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PETER ENGLANDER

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10 Attorneys for Defendant  
THE FOUNTAINHEAD GROUP, INC.

11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF ALAMEDA  
14 UNLIMITED CIVIL JURISDICTION  
15

16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 THE FOUNTAINHEAD GROUP, INC., and  
20 DOES 1-150, inclusive,

21 Defendants.  
22

Case No. CGC-16-552854

**[PROPOSED]**  
**CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Peter Englander  
4 (“Englander”), and defendant, The Fountainhead Group, Inc. (“Fountainhead”), with Englander and  
5 Fountainhead each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Fountainhead 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 & Safety  
13 Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Fountainhead has manufactured, imported, shipped, distributed, sold  
16 and/or offered for sale in California, sprayers with vinyl/PVC tubing containing  
17 di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known  
18 to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The “Products” are defined as (i) sprayers with vinyl/PVC tubing (“Sprayers”), including but  
21 not limited to *Roundup Multi-Purpose Sprayer, Item No. 190315, UPC No. 8 41688 00240 1*, that are  
22 manufactured, imported, distributed, sold and/or offered for sale by Fountainhead and that are sold to  
23 consumers in California; and (ii) vinyl/PVC tubing components (“Components”) manufactured,  
24 imported, distributed, and/or sold by Fountainhead for use in Sprayers that are sold to consumers in  
25 California, including but not limited to *Roundup Ready-To-Use Weed & Grass Killer, UPC No. 70183*  
26 *51001 6*. The term “Exemplar Sprayers” refers to Sprayers described in italics in this Section 1.5.

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1           **1.6       Notices of Violation**

2           On September 24, 2015, Englander served Fountainhead and various public enforcement  
3 agencies with a document entitled “60-Day Notice of Violation” (“Fountainhead Notice”) that  
4 provided the recipients thereof with notice of the allegation that Fountainhead was in violation of  
5 California Health & Safety Code § 25249.6 for failing to warn consumers that its sprayers with  
6 vinyl/PVC tubing exposed users in the State of California to DEHP. To the best of the Parties’  
7 knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in  
8 the Fountainhead Notice.

9           On September 24, 2015, Englander served The Monsanto Company (“Monsanto”) and various  
10 public enforcement agencies with a document entitled “60-Day Notice of Violation” (“Monsanto  
11 Notice”) that provided the recipients thereof with notice of the allegation that Monsanto was in  
12 violation of California Health & Safety Code § 25249.6 for failing to warn consumers that its sprayers  
13 with vinyl/PVC tubing exposed users in the State of California to DEHP. Englander was notified by  
14 counsel for Fountainhead that Fountainhead supplied the Product specifically identified in the  
15 Monsanto Notice. To the best of the Parties’ knowledge, no public enforcer has commenced and is  
16 diligently prosecuting the allegations set forth in the Monsanto Notice.

17           The Fountainhead Notice and the Monsanto Notice are referred to herein collectively as the  
18 “Notices.”

19           **1.7       Complaint**

20           On July 5, 2016, Englander filed the instant action against Fountainhead for the alleged  
21 violations of Health & Safety Code § 25249.6 that are the subject of the Notices.

22           **1.8       No Admission**

23           Fountainhead denies the material, factual, and legal allegations contained in the Notices and  
24 Complaint, and maintains that all of the products that it has sold in California, including the Products,  
25 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed  
26 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall  
27 compliance with this Consent Judgment constitute or be construed as an admission of any fact, finding,  
28 conclusion of law, issue of law, or violation of law, the same being specifically denied by

1 Fountainhead. This Section shall not, however, diminish or otherwise affect Fountainhead’s  
2 obligations, responsibilities, and duties under this Consent Judgment.

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that the Court has jurisdiction  
5 over Fountainhead as to the allegations in the Complaint, that venue is proper in the County of San  
6 Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent  
7 Judgment.

8 **1.10 Execution Date**

9 For purposes of this Consent Judgment, the term “Execution Date” shall mean the date the  
10 Consent Judgment is signed by all Parties.

11 **1.11 Effective Date**

12 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date the  
13 Consent Judgment is approved by the Court.

14 **2. INJUNCTIVE RELIEF: REFORMULATION**

15 Commencing on the date that is 30 days after the Effective Date (the “Compliance Date”),  
16 Fountainhead shall only manufacture, import, distribute, ship, sell or offer for sale Products that  
17 qualify as Reformulated Products, as defined in Section 2.1. Products that Fountainhead distributed,  
18 shipped, sold, or offered for sale prior to the Compliance Date, for which Fountainhead will pay a civil  
19 penalty pursuant to Section 3.1, are not subject to the requirements of Section 2 and are nonetheless  
20 covered within the scope of released claims in Section 4.

21 **2.1 Reformulation Standards**

22 “Reformulated Products” are defined as Products containing concentrations less than 0.1  
23 percent (1000 parts per million) of DEHP, butyl benzyl phthalate (“BBP”), di-n-butyl (“DBP”),  
24 di-isodecyl phthalate (“DIDP”), and diisononyl phthalate (“DINP”), and di-n-hexyl phthalate  
25 (“DnHP”) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies  
26 3580A and 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of  
27 determining DEHP, BBP, DBP, DIDP, DINP, and DnHP content in a solid substance. By entering into  
28 this Consent Judgment, the Parties do not intend to expand or restrict any obligations or responsibilities

1 that may be imposed upon Fountainhead by laws other than Proposition 65, nor do the Parties intend  
2 this Consent Judgment to affect any defenses available to Fountainhead under laws other than  
3 Proposition 65.

#### 4 **2.2 Vendor Notification Requirement**

5 To the extent it has not already done so, no more than ten (10) days after the Execution Date,  
6 Fountainhead shall provide the reformulation standards specified in Section 2.1 for Reformulated  
7 Products to any and all of its vendors of Products, and shall instruct each vendor to use its best efforts to  
8 provide only Reformulated Products, as defined in Section 2.1.

### 9 **3. MONETARY PAYMENTS**

#### 10 **3.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

11 In settlement of all the claims referred to in this Consent Judgment, Fountainhead shall pay a  
12 total of \$135,000 in civil penalties in accordance with this Section. Each penalty payment will be  
13 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the  
14 funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and  
15 the remaining 25% of the penalty retained by Englander, as follows:

16 **3.1.1 Initial Civil Penalty.** Within ten (10) business days of the Execution Date,  
17 Fountainhead shall issue a check for the initial civil penalty payable to “The Chanler Group in Trust for  
18 Peter Englander” in the amount of \$45,000. Plaintiff’s counsel shall provide appropriate tax  
19 identification information for the payment. Wilson Turner Kosmo LLP shall provide The Chanler  
20 Group with written confirmation within five (5) business days of receipt that said funds are being held  
21 in trust by Wilson Turner Kosmo LLP. Within five (5) business days of the Effective Date, Wilson  
22 Turner Kosmo LLP shall issue a check to “The Chanler Group in Trust for Peter Englander” in the  
23 amount of \$45,000.

24 **3.1.2 Final Civil Penalty.** On or before the Effective Date, Fountainhead shall pay a  
25 final civil penalty in the amount of \$90,000 with one check made payable to “Peter Englander, Client  
26 Trust Account.” The final civil penalty shall be waived in its entirety, however, if, no later than August  
27 30, 2016, an officer of Fountainhead provides Englander with written certification that, as of the date of  
28 said certification, and continuing into the future, Fountainhead has met the reformulation standard

1 specified in Section 2.1 above for all Products. The certification in lieu of a final civil penalty payment  
2 provided by this Section is a material term, and time is of the essence.

3 **3.2 Reimbursement of Englander’s Fees and Costs**

4 The Parties acknowledge that Englander and his counsel offered to resolve this dispute without  
5 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to  
6 be resolved after the material terms of the agreement had been settled. Shortly after all other  
7 settlement terms had been finalized, Fountainhead expressed a desire to resolve the fee and cost issue.  
8 The Parties then attempted to (and did) reach an accord on the compensation due Englander and his  
9 counsel under general contract principles and the private attorney general doctrine codified at  
10 California Code of Civil Procedure § 1021.5 for all work performed in this matter exclusive of fees  
11 and costs incurred on appeal, if any. Under these legal principles, Fountainhead shall pay \$54,000 for  
12 fees and costs incurred investigating, litigating, and enforcing this matter, including the fees and costs  
13 incurred (and to be incurred) drafting, negotiating, and obtaining the Court’s approval of this Consent  
14 Judgment in the public interest. Plaintiff’s counsel shall provide appropriate tax identification  
15 information for the payment. Within ten (10) business days of the Execution Date, Fountainhead shall  
16 issue a check payable to “The Chanler Group” in the amount of \$54,000 to be held in trust by Wilson  
17 Turner Kosmo LLP for The Chanler Group. Wilson Turner Kosmo LLP shall provide The Chanler  
18 Group with written confirmation within five (5) business days of receipt that said funds have been  
19 received by Wilson Turner Kosmo LLP. Within five (5) business days of the Effective Date, Wilson  
20 Turner Kosmo LLP shall issue a check for \$54,000 payable to “The Chanler Group.”

21 **3.3 Payment Procedures**

22 All payments owed to Plaintiff and his counsel, pursuant to Sections 3.1 and 3.3 shall be

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

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Englander’s Release of Proposition 65 Claims**

3 Englander, acting in the public interest in a representative capacity, and acting on his own  
4 behalf in an individual capacity and on behalf of his past and current attorneys, agents, representatives,  
5 successors, assigns, and heirs, forever discharges and releases all actions, causes of action, obligations,  
6 costs, expenses, fees (including, but not limited to, attorneys’ fees, investigation fees, and expert fees),  
7 damages, losses, penalties, claims, liabilities, rights, judgments, obligations, duties, and demands  
8 (collectively, “Claims”), and waives all rights to institute or participate in (directly or indirectly) any  
9 form of legal action, against Fountainhead, each entity to which Fountainhead directly or indirectly  
10 distributes or sells the Products including, but not limited to, downstream distributors, wholesalers,  
11 customers, franchisees, brokers, cooperative members, licensees and retailers, and all other  
12 downstream entities in the distribution chain of any Products, and the directors, officers, owners,  
13 shareholders, employees, attorneys, representatives, successors, and assigns of any of them  
14 (collectively, “Releasees”) with respect to alleged violations of Proposition 65 for any exposures to  
15 DEHP from (i) Components manufactured, purchased, imported, distributed or sold by Fountainhead  
16 prior to the Compliance Date, (ii) Exemplar Sprayers and the products sold in the Exemplar Sprayers,  
17 (iii) Sprayers and/or products sold in Sprayers to the extent that any DEHP in the Sprayers or in the  
18 products sold in Sprayers results from Sprayers or Components that are manufactured, imported,  
19 distributed, and/or sold by Fountainhead prior to the Compliance Date, and (iv) Components  
20 manufactured, imported, distributed, and/or sold by Fountainhead prior to the Compliance Date  
21 incorporated in Sprayers sold or assembled by any Releasee, as set forth in the Notices. This Consent  
22 Judgment is a full, final, and binding resolution as to the Claims referenced in this Section 4.1.  
23 Fountainhead’s compliance with the terms of this Consent Judgment constitutes compliance with  
24 Proposition 65 by any Releasee for any exposures to DEHP from (i) Components distributed or sold by  
25 Fountainhead on and after the Compliance Date, (ii) Exemplar Sprayers and the products sold in the  
26 Exemplar Sprayers, (iii) Sprayers and/or products sold in Sprayers to the extent that any DEHP in the  
27 Sprayers or in the products sold in Sprayers results from Sprayers or Components that are  
28 manufactured, imported, distributed, and/or sold by Fountainhead on and after the Compliance Date,

1 and (iv) Components distributed, and/or sold by Fountainhead on and after the Compliance Date  
2 incorporated in Sprayers sold or assembled by any Releasee, as set forth in the Notices.

3 **4.2 Englander’s Individual Release of Claims**

4 Englander, in his individual capacity only and *not* in his representative capacity, also provides a  
5 release on behalf of himself, his past and current agents, representatives, attorneys, successors, assigns,  
6 and heirs as to all Releasees, which shall be effective as a full and final accord and satisfaction, as a bar  
7 to all Claims of any nature, character or kind, whether known or unknown, suspected or unsuspected,  
8 arising out of alleged or actual exposures to DEHP, BBP, DBP, DIDP, DINP, and DnHP from  
9 (i) Components manufactured, purchased, imported, distributed or sold by Fountainhead prior to the  
10 Compliance Date, (ii) Exemplar Sprayers and the products sold in the Exemplar Sprayers, (iii) Sprayers  
11 and/or products sold in Sprayers to the extent that any DEHP in the Sprayers or in the products sold in  
12 Sprayers results from Sprayers or Components that are manufactured, imported, distributed, and/or  
13 sold by Fountainhead prior to the Compliance Date, and (iv) Components manufactured, imported,  
14 distributed, and/or sold by Fountainhead prior to the Compliance Date incorporated in Sprayers sold or  
15 assembled by any Releasee, as set forth in the Notices. The Parties agree that Fountainhead’s  
16 compliance with the terms of this Consent Judgment constitutes compliance by any Releasee with  
17 Proposition 65 with respect to any DEHP, BBP, DBP, DIDP, DINP, and DnHP from (i) Components  
18 distributed or sold by Fountainhead on and after the Compliance Date, (ii) Exemplar Sprayers and the  
19 products sold in the Exemplar Sprayers, (iii) Sprayers and/or products sold in Sprayers to the extent  
20 that any DEHP in the Sprayers or in the products sold in Sprayers results from Sprayers or Components  
21 that are manufactured, imported, distributed, and/or sold by Fountainhead on and after the Compliance  
22 Date, and (iv) Components distributed or sold by Fountainhead on and after the Compliance Date  
23 incorporated in Sprayers sold or assembled by any Releasee, as set forth in the Notices. Englander  
24 acknowledges that he is familiar with California Civil Code § 1542, which provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
26 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
27 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
28

1 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
2 OR HER SETTLEMENT WITH THE DEBTOR.

3 Englander understands and acknowledges the significance and consequence of this waiver of  
4 California Civil Code § 1542 is that if Englander hereafter discovers facts different from or in addition  
5 to those that he now believes to be true with respect to the matters released herein, he will not be able to  
6 assert any Claims arising from such facts. Englander acknowledges that he intends these consequences  
7 even as to any Claims that may exist as of the date of his execution of this Consent Judgment but which  
8 he does not know exist, and which, if known, would materially affect his decision to execute this  
9 Consent Judgment, regardless of whether his lack of knowledge is the result of ignorance, oversight,  
10 error, negligence, or any other cause except as otherwise provided herein. Englander, in his individual  
11 capacity only, and on behalf of himself, his past and current agents, representatives, attorneys,  
12 successors, and assigns expressly waives and relinquishes any and all rights and benefits which he may  
13 have under California Civil Code § 1542 to the fullest extent that it may lawfully waive such rights or  
14 benefits pertaining to the released matters.

15 **4.3 Fountainhead's Release of Englander**

16 Fountainhead on behalf of itself, its past and current agents, representatives, attorneys,  
17 successors, and/or assignees, hereby waives any and all claims against Englander, his attorneys and  
18 other representatives, for any and all actions taken or statements made (or those that could have been  
19 taken or made) by Englander and his attorneys and other representatives, whether in the course of  
20 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with  
21 respect to the Products. Fountainhead also acknowledges that it is familiar with California Civil Code  
22 § 1542, which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER  
25 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
26 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
27 OR HER SETTLEMENT WITH THE DEBTOR.

28 Fountainhead understands and acknowledges the significance and consequence of this waiver

1 of California Civil Code § 1542 is that if Fountainhead hereafter discovers facts different from or in  
2 addition to those that it now believes to be true with respect to the matters released herein, it will not  
3 be able to assert any Claims arising from such facts. Fountainhead acknowledges that it intends these  
4 consequences even as to any Claims that may exist as of the date of its execution of this Consent  
5 Judgment but which it does not know exist, and which, if known, would materially affect its decision  
6 to execute this Consent Judgment, regardless of whether its lack of knowledge is the result of  
7 ignorance, oversight, error, negligence, or any other cause except as otherwise provided herein.  
8 Fountainhead, on behalf of itself, its past and current agents, representatives, attorneys, successors,  
9 and assigns expressly waives and relinquishes any and all rights and benefits which it may have under  
10 California Civil Code § 1542 to the fullest extent that it may lawfully waive such rights or benefits  
11 pertaining to the released matters.

12 **5. COURT APPROVAL**

13 This Consent Judgment is not effective until it is approved and entered by the Court and shall be  
14 null and void if, for any reason, it is not approved and entered by the Court within one year after it has  
15 been fully executed by all Parties.

16 **6. SEVERABILITY**

17 If, subsequent to the execution of this Consent Judgment, any provision is held by a court to be  
18 unenforceable, the validity of the remaining provisions shall not be adversely affected.

19 **7. GOVERNING LAW**

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

1 **8. NOTICES**

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

6 For Fountainhead:

7 Daniel J. O’Toole, President  
8 The Fountainhead Group, Inc.  
9 23 Garden Street  
10 New York Mills, NY 13417

For Englander:

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

11 With a copy on behalf of Fountainhead to:

12 Frederick W. Kosmo Jr.  
13 Wilson Turner Kosmo LLP  
14 550 West C Street, Suite 1050  
15 San Diego, CA 92101-3532

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

23 Englander agrees to comply with the reporting form requirements referenced in California  
24 Health & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California  
25 Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the  
26 settlement. In furtherance of obtaining such approval, Englander and Fountainhead agree to mutually  
27 employ their best efforts, and those of their counsel, to support the entry of this agreement as a Consent  
28 Judgment and to obtain judicial approval of the settlement in a timely manner. For purposes of this  
section, “best efforts” shall include, at a minimum, cooperating on the drafting and filing of the  
necessary moving papers and supporting the motion for judicial approval.

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**11. MODIFICATION**

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party and the entry of a modified consent judgment by the Court.

**12. AUTHORIZATION**

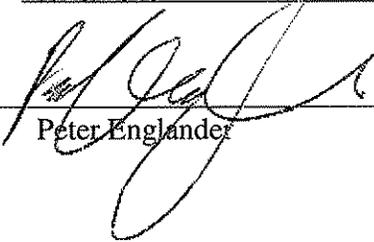
The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: 7/26/2016

Date: 7/29/16

By:   
Peter Englander

By:   
The Fountainhead Group, Inc.

Name: David J. O'Toole

Title: President