

1 Josh Voorhees, State Bar No. 241436
2 Troy C. Bailey, State Bar No. 277424
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.

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION
15

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

17 Plaintiff,

18 v.

19 BCBG MAX AZRIA GROUP, INC., *et al.*,

20 Defendants.

Case No.: CIV11-00909

[Assigned for All Purposes to Hon. Faye
D'Opal, Dept. K]

~~PROPOSED~~ JUDGMENT
PURSUANT TO TERMS OF
CONSENT JUDGMENT

Date: January 20, 2012

Time: 8:30 a.m.

Dept.: E

Judge: Hon. Faye D'Opal

Action Filed: February 17, 2011

FILED

JAN 24 2012

KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Turner, Deputy

1 In the above-entitled action, Plaintiff ANTHONY E. HELD, PH.D., P.E. and Defendant
2 MAX RAVE, LLC have agreed through their respective counsel that judgment be entered
3 pursuant to the terms of the [Proposed] Consent Judgment entered into by the parties on or about
4 October 31, 2011.

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Code of
6 Civil Procedure section 664.6, judgment is entered in accordance with the terms of the [Proposed]
7 Order Approving the Consent Judgment.

8
9 **IT IS SO ORDERED.**

10 **FAYE D'OPAL**

11 Dated: JAN 24 2012

12 Judge of the Marin County Superior Court

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Exhibit 1

1 Josh Voorhees, State Bar No. 241436
2 Troy Bailey, State Bar No. 277424
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 ANTHONY E. HELD

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 BCBG MAX AZRIA GROUP, INC; and)
18 DOES 1-150, inclusive,)

19 Defendants.)

20 Case No. CIV 11-00909

21 [Assigned for All Purposes to Hon. Faye
22 D'Opal, Dept. K]

23 **[PROPOSED]**
24 **CONSENT JUDGMENT AS TO MAX**
25 **RAVE, LLC**

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E. and Max Rave, LLC.**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held (“Held”
4 or “Plaintiff”) and defendant Max Rave, LLC (“Max Rave” or “Defendant”), with Held and Max
5 Rave collectively referred to as the “Parties.”

6 **1.2 Anthony E. Held, Ph.D., P.E.**

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

10 **1.3 Max Rave, LLC.**

11 Max Rave 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 &
13 Safety Code §25249.5 et seq. (“Proposition 65”).

14 **1.4 General Allegations.**

15 Held alleges that Max Rave has manufactured, imported, distributed and/or sold footwear
16 containing di(2-ethylhexyl)phthalate (“DEHP”) for use in the State of California without the
17 requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as a chemical known
18 to the State of California to cause birth defects and reproductive harm.

19 **1.5 Notices of Violation.**

20 1.5.1 On March 19, 2010, Held served BCBG Max Azria Group, Inc. (“BCBG”)
21 and various public enforcement agencies with a document entitled “60-Day Notice of Violation,”
22 that alleged BCBG violated Proposition 65 by failing to warn consumers that women’s shoes
23 including, but not limited to, *Max Rave Jelly Sandals, Pink #TMF61808 (#6 49225 36805 4)*,
24 exposed users in California to DEHP (“Notice”).

25 1.5.2 On October 11, 2011, Held served BCBG, Max Rave, and various public
26 enforcement agencies with a document entitled “Supplemental 60-Day Notice of Violation,” that
27 alleged violations of Proposition 65 for failure to warn consumers that women’s shoes including,
28

1 but not limited to, *Max Rave Jelly Sandals, Pink #TMF61808 (#6 49225 36805 4)*, exposed users
2 in California to DEHP (“Supplemental Notice”).

3 **1.6 Complaint.**

4 On February 17, 2011, Held filed a complaint in the Superior Court in and for the County
5 of Marin against BCBG Max Azria Group, Inc. and Does 1 through 150, *Held v. BCBG, et al.*,
6 Case No. CIV 11-00909 (“Complaint” or “Action”), alleging violations of California Health &
7 Safety Code § 25249.6, based on the alleged exposures to DEHP contained in certain women’s
8 shoes sold by BCBG. In the event that no public enforcement agency diligently prosecutes the
9 allegations raised in the Supplemental Notice, the Complaint shall be deemed amended to name
10 Max Rave as a defendant and to include the allegations contained within the Supplemental
11 Notice.

12 **1.7 No Admission.**

13 The Parties enter into this Consent Judgment as a full and final settlement of all claims
14 that were raised in the Complaint or that could have been raised in the Complaint, arising out of
15 the facts or conduct alleged therein. By execution of this Consent Judgment and agreeing to
16 comply with its terms, Max Rave does not admit any facts or conclusions of law, including, but
17 not limited to, any facts or conclusions of law suggesting or demonstrating any violations of
18 Proposition 65 or any other statutory, common law or equitable requirements relating to DEHP in
19 Covered Products. This Consent Judgment is the product of negotiation and compromise and is
20 accepted by Max Rave for purposes of settling, compromising, and resolving issues disputed in
21 this action. However, this section shall not diminish or otherwise affect the obligations,
22 responsibilities and duties of Max Rave under this Consent Judgment.

23 **1.8 Consent to Jurisdiction.**

24 For purposes of this Consent Judgment only, Max Rave stipulates that this Court has
25 jurisdiction over Max Rave as to the allegations contained in the Complaint, that venue is proper
26 in the County of Marin and that this Court has, and will retain, jurisdiction to enter and enforce
27 the provisions of this Consent Judgment.

1 **2. DEFINITIONS**

2 2.1 “Accessible Component” means a poly vinyl chloride (“PVC”) or other soft
3 plastic, vinyl, or faux leather component of a Covered Product that could be touched by a person
4 during reasonably foreseeable use.

5 2.2 “Covered Product[s]” means all Max Rave Jelly footwear that is manufactured,
6 imported, distributed or sold by Max Rave including, but not limited to the footwear forth by
7 SKU# or other identifying product number on Exhibit A attached hereto.

8 2.3 “Effective Date” means the date this Consent Judgment is approved by this Court.

9 **3. INJUNCTIVE RELIEF: REFORMULATION**

10 Commencing on the Effective Date, Max Rave shall not sell or offer for sale in California
11 any Covered Product containing DEHP in concentrations exceeding 0.1 percent by weight (1,000
12 parts per million (“ppm”)) in any Accessible Component when analyzed pursuant to any
13 methodology utilized by federal or state agencies for the purpose of determining phthalate content
14 in a solid substance (hereinafter “Reformulated Products”).

15 **4. ENFORCEMENT OF CONSENT JUDGMENT**

16 4.1 **General Enforcement Provisions.**

17 Any Party may, by motion or application for an order to show cause before the Marin
18 Superior Court, enforce the terms and conditions contained in this Consent Judgment. A Party
19 may file such a motion or application only after that Party first provides 30 days notice to the
20 Party allegedly failing to comply with the terms and conditions of this Consent Judgment and
21 attempts to resolve such Party’s failure to comply in an open and good faith manner for a period
22 of no less than 30 days. This provision does not abridge any other remedy afforded to a party as
23 allowed by law.

24 **5. MONETARY PAYMENTS**

25 5.1 **Civil Penalty Payments Pursuant to Health & Safety Code § 25249.7(b).**

26 Max Rave shall make a payment of \$20,000 to be apportioned in accordance with Health
27 & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds earmarked
28 for the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”)

1 and the remaining 25% of these penalty monies earmarked for Anthony E. Held, Ph.D., P.E..
2 This penalty reflects a credit of \$40,000 based on Max Rave's commitment, as of the Effective
3 Date, to sell, ship, and offer for sale in California only Reformulated Products.

4 **5.2 Reimbursement of Plaintiff's Fees and Costs.**

5 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
6 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
7 issue to be resolved after the material terms of the agreement had been settled. Max Rave then
8 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
9 been finalized. The Parties then attempted to (and did) reach an accord on the compensation due
10 to Held and his counsel under general contract principles and the private attorney general
11 doctrine codified at California Code of Civil Procedure Section 1021.5, for all work performed
12 in this matter, except fees that may be incurred on appeal. Under these legal principles, Max
13 Rave shall pay the amount of \$58,000 for fees and costs incurred investigating, litigating and
14 enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating,
15 drafting, and obtaining the Court's approval of this Consent Judgment in the public interest.

16 **5.3 Payment Procedures.**

17 All payments required by Sections 5.1 and Section 5.2 shall be delivered within five
18 business days of the Effective Date and shall be made payable, as follows:

- 19 (a) "The Chanler Group in Trust for OEHHA" in the amount of
20 \$15,000;
21 (b) "The Chanler Group in Trust for Anthony E. Held, Ph.D., P.E." in
22 the amount of \$5,000; and
23 (c) "The Chanler Group" in the amount of \$58,000.

24 **5.4 Payment Address.**

25 All payments to The Chanler Group shall be delivered to the following address:

26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

1 **6. CLAIMS COVERED AND RELEASED**

2 6.1 This Consent Judgment is a full, final, and binding resolution between Held and
3 Max Rave and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates,
4 and sister companies and their successors and assigns, including but not limited to, BCBG Max
5 Azria Group, Inc. (“Defendant Releasees”), and their downstream distributors, wholesalers,
6 customers, retailers, franchisees, cooperative members, licensors, and licensees, and any other
7 person or entity to whom they directly or indirectly distribute or sell Covered Products,
8 (“Downstream Defendant Releasees”), of any violation of Proposition 65 that has been or could
9 have been asserted in the public interest against Max Rave, Defendant Releasees, and
10 Downstream Defendant Releasees regarding the failure to warn about exposure to DEHP in
11 Covered Products. Defendant Releasees’ compliance with this Consent Judgment shall constitute
12 compliance with Proposition 65 with respect to DEHP in Covered Products after the Effective
13 Date.

14 6.2 Held on behalf of himself, his past and current agents, representatives, attorneys,
15 successors, and/or assignees, and in the interest of the general public, hereby waives all rights to
16 institute or participate in, directly or indirectly, any form of legal action and releases all claims,
17 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
18 demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not
19 limited to, investigation fees, expert fees, and attorneys’ fees) of any nature whatsoever, , fixed or
20 contingent (collectively “Claims”), against Max Rave, Defendant Releasees, and Downstream
21 Defendant Releasees arising from any violation of Proposition 65 regarding the failure to warn
22 about exposure to DEHP in Covered Products.

23 6.3 Held also, in his individual capacity only and *not* in his representative capacity,
24 provides a general release herein which shall be effective as a full and final accord and
25 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
26 damages, losses, claims, liabilities and demands of Held of any nature, character or kind, known
27 or unknown, suspected or unsuspected, against Max Rave, Defendant Releasees and Downstream
28 Defendant Releasees, arising out of the subject matter of the Complaint, including any claims

1 related to alleged exposure to butyl benzyl phthalate (“BBP”), di-n-butyl phthalate (“DBP”), and
2 DEHP in Covered Products. Held acknowledges that he is familiar with Section 1542 of the
3 California Civil Code, which provides as follows:

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

9 Held, in his individual capacity only and *not* in his representative capacity, expressly
10 waives and relinquishes any and all rights and benefits which he may have under, or which may
11 be conferred on him by the provisions of Section 1542 of the California Civil Code as well as
12 under any other state or federal statute or common law principle of similar effect, to the fullest
13 extent that he may lawfully waive such rights or benefits pertaining to the released matters. In
14 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
15 complete release notwithstanding the discovery or existence of any such additional or different
16 claims or facts arising out of the released matters.

17 6.4 Max Rave waives any and all Claims against Held, his attorneys, and other
18 representatives for any and all actions taken or statements made (or those that could have been
19 taken or made) by Held and his attorneys and other representatives, whether in the course of
20 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
21 matter, and/or with respect to the Covered Products.

22 6.5 Max Rave also provides a general release herein which shall be effective as a full
23 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
24 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Max Rave of any
25 nature, character or kind, known or unknown, suspected or unsuspected, against Held, his
26 attorneys, and other representatives, arising out of the subject matter of the Action. Max Rave
27 acknowledges that it is familiar with Section 1542 of the California Civil Code, which provides as
28 follows:

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

6 Max Rave expressly waives and relinquishes any and all rights and benefits which it may
7 have under, or which may be conferred on it by the provisions of Section 1542 of the California
8 Civil Code as well as under any other state or federal statute or common law principle of similar
9 effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the
10 released matters. In furtherance of such intention, the release hereby given shall be and remain in
11 effect as a full and complete release notwithstanding the discovery or existence of any such
12 additional or different claims or facts arising out of the released matters.

11 7. COURT APPROVAL

12 7.1 By this Consent Judgment and upon its approval, the Parties waive their right to
13 trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
14 including all pleading, procedural, and discovery orders.

15 7.2 Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to
16 California Health & Safety Code §25249.7(f), and Max Rave shall support the entry of such
17 motion.

18 7.3 Upon entry of this Consent Judgment, plaintiff shall dismiss, without prejudice,
19 BCBG Max Azria Group, Inc. as a defendant in this action.

20 7.4 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
21 and any and all prior agreements between the Parties merged herein shall terminate and become
22 null and void, and the action shall revert to the status that existed prior to the execution date of
23 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
24 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
25 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
26 action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
27 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

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8. GOVERNING LAW

8.1 The terms of this Consent Judgment shall be governed by the laws of the State of California, and shall apply only to Covered Products offered for sale in the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Max Rave shall provide written notice to Held of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

8.2 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

9. NOTICES

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

To Max Rave:

Maryn Miller
General Counsel
Max Rave, LLC
145 Talmadge Road, Suite 12
Edison, NJ 08817

1 With a copy to:

2 Jeffrey B. Margulies, Esq.
3 Fulbright & Jaworski LLP
4 555 South Flower Street
Forty-First Floor
Los Angeles, California 90071

5 To Held:

6 Proposition 65 Coordinator
7 The Chanler Group
8 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

9 9.2 Any Party, from time to time, may specify in writing to the other Party a change of
10 address to which all notices and other communications shall be sent.

11 **10. MODIFICATION**

12 **10.1 Modification.**

13 This Consent Judgment may be modified by written agreement of the Parties and upon
14 entry of a modified Consent Judgment by the court, or by motion of any Party and entry of a
15 modified Consent Judgment by the court, if there is good cause shown and other pre-requisites for
16 modifying consent judgments are met.

17 **10.2 Subsequent Legislation.**

18 If, subsequent to the Effective Date, legislation or regulation is adopted that addresses the
19 DEHP content of Covered Products sold in California, any Party shall be entitled to request that
20 the Court modify the reformulation standard of Section 3.1 of this Consent Judgment for good
21 cause shown.

22 **10.3 Notice; Meet and Confer.**

23 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet
24 and confer with the other Party prior to filing a motion to modify the Consent Judgment.

25 **11. ENTIRE AGREEMENT**

26 11.1 This Consent Judgment contains the sole and entire agreement and understanding
27 of the Parties with respect to all issues and disputes arising from the allegations in the Notice
28 and/or the Complaint, existing as of the Effective Date, between Held and Max Rave, and any and

1 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
2 hereby merged herein and therein. No supplementation, modification, waiver, or termination of
3 this Consent Judgment shall be binding unless executed in writing by the Party to be bound
4 thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall
5 constitute a waiver of any of the other provisions hereof whether or not similar.

6 **12. RETENTION OF JURISDICTION**

7 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
8 Consent Judgment.

9 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

10 13.1 This Consent Judgment may be executed in counterparts and by facsimile or
11 portable document format (pdf), each of which shall be deemed an original, and all of which,
12 when taken together, shall constitute one and the same document.

13 **14. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

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15. AUTHORIZATION

15.1 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: APPROVED By Tony at 9:26 am, Nov 06, 2011 By: <i>Anthony E Held</i> Plaintiff ANTHONY E. HELD, Ph.D., P.E.	Date: <u>10-31-11</u> By: <i>[Signature]</i> Defendant MAX RAVE, LLC IK Assistant General Counsel

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

Exhibit A

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1. Max Rave Jelly Sandals, Pink, #TMF61808 (#6 49225 36805 4)
2. Max Rave Jelly Sandals, Pink, #TMF61808 (#6 49225 36805 4)
3. BCBG Max Azria Jelly, Smoke, Style MA-PLAGE (#0 47417 52489 7)
4. BCBGirls Dorothy Sandals, Style BG-DOROTHY, #2501 (#8 86068 24013 4)