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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SANTA CLARA  
10 UNLIMITED CIVIL JURISDICTION  
11

12 PETER ENGLANDER,  
13 Plaintiff,

14 v.

15 EMCO WHEATON RETAIL  
16 CORPORATION, *et al.*,  
17 Defendants.

Case No. 16CV299305

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*, and  
Cal. Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander  
4 (“Englander”), and defendant Emco Wheaton Retail Corporation (“Emco Wheaton”), with Englander  
5 and Emco Wheaton each individually referred to 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  
8 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous  
9 substances contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Englander alleges that Emco Wheaton manufactures, imports, sells, and distributes for sale in  
16 California, fuel pump nozzles with vinyl/PVC covers that contain di(2-ethylhexyl)phthalate  
17 (“DEHP”), and that it does so without first providing the warning required by Proposition 65. DEHP  
18 is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are fuel pump nozzles with vinyl/PVC covers  
21 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by Emco  
22 Wheaton (“Products”) including, but not limited to, the *Emco Wheaton Retail Balance Vapor*  
23 *Recovery Nozzle, Model A4005, #05425.*

24 **1.6 Notice of Violation**

25 On March 23, 2016, Englander served Emco Wheaton, the California Attorney General, and  
26 all other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”),  
27 alleging that Emco Wheaton violated Proposition 65 when it failed to warn its customers and  
28 consumers in California of the health hazards associated with exposures to DEHP from the Products.

1 No public enforcer has commenced and is diligently prosecuting an action to enforce the violations  
2 alleged in the Notice.

3 **1.7 Complaint**

4 On August 29, 2016, Englander filed the instant action (“Complaint”), for the violations of  
5 Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 Emco Wheaton denies the material, factual, and legal allegations contained in the Notice and  
8 Complaint, and maintains that all of the products it has sold and distributed for sale in California,  
9 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent  
10 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or  
11 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an  
12 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall  
13 not, however, diminish or otherwise affect Emco Wheaton’s obligations, responsibilities, and duties  
14 under this Consent Judgment.

15 **1.9 Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
17 jurisdiction over Emco Wheaton as to the allegations in the Complaint, that venue is proper in Santa  
18 Clara County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent  
19 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” means the date on which  
22 the motion for approval of the Consent Judgment contemplated by Section 5 is granted by the Court.

23 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

24 Commencing within 30 days of the Effective Date, and continuing thereafter, Emco Wheaton  
25 agrees to only manufacture for sale, import for sale, or purchase for sale in California, “Reformulated  
26 Products.” For purposes of this Consent Judgment, “Reformulated Products” are defined as Products  
27 with a maximum DEHP concentration of 1,000 parts per million (0.1 %) in any component analyzed  
28 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or

1 equivalent methodologies utilized by state or federal agencies for the purpose of determining DEHP  
2 content in a solid substance.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Civil Penalty Payment**

5 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred  
6 to in this Consent Judgment, Emco Wheaton shall pay \$7,800 in civil penalties. The civil penalty  
7 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with  
8 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health  
9 Hazard Assessment (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Englander.

10 Emco Wheaton shall make the civil penalty payment following the procedure set forth in  
11 sections 3.3 and 3.4 below, in two checks for the following amounts made payable to: (a) “OEHHA”  
12 in the amount of \$5,850 and (b) “Peter Englander, Client Trust Account” in the amount of \$1,950.  
13 Plaintiff’s counsel shall be responsible for delivering OEHHA’s portion of the penalty under this  
14 Consent Judgment to OEHHA.

15 **3.2 Reimbursement of Attorney’s Fees and Costs**

16 The parties acknowledge that Englander and his counsel offered to resolve this dispute  
17 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the  
18 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after  
19 the other settlement terms had been finalized, Emco Wheaton expressed a desire to resolve  
20 Englander’s fees and costs. The Parties then attempted to (and did) reach an accord on the  
21 compensation due to Englander and his counsel under general contract principles and the private  
22 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed  
23 through the mutual execution of this Consent Judgment. Emco Wheaton shall pay \$32,211 in a check  
24 payable to “The Chanler Group” for the fees and costs incurred by Englander investigating, bringing  
25 this matter to the attention of Emco Wheaton’s management, litigating, and negotiating a settlement  
26 in the public interest.

1           **3.3     Payments Held in Trust**

2           All payments due under this Consent Judgment shall be delivered by November 15, 2016,  
3 and held in trust by Emco Wheaton’s counsel until the Court approves the Parties’ settlement. Emco  
4 Wheaton’s counsel shall provide Englander’s counsel with written confirmation of its receipt of the  
5 settlement and, thereafter, hold the funds in trust until the Court approves the Parties’ settlement,  
6 and deliver the payments to Englander’s counsel within two days of the Effective Date.

7           **3.4     Payment Address**

8           All payments required by this Consent Judgment shall be delivered to:

9                           The Chanler Group  
10                          Attn: Proposition 65 Controller  
11                          2560 Ninth Street  
                              Parker Plaza, Suite 214  
                              Berkeley, CA 94710

12 **4.     CLAIMS COVERED AND RELEASED**

13           **4.1     Englander’s Public Release of Proposition 65 Claims**

14           Englander, acting on his own behalf and in the public interest, releases Emco Wheaton and  
15 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,  
16 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the  
17 Products including, but not limited to, it’s downstream distributors, wholesalers, customers,  
18 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for  
19 any violations arising under Proposition 65 for the failure to warn about exposures to DEHP from  
20 Products manufactured for sale or distributed for sale by Emco Wheaton prior to the Effective Date,  
21 as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes  
22 compliance with Proposition 65 with respect to the failure to warn about exposures to DEHP in  
23 Products sold by Emco Wheaton after the Effective Date.

24           **4.2     Englander’s Individual Release of Claims**

25           Englander, in his individual capacity only and *not* in his representative capacity, also provides  
26 a release to Emco Wheaton, Releasees, and Downstream Releasees which shall be effective as a full  
27 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,  
28 attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any nature, character

1 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual  
2 exposures to DEHP in Products manufactured for sale or distributed for sale by Emco Wheaton  
3 before the Effective Date.

4 **4.3 Emco Wheaton's Release of Englander**

5 Emco Wheaton, on its own behalf, and on behalf of its past and current agents,  
6 representatives, attorneys, successors, and assignees, hereby waives any and all claims against  
7 Englander and his attorneys and other representatives, for any and all actions taken or statements  
8 made by Englander and his attorneys and other representatives, whether in the course of  
9 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with  
10 respect to the Products.

11 **5. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved and entered by the Court and shall  
13 be null and void if, for any reason, it is not approved and entered by the Court within one year after it  
14 has been fully executed by the Parties, or by such additional time as the Parties may agree to in  
15 writing.

16 **6. SEVERABILITY**

17 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any  
18 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be  
19 adversely affected.

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the state of California  
22 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is  
23 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Emco  
24 Wheaton may provide written notice to Englander of any asserted change in the law, and shall have  
25 no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent  
26 that, the Products are so affected.

1 **8. NOTICE**

2 All correspondence and notice required by this Consent Judgment shall be in writing and sent  
3 by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a  
4 recognized overnight courier to the following addresses:

5 For Emco Wheaton:

6 James Lawrence, President  
7 Emco Wheaton Retail Corporation  
8 2300 Industrial Park Drive SE  
9 Wilson, NC 27893

10 with a copy to:

11 Garth Ward, Esq.  
12 Lewis Brisbois Bisgaard & Smith LLP  
13 701 B Street, Suite 1900  
14 San Diego, CA 92101

15 For Englander:

16 Proposition 65 Coordinator  
17 The Chanler Group  
18 2560 Ninth Street  
19 Parker Plaza, Suite 214  
20 Berkeley, CA 94710-2565

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

24 This Consent Judgment may be executed in counterparts and by facsimile or portable  
25 document format (PDF) signature, each of which shall be deemed an original, and all of which, when  
26 taken together, shall constitute one and the same document.

27 **10. ADDITIONAL POST EXECUTION ACTIVITIES**

28 Englander and Emco Wheaton agree to mutually employ their best efforts to support the entry  
of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court  
in a timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code  
§ 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which

1 Englander shall draft and file, and Emco Wheaton shall join. If any third party objection to the  
2 noticed motion is filed, Englander and Emco Wheaton shall work together to file a joint reply and  
3 appear at any hearing before the Court. This provision is a material component of the Consent  
4 Judgment and shall be treated as such in the event of a breach.

5 **11. MODIFICATION**

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

9 **12. AUTHORIZATION**

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

12 **AGREED TO:**

**AGREED TO:**

13  
14 Date: 10/17/2016

Date: 10/17/16

15  
16 By:   
PETER ENGLANDER

15  
16 By:   
James Lawrence, President  
EMCO WHEATON RETAIL CORPORATION