

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Anthony E. Held, Ph.D., P.E. and Fashion Avenue Sweater Knits, LLC**

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. ("Held"), on the one hand, and Fashion Avenue Sweater Knits, LLC ("Fashion Avenue") on the other hand, with Held and Fashion Avenue collectively referred to as the "parties". Held is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Fashion Avenue employs ten or more persons and is a person in the course of doing business for purposes of Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* ("Proposition 65").

### **1.2 General Allegations**

Held alleges that Fashion Avenue has manufactured, imported, distributed, sold, and/or offered for sale in the State of California, belts containing the phthalate chemical di(2-ethylhexyl)phthalate ("DEHP"). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as belts containing DEHP manufactured, imported, distributed, sold and/or offered for sale in the State of California by Fashion Avenue including, but not limited to, *United States Sweaters Sweater with Belt, Style #41149*, hereinafter referred to as the "Products".

### **1.4 Notices of Violation**

On April 19, 2011, Held served Fashion Avenue and various public enforcement agencies with a document entitled "60-Day Notice of Violation" ("Notice") that provided the recipients with notice that alleged that Fashion Avenue was in violation of California Health & Safety

Code § 25249.6 for failing to warn consumers and customers that its Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the April 19, 2011, Notice.

**1.5 No Admission**

Fashion Avenue denies the material, factual and legal allegations contained in Held's Notice and maintains that all products that it has manufactured, imported, distributed, sold, and/or offered for sale in California, including the Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Fashion Avenue of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Fashion Avenue of any fact, finding, conclusion, issue of law, or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of Fashion Avenue under this Settlement Agreement.

**1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean October 15, 2012.

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

**2.1 Reformulation Standards**

(a) "Lead Free" Products shall mean any belts with materials on any outer surface of the exterior or interior of the Product that may be handled, touched, or mouthed by a consumer containing less than 50 parts per million ("ppm") lead when such surface material is analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent utilized by federal or state agencies for the purpose of determining lead content in a solid substance and which yield no more than 1.0 micrograms of lead when analyzed pursuant to NIOSH Test Method 9100 performed on any outer surface of the exterior or interior of the Product that may be handled, touched, or mouthed by a consumer.

(b) "DEHP Free" Products shall mean any belts with materials on any outer surface or the exterior or interior of the Product that may be handled, touched, or mouthed by a consumer containing less than or equal to 1,000 ppm of DEHP when analyzed pursuant to EPA testing methodologies 3580A and 8270C or any testing methodology selected by Fashion Avenue that is acceptable to state or federal government agencies in determining compliance with phthalate standards.

## **2.2 Reformulation Commitment**

As of the Effective Date, all Products manufactured, imported, distributed, sold and/or offered for sale in the State of California by Fashion Avenue shall be Products that qualify as Lead Free and DEHP Free as defined in Section 2.1 above (hereafter "Reformulated Products"), or shall carry appropriate Proposition 65 warnings as defined in section 2.3 below.

## **2.3 Product Warnings**

Commencing on the Effective Date, for all Products other than Reformulated Products, Fashion Avenue shall provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b). Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

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

(i) **Product Labeling.** Fashion Avenue shall affix a warning, modified to reflect the presence of either lead or DEHP, to the packaging, labeling, or directly on each Product sold in retail outlets in California by Fashion Avenue or any person selling the Products, that states:

**WARNING:** This product contains [lead][DEHP], a chemical known to the State of California to cause birth defects and other reproductive harm.<sup>1</sup>

(ii) **Point-of-Sale Warnings.** Alternatively, Fashion Avenue may provide warning signs, modified to reflect the presence of either lead or DEHP, in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products. Such instruction sent to Fashion Avenue's customers shall be sent by certified mail, return receipt requested.

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

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement, modified to reflect the presence of either lead or DEHP, shall be used:<sup>2</sup>

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

*[list products for which warning is required]*

(b) **Mail Order Catalog and Internet Sales.** In the event that Fashion Avenue sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, Fashion Avenue shall provide warnings, modified to reflect the presence of either lead or DEHP, for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail

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<sup>1</sup> In the event that the Product contains both lead and DEHP, the warning labels articulated in subsections 2.3(a) and (b) shall be modified to reflect the presence of both lead and DEHP and shall state that lead and DEHP are chemicals known to the State of California to cause birth defects and other reproductive harm.

<sup>2</sup> For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar 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.

order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

(i) **Mail Order Catalog Warning.** Any warning provided in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning, modified to reflect the presence of either lead or DEHP, shall be provided on the same page and in the same location as the display and/or description of the Product:

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

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Fashion Avenue may utilize a designated symbol to cross reference the applicable warning, modified to reflect the presence of either lead or DEHP, and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain [lead][DEHP], a chemical known to the State of California to cause birth defects and other reproductive harm.

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

(ii) **Internet Website Warning.** A warning shall be given in conjunction with the sale of the Products via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a

Product; (c) on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement, modified to reflect the presence of either lead or DEHP, shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Product for which it is given in the same type size or larger than the Product description text:

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

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

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

3. **PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

3.1 **Initial Civil Penalty**

In settlement of all the claims referred to in this Settlement Agreement, Fashion Avenue shall pay an initial civil penalty of \$1,500. The initial civil penalty is to be apportioned in accordance with California Health & Safety Code §§25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Held. Fashion Avenue shall issue two separate checks for the penalty payment: (a) one check made payable to The Chanler Group in Trust for the State of California's Office of Environmental Health Hazard Assessment ("The Chanler Group in Trust for OEHHA") in the amount of \$1,125, representing 75% of the total penalty and (b) one check to "The Chanler Group in Trust for Held" in the amount of \$375,

representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to Held, 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 October 15, 2012, to the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

### **3.2 Final Civil Penalty**

Fashion Avenue shall pay a second and final civil penalty of \$3,000 on November 15, 2012. As incentive for Fashion Avenue to reformulate its Products, however, the final civil penalty shall be waived in its entirety if an Officer of Fashion Avenue certifies in writing that it, as of November 1, 2012, will sell, ship and offer for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before November 1, 2012. The final civil penalty payment shall be apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to Held. Fashion Avenue shall issue two separate checks for the final civil penalty payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in the amount of \$2,250, representing 75% of the total penalty; and (b) one check to "The Chanler Group 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: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Held, whose information shall be provided five calendar days before the payment is due (if different than the information already provided to Fashion Avenue under Section 3.1 above).

Payment shall be delivered to Held's counsel at the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

4. **REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Fashion Avenue then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to Held and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual execution of this agreement. Fashion Avenue shall pay the total amount of \$18,500 for fees and costs incurred as a result of investigating, bringing this matter to Fashion Avenue's attention, and negotiating a settlement in the public interest. Fashion Avenue shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "The Chanler Group" and shall deliver payment on or before October 15, 2012, to the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

5. **RELEASES**

5.1 **Held's Release of Fashion Avenue**

This Settlement Agreement is a full, final and binding resolution between Held, and Fashion Avenue, of any violation of Proposition 65 that was or could have been asserted by Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or



assignees, against Fashion Avenue, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Fashion Avenue directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (“Releasees”), based on their failure to warn about alleged exposures to DEHP contained in the Products that were manufactured, distributed, sold and/or offered for sale by Fashion Avenue in California before the Effective Date.

In further consideration of the promises and agreements herein contained, Held, in his individual capacity only and not in his representative capacity, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all Held’s rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that Held may have, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses -- including, but not limited to, investigation fees, expert fees, and attorneys’ fees, but exclusive of fees and costs on appeal -- limited to and arising under Proposition 65 with respect to lead and DEHP in the Products manufactured, distributed, sold and/or offered for sale by Fashion Avenue before the Effective Date (collectively “claims”), against Fashion Avenue and Releasees.

## **5.2 Fashion Avenue’s Release of Held**

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

6. **POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement Fashion Avenue may ask Held, in writing, to file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment, and to seek the court's approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If so requested, Held agrees to reasonably cooperate with Fashion Avenue and the parties shall use their best efforts to support the entry of a consent judgment by a superior court in California. Pursuant to Code of Civil Procedure sections 1021 and 1021.5, Fashion Avenue will reimburse Held and his counsel for their reasonable fees and costs incurred in filing the complaint, converting the Settlement Agreement into a proposed consent judgment and seeking judicial approval of the consent judgment, in an amount not to exceed \$15,000, exclusive of fees and costs that may be incurred on appeal. Fashion Avenue will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid by Fashion Avenue within ten days after its receipt of monthly invoices from Held for work performed under this paragraph.

7. **SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

8. **GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Fashion Avenue shall provide written notice to Held of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be

interpreted to relieve Fashion Avenue from any obligation to comply with any pertinent state or federal toxics control law.

**9. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (i) personally delivered; (ii) sent by first-class (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one party by the other party at the following addresses:

For Fashion Avenue Sweater Knits, LLC

Mel Weiss, President  
Fashion Avenue Sweater Knits, LLC  
225 West 37<sup>th</sup> Street, Floor 8  
New York, NY 10018

For Held:

Proposition 65 Coordinator  
The Chanler Group  
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 Settlement Agreement may be executed in counterparts and by facsimile or pdf signature, 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 HEALTH & SAFETY CODE § 25249.7(f)**

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

**12. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the parties.



**13. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

**AGREED TO:**

Date: October 9, 2012

By: *Anthony E. Held*  
Anthony E. Held, Ph.D., P.E.

**AGREED TO:**

Date: 10/09/12

By: *Mel Weiss*  
Mel Weiss, President  
Fashion Avenue Sweater Knits, LLC