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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION
12

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

14 Plaintiff,

15 vs.

16 CHILDREN'S APPAREL NETWORK, LTD.;
17 and DOES 1 through 150, inclusive,

18 Defendant.
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Case No. CIV 091150

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

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Children's Apparel Network, Ltd.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Held") and Children's Apparel Network, Ltd. (hereinafter "CAN"), with Held and
5 CAN collectively referred to as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 CAN employs ten or more persons and is a person in the course of doing business for
12 purposes of Proposition 65.

13 **1.4 General Allegations**

14 Held alleges that CAN has manufactured, distributed, and/or sold in the State of
15 California certain children's toys and apparel containing di(2-ethylhexyl)phthalate ("DEHP")
16 and/or lead. DEHP and lead are listed pursuant to the Safe Drinking Water and Toxic
17 Enforcement Act of 1986, California Health & Safety Code §§25249.5 et seq. ("Proposition 65"),
18 as chemicals known to the State of California to cause birth defects and other reproductive harm.
19 DEHP and lead are referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 For purposes of this Agreement, children's toys and apparel sold by CAN in California
22 that contain the Listed Chemical shall be referred to herein as the "Products."

23 **1.6 Notices of Violation**

24 On or about July 10, 2008, October 10, 2008, February 24, 2009 and March 13, 2009,
25 Held served CAN and various public enforcement agencies with a document entitled "60-Day
26 Notice of Violation" (the "Notice") that provided CAN and such public enforcers with notice
27 alleging that CAN was in violation of California Health & Safety Code §25249.6 for failing to
28 warn consumers and customers that the Products exposed users in California to the Listed

1 Chemical. CAN represents that it first learned about DEHP in its bath books after receiving the
2 60-Day Notice issued on July 10, 2008 and, as a result, CAN ceased the sale of all such books for
3 shipment into California thereafter. CAN further represents that it first learned from the
4 Supplemental 60-Day Notices issued on October 10, 2008, February 24, 2009, and March 13,
5 2009, that certain children's toys and children's apparel items contained DEHP and, in some
6 instances, lead as well. As a result, CAN began to immediately start the process of reformulating
7 such products and ceased the sale of those products into California.

8 **1.7 Complaint**

9 On March 13, 2009, 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
11 County of Marin against CAN, and Does 1 through 150, alleging violations of Health & Safety
12 Code § 25249.6 based on the alleged exposures to DEHP contained in children's toys and
13 apparel, specifically (by way of example: bath books; children's vinyl bags; and children's vinyl
14 jackets) distributed and/or sold by CAN. If, after May 18, 2009, no public enforcer has begun to
15 diligently prosecute the allegations related to lead in the children's apparel items referenced in the
16 March 13, 2009 notice, then the Complaint shall be deemed amended to include lead as a Listed
17 Chemical.

18 **1.8 No Admission**

19 CAN denies the material factual and legal allegations contained in Held's Notice and
20 maintains that all products that it has sold and distributed in California, including the Products,
21 have been and are in compliance with all laws. Nothing in this Consent Judgment shall be
22 construed as an admission by CAN 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 CAN of
24 any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by
25 CAN. However, this section shall not diminish or otherwise affect the obligations,
26 responsibilities and duties of CAN under this Consent Judgment.

27 **1.9 Consent to Jurisdiction**

28 For purposes of this Consent Judgment only, the parties stipulate that this Court has

jurisdiction over CAN as to the allegations contained in the Complaint, that venue is proper in the County of Marin 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 March 16, 2009.

2. INJUNCTIVE RELIEF: REFORMULATION IN LIEU OF WARNINGS

2.1 Reformulation Commitments and Schedule

Except as otherwise provided for in this Agreement, as of the Effective Date, CAN shall only offer Products for sale in California that are Phthalate Free, as set forth below. For purposes of this Consent Judgment, “Phthalate Free” Products shall mean Products containing less than or equal to 1,000 parts per million (“ppm”) of DEHP and “Lead Free” shall mean Products containing less than or equal to 300 ppm of lead when analyzed pursuant to Environmental Protection Agency (“EPA”) testing methodologies 3580A and 8270C for DEHP, 3050B and 6010B for lead, or equivalent methods as may be allowed under Proposition 65. These standards are individually and collectively referred to herein as the “Reformulation Standard”. The Reformulation Standard shall only apply to materials that are accessible and not to those materials that are not accessible through reasonably foreseeable use and abuse.

CAN agrees that 50% of the Products that it offers for sale in California after the Effective Date, shall be Phthalate and Lead Free, or shall otherwise be exempt from or comply with the warning requirements as set forth in Section 2.2. CAN further commits that 100% of the Products that it offers for sale in California beginning on September 30, 2009 shall be Phthalate and Lead Free or shall otherwise be exempt from or comply with the warning requirements set forth in Section 2.2.

2.2 Product Warnings.

After the Effective Date, except as provided for in this Consent Judgment, CAN shall not ship, or offer to be shipped for sale in California, Products containing the Listed Chemical unless such Products are shipped with the clear and reasonable warning set out in Section 2.3 and 2.4, or

1 comply with the reformulation requirements set out in Section 2.1.

2 Any warning issued for Products pursuant to Section 2.3 and 2.4 below shall be
3 prominently placed with such conspicuousness as compared with other words, statements designs
4 or devices to render it likely to be read and understood by an ordinary individual under customary
5 conditions of purchase or use, for Products shipped by CAN for sale in California.

6 **2.3 Warnings for Retail Store Sales**

7 **(a) Product Labeling.** CAN may perform its warning obligation by affixing a
8 warning to the packaging of, labeling to, or, if no label exists, directly on each Product sold in
9 retail outlets in California by CAN or its agents, that states:

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

12 **(b) Point-of-Sale Warnings.** CAN may perform its warning obligations by
13 ensuring that signs are posted at retail outlets in the State of California where the Products are
14 sold. Point-of-sale warnings shall be provided through one or more signs posted in close
15 proximity to the point of display of the Products that states:

16 **WARNING:** This product contains a chemical known to
17 the State of California to cause birth defects
18 and other reproductive harm.

19 Where more than one Product is sold in proximity to other like items or to those that do
20 not require a warning (e.g., Phthalate Free as defined in Section 2.1), the following statement
21 must be used:¹

22 **WARNING:** The following products contain a chemical
23 known to the State of California to cause
birth defects and other reproductive harm:

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

25
26
27 ¹ For purposes of this Consent Judgment, “sold in proximity to other like items” shall mean that the Product
28 and another product are offered for sale close enough to each other so that the consumer, under customary conditions
of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 **2.4 Warnings For Catalog and Internet Sales.**

2 CAN may satisfy its warning obligations for Products it sells via catalog or the Internet
3 for sale in California by providing a warning: (i) in the catalog; or (ii) on the website. Warnings
4 given in the catalog or on the website shall identify the specific Product to which the warning
5 applies as further specified in sub sections (a) and (b) below:

6 **(a) Catalog Warning.** Any warning provided in a catalog must be in the
7 same type size or larger than the Product description text within the catalog. The following
8 warning shall be provided on the same page and in the same location as each display of the
9 Product:

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

12 Where it is impracticable to provide the warning on the same page and in the same
13 location as the display of the Product, CAN may utilize a designated symbol (▲) to cross
14 reference the applicable warning and shall define the term “designated symbol” with the
15 following language on the inside of the front cover of the catalog and on the same page as any
16 order form for the Product(s):

17 **WARNING:** Certain products identified with this symbol
18 ▲ and offered for sale in this catalog contain
19 a chemical known to the State of California
20 to cause birth defects and other reproductive
 harm.

21 The designated symbol must appear on the same page and in close proximity to the
22 display or description of the Product on such page. On each page where the designated symbol
23 appears, CAN must provide a reference directing the consumer to the warning language and
24 definition of the designated symbol.

25 **(b) Internet Website Warning.** A warning may be given in conjunction with
26 the sale of the Product via the Internet, provided it appears either: (a) on the same web page on
27 which the Product is displayed; (b) on the same web page as the order form for the Product; (c)
28 on the same page as the price for any Product; or (d) on one or more web pages displayed to a

1 purchaser during the checkout process. The following warning statement shall be used and shall
2 appear in any of the above instances adjacent to or immediately following the display,
3 description, or price of the Product for which it is given in the same type size or larger than the
4 Product description text:

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

7
8 Alternatively, the designated symbol may appear adjacent to or immediately following the
9 display, description, or price of the Product for which a warning is being given, provided that the
10 following warning statement also appears elsewhere on the same web page, as follows:

11 **WARNING:** Products identified on this page with the
12 following symbol ▲ contain a chemical
known to the State of California to cause birth
defects and other reproductive harm

13 **2.5 Exceptions to Reformulation or Warning Requirements**

14 Except as otherwise provided for in this Agreement, the reformulation and warning
15 requirements set forth in Sections 2.2 through 2.4 shall not apply to:

- 16 (i) any Products manufactured before the Effective Date;
- 17 (ii) Phthalate Free or Lead Free Products (as defined in Section 2.1); or
- 18 (iii) Products, other than child care articles and children toys, that comply with
- 19 a Proposition 65 safe harbor, such as a maximum allowable dose limit (MADL) or
- 20 no significant risk level (NSRL), provided that CAN shall give written notice (and
- 21 provide reasonable documentary support) to Held with respect to any assertion
- 22 that Products comply with a Proposition 65 safe harbor level. Held shall be
- 23 entitled to, within 30 days of receiving written notice from CAN, challenge such
- 24 assertion by written notice to CAN specifying the specific reasons for his rejection
- 25 of CAN's assertion that Products comply with a Proposition 65 safe harbor level.
- 26 The Parties at that point shall meet and confer in good faith for a period not to
- 27 exceed 30 days following Held's rejection. At that point, if there is no resolution
- 28

1 reached, CAN may submit the matter to binding arbitration before JAMS or AAA
2 in San Francisco, Chicago, Washington D.C. or New York at Held's option.
3 Should CAN invoke the option to arbitrate the issue, it shall reimburse Held for
4 his reasonable attorneys' fees and costs (including expert fees) incurred in
5 connection to this subsection (§2.5(iii)) in an amount not to exceed \$75,000,
6 unless it is determined that Held has acted arbitrarily in rejecting CAN's assertion
7 in which case no such payment under this section shall be due or payable (or shall
8 be returned). Held shall submit his invoices to CAN on a monthly basis and CAN
9 shall pay him within 15 days upon receipt.

10 **3. MONETARY PAYMENTS**

11 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

12 In settlement of all the claims referred to in this Consent Judgment against it, CAN shall
13 pay \$12,000 in civil penalties to be apportioned in accordance with California Health & Safety
14 Code §25192, with 75% of these funds remitted to the State of California's Office of
15 Environmental Health Hazard Assessment and the remaining 25% of these funds remitted to Held
16 as provided by California Health & Safety Code §25249.12(d). CAN shall issue two separate
17 checks for the penalty payment: (a) one check made payable to Hirst & Chanler LLP in Trust for
18 the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the
19 amount of \$9,000, representing 75% of the total penalty, and (b) one check to Hirst & Chanler
20 LLP in Trust for Held in the amount of \$3,000, representing 25% of the total penalty. Two
21 separate 1099s shall be issued for the above payments to OEHHA, P.O. Box 4010, Sacramento,
22 CA 95814 (EIN: 68-0284486) and to Held whose address and tax identification number shall be
23 furnished, upon request, five calendar days before payment is due. The payments shall be
24 delivered on or before March 23, 2009, at the following address:

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

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

2 **4.1 Attorney Fees and Costs**

3 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
5 issue to be resolved after the material terms of the agreement had been settled. After the other
6 settlement terms had been finalized, the Parties attempted to (and did) reach an accord on the
7 compensation due to Held and his counsel under general contract principles and the private
8 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
9 work performed through the mutual execution of this agreement. CAN shall reimburse Held and
10 his counsel for fees and costs incurred as a result of investigating, bringing this matter to CAN's
11 attention, and litigating and negotiating a settlement in the public interest. CAN shall pay Held
12 and his counsel \$51,750 for fees and costs incurred as a result of investigating, bringing this
13 matter to CAN's attention, and litigating and negotiating a settlement in the public interest. CAN
14 shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check
15 payable to "Hirst & Chanler LLP" and shall be delivered on or before March 23, 2009, to the
16 following:

17 Hirst & Chanler LLP
18 Attn: Proposition 65 Controller
19 455 Capitol Mall, Suite 605
 Sacramento, CA 95814

20 **4.2 Additional Attorney Fees and Costs in Seeking Judicial Approval.**

21 Pursuant to CCP §§1021 and 1021.5, the parties further agree that CAN will reimburse
22 Held and his counsel for their reasonable fees and costs incurred in seeking judicial approval of
23 this Consent Judgment in the trial court and completing other necessary tasks after the execution
24 of the Consent Judgment in an amount not to exceed \$6,250. Such additional fees and costs,
25 exclusive of fees and costs that may be incurred in the event of an appeal include, but are not
26 limited to, drafting and filing of the motion to approve papers, fulfilling the reporting
27 requirements referenced in Health & Safety Code §25249.7(f), responding to any third party
28

1 objections, filing of notice of entry of the judgment, corresponding with opposing counsel and
2 appearing before the Court related to the approval process.

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

7 Hirst & Chanler LLP
8 Attn: Proposition 65 Controller
9 455 Capitol Mall, Suite 605
10 Sacramento, CA 95814

11 CAN has the right to object to the amount of any Additional Fee Claim asserted by Held
12 and may submit the resolution of this issue to the American Arbitration Association (AAA) in
13 Northern California to determine the reasonableness of the Additional Fee Claim, provided that
14 any notice of objection or decision to arbitrate is received by Held by the end of the ten calendar
15 days after receipt of the Additional Fee Claim. If an arbitration notice is not filed with AAA in a
16 timely manner, Held may file a motion with the Court pursuant to both CCP §1021.5 and this
17 Consent Judgment to recover additional attorney fees and costs incurred as set forth in this
18 paragraph. In the event CAN submits the matter to arbitration, Held may seek, pursuant to CCP
19 §1021.5, reasonable attorney fees and costs incurred for the arbitration.

20 **5. RELEASE OF ALL CLAIMS**

21 **5.1 Release of CAN and Downstream Customers**

22 In further consideration of the promises and agreements herein contained, and for the
23 payments to be made pursuant to Sections 3 and 4 above, Held, on behalf of himself, his past and
24 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
25 general public, hereby waives all rights to institute or participate in, directly or indirectly, any
26 form of legal action and releases all claims, including, without limitation, all actions, and causes
27 of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
28 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"), that were brought or could have been brought against CAN and its affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, employees, and sister and parent entities and each of CAN's downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers, (including but not limited to J.C. Penney Company, Macy's and Burlington Coat Factory) franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, employees and sister and parent entities (collectively "Releasees") that arise under Proposition 65 or any other statutory or common law Claims that could have been asserted including such Claims as relate to CAN's and each of its Releasees alleged failure to warn about exposures to or identification of the Listed Chemical contained in the Products, specifically as to bath books, children's vinyl bags and children's vinyl jackets/apparel. 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 CAN.

In addition to the foregoing, Held, on behalf of himself, his past and current agents, representatives, attorneys and successors and/or assigns, and *not* in his representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all Claims against CAN.

5.2 CAN's Release of Held

CAN waives any and all claims against 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 Held and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.

6. COURT APPROVAL

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 one

1 year after it has been fully executed by all parties, in which event any monies that have been
2 provided to Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded
3 within fifteen (15) days after receiving written notice from CAN that the one-year period has
4 expired.

5 **7. SEVERABILITY**

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

9 **8. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to the Products, or federal
13 consumer product safety laws or regulations preempt Proposition 65 then CAN shall provide
14 written notice to Held of any asserted change in the law, and shall have no further obligations
15 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so
16 affected once Held agrees in writing to the change in the law (such agreement not to be
17 unreasonably withheld) or CAN can follow the modification procedure set forth in paragraph 13
18 below.

19 **9. NOTICES**

20 Unless specified herein, all correspondence and notices required to be provided pursuant
21 to 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 CAN:**

25 Murray Maleh, Chief Executive Officer
26 Children's Apparel Network, Ltd.
27 77 South First Street
28 Elizabeth, NJ 07206

1 **With copy to:**

2 Mark R. Kaster, Esq.
3 Dorsey & Whitney LLP
4 50 South 6th Street
5 Minneapolis, MN 55402

6 **To 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
13 address to which all notices and other communications shall be sent.

14 **10. 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 documents.

18 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

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

21 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

22 The parties acknowledge that pursuant to Health & Safety Code §25249.7, a noticed
23 motion is required to obtain judicial approval of this Consent Judgment. In furtherance of
24 obtaining such approval, Held, CAN and their respective counsel agree to mutually employ their
25 best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of
26 the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best
27 efforts shall include, at a minimum, cooperating on the drafting and filing any papers, asserting
28 any oral argument in support of the required motion for judicial approval, and defending any
 appellate review of the Court's approval.

1 **13. MODIFICATION**

2 If CAN determines that the provisions governing the warning or reformulation standard
3 for DEHP or Lead in any other Consent Judgment entered into between Held (or a public
4 enforcer) and a regulated entity under Proposition 65 for the identical or virtually identical type or
5 category of products at issue in this Consent Judgment are less stringent than the provisions of
6 this Consent Judgment, CAN may, upon 30 days prior written notice to Held, request a
7 modification of this Consent Judgment. Held will inform CAN in writing, within 30 days after
8 receipt of such written notice, on whether he will agree to such modification. If Held does not
9 agree, the parties agree to use reasonable good faith efforts to confer and resolve their
10 disagreement. If the parties are unable to resolve their disagreement, the parties agree to submit
11 the matter to mediation. If the parties do not resolve their disagreement through mediation, either
12 party may submit the matter to the Court for a modification pursuant to and consistent with this
13 Section 13. Pursuant to CCP §§ 1021 and 1021.5, CAN will reimburse Held and his counsel for
14 their reasonable fees and costs incurred in seeking modification of this Consent Judgment
15 through mediation or judicial proceedings, in an amount not to exceed \$30,000, unless it is
16 determined that Held has acted arbitrarily in refusing CAN's request for modification in which
17 case no such payment under this section shall be due or payable (or shall be returned). No fees
18 under this paragraph will be due and owing to Held or his counsel unless a request is made to
19 modify this Consent Judgment by CAN. CAN will remit payment of such additional fees within
20 ten days after written request made payable to Hirst & Chanler LLP, at the address set forth in
21 Section 9 above.

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:

Dated: March ____, 2009

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

APPROVED

By Anthony E Held at 10:56 am, 3/11/09

By: Anthony E Held

Anthony E. Held, Ph.D., P.E.

Dated: March 13, 2009

CHILDREN'S APPAREL NETWORK, LTD.

By: Nathan Shalom

Murray Malch, Chief Executive Officer
Children's Apparel Network, Ltd.

NATHAN SHALOM

PROSIDENT