

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Peter Englander and Surgical Appliance Industries, Inc.**

This Settlement Agreement is entered into by and between Peter Englander (“Englander”) on one hand, and Surgical Appliance Industries, Inc. (“Surgical”) on the other, with Englander and Surgical collectively referred to as the “Parties.” Englander is an individual residing in 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. Surgical 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 §§ 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

Englander alleges that Surgical has manufactured, imported, distributed and/or sold in the State of California vinyl/PVC shower hoses containing Di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as vinyl/PVC shower hoses containing DEHP including, but not limited to, *PCP Hand Held Shower, #7031, UPC #0 48503 70310 3*, which are manufactured, imported, distributed, sold and/or offered for sale by Surgical in the State of California, hereinafter the “Products.”

### **1.4 Notice of Violation**

On October 14, 2016, Englander served Surgical and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice alleging that Surgical was in violation of California Health & Safety Code

§ 25249.6 for failing to warn consumers that the Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

Surgical denies the material, factual and legal allegations contained in Englander’s Notice and maintains that all products that it has sold and distributed 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 Surgical or by any of its respective officers, directors, shareholders, employees, agents, parent companies, subsidiaries, divisions, affiliates, franchises, licensees, customers, suppliers, manufacturers, distributors, wholesalers, or retailers of any fact, finding, issue of law or violation of law, fault, wrongdoing, or liability, the same being specifically denied by Surgical; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Surgical of any fact, finding, conclusion, issue of law or violation of law fault, wrongdoing, or liability. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean January 27, 2017.

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

### **2.1 Reformulation Standards**

Reformulated Products are defined as those Products containing a maximum of 1000 parts per million of DEHP when analyzed pursuant to 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.


### **2.2 Reformulation Commitment**


As of the Effective Date, Surgical shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 above, or shall carry the Proposition 65 warnings specified in Section 2.3 below.

### 2.3 Product Warnings


Commencing on the Effective Date, Surgical shall provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) for all Products for sale in the State of California that do not qualify as Reformulated Products. Each warning shall be prominently placed 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. Each warning shall be provided 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.

(a) **Product Labeling.** Surgical shall affix a warning to the packaging, labeling, or directly on each Product provided for sale in retail outlets in California that states:


 **WARNING:** This product can expose you to chemicals, including DEHP, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)  
or

 **WARNING:** This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.


(b) **Point-of-Sale Warnings.** Alternatively, Surgical may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products. Such instruction sent to Surgical's customers shall be sent by certified mail, return receipt requested.

 **WARNING:** This product can expose you to chemicals, including DEHP, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

or


 **WARNING:** This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:<sup>1</sup>

 **WARNING:** The following products can expose you to chemicals, including DEHP, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

*[list products for which warning is required]*

or

 **WARNING:** The following products can expose you to chemicals which are known to the State of California to cause cancer, birth defects or other reproductive harm.

*[list products for which warning is required]*

### **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

In settlement of all the claims referred to in this Settlement Agreement, Surgical shall pay a total of \$12,000.00 in civil penalties in accordance with this Section. Each penalty payment

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<sup>1</sup>For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Englander, as follows:

**3.1 Initial Civil Penalty**

Surgical shall pay an initial civil penalty in the amount of \$2,000.00 on or before the Effective Date. Surgical shall issue two checks, (1) to: “Peter Englander, Client Trust Account” in the amount of \$500.00, and (2) to the “Office Environmental Health Hazard Assessment” in the amount of \$1,500. Upon receipt, Englander and his counsel will then ensure payment to OEHHA. All penalty payments shall be delivered to the addresses listed in Section 3.3 below.

**3.2 Final Civil Penalty**

Surgical shall pay a final civil penalty of \$10,000 on or before December 30, 2017. The final civil penalty shall be waived in its entirety, however, if, no later than December 15, 2017, an officer of Surgical provides Englander or his counsel with written certification that, as of the date of such certification and continuing into the future, Surgical has met the reformulation standard specified in Section 2.1 above, such that all Products manufactured, imported, distributed, sold and offered for sale in California by Surgical are Reformulated Products. Englander must receive any such certification on or before December 15, 2017. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence. Surgical shall issue two checks for its final civil penalty payments, (1) to: “Peter Englander, Client Trust Account” in the amount of \$2,500, and (2) to the “Office Environmental Health Hazard Assessment” in the amount of \$7,500.

**3.3 Payment Procedures**

**3.3.1. Issuance of Payments.** Payments shall be delivered as follows:

All payments owed to Englander, pursuant to Sections 3.1 through 3.2, shall be delivered to the following payment address:\

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

**4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Englander 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 this fee issue to be resolved after the material terms of the agreement had been settled. Surgical then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to Englander 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 agreement. Surgical shall pay \$14,875.00 for fees and costs incurred as a result of investigating, bringing this matter to Surgical's attention, and negotiating a settlement in the public interest. Surgical shall make the check payable to "The Chanler Group" and shall deliver payment on or before the Effective Date, to the address listed in Section 3.3.1 above.

**5. RELEASES**

**5.1 Englander's Release of Surgical**

This Settlement Agreement is a full, final and binding resolution between Englander and Surgical of any violation of Proposition 65 that was or could have been asserted by Englander on behalf of himself and *not* on behalf of the public, and on behalf of his past and current agents, representatives, attorneys, successors and/or assignees, against Surgical, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys and each entity to whom Surgical directly or indirectly distributes or sells products including, but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees ("Releasees"), based on their failure to warn about alleged exposures to

DEHP contained in products that were manufactured, imported, distributed, sold and/or offered for sale by Surgical in California before the Effective Date.

In further consideration of the promises and agreements herein contained, Englander on behalf of himself and *not* on behalf of the public, his past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all of his rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that he 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, -- limited to and arising under Proposition 65 with respect to phthalates in products manufactured, imported distributed, sold and/or offered for sale by Surgical before the Effective Date (collectively "claims"), against Surgical and Releasees.

## **5.2 Surgical's Release of Englander**

Surgical, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Englander and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Englander and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

## **5.3 Mutual Releases**

It is possible that other claims not known to the parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Englander, on behalf of himself only, and Surgical, on behalf of itself only, acknowledge that this Settlement Agreement is expressly intended to cover and include all such claims, including all rights of action therefor. The Parties have full knowledge of the contents of California Civil Code section 1542. The Parties, on behalf of themselves only, acknowledge that the claims released in Sections 5.1 and

5.2 may include unknown claims, and nevertheless waives California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads 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, on behalf of themselves only, acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

**6. SEVERABILITY**

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

**7. 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 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then Surgical may provide written notice to Englander of any asserted change in the law and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**8. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (i) personally delivered; (ii) sent by first-class (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one party by the other party at the following addresses:



For Surgical:

L. Thomas Applegate Jr.  
Surgical Appliance Industries, Inc.  
3906 Rosslyn Drive  
Cincinnati, OH 45209

For 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.

**10. COUNTERPARTS; FACSIMILE AND SIGNATURES**

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

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

Englander agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**12. MODIFICATION**

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

13. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: 1/24/2017

Date: \_\_\_\_\_

By:   
PETER ENGLANDER

SURGICAL APPLIANCE INDUSTRIES,  
INC.

By: \_\_\_\_\_  
L. THOMAS APPLGATE JR.,  
PRESIDENT

13. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

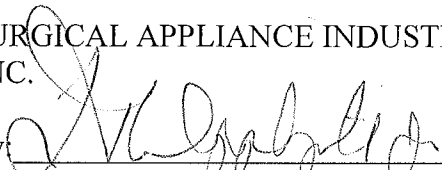
**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 1/30/17

By: \_\_\_\_\_  
PETER ENGLANDER

SURGICAL APPLIANCE INDUSTRIES,  
INC.  
By:   
L. THOMAS APPLIGATE JR.,  
PRESIDENT