

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 defendant QFX, Inc. (“QFX”), with Held and QFX each individually referred to as a “Party” and collectively as the “Parties.” Held is an individual residing in the State of 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. QFX employs ten or more individuals 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 and Safety Code section 25249.5 et seq. (“Proposition 65”).

1.2 General Allegations

Held alleges that QFX manufactured, imported, distributed, and/or sold in the State of California vinyl/PVC headphone cords that contain di(2-ethylhexyl) phthalate (“DEHP”). DEHP is listed under Proposition 65 as a chemical known to the State of California to cause birth defects or other reproductive harm. Held alleges that QFX failed to provide consumers and other individuals exposed to DEHP from the vinyl/PVC headphone cords it sold in California with a clear and reasonable health hazard warning regarding the reproductive toxicity of DEHP, as required by Proposition 65.

1.3 Product Description

For purposes of this Settlement Agreement “Products” are defined as vinyl/PVC headphone cords containing DEHP that are manufactured, sold, or distributed for sale in California by QFX including, but not limited to, the *QFX Bluetooth Stereo Headphones, H-251BT, UPC #6 06540 02395 2*.

1.4 Notice of Violation

On October 24, 2017, Held served QFX, the California Attorney General, and all other requisite public enforcers with a document titled, “60-Day Notice of Violation” (“Notice”), alleging that QFX violated Proposition 65 by failing to warn its customers and consumers in California of the health risks associated with exposures to DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

1.5 No Admission

QFX denies the material, factual, and legal allegations in the Notice, and maintains that all of the products that it has manufactured, imported, stored, distributed, shipped, sold and/or offered 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 QFX of any allegation, fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by QFX of any allegation, fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by QFX. This Section shall not, however, diminish or otherwise affect QFX’ obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean February 15, 2018.

2. INJUNCTIVE RELIEF: REFORMULATION / WARNINGS

2.1 Commitment to Reformulate or Warn

Commencing no later than thirty (30) days after the Effective Date and continuing thereafter, QFX shall only manufacture for sale, purchase for sale, or import for sale in California, Products that are either (a) Reformulated Products as defined by Section 2.2,

below; or (b) Products that are offered by QFX with a clear and reasonable warning pursuant to Section 2.3.

2.2 Reformulation Standard

For the purposes of this Settlement Agreement, “Reformulated Products” are defined as Products that contain DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DEHP content in a solid substance.

2.3 Clear and Reasonable Warning

Commencing on the Effective Date and continuing thereafter, for any Products offered for sale in California by QFX that are not Reformulated Products, QFX agrees to only offer such Products for sale with a clear and reasonable warning in accordance with this Section. QFX further agrees that any warning used will be prominently placed in relation to the Product with such conspicuousness when 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 of purchase or use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying labeling or packaging sold in California containing the following statement:

WARNING: This product can expose you to chemicals including DEHP, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, QFX agrees to

pay a total of \$2,500 in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (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 amount retained by Held.

QFX will deliver its payment on or before February 15, 2018 in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$1,875; and (b) “Anthony E. Held, Client Trust Account” in the amount of \$625. Held’s counsel shall be responsible for delivering OEHHA’s portion of the penalties paid under this Settlement Agreement.

3.2 Attorneys’ 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. QFX agrees to pay \$17,000 to Held and his counsel for all fees and costs incurred investigating, bringing this matter to the attention of QFX’s management, and negotiating a settlement that provides a significant public benefit. QFX’s payment shall be delivered in the form of a check payable to “The Chanler Group” on or before February 15, 2018.

3.3 Payment Address

All payments required by this Settlement Agreement shall be delivered to:

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 QFX

This Settlement Agreement is a full, final, and binding resolution between Held, in his individual capacity and not on behalf of the public, his past and current agents, representatives, attorneys, successors, and/or assignees, on the one hand, and, on the

other hand, (a) QFX and each entity to whom QFX has directly or indirectly provided, distributed, or sold the Products (including but not limited to Tuesday Morning, Inc., Tuesday Morning Partners, Ltd. and Tuesday Morning Corporation); (b) all distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees of the entities identified in (a), above; and (c) all past and current owners, parents, subsidiaries, affiliates, sister and related companies, employees, shareholders, officers, directors, insurers, agents, attorneys, predecessors, successors, and assigns of the entities and individuals identified in (a) and (b), above (the released entities and individuals identified in (a), (b) and (c), above, are collectively referred to as “Releasees”) of any violation(s) or alleged violation(s) of Proposition 65 or any statutory or common law claim that has been, could have been, or may in the future be asserted against the Releasees regarding exposing persons to DEHP and/or the failure to warn about exposure to DEHP in Products manufactured, shipped, and/or otherwise distributed by QFX prior to the Effective Date, even if sold by Releasees after the Effective Date.

Held and his past and current agents, representatives, attorneys, successors, and/or assignees hereby waive with respect to the Products all rights to institute or participate in, directly or indirectly, any form of legal action and release all claims that they may have, 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) (collectively “Claims”), against Releasees that arise under Proposition 65 or any other statutory or common law claims that were or could have been asserted with respect to alleged exposure of persons to DEHP contained in the Products and/or any failure by Releasees to warn about exposures to DEHP contained in the Products, any Products manufactured, shipped, and/or otherwise distributed by QFX prior to the Effective Date, even if sold by Releasees after the Effective Date.

4.2 QFX's Release of Held

QFX, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Held, Held's attorneys, and other representatives, for any and all actions taken or statements made, whether in the course of investigating claims, seeking to enforce Proposition 65 against QFX in this matter, or with respect to the Products.

4.3

Plaintiff acknowledges that it is familiar with Section 1542 of Civil Code, which provides as follows:

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.

Plaintiff, its past and current agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of Civil Code § 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters set forth in Section 4.1.

5. 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.

6. 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 otherwise rendered inapplicable by reason of law generally, or as applied to

the Products, then QFX may provide written notice to Held of the asserted change in the law, and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to the Products, to the extent that the Products are so affected.

7. NOTICE

Unless specified herein, all correspondence and notice required by 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:

QFX:

Sharon Raminfard, Esq.
Novian & Novian LLP
1801 Century Park East, Suite 1201
Los Angeles, CA 90067
sharon@novianlaw.com

Held:

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

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

8. 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.

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

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

10. MODIFICATION

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

11. ENFORCEMENT OF SETTLEMENT AGREEMENT

Any party may file suit in California Superior Court to enforce the terms and conditions contained in this Settlement Agreement. The prevailing party shall be entitled to its reasonable attorneys' fees and costs associated with such enforcement.

No action to enforce this Settlement Agreement may be commenced or maintained unless the party seeking enforcement notifies the other party of the specific acts alleged to breach this Settlement Agreement and, thereafter, meets and confers with the other Party for a period of not less than 30 days in an effort to resolve the alleged breach informally before serving or filing any action to enforce the terms and conditions contained in this Settlement Agreement.

12. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 2/5/2018

Date: Feb 9, 2018

By: 

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

By: 

MORRIS ROCHEL, PRESIDENT
QFX, INC.