

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between plaintiff Peter Englander (“Englander”) and Empire Candle Co., LLC (“Empire Candle”), with Englander and Empire Candle each individually referred to as a “Party” and collectively as the “Parties.” Englander 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 in consumer products. Empire Candle 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 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Englander alleges that Empire Candle sells, and distributes for sale in California, ceramic candles with exterior designs containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Englander alleges that Empire Candle failed to provide individuals exposed to lead from its ceramic candles with a warning regarding the health hazards associated with exposures to lead, as required by Proposition 65.

1.3 Product Description

For purposes of this Settlement Agreement “Products” are defined as ceramic candles with exterior designs containing lead that are sold, or distributed for sale in California, by Empire Candle including, but not limited to, the *Southern Peach Cobbler Candle*, UPC #6 44124 70619 8.

1.4 Notice of Violation

On August 1, 2017, Englander served Empire Candle, the California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation

("Notice"), alleging that Empire Candle violated Proposition 65 when it failed to warn its customers and consumers in California of the health risks associated with exposures to lead 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

Empire Candle denies the material, factual, and legal allegations in the Notice, and maintains that all of the products that it sold, and distributed 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 Empire Candle of any 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 Empire Candle of any fact, finding, conclusion, issue of law, or violation of law, the same being denied by Empire Candle. This Section shall not, however, diminish or otherwise affect Empire Candle'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 March 30, 2018.

2. INJUNCTIVE RELIEF

2.1 Commitment Reformulate or Provide Warnings

Commencing 30 days from the Effective Date and continuing thereafter, Empire Candle shall only purchase for sale or manufacture for sale in California "Reformulated Products" as defined by Section 2.2, or Products which include a warning as provided in Section 2.3.


2.2 Reformulated Products Defined

For purposes of this Settlement Agreement, Reformulated Products are defined as Products that (a) contain lead in concentrations of no more than 90 parts per million ("ppm") (0.09%) in any component of Products analyzed pursuant to U.S. Environmental

Protection Agency (“EPA”) testing methodologies 3050B and 6010B; and (b) yield a result of no more than 1.0 micrograms of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol. In addition to the testing methodologies provided above, the Parties may use equivalent methodologies utilized by state or federal agencies for the purpose of determining lead content in a solid substance to analyze a Product for the purpose of determining whether it qualifies as a Reformulated Product under this Settlement Agreement.

2.3 Warning Alternative

Commencing 30 days from the Effective Date and continuing thereafter, for any Products sold or distributed for sale in California by Empire Candle that are not Reformulated Products, Empire Candle will only offer such Products for sale with a clear and reasonable warning in accordance with this Section. Empire Candle 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 Consent Judgment, 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 that states:

 **WARNING:** This product can expose you to chemicals including lead, 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.

or

 **WARNING** Reproductive Harm –
www.P65Warnings.ca.gov.

Empire Candle may use alternative methods of transmission specified by Title 27, Art. 6, § 25602, however, the warning language shall be one of the two options provided above.

3. MONETARY SETTLEMENT TERMS

3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)

In settlement of all the claims referred to in this Settlement Agreement, Empire Candle shall pay a total of \$2,000 in civil penalties in accordance with this Section. Each civil penalty payment will be allocated in accordance with Health and Safety Code § 25249.12(c)(1) & (d), with seventy-five percent (75%) of the penalty remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty retained by Englander.

Empire Candle shall deliver its payment on or before April 13, 2018 in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$1,500; and (b) “Peter Englander, Client Trust Account” in the amount of \$500.

3.2 Attorneys’ Fees and Costs

The Parties reached an accord on the compensation due to Englander 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. Empire Candle agrees to pay \$18,000 for all fees and costs incurred investigating, bringing this matter to the attention of Empire Candle’s management, and negotiating a settlement that provides a significant public benefit. Empire Candle’s payment shall be delivered in a single check made payable to “The Chanler Group” on or before April 13, 2018.

3.3 Payment Address

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

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

4. CLAIMS COVERED AND RELEASED

4.1 Englander's Release of Empire Candle

This Settlement Agreement is a full, final, and binding resolution between Englander in his individual capacity, and Empire Candle, of any violation of Proposition 65 that was or could have been asserted by Englander, on his own behalf, or on behalf of his past and current agents, representatives, attorneys, successors, and assigns, against Empire Candle, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Empire Candle directly or indirectly distributes or sells Products, including, but not limited, to its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees, and the manufacturers, importers and suppliers of the Products ("Releasees"), based on the failure to warn about exposures to lead in Products manufactured, sold or distributed for sale in California by Empire Candle before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Englander, in his individual capacity, on his own behalf, and on behalf of his past and current agents, representatives, attorneys, successors, and assignees, 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 Empire Candle, 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 for claims arising under Proposition 65 with respect to the alleged or actual failure to warn about exposures to lead in Products manufactured, distributed, sold or offered for sale by Empire Candle, before the Effective Date, as alleged in the Notice.

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

4.2 Empire Candle's Release of Englander

Empire Candle, 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 Englander and his attorneys and other representatives, for any and all actions taken or statements made by Englander and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

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 Empire Candle may provide written notice to Englander 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 Empire Candle:

Tom Lee, Esq.
Bryan Cave
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Tom.lee@bryancave.com

For Englander:

The Chanler Group
Attn: Prop 65 Coordinator
2560 Ninth Street, 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)

Englander 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. **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: 3/29/2018

Date: 3/30/2018

By: 

PETER ENGLANDER

By: 

ROBERT TURTLEDOVE , PRESIDENT
EMPIRE CANDLE COMPANY, LLC