

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 **Emma Bell and Positec USA, Inc.**

This Settlement Agreement is entered into by and between Emma Bell ("Bell") and Positec USA, Inc. ("Positec"). Bell and Positec are referred to separately as "Party" and collectively as the "Parties." Bell is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Positec is considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, et seq. ("Proposition 65").

#### 1.2 **General Allegations**

Bell alleges that Positec has imported, distributed and/or sold in the State of California attachment hoses, including but not limited to Worx 8 ft. Trivac attachment hoses, UPC No. 845534009934, (the "Product"), without the requisite Proposition 65 warning that the Product contains the chemical Di(2-ethylhexyl) phthalate ("DEHP"). On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause developmental male reproductive toxicity.

#### 1.3 **Notice of Violation(s)**

Bell states that on May 26, 2016, she served Positec USA, Inc., Positec Tool Corporation, Positec Group Limited (collectively, the "Positec Entities"), Greapo Power Tools (Suzhou) Co., Ltd., Wal-Mart Stores, Inc ("Wal-Mart"), and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.6, et seq." The Notice provided Positec and such others, including public enforcers, with notice that alleged that Positec was in violation of California Health & Safety Code § 25249.6, for failing to warn consumers and customers

that the Product exposed users in California to DEHP. Further, Bell states that no public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.4 No Admission**

Positec expressly denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Product, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Positec 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 Positec of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Positec. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Positec maintains that it has not knowingly manufactured, or caused to be manufactured, the Product for sale in California in violation of Proposition 65. This Agreement is the product of negotiation and compromise and is accepted by the Parties solely for the purpose of settling, compromising, and resolving the issues addressed in the Notice, and to avoid the significant expense, burden, and attorney's fees associated with litigating these matters.

#### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date that this Settlement Agreement is signed by both Parties.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of the Product**

Commencing ninety (90) days after the Effective Date, and continuing thereafter, Positec shall only ship, sell, or offer the Product for sale in California, Reformulated Product pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section 2.3. Positec and its downstream retailers shall have no

obligation to label Product that entered the stream of commerce prior to the Effective Date. For purposes of this Settlement Agreement, a “Reformulated Product” is Product that is in compliance with the standard set forth below in section 2.2.

## **2.2 Reformulation Standard**

“Reformulated Product” shall mean Product that exposes average consumers to levels of DEHP below the Proposition 65 safe harbor level.

## **2.2 Clear and Reasonable Warnings**

Commencing ninety (90) days after the Effective Date, Positec shall, for all of the Products it sells or distributes and which is intended for sale in California or which Positec has reason to believe will be shipped or sold in California and that are not Reformulated Products, provide clear and reasonable warnings as set forth in subsection 2.2(a) below, or at its sole discretion, the variant of the warning quoted in footnote one.<sup>1</sup> The 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.

### **(a) Retail Store Sales**

**(i) Product Labeling.** Positec shall affix a warning to the packaging, labeling or directly on each Product sold in retail outlets in California by Positec or any person selling the Product that states:

**WARNING:**

This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

**(ii) Point of Sale Warnings.** Alternatively, Positec may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity

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<sup>1</sup> WARNING: This product maybe contains lead, phthalate, or other chemicals known to the State of California to cause cancer, birth defects and other reproductive harm. Please wash your hands after use.

to the point of display of the Product. Such instruction sent to Positec customers shall be sent by certified mail, return receipt requested.

**WARNING:**

This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

**2.4 Exception to Warning Requirement**

The warning requirements set forth in Section 2.3 shall not apply to any Reformulated Product.

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

In settlement of all the claims referred to in this Settlement Agreement, Positec shall pay a total of \$1,900.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (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 Bell. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

**3.1 Initial Civil Penalty**

Within seven (7) business days of the Effective Date, Positec shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$1,425.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$475.00. All penalty payments shall be delivered to the addresses listed in Section 3.2 below.

**3.2 Payment Procedures**

**(a) Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Bell, pursuant to Section 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire

Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

**(b) Copy of Payments to OEHHA.** Positec agrees to provide Bell's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Bell, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

**(C) Tax Documentation.** Positec agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Ema Bell" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001  
I Street, Sacramento, CA 95814.

**4. REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that Bell and her 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. Bell then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties reached an accord on the compensation due to Bell and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Positec shall reimburse Bell's counsel for fees and costs incurred as a result of investigating and bringing this matter to Positec's attention, and negotiating a settlement in the public interest. Within seven (7) business days of the Effective Date, Positec shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$17,100.00 for delivery to the following address:

Evan Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Ste. 510  
Bala Cynwyd, PA 19004

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of the Positec Entities and Downstream Retailers and Entities**

Bell acting on her own behalf releases the Positec Entities, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, attorneys and each entity to whom the Positec Entities directly or indirectly distributes or sells the Product, including but not limited to, downstream distributors, wholesalers, customers, marketplace hosts, retailers, including, but not limited to, Wal-

Mart Stores, Inc. and Walmart.com USA LLC and their respective parents, affiliates and subsidiaries, franchisees, cooperative members and licensees (collectively, the "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposures to the chemical DEHP that is contained in the Product, and were distributed, sold and/or offered for sale by the Positec Entities to retailers, customers and consumers in the State of California.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 3 and 4 above, Bell, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands against the Positec Entities or the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DEHP in the Product.

### **5.2 The Positec Entities' Release of Bell**

The Positec Entities, on behalf of themselves, their past and current agents, representatives, attorneys, successors and/or assignees, hereby waive any and all claims against Bell, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Bell and/or her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Product.

### **5.3 California Civil Code Section 1542**

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. Bell on behalf of herself only, on one hand, and the Positec Entities, on the other hand,

acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 5.1 and 5.2 above may include unknown claims, and nevertheless waive 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.

Bell and the Positec Entities each 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 law 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 as to the Product, Positec shall provide written notice to Bell 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 Product is 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 personally delivered or sent



by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any Party by the other Party to the following addresses:

For Positec:

Christa E. Burger  
Womble Carlyle Sandridge & Rice, LLP  
One West Fourth Street  
Winston-Salem, North Carolina 27101

For Bell:

Evan J. Smith  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

Any Party, from time to time, may specify in writing via first class and electronic mail to the other Party a change of address to which all notices and other communications shall be sent.

**10. COUNTERPARTS: 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)**

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

**12. MODIFICATION**

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

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

**AGREED TO:**

**AGREED TO:**

Date: 8/26/16

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

By: 

By: \_\_\_\_\_

Ema Bell

Positec USA, Inc.

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 of this Settlement Agreement.

**AGREED TO:**


**AGREED TO:**

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

Date: 8/26/2016

By: \_\_\_\_\_

Ema Bell

By:  \_\_\_\_\_

Positec USA, Inc.

CEO/COO