

REC'D DEC 02 2010

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FILED
San Francisco County Superior Court

JAN 20 2011

CLERK OF THE COURT
BY: *Margaret Schmidt-Scott*
Deputy Clerk

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

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

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

Plaintiff,

v.

KMART CORPORATION, and DOES 1-150,
inclusive,

Defendants.

Case No.: CGC-09-491275

**[PROPOSED] JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT**

Date: January 20, 2011
Time: 9:30 A.M.
Dept.: 301
Judge: Hon. Peter J. Busch

1 In the above-entitled action, Plaintiff ANTHONY E. HELD, PH.D., P.E. and Defendant
2 KMART CORPORATION, having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the [Proposed] Order Re: Consent Judgment ("Consent Judgment") entered
4 into by the parties, and following issuance of an order approving this Proposition 65 settlement
5 agreement on January 20, 2011.

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

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11 **IT IS SO ORDERED.**

12 Dated: 1/20/11

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15 JUDGE OF THE SUPERIOR COURT

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PETER J. BUSCH

Exhibit 1

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

5 Attorneys for Plaintiff
6 ANTHONY E. HELD, Ph.D., P.E.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, Ph.D., P.E.,
Plaintiff,
v.
KMART CORPORATION, and DOES 1-150,
inclusive,
Defendants.

Case No. CGC-09-491275

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Kmart Corporation**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Dr. Held") and Kmart Corporation (hereinafter "Kmart Corporation"), with Dr. Held
5 and Kmart Corporation collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Dr. Held alleges that Kmart Corporation has sold in the State of California children's vinyl
16 bathroom animal toys containing di(2-ethylhexyl)phthalate ("DEHP"). DEHP is listed pursuant to
17 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§
18 25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of California to cause birth
19 defects and other reproductive harm. DEHP is referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: children's
22 vinyl bathroom toys containing excessive levels of the Listed Chemical including, but not limited to,
23 *12pk Sealife Animals (#4 895129 725196)*. All such items shall be referred to herein as the
24 "Products."

25 **1.6 Notice of Violation**

26 On August 14, 2008, Dr. Held served Kmart Corporation and various public enforcement
27 agencies with a document entitled "60-Day Notice of Violation" that provided Kmart Corporation
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1 and such public enforcers with notice that alleged that Kmart Corporation was in violation of
2 California Health & Safety Code § 25249.6 for failing to warn consumers and customers that the
3 Products exposed users in California to DEHP.

4 **1.7 Complaint**

5 On August 10, 2009, Dr. Held, who was and is acting in the interest of the general public in
6 California, filed a complaint in the San Francisco Superior Court, Case No. CGC-09-491275
7 ("Complaint"), naming Kmart Corporation as a defendant and alleging violations of Health & Safety
8 Code § 25249.6 by Kmart Corporation based on the alleged exposures to DEHP contained in the
9 Products offered for sale in California by Kmart Corporation.

10 **1.8 No Admission**

11 Kmart Corporation denies the material, factual, and legal allegations contained in Dr. Held's
12 Notice and maintains that all products that it has sold in California, including the Products, have
13 been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as
14 an admission by Kmart Corporation of any fact, finding, issue of law, or violation of law; nor shall
15 compliance with this Consent Judgment constitute or be construed as an admission by Kmart
16 Corporation of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
17 denied by Kmart Corporation. However, this section shall not diminish or otherwise affect the
18 obligations, responsibilities and duties of Kmart Corporation under this Consent Judgment.

19 **1.9 Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the parties stipulate that this Court has
21 jurisdiction over Kmart Corporation as to the allegations contained in the Complaint, that venue is
22 proper in the City and County of San Francisco, and that this Court has jurisdiction to enter and
23 enforce the provisions of this Consent Judgment.

24 **1.10 Effective Date**

25 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 1, 2010.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION**

2 **2.1 Sale of Reformulated Products**

3 Commencing on the Effective Date, Kmart Corporation shall not sell, ship, or offer to be
4 shipped for sale in California any Product unless such Products comply with the reformulation
5 standards set forth in Sections 2.2.

6 **2.2 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, when analyzed pursuant to Environmental
9 Protection Agency ("EPA") testing methodologies 3580A and 8270C or U.S. Consumer Product
10 Safety Commission ("CPSC") test method CPSC-CH-C1001-09.3, as may be amended by the U.S.
11 CPSC or the EPA from time to time.

12 **3. MONETARY PAYMENTS**

13 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

14 In settlement of all claims related to the Products and Listed Chemical referred to in the
15 Complaint, and this Consent Judgment pursuant to Health & Safety Code § 25249.7(b), Kmart
16 Corporation shall pay \$1,000 in civil penalties.

17 Civil penalties are to be apportioned in accordance with California Health & Safety Code
18 § 25192, with 75% of these funds remitted to the State of California's Office of Environmental
19 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony
20 Held as provided by California Health & Safety Code § 25249.12(d). Kmart Corporation shall issue
21 two separate checks for the penalty payment: (a) one check made payable to "the Chanler Group in
22 Trust for OEHHA" in the amount of \$750, representing 75% of the total penalty; and (b) one check to
23 "the Chanler Group in Trust for Anthony Held" in the amount of \$250, representing 25% of the total
24 penalty. Two separate 1099s shall be issued for the above-payments: (a) OEHHA, P.O. Box 4010,
25 Sacramento, CA 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall be
26 provided ten calendar days before the payment is due.

1 Payment shall be delivered to Dr. Held's counsel on or before July 15, 2010, at the following
2 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. REIMBURSEMENT OF FEES AND COSTS**

9 **4.1 Attorney Fees and Costs.**

10 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without
11 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
12 issue to be resolved after the material terms of the agreement had been settled. Kmart Corporation
13 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
14 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
15 Dr. Held and his counsel under general contract principles and the private attorney general doctrine
16 codified at California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed through the
17 mutual execution of this agreement. Kmart Corporation, on behalf of itself and those in its chain of
18 distribution, shall reimburse Dr. Held and his counsel a total of \$17,500 for fees and costs incurred as
19 a result of investigating, bringing this matter to Kmart Corporation's attention, and litigating and
20 negotiating a settlement in the public interest. Kmart Corporation shall issue a separate 1099 for fees
21 and costs (EIN: 94-3171522) and shall make the check payable to "the Chanler Group" and shall be
22 delivered on or before July 15, 2010.

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710
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1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Dr. Held's Release of Kmart Corporation**

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 above, Dr. Held, on behalf of himself, his past and
5 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
6 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
7 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
8 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
9 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
10 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
11 Kmart Corporation and each of its downstream distributors, wholesalers, licensors, licensees,
12 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies,
13 corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
14 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This
15 release is limited to those claims that arise under Proposition 65, as such claims relate to Kmart
16 Corporation's alleged failure to warn about exposures to or identification of Listen Chemicals
17 contained in the Products.

18 **5.2 Kmart Corporation Release of Dr. Held**

19 Kmart Corporation waives any and all claims against Dr. Held, his attorneys and other
20 representatives, for any and all actions taken or statements made (or those that could have been taken
21 or made) by Dr. Held and his attorneys and other representatives, whether in the course of
22 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, or
23 with respect to the Products.

24 **6. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and shall
26 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
27 has been fully executed by all parties, in which event any monies that have been provided to Dr.
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1 Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
2 (15) days after receiving written notice from Kmart Corporation that the one-year period has expired.

3 **7. SEVERABILITY**

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

7 **8. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of California
9 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
10 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Kmart
11 Corporation provide written notice to Dr. Held of any asserted change in the law, and shall have no
12 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
13 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Kmart
14 Corporation from any obligation to comply with any pertinent state or federal toxics control laws.

15 **9. NOTICES**

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

20 For Kmart Corporation:

21 Michael J. Steel
22 Morrison & Foerster LLP
23 425 Market Street
San Francisco, CA 94105

24 For Dr. Held:

25 Proposition 65 Coordinator
26 The Chanler Group
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

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

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

10 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

11 The parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion
12 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
13 approval, Kmart agrees to prepare a motion to approve this Consent Judgment. Dr. Held and Kmart
14 Corporation, together with their respective counsel, agree to mutually employ their best efforts to
15 seek and support the entry of this agreement as a Consent Judgment and obtain approval of the
16 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall
17 include, at a minimum, cooperating on the drafting and filing any papers in support of the required
18 motion for judicial approval. Kmart Corporation and Dr. Held acknowledge that other products
19 allegedly sold by Kmart are or may subject of 60-Day Notices of Violation. Within the 90 days
20 following the Effective Date, Kmart will use commercially reasonable best efforts to investigate Dr.
21 Held's additional claims and exchange information with Dr. Held's counsel, with the objective of
22 determining whether a resolution of Dr. Held's potential claims is possible. By making this
23 representation, Kmart does not admit the validity of any aspect of Dr. Held's claims. Kmart does not
24 intend to waive and expressly intends to preserve any and all defenses to Dr. Held's claims.

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13. MODIFICATION

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

14. 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 hereof.

AGREED TO:

Date: _____

By: _____
ANTHONY E. HELD, Ph.D., P.E.

AGREED TO:

Date: 6/24/10

By: MARY TORTELLA
KMART CORPORATION

APPROVED AS TO FORM:

Date:

THE CHANLER GROUP

By: _____
David Lavine
Attorneys for Plaintiffs
ANTHONY HELD

APPROVED AS TO FORM:

Date: 6/24/2010

MORRISON & FOERSTER LLP

By: W. F. Tarantino
William F. Tarantino
Attorneys for Defendant
KMART CORPORATION

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

1 **13. MODIFICATION**

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

5 **14. AUTHORIZATION**

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

8 **AGREED TO:**

APPROVED
By Tony Held at 11:41 am, Jun 24, 2010

9 Date: _____

10 By: Anthony E Held
11 ANTHONY E. HELD, Ph.D., P.E.

AGREED TO:

Date: _____

By: _____

KMART CORPORATION

13 **APPROVED AS TO FORM:**

14 Date: 6/24/10

15 THE CHANLER GROUP

16 By: [Signature]
17 David Lavine
18 Attorneys for Plaintiffs
19 ANTHONY HELD

APPROVED AS TO FORM:

Date: _____

MORRISON & FOERSTER LLP

By: _____
William F. Tarantino
Attorneys for Defendant
KMART CORPORATION

21 **IT IS SO ORDERED.**

22 Date: _____

23 _____
24 JUDGE OF THE SUPERIOR COURT