

1 Clifford A. Chanler, State Bar No. 135534
David Lavine, State Bar No. 166744
2 HIRST & CHANLER LLP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118
5

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

7 Christopher Locke, State Bar No. 101704
FARELLA BRAUN & MARTEL LLP
8 235 Montgomery Street, 17th Floor
San Francisco, CA 94104
9 Telephone: (415) 954-4400
Facsimile: (415) 954-4480
10

11 Attorneys for Defendant
DARICE, INC.

12 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE COUNTY OF SACRAMENTO
14

15 ANTHONY E. HELD, Ph.D., P.E.,
16 Plaintiff,
17 vs.
18 DARICE, INC., and DOES 1 through 150,
19 inclusive,
20 Defendant.

Case No. 34-2008-00011360

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

21
22
23
24
25
26
27
28

1 **1. INTRODUCTION**

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

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. (“Dr. Held” or “Plaintiff”) and defendant Darice, Inc., and its corporate affiliate Lamrite
5 West, Inc., dba Darice (“Darice” or “Defendant”). Plaintiff and Defendant are collectively
6 referred to as the “parties,” and individually as a “party,” to this Consent Judgment.

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

12 Defendant acknowledges that Darice is a corporation with ten or more employees, and is a
13 “person in the course of doing business” within the meaning of the Safe Drinking Water and
14 Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6 *et seq.* (Proposition
15 65).

16 **1.4 General Allegations**

17 Dr. Held alleges that Darice has manufactured, distributed and/or sold children’s products
18 containing di(2-ethylhexyl)phthalate (hereinafter “DEHP”) in the State of California without the
19 requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as known to the State
20 of California to cause birth defects and other reproductive harm. DEHP shall be referred to
21 hereinafter as the “Listed Chemical.”

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are defined as the 3 5/8" Rubber
24 Duck bath products, M5102 (#6 52695 82063 2), which are referred to hereinafter as the
25 “Covered Products.”

26 **1.6 Notice of Violation**

27 On November 20, 2007, Dr. Held served Darice and various public enforcement agencies
28

1 with a document entitled “60-Day Notice of Violation” (the “Notice”) alleging violations of
2 California Health & Safety Code §25249.6 for failing to warn consumers that Covered Products
3 distributed by Darice exposed users in California to the Listed Chemical. No public enforcer has
4 diligently prosecuted the allegations set forth in the notices.

5 **1.7 Settlement Discussions**

6 Darice asserts that it has conducted testing of the Covered Products and responded to the
7 Notice within the 60-day period, and maintains its denial that the Covered Products caused an
8 exposure to the Listed Chemical. The parties exchanged product information and testing results,
9 engaged in discussions during January-April 2008 to resolve the disputed claims, and reached the
10 settlement described herein.

11 **1.8 Complaint**

12 On May 20, 2008, Dr. Held, acting in the interest of the general public in California and
13 pursuant to the parties’ settlement, filed a complaint (“Complaint” or “Action”) in the Superior
14 Court in and for the County of Sacramento against Darice and Does 1 through 150, alleging
15 violations of California Health & Safety Code §25249.6 based on the alleged exposures to the
16 Listed Chemical contained in the Covered Products distributed by Darice.

17 **1.9 No Admission**

18 Darice denies the material, factual and legal allegations contained in Dr. Held’s Notice
19 and Complaint, and maintains that all Covered Products that they have sold and distributed in
20 California have been and are in compliance with all laws, including without limitation
21 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Darice
22 of any fact, finding, issue of law, or violation of law, nor shall compliance with this Consent
23 Judgment constitute or be construed as an admission by Darice of any fact, finding, conclusion,
24 issue of law, or violation of law, such being specifically denied by Darice. However, this Section
25 shall not diminish or otherwise affect Darice’s obligations, responsibilities, and duties under this
26 Consent Judgment.

1 **1.10 Consent to Jurisdiction**

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

6 **1.11 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this
8 Consent Judgment is fully executed by the parties.

9 **2. INJUNCTIVE RELIEF: WARNINGS AND REFORMULATION**

10 **2.1 Product Warnings**

11 After the Effective Date, Darice shall not sell, distribute, ship, or offer to be shipped for
12 sale in California Covered Products containing the Listed Chemical unless such Covered Products
13 are sold or shipped with one of the clear and reasonable warnings set forth in subsections 2.1(a)
14 and (b), are otherwise exempt pursuant to Section 2.2, or comply with the reformulation standards
15 set forth in Section 2.3.

16 Each warning shall be prominently placed with such conspicuousness as compared with
17 other words, statements, designs, or devices as to render it likely to be read and understood by an
18 ordinary individual under customary conditions before purchase or use. Each warning shall be
19 provided in a manner such that the consumer or user understands to which *specific* Covered
20 Products the warning applies, so as to minimize if not eliminate the chance that an overwarning
21 situation will arise. The warning requirement shall apply when the Covered Product is sold either
22 to consumers or in a business-to-business transaction for distribution in California.

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

24 **(i) Product Labeling.**

25 Darice may perform their warning obligation by ensuring that a warning is affixed to the
26 packaging, labeling, or directly on each Covered Product sold in retail outlets by Darice or their
27 agents, that states:
28

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

5 **(ii) Point-of-Sale Warnings.**

6 Darice may perform its warning obligations by ensuring that signs are posted at retail
7 outlets in the State of California where the Covered Products are sold. Point-of-sale warnings
8 shall be provided through one or more signs posted in close proximity to the point of display of
9 the Covered Products that states:

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

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

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

21 [*List products for which warning is required*]

22 **2.2 Exceptions To Warning Requirements**

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

- 24 (i) Any Covered Products shipped before the Effective Date; or
25 (ii) Reformulated Products (as defined in Section 2.3 below).

26 **2.3 Reformulation Standards**

27 Reformulated Products are defined as those Covered Products containing less than or
28 equal to 1,000 parts per million (“ppm”) of the Listed Chemical. The warnings required pursuant
29 to Section 2.1 above shall not be required for Reformulated Products.

30 ¹ For purposes of the Consent Judgment, “sold in proximity” shall mean that the Covered Product and another
31 product are offered for sale close enough to each other that the consumer, under customary conditions of purchase,
32 could not reasonably determine which of the two products is subject to the warning sign.

1 Darice shall use Environmental Protection Agency (“EPA”) testing methodologies 3580A,
2 3550C and/or 8270C to determine whether the respective levels have been exceeded in its
3 Covered Products.

4 **2.4 Reformulation Commitment**

5 Darice hereby commits that eighty percent (80%) of the Covered Products that they offer
6 for sale in California after June 30, 2008, and one hundred percent (100%) of the Covered
7 Products that they offer for sale in California after December 31, 2008, shall qualify as
8 Reformulated Products or shall otherwise be exempt from the warning requirements of Section
9 2.1.

10 **2.5 Recall of Past Products**

11 Darice hereby agrees to recall all Covered Products remaining in inventory in California,
12 if any, by contacting each of its direct customers for such Covered Products via certified mail.
13 Each recall notice shall be mailed within thirty (30) days of the Effective Date and shall be made
14 available to Dr. Held upon written request.

15 **3. MONETARY PAYMENTS**

16 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

17 In settlement of all the claims referred to in this Consent Judgment, Darice shall pay
18 \$9,000 in civil penalties to be apportioned in accordance with California Health & Safety Code
19 §25192, with 75% of these funds remitted to the State of California’s Office of Environmental
20 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to
21 Anthony Held as provided by California Health & Safety Code §25249.12(d). Darice shall issue
22 two separate checks for the penalty payment: (a) one check made payable to “Hirst & Chanler
23 LLP in Trust For OEHHA” in the amount of \$6,750, representing 75% of the total penalty; and
24 (b) one check to “Hirst & Chanler LLP in Trust for Anthony Held” in the amount of \$2,250,
25 representing 25% of the total penalty. Two separate 1099s shall be issued for the above
26 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)
27 Anthony Held, whose information shall be provided five calendar days before the payment is due.
28

1 Payment shall be delivered to Dr. Held's counsel on or before June 15, 2008, at the
2 following address:

3 HIRST & CHANLER LLP
4 Attn: Proposition 65 Controller
5 455 Capitol Mall, Suite 605
6 Sacramento, CA 95814

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

7 **4.1 Attorney Fees and Costs.**

8 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
9 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
10 this fee issue to be resolved after the material terms of the agreement had been settled. After the
11 other settlement terms had been finalized, the parties attempted to (and did) reach an accord on
12 the compensation due to Dr. Held and his counsel under general contract principles and the
13 private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5,
14 for all work performed through the mutual execution of this agreement and the anticipated work
15 to seek court approval. Darice shall reimburse Dr. Held and his counsel for fees and costs
16 incurred as a result of investigating, bringing this matter to Darice's attention, and litigating and
17 negotiating a settlement in the public interest. Darice shall pay Dr. Held and his counsel \$26,000
18 for all attorneys' fees and costs. Darice shall issue a separate 1099 for fees and costs (EIN: 20-
19 3929984) and shall make the check payable to "HIRST & CHANLER LLP" and shall be delivered
20 on or before June 15, 2008, to the following address:

21
22 HIRST & CHANLER LLP
23 Attn: Proposition 65 Controller
24 455 Capitol Mall, Suite 605
25 Sacramento, CA 95814

25 **5. RELEASE OF ALL CLAIMS**

26 **5.1 Dr. Held's Release of Darice**

27 In further consideration of the promises and agreements herein contained, and for the
28

1 payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself, his past and
2 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
3 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
4 form of legal action and releases all claims including, without limitation, all actions, and causes
5 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
6 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
7 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
8 (collectively "claims"), that were brought or could have been brought against Darice, and each of
9 its downstream wholesalers, licensors, licensees, auctioneers, retailers (including without
10 limitation Michael's, Inc.), distributors, franchisees, dealers, customers, owners, purchasers,
11 users, parent companies, corporate affiliates (including without limitation Lamrite West, Inc., dba
12 Darice), subsidiaries, and their respective officers, directors, attorneys, representatives,
13 shareholders, agents, and employees, and sister and parent entities (collectively "releasees") in
14 this Action. This release is limited to those claims that arise under Proposition 65, as such claims
15 relate to Darice's alleged failure to warn about exposures to the Listed Chemical contained in the
16 Covered Products.

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

20 **5.2 Darice's Release of Dr. Held**

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

26 **6. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved and entered by the Court and
28

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

6 **7. SEVERABILITY**

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

10 **8. ATTORNEYS' FEES**

11 In the event that, after the execution of this Consent Judgment: (1) a dispute arises with
12 respect to any provision of this Consent Judgment; or (2) either party takes reasonable and
13 necessary steps to enforce the terms of this Consent Judgment, the prevailing party in such
14 dispute or enforcement action shall be entitled to reasonable attorneys' fees and costs.

15 **9. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California.

18 **10. NOTICES**

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

23
24 To Darice:

25 Christopher Locke, Esq.
26 FARELLA BRAUN + MARTEL LLP
27 235 Montgomery Street, 30th Floor
28 San Francisco, CA 94104

1 Anthony M. Catanzarite, Esq.
2 REMINGER & REMINGER CO., L.P.A.
3 1400 Midland Building
4 101 Prospect Avenue
5 Cleveland, Ohio 44115-1093

6 To Dr. Held:

7 Proposition 65 Coordinator
8 HIRST & CHANLER LLP
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710-2565

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

14 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

18 **12. COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(f)**

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

21 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

22 Dr. Held and Darice agree to mutually employ their best efforts to obtain approval and
23 entry of this Consent Judgment by the Court in a timely manner. The parties acknowledge that,
24 pursuant to California Health & Safety Code §25249.7, a noticed motion is required to obtain
25 judicial approval of this Consent Judgment. Accordingly, Dr. Held agrees to file a motion to
26 approve the Consent Judgment.

27 **14. MODIFICATION**

28 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

1 General shall be served with notice of any proposed modification to this Consent Judgment at
2 least fifteen (15) days in advance of its consideration by the court. Dr. Held shall be entitled to
3 his reasonable fees and costs incurred in the modification process under CCP §1021.5 if Darice
4 seeks to modify the terms of this Consent Judgment.

5 **15. AUTHORIZATION**

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

9
10 AGREED TO:

11 Dated: May _____, 2008

12 **APPROVED**
13 *By Anthony E Held at 11:07 am, 5/29/08*

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



14 By: _____
15 Anthony E. Held, Ph.D., P.E.
16 Plaintiff

17
18 Dated: May _____, 2008

DARICE, INC., and its corporate affiliate
LAMRITE WEST, INC., dba Darice

19 By: _____
20 Joseph Rudolph
21 Chief Financial Officer

22
23
24
25
26
27
28

1 General shall be served with notice of any proposed modification to this Consent Judgment at
2 least fifteen (15) days in advance of its consideration by the court. Dr. Held shall be entitled to
3 his reasonable fees and costs incurred in the modification process under CCP §1021.5 if Darice
4 seeks to modify the terms of this Consent Judgment.

5 **15. AUTHORIZATION**

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

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

Dated: May _____, 2008

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

By: _____
Anthony E. Held, Ph.D., P.E.
Plaintiff

Dated: May _____, 2008

DARICE, INC., and its corporate affiliate
LAMRITE WEST, INC., dba Darice

By: Joseph Rudolph
Joseph Rudolph
Chief Financial Officer

1 APPROVED AS TO FORM:

2

3 Dated: May _____, 2008

HIRST & CHANLER LLP

4

5

By: _____
David Lavine

6

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

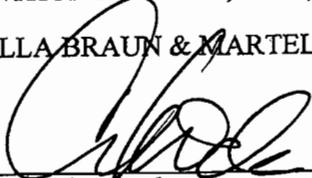
7

8 Dated: May 29, 2008

FARELLA BRAUN & MARTEL LLP

9

10

By:  _____
Christopher Locke

11

Attorneys for Defendant
DARICE, INC.

12

13 IT IS SO ORDERED.

14 Date:

JUDGE OF THE SUPERIOR COURT

15

16

17

18

19

20

21

22

23

24

25

26

27

28

1 APPROVED AS TO FORM:

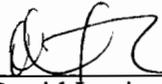
2

3 Dated: May 29, 2008

HIRST & CHANLER LLP

4

5

By: 
David Lavine

6

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

7

8 Dated: May _____, 2008

FARELLA BRAUN & MARTEL LLP

9

10

By: _____
Christopher Locke

11

Attorneys for Defendant
DARICE, INC.

12

13 IT IS SO ORDERED.

14 Date:

JUDGE OF THE SUPERIOR COURT

15

16

17

18

19

20

21

22

23

24

25

26

27

28