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11 Attorneys for Defendant
CUTIE PIE BABY, INC.

12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 THE CITY AND COUNTY OF SAN FRANCISCO
15 UNLIMITED CIVIL JURISDICTION

16 ANTHONY E. HELD, Ph.D., P.E.,
17 Plaintiff,
18 v.
19 CUTIE PIE BABY, INC.; *et al.*,
20 Defendants.
21

Case No. CGC-08-481439
**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Cutie Pie Baby, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Dr. Held") and Cutie Pie Baby, Inc. (hereinafter "Cutie Pie Baby"), with Dr. Held and
5 Cutie Pie Baby collectively referred to as the "Parties."

6 **1.2 Plaintiff**

7 Dr. 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 Cutie Pie Baby employs ten or more persons and 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 Cutie Pie Baby has manufactured, distributed and/or sold in the State of
16 California children's vinyl bags containing di(2 ethylhexyl)phthalate ("DEHP"). DEHP is listed
17 pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
18 Code §§ 25249.5 *et seq.* ("Proposition 65"), as a chemical known to the State of California to cause
19 birth defects and other reproductive harm. DEHP is referred to herein as the "Listed Chemical."

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as follows: children's
22 vinyl bags containing the Listed Chemical, including, but not limited to, *Got Milk? 4 Piece Bottle*
23 *Cooler Set, #5184BMD (#0 84134 05184 7)*. All such items shall be referred to herein as the
24 "Products."

25 **1.6 Notice of Violation**

26 On October 10, 2008, Dr. Held served Cutie Pie Baby, Burlington Coat Factory Warehouse
27 Corporation and various public enforcement agencies with a document entitled "60-Day Notice of
28

1 Violation” (“Notice of Violation”) that provided Cutie Pie Baby and such public enforcers with
2 notice that alleged that Cutie Pie Baby was in violation of California Health & Safety Code § 25249.6
3 for failing to warn consumers and customers that the Products exposed users in California to DEHP.

4 **1.7 Complaint**

5 On February 25, 2009, Dr. Held, who was and is acting in the interest of the general public in
6 California, in the Superior Court in and for the County of Alameda, filed a first amended complaint in
7 the case of *Held v. Ascendia Brands, Co., Inc., et al.*, adding Cutie Pie Baby as a defendant and
8 alleging violations of Health & Safety Code § 25249.6 by Cutie Pie Baby based on the alleged
9 exposures to DEHP contained in the Products manufactured, distributed and/or offered for sale in
10 California by Cutie Pie Baby. The operative second amended complaint (“Complaint”) filed on
11 August 5, 2009 similarly includes Cutie Pie Baby.

12 **1.8 No Admission**

13 Cutie Pie Baby denies the material, factual, and legal allegations contained in Dr. Held’s
14 Notice and maintains that all products that it has manufactured, distributed and/or sold in California,
15 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
16 Judgment shall be construed as an admission by Cutie Pie Baby of any fact, finding, issue of law, or
17 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an
18 admission by Cutie Pie Baby of any fact, finding, conclusion, issue of law, or violation of law, such
19 being specifically denied by Cutie Pie Baby. However, this section shall not diminish or otherwise
20 affect the obligations, responsibilities and duties of Cutie Pie Baby under this Consent Judgment.

21 **1.8 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the parties stipulate that this Court has
23 jurisdiction over Cutie Pie Baby as to the allegations contained in the Notice of Violation and
24 Complaint, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to
25 enter and enforce the provisions of this Consent Judgment.

1 **1.9 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean December 31,
3 2009.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS IF THE PRODUCT**
5 **IS RE-INTRODUCED FOR SALE INTO CALIFORNIA**

6 **2.1 Reformulation Commitment**

7 Cutie Pie Baby represents that it no longer manufactures, sells or distributes the Product at
8 issue and that it has no plans to re-introduce the Products for sale into California. Should Cutie Pie
9 Baby re-introduce the Product for sale into California, as of the Effective Date, Cutie Pie Baby shall
10 only manufacture or cause to be manufactured Products for sale in California that are Phthalate Free,
11 as set forth below. For purposes of this Consent Judgment, “Phthalate Free” Products shall mean
12 Products containing less than or equal to 1,000 parts per million (“ppm”) of the Listed Chemical,
13 when analyzed pursuant to Environmental Protection Agency (“EPA”) testing methodologies 3580A
14 and 8270C.

15 **2.2 Product Warnings**

16 Should Cutie Pie Baby re-introduce the Product for sale into California, as of the Effective
17 Date, Cutie Pie Baby shall not sell, ship, or offer to be shipped for sale in California Products that are
18 not Phthalate Free unless such Products are shipped with the clear and reasonable warnings set out in
19 Section 2.3 and 2.4.

20 Any warning issued for Products pursuant to Section 2.3 and 2.4, below, shall be prominently
21 placed with such conspicuousness as compared with other words, statements, designs or devices as to
22 render it likely to be read and understood by an ordinary individual under customary conditions
23 before purchase or, for Products shipped directly to an individual in California, before use.

24 **2.3 Warnings For Retail Store Sales**

25 **(a) Product Labeling.** Cutie Pie Baby shall perform its warning obligation by
26 affixing a warning to the packaging of, labeling to, or, if no label exists, directly on each Product sold
27 in retail outlets in California by Cutie Pie Baby or its agents, that states:
28

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

4 **(b) Point-of-Sale Warnings.** Cutie Pie Baby shall perform its warning
5 obligations by ensuring that signs are posted at retail outlets in the State of California where the
6 Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in close
7 proximity to the point of display of the Products that states:

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

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

14 **WARNING:** The following products contain DEHP, a
15 chemical known to the State of California to
16 cause birth defects and other reproductive harm:

17 *[list products for which warning is required]*

18 **2.4 Warnings For Mail Order Catalog and Internet Sales**

19 After the Effective Date, Cutie Pie Baby shall satisfy its warning obligations for Products sold
20 via mail order catalog or the Internet to California residents by providing a warning: (i) in the mail
21 order catalog; or (ii) on the website. Warnings given in the mail order catalog or on the website shall
22 identify the specific Product to which the warning applies as further specified in subsections (a) and
23 (b) below.

24 **(a) Mail Order Catalog Warning.** Any warning provided in a mail order
25 catalog must be in the same type size or larger than the Product description text within the catalog.
26 The following warning shall be provided on the same page and in the same location as each display

27 ¹ For purposes of this Consent Judgment, "sold in proximity to other like items" shall mean that the Product and
28 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 of the Product:

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

5 Where it is impracticable to provide the warning on the same page and in the same location as
6 the display of the Product, Cutie Pie Baby shall utilize a designated symbol (▲) to cross reference
7 the applicable warning and shall define the term “designated symbol” with the following language on
8 the inside of the front cover of the catalog and on the same page as any order form for the Product(s):

9 **WARNING:** Certain products identified with this symbol ▲
10 and offered for sale in this catalog contain
11 DEHP, a chemical known to the State of
12 California to cause birth defects and other
13 reproductive harm.

14 The designated symbol must appear on the same page and in close proximity to the display or
15 description of the Product on such page. On each page where the designated symbol appears, Cutie
16 Pie Baby must provide a reference directing the consumer to the warning language and definition of
17 the designated symbol.

18 If Cutie Pie Baby elects to sell one or more Products to consumers via mail order catalog after
19 the Effective Date, then the warnings must be included in all catalogs containing the Products which
20 are distributed in California as of the Effective Date.

21 **(b) Internet Website Warning.** A warning shall be given in conjunction
22 with the sale of the Product to a California consumer via the Internet, and must appear either: (i) on
23 the same web page on which the Product is displayed; (ii) on the same web page as the order form for
24 the Product; (iii) on the same page as the price for any Product; or (iv) on one or more web pages
25 displayed to a purchaser during the checkout process. The following warning statement shall be used
26 and shall appear in any of the above instances adjacent to or immediately following the display,
27 description, or price of the Product for which it is given in the same type size or larger than the
28 Product description text:

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

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

7 **WARNING:** Products identified on this page with the
8 following symbol ▲ contain DEHP, a chemical
9 known to the State of California to cause birth
10 defects and other reproductive harm.

11 **2.5 Exceptions To Warning Requirements**

12 The warning requirements set forth in Sections 2.2 through 2.4 shall not apply to:

- 13 (i) any Products received by Cutie Pie Baby prior to the Effective Date, provided
14 that Cutie Pie Baby does not have actual knowledge, or reason from communications
15 with its suppliers of the Products to believe, that the Listed Chemical is present in such
16 Products in concentrations exceeding 1,000 ppm each; or
17 (ii) Phthalate Free Products (as defined in Section 2.1).

18 **3. MONETARY PAYMENTS**

19 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

20 **3.1.1** In settlement of all claims related to the Covered Products and the Listed
21 Chemical referred to in the Notice of Violation and Complaint, and this Consent Judgment pursuant
22 to Health & Safety Code § 25249.7(b), Cutie Pie Baby shall pay \$4,000 in civil penalties.

23 **3.1.2** Civil penalties are to be apportioned in accordance with California Health &
24 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
25 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
26 remitted to Anthony Held as provided by California Health & Safety Code § 25249.12(d). Cutie Pie
27 Baby shall issue two separate checks for the penalty payment: (a) one check made payable to
28 "Chanler Law Group in Trust for OEHHA" in the amount of \$3,000, representing 75% of the total
 penalty; and (b) one check to "Chanler Law Group in Trust for Anthony Held" in the amount of

1 \$1,000, representing 25% of the total penalty. Two separate 1099s shall be issued for the above-
2 payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b)
3 Anthony Held, whose information shall be provided five calendar days before the payment is due.

4 **3.1.3 Payment Timing.** Not later than five (5) days following the execution of this
5 Consent Judgment by both parties, the penalty payment shall be made by Cutie Pie Baby to Hunton
6 & Williams, to be held in a client Trust Account. Hunton & Williams shall provide Plaintiff with
7 written notice that it has received the penalty payment from Cutie Pie Baby within five days of
8 Hunton & Williams' receipt of such payment from Cutie Pie Baby. Such penalty payment shall
9 remain in the Trust Account until this Consent Judgment has been approved by the Court at the
10 approval hearing and notice of approval has been provided to Cutie Pie Baby by Plaintiff. Payment
11 shall be delivered to the following address within five days of such approval and notification:

12 Chanler Law Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710

15 **4. 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 without
18 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
19 issue to be resolved after the material terms of the agreement had been settled. Cutie Pie Baby then
20 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
21 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Dr.
22 Held and his counsel under general contract principles and the private attorney general doctrine
23 codified at California Code of Civil Procedure (C.C.P.) § 1021.5. Cutie Pie Baby shall reimburse Dr.
24 Held and his counsel a total of \$25,500 for fees and costs incurred as a result of investigating,
25 bringing this matter to Cutie Pie Baby's attention, and litigating, negotiating and seeking court
26 approval of a settlement in the public interest. Not later than five (5) days following the execution of
27 this Consent Judgment by both parties, the fee and cost payment shall be made by Cutie Pie Baby to
28

1 Hunton & Williams, to be held in a client Trust Account. Hunton & Williams shall provide Plaintiff
2 with written notice that it has received the fee and cost payment from Cutie Pie Baby within five days
3 of its receipt of such payment from Cutie Pie Baby. Such fee and cost payment shall remain in the
4 Trust Account until this Consent Judgment has been approved by the Court at the approval hearing
5 and notice of approval has been provided to Cutie Pie Baby by Plaintiff. Payment shall be delivered
6 to the following address within five days of approval of such approval and notification:

7 Chanler Law Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 **5. RELEASE OF ALL CLAIMS**

13 **5.1 Dr. Held's Release of Cutie Pie Baby**

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

1 Dr. Held also, on behalf of himself, his past and current and future agents, representatives,
2 attorneys, successors, and/or assignees, and in his individual capacity only, provides a general release
3 herein which shall be effective as a full and final accord and satisfaction, as a bar to all Claims of Dr.
4 Held against Cutie Pie Baby and Defendant Releasees of any nature, character or kind, known or
5 unknown, suspected or unsuspected, arising under Proposition 65 or an alleged failure to provide
6 warnings for exposures to any Proposition 65-listed chemical from any products manufactured,
7 distributed or sold by Cutie Pie Baby. Dr. Held acknowledges that he is familiar with Section 1542
8 of the California Civil Code, which provides as follows:

9 A general release does not extend to claims which the creditor does
10 not know or suspect to exist in his favor at the time of executing the
11 release, which if known by him must have materially affected his
12 settlement with the debtor.

13 Dr. Held, in his individual capacity only, expressly waives and relinquishes any and all rights
14 and benefits which he may have under, or which may be conferred on him by the provisions of
15 Section 1542 of the California Civil Code as well as under any other state or federal statute or
16 common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or
17 benefits pertaining to the released matters. In furtherance of such intention, the release hereby given
18 shall be and remain in effect as a full and complete release notwithstanding the discovery or existence
19 of any such additional or different claims or facts arising out of the released matters.

20 The Parties further understand and agree that the above releases shall not extend upstream to
21 any entities that manufactured the Products or any component parts thereof, or any distributors or
22 suppliers who sold the Products or any component parts thereof to Cutie Pie Baby.

23 Notwithstanding the foregoing, this release shall not limit or affect Dr. Held's right to enforce
24 the terms of the Consent Judgment.

25 **5.2 Cutie Pie Baby's Release of Dr. Held**

26 Cutie Pie Baby waives any and all claims against Dr. Held, his attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been taken
28 or made) by Dr. Held and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to the Products.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
6 has been fully executed by all parties, in which event any monies that have been provided to Dr.
7 Held, or his counsel, and any funds held by Hunton & Williams LLP in escrow pursuant to Section 3
8 and/or Section 4 above, shall be refunded within fifteen (15) days after receiving written notice from
9 Cutie Pie Baby that the one-year period has expired.

10 **7. SEVERABILITY**

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

14 **8. GOVERNING LAW**

15 The terms of this Consent Judgment shall be governed by the laws of the State of California
16 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
17 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then Cutie
18 Pie shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
19 extent that, the Covered Products are so affected.²

20 **9. NOTICES**

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

25 _____
26 ² Nothing in this Consent Judgment shall be interpreted to relieve Cutie Pie Baby from any
27 obligation to comply with any applicable state or federal toxics control laws.
28

1 For Cutie Pie Baby:

2 Malcolm C. Weiss, Esq.
3 Catherine Allen, Esq.
4 Hunton & Williams LLP
5 550 South Hope Street, Suite 2000
6 Los Angeles, CA 90071

7 For Dr. Held:

8 Proposition 65 Coordinator
9 Chanler Law Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710

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

15 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

22 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

23 The parties acknowledge that, pursuant to Health & Safety Code § 25249.7, a noticed motion
24 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
25 approval, Dr. Held and Cutie Pie and their respective counsel agree to mutually employ their best
26 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
27 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, best efforts shall
28 include, at a minimum, cooperating on the drafting and filing any papers in support of the required
motion for judicial approval, and not stating anything contrary to the terms of the Consent Judgment
in any papers filed, or in any comments made, to the Court.

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13. MODIFICATION

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

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 hereof.

AGREED TO:

AGREED TO:

Date: 12/2/09 _____

Date: _____

By: Anthony E. Held
ANTHONY E. HELD, Ph.D., P.E.

By: _____
Simon Yedid, President
CUTIE PIE BABY, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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13. MODIFICATION

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

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 hereof.

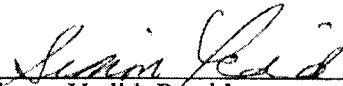
AGREED TO:

AGREED TO:

Date: _____

Date: 12-02-09

By: _____
ANTHONY E. HELD, Ph.D., P.E.

By: 
Simon Yedid, President
CUTIE PIE BABY, INC.

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT