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Attorneys for Plaintiff
ANTHONY E. HELD, PhD., P.E.,

San Francisco County Superior Court
ENDORSED FILED
JUN 18 2012
CLERK OF THE COURT
BY: ERICKA LARNAUTI
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PhD., P.E.,

Plaintiff,

v.

FOX HEAD, INC.; *et al.*,

Defendants.

Case No. CGC-11-511835

**[PROPOSED] JUDGMENT PURSUANT TO
TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: April 17, 2012
Time: 9:30 a.m.
Dept. 302
Judge: Hon. Harold E. Kahn

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Plaintiff, Anthony Held, and defendant, Fox Head, Inc., having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving the parties' Proposition 65 settlement and Consent Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health & Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

IT IS SO ORDERED.

Dated: 6-8-12

HAROLD KAHN
JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

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Attorneys for Plaintiff
ANTHONY E. HELD, PHD., P.E.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

ANTHONY E. HELD, PHD., P.E.,
Plaintiff,
v.
FOX HEAD, INC.; *et al.*,
Defendants.

Case No. CGC-11-511835

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6 *et seq.*

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Anthony E. Held, PhD., P.E.
4 ("Held") and Fox Head, Inc. ("Fox Head"), with Held and Fox Head collectively referred to as the
5 "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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Fox Head employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
13 Safety Code § 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Held alleges that Fox Head has manufactured, distributed, and/or offered for sale in
16 California cosmetic cases/bags containing di(2-ethylhexyl)phthalate ("DEHP") in California
17 without the requisite Proposition 65 warnings. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the state of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are cosmetic cases/bags containing
21 DEHP that are manufactured, sold and/or distributed in California by Fox Head, including, without
22 limitation, the *Fox Girls First Class Fly Cosmetic Pack, #59294-579-000 (#8 84065 95003 2)*
23 (collectively "Products").

24 **1.6 Notice of Violation**

25 On April 8, 2011, Held served Fox Head and various public enforcement agencies with a 60-
26 Day Notice of Violation ("Notice"), a document that informed the recipients that Fox Head was
27 alleged to be in violation of Proposition 65 for failing to warn its customers and consumers in
28 California that the Products expose users to DEHP.

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1.7 Complaint

On June 20, 2011, Held filed the instant action (“Complaint”), against Fox Head for the violations of Health & Safety Code § 25249.6 alleged in the Notice.

1.8 No Admission

Fox Head denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it has sold in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Fox Head of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Fox Head of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Fox Head. This Section shall not, however, diminish or otherwise affect Fox Head’ obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Fox Head as to the allegations contained in the Complaint, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 Effective Date

As used throughout this Consent Judgment, the term “Effective Date” shall mean January 23, 2012.

2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS

2.1 Reformulation

2.1.1 Reformulation Standard.

For purposes of this Consent Judgment “Reformulation Standard” shall mean a maximum DEHP content of 1,000 parts per million in an component part of a Product analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent method utilized by state or federal agencies to determine DEHP content in a solid substance.

1 **2.1.2 Vendor Notification**

2 No more than 30 days after the date that this Consent Judgment is fully executed by
3 the Parties, Fox Head shall provide the Reformulation Standard to each of its then-current vendors
4 of Products that will be sold or offered for sale to California consumers, and shall instruct each
5 vendor to use reasonable efforts to provide only Products that comply with the Reformulation
6 Standard expeditiously. In communicating the obligation set forth in the preceding sentence to its
7 vendor(s), Fox Head shall not employ statements to encourage a vendor to delay compliance with
8 the Reformulation Standard. Upon request, Fox Head shall provide Held with copies of its vendor
9 notification(s), and Held shall regard such copies as confidential business information.

10 **2.1.3 Compliance Deadline**

11 Commencing on December 31, 2012 and continuing thereafter, Fox Head shall only
12 purchase, import, manufacture, or supply to an unaffiliated third party for sale in California,
13 Products that comply with the Reformulation Standard established by this Section or that are sold
14 with a clear and reasonable warning in accordance with Section 2.2.

15 **2.1.4 Products Sold Prior to Compliance Deadline**

16 Provided that Fox Head has complied with the vendor notification and reformulation
17 requirements established by Sections 2.1.1 and 2.1.2 above, sales of Products purchased, imported,
18 manufactured, or supplied to unaffiliated third parties prior to the compliance deadline set forth in
19 subsection 2.1.3 above shall not be separately actionable in another case brought pursuant to
20 Section 25249.7(d) of the Health and Safety Code alleging unwarned exposures to DEHP under
21 Proposition 65.

22 **2.2 Product Warnings**

23 For all Products sold in California that do not comply with the Reformulation Standard
24 established by Section 2.1, provided that Fox Head has complied with the vendor notification
25 requirements of Section 2.2, Fox Head may sell such Products with the clear and reasonable warnings
26 set forth in subsections 2.2(a) and (b). Each warning shall be prominently placed with such
27 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
28 to be read and understood by an ordinary individual under customary conditions before purchase or

1 use. Each warning shall be provided in a manner such that the consumer or user understands to
2 which specific Product the warning applies, so as to minimize the risk of consumer confusion.

3 (a) **Retail Store Sales**

4 (i) **Product Labeling.** Avenues shall affix a warning to the packaging,
5 labeling, or directly on each Product sold in retail outlets in California by Avenues or any person
6 selling the Products, that states:

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

10 (ii) **Point-of-Sale Warnings.** Alternatively, Avenues may provide
11 warning signs in the form below to its customers in California with instructions to post the
12 warnings in close proximity to the point of display of the Products. Such instruction sent to
13 Avenues's customers shall be sent by certified mail.

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

17 Where more than one Product is sold in proximity to other like items or to those that do not
18 require a warning (e.g., Reformulated Products as defined in Section 2.1), the following statement
19 must be used:¹

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

23 *[list products for which warning is required]*

24 (b) **Mail Order Catalog and Internet Sales.** In the event that Avenues sells
25 Products via mail order catalog and/or the internet, to customers located in California, after the
26 Effective Date, and that are not Reformulated Products, Avenues shall provide a warning for such

27 ¹ For purposes of the Consent Judgment, "sold in proximity" shall mean that the Product and another product are
28 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.

1 Products sold via mail order catalog or the internet to California residents: (1) in the mail order
2 catalog; or (2) on the website. Warnings given in the mail order catalog or on the internet shall
3 identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i)
4 and (ii).

5 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
6 catalog must be in the same type size or larger than the Product description text within the catalog.
7 The following warning shall be provided on the same page and in the same location as the display
8 and/or description of the Product:

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

13 Where it is impracticable to provide the warning on the same page and in the same location as
14 the display and/or description of the Product, Avenues may utilize a designated symbol to cross
15 reference the applicable warning and shall define the term "designated symbol" with the following
16 language on the inside of the front cover of the catalog or on the same page as any order form for the
17 Product(s):

18 **WARNING:** Certain products identified with this symbol
19 ▼ and offered for sale in this catalog contain
20 DEHP, a phthalate chemical known to the
21 State of California to cause birth defects and
22 other reproductive harm.

23 The designated symbol must appear on the same page and in close proximity to the display
24 and/or description of the Product. On each page where the designated symbol appears, Avenues must
25 provide a header or footer directing the consumer to the warning language and definition of the
26 designated symbol.

27 (ii) **Internet Website Warning.** A warning may be given in conjunction
28 with the sale of the Products by Fox Head via the internet, when the sale is to a consumer in
California, provided it appears 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 during the checkout process. The
following warning statement shall be used and shall appear in any of the above instances adjacent to

1 or immediately following the display, description, or price of the Product for which it is given in the
2 same type size or larger than the Product description text:

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

7 Alternatively, the designated symbol may appear adjacent to or immediately following the
8 display, description, or price of the Product for which a warning is being given, provided that the
9 following warning statement also appears elsewhere on the same web page, as follows:

10 **WARNING:** Products identified on this page with the
11 following symbol ▼ contain DEHP, a
12 phthalate chemical known to the State of
13 California to cause birth defects and other
14 reproductive harm.

15 **3. MONETARY PAYMENTS**

16 **3.1 Initial Civil Penalty**

17 Pursuant to Health & Safety Code § 25249.7(b), on or before the Effective Date, Fox Head
18 shall pay a total of \$4,000 in civil penalties pursuant to Health & Safety Code section 25249.7(b).
19 This amount reflects a penalty credit of \$6,000 agreed to by Held in response to Fox Head's
20 commitment to Proposition 65 compliance, including notifying its vendors offering Products in
21 compliance with the Reformulation Standard established by Section 2.

22 The civil penalty payment shall be allocated according to Health & Safety Code §
23 25249.12(c)(1) & (d), with seventy-five percent (75%) of the penalty amount earmarked for the
24 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
25 twenty-five percent (25%) of the penalty amount earmarked for Held.

26 **3.2 Final Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

27 On or before December 31, 2012, Fox Head shall pay a final civil penalty of \$12,000. As an
28 incentive to offer only Products that comply with the Reformulation Standard, however, the final
civil penalty shall be waived in its entirety if an Officer of Fox Head certifies in writing to Held's
counsel that as of December 15, 2012, Fox Head will only sell or distribute for sale in California only
Products that comply with the Reformulation Standard established by Section 2 of this Consent
Judgment. Unless waived, the final civil penalty payment shall be apportioned in accordance with

1 California Health & Safety Code § 25249.12(c)(1) & (d), with seventy-five percent (75%) of the final
2 penalty amount remitted to OEHHA and the remaining twenty-five percent (25%) remitted to Held.
3 Payment of the final civil penalty shall be remitted to Held's counsel at the address set forth in
4 Section 3.4.3.

5 **3.3 Reimbursement of Plaintiff's Fees and Costs**

6 The Parties acknowledge that Held and his counsel offered to resolve this dispute without
7 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
8 to be resolved after the material terms of the agreement had been settled. Fox Head then expressed a
9 desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized.

10 The Parties then attempted to (and did) reach an accord on the compensation due Held and his
11 counsel under general contract principles and the private attorney general doctrine codified at
12 California Code of Civil Procedure § 1021.5 for all work performed in this matter, exclusive of fees
13 on appeal, if any. Under these legal principles, on or before the Effective Date, Fox Head shall pay
14 \$31,000 for all fees and costs incurred investigating, litigating and enforcing this matter, including
15 the fees and costs incurred (and yet to be incurred) drafting, negotiating, and obtaining the Court's
16 approval of this Consent Judgment in the public interest.

17 **3.4 Payment Procedures**

18 **3.4.1 Payments Held in Trust**

19 All payments made under this Consent Judgment shall be held in trust until the Court
20 approves the settlement. The Parties acknowledge that Held's counsel gave Fox Head the option of
21 depositing the funds into its attorney's trust account, but that Fox Head elected to have The Chanler
22 Group hold the settlement funds in trust. Settlement funds delivered to The Chanler Group shall be
23 in the form of three checks for the following amounts, made payable as follows:

- 24 (a) one check to "The Chanler Group in Trust for OEHHA" in the amount of
25 \$3,000;
- 26 (b) a second check to "The Chanler Group in Trust for Anthony Held" in the
27 amount of \$1,000; and
- 28 (c) a third check to "The Chanler Group in Trust" in the amount of \$31,000.

1 **3.4.2 Issuance of 1099 Forms**

2 After the Consent Judgment has been approved, Fox Head shall issue three 1099
3 forms for the payments made pursuant to Sections 3.1 and 3.3, as follows:

4 (a) one 1099 form to “Office of Environmental Health Hazard Assessment”, P.O.
5 Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid to
6 OEHHA in the amount of \$3,000;

7 (b) a second 1099 form to “Anthony Held”, whose address and tax identification
8 number shall be furnished upon request after this Consent Judgment has been fully
9 executed by the Parties, for civil penalties paid in the amount of \$1,000; and

10 (c) a third 1099 form to “The Chanler Group” (EIN: 94-3171522) for the
11 reimbursement of fees and costs in the amount of \$31,000.

12 (d) in the event the final civil penalty is not waived, a fourth 1099 form will be
13 required for payments made to OEHHA and Held under section 3.2. Fox Head shall
14 issue such form to Held’s counsel upon request after payment is made.

15 **3.4.3 Payment Address**

16 All payments and tax documents required by Sections 3.1, 3.3, and 3.4.2 shall be
17 delivered to Held’s counsel at the following address:

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710

21 **5. CLAIMS COVERED AND RELEASED**

22 **5.1 Full, Final, and Binding Resolution of Proposition 65 Claims**

23 This Consent Judgment is a full, final, and binding resolution between Held, on behalf of
24 himself and in the public interest, and Fox Head, of any violation of Proposition 65 that Held brought
25 or could have brought against Fox Head, its parents, subsidiaries, affiliated entities under common
26 ownership, directors, officers, employees, attorneys, and each entity to whom Fox Head directly or
27 indirectly distributes or sells Products, including but not limited to, downstream distributors,
28

1 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
2 (“Releasees”), based on unwarned exposures to DEHP contained in the Products sold by Fox Head.

3 **5.2 Held’s Public Interest Release of Proposition 65 Claims**

4 In further consideration of the promises and agreements herein contained, Held on behalf of
5 himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in
6 the public interest, hereby waives all rights to institute or participate in, directly or indirectly, any
7 form of legal action and releases all claims, including, without limitation, all actions and causes of
8 action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
9 losses, or expenses, including, but not limited to, investigation fees, expert fees, and attorneys’ fees
10 (collectively “Claims”) against Fox Head and the Releasees for unwarned exposures to DEHP
11 contained in the Products sold by Fox Head.

12 **5.3 Held’s Individual Release of Claims**

13 Held, in his individual capacity only and *not* in his representative capacity, also provides a
14 release to Fox Head and the Releasees which shall be effective as a full and final accord and
15 satisfaction, as a bar to all Claims, liabilities, and demands of Held of any nature, character, or kind,
16 whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to
17 DEHP contained in the Products.

18 **5.4 Fox Head’s Release of Held**

19 Fox Head on behalf of itself, its past and current agents, representatives, attorneys, successors,
20 and/or assignees, hereby waives any and all claims against Held and his attorneys and other
21 representatives, for any and all actions taken or statements made (or those that could have been taken
22 or made) by Held and his attorneys and other representatives, whether in the course of investigating
23 claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
24 Products.

25 **6. COURT APPROVAL**

26 This Consent Judgment is not effective until it is approved and entered by the Court and
27 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
28 after it has been fully executed by all Parties, in which event any monies that have been provided to

1 Held or his counsel pursuant to Section 3.1, 3.2 or 3.3 above shall be refunded within fifteen days
2 after receiving written notice from Fox Head that the one-year period has expired and the Consent
3 Judgment has not been approved and entered by the Court.

4 **7. SEVERABILITY**

5 If, subsequent to the execution of this Consent Judgment, any provision is held by a court to
6 be unenforceable, the validity of the provisions remaining shall not be adversely affected.

7 **8. GOVERNING LAW**

8 The terms of this Consent Judgment shall be governed by the laws of the State of California
9 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
10 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Fox Head
11 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
12 extent that, the Products are so affected.

13 **9. NOTICES**

14 Unless specified herein, all correspondence and notices required to be provided pursuant to
15 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class,
16 registered, or certified mail, return receipt requested, or (iii) a recognized overnight courier to any
17 party by the other party at the following addresses:

18 For Fox Head:

19 Tim Naylor, Esq.
20 Vice President Legal and Strategic Development
21 Fox Head, Inc.
18400 Sutter Blvd.
Morgan Hill, CA 95037

22 For Held:

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

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

28

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or portable
3 document format (pdf) signature, each of which shall be deemed an original, and all of which, when
4 taken together, shall constitute one and the same document.

5 **11. POST EXECUTION ACTIVITIES**

6 Held agrees to comply with the reporting form requirements referenced in California Health
7 & Safety Code § 25249.7(f). In addition, the Parties acknowledge that, pursuant to California
8 Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of
9 this Consent Judgment. In furtherance of obtaining such approval, Held and Fox Head and their
10 respective counsel agree to mutually employ their best efforts to support the entry of this agreement
11 as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
12 manner. For purposes of this section, "best efforts" shall include, at a minimum, cooperating on the
13 drafting and filing of any papers in support of the required motion for judicial approval.

14 **12. MODIFICATION**

15 This Consent Judgment may be modified only: (i) by a written agreement of the Parties and
16 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion of
17 any party and entry of a modified consent judgment by the Court.

18 **13. AUTHORIZATION**

19 The undersigned are authorized to execute this Consent Judgment and have read,
20 understood, and agree to all of the terms and conditions of this Consent Judgment.

21 **AGREED TO:**

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

21 **AGREED TO:**

22 By: Tim Naylor
23 Tim Naylor, V.P. Legal & Strategic Dev.
24 Fox Head, Inc.

25 Date:

26 **APPROVED**
27 By Tony at 9:55 am, Jan 18, 2012

25 Date:

26 1/13/12