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ENDORSED
FILED
ALAMEDA COUNTY

SEP 17 2008

Alexin, Exec. Off./Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

UNLIMITED CIVIL JURISDICTION

ANTHONY HELD, Ph.D., P.E., Plaintiff, v. UNIQUE INDUSTRIES, INC.; and DOES 1 through 150, inclusive, Defendants.	Case No. RG08388551 **STIPULATION AND [~~PROPOSED~~] ORDER RE: CONSENT JUDGMENT**

1. INTRODUCTION

1.1 Anthony E. Held, Ph.D., P.E., and Unique Industries, Inc.

This consent judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E. ("Dr. Held" or "Plaintiff") and Unique Industries, Inc. ("Unique Industries" or "Defendant"), with Plaintiff and Unique Industries collectively referred to as the "Parties."

1.2 Plaintiff

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

1.3 Defendant

Unique Industries employs ten or more persons who are each a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6 *et seq.* (Proposition 65).

1.4 General Allegations

Dr. Held alleges that Unique Industries has manufactured, distributed and/or sold bath toys containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") without the requisite health hazard warnings. DEHP is known to cause birth defects and other reproductive harm and is listed by its chemical nomenclature pursuant to Proposition 65. DEHP shall be referred to hereinafter as the "Listed Chemical."

1.5 Product Description

The products that are covered by this Consent Judgment are defined as follows: children's bath toys containing the plasticizer phthalate DEHP, such as Party 6 Squeaky Ducks # 86920 (#0 11179 86920 6). All such bath toys containing DEHP are referred to hereinafter as "Products" and singly as "Product."

1.6 Notice of Violation

On November 20, 2007, Dr. Held served Unique Industries and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Unique Industries and public enforcers with notice of alleged violations of California Health &

Safety Code §25249.6 for failing to warn consumers that the Products that Unique Industries sold exposed users in California to the Listed Chemical. To the best of the parties' knowledge, no public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.7 Complaint

On May 20, 2008, Dr. Held, acting in the interest of the general public in California, filed a complaint ("Complaint") in the Superior Court in and for the County of Alameda against Unique Industries and Does 1 through 150, alleging violations of California Health & Safety Code §25249.6 based on the alleged exposures to the Listed Chemical contained in the Products sold by Unique Industries.

1.8 No Admission

Unique Industries denies the material, factual and legal allegations contained in Dr. Held's Notice and Complaint and maintains that all Products that they have sold and distributed in California have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Unique Industries of any fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Unique Industries of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Unique Industries. However, this section shall not diminish or otherwise affect Unique Industries' obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Unique Industries as to the allegations contained in the Complaint, that venue is proper in the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" shall mean July 1, 2008.

2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION

2.1 Product Warnings

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

Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize if not eliminate the chance that an overwarning situation will arise.

(a) Retail Store Sales.

(i) Product Labeling. Unique Industries may perform its warning obligation by ensuring that a warning is affixed to the packaging, labeling, or directly on each Product sold in retail outlets in California by Unique Industries or its agents, that states:

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

(ii) Point-of-Sale Warnings. Unique Industries may perform its warning obligations by providing warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products.

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

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

[1]For purposes of the consent judgment, "sold in proximity" shall mean that the Product and another product are

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

[*list products for which warning is required*]

(b) Mail Order Catalog and Internet Sales. In the event that Unique Industries sells Products via mail order catalog or internet to customers located in California after the Effective Date that are not Reformulated Products, Unique Industries shall satisfy its warning obligations for Products sold via mail order catalog or the Internet to California residents by providing a warning: (i) in the mail order catalog, or (ii) on the website. Warnings given in the mail order catalog or on the website shall identify the specific Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

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

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

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

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

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offered for sale or purchase close enough to each other that the consumer, under customary conditions, could not reasonably determine which of the two products is subject to the warning sign.

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, Unique Industries must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

If Unique Industries elects to provide warnings in the mail order catalog, then the warnings must be included in all catalogs offering to sell one or more Products printed after July 1, 2008.

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

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

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

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

2.2 <u>Exceptions To Warning Requirements</u>

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

(i) Any Products shipped to Unique Industries' customers in California prior to the Effective Date; or

(ii) Reformulated Products (as defined in Section 2.3 below).

2.3 Reformulation Standards

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

Unique Industries shall use Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C, or other comparable methodologies accepted by one or more federal and/or state agencies, including, if appropriate, ASTM D3421, to determine whether the respective levels have been exceeded in its Products.

2.4 Reformulation Commitment

Unique Industries hereby commits that one hundred percent (100%) of the Products that they offer for sale in California after September 30, 2008, shall qualify as Reformulated Products or shall otherwise be exempt from the warning requirements of Section 2.1.

3. MONETARY PAYMENTS

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

In settlement of all the claims referred to in this Consent Judgment, Unique Industries shall pay $3,500 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d). Unique Industries shall issue two separate checks for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in Trust For OEHHA" in the amount of $2,625, representing 75% of the total penalty; and (b) one check to ""Hirst & Chanler LLP in Trust for Anthony Held" in the amount of $875, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall be provided five calendar days before the payment is due.

Payment shall be delivered to Dr. Held's counsel within ten days of the Effective Date at the following address:

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

The sums paid pursuant to this section 3.1 shall be held by Hirst & Chanler in the appropriate client trust account until entry of this Consent Judgment by the Court becomes final, including any potential appeals.

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Attorney Fees and Costs.

The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Unique Industries then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Dr. Held and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual execution of this agreement. Unique Industries shall reimburse Dr. Held and his counsel a total of $23,000 for fees and costs incurred as a result of investigating, bringing this matter to Unique Industries' attention, and litigating and negotiating a settlement in the public interest. Unique Industries shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check payable to "HIRST & CHANLER LLP" and shall be delivered within ten days of the Effective Date to the following address:

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

4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.

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

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

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

Unique Industries has the right to object to such reimbursement and may submit the resolution of this issue to the American Arbitration Association (AAA) in Northern California to determine the reasonableness of the additional fees and costs sought, provided that an arbitration such notice of objection or decision to arbitrate is received by Dr. Held by the end of the ten calendar days. If an arbitration notice is not filed with AAA in a timely manner, Dr. Held may file a motion with the Court pursuant to both CCP §1021.5 and this settlement agreement to recover additional attorney fees and costs incurred as set forth in this paragraph. In the event Unique Industries submits the matter to arbitration, the prevailing party shall be awarded reasonable attorneys fees and costs incurred in connection with the arbitration.

5. RELEASE OF ALL CLAIMS

5.1 Dr. Held's Release of Unique Industries

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all rights to 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 (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"), against Unique Industries and each of its downstream wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees") that arise under Proposition 65, as such claims relate to Unique Industries' failure to warn about exposure to the Listed Chemicals contained in toy ducks.

The parties further understand and agree that this release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Unique Industries.

5.2 <u>Unique Industries' Release of Dr. Held</u>

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

6. <u>COURT APPROVAL</u>

This Consent Judgment is not effective until it is approved and entered by the court and shall be null and void if, for any reason, it is not approved and entered by the court within six months after it has been fully executed by all parties. In the event that this Consent Judgment is (a)

not entered by this Court for any reason whatsoever, or (b) is entered by the Court and subsequently overturned by any appellate court, any monies that have been provided to Plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, together with interest at the prevailing federal rate accruing from the date of payment by Defendant, shall be refunded within fifteen days of the written demand by Defendant for return of such funds.

7. SEVERABILITY

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

8. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within 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 Unique Industries shall provide written notice to Dr. 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 Products are so affected.

9. NOTICES

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 Unique Industries:

Glenn Wattenmaker, General Counsel
UNIQUE INDUSTRIES, INC.
4750 League Island Boulevard
Philadelphia, Pennsylvania 19112

With copy to:

Michael J. Stiles, Esq.
JEFFER, MANGELS, BUTLER & MARMARO LLP
1900 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067

To Dr. Held:

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

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

10. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

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

12. ADDITIONAL POST EXECUTION ACTIVITIES

Dr. Held and Unique Industries 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. 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 a motion to approve the settlement.

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. The Attorney General shall be served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days in advance of its consideration 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 of this Consent Judgment.

AGREED TO: APPROVED By Anthony E Held at 10:33 am, 9/12/08 Date:_____ By: Anthony E Held Plaintiff, ANTHONY E. HELD, Ph.D., P.E.	AGREED TO: Date:_____ By:_____ Defendant, UNIQUE INDUSTRIES, INC.
APPROVED AS TO FORM: Date: Sept. 12, 2008 HIRST & CHANLER LLP By: _____ David Lavine Attorneys for Plaintiff ANTHONY E. HELD, Ph.D., P.E.	APPROVED AS TO FORM: Date:_____ JEFFER, MANGELS, BUTLER & MARMARO LLP By:_____ Michael J. Stiles Attorneys for Defendant UNIQUE INDUSTRIES, INC.

IT IS SO ORDERED.

Date: Sept 17, 2008

JUDGE OF THE SUPERIOR 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 of this Consent Judgment.

AGREED TO: Date:_____ By:_____ Plaintiff, ANTHONY E. HELD, Ph.D., P.E.	AGREED TO: Date: September 12, 2008 By: [signature] Defendant, UNIQUE INDUSTRIES, INC.
APPROVED AS TO FORM: Date:_____ HIRST & CHANLER LLP By:_____ David Lavine Attorneys for Plaintiff ANTHONY E. HELD, Ph.D., P.E.	APPROVED AS TO FORM: Date:_____ JEFFER, MANGELS, BUTLER & MARMARO LLP By:_____ Michael J. Stiles Attorneys for Defendant UNIQUE INDUSTRIES, INC.

IT IS SO ORDERED.

Date: _____ _____
JUDGE OF THE SUPERIOR 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 of this Consent Judgment.

AGREED TO: Date:_____ By:_____ Plaintiff, ANTHONY E. HELD, Ph.D., P.E.	AGREED TO: Date:_____ By:_____ Defendant, UNIQUE INDUSTRIES, INC.
APPROVED AS TO FORM: Date:_____ HIRST & CHANLER LLP By:_____ David Lavine Attorneys for Plaintiff ANTHONY E. HELD, Ph.D., P.E.	APPROVED AS TO FORM: Date: Sept. 11, 2008 JEFFER, MANGELS, BUTLER & MARMARO LLP By:_____ Michael J. Stiles Attorneys for Defendant UNIQUE INDUSTRIES, INC.

IT IS SO ORDERED.

Date: _____

_____
JUDGE OF THE SUPERIOR COURT