

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 Anthony E. Held, Ph.D., P.E., Turn Up the Music Inc., and TUTM Entertainment, Inc.

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (hereinafter "Held"), Turn Up the Music, Inc., and TUTM Entertainment, Inc. (hereinafter "TUTM"), with Held and TUTM collectively referred to as the "Parties." Held is an individual residing in California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Turn Up the Music Inc. and TUTM Entertainment, Inc. each employ ten or more persons and are each a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.6 *et seq.* (hereinafter "Proposition 65").

#### 1.2 General Allegations

Held alleges that TUTM manufactured, distributed and/or sold in the State of California children's vinyl toys containing di(2-ethylhexyl) phthalate (hereinafter "DEHP") without the requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm. DEHP shall be referred to hereinafter as the "Listed Chemical."

#### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as follows: children's vinyl toys containing DEHP, including, but not limited to the *Party Games & Music Pass the "Hot" Pumpkin* (#7 90617 70246 5). All such items shall be referred to herein as the "Covered Products".

#### 1.4 Notice of Violation

On November 7, 2008, Held served TUTM and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (hereinafter "Notice")

that provided TUTM and such public enforcers with notice that alleged that TUTM was in violation of Proposition 65 for failing to warn consumers and customers that the Covered Products exposed users in California to the Listed Chemical.

**1.5 No Admission**

TUTM denies the material, factual and legal allegations contained in Held's Notice and maintain that all products it has manufactured, sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by TUTM 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 TUTM of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by TUTM. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of TUTM under this Settlement Agreement.

**1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean January 1, 2009.

**2. INJUNCTIVE RELIEF: REFORMULATION**

As of the Effective Date, TUTM shall only sell and/or distribute Covered Products in California that are Phthalate Free, as set forth below. For purposes of this Settlement Agreement "Phthalate Free" Products shall mean Products containing less than or equal to 1,000 parts per million ("ppm"), which equates to 0.1%, of the Listed Chemical, when analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C. TUTM acknowledges that as a result of Plaintiff's Notice, TUTM has taken steps to ensure compliance with the standard set forth above.

### **3. MONETARY PAYMENTS**

In settlement of all claims referred to in this Settlement Agreement, TUTM shall pay \$1,500 in civil penalties to be apportioned in accordance with California Health & Safety Code §25192, 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 Anthony Held as provided by California Health & Safety Code §25249.12(d). TUTM shall issue two separate checks for the penalty payment: (a) one check made payable to "Hirst & Chanler LLP in Trust For OEHHA" in the amount of \$1,125 representing 75% of the total penalty; and (b) one check to "Hirst & Chanler LLP in Trust for Anthony Held" in the amount of \$375 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) Anthony Held, whose information shall be provided prior to payment. Held will cause a W-9 Form with respect to himself to be provided to TUTM or TUTM's counsel prior to payment.

Payment shall be delivered to Dr. Held's counsel on or before May 10, 2009, at the following address:

Hirst & Chanler LLP  
Attn: Proposition 65 Controller  
2560 Ninth Street, 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. TUTM 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. TUTM shall reimburse Held and his counsel the total of \$18,500 for fees and costs incurred as a result of investigating, bringing this matter to TUTM's attention and negotiating a settlement in the public interest. Hirst & Chanler LLP will cause a completed W-9 Form with respect to itself to be provided to TUTM or TUTM's counsel prior to payment. TUTM shall issue a 1099 to Hirst & Chanler LLP for the above fees and costs. The payment shall be made payable to "Hirst & Chanler LLP" and shall be delivered in two installments of \$9,250 each with the first installment due on or before May 10, 2009, and the second installment due on or before June 10, 2009. Each installment shall be sent to the following address:

Hirst & Chanler LLP  
Attn: Proposition 65 Controller  
2560 Ninth Street, Suite 214  
Berkeley, CA 94710

## **5. RELEASE OF ALL CLAIMS**

### **5.1 Release of TUTM and Downstream Customers**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4, Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and on behalf of the general public to the extent allowed by law, 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) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"), against TUTM and each of their downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (specifically including but not limited to, Wishing Well Enterprises, Inc.), franchisees, dealers, customers, owners, purchasers,

users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees, and sister and parent entities (collectively "Releasees"). This release is limited to those claims that arise under Proposition 65, as such claims relate to TUTM's alleged failure to warn about exposures to or identification of the Listed Chemical contained in the Covered Products.

Dr. Held also, in his individual capacity only and *not* in his representative capacity, provides a general 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, known or unknown, suspected or unsuspected, arising out of the subject matter of the Notice. Dr. Held acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Dr. Held, in his individual capacity only and *not* in his representative capacity, expressly waives and relinquishes any and all rights and benefits which he may have under, or which may be conferred on him by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

The Parties further understand and agree that this release shall not extend upstream to any entities that manufactured the Covered Products or any component parts

thereof, or any distributors or suppliers who sold the Covered Products or any component parts thereof to TUTM.

## **5.2 TUTM's Release of Held**

TUTM waives any and all claims against 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 Held and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect to the Covered Products.

## **6. SEVERABILITY**

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

## **7. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any Party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

## **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 Covered Products, then TUTM 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 Covered Products are so affected.

**9. NOTICES**

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

To TUTM:

James Robert Maxwell, Esq.  
Rogers Joseph O'Donnell  
311 California Street  
Suite 1000  
San Francisco, CA 94104

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 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.

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

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

**12. MODIFICATION**

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

**13. 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:**

Date: 05/01/09

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

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

By: \_\_\_\_\_  
TURN UP THE MUSIC INC.;  
TUTM ENTERTAINMENT, INC.

**APPROVED AS TO FORM:**

**APPROVED AS TO FORM:**

Date: 5/1/09  
HIRST & CHANLER LLP

Date: \_\_\_\_\_  
ROGERS JOSEPH O'DONNELL

By: *CM*  
Christopher M. Martin  
Attorneys for  
ANTHONY E. HELD, Ph.D., P.E.

By: \_\_\_\_\_  
James Robert Maxwell  
Attorneys for  
TURN UP THE MUSIC INC.;  
TUTM ENTERTAINMENT, INC.



**13. 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:**

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

By: \_\_\_\_\_  
ANTHONY E. HELD, Ph.D., P.E.

**AGREED TO:**

Date: 4.30.09

By:   
TURN UP THE MUSIC INC.;  
TUTM ENTERTAINMENT, INC.


**APPROVED AS TO FORM:**

Date: \_\_\_\_\_  
HIRST & CHANLER LLP

By: \_\_\_\_\_  
Christopher M. Martin  
Attorneys for  
ANTHONY E. HELD, Ph.D., P.E.

**APPROVED AS TO FORM:**

Date: 4/30/09  
ROGERS JOSEPH O'DONNELL

By:   
James Robert Maxwell  
Attorneys for  
TURN UP THE MUSIC INC.;  
TUTM ENTERTAINMENT, INC.