

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 Parties

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”) and Merkury Innovations LLC (“Merkury”), with Held and Merkury each individually referred to as a “Party” and collectively as the “Parties.” Held is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Merkury 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 § 25249.6 *et seq.* (“Proposition 65”).

#### 1.2 General Allegations

Held alleges that Merkury manufactures, sells, and/or distributes for sale in California, earphone cords that contain the toxic chemical di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Held alleges that Merkury failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from earphone cords. Merkury denies Held’s claims and denies that Proposition 65 warnings are required for the Products (as defined in Section 1.3 below).

#### 1.3 Product Description

The products that are covered by this Settlement Agreement are earphone cords containing DEHP, including, but not limited to, the *Merkury Innovations Active Buds, MI-ES100-652, UPC #8 44702 02021 4* that are/were manufactured, sold and/or distributed for sale in California by Merkury (collectively, “Products”).

#### **1.4 Notice of Violation**

On or about June 20, 2014, Held served Merkury and the requisite public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice of alleged violations of Proposition 65 by Merkury for failing to warn its customers and consumers in California that the Products it sold expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

#### **1.5 No Admission**

Merkury denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has manufactured, sold and/or 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 Merkury of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Merkury of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Merkury. However, this Section shall not diminish or otherwise affect Merkury’s obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean February 19, 2015, or the date on which it is fully executed by both Parties, whichever date is earlier.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

### **2.1 Reformulation**

After the Effective Date, Merkury shall only manufacture Products for sale or distribution in California if they either (1) comply with the warning requirements of Section 2.2, or (2) are Reformulated Products. For purposes of this Settlement

Agreement, “Reformulated Products” are Products that contain no more than 1,000 ppm (0.1%) DEHP content in any Accessible Component when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C, or equivalent methodologies used by state or federal agencies for purposes of determining DEHP content in a solid substance. For purposes of this Settlement Agreement, an Accessible Component refers to a component of a Product that could be touched by a person during normal and reasonably foreseeable use.

## **2.2 Product Warnings**

For products requiring a warning under Section 2.1, 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. Merkury shall affix or print a warning upon the packaging or labeling of any Products, or directly on the Product(s). Merkury shall utilize one of the following two warning options:

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

or

**WARNING:** This product contains chemicals known to the State of California to cause [cancer and<sup>1</sup>] birth defects or other reproductive harm.

---

<sup>1</sup> While Held has only alleged Merkury failed to warn about exposures to DEHP requiring a warning due to the risk of reproductive harm, the bracketed “cancer and” may be incorporated into the warning statement for Products that Merkury knows to cause, or that are substantially likely to cause, an exposure to a Proposition 65-listed carcinogen.

### **3. MONETARY SETTLEMENT TERMS**

#### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Merkury agrees to pay \$16,400 in civil penalties. Each penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Held, as follows.

**3.1.1 Civil Penalty.** Within five business days of the Effective Date, Merkury shall pay a civil penalty in the amount of \$16,400. Merkury will provide its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$12,300; and (b) “The Chanler Group in Trust for Anthony E. Held, Ph.D., P.E.” in the amount of \$4,100.

#### **3.2 Reimbursement of Held’s Attorneys’ Fees and Costs**

The Parties reached an accord on the compensation due to Held and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within five business days of the Effective Date, Merkury agrees to pay \$27,000 to Held and his counsel for all fees and costs incurred investigating, bringing this matter to the attention of Merkury’s management, and negotiating a settlement in the public interest.

### 3.3 Payment Procedures

#### 3.3.1 Payment Addresses. Payments shall be delivered as follows:

(a) All payments and tax documentation required for Held and his counsel under this Settlement Agreement shall be delivered to:

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

(b) All payments and tax forms required for OEHHA under this Settlement Agreement shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of the following addresses as appropriate:

##### For United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

##### For Courier or Other Non-U.S. Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

**3.3.2 Proof of Payment to OEHHA.** Merkury agrees to provide Held with a copy of the penalty check sent to OEHHA, enclosed with Merkury's penalty payment to Held, and delivered to the address provided in Section 3.3.1(a).

#### **4. CLAIMS COVERED AND RELEASED**

##### **4.1 Held's Release of Merkury**

This Settlement Agreement is a full, final and binding resolution between Held and Merkury, of any violation of Proposition 65 that was or could have been asserted by Held on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against Merkury, its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, attorneys, and each entity to whom Merkury directly or indirectly distributes or sells Products including, but not limited to, downstream distributors, wholesalers, customers, retailers (including but not limited to Ross Stores, Inc.), franchisees, cooperative members, licensors, and licensees, and each of their respective agents, attorneys, representatives, shareholders, directors, officers, employees, predecessors, successors, and assigns (collectively referred to as the "Releasees"), based on their alleged failure to warn about exposures to DEHP contained in the Products manufactured, distributed, sold and/or offered for sale by Merkury in California before the Effective Date as set forth in the Notice. The Parties agree that compliance by Merkury with the terms of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to exposures to DEHP in the Products, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Held, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he may have against Merkury and the Releasees, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, without limitation, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to exposures to DEHP from Products manufactured, distributed, sold and/or offered for sale by Merkury before the

Effective Date. The releases provided by Held under this Settlement Agreement are provided solely on Held's behalf and are not releases on behalf of the public.

**4.2 Merkury's Release of Held**

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

**4.3 No Limitation On Enforcement Rights**

Nothing in Section 4 affects or limits a Party's right to enforce the terms of this Settlement Agreement.

**5. 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.

**6. 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 Products, then Merkury may 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.

**7. NOTICE**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal

delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For Merkury:

David Adelpour, President  
Merkury Innovations LLC  
39 Broadway, Suite 1530  
New York, NY 10006

with copy to:

Sarah Esmaili, Esq.  
Arnold & Porter LLP  
Three Embarcadero Center, 10<sup>th</sup> Floor  
San Francisco, CA 94111

For Held:

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

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.

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (PDF) signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

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

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

**10. MODIFICATION**

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

**11. 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.



12. 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.

AGREED TO:

Date: February 19, 2015

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

AGREED TO:

Date: February 23, 2015

By: [Signature]  
Print Name: Gregory Cortali  
Title: Exec. Vice President  
MERKURY INNOVATIONS LLC