

RELEASE AND SETTLEMENT AGREEMENT

This Settlement and Release Agreement ("Agreement") is entered into between Michael DiPirro, a California citizen acting on behalf of the People of the State of California, and Hypertherm, Inc., a New Hampshire corporation, as of July 20, 1999 (the "Effective Date").

WHEREAS:

A. Michael DiPirro ("DiPirro") is an individual residing in San Francisco who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer and industrial products;

B. Hypertherm, Inc. (hereafter referred to as "Hypertherm") manufactures and sells in the State of California certain products that contain, or whose customary use and application may produce fumes or gases which contain, chemicals listed pursuant to Proposition 65 (California Health & Safety Code §§25249.5 *et seq.*).

C. The products that contain, or whose customary use and application may produce fumes or gases which contain, one or more of the chemicals listed pursuant to Proposition 65 and which are covered by this Agreement are set forth in Exhibit A (the "Products"), which is attached hereto and incorporated herein by this reference. These Products include plasma arc cutting systems.

D. Some of the Products have been manufactured and distributed by Hypertherm for use in California since 1995;

E. By notice dated February 22, 1999, DiPirro first served Hypertherm and all of the requisite public enforcement agencies a document entitled "60-Day Notice" which provided Hypertherm and such public agencies with notice that Hypertherm was allegedly in violation of Health & Safety Code § 25249.6 for failing to warn purchasers that certain products it manufactures and/or distributes in California expose users to certain Proposition 65-listed chemicals;

F. On July 9, 1999, DiPirro filed a complaint entitled *Michael DiPirro v. Hypertherm, Inc., et al.* (No. H208084-0) in the Alameda County Superior Court, naming Hypertherm as a defendant and alleging violations of Business & Professions Code §17200 *et seq.* and Health & Safety Code §25249 *et seq.* on behalf of individuals in California who may have been exposed to certain chemicals listed pursuant to Proposition 65 contained in certain Hypertherm products, or whose customary use and application may have produced fumes or gases which contain such chemicals.

G. Hypertherm denies the material factual and legal allegations contained in the 60-Day Notice and the Complaint filed by DiPirro for alleged violations of Proposition 65 and Business & Professions Code §§17200 *et seq.*, and maintains that all Products manufactured and/or distributed by Hypertherm in California are in compliance with all laws. Nothing in this Agreement shall constitute or be construed as an admission by Hypertherm of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Hypertherm of any fact, finding, conclusion, issue of law or violation of law.

NOW THEREFORE, in consideration of the promises, covenants and agreements herein contained and for other consideration, the sufficiency and adequacy of which is hereby confirmed by the parties who intend to be legally bound hereby, it is agreed as follows:

1. **Product Labeling.** Beginning immediately, Hypertherm shall initiate efforts to revise its current product or packaging labels for Covered Products consistent with this Agreement ("Revised Labels"). For purposes of this Agreement, "Covered Products" includes all products listed on Exhibit A hereto, and any other substantially similar products which may be manufactured and/or distributed by Hypertherm in California after the Effective Date which now or in the future contain, or whose customary use and application may produce fumes or gases that contain, Listed Chemicals. For purposes of this Agreement, "Listed Chemicals" means chemicals that are currently or may, in the future, be listed pursuant to Proposition 65. Hypertherm shall use reasonable efforts to ensure that all Covered Products in its possession intended for distribution or sale in California are packaged or sold using Revised Labels as soon as commercially reasonable; however, Hypertherm agrees that as of October 20, 1999 (the "Revised Label Compliance Date") Hypertherm shall not ship to California for sale or distribution any Covered Products unless each such Covered Product is accompanied by a Revised Label on or within the Covered Product package or affixed to Covered Products as follows:

For Covered Products which contain (or produce fumes or gases that contain) a chemical listed by the State of California as known to cause birth defects (or other reproductive harm) and which also may be used in various welding, cutting, brazing, soldering or other similar applications that, in some instances, produce fumes or gases that contain a chemical listed by the State of California as known to cause cancer:

“WARNING: This product, when used for welding or cutting, produces fumes or gases which contain chemicals known to the State of California to cause birth defects and, in some cases, cancer.”

The warning statement shall be prominent and displayed with such conspicuousness, as compared with other words, statements, or designs, as to render it likely to be read and reasonably understood by an ordinary individual under customary conditions of purchase or use. For purposes of this Agreement, "Revised Label" does not include an MSDS form that otherwise meets the requirements of Paragraph 2.

2. **MSDS Revision.** Beginning immediately, Hypertherm shall initiate efforts to revise its Material Safety Data Sheets (MSDSs) pertaining to each of the Covered Products which are intended for distribution and sale into California. Hypertherm shall ensure the MSDS for each of the Covered Products contain a warning in the MSDS that is consistent in wording with the on-label warning language required pursuant to Paragraph 1 of this Agreement ("Revised MSDS"). Hypertherm shall distribute Revised MSDSs in the normal course of business not later than October 20, 1999. Notwithstanding anything to the contrary contained in this Agreement, Hypertherm shall have no obligation to provide Revised MSDSs for Covered Products which are not required by federal law to be sold or distributed with an MSDS.

3. **Deemed Compliance.** Any New Products (as defined in this Paragraph 3) manufactured, distributed and/or sold by Hypertherm after the Revised Label Compliance Date shall be deemed to comply with the provisions of this Agreement and the requirements of Proposition 65 with respect to product warnings if they are accompanied by Revised Labels as required in Paragraph 1 of this Agreement. For purposes of this Agreement, "New Products" shall include any Products that are substantially similar to those included in Exhibit A which contain, or whose customary use or application may produce fumes or gases that contain, a Listed Chemical and which were not manufactured, distributed and/or sold by Hypertherm into California on or before the Effective Date.

4. **Civil Penalty.** Hypertherm shall, pursuant to Health & Safety Code § 25249.7(b), pay a civil penalty of \$4,000 to DiPirro within ten (10) calendar days of the Effective Date. Penalty monies shall

be apportioned by DiPirro in accordance with Health & Safety Code § 25192, with 75% of these funds remitted to the State of California. This payment shall be made payable to the "Chanler Law Group in Trust for Michael DiPirro" and shall be held in escrow by DiPirro's counsel until the Court has approved this settlement and issued the Order as set forth in Paragraph 11. It is specifically understood and agreed that DiPirro shall bear all responsibility for apportioning and paying to the State of California the appropriate civil penalties paid in accordance with this paragraph. In the event the Court rejects this settlement and fails to issue the Order as set forth in Paragraph 11, the payment made pursuant to this paragraph shall be returned to Hypertherm, with interest thereon at a rate of six percent (6%) per annum, within five (5) days of receipt of notice of the Court's rejection of the settlement and proposed Order.

5. **Reimbursement of Fees and Costs.** Within ten (10) calendar days of the Effective Date of the Agreement, Hypertherm shall pay to DiPirro the sum of \$9,000 for his investigation fees incurred prior to the filing of the 60-Day Notice, \$875 for investigation, expert and litigation costs, and \$6,125 for attorneys' and paraprofessional fees incurred in this matter. Such amounts (that total \$16,000) shall be made payable to the "Chanler Law Group" and held in escrow by DiPirro's counsel until the Court has approved this settlement and issued an Order as set forth in Paragraph 11. In the event the Court rejects this settlement and fails to issue the Order as set forth in Paragraph 11, the amounts paid by Hypertherm in accordance with this paragraph shall be returned to Hypertherm, with interest thereon at a rate of six percent (6%) per annum, within five (5) days of receipt of notice of the Court's rejection of the settlement and proposed Order.

6. **DiPirro's Release of Hypertherm.** In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Paragraphs 4 and 5, DiPirro, by this Agreement, on behalf of himself, his agents, and/or assignees, and the People of the State of California on whose behalf this action was brought, hereby waives all rights to institute any form of legal action and releases all claims, including, without limitation, all actions, causes of action, in law or in equity, suits, liabilities, demands, damages, losses, costs or expenses (including attorneys' fees and other costs) of any nature whatsoever, whether known or unknown, fixed or contingent, (collectively, "Claims") against Hypertherm and its parent and affiliated companies, divisions, subdivisions, subsidiaries (and the predecessors, successors and assigns of any of them) and their respective officers, directors, attorneys, representatives, shareholders, agents, and employees (collectively, "Hypertherm Releasees"). This waiver and release shall specifically include Claims arising under Proposition 65 or Business & Professions Code §§17200 *et seq.*, related to Hypertherm's alleged failure to warn about exposures on or before the Effective Date to certain Listed Chemicals contained in, or which may be produced in the fumes or gases resulting

from the customary use and application of, any of the Covered Products listed in Exhibit A. It is specifically understood and agreed that Hypertherm's compliance with the terms of this Agreement resolves all issues and liability, now and in the future, concerning the Hypertherm's Releasees' past compliance with the requirements of Proposition 65, Business and Professions Code §§17200 *et seq.*, or any other Claims arising from Hypertherm's alleged failure to comply with Proposition 65 in connection with the Covered Products listed on Exhibit A occurring on or before the Effective Date.

7. **DiPirro's Release of "Downstream Parties."** DiPirro, on behalf of himself, his agents, and/or assignees and the People of the State of California on whose behalf this action was brought, further waives all rights to institute any form of legal action and releases all Claims against each distributor, wholesaler, retailer, dealer, owner, operator, lessor, lessee or user of the Covered Products, or any of their respective parent and affiliated companies, divisions, subdivisions, subsidiaries (and the predecessors, successors and assigns of any of them) and their respective officers, directors, attorneys, representatives, agents and employees (collectively, "Downstream Parties"). This waiver and release shall specifically include Claims arising under Proposition 65 or Business & Professions Code §§17200 *et seq.*, related to the Downstream Parties' alleged failure to warn about exposures on or before the Effective Date to Listed Chemicals contained in, or which may be produced in fumes or gases resulting from the customary use or application of, Covered Products listed in Exhibit A. It is specifically understood and agreed that this Agreement resolves all issues and liability concerning the Downstream Parties' past compliance with the requirements of Proposition 65, Business & Professions Code §§17200, *et seq.*, or any other Claims arising from Hypertherm's or the Downstream Parties' alleged failure to comply with Proposition 65 in connection with the Covered Products on or before the Effective Date.

8. **Hypertherm Release.** Hypertherm, by this Agreement, waives all rights to institute any form of legal action against DiPirro, and his attorneys or representatives, for all actions taken or statements made on or before the Effective Date by DiPirro, and his attorneys or representatives, in the course of seeking enforcement of Proposition 65 or Business & Professions Code §§17200, *et seq.* against Hypertherm.

9. **Product Characterization.** Hypertherm acknowledges that each of the Covered Products listed in Exhibit A contains, or in the customary use or application of the Covered Products likely produces fumes or gases that contain one or more substances known to the State of California to cause cancer or birth defects or other reproductive harm. In the event that Hypertherm obtains analytical, risk assessment or other data ("Exposure Data") that shows that an exposure to any or all Covered Products poses "no

significant risk” or will have “no observable effect,” as each such standard is applicable and as each is defined under Health & Safety Code §25249.10(c), Hypertherm shall provide DiPirro with 90 days prior written notice of its intent to limit or eliminate the warning provisions under this Agreement based on the Exposure Data and shall provide DiPirro with all such supporting Exposure Data. Within thirty (30) days of receipt of Hypertherm's Exposure Data, DiPirro shall provide Hypertherm with written notice of his intent to challenge the Exposure Data (in the event that he chooses to make such a challenge). If DiPirro fails to provide Hypertherm written notice of his intent to challenge the Exposure Data within thirty (30) days of receipt of Hypertherm notice and the Exposure Data, DiPirro shall waive all rights to challenge the Exposure Data, and Hypertherm shall be entitled to limit or eliminate the warning provisions required under this Agreement with respect to those Covered Product(s) to which the Exposure Data applies. If DiPirro timely notifies Hypertherm of his intent to challenge the Exposure Data, DiPirro and Hypertherm shall negotiate in good faith to attempt to reach a settlement. In the event that no settlement is reached within thirty (30) days of mailing by DiPirro of such notice of challenge, DiPirro and Hypertherm agree to submit such challenge to the Court for determination, pursuant to the Court's continuing jurisdiction of this matter under California Code of Civil Procedure §664.6 and this Agreement. The prevailing party shall be entitled to reasonable attorneys' fees and costs associated with such a determination. If DiPirro does not challenge Hypertherm's notice or the Court determines that no warning is required for particular Covered Products, Hypertherm shall no longer be required to provide the warnings described in this Agreement for those Covered Products.

10. Hypertherm's Covered Product Information. Hypertherm understands that the Covered Product sales (and other) information provided to counsel for DiPirro by Hypertherm was a material factor upon which DiPirro has relied to determine a fair and reasonable settlement as set forth in this Agreement. To the best of Hypertherm's knowledge, the information provided is true and accurate. In the event DiPirro discovers facts which demonstrate to a reasonable degree of certainty that the information is materially inaccurate, all other parts of this Agreement notwithstanding, DiPirro shall have the right to rescind this Agreement and re-institute an enforcement action against Hypertherm, provided that all sums paid by Hypertherm pursuant to Paragraphs 3 and 4 are returned to Hypertherm, with interest thereon at a rate of six percent (6%) per annum, within five (5) days from the date on which DiPirro notifies Hypertherm of his intent to rescind this Agreement. In such case, all applicable statutes of limitation shall be deemed tolled for the period between the date DiPirro filed the instant action and the date DiPirro notifies Hypertherm that he is rescinding this Agreement pursuant to this paragraph, provided that, in no event shall any statute of limitation be tolled beyond four (4) years from the date this action was filed.

11. **Stipulated Judgment and Order.** The parties shall file a Stipulated Judgment to be approved pursuant to California Code of Civil Procedure Section 664.6 by the Alameda County Superior Court in accordance with the terms of this Agreement. It is expressly understood and agreed by the parties hereto that the rights and obligations contained in this Agreement are expressly conditioned on the issuance by the Court of an Order approving the Stipulated Judgment. If the Court fails to issue such Order within sixty (60) days of the Effective Date, this Agreement shall be deemed null and void as of the sixty-first (61st) day after the Effective Date.

12. **Severability.** In the event that any of the provisions of this Agreement are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected thereby.

13. **Attorneys' Fees.** In the event that a dispute arises with respect to any provision(s) of this Agreement, the prevailing party shall be entitled to recover costs and reasonable attorneys' fees.

14. **Governing Law.** The terms of this Agreement shall be governed by the laws of 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 Covered Products specifically, Hypertherm shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, those Covered Products are so affected.

15. **Notices.** All correspondence and notices required to be provided pursuant to this Agreement shall be in writing and shall be personally delivered or sent by first-class, registered, certified mail, overnight courier, and/or via facsimile transmission (with presentation of facsimile transmission confirmation) addressed as follows:

If to DiPirro: Chanler Law Group
 Magnolia Lane
 (Off 72 Huckleberry Hill)
 New Canaan, Connecticut 06840-3801
 (Fax) 203/801-5222

If to Hypertherm: Hypertherm, Inc.
 Attn: Michael Golden
 Etna Road P.O. Box 5010
 Hanover, NH 03755
 (Fax) 603/643-5352

with a copy to: John E. Dittoe, Esq.
Crosby, Heafey, Roach & May
1999 Harrison Street
P.O. Box 2084
Oakland, CA 94604-2084
(Fax) 510/273-8832

Either party, from time to time, may specify a change of address or facsimile number to which all notices and other communications shall be sent.

16. No Admissions. Nothing in this Agreement shall constitute or be construed as an admission by Hypertherm of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Hypertherm of any fact, finding, conclusion, issue of issue of law, or violation of law, such being specifically denied by Hypertherm. Hypertherm reserves all of its rights and defenses with regard to any claim by any party under Proposition 65 or otherwise. However, this Paragraph shall not diminish or otherwise affect the obligations, responsibilities, and duties of Hypertherm under this Agreement.

17. Entire Agreement; Modification. This Agreement, together with the exhibits hereto which are specifically incorporated herein by this reference, constitutes the entire agreement between the parties relating to the rights and obligations herein granted and assumed, and supersedes all prior agreements and understandings between the parties. This Agreement may be modified only upon the written agreement of the parties. To the extent any such modification is made to this Agreement that also requires modification of the Stipulated Judgment provided for herein, the parties shall cooperate in modifying the Stipulated Judgment submitted to the Court.

18. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

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

AGREED TO:

DATE: 7/26/99

MICHAEL DIPIRRO

Michael DiPirro

AGREED TO:

DATE: July 20, 1999

HYPERTHERM INC.,
a New Hampshire corporation

By: Michael Golden
Michael Golden

Its: VP/CFo