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

FILED
San Francisco County Superior Court

NOV 16 2009

GORDON PARK-LI, Clerk
BY: *Judith A. Rogness*
Deputy Clerk

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

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

Plaintiff,

v.

BABYVISION, INC., *et al.*,

Defendants.

(Jury)

Case No. CGC-08-481439

**[PROPOSED] JUDGMENT PURSUANT
TO TERMS OF CONSENT JUDGMENT**

Date: November 16, 2009
Time: 9:30 a.m.
Dept.: 301
Judge: Hon. Peter Busch

1 In the above-entitled action, Plaintiff ANTHONY E. HELD, Ph.D., P.E. and Defendant
2 BABYVISION, INC., having agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the Proposition 65 settlement agreement in the form of a [Proposed]
4 Consent Judgment entered into by the parties, and following issuance of an order approving this
5 Proposition 65 settlement agreement and entering the Consent Judgment on November 16, 2009.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
7 Civil Procedure §664.6, judgment is entered in accordance with the terms of the Consent
8 Judgment attached hereto as **Exhibit 1**.

9
10 **IT IS SO ORDERED.**

11
12 Dated: 11/16/09

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14 JUDGE OF THE SUPERIOR COURT

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PETER J. BUSCH

EXHIBIT 1

1 Clifford A. Chanler, State Bar No. 135534
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6 Attorneys for Plaintiff
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.
BABYVISION, INC., *et al.*,
Defendants.

Case No. CGC-08-481439
**[PROPOSED] CONSENT
JUDGMENT**
Health & Safety Code §25249.6

1 **I. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and BabyVision, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Dr. Held") and BabyVision, Inc. (hereinafter "BabyVision"), with Dr. Held and
5 BabyVision 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 BabyVision employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code §25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Dr. Held alleges that BabyVision has manufactured, distributed and/or sold in the State of
16 California vinyl baby booties containing di(2-ethylhexyl)phthalate ("DEHP"). DEHP is listed
17 pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
18 Code §§25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of California to cause
19 birth 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: vinyl baby
22 booties containing the Listed Chemical, including, but not limited to, *Lovable Friends Baby Booties,*
23 *Style 01189 (#6 60168 01189 0).* All such items shall be referred to herein as the "Products."

24 **1.6 Notice of Violation**

25 On April 30, 2009, Dr. Held served BabyVision and various public enforcement agencies
26 with a document entitled "60-Day Notice of Violation" that provided BabyVision and such public
27 enforcers with notice that alleged that BabyVision was in violation of California Health & Safety
28

1 Code §25249.6 for failing to warn consumers and customers that the Products exposed users in
2 California to DEHP.

3 **1.7 Complaint**

4 On August 5, 2009, Dr. Held, who was and is acting in the interest of the general public in
5 California, filed a second amended complaint ("Complaint") in case number CGC-08-481439 of the
6 San Francisco Superior Court, adding BabyVision as a defendant and alleging violations of Health &
7 Safety Code §25249.6 by BabyVision based on the alleged exposures to DEHP contained in the
8 Products manufactured, distributed and/or offered for sale in California by BabyVision.

9 **1.8 No Admission**

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

18 **1.9 Consent to Jurisdiction**

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

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean September 30,
25 2009.

1 **2. INJUNCTIVE RELIEF; WARNINGS AND REFORMULATION**

2 **2.1 Product Warnings**

3 Commencing on the Effective Date, BabyVision shall not sell, ship, or offer to be shipped for
4 sale in California any Product unless such Products are sold or shipped with one of the clear and
5 reasonable warnings set forth in subsections 2.1(a) and (b), are otherwise exempt pursuant to Section
6 2.2, or comply with the reformulation standards set forth in Section 2.3.

7 Each warning shall be prominently placed with such conspicuousness as compared with other
8 words, statements, designs, or devices as to render it likely to be read and understood by an ordinary
9 individual under customary conditions before purchase or use. Each warning shall be provided in a
10 manner such that the consumer or user understands to which *specific* Product the warning applies, so
11 as to minimize the risk of consumer confusion.

12 **(a) Retail Store Sales.**

13 **(i) Product Labeling.** BabyVision may affix a warning to the packaging,
14 labeling, or directly on each Product sold in retail outlets in California by BabyVision or its agents,
15 that states:

16 **WARNING:** This product contains DEHP, a phthalate
17 chemical known to the State of California to
cause birth defects and other reproductive harm.

18 **(ii) Point-of-Sale Warnings.** Alternatively, BabyVision may provide
19 warning signs in the form below to its customers in California with instructions to post the warnings
20 in close proximity to the point of display of the Products.

21 **WARNING:** This product contains DEHP, a phthalate
22 chemical known to the State of California to
cause birth defects and other reproductive harm.

23 Where more than one Product is sold in proximity to other like items or to those that do not
24 require a warning (e.g., Reformulated Products as defined in Section 2.3), the following statement
25 must be used:¹

26 _____
27 ¹ For purposes of the consent judgment, "sold in proximity" shall mean that the Product and another product
28 are offered for sale close enough to each other that the consumer, under customary conditions of purchase,
could not reasonably determine which of the two products is subject to the warning sign.

1 **WARNING:** The following products contain DEHP, a
2 phthalate chemical known to the State of
3 California to cause birth defects and other
4 reproductive harm.

5 *[list products for which warning is required]*

6 **(b) Mail Order Catalog and Internet Sales.** In the event that BabyVision sells
7 Products via mail order catalog or internet to customers located in California after the Effective Date
8 that are not Reformulated Products, BabyVision shall provide a warning for Products sold via mail
9 order catalog or the Internet to California residents: (i) in the mail order catalog; or (ii) on the
10 website. Warnings given in the mail order catalog or on the website shall identify the specific
11 Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

12 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order
13 catalog must be in the same type size or larger than the Product description text within the catalog.
14 The following warning shall be provided on the same page and in the same location as the display
15 and/or description of the Product:

16 **WARNING:** This product contains DEHP, a phthalate
17 chemical known to the State of California to
18 cause birth defects and other reproductive harm.

19 Where it is impracticable to provide the warning on the same page and in the same location as
20 the display and/or description of the Product, BabyVision may utilize a designated symbol to cross
21 reference the applicable warning and shall define the term "designated symbol" with the following
22 language on the inside of the front cover of the catalog or on the same page as any order form for the
23 Product(s):

24 **WARNING:** Certain products identified with this symbol
25 ▼ and offered for sale in this catalog contain
26 DEHP, a phthalate chemical known to the
27 State of California to cause birth defects and
28 other reproductive harm.

 The designated symbol must appear on the same page and in close proximity to the display
 and/or description of the Product. On each page where the designated symbol appears, BabyVision
 must provide a header or footer directing the consumer to the warning language and definition of the
 designated symbol.

1 If BabyVision elects to provide warnings in the mail order catalog, then the warnings must be
2 included in all catalogs offering to sell one or more Products printed after the Effective Date.

3 (ii) **Internet Website Warning.** A warning may be given in conjunction
4 with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
5 which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the
6 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
7 during the checkout process. The following warning statement shall be used and shall appear in any
8 of the above instances adjacent to or immediately following the display, description, or price of the
9 Product for which it is given in the same type size or larger than the Product description text:

10 **WARNING:** This product contains DEHP, a phthalate
11 chemical known to the State of California to
cause birth defects and other reproductive harm.

12 Alternatively, the designated symbol may appear adjacent to or immediately following the
13 display, description, or price of the Product for which a warning is being given, provided that the
14 following warning statement also appears elsewhere on the same web page, as follows:

15 **WARNING:** Products identified on this page with the
16 following symbol contain DEHP, a phthalate
17 chemical known to the State of California to
cause birth defects and other reproductive
harm: ▼.

18 **2.2 Exceptions To Warning Requirements**

19 The warning requirements set forth in Section 2.1 shall not apply to:

- 20 (i) Any Product manufactured by BabyVision prior to the Effective Date; or
21 (ii) Reformulated Products (as defined in Section 2.3 below).

22 **2.3 Reformulation Standards**

23 Reformulated Products are defined as those Products containing less than or equal to 1,000
24 parts per million ("ppm") of the Listed Chemical. The warnings required pursuant to Section 2.1
25 above shall not be required for Reformulated Products.

26 **2.4 Past and Future Reformulation Steps**

27 BabyVision hereby commits that one hundred percent (100%) of the Products that it
28 manufactures after the Effective Date, for sale in California, shall qualify as Reformulated Products.

1 **3. MONETARY PAYMENTS**

2 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

3 In settlement of all claims related to the Products and Listed Chemical referred to in the
4 Complaint, and this Consent Judgment pursuant to Health & Safety Code § 25249.7(b), BabyVision
5 shall pay \$2,000 in civil penalties.

6 Civil penalties are to be apportioned in accordance with California Health & Safety Code §
7 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health
8 Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony Held as
9 provided by California Health & Safety Code §25249.12(d). BabyVision shall issue two separate
10 checks for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in Trust for
11 OEHHA" in the amount of \$1,500, representing 75% of the total penalty; and (b) one check to "Hirst
12 & Chanler LLP in Trust for Anthony Held" in the amount of \$500, representing 25% of the total
13 penalty. Two separate 1099s shall be issued for the above-payments: (a) OEHHA, P.O. Box 4010,
14 Sacramento, CA 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall be
15 provided five calendar days before the payment is due.

16 Payment shall be delivered to Dr. Held's counsel on or before September 30, 2009, at the
17 following address:

18 Hirst & Chanler LLP
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710

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

22 **4.1 Attorney Fees and Costs.**

23 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without
24 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
25 issue to be resolved after the material terms of the agreement had been settled. BabyVision then
26 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
27 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Dr.
28 Held and his counsel under general contract principles and the private attorney general doctrine

mlh

1 codified at California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed through the
2 mutual execution of this agreement. BabyVision, on behalf of itself and those in its chain of
3 distribution, shall reimburse Dr. Held and his counsel a total of \$16,000 for fees and costs incurred as
4 a result of investigating, bringing this matter to Baby Vision's attention, and litigating and negotiating
5 a settlement in the public interest. BabyVision shall issue a separate 1099 for fees and costs (EIN:
6 20-3929984) and shall make two equal installments of \$8,000 each, payable to "Hirst & Chanler
7 L.L.P." to be delivered on or before September 30, 2009 and January 31, 2010, respectively, to:

8 Hirst & Chanler L.L.P.
9 Attn: Proposition 65 Controller
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710

11 **5. RELEASE OF ALL CLAIMS**

12 **5.1 Dr. Held's Release of BabyVision**

13 In further consideration of the promises and agreements herein contained, and for the
14 payments to be made pursuant to Sections 3 and 4 above, Dr. Held, on behalf of himself, his past and
15 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
16 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
17 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
18 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
19 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
20 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
21 BabyVision and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers,
22 retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
23 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
24 shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This
25 release is limited to those claims that arise under Proposition 65, as such claims relate to
26 BabyVision's alleged failure to warn about exposures to or identification of DEHP contained in the
27 Products.
28

1 The Parties further understand and agree that the above releases shall not extend upstream to
2 any entities that manufactured the Products or any component parts thereof, or any distributors or
3 suppliers who sold the Products or any component parts thereof to BabyVision.

4 **5.2 BabyVision Release of Dr. Held**

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

10 **6. COURT APPROVAL**

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

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 provisions
19 remaining shall not be adversely affected.

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, preempted, or is
23 otherwise rendered inapplicable by reason of law generally, or as to the Products, then BabyVision
24 provide written notice to Dr. Held of any asserted change in the law, and shall have no further
25 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
26 so affected. Nothing in this Consent Judgment shall be interpreted to relieve BabyVision from any
27 obligation to comply with any pertinent state or federal toxics control laws.
28

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 For BabyVision:

7 Shreenivas Shah, President
8 BabyVision, Inc.
9 30 Firemens Way
10 Poughkeepsie, NY 12603

11 For Dr. Held:

12 Proposition 65 Coordinator
13 Hirst & Chanler, LLP
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710

17 Any party, from time to time, may specify in writing to the other party a change of address to
18 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 shall
21 be deemed an original, and all of which, when taken together, shall constitute one and the same
22 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 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
28 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
approval, Dr. Held and BabyVision and their respective counsel agree to mutually employ their best
efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall

1 include, at a minimum, cooperating on the drafting and filing of any papers in support of the required
2 motion for judicial approval.

3 **13. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the parties and
5 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
6 any party and entry of a modified consent judgment by the Court. The Attorney General shall be
7 served with notice of any proposed modification to this Consent Judgment at least fifteen days in
8 advance of its consideration by the Court.

9 **14. AUTHORIZATION**

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

12
13 **AGREED TO:**

14 Date: September 17, 2009

15
16 By: Anthony E. Held
17 ANTHONY E. HELD, Ph.D., P.E.

AGREED TO:

14 Date: Sept. 17, 2009

15
16 By: Shreenivas Shah
17 Shreenivas Shah, President
BABYVISION, INC.

18
19 **IT IS SO ORDERED.**

20
21 Date: _____

JUDGE OF THE SUPERIOR COURT