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15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 FOR THE CITY AND COUNTY OF SAN FRANCISCO
18 UNLIMITED CIVIL JURISDICTION

19
20 ANTHONY E. HELD, Ph.D., P.E.,

21 Plaintiff,

22 v.

23 FASHION OPTIONS, INC., *et al.*,

24 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 Fashion Options, Inc.**

3 This Consent Judgment is entered into by and between Anthony E. Held, Ph.D., P.E.
4 (hereinafter "Held") and Fashion Options, Inc. (hereinafter "Fashion Options"), with Held and
5 Fashion Options together referred to as "Parties," and at times referred to individually as a
6 "Party."

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Held alleges that Fashion Options has manufactured, distributed, and/or sold in the State
16 of California children's clothing with vinyl zipper pulls 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 ("H&S Code") §§25249.5 *et seq.* ("Proposition 65"), as a
19 chemical known to the State of California to cause birth defects and other reproductive harm.
20 DEHP is 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 clothing
23 with vinyl zipper pulls containing di(2-ethylhexyl)phthalate including, but not limited to,
24 components of the *Airwalk Hooded Jacket, Style T2335BC (#7 57649 12651 5)*. All such
25 products containing DEHP are referred to hereinafter as the "Products."

26 **1.6 Notice of Violation**

27 On April 2, 2009, Held served Fashion Options, Inc. and others with a "60-Day Notice of
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1 Violation” (the “Notice”) that provided Fashion Options with notice of alleged violations of H&S
2 Code §25249.6 for its failure to warn consumers that the Products Fashion Options sold exposed
3 users in California to the Listed Chemical.

4 **1.7 Complaint**

5 On August 5, 2009, Dr. Held, who was and is acting in the interest of the general public in
6 California, filed a second amended complaint in case number CGC-08-481439 of the San
7 Francisco Superior Court, adding Fashion Options as a defendant and alleging violations of H&S
8 Code §25249.6 by Fashion Options based on the alleged exposures to DEHP contained in the
9 Products sold in California by Fashion Options (“Complaint”).

10 **1.8 No Admission**

11 Fashion Options denies the material factual and legal allegations contained in Held’s
12 Notice and maintains that all units of the Products that it has sold and distributed in California
13 have been and are in compliance with all applicable laws and regulations. Fashion Options was a
14 wholesaler of the Products, and as such, never manufactured the Products. Additionally, Fashion
15 Options recalled all units of the Products it sold in California after receiving Held’s Notice.
16 Nothing in this Consent Judgment shall be construed as an admission by Fashion Options of any
17 fact, finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment
18 constitute or be construed as an admission by Fashion Options of any fact, finding, conclusion,
19 issue of law or violation of law, such being specifically denied by Fashion Options. However,
20 this section shall not diminish or otherwise affect the obligations, responsibilities and duties of
21 Fashion Options under this Consent Judgment.

22 **1.9 Consent to Jurisdiction**

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

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean November
3 4, 2009.

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

5 **2.1 Product Warnings**

6 Commencing on the Effective Date, Fashion Options shall not sell, ship, or offer to be
7 shipped for sale in California the Products, unless the Products are sold or shipped with one of the
8 clear and reasonable warnings set forth in subsections 2.1(a) and (b), is otherwise exempt
9 pursuant to Section 2.2, or complies with the reformulation standards set forth in Section 2.3.

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

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

17 **(i) Product Labeling.** Fashion Options may affix a warning to the
18 packaging, labeling, or directly on each of the Products sold or shipped into California by
19 Fashion Options or its agents, that states:

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

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

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

1 Where the Products are sold in proximity to other like items or to those that do not require
2 a warning (e.g., Reformulated Product as defined in Section 2.3), the following statement must be
3 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.** Fashion Options has not sold
10 the Products via mail order catalog or Internet to anyone located in California. However, if it
11 does so after the Effective Date and the Products do not qualify as Reformulated Product, Fashion
12 Options shall provide a warning for the Products sold via mail order catalog or the Internet to
13 those customers: (1) in the mail order catalog; or (2) on the website where the Products are sold.
14 Warnings given in the mail order catalog or on the website shall identify the Products as the
15 specific items to which the warning applies, as further specified in Sections 2.1(b)(i) and (ii).

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

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

24 Where it is impracticable to provide the warning on the same page and in the same
25 location as the display and/or description of the Products, Fashion Options may utilize a
26 designated symbol to cross reference the applicable warning and shall define the term "designated
27 symbol"

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¹For purposes of the consent judgment, "sold in proximity" shall mean that the Products 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 symbol” with the following language on the inside of the front cover of the catalog or on the
2 same page as any order form for the Product(s):

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 Products. On each page where the designated symbol appears,
11 Fashion Options must provide a header or footer directing the consumer to the warning language
12 and definition of the designated symbol.

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

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

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

4 **2.2 Exceptions To Warning Requirements**

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

- 6 (i) Any units of the Products sold by Fashion Options prior to the Effective
7 Date; or
8 (ii) Reformulated Product (as defined in Section 2.3 below).

9 **2.3 Reformulation Standards**

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

13 **2.4 Past and Future Reformulation Steps**

14 Fashion Options hereby commits that one hundred percent (100%) of the Products that it
15 sells after the Effective Date in California shall qualify as Reformulated Product.

16 **3. MONETARY PAYMENTS**

17 **3.1 Payments Pursuant to H&S Code § 25249.7(b)**

18 In settlement of all the claims referred to in this Consent Judgment against it, Fashion
19 Options shall pay \$3,000 in civil penalties to be apportioned in accordance with California H&S
20 Code §25249.12(d), with 75% of these funds remitted to the State of California’s Office of
21 Environmental Health Hazard Assessment and the remaining 25% of these funds remitted to
22 Held. Fashion Options shall issue two separate checks for the penalty payments: (a) one check
23 made payable to Hirst & Chanler LLP in Trust for the State of California’s Office of
24 Environmental Health Hazard Assessment (“OEHHA”) in the amount of \$2,250, representing
25 75% of the total penalty, and (b) one check to Hirst & Chanler LLP in Trust for Held in the
26 amount of \$750, representing 25% of the total penalty. Two separate 1099s shall be issued for
27 the above penalty payments, one to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
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1 0284486), and the other to Held, whose address and tax identification number shall be furnished
2 to Fashion Options five (5) calendar days before the penalty payments are due. The above
3 penalty payments shall be 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 this Consent Judgment had been settled. After the
14 other settlement terms had been finalized, the Parties attempted to (and did) reach an accord on
15 the 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 Consent Judgment. Fashion Options shall
18 reimburse Held and his counsel for fees and costs incurred as a result of investigating, bringing
19 this matter to Fashion Options’ attention, and litigating and negotiating this settlement in the
20 public interest. Fashion Options shall pay Held and his counsel \$20,000 for fees and costs
21 incurred as a result of investigating, bringing this matter to Fashion Options’ attention, and
22 litigating and negotiating this settlement in the public interest. Fashion Options shall issue a
23 separate 1099 for such fees and costs (EIN: 20-3929984), make the check for such fees and costs
24 payable to “Hirst & Chanler LLP,” and deliver the 1099 and check for such fees and costs on or
25 before the Effective Date to the following address:

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

1 **5. RELEASE OF ALL CLAIMS**

2 **5.1 Release of Fashion Options 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 Fashion Options
12 and its affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
13 owners, shareholders, agents, employees, and sister and parent entities, and each of Fashion
14 Options' downstream distributors, wholesalers, vendors, suppliers, licensors, licensees,
15 auctioneers, retailers, franchisees, dealers, customers, owners, purchasers, users, parent
16 companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,
17 representatives, owners, shareholders, agents, employees and sister and parent entities
18 (collectively "Releasees") that arise under Proposition 65 or any other statutory or common law
19 Claims that could have been asserted, including such Claims as relate to Fashion Options' and
20 each of its Releasees' alleged failure to warn about exposures to or identification of the Listed
21 Chemical contained in the Products.

22 **5.2 Fashion Options' Release of Held**

23 Fashion Options waives any and all claims against Held, his attorneys and other
24 representatives, for any and all actions taken or statements made (or those that could have been
25 taken or made) by Held and his attorneys and other representatives, whether in the course of
26 investigating claims or otherwise, seeking enforcement of Proposition 65 against Fashion Options
27 in this matter, and/or with respect to 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 Fashion Options that the one year
7 period has 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 Fashion Options shall provide written notice to Held of any asserted change in the
17 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be
19 interpreted to relieve Fashion Options from any obligation to comply with any pertinent
20 California or federal toxics control laws (e.g., the federal ban on selling childcare items and
21 certain children’s toys containing more than 1,000 ppm of DEHP) in connection with the
22 Products.

23 **9. NOTICES**

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

Michael Haddad, President
Fashion Options, Inc.
1370 Broadway Avenue, Suite 901
New York, NY 10018

With copies to:

Bernard P. Simons, Esq.
Eric M. McLaughlin, Esq.
Reed Smith LLP
1901 Avenue of the Stars, Suite 700
Los Angeles, CA 90067-6078

To Held:

Proposition 65 Coordinator
Hirst & Chanler, LLP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

10. COUNTERPARTS, FACSIMILE SIGNATURES

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

11. COMPLIANCE WITH H&S CODE § 25249.7(f)

Held agrees to promptly comply with the reporting form requirements referenced in H&S Code § 25249.7(f).

12. ADDITIONAL POST EXECUTION ACTIVITIES

The Parties acknowledge that pursuant to H&S Code §25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Held, Fashion Options and their respective counsel agree to mutually employ their best efforts 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

1 shall include, at a minimum, cooperating on the drafting and filing of any papers, asserting any
2 oral argument in support of the required motion for judicial approval, and defending any appellate
3 review of the Court's approval.

4 **13. MODIFICATION**

5 This Consent Judgment may be modified only: (1) by written and signed agreement of
6 the Parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a
7 successful motion of either Party and entry of a modified Consent Judgment by the Court.

8 **14. AUTHORIZATION**

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

12 **AGREED TO:** **APPROVED** **AGREED TO:**
13 *By Tony Held at 9:06 am, Oct 30, 2009* Date: 10/29/09

14 By: Anthony E. Held By: Michael Haddad
15 Plaintiff, ANTHONY E. HELD, Ph.D., P.E. Defendant, FASHION OPTIONS, INC.
16

17 **APPROVED AS TO FORM ONLY:** **APPROVED AS TO FORM ONLY:**
18 **HIRST & CHANLER LLP** **REED SMITH LLP**
19 Date: 10/30/2009 Date: 10/29/09
20 By: Laura Han for David Lavine By: Eric M. McLaughlin
21 David Lavine Attorneys for Plaintiff Attorneys for Defendant
22 ANTHONY E. HELD, Ph.D., P.E. FASHION OPTIONS, INC.

24 **IT IS SO ORDERED.**
25 Date: _____
26 _____
27 JUDGE OF THE SUPERIOR COURT
28