

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

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

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Dr. Held”) and PhotoMedex, Inc. (“PhotoMedex”), with Dr. Held and PhotoMedex each individually referred to as a “Party” and collectively as the “Parties.” Dr. 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. Dr. Held alleges that PhotoMedex 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, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”). PhotoMedex asserts that during certain periods prior to the Effective Date (defined below) and currently, it employed fewer than 10 persons.

### 1.2 General Allegations

Dr. Held alleges that PhotoMedex manufactures, imports, sells, and/or distributes for sale in California, octocrylene-containing sunscreen (products claiming a Sun Protection Factor) containing benzophenone. On June 22, 2012, benzophenone was listed pursuant to Proposition 65 as a chemical known to cause cancer. Dr. Held alleges that PhotoMedex failed to provide the health hazard warning required by Proposition 65 for exposures to benzophenone from sunscreen.

### 1.3 Product Description

The product that is covered by this Settlement Agreement is the octocrylene-containing sunscreen (products claiming a Sun Protection Factor) containing benzophenone *Neova Day Therapy Broad Spectrum SPF 30 (Octocrylene 6%), #9002197, UPC #8 78585 00054 4* (which PhotoMedex asserts was the only octocrylene-containing sunscreen it sold during the relevant

time period) that was or is manufactured, imported, distributed, sold and/or offered for sale in California by PhotoMedex (“Product” or “Products”).

**1.4 Notice of Violation**

On or about May 26, 2016, Dr. Held served PhotoMedex, and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that PhotoMedex was required, and failed, to warn its customers and consumers in California that the Products expose users to benzophenone and therefore violated Proposition 65. 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**

PhotoMedex denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, sold, or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. PhotoMedex further asserts that their independent testing of the Products demonstrates compliance with all Proposition 65 requirements. Nothing in this Settlement Agreement shall be construed as an admission by PhotoMedex 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 PhotoMedex of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by PhotoMedex. This section shall not, however, diminish or otherwise affect PhotoMedex’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 24, 2017.

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

### **2.1 Reformulation Standards**

PhotoMedex alleges that it has recently sold the Neova product line and is in the process of finishing the transition of the product line and associated inventory, website, and sales to the buyer. However, to the extent that PhotoMedex sells Products in California after the Effective Date, all such Products shall be “Reformulated Products.” For purposes of this Settlement Agreement, “Reformulated Products” are Products that contain no more than: (i) 35 ppm benzophenone; or (ii) 350 ppm of benzophenone in the ingredient octocrylene when analyzed by an accredited laboratory pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by state and federal agencies for the purpose of determining benzophenone content in a solid substance.

### **2.2 Reformulation Commitment**

As of the Effective Date, PhotoMedex 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.

## **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, PhotoMedex agrees to pay \$2,500 in civil penalties on or before the Effective Date. The 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”) by Dr. Held. Dr. Held’s counsel shall be responsible for remitting PhotoMedex’s penalty payment under this Settlement Agreement to OEHHA. PhotoMedex will provide its payment in a check made payable to “Anthony E. Held, Client Trust Account” in the amount of \$625 and a check made payable to “OEHHA” in the amount of \$1,875, sent to the address provided in Section 3.3 below.

### **3.2 Reimbursement of Attorneys' 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 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, PhotoMedex expressed a desire to resolve Dr. Held's fees and costs. The Parties then negotiated a resolution of 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 section 1021.5. For all work performed through the mutual execution of this agreement, PhotoMedex shall reimburse Dr. Held and his counsel \$22,500. PhotoMedex's payment shall be delivered to the address in Section 3.3, on or before the Effective Date, in the form of a check payable to "The Chanler Group." The reimbursement shall cover all fees and costs incurred by Dr. Held investigating, bringing this matter to PhotoMedex's attention and negotiating a settlement of the matter in the public interest.

### **3.3 Payment Address**

All payments required by this Settlement Agreement shall be delivered to the following address:

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

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

### **4.1 Dr. Held's Release of Proposition 65 Claims**

Dr. Held acting on his own behalf, and *not* on behalf of the public, releases PhotoMedex, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom PhotoMedex directly or indirectly distributed or sold Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all

claims for violations of Proposition 65 for Products manufactured, imported, distributed, or sold by PhotoMedex through the Effective Date based on unwarned exposures to benzophenone 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 benzophenone from the Products, as set forth in the Notice. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to PhotoMedex.

#### **4.2 Dr. Held's Individual Releases of Claims**

Dr. Held, in his individual capacity only and *not* in his representative capacity, provides a release herein to PhotoMedex 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 benzophenone in the Products manufactured, imported, distributed, or sold by PhotoMedex prior to the Effective Date.

The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to PhotoMedex. Nothing in this Section affects Dr. Held's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve PhotoMedex's Products.

#### **4.3 California Civil Code Section 1542 Waiver**

Dr. Held acknowledge that he is familiar with Section 1542 of 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 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.

Dr. Held, on his own behalf, and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, 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 Civil Code section 1542, 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.

**4.4 PhotoMedex's Release of Dr. Held**

PhotoMedex, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Dr. Held and his attorneys and other representatives, for any and all actions taken or statements 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. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions 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 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 PhotoMedex shall provide written notice to Dr. Held of any asserted change in the law and shall

have no further injunctive 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 PhotoMedex from any obligation to comply with any pertinent state or federal toxics control law.

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

For PhotoMedex:

Dennis McGrath, President  
PhotoMedex, Inc.  
100 Lakeside Drive, Suite 100  
Horsham, PA 19044

With a copy to:

Jeffrey J. Parker, Esq.  
SHEPPARD MULLIN  
333 South Hope Street, 43<sup>rd</sup> Floor  
Los Angeles, CA 90071-1422

For Dr. Held:

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

Any Party may, from time to time, specify in writing to the other Party 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 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)**

Dr. 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 a written agreement of the Parties.

11. **AUTHORIZATION**


The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions herein.


**AGREED TO:**

**AGREED TO:**

Date: 2/15/2017

Date: 2/16/17

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

By:   
Dennis McGrath, President  
PhotoMedex, Inc.