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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF MARIN
12 UNLIMITED CIVIL JURISDICTION
13

14 ANTHONY E. HELD, PH.D., P.E.,

15 Plaintiff,

16 v.

17 ICON HEALTH & FITNESS, INC.; *et al.*

18 Defendants.
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Case No. CIV1600574

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D., P.E.
4 (“Held”) and ICON Health & Fitness, Inc. (“ICON”), with Held and ICON each individually referred
5 to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Held alleges that ICON manufactures, imports, sells, and/or distributes for sale in California
16 vinyl/PVC exercise mats containing diisononyl phthalate (“DINP”) and/or di(2-ethylhexyl)phthalate
17 (“DEHP”). DINP is listed by Proposition 65 as a chemical known to cause cancer, and DEHP is
18 listed by Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Held
19 alleges ICON failed to provide the health hazard warning required by Proposition 65 for exposures to
20 DINP and DEHP from its vinyl/PVC exercise mats.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC exercise mats containing
23 DINP and/or DEHP that are manufactured, imported, sold or distributed for sale in the State of
24 California by ICON, including, but not limited to, the exercise mat components of the *NordicTrack*
25 *iFit Sport Performance Kit, #14871, NTTLSPK08, UPC #0 74345 80753 2*, and the *NordicTrack iFit*
26 *Weight Loss Kit, #14870, NTTLWLK08, UPC #0 74345 80159 2*. All such vinyl/PVC exercise mats
27 containing DINP and/or DEHP are referred to, collectively, hereinafter as the “Products.”
28

1 **1.6 Notices of Violation**

2 On April 24, 2015, Held served ICON, the California Attorney General, and other requisite
3 public enforcers with a “60-Day Notice of Violation” (“Notice”), alleging that ICON violated
4 Proposition 65 when it failed to warn its customers and consumers in California that its Products
5 expose users to DINP.

6 On September 15, 2015, Held served ICON, the California Attorney General, and other
7 requisite public enforcers with a Supplemental 60-Day Notice of Violation (“Supplemental Notice”),
8 alleging ICON violated Proposition 65 when it failed to warn its customers and consumers in
9 California that its Products expose users to DEHP.

10 The Notice and the Supplemental Notice are referred to collectively, hereinafter, as the
11 “Notices.” No public enforcer has commenced and is diligently prosecuting an action to enforce the
12 violations that are the subject of the Notices.

13 **1.7 Complaint**

14 On January 22, 2016, Held filed the instant action (“Complaint”), naming ICON as a
15 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
16 Notices.

17 **1.8 No Admission**

18 ICON denies the material, factual, and legal allegations contained in the Notices and
19 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
20 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
21 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
22 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
23 admission by ICON of any fact, finding, conclusion of law, issue of law, or violation of law. This
24 Section shall not, however, diminish or otherwise affect ICON’s obligations, responsibilities, and
25 duties under this Consent Judgment.

26 **1.9 Jurisdiction**

27 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28 jurisdiction over ICON as to the allegations in the Complaint, that venue is proper in the County of

1 Marin, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
2 Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” means the date upon which
5 the motion for approval of this Consent Judgment is granted by the Court.

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

7 **2.1 Reformulation Commitment**

8 As of the Effective Date, and continuing thereafter, ICON agrees to only manufacture for sale
9 or purchase for sale in California “Reformulated Products,” as defined by Section 2.2 below, or those
10 Products that carry Proposition 65 warnings in accord with Section 2.3, below.

11 **2.2 Reformulated Products**

12 For purposes of this Consent Judgment, Reformulated Products are defined as Products
13 containing no more than 1,000 parts per million (0.1%) each of either DINP or DEHP, when analyzed
14 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other
15 equivalent methodologies utilized by state and federal agencies for the purpose of determining DINP
16 or DEHP content in a solid substance.

17 **2.3 Clear and Reasonable Warnings**

18 Commencing on the Effective Date and continuing thereafter, for all Products sold or
19 distributed for sale in California by ICON that do not qualify as Reformulated Products, as defined by
20 Section 2.2, ICON agrees that it will only sell or distribute for sale in California Products bearing a
21 clear and reasonable warning in compliance with this Section.

22 **2.3.1 General Warning Requirements**

23 For purposes of this Consent Judgment, a clear and reasonable warning shall be
24 prominently placed with such conspicuousness when compared with other words, statements,
25 designs, or devices as to render it likely to be read and understood by an ordinary individual under
26 customary conditions before purchase or use. Each warning shall be provided in a manner such that
27 the consumer or user understands to which specific Product the warning applies, so as to minimize
28 the risk of consumer confusion.

1 **2.3.2 Retail Product Warnings**

2 In the event that ICON sells Products at retail to consumers in California, ICON shall
3 affix a warning directly to the Product or its accompanying labeling or packaging containing
4 one of the following statements:

5 **(a)** For Products containing DEHP

6 **WARNING:** This product contains a chemical
7 known to the State of California to
8 cause birth defects or other
 reproductive harm.

9 **WARNING:** This product contains a chemical
10 known to the State of California to
11 cause cancer and birth defects or
 other reproductive harm.

12 **(b)** For Products containing DINP:

13 **WARNING:** This product contains a chemical
14 known to the State of California to
 cause cancer.

15 **(c)** For Products that contain (i) DEHP *and* DINP, **or** (ii) DEHP or
16 DINP *and* another Proposition 65-listed chemical:

17 **WARNING:** This product contains chemicals
18 known to the State of California to
19 cause cancer and birth defects and
 other reproductive harm.

20 **2.3.3 Mail Order Catalog and Internet Warnings**

21 In the event that ICON sells Products via mail order catalog and/or the internet, to customers
22 located in California, the warning requirements of this Section shall be satisfied if one of the
23 foregoing warnings, as described in Section 2.3.2 and appearing in the same type size or larger than
24 the Product description text, appears either: (a) on the same catalog page or web page on which the
25 Product is displayed and/or described; (b) on the same catalog page or web page as the price for the
26 Product; or (c) on one or more web pages displayed to a customer or consumer prior to purchase
27 during the checkout process.

28 Alternately, a designated symbol, consisting of a black exclamation point in a yellow or white
equilateral triangle, may appear adjacent to, or immediately following, the display, description, price

1 or checkout listing of the Product, provided the warning statement appears elsewhere on the same
2 catalog or web page, in close proximity to the display and/or description, and in a manner that clearly
3 associates it with the Product(s) to which the warning applies.

4 **2.4 Grace Period for Existing Inventory of Products**

5 ICON represents that, prior to entering this Settlement Agreement, it implemented a health
6 hazard warning for the Products, which includes the following language: “Warning: This product
7 contains one or more chemicals known to the State of California to cause cancer, birth defects and
8 other reproductive harm.” Held agrees that ICON may continue using this warning, until it exhausts
9 its current supply of Products and/or packaging or labeling bearing the warning.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Civil Penalty Payments**

12 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims referred
13 to in the Notices, Complaint, and this Consent Judgment, ICON shall pay civil penalties in accordance
14 with this Section. Each civil penalty payment shall be allocated according to Health and Safety Code
15 § 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
16 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
17 (25%) of the penalty remitted to Held. Held’s counsel shall be responsible for delivering OEHHA’s
18 portion of any penalty payment(s) made under this Consent Judgment.

19 **3.1.1 Initial Civil Penalty**

20 Within thirty days of the mutual execution of this Consent Judgment, ICON shall issue a
21 check for its initial civil penalty payment in the amount of \$3,000 to “Yoka & Smith, LLP” to be held
22 in trust. Yoka & Smith, LLP shall provide The Chanler Group with written confirmation, within five
23 days of receipt, that the funds have been deposited in a trust account. Held’s counsel agrees to provide
24 written notice to ICON’s counsel via email and/or facsimile when the motion to approve this Consent
25 Judgment is granted by the Court. Within two business days after Held’s counsel sends such notice of
26 approval, or within five days of the Effective Date, whichever date is later, ICON’s counsel shall
27 deliver payment of the initial civil penalty, to the address listed in Section 3.3, in the form of two
28 checks, made payable to “Anthony E. Held, Client Trust Account” in the amount of \$750 and

1 “OEHHA” in the amount of \$2,250. Held’s counsel further agrees to provide ICON’s counsel with
2 IRS W9 forms for Held, his counsel and OEHHA to enable ICON to process the penalty payments due
3 under this Consent Judgment. The Parties agree that payments under this Agreement will not become
4 due until such an IRS W9 forms are provided to ICON by Held and his counsel.

5 **3.1.2 Final Civil Penalty**

6 On May 30, 2017, ICON shall pay a final civil penalty of \$9,000. The final civil penalty shall
7 be waived in its entirety, however, if, no later than May 15, 2017, an officer of ICON provides Held
8 with signed declaration certifying that, as of the date of the declaration and continuing into the future,
9 all Products manufactured, imported, distributed, sold and offered for sale in California by, or on
10 behalf of, ICON are Reformulated Products. Alternately, ICON may certify that it is not presently
11 offering Products for sale in California, but, if it recommences sales in the future, it will only sell
12 Reformulated Products. The option to provide a declaration under this Section in lieu of making the
13 final civil penalty payment is a material term, and time is of the essence. In the event the final civil
14 penalty is not waived, ICON shall issue two separate checks for its final civil penalty payments to: (a)
15 Anthony E. Held, Client Trust Account” in the amount of \$2,250; and (b) “OEHHA” in the amount of
16 \$6,750.

17 **3.2 Reimbursement of Attorney’s Fees and Costs**

18 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
19 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
20 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
21 other settlement terms had been finalized, the Parties negotiated the compensation due to Held and
22 his counsel under general contract principles and the private attorney general doctrine codified at
23 California Code of Civil Procedure § 1021.5 for all work performed through the mutual execution of
24 this Consent Judgment, and through court approval of the same. ICON shall, within thirty days of the
25 mutual execution of this Consent Judgment by the Parties, issue a check payable to “Yoka & Smith,
26 LLP” in the amount of \$39,000 to be held in trust by Yoka & Smith, LLP for The Chanler Group for
27 fees and costs incurred as a result of investigating, bringing this matter to ICON’s attention, and
28 negotiating a settlement in the public interest. This figure includes Held’s future costs and attorney’s

1 fees to be incurred in seeking judicial approval of this Consent Judgment. Yoka & Smith, LLP shall
2 provide The Chanler Group with written confirmation within five days of receipt that the funds have
3 been deposited in a trust account. Per the terms of Section 3.1.1, above, within two business days of
4 the date that Held provides ICON with notice that this Consent Judgment is approved by the Court or
5 within five days of the Effective Date, whichever is later, ICON's counsel shall deliver the fee
6 reimbursement payment required by this Section to Held's counsel in a single check payable to "The
7 Chanler Group."

8 **3.3 Payment Timing; Payments Held in Trust**

9 All payments due under this Consent Judgment shall be tendered when due and held in trust
10 by ICON's counsel, until such time as the Court approves the Parties' settlement. Except the final
11 civil penalty payment, if any, required by Section 3.1.2, all payments shall be delivered within thirty
12 (30) days of the date this Consent Judgment is fully executed by the Parties and held in trust by
13 ICON's counsel, until the Court grants the motion for approval of this Consent Judgment
14 contemplated by Section 5. ICON's counsel shall provide Held's counsel with written confirmation
15 of its receipt of ICON's penalty payment(s). Within five days of the Court's approval of this
16 Consent Judgment, or within two business days of the date Held's counsel provides ICON's counsel
17 with written notice of the Court's approval of this Consent Judgment, whichever is later, ICON's
18 counsel shall deliver the initial civil penalty and attorneys' fee reimbursement payments to Held's
19 counsel at the address in Section 3.4. In the event the final civil penalty payment, required by
20 subsection 3.1.2, has not been waived and becomes due prior to the Effective Date, the penalty
21 payment shall be tendered to ICON's counsel when due, held in trust until, and disbursed within five
22 days after the Effective Date.

23 **3.4 Payment Address**

24 All payments under this Consent Judgment shall be delivered to:

25
26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Held's Public Release of Proposition 65 Claims**

3 Held, acting on his own behalf and in the public interest, pursuant to Health & Safety Code §
4 25249.7(d), and on behalf of his past and current agents, representatives, attorneys, successors, and
5 assignees hereby releases ICON and its parents, subsidiaries, affiliated entities under common
6 ownership, directors, officers, employees, and attorneys ("Releasees") and each entity to whom
7 ICON directly or indirectly distributes or sells the Products including, but not limited to, its
8 downstream distributors, wholesalers, customers, retailers (including but not limited to, Tuesday
9 Morning Corporation and Tuesday Morning, Inc.), franchisers, cooperative members, licensors and
10 licensees and each of their respective directors, officers, agents employees, attorneys, predecessors,
11 successors, and assigns ("Downstream Releasees") for any violations arising under Proposition 65 for
12 unwarned exposures to DINP and/or DEHP from the Products sold or distributed for sale by ICON
13 prior to the Effective Date, as set forth in the Notices. Compliance with the terms of this Consent
14 Judgment constitutes compliance with Proposition 65 with respect to alleged or actual failure to warn
15 about exposures to DINP and/or DEHP from the Products after the Effective Date.

16 In addition, Held, acting on his own behalf and in the public interest pursuant to Health &
17 Safety Code § 25249.7(d), and his past and current agents, representatives, attorneys, successors, and
18 assignees hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
19 action against ICON, Releasees, and Downstream Releasees for any violations arising under
20 Proposition 65 for unwarned exposures to DINP and/or DEHP from the Products sold by ICON prior
21 to the Effective Date, as set forth in the Notices.

22 **4.2 Held's Individual Release of Claims**

23 Held, in his individual capacity only and *not* in his representative capacity, on his own behalf,
24 and on behalf of his past and current agents, representatives, attorneys, successors, and assignees also
25 provides a release to ICON, Releasees, and Downstream Releasees which shall be effective as a full
26 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
27 attorneys' fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
28 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual

1 exposures to DINP and/or DEHP in Products sold or distributed for sale by ICON before the
2 Effective Date.

3 **4.3 ICON's Release of Held**

4 ICON, on its own behalf, and on behalf of its past and current agents, representatives,
5 attorneys, successors, and assignees, hereby waives any and all claims against Held and his
6 attorneys and other representatives, for any and all actions taken or statements made by Held and
7 his attorneys and other representatives, whether in the course of investigating claims, otherwise
8 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

9 **4.4 Mutual Waiver of California Civil Code § 1542**

10 The Parties each acknowledge he/it is familiar with §1542 of the Civil Code, which
11 provides as follows:

12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
13 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
14 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
15 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
16 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

17 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
18 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and
19 all rights and benefits which they may have under, or which may be conferred upon them by the
20 provisions of Civil Code §1542, as well as under any other state or federal statute or common law
21 principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
22 pertaining to the released matters, as specifically defined by Sections 4.2 and 4.3, above.

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the Court and shall
25 be null and void if it is not approved and entered by the Court within one year after it has been fully
26 executed by the Parties.

27 **6. SEVERABILITY**

28 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
adversely affected.

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of California and
3 apply within the State of California. In the event that Proposition 65 is repealed, preempted or is
4 otherwise rendered inapplicable by reason of law generally, or as to the Products, then ICON may
5 provide written notice to Held of any asserted change in the law and shall have no further obligations
6 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

7 **8. NOTICE**

8 Unless specified herein, all correspondence and notice required by this Consent Judgment
9 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
10 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

11 For ICON:

12 Everett Smith, Esq.
13 Secretary and General Counsel
14 ICON Health & Fitness, Inc.
15 1500 South 1000 West
16 Logan, UT 84321

17 with a copy to ICON's counsel:

18 Aaron Case, Esq.
19 Yoka & Smith LLP
20 335 South Figueroa Street, 38th Floor
21 Los Angeles, CA 90071

22 For Held:

23 Proposition 65 Coordinator
24 The Chanler Group
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710-2565

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

 This Consent Judgment 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. A facsimile or pdf signature shall be as valid as the original.

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10. POST EXECUTION ACTIVITIES

Held agrees to comply with the reporting form requirements referenced in Health and Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code § 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion, responding to any opposition or objection any third-party may raise, and appearing at the hearing before the Court if an opposition or objection is filed in response to Held’s motion for judicial approval of this Consent Judgment.

11. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any Party, and the entry of a modified consent judgment thereon by the Court.

12. AUTHORIZATION

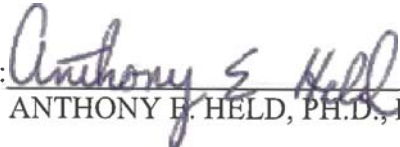
The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: 5/3/2017

Date: 2 May 2017

By: 
ANTHONY E. HELD, PH.D., P.E.

By: 
Everett Smith, Secretary and General Counsel
ICON HEALTH& FITNESS, INC.