

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Peter Englander and American Textile Company, Incorporated**

This Settlement Agreement is entered into by and between Peter Englander (“Englander”) and American Textile Company, Incorporated (“American”), with Englander and American collectively referred to as the “Parties.” Englander is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. American employs ten or more persons and is a person in the course of doing business for purposes of 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 American has manufactured, imported, distributed, sold and/or offered for sale in the State of California, mattress covers containing di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer and birth defects and other reproductive harm.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are defined as mattress covers containing DEHP including, but not limited to, the *Rest Right Mattress Protector*, SKU #858716 (#0 22415 94418 2) manufactured, imported, distributed, sold and/or offered for sale by American in the State of California, collectively referred to hereinafter as the “Products.”

“Additional Products” that are covered by this Settlement Agreement are defined as pillow covers containing DEHP manufactured, imported, distributed, sold and/or offered for sale by American in the State of California, collectively referred to hereinafter as the “Additional Products.”

#### **1.4 Notice of Violation**

On December 13, 2011, Englander served American and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients with notice that American was in violation of California Health & Safety Code § 25249.6 for failing to warn consumers that its Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.5 No Admission**

American 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 and Additional Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by American of any fact, finding, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by American of any fact, finding, conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties of American under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean January 31, 2013.

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

### **2.1 Reformulation Standards**

Reformulated Products are defined as those Products and Additional Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal or state agencies for the purpose of determining the DEHP content in a solid substance. American has represented that it has provided its vendors of Products and Additional Products that will be sold or offered for sale to California consumers with the Reformulated Products standards, above, and is working with potential vendors, using

reasonable efforts, to obtain Reformulated Products expeditiously, at a commercially viable price point.

## **2.2 Reformulation Commitment**

As of the Effective Date all Products and Additional Products imported and/or distributed by American, which will be sold in the State of California by American, shall qualify as Reformulated Products as defined in Section 2.1 above, or shall carry the Proposition 65 warnings specified in Section 2.3 below.

## **2.3 Product Warnings**

The Parties acknowledge and agree that American, as of the Effective Date, has already implemented a warning program for non-Reformulated Products manufactured, distributed and/or sold by American that are intended or otherwise known to be sold in California, that provides as follows:

**WARNING:** This product contains chemicals including DEHP, known to the State of California to cause cancer and birth defects or other reproductive harm.

American may continue to sell the Products and Additional Products already in the stream of commerce and may continue to utilize the existing warnings on the Products and Additional Products until American has exhausted its current supply of warning labels, at which time, American shall use the warnings as set forth in subsections 2.3(a) and (b), for all Products and Additional Products other than Reformulated Products that enter the stream of commerce for sale in California after the Effective Date, and that do not already contain the above-referenced warning. 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 and Additional Product the warning applies, so as to minimize the risk of consumer confusion.

**(a) Retail Store Sales.**

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

**WARNING:** This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

**(ii) Point-of-Sale Warnings.** Alternatively, American 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 and Additional Products. Such instruction sent to American's customers shall be sent by certified mail, return receipt requested.

**WARNING:** This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

Where more than one Product and/or Additional 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 contain chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm:

*[list products for which warning is required]*

**(b) Mail Order Catalog and Internet Sales.** In the event that American sells Products and/or Additional Products via mail order catalog and/or the internet, directly to customers located in California, after the Effective Date, that are not Reformulated Products,

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<sup>1</sup>For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and/or Additional 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.

American shall provide warnings for such Products and Additional Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product and Additional Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

(i) **Mail Order Catalog Warning.** Any warning provided in a mail order catalog shall be in the same type size or larger than the Product and Additional Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product and Additional Product:

**WARNING:** This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product and/or Additional Product, American may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s) and Additional Product(s):

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product and Additional Product. On each page where the designated symbol appears, American must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(ii) **Internet Website Warning.** A warning shall be given in conjunction with the sale of the Products and Additional Products via the internet, which warning shall appear either: (a) on the same web page on which a Product and/or Additional Product is displayed; (b) on the same web page as the order form for a Product and/or Additional

Product; (c) on the same page as the price for any Product and/or Additional Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description or price of the Product and Additional Product for which it is given in the same type size or larger than the Product and Additional Product description text:

**WARNING:** This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description or price of the Product and Additional Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

**WARNING:** This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.

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

In settlement of all the claims referred to in this Settlement Agreement, American shall pay \$80,000 under this Section. Each civil penalty payment will be allocated in accordance with California Healthy & 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**

American shall pay an initial civil penalty in the amount of \$17,500 on or before January 31, 2013. American shall issue two separate checks to: (a) “OEHHA” in the amount of \$13,125; and (b) “The Chanler Group in Trust for Peter Englander” in the amount of \$4,375. All civil penalty payments shall be delivered to the addresses listed in section 3.4.1 below.

### **3.2 Payment to Silent Spring Institute**

American shall pay the sum of \$17,500 to Silent Spring Institute (“Silent Spring”), a not-for-profit institution, in lieu of further initial civil fines pursuant to California Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). Silent Spring will use such funds in one or more of the following ways: (a) to continue its work identifying the links between exposure to environmental chemicals including lead, DEHP and other phthalates such as di-n-butyl phthalate (“DBP”) and butyl benzyl phthalate (“BBP”) that cause reproductive and developmental harm, as well as educating the public about such potential exposures; (b) to conduct exposure and risk-based prioritization of chemicals listed under Proposition 65, or chemicals OEHHA has identified as candidates for listing, in order to identify exposures of potential public health significance; (c) to monitor compliance with the reformulation requirements of this and other similar consent judgments addressing Proposition 65-listed chemical exposures; or (d) to conduct additional exposure measurements that evaluate the levels of chemical exposures to users of products that contain lead, DEHP, DBP and BBP. American shall issue a check for the payment in lieu of further initial civil fines made payable to “The Chanler Group in Trust For Silent Spring Institute” in the amount of \$17,500. The payment shall be delivered on or before July 30, 2013, to the address listed in section 3.4.1 below.

### **3.3 Additional Civil Penalties**

American shall pay a second civil penalty of \$10,000 on or before January 31, 2014. As incentive for American to reformulate its Products and Additional Products, however, the final civil penalty shall be waived in its entirety if an officer of American certifies in writing that it, as of January 15, 2014, will import, distribute and ship for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before January 15, 2014. If American is unable to certify reformulation of its Products and Additional Products by January 15, 2014, American shall provide a reformulation report showing the continuing good faith efforts taken, since January 2013, to import, distribute and ship for sale in California only

Reformulated Products. Certification in lieu of additional civil penalties provided by this Section is a material term, and time is of the essence.

American shall pay a third civil penalty of \$15,000 on or before January 31, 2015. As incentive for American to reformulate its Products and Additional Products, however, the third civil penalty shall be waived in its entirety if an officer of American certifies in writing that it, as of January 15, 2015, will import, distribute and ship for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before January 15, 2015. If American is unable to certify reformulation of its Products and Additional Products by January 15, 2015, American shall provide a reformulation report showing the continuing good faith efforts taken, since January 2014, to import, distribute and ship for sale in California only Reformulated Products.

American shall pay a fourth civil penalty of \$20,000 on January 31, 2016. As incentive for American to reformulate its Products and Additional Products, however, the fourth civil penalty shall be waived in its entirety if an Officer of American certifies in writing that it, as of January 15, 2016, will import, distribute and ship for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before January 15, 2016. If American is unable to certify reformulation of its Products and Additional Products by January 15, 2016, American shall provide a reformulation report showing the continuing good faith efforts taken, since January 2015, to import, distribute and ship for sale in California only Reformulated Products.

### **3.4 Payment Procedures**

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

- (a) All payments owed to Silent Spring and Englander, pursuant to Sections 3.1 through 3.3, 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

- (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections 3.1 through 3.3, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at the following payment addresses:

For United States Postal Service Delivery:

Mike Gyrics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
P.O. Box 4010  
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyrics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

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

**3.4.2 Issuance of 1099 Forms.** After each payment, American shall issue separate 1099 forms for each payment, as follows:

- (a) For each penalty payment owed in Sections 3.1 and 3.3, a 1099 shall be issued to OEHHA, in the amount of 75% of the total penalty payment, at the address listed in Section 3.4.1 above;
- (b) For each penalty payment owed in Sections 3.1 and 3.3, a 1099 shall be issued to Englander, whose address and tax identification number shall be furnished upon request, in the amount of 25% of the total penalty payment; and

- (c) For the payment in lieu of further initial civil fines, a 1099 shall be issued to Silent Spring Institute, 29 Crafts Street, Newton, Massachusetts 02458 in the amount of \$17,500.

**4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Englander and his counsel offered to resolve certain aspects of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved by mutual agreement after other material terms of the agreement had been settled. Englander 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 (CCP) § 1021.5, for all work performed through the mutual execution of this agreement. American shall pay \$50,000 for fees and costs incurred as a result of investigating, bringing this matter to the American's attention, and negotiating a settlement in the public interest. American shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to "The Chanler Group" and shall deliver payment on or before February 28, 2013, to the address listed in Section 3.4.1(a).

**5. RELEASES**

**5.1 Englander's Release of American**

This Settlement Agreement is a full, final and binding resolution between Englander, and American, of any violation of Proposition 65 that was or could have been asserted by Englander on behalf of himself his past and current agents, representatives, attorneys, successors and/or assignees, against American, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys and each entity to whom American directly or indirectly distributes or sells Products and/or Additional 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 the Products that were manufactured, imported, distributed, sold and/or offered for sale by American in California before the Effective Date.

In further consideration of the promises and agreements herein contained, Englander on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, hereby waives all Englander's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that Englander 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, but exclusive of fees and costs on appeal -- limited to and arising under Proposition 65 with respect to DEHP in the Products and Additional Products manufactured, distributed, sold and/or offered for sale by American before the Effective Date (collectively "claims"), against American and Releasees.

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

American, 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 and Additional Products.

## **6. POST EXECUTION CONVERSION TO CONSENT JUDGMENT**

Within twelve months of the execution of this Settlement Agreement American may ask Englander, in writing, to file a complaint in the public interest, incorporate the terms of this Settlement Agreement into a proposed consent judgment and to seek the court's approval of the consent judgment pursuant to Health and Safety Code section 25249.7, or as may be otherwise allowed by law. If so requested, Englander agrees to reasonably cooperate with American and the parties shall use their best efforts to support the entry of a consent judgment by a superior court in California. Pursuant to Code of Civil Procedure sections 1021 and 1021.5, American

will reimburse Englander and his counsel for their reasonable fees and costs incurred in filing the complaint, converting the Settlement Agreement into a proposed consent judgment and seeking judicial approval of the consent judgment, in an amount not to exceed \$16,000 exclusive of fees and cost that may be incurred on appeal. American will remit payment to The Chanler Group, at the address set forth in Section 4 above. Such additional fees shall be paid American within ten days after its receipt of monthly invoices from Englander for work performed under this paragraph.

**7. 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.

**8. 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 and/or Additional Products, then American shall 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 and/or Additional Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve American from any obligation to comply with any pertinent state or federal toxics control law.

**9. 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 American:

Jack Ouellette, Chief Executive Officer  
American Textile Company, Incorporated  
10 North Linden Street  
Duquesne, PA

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: January 31, 2013

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

By:  \_\_\_\_\_  
Peter Englander

By: \_\_\_\_\_  
Jack Ouellette, Chief Executive Officer  
American Textile Company, Incorporated

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: 1-25-2013

By: \_\_\_\_\_  
Peter Englander

By:   
Jack Ouellette, Chief Executive Officer  
American Textile Company, Incorporated