

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Anthony E. Held, Ph.D., P.E., and California Optical Corp.

This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Dr. Held”) and California Optical Corp. (“California Optical”), with Held and California Optical collectively referred to as the “Parties.” Dr. Held is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. California Optical 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

Dr. Held alleges that California Optical has manufactured, distributed and/or offered for sale cosmetic cases which contain phthalates, including di(2-ethylhexyl)phthalate (hereinafter the “Listed Chemical”), without the requisite Proposition 65 warnings. The Listed Chemical is on the Proposition 65 list as a chemical known to cause cancer as well as birth defects and other reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as follows: cosmetic cases containing the Listed Chemical such as, but not limited to, *California Accessories Material Girl Carrying Bag, #025165/I3303WHT (#0 79402 47990 5)*. All such cosmetic cases containing the Listed Chemical are referred to hereinafter as the “Products”.

**1.4 Notice of Violation**

On or about December 15, 2009, Dr. Held served California Optical, and Totes»ISOTONER Corporation (“Totes”) and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided California Optical, Totes and public enforcers with notice of alleged violations of California Health & Safety Code § 25249.6 for failing to warn consumers that the Products that California Optical sold exposed users in California to the Listed Chemical. To the best of the parties’ knowledge, no public enforcer has diligently prosecuted the allegations set forth in the Notice.

**1.5 No Admission**

California Optical denies the material, factual and legal allegations contained in Dr. Held’s Notice and maintains that all Products that it has sold and distributed in California have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by California Optical of any fact, finding, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by California Optical of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by California Optical. However, this section shall not diminish or otherwise affect California Optical’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 May 17, 2010.

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

**2.1 Reformulation Commitment**

As of the Effective Date, California Optical shall only manufacture or cause to be

manufactured Products for sale in California that are Phthalate Free, as set forth below. For purposes of this Settlement Agreement, "Phthalate Free" Products shall mean Products containing less than or equal to 1,000 parts per million ("ppm") of the Listed Chemical, when analyzed pursuant to Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C.

California Optical further commits that 100% of the Products that it offers for sale in California after May 17, 2010 shall be Phthalate Free, or shall otherwise be exempt from the warning requirements as set forth in Section 2.5.

## **2.2 Product Warnings**

After the Effective Date, California Optical shall not sell, ship, or offer to be shipped for sale in California, Products containing the Listed Chemical unless such Products are shipped with the clear and reasonable warnings set out in Section 2.3 and 2.4 or comply with the reformulation requirements of Phthalate Free Products set out in Section 2.1.

Any warning issued for Products pursuant to Section 2.3 and 2.4, below, 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, for Products shipped directly to an individual in California, before use.

## **2.3 Warnings For Retail Store Sales**

(a) **Product Labeling.** California Optical may perform its warning obligation by affixing a warning to the packaging of, labeling to, or, if no label exists, directly on each Product sold in retail outlets in California by California Optical or its agents, that states:

**WARNING:** This product contains DEHP, a phthalate

chemical known to the State of California to cause birth defects and other reproductive harm.

**(b) Point-of-Sale Warnings.** California Optical may perform its warning obligations by ensuring that signs are posted at retail outlets in the State of California where the Products are sold. Point-of-sale warnings shall be provided through one or more signs posted in close proximity to the point of display of the Products that states:

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

Where more than one Product is sold in proximity to other like items<sup>1</sup> or to those that do not require a warning (e.g., Phthalate Free as defined in Section 2.1), the following statement must be used:

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

*[list products for which warning is required]*

**2.4 Warnings For Mail Order Catalog and Internet Sales.** California Optical shall satisfy its warning obligations for Products sold via mail order catalog or the Internet to California residents by providing a warning: (i) in the mail order catalog; or (ii) on the website. Warnings given in the mail order catalog or on the website shall

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<sup>1</sup> For purposes of this Settlement Agreement, "sold in proximity to other like items" shall mean that the Product and another product are offered for sale close enough to each other so that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

identify the specific Product to which the warning applies as further specified in sub sections (a) and (b) below.

**(a) Mail Order Catalog Warning.** Any warning provided in a mail order catalog must 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 each display of the Product:

**WARNING:** This product contains DEHP, a phthalate chemical known to the State of California to cause 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 of the Product, California Optical 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 and on the same page as any order form for the Product(s):

**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 birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display or description of the Product on such page. On each page where the designated symbol appears, California Optical must provide a reference directing the consumer to the warning language and definition of the designated symbol.

If California Optical elects to sell its products in mail order catalog after the Effective Date, then the warnings must be included in all catalogs offering to sell one or

more Products printed after February 28, 2010.

(b) **Internet Website Warning.** A warning may be given in conjunction with the sale of the Product via the Internet, provided it appears either: (a) on the same web page on which the Product is displayed; (b) on the same web page as the order form for the 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 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 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:** Products identified on this page with the following symbol □ contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm

## 2.5 **Exceptions To Warning Requirements**

The warning requirements set forth in Sections 2.2 through 2.4 shall not apply to:

- (i) Any Products manufactured before the Effective Date; or
- (ii) Phthalate Free Products (as defined in Section 2.1).

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

In settlement of all the claims referred to in this Settlement Agreement, California Optical shall pay \$2,000 in civil penalties 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 ("OEHHA") and the remaining 25% of the penalty remitted to Anthony Held, Ph.D., P.E., as provided by California Health & Safety Code § 25249.12(d). California Optical shall issue two separate checks for the penalty payment: (a) one check made payable to "Chanler Law Group in Trust For OEHHA" in the amount of \$1,500, representing 75% of the total penalty; and (b) one check to "Chanler Law Group in Trust for Anthony Held" in the amount of \$500, representing 25% of the total penalty. Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) Anthony Held, Ph.D., P.E., whose information shall be provided five (5) calendar days before the payment is due.

Payment shall be delivered to Dr. Held's counsel on or before the Effective Date at the following address:

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

**4. REIMBURSEMENT OF FEES AND COSTS**

The parties reached an accord on the compensation due to Dr. Held and his counsel under the private attorney general doctrine and principles of contract law. Under these legal principles, California Optical shall reimburse Dr. Held's counsel for fees and costs, incurred as a result of investigating, bringing this matter to California Optical's attention, and negotiating a settlement in the public interest. California Optical shall pay Dr. Held and his counsel \$23,000

for all attorneys' fees, expert and investigation fees, and related costs. The payment shall be issued in a third separate check made payable to "Chanler Law Group" and shall be delivered on or before the Effective Date, at the following address:

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

California Optical shall issue a separate 1099 for attorney's fees and costs paid in the amount of \$23,000 to Chanler Law Group, 2560 Ninth Street, Parker Plaza, Suite 214, Berkeley, California 94710 (EIN: 94-3171522).

**5. RELEASE OF ALL CLAIMS**

**5.1 Dr. Held's Release of California Optical**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4, Dr. Held on behalf of himself and in his representative capacity, his past and current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases 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 attorney's fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "claims"), against California Optical and each of its wholesalers, licensors, licensees, auctioneers, retailers, distributors, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates, subsidiaries, and their respective officers, directors, attorneys,

representatives, shareholders, agents, and employees, and sister and parent entities, including without limitation, Totes (collectively "Releasees"), that arise under Proposition 65, as such claims relate to California Optical's alleged failure to warn about exposures to the Listed Chemical contained in the Products. In addition, Dr. Held, in his individual capacity, but not in his representative capacity, agrees not to pursue further claims as to Releasees with respect to products under investigation as of the date of this Settlement Agreement.

**5.2 California Optical's Release of Dr. Held**

California Optical, on behalf of itself and its Releasees, waives any and all claims against Dr. Held, his attorneys, and other representatives for any and all actions taken by Dr. Held and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect to the Products.

**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 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 California Optical may provide written notice to Dr. 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.

**8. 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 California Optical:

Robert L. Hines  
Farella Braun + Martel LLP  
Russ Building  
235 Montgomery Street, 17th Floor  
San Francisco, CA 94104

To Dr. Held:

Proposition 65 Coordinator  
Chanler Law Group  
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.

**9. 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. A facsimile or .pdf signature shall be as valid as the original.

**10. 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 & Safety Code § 25249.7(f).

11. **MODIFICATION**

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

12. **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.

AGREED TO:

**APPROVED**

*By Tony Held at 9:56 am, Mar 24, 2010*

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

By: \_\_\_\_\_

*Anthony E. Held*  
Anthony E. Held, Ph.D., P.E.

AGREED TO:

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

*March 23, 2010*

By: \_\_\_\_\_

*[Signature]*  
Fredric Greihel, President/CEO  
California Optical Corp.

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