

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Anthony E. Held, Ph.D., P.E. and ICUP, Inc.**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”) and ICUP, Inc. (“ICUP”) with Held and ICUP collectively referred to as the “Parties.” Held is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. ICUP employs ten or more persons and is 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 §§ 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

Held alleges that ICUP has manufactured, imported, distributed and/or sold in the State of California drinking cups with vinyl/PVC sleeves containing Di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as drinking cups with vinyl/PVC sleeves containing DEHP including, but not limited to, *Drinking Cup “Star Wars Darth Vader,”* #200022720, #12115220, UPC #6 74449 08648 4 which are manufactured, imported, stored, distributed, shipped, sold and/or offered for sale by ICUP in the State of California, collectively hereinafter the “Products.”

### **1.4 Notice of Violation**

On April 30, 2014, Held served ICUP, Target Corporation (“Target”) and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice that ICUP and Target were alleged to be in violation of

California Health & Safety Code § 25249.6 for failing to warn consumers that the Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

ICUP denies the material, factual and legal allegations contained in Held's Notice and maintains that all products it is alleged to have manufactured, imported, stored, distributed, shipped, 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 ICUP of any allegation, fact, finding, conclusion, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by ICUP of any allegation, 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 Held and ICUP under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean July 16, 2015.

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

### **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) 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 the DEHP content in a solid substance.

### **2.2 Reformulation Commitment**

Within thirty (30) days of the Effective Date, ICUP shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are

Reformulated Products pursuant to Section 2.1 above, or shall carry the Proposition 65 warnings specified in Section 2.3 below.

### **2.3 Product Warnings**

Within thirty (30) days of the Effective Date, ICUP shall provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) for all Products that do not qualify as Reformulated Products. 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.** ICUP shall affix a warning to the packaging, labeling, or directly on each Product, that does not qualify as Reformulated Products, provided for sale in retail outlets in California that states:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause cancer and birth defects and other reproductive harm.

**(ii) Point-of-Sale Warnings.** Alternatively, ICUP may provide warning signs 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 that do not qualify as Reformulated Products. Such instruction sent to ICUP's customers shall be sent by certified mail, return receipt requested.

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause cancer and 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 shall be used:<sup>1</sup>

WARNING: The following products contain DEHP, a phthalate chemical, known to the State of California to cause cancer and birth defects and other reproductive harm.

**(b) Mail Order Catalog and Internet Sales.** In the event that ICUP sell Products via mail order catalog and/or the internet, to customers located in California, thirty (30) or more days after the Effective Date, that are not Reformulated Products, ICUP shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail 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 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 DEHP, a phthalate chemical known to the State of California to cause cancer and 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, ICUP may utilize a designated symbol to cross reference the applicable warning 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):

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<sup>1</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.

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain DEHP, a phthalate chemical known to the State of California to cause cancer and 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, ICUP 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 of a Product during the checkout process. The following warning statement 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 DEHP, a phthalate chemical known to the State of California to cause cancer and 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 also appears elsewhere on the same web page, as follows:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause cancer and birth defects and other reproductive harm.

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

In settlement of all the claims referred to in this Settlement Agreement, ICUP shall pay a total of \$13,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment

("OEHHA") by Held. All penalty payments shall be delivered to the address listed in Section 3.3 below.

**3.1 Initial Civil Penalty**

ICUP shall pay an initial civil penalty in the amount of \$4,000 on or before July 16, 2015. ICUP shall issue the check payable to "Anthony E. Held, Client Trust Account."

**3.2 Final Civil Penalty**

ICUP shall pay a final civil penalty of \$9,000 by issuing a check in the amount of \$9,000 payable to "Anthony E. Held, Client Trust Account" on or before December 15, 2015. The final civil penalty shall be waived in its entirety, however, if, no later than December 1, 2015, an officer of ICUP provides Held with written certification that, as of the date of such certification and continuing into the future, ICUP has met the reformulation standard specified in Section 2.1 above, such that all Products manufactured, imported, distributed, sold and offered for sale in California by ICUP after thirty (30) days from the Effective Date are Reformulated Products. Held must receive any such certification on or before December 1, 2015. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence.

**3.3 Payment Procedures**

All payments owed and payable to Held, pursuant to Sections 3.1 through 3.2, shall be delivered to the following payment address:

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

**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 Settlement Agreement had been settled. Held 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 § 1021.5, for all work performed through the mutual execution of this Settlement Agreement. ICUP shall pay \$25,500 to The Chanler Group for fees and costs incurred as a result of investigating, bringing this matter to ICUP's attention, and negotiating a settlement in the public interest. ICUP shall provide a check in the amount of \$25,500 payable to "The Chanler Group" and shall deliver the check for the payment to The Chanler Group on or before July 16, 2015, to the address listed in Section 3.3 above.

## **5. ISSUANCE OF 1099 FORMS**

After the settlement funds required by Sections 3.1 and 4 have been transmitted to The Chanler Group at the address provided at Section 3.3 of this Settlement Agreement, ICUP will issue three separate 1099 forms, as follows:

5.1 The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, PO Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$3,000;

5.2 The second 1099 shall be issued to Held in the amount of \$1,000; Held's address and tax identification number shall be furnished upon request;

5.3 The third 1099 shall be issued to the Chanler Group (EIN: 94-3171522) in the amount of \$25,500; and,

5.4 A fourth 1099 shall be issued to the Office of Environmental Health Hazard Assessment in the amount of \$6,750 and a fifth 1099 shall be issued to Held in the amount of \$2,250 at the address indicated in sub-sections 5.1 and 5.2, respectively, in the event the Final Civil Penalty is not waived pursuant to Section 3.2 of this Settlement Agreement.

## **6. CLAIMS COVERED AND RELEASED**

### **6.1 Held's Release of Proposition 65 Claims**

Held acting on his own behalf, and *not* on behalf of the public, releases ICUP, its parents, subsidiaries, affiliated entities under common ownership, owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, predecessors, successors,

assignees, and each entity to whom ICUP directly or indirectly distributes, ships, or sells Products, including, but not limited to, downstream distributors, wholesalers, customers, retailers including Target, franchisees, cooperative members, and licensees and their owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, predecessors, successors, and assigns (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to DEHP in the Products, as set forth in the Notice. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products, as set forth in the Notice. The Parties further understand and agree that this Section 6.1 release shall not extend to any entities, upstream from ICUP, that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof, all prior to ICUP's receipt of those particular Products in the chain of commerce.

## **6.2 Held's Individual Releases of Claims**

Held, 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 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, imported, distributed, shipped, stored, sold or offered for sale by ICUP in California prior to the Effective Date. The Parties further understand and agree that this Section 6.2 release shall not extend to any entities upstream from ICUP that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof, all prior to ICUP's receipt of those particular Products in the chain of commerce. Nothing in this Section affects Held's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve the Products.



**6.3 ICUP's Release of Held**

ICUP, on behalf of itself, its past and current agents, representatives, attorneys, successors, and 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 or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**6.4 Waiver of Civil Code Section 1542**

Held, in his individual capacity only and *not* in his representative capacity, and ICUP, having the specific intent to release all claims and potential claims described in Sections 6.1, 6.2 and 6.3 herein, hereby acknowledge and expressly waive the provisions of §1542 of the California Civil Code, which provides:

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

Notwithstanding the provisions of §1542 of the California Civil Code, Held, in his individual capacity only and *not* in his representative capacity, and ICUP, intend to release all claims described in Sections 6.1, 6.2 and 6.3 of this Agreement, known or unknown, and asserted or not asserted as of the Effective Date.

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

**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 ICUP:

Robert J. Parks, Esq.  
Buchanan, Ingersoll & Rooney LLP  
One America Plaza  
600 West Broadway, Suite 1100  
San Diego, CA 92101-3387

For Held:

The Chanler Group  
Attn: Proposition 65 Coordinator  
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 AND 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.

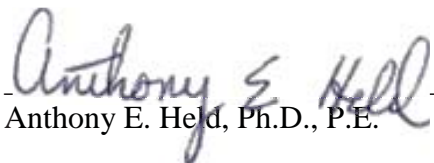
**13. AUTHORIZATION**

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 BY HELD:**

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

Date: 7/14/15

  
\_\_\_\_\_  
Anthony E. Held, Ph.D., P.E.

**AGREED TO BY ICUP:**

ICUP, Inc.

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

By: \_\_\_\_\_  
Steven Trachtenberg, President  
ICUP, Inc.

**10. COUNTERPARTS; FACSIMILE AND 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 BY HELD:**

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

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

\_\_\_\_\_  
Anthony E. Held, Ph.D., P.E.

**AGREED TO BY ICUP:**

ICUP, Inc.

Date: 7/4/15 \_\_\_\_\_

By:  \_\_\_\_\_  
Steven Trachtenberg, President  
ICUP, Inc.