

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

STIPULATION AND [PROPOSED] ORDER RE: CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Sara Max Corporation**

3 This consent judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.
4 ("Dr. Held" or "Plaintiff") and defendant Sara Max Apparel Group, Inc. ("Sara Max" or
5 "Defendant"), with Plaintiff and Defendant collectively referred to as the "parties."

6 **1.2 Plaintiff**

7 Dr. 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 products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Dr. Held alleges that Sara Max has manufactured, distributed and/or sold certain child care
16 articles containing lead and di(2-ethylhexyl)phthalate (hereinafter "DEHP") in the State of
17 California without the requisite health hazard warnings. Lead and DEHP are listed pursuant to
18 Proposition 65, and are known to cause birth defects and other reproductive harm. Lead and DEHP
19 shall be referred to hereinafter as the "listed chemicals."

20 **1.5 Product Description**

21 The products that are covered by this consent judgment are defined as follows: baby bibs
22 containing lead and/or the plasticizer phthalate DEHP, such as the Kellogg's Vinyl Bib, #4605,
23 Style #K1004R (#0 14614 40652 3). All such baby bibs containing lead and/or DEHP are referred
24 to hereinafter as the "Products".

25 **1.6 Notice of Violation**

26 On November 20, 2007, and again on January 11, 2008, Dr. Held served Sara Max and the
27 Office of the California Attorney General of the State of California, all California counties' District
28

1 Attorneys and all City Attorneys of California cities with populations exceeding 750,000,
2 (collectively, "Public Enforcers") with a document entitled "60-Day Notice of Violation" (the
3 "Notices") that provided Sara Max and Public Enforcers with notice of alleged violations of
4 California Health & Safety Code §25249.6 for failing to warn consumers that the Products that Sara
5 Max sold exposed users in California to the listed chemicals, while the items were handled or
6 chewed of the items. No Public Enforcer has diligently prosecuted the allegations set forth in the
7 Notices.

8 **1.7 Complaint**

9 On March 21, 2008, Dr. Held, who was and is acting in the interest of the general public in
10 California, filed a complaint ("Complaint" or "Action") in the Superior Court in and for the County
11 of Alameda against Sara Max and Does 1 through 150, alleging violations of California Health &
12 Safety Code §25249.6 based on the alleged exposures to the listed chemicals contained in the
13 Products sold by Sara Max. On April 21, 2008, Dr. Held filed an amended complaint to include
14 alleged exposure to lead from the handling or other reasonably foreseeable use of the Products
15 ("Amended Complaint").

16 **1.8 No Admission**

17 Sara Max denies the material, factual and legal allegations contained in Dr. Held's Notice
18 and Amended Complaint and maintains that all Products that they have sold and distributed in
19 California have been and are in compliance with all laws. Nothing in this consent judgment shall
20 be construed as an admission by Sara Max of any fact, finding, issue of law, or violation of law, nor
21 shall compliance with this consent judgment constitute or be construed as an admission by Sara
22 Max of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
23 denied by Sara Max. In order to avoid the costs and expenses of litigation and without admitting
24 liability or wrongdoing, Sara Max has elected to resolve this matter by settlement and on the terms
25 set forth herein. However, this section shall not diminish or otherwise affect Sara Max's
26 obligations, responsibilities, and duties under this consent 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 Sara Max as to the allegations contained in the Complaint, that venue is proper in
4 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
5 this consent judgment.

6 **1.10 Effective Date**

7 For purposes of this consent judgment, the term “effective date” shall mean May 30, 2008.

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

9 **2.1 Product Warnings**

10 After the effective date, Sara Max shall not sell, ship, or offer to be shipped for sale in
11 California any Products containing the listed chemicals unless such Products are sold or shipped
12 with one of the clear and reasonable warnings set forth in subsections 2.1(a) and (b), are otherwise
13 exempt pursuant to Section 2.2, or comply with the reformulation standards set forth in Section 2.3.

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

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

21 **(i) Product Labeling.** Sara Max may perform its warning obligation by
22 ensuring that a warning is affixed to the packaging, labeling, or directly on each Product sold in
23 retail outlets by Sara Max or its agents, that states:

24 **WARNING:** This product contains lead and/or the
25 phthalate chemical known as DEHP,
26 chemicals known to the State of California
27 to cause birth defects and other
28 reproductive harm.

1 (ii) **Point-of-Sale Warnings.** Sara Max may perform its warning
2 obligations by ensuring that signs are posted at retail outlets in the State of California where the
3 Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in
4 close proximity to the point of display of the Products that states:

5 **WARNING:** This product contains lead and/or the
6 phthalate chemical known as DEHP,
7 chemicals known to the State of California
 to cause birth defects and other
 reproductive harm.

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

11 **WARNING:** The following products contain lead and/or
12 the phthalate chemical known as DEHP,
13 chemicals known to the State of California
 to cause birth defects and other
 reproductive harm.

14 [list products for which warning is required]

15 (b) **Mail Order Catalog and Internet Sales.** Sara Max shall satisfy its warning
16 obligations for Products sold via mail order catalog or the Internet to California residents by
17 providing a warning: (i) in the mail order catalog; or (ii) on the website. Warnings given in the
18 mail order catalog or on the website shall identify the specific Product to which the warning applies
19 as further specified in Sections 2.1(b)(i) and (ii).

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

24 **WARNING:** This product contains lead and/or the
25 phthalate chemical known as DEHP,
26 chemicals known to the State of California
 to cause birth defects and other
 reproductive harm.

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

6 **WARNING:** Certain products identified with this
7 symbol ▼ and offered for sale in this
8 catalog contain lead and/or the phthalate
chemical known as DEHP, chemicals
known to the State of California to cause
birth defects and other reproductive harm.

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

13 If Sara Max elects to provide warnings in the mail order catalog, then the warnings must be
14 included in all catalogs offering to sell one or more Products printed after the date of entry of this
15 consent judgment.

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

24 **WARNING:** This product contains lead and/or the
25 phthalate chemical known as DEHP,
26 chemicals known to the State of California
to cause birth defects and other
27 reproductive harm.
28

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

4 **WARNING:** Products identified on this page with the
5 following symbol contain lead and/or the
6 phthalate chemical known as DEHP,
7 chemicals known to the State of California
8 to cause birth defects and other
9 reproductive harm: ▼.

8 **2.2 Exceptions To Warning Requirements**

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

- 10 (i) Any Products shipped to a customer located in California before the effective
11 date; or
12 (ii) Reformulated Products (as defined in Section 2.3 below).

13 **2.3 Reformulation Standards**

14 Reformulated Products are defined as those containing both: (1) less than two one-
15 hundredths of one percent (0.02%) of lead by weight, as measured using a test method of sufficient
16 sensitivity to establish a detection limit of less than 200 parts per million ("ppm"); and (2) less than
17 1,000 ppm of phthalate chemical, as measured by Environmental Protection Agency ("EPA")
18 testing methodologies 3580A and 8270C. The warnings required pursuant to Section 2.1 above
19 shall not be required for such Reformulated Products.

20 **2.4 Reformulation Commitment**

21 Sara Max hereby commits that eighty percent (80%) of the Products that they offer for sale
22 in California after June 30, 2008, and one hundred percent (100%) of the Products that they offer
23 for sale in California after September 30, 2008, shall qualify as Reformulated Products or shall
24 otherwise be exempt from the warning requirements of Section 2.1.

1 **3. MONETARY PAYMENTS**

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

3 In settlement of all the claims referred to in this consent judgment, Sara Max shall pay
4 \$16,000 to be apportioned in accordance with California Health & Safety Code §25192, with 75%
5 of these funds remitted to the State of California's Office of Environmental Health Hazard
6 Assessment ("OEHHA") and the remaining 25% remitted to Anthony Held as provided by
7 California Health & Safety Code §25249.12(d). Sara Max shall issue two separate checks for the
8 payment: (a) one check made payable to "Hirst & Chanler LLP in Trust For OEHHA" in the
9 amount of \$12,000, representing 75% of the total amount; and (b) one check to "Hirst & Chanler
10 LLP in Trust for Anthony Held" in the amount of \$4,000, representing 25% of the total amount.
11 Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010,
12 Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Anthony Held, whose information shall be
13 provided five days before the payment is due.

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

16 HIRST & CHANLER LLP
17 Attn: Proposition 65 Controller
18 455 Capitol Mall, Suite 605
19 Sacramento, CA 95814

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

21 **4.1 Attorney Fees and Costs.**

22 The parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
24 this fee issue to be resolved after the material terms of the agreement had been settled. Sara Max
25 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
26 been finalized. The parties then attempted to (and did) reach an accord on the compensation due to
27 Dr. Held and his counsel under general contract principles and the private attorney general doctrine
28 codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the

1 mutual execution of this agreement. Sara Max shall reimburse Dr. Held and his counsel for fees
2 and costs incurred as a result of investigating, bringing this matter to Sara Max's attention, and
3 litigating and negotiating a settlement in the public interest. Sara Max shall pay Dr. Held and his
4 counsel \$34,750 for all attorneys' fees and costs. Sara Max shall issue a separate 1099 for fees and
5 costs (EIN: 20-3929984) and shall make the check payable to "Hirst & Chanler LLP" and shall be
6 delivered on or before July 1, 2008, to the following address:

7 HIRST & CHANLER LLP
8 Attn: Proposition 65 Controller
9 Capitol Mall Complex
10 455 Capitol Mall, Suite 605
11 Sacramento, CA 95814

12 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

13 Pursuant to CCP §§1021 and 1021.5, the parties further agree that Sara Max will reimburse
14 Dr. Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
15 this settlement agreement in the trial court, in an amount not to exceed \$8,500. Such additional fees
16 and costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are
17 not limited to, drafting and filing of the motion to approve papers, fulfilling the reporting
18 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party
19 objections, corresponding with opposing counsel and appearing before the Court related to the
20 approval process.

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

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

1 Sara Max has the right to object to such reimbursement and may submit the resolution of
2 this issue to the American Arbitration Association (AAA) in Northern California to determine the
3 reasonableness of the additional fees and costs sought, provided that an arbitration such notice of
4 objection or decision to arbitrate is received by Dr. Held by the end of the ten calendar days. If an
5 arbitration notice is not filed with AAA in a timely manner, Dr. Held may file a motion with the
6 Court pursuant to both CCP §1021.5 and this consent judgment to recover additional attorney fees
7 and costs incurred as set forth in this paragraph. In the event Sara Max submits the matter to
8 arbitration, Dr. Held may seek, pursuant to CCP §1021.5, reasonable attorney fees and costs
9 incurred for the arbitration.

10 **5. RELEASE OF ALL CLAIMS**

11 **5.1 Dr. Held's Release of Sara Max**

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

1 contained in the Products, with respect to any Products distributed or sold by Defendant. The
2 parties further understand and agree that this release shall not extend upstream to any entities that
3 manufactured the Products or any component parts thereof, or any distributors or suppliers who sold
4 the Products or any component parts thereof to Sara Max.

5 Dr. Held, in his individual capacity and *not* in his representative capacity, releases any and
6 all general claims that he may presently have against Sara Max beyond those claims covered in this
7 paragraph. Dr. Held further waives any and all rights and benefits which he now has, or in the
8 future may have, conferred upon by virtue of the provisions of Section 1542 of the California Civil
9 Code, which provides as follows:

10 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
11 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
12 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
13 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
14 THE DEBTOR.

14 **5.2 Sara Max's Release of Dr. Held**

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

20 **6. COURT APPROVAL**

21 This consent judgment is not effective until it is approved and entered by the Court and shall
22 be null and void if, for any reason, it is not approved and entered by the Court within one year after
23 it has been fully executed by all parties, in which event any monies that have been provided to
24 Plaintiff, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within
25 fifteen days after receiving written notice from Sara Max that the one-year period has expired.

1 **7. SEVERABILITY**

2 If, subsequent to the execution of this consent judgment, any of the provisions of this
3 consent judgment are held by a court to be unenforceable, the validity of the enforceable provisions
4 remaining shall not be adversely affected.

5 **8. ENTIRE AGREEMENT**

6 This consent judgment contains the sole and entire agreement and understanding of the
7 parties with respect to the entire subject matter hereof, and any and all prior discussions,
8 negotiations, commitments, and understandings related hereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any party
10 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
11 to exist or to bind any of the parties.

12 **9. GOVERNING LAW**

13 The terms of this consent judgment shall be governed by the laws of the State of California
14 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
15 rendered inapplicable by reason of law generally, or as to the Products, then Sara Max shall provide
16 written notice to Dr. Held of any asserted change in the law, and shall have no further obligations
17 pursuant to this consent judgment with respect to, and to the extent that, the Products are so
18 affected.

19 **10. NOTICES**

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

24 To Sara Max:

25 Robert A. Schachter, Esq.
26 ROBINSON BROG LEINWAND GREENE
27 GENOVESE & GLUCK, P.C.
28 1345 Avenue of the Americas
 New York, NY 10105

1 To Dr. Held:

2 Proposition 65 Coordinator
3 HIRST & CHANLER LLP
4 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

7 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

8 This consent judgment may be executed in counterparts and by facsimile, each of which
9 shall be deemed an original, and all of which, when taken together, shall constitute one and the
10 same document.

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

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

14 **13. ADDITIONAL POST EXECUTION ACTIVITIES**

15 Dr. Held and Sara Max agree to mutually employ their best efforts to support the entry of
16 this agreement as a consent judgment and obtain approval of the consent judgment by the Court in a
17 timely manner. The parties acknowledge that, pursuant to California Health & Safety Code
18 §25249.7, a noticed motion is required to obtain judicial approval of this consent judgment.
19 Accordingly, Plaintiff agrees to file a motion to approve the settlement.

20 **14. MODIFICATION**

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

1 **15. AUTHORIZATION**

2 The undersigned are authorized to execute this consent judgment on behalf of their
3 respective parties and have read, understood, and agree to all of the terms and conditions of this
4 consent judgment.

AGREED TO: Date: <u>05/29/2008</u> <i>Anthony E. Held</i> By: _____ Plaintiff, ANTHONY E. HELD, Ph.D., P.E.	AGREED TO: Date: <u>6/2/08</u> <i>Michael Kroneberg</i> By: _____ Defendant, SARA MAX APPAREL GROUP, INC.
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12 **IT IS SO ORDERED.**

14 Date: _____

_____ JUDGE OF THE SUPERIOR COURT