

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

1. INTRODUCTION

1.1 The Parties

This settlement agreement and mutual release (the “Settlement Agreement”) is entered into by and between Anthony E. Held, Ph.D., P.E (“Held”) and Jay Franco and Sons, Inc., (“Jay Franco”). (Held and Jay Franco individually may be referred to as “Party,” and collectively as the “Parties”). Held is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Jay Franco is a person in the course of doing business in the State of California as defined in 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 Jay Franco has manufactured, distributed and/or sold children’s vinyl bathroom toys and vinyl pillows containing di-(2-ethylhexyl) phthalate (“DEHP”) in the State of California (the “Allegations”) including, but not limited to, the Scholastic Clifford The Big Red Dog Water Squirters (the “Water Squirters”) and Disney Pixar Cars Microbead Pillows (the “Microbead Pillows”). Proposition 65 lists DEHP as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.3 Product Descriptions

This Settlement Agreement is intended to cover children’s vinyl products manufactured by Jay Franco and/or its licensees, franchisees, sister and parent entities, corporate affiliates, subsidiaries, that contain DEHP including the products identified in Exhibit A hereto (collectively, the

“Products”)—the Water Squirters and the Microbead Pillows.

1.4 Notices of Violation

On or about May 23, 2008, Held served Jay Franco and various public enforcement agencies with a “60-Day Notice of Violation” (the “First Notice”) alleging that Jay Franco was in violation of Proposition 65 for failing to warn consumers and customers that the Water Squirters exposed users in California to DEHP. On or about November 7, 2008, Held served Jay Franco and various public enforcement agencies with a “Supplemental 60-Day Notice of Violation” (the “Supplemental Notice” and, collectively with the First Notice, the “Notices”) alleging that Jay Franco was in violation of Proposition 65 for failing to warn consumers and customers that the Water Squirters and the Microbead Pillows exposed users in California to DEHP. To date, no public enforcer has prosecuted the allegations set forth in the Notices.

1.5 No Admission

This Settlement Agreement represents a compromise of disputed claims and is not intended to be, and shall not be construed to be, an admission by Jay Franco of any liability for any contention or allegation made by Held. Jay Franco expressly denies the material factual and legal allegations contained in Held’s Notices, and does not admit or concede any actual or potential fault, wrongdoing or liability in connection with any facts or claims that have been or could have been alleged against it by Held. Jay Franco maintains that all products that it has manufactured, distributed and/or sold in California, including the Products, have been and are in compliance with all laws. Jay Franco specifically denies that it manufactured, distributed and/or sold the Water Squirters and or that it is affiliated in any way with Playfully Yours, as indicated on the prod-

uct packaging.

Neither this Settlement Agreement nor the settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Settlement Agreement or the settlement: (i) is or may be deemed to be or may be used as an admission of, or evidence of, the validity of any claim released under Paragraph 5 of this Settlement Agreement, or of any wrongdoing by or liability of Jay Franco; (ii) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission by Jay Franco in any civil, criminal or administrative proceeding in any court, arbitration, administrative agency or other tribunal; and/or (iii) shall be offered in evidence or alleged in any pleading by Held.

However, this paragraph shall not diminish or otherwise affect the obligations, responsibilities and duties of Jay Franco under this Settlement Agreement. Jay Franco may use and file this Settlement Agreement in any other action that has been or may be brought against it in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good-faith settlement, judgment bar or reduction or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean January 1, 2009.

2. MANUFACTURING COMMITMENT

As of the Effective Date, Jay Franco shall only manufacture (or cause to be manufactured), sell, or distribute Products in California that are phthalate free; that is, Products that con-

tain DEHP in concentrations not to exceed 0.1 percent ("Phthalate Free"), when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C.

3. CONSIDERATION

3.1 Payment of Penalties Pursuant to California Health & Safety Code § 25249.7(b)

In settlement of the Allegations against it, Jay Franco shall pay the sum of Two Thousand Dollars (\$2,000.00) in civil penalties (the "Penalty Payment") to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment and 25% of these funds remitted to Held as provided by California Health & Safety Code §25249.12(d).

The Penalty Payment shall be made by two separate checks: (a) one check made payable to Hirst & Chanler LLP in Trust for the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of \$1,500.00, representing 75% of the total penalty; and (b) one check to Hirst & Chanler LLP in Trust for Held in the amount of \$500.00, representing 25% of the total penalty. Jay Franco shall issue two separate 1099s for the above payments: (a) one to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$1,500.00; and (2) one to Held in the amount of \$500.00, whose address and tax identification number shall be furnished, upon request, five calendar days before payment is due.

The Penalty Payment shall be delivered on or before December 30, 2008, at the following address:

HIRST & CHANLER LLP
Attn: Proposition 65 Controller
Capitol Mall Complex
455 Capitol Mall, Suite 605
Sacramento, CA 95814

4. REIMBURSEMENT OF FEES AND COSTS

The Parties have agreed that Jay Franco shall reimburse Held's counsel in the amount of Twenty-Four Thousand Dollars (\$24,000.00) in full and final payment for services rendered and costs incurred as a result of investigating the Allegations, bringing this matter to Jay Franco's attention, and negotiating a settlement in the public interest. This amount shall be payable to Hirst & Chanler LLP and shall be delivered to it on or before December 30, 2008, at the following address:

HIRST & CHANLER LLP
Attn: Proposition 65 Controller
Capitol Mall Complex
455 Capitol Mall, Suite 605
Sacramento, CA 95814

Jay Franco shall issue a separate 1099 for fees and cost in the amount of \$24,000.00 to Hirst & Chanler LLP, 455 Capitol Mall, Suite 605, Sacramento, CA 95814 (EIN: 20-3929984).

5. RELEASE OF ALL CLAIMS

5.1 Release of Jay Franco and Downstream Customers

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Paragraphs 3 and 4 above, Held, on behalf of himself, his past

and current agents, representatives, attorneys, successors and/or assignees, and in the interest of the general public, hereby forever waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases and discharges all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses (including, but not limited to, investigation fees, expert fees and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively, the "Claims") against Jay Franco and each of its downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers (specifically including Sears and Dollar Tree Stores), franchisees, dealers, customers, owners, purchasers, users, sister and parent entities, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees arising out of or relating in any way to the Allegations, the Products, and/or claims, whether known or unknown, that arise or could have arisen under Proposition 65.

5.2 Limitations on and Release

The Parties understand and agree that this 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 Jay Franco.

5.3 Jay Franco's Release of Held

Jay Franco hereby waives any and all claims against Held, 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 in-

investigating claims or otherwise seeking enforcement of Proposition 65 against Jay Franco in this matter, and/or with respect to the Products.

5.4 Section 1542 Waiver

Held, in his individual capacity, and Jay Franco expressly waive the benefits of any statutory provision or common law rule that provides, in sum or substance, that a release does not extend to claims that they do not know or suspect to exist in their favor at the time of executing the release, which if known by them, would have materially affected the settlement with the other party. In particular, but without limitation, Held, in his individual capacity, and Jay Franco expressly understand the provisions of California Civil Code § 1542, which provides that:

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.

Held, in his individual capacity, and Jay Franco agree that (i) the provisions of Section 1542 are hereby knowingly and voluntarily waived and relinquished, and (ii) the provisions of all similar federal or state laws, rights, rules, or legal principles of any other jurisdiction, to the extent they are found to be applicable herein, also are hereby knowingly and voluntarily waived and relinquished. Notwithstanding the foregoing waiver of Section 1542, Held, in his individual capacity, and Jay Franco acknowledge that the releases set forth in this Settlement Agreement are specific to the matters set forth in the releases and are not intended to create general releases as to all claims, or potential claims, between the releasing and released parties.

5.5 Other Unknown Claims

In connection with the releases contained herein, Held, in his individual capacity, and Jay Franco each acknowledges that it is aware that it may hereafter discover claims presently unknown or unsuspected, or facts in addition to or different from those that it now knows or believes to be true with respect to the matters released herein. Nevertheless, it is the intention of each of them in executing this Settlement Agreement to fully, finally and forever settle and release all such matters and all claims relating thereto, which exist, hereafter may exist, or might have existed (whether or not previously or currently asserted), in accordance with the releases contained herein.

5.6 Attorneys' Fees and Costs

Except as otherwise provided herein, the Parties shall each bear its own attorneys' fees and costs in connection with the negotiation, execution, and administration of this Settlement Agreement.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the laws of the State of California excluding any conflict of laws or choice of law provisions that would require reference to the laws of another state.

8. CONSTRUCTION OF AGREEMENT

The language of this Settlement Agreement shall be construed as a whole, according to its fair meaning and intent, and not strictly for or against any Party, regardless of who drafted or was principally responsible for drafting the Settlement Agreement or any specific terms or conditions hereof. This Settlement Agreement shall be deemed to have been drafted by all Parties, and neither Party shall urge otherwise.

9. INTEGRATION

This Settlement Agreement constitutes the entire agreement among the Parties with respect to the subject matter hereof, and no representations, warranties or inducements have been made to any Party concerning this Settlement Agreement other than the representations, warranties and covenants contained and memorialized herein.

10. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by the other party at the following addresses:

To Jay Franco:

Joseph A. Franco, President
Jay Franco & Sons, Inc.
295 Fifth Avenue, Suite 312
New York, NY 10016

With a copy to:

Alan Z. Yudkowsky, Esq.
STROOCK & STROOCK & LAVAN LLP
2029 Century Park East, Suite 1800
Los Angeles, CA 90067

To Held:

Proposition 65 Coordinator
Hirst & Chanler, LLP
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.

11. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

Held agrees to comply with the reporting form requirements referenced in Health & Safety Code §25249.7(f).

13. MODIFICATION

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

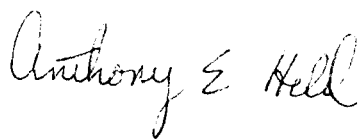
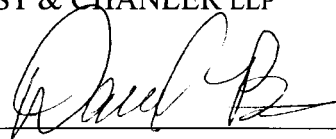
14. ENFORCEMENT OF AGREEMENT

The Parties agree that their respective duties and obligations hereunder may be specifically enforced through an action at law or in equity by the Party for whose benefit such duty or obliga-

tion is to be performed, but no breach of any duty or obligation by either of the Parties hereunder shall entitle the other Party to rescind or terminate this Settlement Agreement, except as expressly provided herein. In any such action, and in any action to enforce the provisions of this Settlement Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs incurred in connection with such action.

15. 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.

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| <p>AGREED TO:</p> <p>Date: December <u>17</u>, 2008</p> <p>By:  Anthony Held</p> | <p>AGREED TO:</p> <p>Date: December __, 2008</p> <p>By: _____ Joseph A. Franco, President Jay Franco & Sons, Inc.</p> |
| <p>APPROVED AS TO FORM:</p> <p>Date: December <u>18</u>, 2008</p> <p>HIRST & CHANLER LLP</p> <p>By:  Daniel Bornstein Attorneys for Anthony Held</p> | <p>APPROVED AS TO FORM:</p> <p>Date: December __, 2008</p> <p>STROOCK & STROOCK & LAVAN LLP</p> <p>By: _____ Alan Z. Yudkowsky Attorneys for Jay Franco & Sons, Inc.</p> |

tion is to be performed, but no breach of any duty or obligation by either of the Parties hereunder shall entitle the other Party to rescind or terminate this Settlement Agreement, except as expressly provided herein. In any such action, and in any action to enforce the provisions of this Settlement Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and costs incurred in connection with such action.

15. 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.

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| AGREED TO: Date: December __, 2008 By: _____ Anthony Held | AGREED TO: Date: December <u>19th</u> , 2008 By: <u>J. A. Franco</u> Joseph A. Franco, President <u>SECT.</u> Jay Franco & Sons, Inc. |
| APPROVED AS TO FORM: Date: December __, 2008 HIRST & CHANLER LLP By: _____ Daniel Bornstein Attorneys for Anthony Held | APPROVED AS TO FORM: Date: December <u>22</u> , 2008 STROOCK & STROOCK & LAVAN LLP By: <u>Alan Z. Yudkowsky</u> Alan Z. Yudkowsky Attorneys for Jay Franco & Sons, Inc. |

EXHIBIT A

The Products covered by this Settlement Agreement are children's vinyl products manufactured by Jay Franco and/or its licensees, franchisees, sister and parent entities, corporate affiliates, subsidiaries, that contain DEHP including, but not limited to, the following products:

Scholastic Clifford The Big Red Dog Squirters (#6 97696 92002 8)

Disney Pixar Cars Microbead Pillows (#0 32281 27384 2)