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8 Attorneys for Plaintiff
9 PETER ENGLANDER

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF ALAMEDA

12 UNLIMITED CIVIL JURISDICTION

13 PETER ENGLANDER,

14 Plaintiff,

15 v.

16 THERMWELL PRODUCTS CO. INC., and
17 DOES 1-150, inclusive,

18 Defendants.
19 _____

) Assigned for all purposes to the Honorable
) Ronni MacLaren, Judge of the Superior Court

) Case No. RG 12655783

) **SETTLEMENT AGREEMENT PURSUANT**
) **TO CALIFORNIA CIVIL PROCEDURE**
) **§ 664.6 AS TO DEFENDANT THERMWELL**
) **PRODUCTS CO., INC.**

1 **1. INTRODUCTION**

2 **1.1 Peter Englander and Thermwell Products Co., Inc.**

3 This Settlement Agreement is entered into by and between plaintiff Peter Englander
4 (“Englander” or “Plaintiff”) and defendant Thermwell Products Co., Inc. (“Thermwell” or
5 “Defendant”), with Englander and Thermwell collectively referred to as the “Parties.”

6 **1.2 Peter Englander**

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

10 **1.3 Thermwell Products Co., Inc.**

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

14 **1.4 General Allegations**

15 Englander alleges that Thermwell has manufactured, imported, distributed and/or sold in the
16 State of California vinyl/PVC sheeting containing Di(2-ethylhexyl)phthalate (“DEHP”) without the
17 requisite health hazard warnings. DEHP is listed pursuant to Proposition 65 as a chemical known to
18 the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Settlement Agreement are defined as vinyl/PVC
21 sheeting including, but not limited to, the *Frost King Vinyl Sheeting, 4 mil thick Chrystal Clear*
22 *3225/4 (#0 77578 03190 3)* manufactured, imported, distributed, sold and/or offered for sale by
23 Thermwell in the State of California, hereinafter the “Products.”

1 **1.6 Notice of Violation**

2 On August 31, 2012, Englander served Thermwell and various public enforcement agencies
3 with a document entitled “60-Day Notice of Violation,” that alleged that Thermwell violated
4 Proposition 65 by failing to warn consumers the Products exposed users in California to DEHP.

5 **1.7 Complaint**

6 On November 13, 2012, Englander, acting in the interest of the general public in California,
7 filed a Complaint, in the Superior Court in and for the County of Alameda, naming Thermwell as a
8 defendant, *Englander v. Thermwell Products, Co., et al.*, Case No. RG 12-655783 and alleging
9 violations of Health & Safety Code §§ 25249.6, *et seq.* based on, *inter alia*, alleged occupational
10 and consumer exposures to DEHP in the contained in the Products sold in California without the
11 clear and reasonable warning required by Proposition 65 (“Complaint”).

12 **1.8 No Admission**

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

21 **1.9 Consent to Jurisdiction**

22 For purposes of this Settlement Agreement only, the parties stipulate that this Court has
23 jurisdiction over Thermwell as to the allegations contained in the Complaint, that venue is proper in
24 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of
25 this Settlement Agreement.

26 **1.10 Effective Date**

27 For purposes of this Settlement Agreement, the term “Effective Date” shall mean September
28 15, 2013.

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

2 **2.1 Reformulation Standard**

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

8 **2.2. Vendor Notification**

9 To the extent it has not already done so, no later than September 15, 2013, Thermwell shall
10 provide the Reformulation Standard to its then-current vendors of Products that will be sold or
11 offered for sale to California consumers, or that Thermwell has reason to believe may be sold or
12 distributed for sale in California, and shall instruct each vendor to use reasonable efforts to provide
13 Products that comply with the Reformulation Standard on a nationwide basis.

14 **2.3 Reformulation Commitment**

15 As of the Effective Date, all Products distributed, sold and/or offered for sale in California
16 shall qualify as Reformulated Products as defined in Section 2.1 above or shall carry the appropriate
17 Proposition 65 health hazard warnings as set forth in Section 2.4 below.

18 **2.4 Product Warnings**

19 As of the Effective Date, any Products that do not qualify as Reformulated Products as
20 defined in Section 2.1 above, and that Thermwell has reason to believe may be sold or distributed
21 for sale in California, shall carry a clear and reasonable warning that shall be affixed to the
22 packaging, labeling, or directly on each Product. Each warning shall be prominently placed with
23 such conspicuousness as compared with other words, statements, designs, or devices as to render it
24 likely to be read and understood by an ordinary individual under customary conditions before
25 purchase. Each warning shall be provided in a manner such that the consumer or user understands
26 to which specific Product the warning applies, so as to minimize the risk of consumer confusion.

27 Any clear and reasonable health hazard warning provided pursuant to this Settlement
28 Agreement shall state:

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

3. MONETARY PAYMENTS

In settlement of all claims referred to in this Settlement Agreement, Thermwell shall pay \$15,000 in civil penalties, which sum includes both the initial civil penalty in Section 3.1 below, and final (contingent) civil penalty in Section 3.2 below. All civil penalties paid shall be apportioned in accordance with California Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25% of these monies remitted to “The Chanler Group in Trust for Englander.”

3.1 Initial Civil Penalty

Thermwell shall pay an initial civil penalty in the amount of \$6,000 on or before the Effective Date. Thermwell shall issue two separate checks to: (a) “OEHHA” in the amount of \$4,500; and (b) “The Chanler Group in Trust for Englander” in the amount of \$1,500. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

3.2 Final Civil Penalty

Thermwell shall pay a final civil penalty of \$9,000 on or before December 31, 2014. The final civil penalty shall be waived in its entirety, however, if, no later than December 15, 2014, an officer of Thermwell provides Englander with written certification that it, as of December 15, 2014, Thermwell has taken reasonable best efforts to obtain the manufacture for sale in California of only Reformulated Products from its manufacturers, but has been unable to obtain any reasonably commercially feasible Reformulated Products. For purposes of this Section 3.2, whether a Reformulated Product is “reasonably commercially feasible” shall be a determination which may consider the following factors: availability and supply of a Reformulated Product; cost of the Reformulated Product; and performance characteristics of the Reformulated Product. Such certification must be received by The Chanler Group on or before December 15, 2014. The certification in lieu of paying the final civil penalty provided by this section is a material term, and

1 time is of the essence. Unless waived, Thermwell shall issue two separate checks for the final civil
2 penalty payment to: (a) “OEHHA” in the amount of \$6,000; and (b) “The Chanler Group in Trust
3 for Englander” in the amount of \$3,000.

4 **3.3 Reimbursement of Fees and Costs**

5 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
6 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
7 this fee issue to be resolved after the material terms of the agreement had been settled. Englander
8 then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had
9 been finalized. The parties then attempted to (and did) reach an accord on the compensation due to
10 Englander and his counsel under general contract principles and the private attorney general
11 doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through
12 the mutual execution of this agreement. Thermwell shall pay \$45,000 for fees and costs incurred as
13 a result of investigating, bringing this matter to Thermwell’s attention, and negotiating a settlement
14 in the public interest. Thermwell shall issue a separate 1099 for fees and costs (EIN: 94-3171522),
15 shall make the check payable to “The Chanler Group” and shall deliver payment on or before the
16 Effective Date.

17 **3.4 Payment Procedures**

18 **3.4.1. Issuance of Payments.** Payments shall be delivered as follows:

- 19 (a) All payments owed to Englander and The Chanler Group, pursuant to
20 Sections 3.1, 3.2 (unless waived) and 3.3, shall be delivered to the following
21 payment address:

22 The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710

- 27 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section
28 3.1, 3.2 (unless waived) shall be delivered directly to OEHHA (Memo
line “Prop 65 Penalties”) at the following addresses:

1 For United States Postal Service Delivery:

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

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

13 With a copy of the checks payable to OEHHA mailed to The Chanler
14 Group at the address set forth above in 3.4.1(a), as proof of payment to
15 OEHHA.

16 **3.3.2 Issuance of 1099 Forms.** After each penalty payment, Thermwell shall
17 issue separate 1099 forms for each payment to Englander, whose address and tax identification
18 number shall be furnished upon request after this Settlement Agreement has been fully executed by
19 the Parties, and OEHHA at the addresses listed in Section 3.4.1 above.

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Englander's Public Release of Proposition 65 Claims**

22 Englander acting on his own behalf and in the public interest releases Thermwell from all
23 claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP
24 from the Products as set forth in the Notice. Compliance with the terms of this Settlement
25 Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from the
26 Products as set forth in the Notice.

27 **4.2 Englander's Individual Release of Claims**

28 Plaintiff also, in his individual capacity only and *not* in his representative capacity, provides
a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,

1 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
2 suspect or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the
3 Products manufactured, distributed or sold by Thermwell.

4 Englander acknowledges that he is familiar with Section 1542 of the California Civil Code,
5 which provides as follows:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
7 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
8 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
9 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
10 SETTLEMENT WITH THE DEBTOR.

11 Englander, in his individual capacity only and *not* in his representative capacity, expressly
12 waives and relinquishes any and all rights and benefits which he may have under, or which may be
13 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
14 any other state or federal statute or common law principle of similar effect, to the fullest extent that
15 he may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of
16 such intention, the release hereby given shall be and remain in effect as a full and complete release
17 notwithstanding the discovery or existence of any such additional or different claims or facts arising
18 out of the released matters.

19 This release is expressly limited to those claims that arise under Proposition 65, as such
20 claims relate to Defendant's alleged failure to warn about exposures to or identification of the
21 DEHP contained in the Products, as such claims are identified in the Proposition 65 60-Day Notice
22 to Defendant and to the extent that any alleged violations occur prior to the Effective Date. This
23 Release does not release any person, party or entity from any liability for any violation of
24 Proposition 65 regarding the Products that occur after the Effective Date.

25 The parties further understand and agree that this release shall not extend upstream to any
26 entities, other than Thermwell, that manufactured the Products or any component parts thereof, or
27 any distributors or suppliers who sold the Products or any component parts thereof to Thermwell.
28

1 **4.3 Thermwell’s Release of Englander**

2 Thermwell on behalf of itself, its past and current agents, representatives, attorneys,
3 successors and/or assignees, hereby waives any and all claims against Englander, his attorneys and
4 other representatives, for any and all actions taken or statements made (or those that could have
5 been taken or made) by Englander and his attorneys and other representatives, whether in the course
6 of 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 Settlement Agreement is not effective until it is approved by the Court and shall be null
10 and void if, for any reason, it is not approved by the Court within one year after it has been fully
11 executed by all parties.

12 **6. SEVERABILITY**

13 If, subsequent to the execution of this Settlement Agreement, any of the provisions of this
14 Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable
15 provisions remaining shall not be adversely affected.

16 **7. GOVERNING LAW**

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

1 **8. NOTICES**

2 Unless specified herein, all correspondence and notices required to be provided pursuant to
3 this Settlement Agreement 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 Thermwell:

7 Robert R. Cross, Esq.
8 Fitzgerald, Abbott &
9 Beardsley LLP
10 1221 Broadway
11 Twenty-First Floor
12 Oakland, California 94612

 To Peter Englander:

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

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

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

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

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

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

20 **11. ENFORCEMENT OF SETTLEMENT AGREEMENT**

21 After the Effective Date, any Party may, after meeting and conferring, by motion,
22 application for an order to show cause, or any other available remedy at law before this Court,
23 enforce the terms and conditions contained in this Settlement Agreement. In the event that Plaintiff
24 discovers a Product sold in California, that does not comply with the injunctive requirements of
25 Section 2.1 and 2.4 above, he shall send a written notice of violation (“NOV”) to Thermwell, prior
26 to filing any enforcement action including, but not limited to, an action for breach of contract. The
27 NOV shall contain: (a) a copy of the sale receipt showing the date and location form which the
28 Product was purchased, and the identification of the Product, including the SKU and/or other

1 identification number(s); (b) evidence that the Product was not accompanied by any clear and
2 reasonable warning as required by Section 2.4 above; and (c) all test data obtained by Englander
3 regarding the Product and supporting documentation sufficient for validation of the test results,
4 including any laboratory reports, quality assurance reports and quality control reports associated
5 with the testing of the Products demonstrating that the Product contains more than 1,000 ppm
6 DEHP. Thermwell can address the NOV by providing Englander with information, including a
7 certification, evidencing that Thermwell instructed the retailer or distributor of the violative Product
8 that it was not to be distributed or sold in California.

9 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

10 Englander and Thermwell agree to mutually employ their best efforts to support the entry of
11 this agreement as a Settlement Agreement and obtain approval of the Settlement Agreement by the
12 Court in a timely manner. The parties acknowledge that, pursuant to California Health & Safety
13 Code § 25249.7, a noticed motion is required to obtain judicial approval of this Settlement
14 Agreement, which Englander shall draft and file, and Thermwell shall join. If any third party
15 objection to the noticed motion is filed, Englander and Thermwell shall work together to file a joint
16 reply and appear at any hearing before the Court. This provision is a material component of the
17 Settlement Agreement and shall be treated as such in the event of a breach.

18 **13. MODIFICATION**

19 This Settlement Agreement may be modified only: (1) by written agreement of the parties
20 and upon entry of a modified Settlement Agreement by the Court thereon; or (2) upon a successful
21 motion of any party and entry of a modified Settlement Agreement by the Court.
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1 **14. AUTHORIZATION**

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

5
6 AGREED TO:

AGREED TO:

7 Date: October 17, 2013

Date: _____

8
9 By: 
10 Peter Englander

By: _____
Thermwell Products, Inc.

1 **14. AUTHORIZATION**

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

5
6 AGREED TO:

AGREED TO:

7 Date: _____

Date: 10/18/2013

8
9 By: _____

By: 

10 Peter Englander

Thermwell Products, Inc.

Vincent G. ... ex J.P.