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TUESDAY MORNING CORPORATION

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF SACRAMENTO
14 UNLIMITED CIVIL JURISDICTION
15

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

17 Plaintiff,

18 v.

19 TUESDAY MORNING CORPORATION; and
20 DOES 1 through 150, inclusive,

21 Defendants.

Case No. 2008-00020367

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

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Tuesday Morning Corporation**

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 Tuesday Morning Corporation ("Tuesday Morning"
5 or "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
8 awareness of exposure to toxic chemicals and improve human health by reducing or eliminating
9 hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Tuesday Morning employs ten or more persons and is 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 Tuesday Morning has manufactured, distributed and/or sold sporting
16 toys/children's items and bibs containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") in the
17 State of California without the requisite health hazard warnings. DEHP is known to cause birth
18 defects and other reproductive harm and is listed by its chemical nomenclature pursuant to
19 Proposition 65. DEHP listed by the State of California under Proposition 65 shall be referred to
20 hereinafter as the "Listed Chemical."

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows: baby bibs,
23 children's vinyl tote bags, and sporting toys containing the plasticizer phthalate DEHP, such as 5
24 *Piece Soft Sport Set* (#6 78565 20692 4); *PuppeTotes Little Quack* (#0 37755 61210 3); and
25 *Kinderware Travel Kit bibs* (#8 35422 00765 4) which Tuesday Morning manufactured,
26 distributed, and/or sold in the State of California. All such baby bibs, children's vinyl tote bags,
27 and sporting toys containing DEHP are referred to hereinafter as the "Products".

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1 **1.6 Notice of Violation**

2 On May 23, 2008, Dr. Held served Tuesday Morning and various public enforcement
3 agencies with a document entitled "60-Day Notice of Violation" ("Notice") that provided Tuesday
4 Morning and public enforcers with notice of alleged violations of California Health & Safety Code
5 §25249.6 for failing to warn consumers that the Products, including but not limited to sporting
6 toys/children's items, exposed users in California to DEHP.

7 **1.7 Supplemental Notice of Violation**

8 On June 5, 2008 and January 26, 2009, Dr. Held served Tuesday Morning and various
9 enforcement agencies with a supplemental 60-Day Notices of Violation that provided Tuesday
10 Morning and public enforcers with notice of additional alleged violations of California Health &
11 Safety Code §25249.6 for failing to warn consumers that the Products including, but not limited
12 to, baby bibs, children's vinyl tote bags, and sporting toys, exposed users in California to DEHP.

13 **1.8 Complaint**

14 On August 26, 2008, Dr. Held, who was and is acting in the interest of the general public
15 in California, filed a Complaint ("Complaint" or "Action") in the Superior Court in and for the
16 County of Sacramento against Tuesday Morning alleging violations of California Health & Safety
17 Code §25249.6 based on the alleged exposures to DEHP contained in the Products.

18 **1.9 No Admission**

19 Tuesday Morning denies the material factual and legal allegations contained in Dr. Held's
20 Notices and Complaint, and maintains that all Products sold and distributed in California have
21 been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as
22 an admission by Tuesday Morning of any fact, finding, issue of law, or violation of law, nor shall
23 compliance with this Consent Judgment constitute or be construed as an admission by Tuesday
24 Morning of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
25 denied by Tuesday Morning. In order to avoid further litigation costs and attorneys' fees, Tuesday
26 Morning chooses to resolve this matter with Dr. Held through settlement as set forth herein.
27 However, this Section shall not diminish or otherwise affect Tuesday Morning's obligations,
28 responsibilities, and duties under this 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 Tuesday Morning as to the allegations contained in the Complaint, that venue is
4 proper in the County of Sacramento and that this Court has jurisdiction to enter and enforce the
5 provisions of this Consent Judgment.

6 **1.11 Effective Date**

7 For purposes of this Consent Judgment, the term "Effective Date" shall mean June 30,
8 2009.

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

10 **2.1 Product Warnings**

11 Commencing on the Effective Date, Tuesday Morning shall not sell, ship, or offer to be
12 shipped for sale in California any Product unless such Product is sold or shipped with one of the
13 clear and reasonable warnings set forth in subsections 2.1(a), or comply with the reformulation
14 standards set forth in Section 2.2.

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

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

22 **(i) Product Labeling.** Tuesday Morning may comply with its warning
23 requirements by affixing a warning to the packaging, labeling, or directly on each Product sold in
24 retail outlets in California by Tuesday Morning or its agents, that states:

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

27 **(ii) Point-of-Sale Warnings.** Alternatively, Tuesday Morning may
28

1 provide warning signs in the form below to its customers in California with instructions to post the
2 warnings in close proximity to the point of display of the Products.

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

7 Where more than one Product is sold in proximity to other like items or to those that do not
8 require a warning (*e.g.*, Reformulated Products as defined in Section 2.2), the following statement
9 must be used:¹

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 *[list products for which warning is required]*

15 **2.2 Reformulation**

16 As of the Effective Date, Tuesday Morning will no longer be involved in the chain of
17 distribution for the *5 Piece Soft Sport Set* (#6 78565 20692 4), *PuppeTotes Little Quack* (#0
18 37755 61210 3), and *Kinderware Travel Kit bibs* (#8 35422 00765 4) products in the State of
19 California, and may agree to not sell, ship, offer to be shipped for sale in California any Products
20 containing any amount of the Listed Chemical. Tuesday Morning also represents that, as a direct
21 result of the Notices issued on May 23, 2008, June 5, 2008, and January 26, 2009, the company
22 began to immediately implement a process for the reformulation of the exemplar products at issue
23 by removing *5 Piece Soft Sport Set* (#6 78565 20692 4), *PuppeTotes Little Quack* (#0 37755
24 61210 3), and *Kinderware Travel Kit bibs* (#8 35422 00765 4) from its stores. As a direct result
25 of the Notices, the company also provided warnings consistent with Section 2.1 above for other
26 products prior to the Effective Date.

27 ¹ For purposes of the consent judgment, "sold in proximity" shall mean that the Product and another product are
28 offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not
 reasonably determine which of the two products is subject to the warning sign.

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2 **3. MONETARY PAYMENTS**

3 **3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

4 In settlement of all the claims referred to in this Consent Judgment, Tuesday Morning shall
5 pay \$7,000 in civil penalties to be apportioned in accordance with California Health & Safety
6 Code §25192, with 75% of these funds remitted to the State of California's Office of
7 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
8 remitted to Anthony Held as provided by California Health & Safety Code §25249.12(d).
9 Tuesday Morning shall issue two separate checks for the penalty payment: (a) one check made
10 payable to "Hirst & Chanler LLP in Trust For OEHHA" in the amount of \$5,250, representing 75%
11 of the total penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the
12 amount of \$1,750, representing 25% of the total penalty. Two separate 1099s shall be issued for
13 the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486);
14 and (b) Anthony Held, whose information shall be provided five calendar days before the payment
15 is due.

16 Payment shall be delivered to Dr. Held's counsel on or before July 10, 2009 at the
17 following address:

18 HIRST & CHANLER LLP
19 Attn: Proposition 65 Controller
20 2560 Ninth Street, Suite 214
21 Berkeley, CA 94710

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

23 **4.1 Attorney Fees and Costs.**

24 The Parties acknowledge that Dr. Held and his counsel offered to resolve this dispute
25 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
26 this fee issue to be resolved after the material terms of the agreement had been settled. Tuesday
27 Morning then expressed a desire to resolve the fee and cost issue shortly after the other settlement
28 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

1 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
2 work performed through the mutual execution of this agreement. Tuesday Morning shall
3 reimburse Dr. Held and his counsel for fees and costs incurred as a result of investigating,
4 bringing this matter to Tuesday Morning's attention, and litigating and negotiating a settlement in
5 the public interest. Tuesday Morning shall pay Dr. Held and his counsel \$39,000 for all attorneys'
6 fees and costs. Tuesday Morning shall issue a separate 1099 for fees and costs (EIN: 20-3929984)
7 and shall make the check payable to "Hirst & Chanler LLP" and shall be delivered on or before July
8 10, 2009, to the following address:

9 HIRST & CHANLER LLP
10 Attn: Proposition 65 Controller
11 2560 Ninth Street, Suite 214
12 Berkeley, CA 94710

13 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

14 Pursuant to CCP §§1021 and 1021.5, the Parties agree that Tuesday Morning will
15 reimburse Dr. Held and his counsel for their reasonable fees and costs incurred in seeking judicial
16 approval of this settlement agreement in the trial court and performing other necessary tasks after
17 the execution of this agreement, in an amount not to exceed \$4,000. Such additional fees and
18 costs, exclusive of fees and costs that may be incurred in the event of an appeal include, but are
19 not limited to, drafting and filing of the motion to approve papers, fulfilling the reporting
20 requirements referenced in Health & Safety Code §25249.7(f), corresponding with opposing
21 counsel responding to any third party objections, filing a notice of entry of approval, and
22 appearing before the Court related to the approval process.

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

27 HIRST & CHANLER LLP
28 Attn: Proposition 65 Controller
 2560 Ninth Street
 Berkeley, CA 94710

Tuesday Morning has the right to object to such reimbursement and may submit the

1 resolution of this issue to the American Arbitration Association (AAA) in Northern California to
2 determine the reasonableness of the additional fees and costs sought, provided that a notice of
3 objection or decision to arbitrate is received by Dr. Held by the end of the ten calendar days of
4 receipt of invoice. If an arbitration notice is not filed with AAA in a timely manner, Dr. Held may
5 file a motion with the Court pursuant to both CCP §1021.5 and this settlement agreement to
6 recover additional attorney fees and costs incurred as set forth in this paragraph.

7 **5. RELEASE OF ALL CLAIMS**

8 **5.1 Dr. Held's Release of Tuesday Morning**

9 In further consideration of the promises and agreements herein contained, and for the
10 payments to be made pursuant to Sections 3 and 4 of this Consent Judgment, Dr. Held on behalf of
11 himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in
12 the interest of the general public, hereby waives all rights to institute or participate in, directly or
13 indirectly, any form of legal action and releases all claims, including, without limitation, all
14 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
15 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
16 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or
17 contingent (collectively "claims"), against Tuesday Morning and each of its downstream
18 wholesalers, licensors, licensees, auctioneers, retailers, franchisees, dealers, customers, owners,
19 purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers,
20 directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent
21 entities (collectively "releasees"). This release is limited to those claims that arise under
22 Proposition 65 as such claims relate to Tuesday Morning's alleged failure to warn about exposures
23 to the Listed Chemicals contained in the Products.

24 The Parties further understand and agree that this release shall not extend upstream to any
25 entities, other than Tuesday Morning, that manufactured the Products or any component parts
26 thereof or to any distributors or suppliers who sold the Products or any component parts thereof to
27 Tuesday Morning.

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2 **5.2 Tuesday Morning's Release of Dr. Held**

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

8 **6. 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 year
11 after it has been fully executed by all Parties, in which event any monies that have been provided
12 to Dr. Held or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within
13 fifteen (15) days after receiving written notice from Tuesday Morning that the one-year period has
14 expired.

15 **7. 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 **8. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California and apply within the State of California. In the event that Proposition 65 is repealed or
22 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Tuesday
23 Morning shall provide written notice to Dr. Held of any asserted change in the law, and shall have
24 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
25 Products are so affected.

26 **9. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant to
28 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 Tuesday Morning:

Paul W. Smigliani
MUNRO SMIGLIANI & JORDAN LLP
655 W. Broadway, Suite 840
San Diego, CA 92101

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

The Parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a Motion to Approve the Agreement (“noticed motion”) is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Dr. Held, Tuesday Morning and their respective counsel 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. For purposes of this paragraph, best efforts shall include, at a minimum, cooperating on the drafting and filing any papers, asserting any oral argument in support of the

1 required motion for judicial approval, and defending any appellate review of the Court's approval.
2 This provision is a material component of the Consent Judgment and shall be treated as such in the
3 event of a breach. Within two business days of the Court's approval, Dr. Held shall dismiss
4 Tuesday Morning from the case entitled, *Held v. Princess Soft Toys, et al.*, San Francisco Superior
5 Court Case No. CGC-09-487820, without prejudice.

6 **13. MODIFICATION**

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

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1 **14. 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
6 **AGREED TO:**

7 Date: 06/23/2009

8
9 By: 

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

AGREED TO:

Date: _____

By: _____

Defendant, TUESDAY MORNING
CORPORATION

11
12 **APPROVED AS TO FORM:**

13 Date: 6/24/09

HIRST & CHANLER LLP

14
15 By: 

16 Christopher M. Martin
Attorneys for Plaintiff
17 ANTHONY E. HELD, Ph.D., P.E.

APPROVED AS TO FORM:

Date: _____

MUNRO SMIGLIANI & JORDAN LLP

By: _____

Paul W. Smigliani
Attorneys for Defendant
TUESDAY MORNING CORPORATION

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1 **14. 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.

6 **AGREED TO:**

7 Date: _____

9 By: _____
10 Plaintiff, ANTHONY E. HELD,
11 Ph.D., P.E.

12 **APPROVED AS TO FORM:**

13 Date: _____
14 HIRST & CHANLER LLP

15 By: _____
16 Christopher M. Martin
17 Attorneys for Plaintiff
18 ANTHONY E. HELD, Ph.D., P.E.

6 **AGREED TO:**

7 Date: 6/23/2009

9 By: [Signature]
10 Defendant, TUESDAY MORNING
11 CORPORATION

12 **APPROVED AS TO FORM:**

13 Date: 6/25/09
14 MUNRO SMIGLIANI & JORDAN LLP

15 By: [Signature]
16 Paul W. Smigliani
17 Attorneys for Defendant
18 TUESDAY MORNING CORPORATION

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