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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 ANTHONY E. HELD, PH.D., P.E.,)

13 Plaintiff,)

14 v.)

15 AVA ENTERPRISES, INC.; *et al.*,)

16 Defendants.)
17 _____)

Case No. RG14741385

[PROPOSED] CONSENT JUDGMENT

Action Filed: September 19, 2014

1 **1. INTRODUCTION**

2 **1.1 Anthony E. Held, Ph.D., P.E. and Ava Enterprises, Inc.**

3 This Consent Judgment is entered into by and between plaintiff Anthony E. Held, Ph.D.,
4 P.E. (“Held” or “Plaintiff”) and defendant Ava Enterprises, Inc. (“Ava”) with Plaintiff and
5 Defendant collectively referred to as the “parties.”

6 **1.2 Anthony E. Held, Ph.D., P.E.**

7 Held is an individual residing in the State of California who seeks to promote awareness of
8 exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 Ava Enterprises, Inc.**

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

14 **1.4 General Allegations**

15 Held alleges that Defendant manufactured, imported, distributed and/or sold in the State of
16 California headphones with vinyl/PVC components containing Di(2-ethylhexyl)phthalate
17 (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
18 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 defined as headphones with
21 vinyl/PVC components containing DEHP including, but not limited to, *Boss Audio Systems*
22 *Wireless Headphones, HP34C, UPC #7 91489 11855 2*, which are manufactured, imported,
23 distributed, sold and/or offered for sale by Defendant in the State of California, hereinafter the
24 “Products.”

25 **1.6 Notices of Violation**

26 On June 20, 2014, Held served Ava Enterprises, Inc. and various public enforcement
27 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the
28

1 recipients with notice that Ava was in violation of California Health & Safety Code § 25249.6 for
2 failing to warn consumers that their Products exposed users in California to DEHP.

3 **1.7 Complaint**

4 On September 19, 2014, Held filed a complaint in the Superior Court in and for the County
5 of Alameda against Ava and Does 1 through 150, *Held v. Ava Enterprises, Inc., et al.*, Case No.
6 RG14741385 (the “Action”), alleging violations of California Health & Safety Code § 25249.6,
7 based on the alleged exposures to DEHP from Products sold by Defendant in the State of California.

8 **1.8 No Admission**

9 Defendant denies the material, factual and legal allegations contained in Held’s Notice and
10 Complaint and maintains that all products that it has sold, manufactured, imported and/or
11 distributed in California, including the Products, have been and are in compliance with all laws.
12 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
13 finding, issue of law or violation of law, nor shall compliance with this Consent Judgment constitute
14 or be construed as an admission by Defendant of any fact, finding, conclusion, issue of law or
15 violation of law. However, this section shall not diminish or otherwise affect Defendant’s
16 obligations, responsibilities and duties under this Consent Judgment.

17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the parties stipulate that this Court has
19 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
20 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
21 this Consent Judgment.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” shall mean January 15,
24 2015.

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

2 **2.1 Reformulation Standards**

3 “Reformulated Products” are defined as those Products containing a maximum of 1,000
4 parts per million (“ppm”) of DEHP by weight in any accessible component (i.e., any component
5 that can be touched or handled during reasonably foreseeable use) when analyzed pursuant to
6 Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology
7 utilized by federal or state government agencies for the purpose of determining DEHP content in a
8 solid substance.

9 **2.2 Reformulation Commitment**

10 As of the Effective Date all Products manufactured for sale and/or purchased for sale in the
11 State of California by Defendant shall be Products that qualify as Reformulated Products as defined
12 in Section 2.1 above or shall carry the Proposition 65 warnings specified in Section 2.3 below.

13 **2.3 Product Warnings**

14 As of the Effective Date, Ava shall provide clear and reasonable warnings for all Products as
15 set forth in subsections 2.3(a) and (b) for all Products that do not qualify as Reformulated Products.
16 Each warning shall be prominently placed with such conspicuousness as compared with other
17 words, statements, designs, or devices as to render it likely to be read and understood by an ordinary
18 individual under customary conditions before purchase or use. Each warning shall be provided in a
19 manner such that the consumer or user understands to which *specific* Product the warning applies,
20 so as to minimize the risk of consumer confusion. However, the parties acknowledge that Ava
21 presently has a warning program in place with regard to the Products. Therefore, to the extent the
22 warning label requirements set forth below vary from the label language and logistics that Ava has
23 been applying, Ava may continue to use its present labeling system until it converts its system to the
24 provisions set forth herein or January 15, 2015, whichever occurs sooner.

1 (a) **Retail Store Sales.**

2 (i) **Product Labeling.** Ava shall affix a warning to the packaging,
3 labeling, or directly on each Product provided for sale in retail outlets in California that states:

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

7 (ii) **Point-of-Sale Warnings.** Alternatively, Ava may provide warning
8 signs in the form below to its customers in California with instructions to post the warnings in close
9 proximity to the point of display of the Products. Such instruction sent to Ava’s customers shall be
10 sent by certified mail, return receipt requested.

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

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

17 WARNING: The following products contain DEHP, a
18 phthalate chemical, known to the State of California
19 to cause birth defects and other reproductive harm:
20 [list products for which warning is required]

21 (b) **Mail Order Catalog and Internet Sales.** In the event that Ava sells Products via
22 mail order catalog and/or the internet, to customers located in California, after the Effective Date,
23 that are not Reformulated Products, Ava shall provide warnings for such Products sold via mail
24 order catalog or the internet to California residents. Warnings given in the mail order catalog or on
25 the internet shall identify the *specific* Product to which the warning applies as further specified in
26 Sections 2.3(b)(i) and (ii).

27 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order
28

¹For purposes of the Consent Judgment, “sold in proximity” shall mean that the Product and another similar product are 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 catalog shall be in the same type size or larger than the Product description text within the catalog.

2 The following warning shall be provided on the same page and in the same location as the display
3 and/or description of the Product:

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

6 Where it is impracticable to provide the warning on the same page and in the same location
7 as the display and/or description of the Product, Ava may utilize a designated symbol to cross
8 reference the applicable warning and shall define the term “designated symbol” with the following
9 language on the inside of the front cover of the catalog or on the same page as any order form for
10 the Product(s):

11 WARNING: Certain products identified with this symbol ▼
12 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.

13 The designated symbol must appear on the same page and in close proximity to the display
14 and/or description of the Product. On each page where the designated symbol appears, Ava must
15 provide a header or footer directing the consumer to the warning language and definition of the
16 designated symbol.

17 (ii) **Internet Website Warning.** A warning shall be given in conjunction with
18 the sale of the Products via the internet, which warning shall appear either: (a) on the same web
19 page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c)
20 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
21 purchaser during the checkout process. The following warning statement shall be used and shall
22 appear in any of the above instances adjacent to or immediately following the display, description,
23 or price of the Product for which it is given in the same type size or larger than the Product
24 description text:

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

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

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

7 **3. MONETARY PAYMENTS**

8 **3.1 Civil Penalty Payments**

9 In settlement of all the claims referred to in this Consent Judgment, Defendant has been
10 assessed a total of \$20,000 in civil penalties in accordance with this Section. Each penalty payment
11 will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with
12 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
13 (“OEHHA”) and the remaining 25% of the penalty remitted to Held, as follows:

14 **3.1.1 Initial Civil Penalty**

15 Defendant shall pay an initial civil penalty in the amount of \$7,000 on or before the
16 Effective Date. Defendant shall issue a check for its initial civil penalty payment in the amount of
17 \$7,000 to “Barg Coffin Lewis & Trapp, LLP.” Barg Coffin Lewis & Trapp, LLP shall provide The
18 Chanler Group with written confirmation within five days of receipt that the funds have been
19 deposited in a trust account. Within five business days of the date this Consent Judgment is
20 approved by the Court, including any tentative rulings that are not opposed by any party, Barg
21 Coffin Lewis & Trapp, LLP shall issue a check for the initial civil penalty payment to “Anthony E.
22 Held, Ph.D., P.E., Client Trust Account” in the amount of \$7,000, in accordance with Section 3.3
23 below. Defendant shall be liable for payment of interest, at an annual rate of 10% simple interest,
24 for all amounts due and owing under this Section that are not received within five business days of
25 the due date.

26 **3.1.2 Final Civil Penalty**

27 Defendant shall pay a final civil penalty of \$13,000 on or before May 1, 2015. The
28 final civil penalty shall be waived in its entirety, however, if, no later than April 15, 2015, an officer

1 of Defendant provides Held with written certification that, as of the date of such certification and
2 continuing into the future, all Products manufactured or imported for distribution, sale or offer for
3 sale in California by, or on behalf of, Defendant are Reformulated Products. Held must receive any
4 such certification on or before April 15, 2015. The certification in lieu of a final civil penalty
5 payment provided by this Section is a material term, and time is of the essence. In the event a final
6 civil penalty payment is required, Defendant shall issue a check for its final civil penalty payments
7 to “Anthony E. Held, Ph.D., P.E., Client Trust Account” in the amount of \$13,000.

8 **3.2 Reimbursement of Fees and Costs**

9 The parties acknowledge that Held and his counsel offered to resolve this dispute before
10 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
11 issue to be resolved after the material terms of the agreement had been agreed to in principle. The
12 parties then agreed to resolve the fee and cost issue shortly after the other settlement terms had
13 been tentatively finalized subject to agreement on fees and costs. The parties then attempted to
14 (and did) reach an accord on the compensation due to Held and his counsel under general contract
15 principles and the private attorney general doctrine codified at California Code of Civil Procedure
16 § 1021.5, for all work performed through the mutual execution of this agreement, and for work
17 necessary to implement the post-executive activities set forth in Section 11. Defendant shall pay
18 \$28,500 for fees and costs incurred as a result of investigating, bringing this matter to Defendant’s
19 attention, and negotiating a settlement in the public interest. On or before the Effective Date, Ava
20 shall issue a check payable to “Barg Coffin Lewis & Trapp, LLP” in the amount of \$28,500 to be
21 held in trust by the Barg Coffin Lewis & Trapp, LLP for The Chanler Group. Barg Coffin Lewis
22 & Trapp, LLP shall provide The Chanler Group with written confirmation within five days of
23 receipt that the funds have been deposited in a trust account. Within five business days of the date
24 this Consent Judgment is approved by the Court, including any tentative rulings not opposed by
25 any party, Barg Coffin Lewis & Trapp, LLP shall issue a check payable to “The Chanler Group”,
26 in the amount of \$28,500, to the address found in Section 3.3 below.

1 **3.3 Payment Procedures**

2 **3.3.1. Issuance of Payments.** Payments shall be delivered as follows:

3 (a) All payments owed to Held and his counsel, pursuant to Sections 3.1
4 through 3.3, shall be delivered to the following payment address:

5 The Chanler Group
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Held’s Public Release of Proposition 65 Claims**

10 Held, acting on his own behalf and in the public interest, releases Defendant and its parents,
11 subsidiaries, affiliated entities under common ownership, including without limitation Melody
12 Audio International and Sound Storm Laboratories Corporation, and each of their directors, officers,
13 employees, and attorneys (“Releasees”), and each entity to whom Releasees, respectively, directly
14 or indirectly distribute or sell the Products including, but not limited to, their respective downstream
15 distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors and
16 licensees (“Downstream Releasees”), for any violations arising under Proposition 65 for unwarmed
17 exposures to DEHP from the Products sold by Defendant prior to the Effective Date, as set forth in
18 the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
19 Proposition 65 with respect to exposures to DEHP from the Products as set forth in the Notice.

20 **4.2 Held’s Individual Release of Claims**

21 Held, in his individual capacity only and *not* in his representative capacity, also provides a
22 release to Defendant, Releasees, and Downstream Releasees which shall be effective as a full and
23 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
24 attorneys’ fees, damages, losses, claims, liabilities and demands of Held of any nature, character or
25 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
26 exposures to DEHP in the Products sold or distributed for sale by Defendant before the Effective
27 Date.
28

1 **4.3 Ava’s Release of Held**

2 Defendant on behalf of itself, its past and current agents, representatives, attorneys,
3 successors and/or assignees, hereby waives any and all claims against Held, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Held and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Products.

8 **5. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and
10 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
11 after it has been fully executed by all parties.

12 **6. SEVERABILITY**

13 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
14 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
15 remaining shall not be adversely affected, so long as the deletion of provisions deemed
16 unenforceable does not materially affect, or otherwise result in the effect of the Consent Judgment
17 being contrary to, the intent of the Parties in entering into this Consent Judgment.

18 **7. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the State of California
20 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
21 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
22 Consent Judgment are rendered inapplicable or no longer required as a result of any such repeal or
23 preemption or rendered inapplicable by reason of law generally as to the Products, then Defendant
24 shall provide written notice to Held of any asserted change in the law, and shall have no further
25 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
26 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Defendant from
27 any obligation to comply with any pertinent state or federal toxics control law.

1 **8. NOTICES**

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

6 To Ava:

7 Joshua A. Bloom, Esq.
8 Barg Coffin Lewis & Trapp, LLP
9 350 California Street, 22nd Floor
 San Francisco, CA 94104

 To Anthony E. Held, Ph.D., P.E.:

 Proposition 65 Coordinator
 The Chanler Group
 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

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

12 **9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

13 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
14 each of which shall be deemed an original, and all of which, when taken together, shall constitute
15 one and the same document. A facsimile or pdf signature shall be as valid as the original.

16 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

17 Held and his attorneys agree to comply with the reporting form requirements referenced in
18 California Health & Safety Code § 25249.7(f).

19 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

20 Held and Defendant agree to mutually employ their best efforts to support the entry of this
21 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
22 timely manner. The parties acknowledge that, pursuant to California Health & Safety Code
23 § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which
24 Held shall draft and file, and Defendant shall join. If any third party objection to the noticed motion
25 is filed, Held and Defendant shall work together to file a joint reply and appear at any hearing
26 before the Court. This provision is a material component of the Consent Judgment and shall be
27 treated as such in the event of a breach.

28 **12. MODIFICATION**

This Consent Judgment may be modified only: (1) by written agreement of the parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified Consent Judgment by the Court.

13. AUTHORIZATION

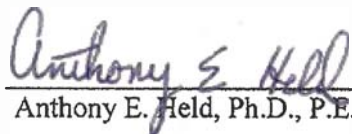
The undersigned are authorized to execute this Consent Judgment on behalf of their respective parties and have read, understood and agree to all of the terms and conditions of this Consent Judgment.

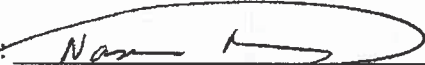
AGREED TO:

AGREED TO:

Date: January 13, 2015

Date: 1-8-2015

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

By: 
Soheil Rabbani, President
Ava Enterprises, Inc.