

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

**1.1 Parties.** This Settlement Agreement is entered into by and between Anthony E. Held, Ph.D., P.E. (“Held”) and Kentuckiana Foam, Inc. (“KFI”), collectively referred to herein as “Parties”. 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. KFI is a Corporation, incorporated under the laws of Kentucky.

**1.2 General Allegations.** Held alleges that that KFI is a person in the course of doing business within the meaning of Health and Safety Code section 25249.11, and that KFI manufactures, distributes and/or sells chairs with foam padding containing Tris(1,3-dichloro-2-propyl)phosphate (“TDCPP”) and chairs with vinyl/PVC upholstery containing Di(2-ethylhexyl)phthalate (“DEHP”), collectively referred to herein as “Products,” including, but not limited to, the *KFI Stack Chair, IM810 BK* (collectively “Products”). Held also alleges that KFI violated the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections 25249.6, *et seq.* (“Proposition 65”), by knowingly and intentionally exposing California consumers to TDCPP and DEHP, which Held alleges escapes from Products, leading to human exposures.<sup>1</sup>

**1.3 Notice of Violation.** Held served KFI and the requisite public enforcement agencies with a document entitled “60-Day Notice of Violation,” dated October 25, 2013, (“Notice”) that provided the recipients with notice of the alleged violations of Proposition 65 based on the alleged failure to warn customers, consumers and users in the State of California that Products expose users to TDCPP and/or DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting the allegations set forth in the

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<sup>1</sup> Pursuant to Proposition 65, TDCPP is listed as a chemical known to cause cancer, and DEHP is listed as a chemical known to cause birth defects and other reproductive harm. TDCPP and DEHP are both subject to the “clear and reasonable warning” requirements of Proposition 65. Cal. Code Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8, 25249.10(b).

Notice.

**1.4 No Admission.** KFI denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, imported, distributed, and/or sold in the State of 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 KFI 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 KFI of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by KFI. This paragraph shall not, however, diminish or otherwise affect KFI's obligations, responsibilities, and duties under this Settlement Agreement.

**1.5 Effective Date.** For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date upon which this Settlement Agreement is executed by all Parties.

## **2. INJUNCTIVE RELIEF**

**2.1 Reformulation Commitment.** Commencing on September 30, 2014, KFI shall manufacture, import, ship, sell, and distribute for sale in California only chairs with foam padding and chairs with vinyl/PVC upholstery that contain no greater than 25 parts per million ("ppm") (the equivalent of 0.0025 %) of TDCPP, and no greater than 1000-ppm of DEHP, when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580 and 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of determining the presence, and measure the quantity of, TDCPP and/or DEHP, as applicable ("Reformulated Products").

**2.2 Current Inventory.** Any Products in, or manufactured and en route to, KFI's inventory as of August 31, 2014, that do not qualify as Reformulated Products and that KFI has reason to believe may be sold or distributed for sale in California, shall contain a clear and reasonable warning.

**2.3 Product Warnings/Labeling.** The following warnings, as appropriate, when measuring 3" x 5", with no less than 12 point font, affixed to the packaging, labeling, or directly

on each Product, shall constitute a clear and reasonable warning, in compliance with paragraph 2.2 of this Settlement Agreement:

**WARNING:** This product contains TDCPP, a flame retardant chemical known to the State of California to cause cancer.

or

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

or

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

### **3. MONETARY SETTLEMENT TERMS**

**3.1 Civil Penalty Payments.** Pursuant to Health and Safety Code section 25249.7(b), KFI shall pay the civil penalties described herein, and each penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid to Held, as follows:.

**3.1.1 Initial Civil Penalty.** Within five days of the Effective Date, KFI shall make an initial civil penalty payment of \$9,000. KFI shall provide its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$6,750; and (b) “Anthony Held, Client Trust Account” in the amount of \$2,250.

**3.1.2 Final Civil Penalty.** On or before October 15, 2014, KFI will make a final civil penalty payment of \$10,000. Pursuant to California Code of Regulations, title 11, section 3203(c), the final civil penalty payment will be waived in its entirety if, no later than September 30, 2014, an officer of KFI certifies in writing to Held’s counsel that, as of the date of the certification, and into the future, it shall only manufacture or import for distribution or sale in California or cause to be manufactured or imported for distribution or sale in California,

Products that qualify as Reformulated Products. The option to make a certification in compliance with this provision constitutes a material term of this Settlement Agreement, and with regard to such term, time is of the essence.

**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 Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, KFI shall reimburse Held and his counsel \$35,000 for the fees and costs incurred in investigating, bringing this matter to the attention of KFI's management, and negotiating a settlement in the public interest. KFI shall provide payment in the form of a check made payable to "Moscone Emblidge Sater & Otis LLP in Trust" and delivered according to the following schedule: (a) within five days of the Effective Date, KFI shall deliver a check for \$2,000; (b) on or before July 1, 2014, KFI shall deliver a second check for \$11,000; (c) on or before August 1, 2014, KFI shall deliver a third check for \$11,000; and (d) on or before September 1, 2014, KFI shall deliver a fourth check for \$11,000.

KFI represents that, as of the Effective Date, it lacks the financial capacity to satisfy all of the monetary obligations provided by this Settlement Agreement, and must do so in installments, as set forth above. The Parties agree, however, that, in the event that KFI fails to make any payment required by this Settlement Agreement, or any payment is delayed by more than five days, all amounts owed will become due immediately.

**3.3 Payment Procedures.** Payments are to be delivered according to the following paragraphs.

**3.3.1 Payment Address for Held.** All payments to Held and his counsel under this Settlement Agreement are to be delivered to the following address:

Moscone Emblidge Sater & Otis LLP  
Attn: Proposition 65 Controller  
220 Montgomery Street, Suite 2100  
San Francisco, CA 94104

**3.3.2 Payment Addresses for OEHHA.** All payments to OEHHA under this Settlement Agreement will be delivered directly to OEHHA (memo line: “Prop. 65 Penalties”) at one of the following addresses, as appropriate:

For United States Postal Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

For Non-U.S. Postal Delivery or Courier:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95812-4010

**3.3.3 Copy of Payments to OEHHA.** KFI agrees to provide Held’s counsel with a copy of each check payable to OEHHA, simultaneous with its penalty payments to Held, to be delivered to the address provided in paragraph 3.3.1.

**3.3.4 Tax Documentation.** KFI agrees to provide a completed IRS 1099 form for its payments to each of the following payees under this Settlement Agreement:

- (a) “Anthony Held” whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;
- (b) “Moscone Emblidge Sater & Otis LLP” (EIN: 80-0826360) at the address provided in paragraph 3.3.1; and
- (c) “Office of Environmental Health Hazard Assessment” (EIN: 68-0284486), 1001 I Street, Sacramento, CA 95814.

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

**4.1 Held’s Release of KFI.** This Settlement Agreement is a full, final, and binding resolution between Held and KFI of any violation of Proposition 65 that was or could have been

asserted by Held, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against KFI, its successors, assignees, parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom KFI directly or indirectly distributes or sells the Products, including, without limitation, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), based on unwarned exposures to TDCPP and/or DEHP in Products manufactured, sold or distributed for sale in California Releasees prior to the Effective Date.

In further consideration of the promises and agreements herein contained, Held, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against KFI, including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 for unwarned exposures to TDCPP and/or DEHP from Products manufactured, sold, or distributed for sale in California by KFI prior to the Effective Date.

**4.2 KFI's Release of Held.** KFI, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, assignees and Releasees, hereby waives any and all claims that it may have 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, otherwise seeking to enforce Proposition 65 against it and the Releasees in this matter, or with respect to the Products.

## **5. POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within eighteen months of the execution of this Settlement Agreement, KFI may request in writing that Held draft and file a complaint, incorporate the terms of this Settlement

Agreement into a proposed consent judgment providing a release for the Products in the public

interest, and seek court approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If requested, Held and KFI agree to reasonably cooperate and to use their best efforts, and those of their counsel, to obtain an entry of judgment in accordance with the terms of this Settlement Agreement by a superior court in California in a timely manner.

Pursuant to Code of Civil Procedure sections 1021 and 1021.5, if so requested, KFI agrees to reimburse Held and his counsel for the reasonable fees and costs incurred in connection with work performed pursuant to this paragraph in an amount not to exceed \$10,000, exclusive of fees and cost on appeal, if any. Within ten days of receiving an invoice for work performed under this paragraph, KFI will remit payment to the address provided in paragraph 3.3.1.

**6. 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.

**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 KFI may provide written notice to Held of any asserted change in the law, and have no further 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 KFI or any Releasees from any obligation to comply with any pertinent state or federal law.

**8. NOTICE**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For KFI:

Melissa A. Jones, Esq.  
Stoel Rives, LLP  
500 Capitol Mall, Suite 1600  
Sacramento, CA 95814

For Held:

Moscone Emblidge Sater & Otis LLP  
Attn: Proposition 65 Controller  
220 Montgomery Street, Suite 2100  
San Francisco, CA 94104

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 and Safety Code section 25249.7(f).

**11. ENFORCEMENT**

This Settlement Agreement is enforceable pursuant to Code of Civil Procedure section 664.6.

**12. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

**13. MODIFICATION**

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

**14. 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:**

**AGREED TO:**

Date: 7/2/2014

Date: 7/1/14

By: *Anthony E. Held*  
ANTHONY E. HELD, Ph.D., P.E.

By: *[Signature]*  
KENTUCKIANA FOAM, INC.