

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between Anthony E. Held, PhD., P.E. (“Held”) and Gemmy Industries Corporation (“Gemmy”), with Held and Gemmy collectively referred to 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. Gemmy 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 Gemmy manufactures, distributes, and/or sells in the state of California shower curtains containing di(2-ethylhexyl)phthalate (“DEHP”) without the first providing the clear and reasonable warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are shower curtains that contain DEHP and are sold or distributed for sale in California by Gemmy, including, but not limited to, the *Serial Killer Shower Curtain, Item #20870 (#0 86786 20870 0)* (collectively “Products”).

### 1.4 Notice of Violation

On or about January 19, 2012, Held served Gemmy and various public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the recipients of Held’s allegation that Gemmy was in violation of Proposition 65 for failing to warn its customers and consumers in California that the Products 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**

Gemmy denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has sold or distributed for sale 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 Gemmy 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 Gemmy of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Gemmy. This section shall not, however, diminish or otherwise affect Gemmy'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 June 30, 2012.

## **2. INJUNCTIVE RELIEF**

As of the Effective Date, Gemmy represents that it no longer sells or distributes the Products in California. Beginning on the Effective Date, Gemmy shall, prior to recommencing sales or distribution of the Products in California, only import, ship, sell or distribute for sale in California, Products that contain a maximum of 1,000 parts per million (0.1%) DEHP in any accessible component (i.e. any component that may be touched by a user during a reasonably foreseeable use) analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent methodologies utilized by state or federal agencies to determine DEHP content in a solid substance.

## **3. MONETARY PAYMENTS**

### **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

Pursuant to Health & Safety Code § 25249.7(b), Gemmy shall pay \$2,500 in civil penalties. This amount reflects a penalty credit of \$7,500 agreed to by Held in response to

Gemmy's commitment to Proposition 65 compliance, including only offering Products that comply with the content limits for DEHP established by section 2.

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

Gemmy shall issue two checks for the following amounts made payable to: (a) "The Chanler Group in Trust for OEHHA" in the amount of \$1,875; and (b) "The Chanler Group in Trust for Anthony Held" in the amount of \$625. Gemmy shall also provide two 1099 forms for the payments to: (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) "Anthony Held", whose address and tax identification number shall be furnished upon request after this Settlement Agreement has been fully executed by the Parties. Payment shall be on or before the Effective Date to the Payment Address provided in section 3.3.

### **3.2 Attorney 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 California Code of Civil Procedure ("CCP") § 1021.5 for all work performed in this matter. Under these legal principles, Gemmy shall pay \$16,000 for all fees and costs incurred investigating, bringing this matter to the attention of Gemmy, and negotiating a settlement in the public interest. Gemmy shall provide its payment in the form of a check payable to "The Chanler Group," issue a separate form 1099 for fees and costs (EIN: 94-3171522), and deliver payment to Held's counsel on or before the Effective Date at the Payment Address provided in section 3.3.

### **3.3 Payment Address**

All payments and tax documentation required by this section shall be delivered to Held's counsel at 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 Held's Release of Gemmy**

This Settlement Agreement is a full, final, and binding resolution between Held and Gemmy 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 Gemmy, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Gemmy directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees ("Releasees"), based on the alleged failure to warn about exposures to DEHP contained in Products imported, manufactured, sold or distributed for sale in California by Gemmy before the Effective Date.

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 his rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against Gemmy and Releasees, including, without limitation, all actions, causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, but not limited to, investigation fees, expert fees, and attorneys' fees (but exclusive of fees and costs on appeal, if any) arising under Proposition 65 for unwarned exposures to DEHP in the Products imported, manufactured, sold, or distributed for sale in California by Gemmy before the Effective Date.

**4.2 Gemmy's Release of Held**

Gemmy 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, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

**5. POST-EXECUTION CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement, Gemmy may send Held a written request to draft and file a complaint, incorporate the terms of this Settlement Agreement into a proposed consent judgment, and seek court approval of the settlement pursuant to Health and Safety Code § 25249.7(f), or as may be otherwise allowed by law. If requested, Held agrees to reasonably cooperate with Gemmy, and to use his best efforts and that of his counsel to obtain approval of the Parties' settlement by a superior court in California, and an entry of judgment in accordance with the terms set forth herein.

Pursuant to Code of Civil Procedure §§ 1021 and 1021.5, Gemmy will reimburse Held and his counsel for the reasonable fees and costs incurred filing the complaint, converting the Settlement Agreement into a proposed consent judgment and seeking judicial approval of the consent judgment in an amount not to exceed \$15,000, exclusive of fees and cost that may be incurred on appeal. Within ten days after its receipt of a monthly invoice from Held's counsel for work performed under this section, Gemmy will remit payment to The Chanler Group at the address set forth in section 3.3.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any provision is held by a court to be unenforceable, the validity of the remaining provisions 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 and/or DEHP, then Gemmy shall 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.

**8. NOTICES**

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 to any Party by the other Party at the following addresses:

For Gemmy:

Jason McCann, President  
Gemmy Industries Corporation  
117 Wrangler Drive, Suite 100  
Coppell, TX 75019

with a copy to:

David McIntyre, Director of Compliance  
Gemmy Industries Corporation  
117 Wrangler Drive, Suite 100  
Coppell, TX 75019

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 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 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.

**10. POST-EXECUTION ACTIVITIES**

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

**11. MODIFICATION**

This Settlement Agreement may be modified only by a 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:**

Date: 

<b>APPROVED</b> By Tony Held at 9:23 am, Jul 16, 2012
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By: Anthony E Held  
Anthony E. Held, PhD., P.E.

**AGREED TO:**

Date: JUNE 20, 2012

By: Jason McCann  
Jason McCann, President  
Gemmy Industries Corporation