

1 Clifford A. Chanler, State Bar No. 135534
2 David Lavine, State Bar No. 166744
3 HIRST & CHANLER LLP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, California 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 ANTHONY E. HELD, Ph.D., P.E.

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

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

15 Plaintiff,

16 v.

17 DARON FASHIONS, INC., *et al.*,

18 Defendant.

Case No. CGC-08-481439

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

Health & Safety Code § 25249.6 *et seq.*

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E., and Daron Fashions, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter “Held”) and Daron Fashions, Inc. (hereinafter “Daron”), with Held and Daron
5 together 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 Daron 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 Daron has manufactured, distributed, and/or sold in the State of
15 California through its customer, co-defendant Burlington Coat Factory Warehouse Corporation,
16 (hereinafter “Burlington”), children’s vinyl jackets containing di(2-ethylhexyl)phthalate
17 (“DEHP”). DEHP is listed pursuant to the Safe Drinking Water and Toxic Enforcement Act of
18 1986, California Health & Safety Code §§25249.5 *et seq.* (“Proposition 65”), as a chemical
19 known to the State of California to cause birth defects and other reproductive harm. DEHP is
20 referred to herein as the “Listed Chemical.”

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as children’s vinyl
23 jackets containing DEHP including, but not limited to, *Hawke & Co. Outfitter Jacket, Black*
24 *#28050BU (#6 06055 88855 8)*. All such products containing DEHP are referred to hereinafter as
25 the “Products”.

26 **1.6 Notice of Violation**

27 On March 5, 2009, Held served Daron Fashions, Inc., Burlington Coat Factory
28

1 Warehouse Corporation, and various public enforcement agencies with a “60-Day Notice of
2 Violation” (the “Notice”) that provided Daron with notice of alleged violations of Health &
3 Safety Code §25249.6 for its failure to warn consumers that the Products that Daron sold to
4 Burlington exposed users in California to the Listed Chemical.

5 **1.7 Complaint**

6 On August 5, 2009, Dr. Held, who was and is acting in the interest of the general public in
7 California, filed a second amended complaint (“Complaint”) in case number CGC-08-481439 of
8 the San Francisco Superior Court, adding Daron as a defendant and alleging violations of Health
9 & Safety Code §25249.6 by Daron based on the alleged exposures to DEHP contained in the
10 Products manufactured, distributed and/or offered for sale in California by Daron through its
11 customer Burlington.

12 **1.8 No Admission**

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

21 **1.9 Consent to Jurisdiction**

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

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” shall mean October 29,
28

1 2009.

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

3 **2.1 Product Warnings**

4 Commencing on the Effective Date, Daron shall not sell, ship, or offer to be shipped for
5 sale in California any Product unless such Products are sold or shipped with one of the clear and
6 reasonable warnings set forth in subsections 2.1(a) and (b), are otherwise exempt pursuant to
7 Section 2.2, or comply with the reformulation standards set forth in Section 2.3.

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

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

15 **(i) Product Labeling.** Daron may affix a warning to the packaging,
16 labeling, or directly on each Product sold in retail outlets in California by Daron or its agents, that
17 states:

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

21 **(ii) Point-of-Sale Warnings.** Alternatively, Daron may provide
22 warning signs in the form below to its customers in California with instructions to post the
23 warnings in close proximity to the point of display of the Products.

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

1 Where more than one Product is sold in proximity to other like items or to those that do
2 not require a warning (e.g., Reformulated Products as defined in Section 2.3), the following
3 statement must be used:¹

4 **WARNING:** These products contain DEHP, a phthalate
5 chemical known to the State of California to
6 cause birth defects and other reproductive
7 harm.

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

9 **(b) Mail Order Catalog and Internet Sales.** In the event that Daron sells
10 Products via mail order catalog or internet to customers located in California after the Effective
11 Date that are not Reformulated Products, Daron shall provide a warning for Products sold via
12 mail order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on
13 the website. Warnings given in the mail order catalog or on the website shall identify the specific
14 Product to which the warning applies as further specified in Sections 2.1(b)(i) and (ii).

15 **(i) Mail Order Catalog Warning.** Any warning provided in a mail
16 order catalog must be in the same type size or larger than the Product description text within the
17 catalog. The following warning shall be provided on the same page and in the same location as
18 the display and/or description of the Product:

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

23 Where it is impracticable to provide the warning on the same page and in the same
24 location as the display and/or description of the Product, Daron may utilize a designated symbol
25 to cross reference the applicable warning and shall define the term “designated symbol” with the
26 following language on the inside of the front cover of the catalog or on the same page as any

27 _____
28 ¹For purposes of the consent judgment, “sold in proximity” shall mean that the Product and another product are 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.

1 order form for the Product(s):
2

3 **WARNING:** Certain products identified with this
4 symbol ▼ and offered for sale in this
5 catalog contain DEHP, a phthalate
6 chemical known to the State of California
7 to cause birth defects and other
8 reproductive harm.

9 The designated symbol must appear on the same page and in close proximity to the
10 display and/or description of the Product. On each page where the designated symbol appears,
11 Daron must provide a header or footer directing the consumer to the warning language and
12 definition of the designated symbol.

13 If Daron elects to provide warnings in the mail order catalog, then the warnings must be
14 included in all catalogs offering to sell one or more Products printed after the Effective Date.

15 **(ii) Internet Website Warning.** A warning may be given in
16 conjunction with the sale of the Product via the Internet, provided it appears either: (a) on the
17 same web page on which the Product is displayed; (b) on the same web page as the order form for
18 the Product; (c) on the same page as the price for any Product; or (d) on one or more web pages
19 displayed to a purchaser during the checkout process. The following warning statement shall be
20 used and shall appear in any of the above instances adjacent to or immediately following the
21 display, description, or price of the Product for which it is given in the same type size or larger
22 than the Product description text:

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

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WARNING: Products identified on this page with the following symbol contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm: ▼.

2.2 Exceptions To Warning Requirements

The warning requirements set forth in Section 2.1 shall not apply to:

- (i) Any Product manufactured by Daron prior to the Effective Date; or
- (ii) Reformulated Products (as defined in Section 2.3 below).

2.3 Reformulation Standards

Reformulated Products are defined as those Products containing less than or equal to 1,000 parts per million (“ppm”) of the Listed Chemical. The warnings required pursuant to Section 2.1 above shall not be required for Reformulated Products.

2.4 Past and Future Reformulation Steps

Daron hereby commits that one hundred percent (100%) of the Products that it manufactures after the Effective Date for sale in California shall qualify as Reformulated Products.

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, Daron 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 funds remitted to Held as provided by California Health & Safety Code §25249.12(d). Daron 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 (OEHHA) in the amount of \$2,250, representing 75% of the total penalty, and (b) one check to Hirst & Chanler LLP in Trust for Held in the amount of \$750, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments to OEHHA, P.O. Box 4010, Sacramento,

1 CA 95814 (EIN: 68-0284486) and to Held whose address and tax identification number shall be
2 furnished, upon request, five calendar days before payment is due. The payments shall be
3 delivered on or before the Effective Date to the following address:

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

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

10 **4.1 Attorney Fees and Costs**

11 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
12 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
13 issue to be resolved after the material terms of the agreement had been settled. After the other
14 settlement terms had been finalized, the Parties attempted to (and did) reach an accord on the
15 compensation due to Held and his counsel under general contract principles and the private
16 attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all
17 work performed through the mutual execution of this agreement. Daron shall reimburse Held and
18 his counsel for fees and costs incurred as a result of investigating, bringing this matter to Daron's
19 attention, and litigating and negotiating a settlement in the public interest. Daron shall pay Held
20 and his counsel \$20,000 for fees and costs incurred as a result of investigating, bringing this
21 matter to Daron's attention, and litigating and negotiating a settlement in the public interest.
22 Daron shall issue a separate 1099 for fees and costs (EIN: 20-3929984) and shall make the check
23 payable to "Hirst & Chanler LLP" and shall be delivered on or before the Effective Date to the
24 following address:

25 Hirst & Chanler LLP
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Release of Daron and Downstream Customers**

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

21 **5.2 Daron's Release of Held**

22 Daron waives any and all claims against Held, his attorneys and other representatives, for
23 any and all actions taken or statements made (or those that could have been taken or made) by
24 Held and his attorneys and other representatives, whether in the course of investigating claims or
25 otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to
26 the Products.

1 **6. COURT APPROVAL**

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

8 **7. SEVERABILITY**

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

12 **8. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the State of
14 California and apply within the State of California. In the event that Proposition 65 is repealed or
15 is otherwise rendered inapplicable by reason of state or federal law generally, or as to the
16 Products, then Daron shall provide written notice to Held of any asserted change in the law, and
17 shall have no further obligations pursuant to this consent judgment with respect to, and to the
18 extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to
19 relieve Daron from any obligation to comply with any pertinent state or federal toxics control law.

20 **9. NOTICES**

21 Unless specified herein, all correspondence and notices required to be provided pursuant
22 to 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 **To Daron:**
26 Sean Vincent, Production & Sourcing Manager
27 Daron Fashions, Inc.
28 131 West 35th Street, 7th Floor
 New York, NY 10001

1 **With a copy to:**
2 Marvin H. Kleinberg
3 Kleinberg & Lerner, LLP
4 1875 Century Park East, Suite 1150
5 Los Angeles, CA 90067-3112

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, Daron 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.

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

1 motion of any party and entry of a modified consent judgment by the Court.

2 **14. AUTHORIZATION**

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

6 **AGREED TO:** **APPROVED**
7 *By Anthony Held at 3:27 pm, Oct 26, 2009*
8 Date: _____

AGREED TO:
Date: _____

9 By: *Anthony E Held*
10 Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

By: _____
Sean Vincent
Production and Sourcing Manager
Defendant, DARON FASHIONS, INC.

11
12
13 **APPROVED AS TO FORM:**
14 Date: *Oct 26, 2009*

APPROVED AS TO FORM:
Date: _____

15 HIRST & CHANLER LLP

KLEINBERG & LERNER LLP

16
17 By: *[Signature]*
18 David S. Lavine
19 Attorneys for Plaintiff
20 ANTHONY E. HELD, PH.D., P.E.

By: _____
Marvin H. Kleinberg
Attorneys for Defendant
DARON FASHIONS, INC.

1 motion of any party and entry of a modified consent judgment by the Court.

2 **14. AUTHORIZATION**

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

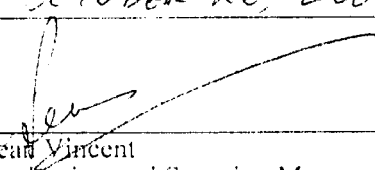
6 **AGREED TO:**

7 Date: _____

8
9 By: _____
10 Plaintiff, ANTHONY E. HELD, Ph.D., P.E.

6 **AGREED TO:**

7 Date: October 26, 2009

8
9 By: 
10 Sean Vincent
11 Production and Sourcing Manager
12 Defendant, DARON FASHIONS, INC.

13 **APPROVED AS TO FORM:**

14 Date: _____

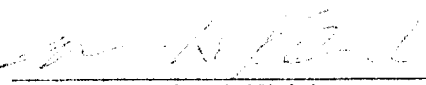
15 HIRST & CHANLER LLP

16
17 By: _____
18 David S. Lavine
19 Attorneys for Plaintiff
20 ANTHONY E. HELD, Ph.D., P.E.

13 **APPROVED AS TO FORM:**

14 Date: October 26, 2009

15 KLEINBERG & LERNER LLP

16
17 By: 
18 Marvin H. Kleinberg
19 Attorneys for Defendant
20 DARON FASHIONS, INC.