause the Action to be
15 dismissed without prejudice as to Walgreen Co. and Does 1-150.

16 **7. SEVERABILITY**

17 If, subsequent to the execution 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, and shall remain in full force and effect.

20 **8. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California
22 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
23 rendered inapplicable by reason of law generally, or as to the Listed Chemical and/or the Products,
24 then Aqua Leisure shall provide written notice to Dr. Held of any asserted change in the law, and
25 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
26 extent that, the Products are so affected.

1 **9. NOTICES**

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

6 To Aqua Leisure:

7 Kevin C. Mayer, Esq.
8 LINER YANKELEVITZ SUNSHINE & REGENSTREIF LLP
9 1100 Glendon Avenue, 14th Floor
10 Los Angeles, CA 90024

11 To Dr. Held:

12 Proposition 65 Coordinator
13 HIRST & CHANLER LLP
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

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

19 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

20 This Consent Judgment may be executed in counterparts and by facsimile, each of which
21 shall be deemed an original, and all of which, when taken together, shall constitute one and the
22 same document.

23 **11. COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(f)**

24 Dr. Held agrees to comply with the reporting form requirements referenced in California
25 Health & Safety Code §25249.7(f).

26 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

27 Dr. Held and Aqua Leisure agree to mutually employ their best efforts to support the entry
28 of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court
in a timely manner. The parties acknowledge that, pursuant to California Health & Safety Code
§25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment.
Accordingly, Plaintiff agrees to file the necessary motion to approve the settlement.

