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11 ESSEX MANUFACTURING, INC.

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

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

17 Plaintiff,

18 v.

19 ESSEX MANUFACTURING, INC.; and DOES 1
20 through 150 inclusive,

21 Defendants.

Case No. 34-2009-00035020

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code §25249.6

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Essex Manufacturing, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Dr. Held") and Essex Manufacturing, Inc. (hereinafter "Essex"), with Dr. Held and
5 Essex 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 Defendants**

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

14 **1.4 General Allegations**

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

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows: children's
23 jackets containing the Listed Chemicals, including, but not limited to, *Misty Harbor Jacket, Style*
24 *4160BC (#0 12655 94032 7)*. All such items shall be referred to herein as the "Products."

25 **1.6 Notice of Violation**

26 On November 17, 2008, Dr. Held served Essex and various public enforcement agencies with
27 a document entitled "60-Day Notice of Violation" that provided Essex and such public enforcers with
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1 notice that alleged that Essex was in violation of California Health & Safety Code §25249.6 for
2 failing to warn consumers and customers that the Products exposed users in California to DEHP.
3 Also on November 17, 2008, Dr. Held served Essex and various public enforcement agencies with a
4 document entitled “60-Day Notice of Violation” that provided Essex and such public enforcers with
5 notice that alleged that Essex was in violation of California Health & Safety Code §25249.6 for
6 failing to warn consumers and customers that the Products exposed users in California to lead. No
7 public enforcer has diligently prosecuted the allegations set forth in either of the 60-Day Notices of
8 Violation (“Notices”).

9 **1.7 Complaint**

10 On February 20, 2009, Dr. Held, who was and is acting in the interest of the general public in
11 California, filed a complaint in the Superior Court in and for the County of Sacramento against
12 Essex, and Does 1 through 150, alleging violations of Health & Safety Code § 25249.6 based on the
13 alleged exposures to DEHP and lead contained in children’s jackets manufactured, distributed and/or
14 sold by Essex (“Complaint”).

15 **1.8 No Admission**

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

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the parties stipulate that this Court has
26 jurisdiction over Essex as to the allegations contained in the Complaint, that venue is proper in the
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1 County of Sacramento, and that this Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term "Effective Date" shall mean September 30,
5 2009.

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

7 **2.1 Reformulation Commitment**

8 Except as provided for in this Agreement, as of the Effective Date, Essex commits that it shall
9 only manufacture, distribute or caused to be manufactured or distributed, Products in California that
10 are Phthalate Free and Lead Free, as set forth below. For purposes of this Consent Judgment,
11 "Phthalate Free" Products shall mean Products containing less than or equal to 1,000 parts per million
12 ("ppm") of DEHP when analyzed pursuant to Environmental Protection Agency ("EPA") testing
13 methodologies 3580A and 8270C, or equivalent methods as may be allowed under Proposition 65,
14 and "Lead Free" shall mean products containing less than or equal to 300 ppm of lead when analyzed
15 pursuant to EPA testing methodologies, 3050B and 6010B, or equivalent methods as may be allowed
16 under Proposition 65.

17 Essex further commits that 100% of the Products that it offers for sale in California after the
18 Effective Date shall be Phthalate Free and Lead Free or otherwise be exempt from the warning
19 requirements as set forth in Section 2.5.

20 **2.2 Product Warnings**

21 After the Effective Date, Essex shall not sell, ship, or offer to be shipped for sale in
22 California, Products containing the Listed Chemicals unless such Products are shipped with the clear
23 and reasonable warnings set out in Section 2.3 and 2.4 or comply with the reformulation requirements
24 of Phthalate-Free and Lead-Free Products set out in Section 2.1.

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

2 **2.3 Warnings For Retail Store Sales**

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

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

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

13 **WARNING:** This product contains lead and the phthalate
14 DEHP, chemicals known to the State of
15 California to cause birth defects and other
reproductive harm.

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

19 **WARNING:** The following products contain lead and the
20 phthalate DEHP, chemicals known to the State
21 of California to cause birth defects and other
reproductive harm:

22 *{list products for which warning is required}*

23 **2.4 Warnings For Mail Order Catalog and Internet Sales.**

24 Essex shall satisfy its warning obligations for Products sold via mail order catalog or the

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

1 Internet to California residents by providing a warning: (i) in the mail order catalog; or (ii) on the
2 website. Warnings given in the mail order catalog or on the website shall identify the specific
3 Product to which the warning applies as further specified in subsections (a) and (b) below.

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

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

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

15 **WARNING:** Certain products identified with this symbol ▲
16 and offered for sale in this catalog contain lead
17 and the phthalate DEHP, chemicals known to the
State of California to cause birth defects and
other reproductive harm.

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

22 If Essex elects to sell one or more Products to consumers via mail order catalog after the
23 Effective Date, then the warnings must be included in all catalogs containing the Products which are
24 distributed in California as of the Effective Date.

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

7 **WARNING:** This product contains lead and the phthalate
8 DEHP, chemicals known to the State of
9 California to cause birth defects and other
 reproductive harm.

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

13 **WARNING:** Products identified on this page with the
14 following symbol ▲ contain lead and the
15 phthalate DEHP, chemicals known to the State of
 California to cause birth defects and other
 reproductive harm.

16 **2.5 Exceptions To Warning Requirements**

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

- 18 (i) any Products received by Essex prior to receipt of the Notices, provided that
19 Essex does not have actual knowledge, or reason from communications with its
20 suppliers of the Products to believe, that DEHP is present in such Products in
21 concentrations exceeding 1,000 ppm each, or that lead is present in concentrations
22 exceeding 300 ppm each;
- 23 (ii) any Products shipped by Essex to its California customers before the Effective
24 Date; or
- 25 (iii) Phthalate-Free and Lead-Free Products (as defined in Section 2.1).
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3. MONETARY PAYMENTS

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

In settlement of all the claims referred to in this Consent Judgment against it, Essex shall pay \$3,000 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment and the remaining 25% of these penalty monies remitted to Dr. Held as provided by California Health & Safety Code §25249.12(d). Essex shall issue two separate checks for the penalty payment: (a) one check made payable to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental Health Hazard Assessment ("Hirst & Chanler LLP in Trust for OEHHHA") in the amount of \$2,250, representing 75% of the total penalty and (b) one check to "Hirst & Chanler LLP in Trust for A. Dr. Held" in the amount of \$750, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$2,250. The second 1099 shall be issued to Dr. Held in the amount of \$750, whose address and tax identification number shall be furnished, upon request, at least five calendar days before payment is due. The payments shall be delivered on or before the Effective Date, at the following address:

HIRST & CHANLER LLP
Attn: Proposition 65 Controller
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

4. REIMBURSEMENT OF FEES AND COSTS

4.1 Attorney Fees and Costs.

The parties reached an accord on the compensation due to Dr. Held and his counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, Essex shall reimburse Dr. Held's counsel for fees and costs, incurred as a result of investigating, bringing this matter to Essex attention, and negotiating a settlement in the public interest. Essex shall pay Dr. Held and his counsel \$30,000 for all attorneys' fees, expert and investigation fees, and related costs.

1 The payment shall be issued in a third separate check made payable to "Hirst & Chanler LLP" and
2 shall be delivered on or before the Effective Date, at the following address:

3
4 HIRST & CHANLER LLP
5 Attn: Proposition 65 Controller
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710

9 Essex shall issue a separate 1099 for fees and cost paid in the amount of \$30,000 to Hirst & Chanler
10 LLP, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California, 94710 (EIN: 20-3929984).

11 **5. RELEASE OF ALL CLAIMS**

12 **5.1 Dr. Held's Release of Essex**

13 In further consideration of the promises and agreements herein contained, and for the
14 payments to be made pursuant to Sections 3 and 4 above, Dr. Held, on behalf of himself, his past and
15 current agents, representatives, attorneys, successors and/or assignees, and in the interest of the
16 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
17 legal action and releases all claims, including, without limitation, all actions, and causes of action, in
18 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or
19 expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any
20 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against
21 Essex and its officers, directors, attorneys, representatives, shareholders, agents and employees and
22 sister and parent entities 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 Essex's
27 alleged failure to warn about exposures to or identification of DEHP and/or lead contained in the
28 Products.

1 The Parties further understand and agree that the above releases shall not extend upstream to
2 any entities that manufactured the Products or any component parts thereof, or any distributors or
3 suppliers who sold the Products or any component parts thereof to Essex.

4 **5.2 Essex's Release of Dr. Held**

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

10 **6. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and shall
12 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
13 has been fully executed by all parties, in which event any monies that have been provided to Dr.
14 Held, or his counsel pursuant to Section 3 and/or Section 4 above, shall be refunded within fifteen
15 (15) days after receiving written notice from Essex that the one-year period has expired.

16 **7. SEVERABILITY**

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

20 **8. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California
22 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
23 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then Essex
24 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
25 that, the Covered Products are so affected.

26 **9. NOTICES**

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

4 For Essex:

5 Lawrence E. Fabian, Esq.
6 Law Offices of Lawrence E. Fabian
7 250 West 57th Street, Suite 1720
8 New York, NY 10107

9 For Dr. Held:

10 Proposition 65 Coordinator
11 Hirst & Chanler, LLP
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

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

17 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

24 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

25 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion
26 is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
27 approval, Dr. Held and Essex and their respective counsel agree to mutually employ their best efforts
28 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,

1 at a minimum, cooperating on the drafting and filing any papers in support of the required motion for
2 judicial approval.

3 **13. MODIFICATION**

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

9 **14. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their respective
11 parties and have read, understood, and agree to all of the terms and conditions hereof.

13 **AGREED TO:**

APPROVED

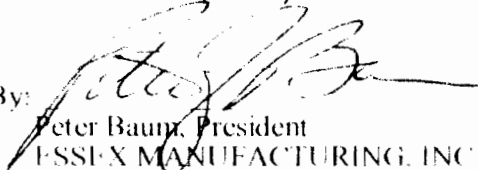
By Tony Held at 11:46 am, Sep 26, 2009

14 Date:

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

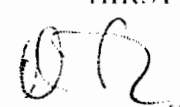
AGREED TO:

Date:

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18 Date: 9/22/09
By: 
Peter Baum, President
ESSEX MANUFACTURING, INC.


19 **APPROVED AS TO FORM:**

20 Date:

21 9/30/09
HIRST & CHANLER LLP
22
23 By: 
David Lavine
Attorneys for Plaintiff
ANTHONY E. HELD, Ph.D., P.E.

APPROVED AS TO FORM:

Date:

24 9/22/09
CRITCHLOW & DISKINT LLP
25
26 By: 
Robert Diskint
Attorneys for Defendant
ESSEX MANUFACTURING, INC.

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IT IS SO ORDERED.

Date: _____ JUDGE OF THE SUPERIOR COURT _____