

1 Clifford A. Chanler (State Bar No. 135534)
2 Laurence D. Haveson (State Bar No. 152631)
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, California 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 ANTHONY E. HELD, Ph.D., P.E.

11 ROGERS JOSEPH O'DONNELL
12 RENÉE D. WASSERMAN (State Bar No. 108118)
13 JAMES ROBERT MAXWELL (State Bar No. 143203)
14 311 California Street
15 San Francisco, California 94104
16 Telephone: (415) 956-2828
17 Facsimile: (415) 956-6457

18 Attorneys for Defendants
19 SAVE MART SUPERMARKETS and
20 FOOD MAXX

21 SUPERIOR COURT OF THE STATE OF CALIFORNIA
22 COUNTY OF ALAMEDA

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

24 Plaintiff,

25 vs.

26 STK INTERNATIONAL, INC.; SAVE
27 MART SUPERMARKETS; FOOD MAXX;
28 and DOES 1 through 150, inclusive,

Defendants.

AND CONSOLIDATED ACTIONS

Case No. RG07350981

[Original Case No. RG08370704]

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

Health & Safety Code § 25249.6

1 **I. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Save Mart Supermarkets**
3 **for Itself and dba Food Maxx**

4 This Consent Judgment is entered into by and between Plaintiff Anthony E. Held, Ph.D.,
5 P.E. (“Dr. Held” or “Plaintiff”) and Defendants Save Mart Supermarkets (“Save Mart”) for itself
6 and dba Food Maxx (“Food Maxx”) (hereinafter “Save Mart and Food Max” or “Defendants”),
7 with Plaintiff and Defendants collectively referred to as the “parties.”

8 **1.2 Plaintiff**

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

12 **1.3 Defendants**

13 Save Mart and Food Maxx each employ 10 or more persons and thus are persons in the
14 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
15 1986, California Health & Safety Code § 25249.6 *et seq.* (Proposition 65).

16 **1.4 General Allegations**

17 Dr. Held alleges that Save Mart and Food Maxx have manufactured, distributed and/or
18 sold certain infant’s and children’s items including, but not limited to, *My Baby Products 3pc*
19 *PVC Baby Bibs, BI-232 (#7 88914 30437 6)* containing di(2-ethylhexyl)phthalate (“DEHP”)
20 without the requisite health hazard warnings. DEHP is a phthalate that is listed as a reproductive
21 and developmental toxicant pursuant to Proposition 65 and is referred to hereinafter as “the
22 Listed Chemical.”

23 **1.5 Product Description**

24 The products that are covered by this Consent Judgment are infant’s and children’s items
25 including, but not limited to, *My Baby Products 3pc PVC Baby Bibs, BI-232 (#7 88914 30437 6)*
26 containing the Listed Chemical that are manufactured, distributed and/or sold by Save Mart and
27 Food Maxx. All such infant’s and children’s items shall be referred to hereinafter as the
28 “Covered Products.”

1 **1.6 Notices of Violation**

2 On November 20, 2007 Dr. Held served Save Mart, Food Maxx, STK International, Inc.,
3 and various public enforcement agencies with a document entitled “60-Day Notice of Violation”
4 and on January 26, 2009 served Save Mart, Food Maxx and Lucky a Supplemental 60-Day
5 Notice listing other infant’s and children’s items, (both hereinafter referred to as the “Notice”)
6 that provided Save Mart, Food Maxx, Lucky and public enforcers with notice of alleged
7 violations of Health & Safety Code § 25249.6 for failing to warn consumers that the Covered
8 Products that Save Mart, Food Maxx and Lucky manufactured, distributed and/or sold exposed
9 users in California to DEHP. No public enforcer has diligently prosecuted the allegations set
10 forth in the Notices.

11 **1.7 Complaint**

12 On February 11, 2008, Dr. Held, who was and is acting in the interest of the general
13 public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court in and for
14 the County of Alameda against Save Mart, Food Maxx, STK International, Inc., and Does 1
15 through 150, alleging violations of Health & Safety Code § 25249.6 based on the alleged
16 exposures to DEHP contained in bibs distributed and/or sold by Save Mart and Food Maxx. The
17 case number for the action is RG08370704.

18 **1.8 No Admission**

19 Save Mart and Food Maxx deny the material, factual and legal allegations contained in
20 Dr. Held's Notice, and the Complaint and maintain that all Covered Products that they have
21 manufactured, distributed and/or sold in California have been and are in compliance with all
22 applicable laws. Nothing in this Consent Judgment shall be construed as an admission by Save
23 Mart or Food Maxx of any fact, finding, issue of law, or violation of law, nor shall compliance
24 with this Consent Judgment constitute or be construed as an admission by Save Mart or Food
25 Maxx of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
26 denied by Save Mart and Food Maxx. However, this Section shall not diminish or otherwise
27 affect Save Mart and Food Maxx's obligations, responsibilities, and duties under this Consent
28 Judgment.

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the parties stipulate that this Court has
3 jurisdiction over Save Mart and Food Maxx as to the allegations contained in the Complaint, that
4 venue is proper in the County of Alameda and that this Court has jurisdiction to enter and enforce
5 the provisions of this Consent Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean January 1,
8 2009.

9 **II. INJUNCTIVE RELIEF: REFORMULATION IN LIEU OF WARNINGS**

10 **2.1 Reformulation Commitments and Schedule**

11 As of the Effective Date, Save Mart and Food Maxx shall: (1) not sell any *My Baby*
12 *Products 3pc PVC Baby Bibs, BI-232 (#7 88914 30437 6)* unless they are Phthalate Free; and (2)
13 demand in writing and/or obtain written assurance that their suppliers for Covered Products other
14 than *My Baby Products 3pc PVC Baby Bibs, BI-232 (#7 88914 30437 6)* only supply or cause to
15 be supplied Covered Products for sale in California that are Phthalate Free. Upon written request,
16 Save Mart and Food Maxx shall send Dr. Held a copy of demand letters and any assurance or
17 certification that Save Mart and Food Maxx receive from those suppliers whose products have
18 been subject to a 60-Day Notice from Dr. Held. For purposes of this section “Phthalate Free”
19 Covered Products shall mean Covered Products containing less than or equal to 0.1% DEHP,
20 which is 1,000 parts per million (“ppm”) of the Listed Chemical when analyzed pursuant to:
21 Environmental Protection Agency (“EPA”) testing methodologies 3580 and 8270, or other
22 comparable methodologies recognized and accepted by one or more federal and/or state agencies,
23 including the Consumer Product Safety Commission, to determine whether the respective levels
24 have been exceeded in its Products. Products that are Phthalate Free shall be referred to herein as
25 “Reformulated Products.” Save Mart and Food Maxx represent that they first learned from the
26 60-Day Notice issued on November 20, 2007, that certain of the *My Baby Products Baby Bibs*
27 they sold contained the Listed Chemical. As a result thereof, Save Mart and Food Maxx began to
28 immediately remove all such products from the shelves and within approximately two weeks

1 thereafter ceased sale of all *My Baby Products Baby Bibs*. Save Mart and Food Maxx further
2 represent that they first learned from the Supplemental 60-Day Notice issued on January 26,
3 2009, that certain other infant's and children's items they sold contained the Listed Chemical. As
4 a result thereof, Save Mart and Food Maxx began to immediately remove all such products from
5 the shelves and within approximately two weeks thereafter ceased sale of those items.

6 **III. MONETARY PAYMENTS**

7 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

8 In settlement of all claims related to the Covered Products and Listed Chemical referred to
9 in the Complaint and this Consent Judgment pursuant to Health & Safety Code § 25249.7(b),
10 Save Mart and Food Maxx, on behalf of themselves and those in its chain of distribution, shall
11 pay \$1,000 in civil penalties.

12 Civil penalties are to be apportioned in accordance with California Health & Safety Code
13 § 25192, with 75% of these funds remitted to the State of California's Office of Environmental
14 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to
15 Anthony Held as provided by California Health & Safety Code §25249.12(d). Save Mart and
16 Food Maxx shall issue two separate checks for the penalty payment: (a) one check made payable
17 to "Hirst & Chanler LLP in Trust for OEHHA" in the amount of \$750.00, representing 75% of
18 the total penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the
19 amount of \$250.00, representing 25% of the total penalty. Two separate 1099s shall be issued for
20 the above-payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486);
21 and (b) Anthony Held, whose information shall be provided five calendar days before the
22 payment is due.

23 Payment shall be delivered to Dr. Held's counsel on or before February 27, 2009, at the
24 following address:

25 Hirst & Chanler LLP
26 Attn: Proposition 65 Controller
27 455 Capitol Mall, Suite 605
28 Sacramento, CA 95814

1 **IV. REIMBURSEMENT OF FEES AND COSTS**

2 **4.1 Attorney Fees and Costs**

3 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
4 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
5 this fee issue to be resolved after the material terms of the agreement had been settled.
6 Defendants then expressed a desire to resolve the fee and cost issue shortly after the other
7 settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on
8 the compensation due to Dr. Held and his counsel under general contract principles and the
9 private attorney general doctrine codified at California Code of Civil Procedure (C.C.P.)
10 § 1021.5, for all work performed in this case. Save Mart and Food Maxx, on behalf of
11 themselves and those in their chain of distribution shall reimburse Dr. Held and his counsel a
12 total of \$15,000 for fees and costs incurred as a result of investigating, bringing this matter to
13 Save Mart and Food Maxx's attention, and litigating and negotiating a settlement in the public
14 interest. Save Mart and Food Maxx shall issue a separate 1099 for fees and costs (EIN: 20-
15 3929984) and shall make the check payable to "Hirst & Chanler LLP" and shall be delivered on
16 or before February 27, 2009, to the following address:

17 Hirst & Chanler LLP
18 Attn: Proposition 65 Controller
19 455 Capitol Mall, Suite 605
20 Sacramento, CA 95814

21 **V. CLAIMS COVERED AND RELEASE**

22 **5.1 Dr. Held's Release of Save Mart and Food Maxx, their affiliates and their
23 Chain of Distribution**

24 In further consideration of the promises and agreements herein contained, the injunctive
25 relief commitments set forth in Section 2.1, and for the payments to be made pursuant to Sections
26 3 and 4, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys,
27 successors, and/or assignees, in the interest of the general public, hereby waives all rights to
28 institute or participate in, directly or indirectly, any form of legal action and releases all claims,
including, without limitation, all actions, and causes of action, in law or in equity, suits,
liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses

1 (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature
2 whatsoever, whether known or unknown, fixed or contingent (collectively "claims"), against
3 Save Mart and Food Maxx and each of their parents, subsidiaries, import partners, affiliates,
4 including but not limited to Lucky®, wholesalers, retailers, dealers, customers, owners,
5 purchasers, users, and their respective officers, directors, attorneys, representatives, shareholders,
6 agents, and employees (collectively "Releasees") that arise under Proposition 65, as such claims
7 relate to the Releasees' alleged failure to warn about exposures to the Listed Chemical contained
8 in the Covered Products, specifically vinyl baby bibs and baseball and glove sets.

9 Dr. Held also, in his individual capacity only and *not* in his representative capacity,
10 provides a general release herein which shall be effective as a full and final accord and
11 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
12 damages, losses, claims, liabilities and demands of Dr. Held of any nature, character or kind,
13 known or unknown, suspected or unsuspected, arising out of the subject matter of the Action
14 except as provided for herein. Dr. Held acknowledges that he is familiar with Section 1542 of the
15 California Civil Code, which provides as follows:

16 A general release does not extend to claims which the creditor does
17 not know or suspect to exist in his favor at the time of executing the
18 release, which if known by him must have materially affected his
settlement with the debtor.

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

27 The parties further understand and agree that this release shall not extend upstream to any
28 entities that manufactured the Products or any component parts thereof, or any distributors or

1 suppliers who sold the Products or any component parts thereof to Save Mart and Food Maxx.

2 **5.2 Save Mart and Food Maxx's Release of Dr. Held**

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

8 **VI. COURT APPROVAL**

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

15 **VII. SEVERABILITY**

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

19 **VIII. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
22 inapplicable by reason of law generally, or as to the Listed Chemical and/or the Covered
23 Products, then Save Mart and Food Maxx shall have no further obligations pursuant to this
24 Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

25 **IX. NOTICES**

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

1 other party at the following addresses:

2 To Save Mart Supermarkets and Food Maxx:

3 Michael J. Silveira, Esq.
4 Senior Vice President & Chief Administrative Officer
5 Save Mart Supermarkets
6 P.O. Box 3689
7 1800 Standiford Avenue
8 Modesto CA 95350

9 With a copy to:

10 Renee D. Wasserman, Esq.
11 ROGERS JOSEPH O'DONNELL
12 311 California St., 10th Floor
13 San Francisco, CA 94104

14 To Dr. Held:

15 Hirst & Chanler LLP
16 Attn: Proposition 65 Coordinator
17 2560 Ninth Street, Suite 214
18 Berkeley, CA 94710

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

21 **X. COUNTERPARTS, FACSIMILE SIGNATURES**

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

25 **XI. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

28 **XII. ADDITIONAL POST EXECUTION ACTIVITIES**

The parties acknowledge that pursuant to Health & Safety Code §25249.7, a noticed
motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
obtaining such approval, Held, Save Mart, Food Maxx and their respective counsel agree to
mutually employ their best efforts to support the entry of this agreement as a Consent Judgment

1 and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of
2 this paragraph, best efforts shall include, at a minimum, cooperating on the drafting and filing any
3 papers, asserting any oral argument in support of the required motion for judicial approval, and
4 defending any appellate review of the Court's approval.

5 **XIII. MODIFICATION**

6 This Consent Judgment may be modified only: (1) by written agreement of the parties
7 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
8 motion of any party and entry of a modified Consent Judgment by the Court. The Attorney
9 General shall be served with notice of any proposed modification to this Consent Judgment at
10 least fifteen (15) days in advance of its consideration by the Court. Dr. Held shall be entitled to
11 his reasonable fees and costs incurred in the modification process under C.C.P. §1021.5 if
12 Defendants, the Attorney General and/or any third party seeks to modify the terms of this
13 Consent Judgment.

14 ///

15 ///

16 ///

17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

XIV. 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 of this Consent Judgment.

AGREED TO:

APPROVED
By Anthony E Held at 9:08 am, 2/20/09

AGREED TO:

Date: Feb 26, 2009

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

By: [Signature]
Defendants SAVE MART
SUPERMARKETS for itself and dba
FOOD MAXX

APPROVED AS TO FORM:

Date: 2/20/2009

HIRST & CHANLER LLP

By: Laurence D. Haveson
Laurence D. Haveson
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

APPROVED AS TO FORM:

Date: 2/25/09

ROGERS JOSEPH O'DONNELL

By: [Signature]
Renee D. Wasserman
Attorneys for Defendant
SAVE MART SUPERMARKETS AND
FOOD MAXX