

# 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 Lowe’s Home Centers LLC (“Lowe’s), with Held and Lowe’s 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 used in consumer products. Held alleges that Lowe’s 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 Lowe’s sold or offered for sale in the State of California the Garden Treasures Garden Greenhouse with Shelves, alleged to contain di(2-ethylhexyl)phthalate (“DEHP”), without first providing Proposition 65 warnings to consumers. DEHP is listed by the California Office of Environmental Health Hazard Assessment (“OEHHA”) as a chemical known to cause birth defects or other reproductive harm.

### 1.3 Product Description

The products covered by this Settlement Agreement are specifically limited to the *Garden Treasures Garden Greenhouse with Shelves, Item #0404388, Model #4404, LW013001-082016, UPC #6 936863 04404 9* (hereinafter, “Products”), vinyl/PVC greenhouse covers containing DEHP that are manufactured by Shanghai Worth Garden Products Co., Ltd., of Shanghai, China (“Worth Garden”) and sold or offered for sale by Lowe’s in California.

### 1.4 Notice of Violation

On December 13, 2017, Held served Lowe’s Companies, Inc., the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation (“Notice”), alleging that Lowe’s violated Proposition 65 by not warning its customers and consumers in

California of the health risks associated with exposures to DEHP with respect to the Products. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

### **1.5 No Admission**

Lowe's denies the material, factual, and legal allegations in the Notice, and maintains that all of the Products sold, distributed, or offered for sale in California have been, and are, in compliance with Proposition 65. Lowe's represents that the Products were manufactured and distributed exclusively by Worth Garden that had an obligation to Lowe's to identify and include Proposition 65 warnings, if any, required for sale of the Products in California. Lowe's represents that Worth Garden has declined to participate in settlement of this matter. Nothing in this Settlement Agreement shall be construed as an admission by Lowe's 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 Lowe's of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Lowe's, nor shall this Settlement Agreement preclude Lowe's seeking indemnity from Worth Gardens. This Section shall not, however, diminish or otherwise affect Lowe'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 December 21, 2018.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

As a material term of this Settlement Agreement, Lowe's represents that it no longer purchases any Products from Worth Gardens. Conditioned upon Lowe's cessation of any future purchases of any Product, Lowe's shall have no warning obligation or reformulation requirement. However, should Lowe's resume the purchase of Products from Worth Gardens, Lowe's shall condition the purchase of Products for sale in California on Worth Gardens either providing: (a) "Reformulated Products", as defined by Section 2.1, below; or (b) Products

bearing a clear and reasonable health hazard warning, pursuant to Section 2.2.

## **2.1 Reformulated Products Defined**

For purposes of this Settlement Agreement, "Reformulated Products" are defined as Products containing DEHP in maximum concentrations of less than 0.1 percent (1,000 parts per million) in any accessible component (i.e., any component that may be touched during a reasonably foreseeable use) when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally accrediting organization (the "Reformulation Standard"). Products that meet the definition of Reformulated Products are exempt from the warning requirements of Health & Safety Code § 25249.6. For purposes of compliance with this Reformulation Standard, testing samples shall be prepared and extracted using Consumer Product Safety Commission ("CPSC") methodology CPSC-CH-C1001.09.3 and analyzed using U.S. Environmental Protection Agency ("EPA") methodology 8270D, or other methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

## **2.2 Proposition 65-Compliant Health Hazard Warnings**

For Products that do not qualify as Reformulated Products, as defined in Section 2.1, above, Lowe's purchase of Products from Worth Garden shall be conditioned on Worth Garden providing one of the following clear and reasonable health hazard warnings for all Products sold or offered for sale in California, in a manner consistent with the "safe harbor" warning provisions of Article 6 of Title 27 of the California Code of Regulations, which includes: (1) prominently placing each warning 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 use; and (2) providing warnings in a manner such that the consumer or user understands to which specific Product the warning applies, so as to minimize the risk of consumer confusion. For purposes of this Settlement Agreement, a clear and reasonable warning displayed or transmitted according the above criteria, and containing the following statement, shall satisfy these requirements:

**⚠ WARNING:** This product can expose you to chemicals, including di(2-ethylhexyl)phthalate, 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](http://www.P65Warnings.ca.gov).

Or, if placed directly on a Product or the Product's label, the following short-form warning statement may be used, provided it appears in a type size no smaller than the largest type size used for other consumer information on the Product's label and in no case smaller than 6-point type:

**⚠ WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

### **2.3 Previously Obtained Inventory**

Following receipt of the Notice from Plaintiff, Lowe's took action to remove all inventory of the Products from California Lowe's stores and refrain from any further sale of the Products to California customers. As a material term of this Settlement Agreement, Lowe's represents that, to the best of its knowledge, it no longer has any inventory of the Products available for sale in any Lowe's California store.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims alleged in the Notice and referred to in this Settlement Agreement, within fifteen (15) business days of the Effective Date, Lowe's agrees to pay \$2,750 in civil penalties. The civil penalty payment shall be allocated according to Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to OEHHA, and the remaining twenty-five percent (25%) of the penalty paid to Held. Lowe's shall issue its payment in two checks for the following amounts: (a) "OEHHA" in the amount of \$2,062.50; and (b) "Anthony E. Held, Client Trust Account" in the amount of \$687.50. Held's counsel shall be responsible for delivering OEHHA's portion of any penalty payment made under this Settlement Agreement.

### **3.2 Attorneys' Fees and Costs**

The parties acknowledge that Held and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of this Settlement Agreement had been settled. After the Parties reached an agreement as to all other settlement terms, the Parties then 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 § 1021.5, for all work performed through the mutual execution of this Settlement Agreement. Under these legal principles, within fifteen (15) business days of the Effective Date, Lowe's agrees to pay \$24,250 to Held and his counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Lowe's management, and negotiating a settlement in the public interest. Lowe's payment shall be delivered in the form of a check payable to "The Chanler Group" to the address identified in Paragraph 3.3. below.

### **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 Lowe's**

This Settlement Agreement is a full, final, and binding resolution between Held, on his own behalf and not on behalf of the public, and Lowe's, of any violation of Proposition 65 that was or could have been asserted by Held, on his own behalf, on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Lowe's, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, agents, assigns, attorneys, and each entity to whom Lowe's directly or indirectly distributes or sells Products, including, but not limited, to its downstream distributors, wholesalers, customers,

retailers, franchisees, cooperative members, and licensees ("Releasees"), in connection with claims asserted in the Notice regarding the Products sold or offered for sale in California by Lowe's before the Effective Date.

In further consideration of the promises and agreements herein contained, Held, on his own behalf and not on behalf of the public, on behalf of his past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all rights that he may have to institute or participate in, directly or indirectly, any form of legal action, and releases all claims against Lowe's and Releasees including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses, investigation fees, expert fees, and attorneys' fees, known or unknown in law or equity, fixed or contingent, now or in the future that he could make against Lowe's or the other Releasees relating to the alleged violations of Proposition 65 relating to or arising from the Products. Compliance with the terms of this Settlement Agreement constitute compliance with Proposition 65 with respect to exposures to DEHP from the Products. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Lowe's. This release is limited solely to Products provided to Lowe's by Worth Garden. No other Products are intended to be part of this release.

The releases provided by Held under this Settlement Agreement are provided solely on Held's behalf and are not releases on behalf of the public.

#### **4.2 Lowe's Release of Held**

Lowe's, 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 and his attorneys and other representatives, for any and all actions taken or statements made by Held and his attorneys and other representatives, whether in the course of investigating claims related to the Products, otherwise seeking to enforce Proposition 65 against it in this matter, or

with respect to the Products. The waiver in this paragraph shall not affect Lowe's from asserting any claims it may have against the Product supplier, Worth Gardens, with respect to alleged violations of Proposition 65 and its implementing regulations.

#### **4.3 Mutual Waiver of California Civil Code § 1542**

The Parties each acknowledge he/it is familiar with §1542 of the 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.

The Parties, each on his/its own behalf, and on behalf of his/its past and current agents, representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred upon them 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 he/it may lawfully waive such rights or benefits pertaining to the released matters, as specifically defined by Sections 4.1 and 4.2, above.

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

7. **NOTICE**

Unless specified herein, all correspondence and notice 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 Lowe's:

J. Tom Boer, Esq.  
Hunton Andrews Kurth, LLP  
50 California Street, Suite 1700  
San Francisco, CA 94111

For Held:

Proposition 65 Coordinator  
The Chanler Group  
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 § 25249.7(f).

10. **MODIFICATION**

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

11. **ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged



within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

**12. ENFORCEABILITY**

This Settlement Agreement and the terms and conditions herein shall become legally enforceable on the later occurrence of either: (i) the Effective Date, as defined above, or (ii) five business days after both Parties have fully executed the Settlement Agreement. The Parties shall each shall timely deliver its copy of the executed Settlement Agreement to the other Party within a reasonable amount of time, but no later than five business days after execution.

**13. 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: 12/21/2018

Date: 12.20.18

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

By:   
LOWE'S HOME CENTERS, LLC

Printed Name: JASON MILLER

Title: MERCHANDISING DIRECTOR