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18 KELLYTOY (USA), INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF ALAMEDA

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

22 Plaintiff,

23 vs.

24 KELLYTOY (USA), INC.; NATIONAL
25 STORES, INC.; FACTORY 2-U; and DOES
26 1 through 150, inclusive,

27 Defendants.

28 AND CONSOLIDATED ACTIONS

Case No. RG07350981

[Original Case No. RG08379184]

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

Health & Safety Code § 25249.6

10/17/2008 3:03 PM

1 **I. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Kellytoy (USA), 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 Kellytoy (USA), Inc. ("Kellytoy" or "Defendant"),
5 with Plaintiff and Defendant collectively referred to as the "parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Kellytoy employs 10 or more persons and thus is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
13 & Safety Code § 25249.6 *et seq.* (Proposition 65).

14 **1.4 General Allegations**

15 Dr. Held alleges that Kellytoy has manufactured, distributed and/or sold sporting items for
16 children, including but not limited to *The Amazing Spider-Man Bat and Ball Set, #73112 (7*
17 *34689 73112 1)*, containing di(2-ethylhexyl)phthalate ("DEHP") without the requisite health
18 hazard warnings. DEHP is a phthalate that is listed as a reproductive and developmental toxicant
19 pursuant to Health & Safety Code §25249.8 ("Proposition 65") and is referred to hereinafter as
20 "the Listed Chemical." Kellytoy denies all of Dr. Held's allegations against it, and contends that
21 it is not violating any aspect of Proposition 65 with respect to its products.

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are sporting goods and toys made
24 for children, including but not limited to *The Amazing Spider-Man Bat and Ball Set, #73112 (7*
25 *34689 73112 1)*. All sporting goods and toys made for children containing the Listed Chemical
26 and manufactured and/or sold by Kellytoy are referred to hereinafter as the "Covered Products."
27
28

1 **1.6 Notice of Violation**

2 On January 11, 2008, Dr. Held served Kellytoy and various public enforcement agencies
3 with a document entitled "60-Day Notice of Violation" (the "Notice") that provided Kellytoy and
4 public enforcers with notice of alleged violations of Health & Safety Code § 25249.6 for failing
5 to warn consumers that the Covered Products that Kellytoy manufactured, distributed and/or sold
6 exposed users in California to DEHP. No public enforcer, to the parties' knowledge, has
7 diligently prosecuted the allegations set forth in the Notice.

8 **1.7 Complaint**

9 On March 28, 2008, Dr. Held, who represents that he was and is acting in the interest of
10 the general public in California, filed a complaint ("Complaint" or "Action") in the Superior
11 Court in and for the County of Alameda against Kellytoy (USA), Inc., National Stores, Inc., and
12 Factory 2-U, and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6
13 based on the alleged exposures to DEHP contained in sporting goods for children (such as the
14 Spider-Man Bat and Ball Set) manufactured, distributed and/or sold by Kellytoy. The case
15 number for the action is RG08379184 ("Alameda Action"), but was consolidated into another
16 action whose case number is RG07350981. A First Amended Complaint was filed in the
17 consolidated action on August 18, 2008.

18 **1.8 No Admission**

19 Kellytoy denies the material, factual and legal allegations contained in Dr. Held's Notice,
20 and the Complaint in the Alameda Action and maintains 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, statutes and regulations. Nothing in this Consent Judgment shall be construed as
23 an admission by Kellytoy of any fact, finding, issue of law, or violation of law, nor shall
24 compliance with this Consent Judgment constitute or be construed as an admission by Kellytoy of
25 any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
26 Kellytoy. However, this Section shall not diminish or otherwise affect Kellytoy's obligations,
27 responsibilities, and duties under this Consent Judgment.

28

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the parties stipulate that this Court has
3 jurisdiction over Kellytoy 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 September
8 30, 2008.

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

10 **2.1 Reformulation Commitments and Schedule**

11 As of the Effective Date, Kellytoy shall only ship Covered Products for sale in California
12 that are Phthalate Free. For purposes of this section "Phthalate Free" Covered Products shall
13 mean Covered Products containing less than or equal to 0.1% DEHP, which is 1,000 parts per
14 million ("ppm") of the Listed Chemical when analyzed pursuant to: Environmental Protection
15 Agency ("EPA") testing methodologies 3580 and 8270, or other comparable methodologies
16 recognized and accepted by one or more federal and/or state agencies, including the Consumer
17 Product Safety Commission, to determine whether the respective levels have been exceeded in its
18 Products. Products that are Phthalate Free shall be referred to herein as "Reformulated Products."

19 Kellytoy represents that, as a direct result of the Notice issued on January 11, 2008, it not
20 only confirmed that the *The Amazing Spider-Man Bat and Ball Set*, #73112 (7 34689 73112
21 1) was no longer being sold by its customers, but also elected to discontinue using DEHP in any
22 of its products in the future.

23 **III. MONETARY PAYMENTS**

24 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

25 In settlement of all claims related to the Covered Products and Listed Chemical referred to
26 in the Alameda Action and this Consent Judgment pursuant to Health & Safety Code §
27 25249.7(b), Kellytoy shall pay \$10,000 in civil penalties.

28 Civil penalties are to be apportioned in accordance with California Health & Safety Code

1 § 25192, with 75% of these funds remitted to the State of California's Office of Environmental
2 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to
3 Anthony Held as provided by California Health & Safety Code §25249.12(d). Kellytoy shall
4 issue two separate checks for the penalty payment: (a) one check made payable to "Hirst &
5 Chanler LLP in Trust for OEHHA" in the amount of \$7,500, representing 75% of the total
6 penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of
7 \$2,500, representing 25% of the total penalty. Two separate 1099s shall be issued for the above-
8 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)
9 Anthony Held, whose information shall be provided five calendar days before the payment is due.

10 Payment shall be delivered to Dr. Held's counsel on or before October 31, 2008, at the
11 following address:

12 Hirst & Chanler LLP
13 Attn: Proposition 65 Coordinator
14 Capitol Mall Complex
455 Capitol Mall, Suite 6052560 Ninth Street
Sacramento, CA 95814

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

16 **4.1 Attorney Fees and Costs**

17 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
18 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
19 this fee issue to be resolved after the material terms of the agreement had been settled. Kellytoy
20 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
21 had been finalized. The Parties then attempted to (and did) reach an accord on the compensation
22 due to Dr. Held and his counsel under general contract principles and the private attorney general
23 doctrine codified at California Code of Civil Procedure (C.C.P.) § 1021.5, for all work performed
24 through the mutual execution of this agreement. Kellytoy shall reimburse Dr. Held and his
25 counsel a total of \$28,000 for fees and costs incurred as a result of investigating, bringing this
26 matter to Kellytoy's attention, and litigating and negotiating a settlement in the public interest.
27 Kellytoy shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the
28 check payable to "Hirst & Chanler LLP" and shall be delivered on or before October 31, 2008, to

1 arbitration, Dr. Held may seek, pursuant to C.C.P. §1021.5, his reasonable attorney fees and costs
2 incurred for the arbitration, and the prevailing party shall be entitled to reasonable attorneys' fees
3 and costs.

4 **V. CLAIMS COVERED AND RELEASE**

5 **5.1 Dr. Held's Release of Kellytoy, and its Chain of Distribution**

6 In further consideration of the promises and agreements herein contained, the injunctive
7 relief commitments set forth in Section 2.1, and for the payments to be made pursuant to Sections
8 3 and 4, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys,
9 successors, and/or assignees, and as to children's soft bats and balls only, in the interest of the
10 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
11 form of legal action and releases all claims, including, without limitation, all actions, and causes
12 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
13 penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and
14 attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent
15 (collectively "Claims"), against Kellytoy and each of its downstream distributors, wholesalers,
16 licensors, licensees, auctioneers, retailers (including, without limitation National Stores, Inc., and
17 Factory 2-U, and any other retailer in its chain of distribution in California), franchisees, dealers,
18 customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and
19 their respective officers, directors, attorneys, representatives, shareholders, agents, and
20 employees, and sister and parent entities (collectively "Releasees") that arise under Proposition
21 65, as such claims relate to the Releasees' alleged failure to warn about exposures to the Listed
22 Chemical contained in the Covered Products. Pursuant to this release and the consideration
23 therefore, Dr. Held shall execute and cause to be filed a Request for Dismissal of National Stores,
24 Inc., and Factory 2-U from the Alameda Action without prejudice, only as to *The Amazing*
25 *Spider-Man Bat and Ball Set, #73112 (#7 34689 73112 1)*, manufactured, distributed, or sold
26 by Kellytoy, National Stores, Inc., and Factory 2-U, as alleged in the First Amended Complaint,
27 within 10 days after this Consent Judgment is approved by the Court pursuant to section VI
28 below. Dr. Held does not agree to dismiss National Stores, Inc., and Factory 2-U from the

1 Alameda Action as to the *Suave Kids 7 Piece Bath Set, #SVK9500W (#0 24576 74658 2)*
2 manufactured, distributed, or sold by Almar Sales, Inc., National Stores, Inc., and Factory 2-U, as
3 alleged in the First Amended Complaint.

4 Dr. Held in his individual capacity and *not* his representative capacity hereby releases all
5 claims which he now has or may have in the future against Kellytoy, irrespective of the subject
6 matter, of all character, kind and nature, whether said claims are known or unknown or are
7 suspected or unsuspected and Dr. Held expressly waives any and all rights and benefits which he
8 now has, or in the future may have, under California Civil Code Section 1542, which provides as
9 follows:

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

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

17 **5.2 Kellytoy's Release of Dr. Held**

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

23 **VI. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and
25 shall be null and void and cannot be used in any proceeding for any purpose if, for any reason, it
26 is not approved and entered by the Court within six months after it has been fully executed by all
27 parties, in which event, or in the event of an appellate reversal, any monies that have been
28 provided to Dr. Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be
refunded in full within fifteen (15) days after receiving written notice from Kellytoy that the six
months period has expired or an appellate reversal has become final. Dr. Held agrees to file his

1 motion to approve within sixty days of the Effective Date and to request a hearing date on such
2 motion within 90 days of the date he files such motion.

3 **VII. SEVERABILITY**

4 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
5 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
6 provisions remaining shall not be adversely affected so long as the material terms of this Consent
7 Judgment and its general intent are not vitiated.

8 **VIII. GOVERNING LAW**

9 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
11 inapplicable by reason of law generally, or as to the Listed Chemical and/or the Covered
12 Products, then Kellytoy shall have no further obligations pursuant to this Consent Judgment with
13 respect to, and to the extent that, the Covered Products are so affected.

14 **IX. NOTICES**

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

19 To Kellytoy:

Jonathan Kelly, Sr. Vice President
KELLYTOY (USA), INC.
5602 Bickett Street
Vernon, CA 90058

22 With a copy to:

23 Robert E. White, Esq.
24 LAW OFFICES OF ROBERT E. WHITE
177 Post Street, Suite 890
25 San Francisco, CA 94108
26
27
28

1 the following address:

2 Hirst & Chanler LLP
3 Attn: Proposition 65 Coordinator
4 Capitol Mall Complex
455 Capitol Mall, Suite 605
5 Sacramento, CA 95814

6 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval**

7 Pursuant to C.C.P. §§ 1021 and 1021.5, the Parties agree that Kellytoy will reimburse Dr.
8 Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
9 this settlement agreement in the trial court and all other required tasks performed after the parties'
10 execution of the Consent Judgment, in an amount not to exceed \$8,500. Such additional fees and
11 costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are
12 not limited to, drafting and filing of the motion to approve papers, fulfilling the reporting
13 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party
14 objections, issuing any notice of entry of the Consent Judgment, corresponding with opposing
15 counsel and appearing before the Court related to the approval process.

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

20 Hirst & Chanler LLP
21 Attn: Proposition 65 Coordinator
22 Capitol Mall Complex
455 Capitol Mall, Suite 605
23 Sacramento, CA 95814

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

1 To Dr. Held:

2 HIRST & CHANLER LLP
3 Attn: Proposition 65 Coordinator
4 2560 Ninth Street, Suite 214
5 Berkeley, CA 94710

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

8 **X. COUNTERPARTS, FACSIMILE SIGNATURES**

9 This Consent Judgment may be executed in counterparts, by facsimile, or by Adobe
10 Portable Document Format (“pdf”), each of which shall be deemed an original, and all of which,
11 when taken together, shall constitute one and the same documents.

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

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

15 **XII. ADDITIONAL POST EXECUTION ACTIVITIES**

16 The parties acknowledge that pursuant to Health & Safety Code §25249.7, a noticed
17 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
18 obtaining such approval, Held, Kellytoy and their respective counsel agree to mutually employ
19 their best efforts to support the entry of this agreement as a Consent Judgment, obtain approval of
20 the Consent Judgment by the Court in a timely manner and defend any appellate review of the
21 Court’s approval.

22 **XIII. MODIFICATION**

23 This Consent Judgment may be modified only: (1) by written agreement of the parties
24 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
25 motion of Kellytoy and entry of a modified Consent Judgment by the Court. The Attorney
26 General shall be served with notice of any proposed modification to this Consent Judgment at
27 least fifteen (15) days in advance of its consideration by the Court. Dr. Held shall be entitled to
28 seek his reasonable fees and costs incurred in the modification process under C.C.P. § 1021.5 if
Kellytoy seeks to modify the terms of this Consent Judgment, to the extent provided by law.

1 **XIV. 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.

5 AGREED TO:

6 **APPROVED**

7 By Anthony E Held at 9:32 pm, 10/21/08

8 Date:

9 *Anthony E Held*

10 By:

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

12 AGREED TO:

13 Date:

14 *10-21-08*

15 By:

16 *Jonathan S. Kelly*

17 Jonathan Kelly, Senior Vice President
18 Defendant KELLYTOY (USA), INC.

19 APPROVED AS TO FORM:

20 Date: October 22, 2008

21 HIRST & CHANLER LLP

22 By:

23 *Laurence D. Haveson*

24 Laurence D. Haveson
25 Attorneys for Plaintiff
26 ANTHONY E. HELD, Ph.D., P.E.

27 APPROVED AS TO FORM:

28 Date: Oct. 21, 2008

LAW OFFICES OF ROBERT E. WHITE

By:

Robert E. White

Robert E. White
Attorneys for Defendants
KELLYTOY (USA), INC.