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Brian C. Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
ANTHONY E. HELD, PH.D., P.E.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PH.D., P.E.,
Plaintiff,
v.
SMILES FASHION CORPORATION; *et al.*,
Defendants.

Case No. 112CV230221

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Anthony E. Held, Ph.D., P.E.
4 ("Held"), and defendant, Smiles Fashion Corporation ("Smiles"), with Held and Smiles each
5 individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Smiles 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, Health & Safety Code
13 § 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Held alleges that Smiles sold belts containing di(2-ethylhexyl)phthalate ("DEHP") without
16 first providing the clear and reasonable warning required by Proposition 65. DEHP is listed pursuant
17 to Proposition 65 as a chemical known to the state of California to cause birth defects or other
18 reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are belts containing DEHP that are
21 imported, manufactured, sold, or distributed for sale by Smiles in California (collectively "Products")
22 including, but not limited to, those offered in connection with the *Mlle Gabrielle Dress with Belt,*
23 *Style 72120.*

24 **1.6 Notice of Violation**

25 On or about April 25, 2012, Held served Smiles and certain requisite public enforcement
26 agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed the recipients of
27 Held's allegation that Smiles was in violation of Proposition 65 for failing to warn its customers and
28 consumers in California that the Products expose users to DEHP.

1 **1.7 Complaint**

2 On August 10, 2012, Held filed the instant action against Smiles (“Complaint”) for the
3 alleged violations of Health & Safety Code § 25249.6 that are the subject of the Notice.

4 **1.8 No Admission**

5 Smiles denies the material, factual and legal allegations contained in the Notice and
6 Complaint, and it maintains that all of the products that it has sold and distributed in California,
7 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
8 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
9 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
10 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
11 not, however, diminish or otherwise affect Smiles’ obligations, responsibilities, and duties under this
12 Consent Judgment.

13 **1.9 Consent to Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
15 jurisdiction over Smiles as to the allegations in the Complaint, that venue is proper in Santa Clara
16 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
17 Judgment.

18 **1.10 Effective Date**

19 For purposes of this Consent Judgment, the term “Effective Date” shall mean October 1,
20 2012.

21 **2. INJUNCTIVE RELIEF: REFORMULATION**

22 Commencing on the Effective Date and continuing thereafter, Smiles shall only import,
23 manufacture, sell or distribute for sale in California “Reformulated Products.” For purposes of this
24 Consent Judgment, Reformulated Products contain a maximum of 1,000 parts per million (0.1%)
25 DEHP content in any accessible component (i.e., any component that may be touched or handled
26 during a reasonably foreseeable use) when analyzed pursuant to EPA testing methodologies 3580A
27 and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of
28 determining DEHP content in a solid substance.

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health & Safety Code § 25249.7(b), Smiles shall pay \$5,500 in civil penalties in
4 total. On or before the Effective Date, Smiles shall pay an initial civil penalty of \$2,500. On January
5 1, 2013, Smiles shall pay the remaining penalty amount of \$3,000, except that the remaining portion
6 of the penalty shall be waived in its entirety if, no later than December 15, 2012, an officer of Smiles
7 certifies in writing to Held’s counsel that one hundred percent of the Products that Smiles sells or
8 distributes for sale in California are Reformulated Products as defined by section 2.

9 The penalty payment shall be allocated according to Health & Safety Code § 25249.12 (c)(1)
10 and (d), with seventy-five percent (75%) of the penalty amount earmarked for the California Office
11 of Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five (25%) of
12 the penalty amount earmarked for Held.

13 **3.2 Reimbursement of Held’s Fees and Costs**

14 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
15 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
16 to be resolved after the material terms of the agreement had been settled. Shortly after all other
17 settlement terms had been finalized, Smiles expressed a desire to resolve the fees and costs. The
18 Parties then attempted to (and did) reach an accord on the compensation due Held and his counsel
19 under general contract principles and the private attorney general doctrine codified at Code of Civil
20 Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs incurred on
21 appeal, if any. Under these legal principles, Smiles shall pay \$18,000 for the fees and costs incurred
22 investigating, litigating, and enforcing this matter, including the fees and costs incurred (and to be
23 incurred) drafting, negotiating, and obtaining the Court’s approval of this Consent Judgment in the
24 public interest.

25 **3.3 Payment Procedures**

26 **3.3.1 Payments Held in Trust**

27 All payments made under this Consent Judgment shall be held in trust until the Court
28 approves the settlement. The Parties acknowledge that Held’s counsel gave Smiles the option of

1 depositing the funds into its attorney's trust account, but that Smiles elected to have The Chanler
2 Group hold the settlement funds in trust until such time as the hearing of the motion for judicial
3 approval.

4 **3.3.2 Payment Schedule**

5 On or before the Effective Date, Smiles shall deliver three checks for the for the
6 following amounts made payable to:

- 7 (a) "The Chanler Group in Trust for OEHHA" in the amount of \$1,875;
8 (b) "The Chanler Group in Trust for Anthony E. Held" in the amount of \$625;
9 and
10 (c) "The Chanler Group in Trust" in the amount of \$6,000.

11 On or before November 1, 2012, Smiles shall deliver a fourth check payable to:

- 12 (a) "The Chanler Group in Trust" in the amount of \$6,000.

13 On or before December 1, 2012, Smiles shall deliver a fifth check payable to:

- 14 (a) "The Chanler Group in Trust" in the amount of \$6,000.

15 **3.3.3 Issuance of 1099 Forms**

16 After the Consent Judgment has been approved, Smiles shall provide Held's counsel
17 with a separate 1099 form for each of its payments to:

- 18 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010,
19 Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid in the 2012
20 calendar year;
21 (b) "Anthony E. Held", whose address and tax identification number shall be
22 furnished upon request after this Consent Judgment has been fully executed by the
23 Parties for the civil penalty payment in the 2012 calendar year; and
24 (c) "The Chanler Group" (EIN: 94-3171522) for fees and costs reimbursed in
25 them amount of \$18,000.

26 Smiles shall also provide Held's counsel with two additional 1099 forms for civil penalty payments
27 made in the 2013 calendar year to OEHHA and Held, if any.

28

1 **3.3.4 Payment Address**

2 All payments and tax forms required by this Section shall be delivered to the
3 following address:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Held’s Public Release of Proposition 65 Claims**

10 Held, acting on his own behalf and in the public interest, releases Smiles Held, acting on his
11 own behalf and in the public interest, releases Smiles and its parents, subsidiaries, affiliated entities
12 under common ownership, directors, officers, employees, and attorneys (“Releasees”) and each
13 entity to whom they directly or indirectly distribute or sell the Products, including but not limited to
14 its downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
15 licensors and licensees (“Downstream Releasees”) for any violations arising under Proposition 65
16 for unwarned exposures to DEHP contained in the Products sold by Smiles prior to the Effective
17 Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
18 compliance with Proposition 65 with respect to exposures to DEHP from the Products sold by
19 Smiles before the Effective Date, as set forth in the Notice.

20 **4.2 Held’s Individual Release of Claims**

21 Held, in his individual capacity only and *not* in his representative capacity, also provides a
22 release to Smiles, Releasees, and Downstream Releasees which shall be effective as a full and final
23 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
24 attorneys’ fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
25 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
26 exposures to DEHP in the Products sold or distributed for sale by Smiles before the Effective Date.

1 **4.3 Smiles' Release of Held**

2 Smiles on behalf of itself and on behalf of its past and current agents, representatives,
3 attorneys, successors, and/or assignees, hereby waives any and all claims against Held and his
4 attorneys and other representatives, for any and all actions taken or statements made (or those that
5 could have been taken or made) by Held and his attorneys and other representatives, whether in the
6 course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter,
7 or with respect to the Products.

8 **5. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and shall
10 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
11 has been fully executed by all Parties.

12 **6. SEVERABILITY**

13 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
14 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
15 adversely affected.

16 **7. GOVERNING LAW**

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

24 **8. NOTICES**

25 Unless specified herein, all correspondence and notices required by this Consent Judgment
26 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
27 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

28

1 For Smiles:

2 Ashok Gurnani, President
3 Smiles Fashion Corporation
4 555 Secaucus Road
5 Secaucus, NJ 07094

6 with a copy to:

7 Bruce S. Koppel, Esq.
8 10 Depot Square
9 P.O. Box 348
10 Englewood, NJ 07631-0348

11 For Held:

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

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 This Consent Judgment may be executed in counterparts and by facsimile or portable
21 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
22 taken together, shall constitute one and the same document.

23 **10. POST EXECUTION ACTIVITIES**

24 Held agrees to comply with the reporting form requirements referenced in Health & Safety
25 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
26 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
27 of obtaining such approval, Held and Smiles agree to mutually employ their best efforts, and that of
28 their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of
their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a
minimum, cooperating on the drafting and filing of the necessary moving papers, and supporting the
motion for judicial approval.

1 **12. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
4 application of any Party and the entry of a modified consent judgment by the Court.

5 **13. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and have read, understood,
7 and agree to all of the terms and conditions contained herein.

8 **AGREED TO:**

AGREED TO:

9 **APPROVED**
10 Date: By Tony Held at 1:40 pm, Oct 01, 2012

Date: September 27, 2012

11 By: Anthony E Held
12 ANTHONY E. HELD, PH.D., P.E.

By: Ashok Gurnani
Ashok Gurnani, President
SMILES FASHION CORPORATION

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