

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Anthony E. Held, Ph.D., P.E., Picked Fresh, LLC**

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Dr. Held”) and Picked Fresh, LLC (“Picked Fresh”), with Dr. Held and Picked Fresh collectively referred to as the “parties.” Dr. Held represents that he 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. Picked Fresh 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**

Dr. Held alleges that Picked Fresh manufactured, distributed, and/or sold in the State of California, jackets 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 jackets (a/k/a coats) containing DEHP manufactured, distributed, sold and/or offered for sale in the State of California by Picked Fresh including, but not limited to, *Apple Bottoms by Nelly Picked Fresh Daily Jacket, Style: AFO-9142Z*. All such items shall be referred to herein as the “Products.”

### **1.4 Notice of Violation**

On May 11, 2011, Dr. Held served Picked Fresh and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with notice that alleged that Picked Fresh 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 May 11, 2011, Notice.

**1.5 No Admission**

Picked Fresh denies the material, factual and legal allegations contained in Dr. Held's Notice and maintain that all products that it has sold and distributed 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 Picked Fresh 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 Picked Fresh 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 Picked Fresh under this Settlement Agreement.

**1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean August 10, 2011.

**2. INJUNCTIVE RELIEF: REFORMULATION**

**2.1 Reformulation Standards**

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

**2.2 Reformulation Commitment**

As of the Effective Date all Products manufactured, imported, distributed, sold or offered for sale in the State of California by Picked Fresh shall be Products that qualify as Reformulated Products as defined in section 2.1 above.

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

In settlement of all the claims referred to in this Settlement Agreement, Picked Fresh shall pay \$3,000 in civil penalties. This civil penalty reflects a credit of \$3,000 due to Picked Fresh's commitment to reformulate the Products pursuant to Section 2.2 above. Civil penalties are 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 Dr. Held. Picked Fresh 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 an amount of \$2,250, representing 75% of the total penalty and (b) one check to "The Chanler Group in Trust for Dr. Held" in an amount of \$750, 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 Dr. 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 August 10, 2011, to 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 Dr. 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. Picked Fresh 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 Dr. 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. Picked Fresh shall pay the amount of \$15,000 for fees and costs incurred as a result of investigating, bringing this matter to Picked Fresh' attention, and negotiating a settlement in the public interest. Picked Fresh shall make a payment on or before August 10, 2011, in the amount of \$7,500 and a second payment in the amount of \$7,500 on or before September 15, 2011. Picked Fresh shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the checks payable to "The Chanler Group" and shall deliver payment, to the following address:

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

5. **CLAIMS COVERED AND RELEASED**

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

This Settlement Agreement is a full, final and binding resolution between Dr. Held, on behalf of himself and the public, and Picked Fresh, of any violation of Proposition 65 that was or could have been asserted by Dr. Held against Picked Fresh, their parents, subsidiaries, affiliated entities that are under common ownership, including ICER Brands, LLC, directors, officers, employees, attorneys, licensors and licensees, and each entity to whom Picked Fresh directly or indirectly distributes or sells Products, including but not limited to downstream distributors, wholesalers, customers, retailers, franchisees, and cooperative members ("releasees"), based on their failure to warn about alleged exposures to DEHP contained in the Products that were sold by Picked Fresh.

5.2 **Dr. Held's Public Release of Proposition 65 Claims**

In further consideration of the promises and agreements herein contained, Dr. Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or

assignees, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, 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 DEHP in the Products sold by Picked Fresh (collectively "claims"), against Picked Fresh and releasees.

### **5.3 Dr. Held's Individual Release of Claims**

Dr. Held also, in his individual capacity only and *not* in his representative capacity, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Dr. Held of any nature, character or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the Products manufactured, distributed or sold by Picked Fresh.

### **5.4 Picked Fresh's Release of Dr. Held**

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

### **5.5 Post Execution Activities**

The parties intend and agree that this Settlement Agreement shall be given full effect for purposes of precluding claims regarding the Products against Picked Fresh or the releasees under Proposition 65 as covered under this release. If requested in writing by Picked Fresh (within twelve months of the Effective Date), Picked Fresh may ask Dr. Held to file a complaint and

seek approval of this Settlement Agreement through a court approved consent judgment incorporating the terms of this Settlement Agreement pursuant to California Health and Safety Code § 25249.7, or as may be otherwise allowed by law. If requested, Dr. Held agrees to reasonably cooperate with Picked Fresh and to use best efforts and that of his counsel to support the entry of a consent judgment incorporating the terms of this Settlement Agreement for approval by a superior court in California. Pursuant to CCP §§ 1021 and 1021.5, Picked Fresh will reimburse Dr. Held and his counsel for their reasonable fees and costs incurred in filing the complaint and seeking judicial approval of this Settlement Agreement in an amount not to exceed \$15,000.00. No fees under this paragraph will be due and owing to Dr. Held or his counsel unless a written request is made by Picked Fresh to have Dr. Held file a complaint and seek a consent judgment. Picked Fresh will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid by Picked Fresh within ten days after its receipt of monthly invoices from Dr. Held for work performed under this paragraph. In the event a third party were to appeal the entry of a Consent Judgment sought pursuant to this Section 5.5, Dr. Held and his counsel shall be entitled to seek their fees and costs associated with all such appealed work pursuant to CCP § 1021.5.

**6. 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.

**7. 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer require as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then

Picked Fresh shall provide written notice to Dr. 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 Picked Fresh from any obligation to comply with any pertinent state or federal toxics control law.

**8. 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 Icer Brands, LLC and Picked Fresh, LLC:

Lawrence Jemal, President  
Icer Brands, LLC, Picked Fresh, LLC  
1385 Broadway, Floor 16  
New York, NY 10018

For Dr. 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.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement 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.

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

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

11. **MODIFICATION**

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

12. **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:**

**APPROVED**  
By Tony Held at 11:21 pm, Sep 07, 2011

Date: \_\_\_\_\_

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

**AGREED TO:**

Date: \_\_\_\_\_ 8/18/11

By: Norman Jemal  
Norman Jemal  
Manager, Picked Fresh, LLC