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

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE CITY AND COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION
15

16 ANTHONY E. HELD, PH.D., P.E.,)

17 Plaintiff,)

18 v.)

19 IMPLUS FOOTCARE, LLC, and DOES 1-)
20 150, inclusive,)

21 Defendants.)
22)
23)
24)
25)
26)
27)

Case No. CIV-1005294

UNLIMITED JURISDICTION

**[PROPOSED] SETTLEMENT
AGREEMENT AS TO IMPLUS
FOOTCARE, LLC**

Dept:

Judge:

Date: None set

Complaint Filed: October 5, 2010

1 **1. INTRODUCTION**

2 **1.1 Anthony Held and Implus Footcare, LLC**

3 This Settlement Agreement is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. (“Held” or “Plaintiff”) and defendant Implus Footcare, LLC (“Implus”), with Plaintiff and
5 Implus collectively referred to as the “parties.”

6 **1.2 Anthony Held**

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

10 **1.3 Implus Footcare, LLC**

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

14 **1.4 General Allegations**

15 Held alleges that Implus has manufactured, imported, distributed and/or sold bags/cases for
16 toiletries that contain phthalates, including di(2-ethylhexyl)phthalate (“DEHP”), without the
17 requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause birth
18 defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Settlement Agreement are defined as follows:
21 bags/cases for toiletries containing DEHP including, but not limited to, *Airplus Spa Gift Bag*,
22 #0397787 (#0 96506 20052 5) manufactured, imported, distributed and/or sold by, or on behalf of,
23 Implus. All such bags/cases for toiletries containing DEHP are referred to hereinafter as the
24 “Products.”

25 **1.6 Notice of Violation**

26 On June 3, 2010, Held served Implus Footcare, LLC and various public enforcement
27 agencies, with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided
28

1 Implus and public enforcers with notice of alleged violations of California Health & Safety Code §
2 25249.6 for failing to warn consumers that the Products sold by Implus, exposed users in California
3 to DEHP. To the best of the parties' knowledge, no public enforcer has prosecuted the allegations
4 set forth in the Notice.

5 **1.7 Complaint**

6 On October 5, 2010, Held filed a complaint in the Superior Court in and for the County of
7 Marin against Implus Footcare, LLC, and Does 1 through 150, *Held v. Implus Footcare, LLC, et al.*,
8 Case No. CIV-1005294 (the "Action"), alleging violations of California Health & Safety Code
9 § 25249.6, based on the alleged exposures to DEHP contained in certain bags/cases for toiletries
10 sold by Implus.

11 **1.8 No Admission**

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

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Settlement Agreement only, the parties stipulate that this Court has
22 jurisdiction over Implus as to the allegations contained in the Complaint, that venue is proper in the
23 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
24 Settlement Agreement.

25 **1.10 Effective Date**

26 For purposes of this Settlement Agreement, the term "Effective Date" shall mean August 1,
27 2011.

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

2 **2.1 Reformulation Standards**

3 Reformulated Products are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) in each accessible component when analyzed
5 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
6 other methodology utilized by federal or state agencies for the purpose of determining DEHP
7 content in a solid substance.

8 **2.2 Product Warnings**

9 Commencing on the Effective Date, Implus shall, for all Products other than Reformulated
10 Products, provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b). The
11 parties hereby acknowledge and agree that Implus has already implemented a labeling program that
12 uses the following language:

13 **WARNING:** The vinyl bag containing this product contains
14 one or more substances known to the State of
15 California to cause birth defects or other
 reproductive harm.

16 Therefore, the parties agree that Implus need not re-label any Product containing such
17 warning as of the Effective Date. Implus shall, however, use the specific language provided in
18 Sections 2.2(a) and 2.2(b) below for all Products in Implus's possession not containing the above
19 warning on or before the Effective Date. In all cases each warning shall be prominently placed with
20 such conspicuousness as compared with other words, statements, designs, or devices as to render it
21 likely to be read and understood by an ordinary individual under customary conditions before
22 purchase or use. Each warning shall be provided in a manner such that the consumer or user
23 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
24 confusion.

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

26 **(i) Product Labeling.** Implus shall affix a warning to the packaging,
27 labeling, or directly on each Product shipped by Implus after the Effective Date for sale in retail
28 outlets in California by Implus or any person selling the Products, that states:

1 **WARNING:** This vinyl bag contains one or more chemicals,
2 including DEHP, known to the State of
3 California to cause birth defects or other
4 reproductive harm.

5 **(ii) Point-of-Sale Warnings.** Alternatively, Implus may provide
6 warning signs in the form below to its customers in California with instructions to post the
7 warnings in close proximity to the point of display of the Products. Such instruction sent to
8 Implus' customers shall be sent by certified mail, return receipt requested.

9 **WARNING:** This vinyl bag contains one or more chemicals,
10 including DEHP, known to the State of
11 California to cause birth defects or other
12 reproductive harm.

13 Where more than one Product is sold in proximity to other like items or to those that do not
14 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
15 shall be used:¹

16 **WARNING:** The following products contain one or more
17 chemicals, including DEHP, known to the State
18 of California to cause birth defects or other
19 reproductive harm:

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

21 **(b) Mail Order Catalog and Internet Sales.** In the event that Implus directly
22 sells Products via its own mail order catalog and/or its own internet site, to customers located in
23 California, after the Effective Date, that are not Reformulated Products, Implus shall provide
24 warnings for such Products sold in such a manner to California residents. Said warnings shall
25 identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i)
26 and (ii).

27 **(i) Mail Order Catalog Warning.** Any warning provided in Implus's
28 mail order catalog shall be in the same type size or larger than the Product description text within
the catalog. The following warning shall be provided on the same page and in the same location as
the display and/or description of the Product:

¹For 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.

1
2 **WARNING:** The vinyl bag containing this product contains
3 one or more chemicals, including DEHP, known
 to the State of California to cause birth defects
 or other reproductive harm.

4 Where it is impracticable to provide the warning on the same page and in the same location
5 as the display and/or description of the Product, Implus may utilize a designated symbol to cross
6 reference the applicable warning and shall define the term “designated symbol” with the following
7 language on the inside of the front cover of the catalog or on the same page as any order form for
8 the Product(s):

9 **WARNING:** Certain products identified with this symbol
10 ▼ and offered for sale in this catalog contain
 one or more chemicals, including DEHP,
11 known to the State of California to cause
 birth defects or other reproductive harm.

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

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

23 **WARNING:** The vinyl bag containing this product contains
24 one or more chemicals, including DEHP, known
 to the State of California to cause birth defects
25 or other reproductive harm.

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

1
2 **WARNING:** Products identified on this page with the
3 following symbol ▼ contain one or more
4 chemicals, including DEHP, known to the
 State of California to cause birth defects or
 other reproductive harm.

5 **3. PAYMENT OF CIVIL PENALTY**

6 Implus shall pay a civil penalty of \$10,000, to be apportioned in accordance with California
7 Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to the State of
8 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
9 25% of the penalty remitted to Anthony E. Held, Ph.D., P.E.. Implus shall issue two separate
10 checks for the penalty payment: (a) one check made payable to “The Chanler Group in Trust For
11 OEHHA” in an amount representing 75% of the total penalty; and (b) one check to “The Chanler
12 Group in Trust for Anthony E. Held, Ph.D., P.E.” in an amount representing 25% of the total
13 penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010,
14 Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Anthony E. Held, Ph.D., P.E., whose
15 information shall be provided five calendar days before the payment is due.

16 Payment shall be delivered to Held’s counsel on or before August 1, 2011, at the following
17 address:

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

20 **4. REIMBURSEMENT OF ATTORNEY’S FEES AND COSTS**

21 The parties reached an accord on the compensation due to Held and his counsel under
22 general contract principles and the private attorney general doctrine codified at California Code of
23 Civil Procedure (CCP) §1021.5. Implus shall reimburse Held and his counsel \$28,000 for fees and
24 costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a
25 settlement in the public interest. This figure includes Held’s current and future fees and costs
26 including attorney’s fees to be incurred in seeking judicial approval of this Settlement Agreement as
27 well as any other legal work performed after the execution of this Settlement Agreement incurred in
28 an effort to obtain finality of the case.

1 The check for reimbursement of fees and costs shall be made payable to “The Chanler
2 Group” and shall be delivered on or before August 1, 2011, to the following address:

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

8 A separate 1099 shall be issued to “The Chanler Group” (EIN: 94-3171522) for the amount
9 of the reimbursement of Plaintiff’s fees and costs.

10 **5. CLAIMS COVERED AND RELEASED**

11 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

12 This Settlement Agreement is a full, final and binding resolution between Plaintiff, on
13 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
14 assignees, and the public, and Defendant, of any violation of Proposition 65 that was or could have
15 been asserted by Plaintiff against Defendant, its parents, subsidiaries, affiliated entities that are
16 under common ownership, directors, officers, employees, attorneys, and each entity to whom
17 Defendant directly or indirectly distributes or sells Products, including but not limited to
18 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
19 licensors, and licensees (“Releasees”), based on their failure to warn about alleged exposures to
20 DEHP contained in the Products that were sold by Defendant.

21 **5.2 Plaintiff’s Public Release of Proposition 65 Claims**

22 In further consideration of the promises and agreements herein contained, Plaintiff on
23 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
24 assignees, and the public, hereby waives all rights to institute or participate in, directly or
25 indirectly, any form of legal action and releases all claims, including, without limitation, all
26 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
27 costs, fines, penalties, losses, or expenses -- including, but not limited to, investigation fees, expert
28 fees, and attorneys’ fees, -- limited to and arising under Proposition 65 with respect to DEHP in
the Products sold by Defendant (collectively “claims”), against Defendant and Releasees.

1 **5.3 Plaintiff's Individual Release of Claims**

2 Plaintiff also, in his individual capacity only and not in his representative capacity,
3 provides a release herein which shall be effective as a full, complete and final accord and
4 satisfaction, as a bar to any and all actions, causes of action, obligations, costs, expenses,
5 attorneys' fees, damages, losses, claims, liabilities and demands of plaintiff of any nature,
6 character or kind, whether known or unknown, suspected or unsuspected, limited to and arising
7 out of alleged violations of Proposition 65 relating to the Products.

8 **5.4 Defendant's Release of Plaintiff**

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

15 **5.5 Representation Regarding Additional Litigation**

16 Plaintiff hereby represents and warrants that as of the date of the execution of this
17 Settlement Agreement, to the best of his knowledge, he is unaware of any additional potential
18 litigation involving Defendant and Proposition 65.

19 **6. COURT APPROVAL**

20 This Settlement Agreement is not effective until it is approved and entered by the Court and
21 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
22 after it has been fully executed by all parties.

23 **7. SEVERABILITY**

24 If, subsequent to the execution of this Settlement Agreement, any of the provisions of this
25 Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable
26 provisions remaining shall not be adversely affected.
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1 **8. GOVERNING LAW**

2 The terms of this Settlement Agreement shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is repealed,
4 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
5 provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result
6 of any such repeal or preemption or rendered inapplicable by reason of law generally as to the
7 Products, then Implus shall immediately have no further obligations pursuant to this Settlement
8 Agreement with respect to, and to the extent that, the Products are so affected.

9 **9. NOTICES**

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

14 To Implus:

15 Donald W. Myers, Esq.
16 Two Liberty Place
17 50 South 16th Street, Suite 3200
18 Philadelphia, PA 19102-2555

14 To Held:

15 Proposition 65 Coordinator
16 The Chanler Group
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710-2565

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

21 This Settlement Agreement may be executed in counterparts and by facsimile or pdf
22 signature, each of which shall be deemed an original, and all of which, when taken together, shall
23 constitute one and the same document. A facsimile or pdf signature shall be as valid as the original.

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

25 Held and his attorneys agree to comply with the reporting form requirements referenced in
26 California Health & Safety Code § 25249.7(f).

1 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

2 Held and Implus agree to mutually employ their, and their counsel’s, best efforts to support
3 the entry of this agreement as a Settlement Agreement and obtain approval of the Settlement
4 Agreement by the Court in a timely manner. The parties acknowledge that, pursuant to California
5 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
6 Settlement Agreement, which Held shall draft and provide to Implus for approval at least five (5)
7 days prior to filing, which approval shall not be unreasonably withheld. If any third party objection
8 to the noticed motion is filed, Held and Implus shall work together to file a joint reply and appear at
9 any hearing before the Court. This provision is a material component of the Settlement Agreement
10 and shall be treated as such in the event of a breach. If the Superior Court does not approve the
11 motion to approve this Settlement Agreement, and if the parties choose not to pursue a modified
12 Settlement Agreement within 30 days after the Court’s denial of the motion to approve, or if a third
13 party successfully appeals the approval of the Settlement Agreement, all payments made pursuant to
14 this Settlement Agreement will be returned to counsel for Implus within ten (10) business days of
15 the Court’s denial or the third party’s successful appeal.

16 **13. MODIFICATION**

17 This Settlement Agreement may be modified only: (1) by written agreement of the parties
18 and upon entry of a modified Settlement Agreement by the Court thereon; or (2) upon a successful
19 motion of any party and entry of a modified Settlement Agreement by the Court.
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14. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective parties and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

AGREED TO:

APPROVED
By Tony Held at 8:02 am, Aug 04, 2011

Date: _____

Date: 7/29/11

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

By: [Signature]
Defendant, Implus Footcare, LLC