

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Peter Englander and Team ProMark, LLC**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Peter Englander (“Englander”) and Team ProMark, LLC (“ProMark”) with Englander and ProMark 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. ProMark 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 ProMark manufactures, imports, sells and/or distributes for sale in California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without providing the health hazard warning that Englander alleges is required by Proposition 65. 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 steering wheel covers containing DEHP including, but not limited to, the *NFL Steering Wheel Cover with Premium Embroidery, SKU No. SWCNF26, UPC #6 81620 25326 9* that are manufactured, imported, distributed, sold and/or offered for sale by ProMark in the State of California, hereinafter the “Products.”

**1.4 Notice of Violation**

On or about August 1, 2017, Englander served ProMark, and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that ProMark violated Proposition 65 when it failed to warn its customers and consumers in California that the Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

**1.5 No Admission**

ProMark denies the material, factual and legal allegations contained in the 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 ProMark 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 ProMark of any fact, finding, conclusion, issue of law or violation of law. This Section shall not, however, 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 November 30, 2017.

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

**2.1 Reformulation Standards**

“Reformulated Products” are defined as those 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.

## **2.2 Reformulation Commitment**


As of the Effective Date, ProMark 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 appropriate health hazard warnings per section 2.3, below.

## **2.3 Product Warnings**

Commencing on or before the Effective Date, ProMark shall provide clear and reasonable warnings for all Products as set forth in subsections 2.3(a) and (b) for all products 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) Retail Store Sales.**


**(i) Product Labeling.** ProMark 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 DEHP, which is 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).

**(ii) Point-of-Sale Warnings.** Alternatively, ProMark 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 ProMark's customers shall be sent by certified mail, return receipt requested.

 **WARNING:** This product can expose you to DEHP, which is 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).


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 DEHP, which is 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]*

**(b) Mail Order Catalog and Internet Sales.** In the event that ProMark sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, ProMark shall provide warnings for such 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 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 description text within the catalog. For any catalogue printed after the effective date, the following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

 **WARNING:** This product can expose you to DEHP, which is 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).

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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.

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, ProMark 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):

 **WARNING:** Certain products identified with this symbol ▼ can expose you to DEHP, which is 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).


The designated symbol must appear on the same page and near the display and/or description of the Product. On each page where the designated symbol appears, ProMark 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 via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the same page as the price for any 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 for which it is given in the same type size or larger than the Product description text:

 **WARNING:** This product can expose you to DEHP, which is 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).

Alternatively, 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, ProMark may utilize a designated symbol to cross reference the applicable warning with a “designated symbol” which may appear adjacent to or immediately following the display, description, or price of the 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:** Certain products identified with this symbol ▼ can expose you to DEHP, which is 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).

**(c) Modifications to Warnings to Conform to Safe Harbor Warning Regulations**

In the event that Proposition 65 Regulations and/or guidelines regarding “Safe Harbor” language is amended including, but not limited to California Code of Regulations sections 25102 et seq., ProMark may modify the text or methods of transmission of the warnings set forth in subparts (a) and (b) above, in order to conform to the regulations set forth therein. However, prior to any such modification, Pro Mark shall provide notice to Englander and shall meet and confer with Englander to confirm the appropriateness of any such modification. In the event of any disagreement between Englander and Pro Mark regarding said modification, the parties agree to mediation (through JAMS or other similar entity) of such dispute.

**3. MONETARY SETTLEMENT TERMS**

**3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this settlement Agreement, ProMark shall pay a total of \$3,000 in civil penalties in accordance with this Section. The penalty payment 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 on or before the Effective Date, as follows: ProMark shall issue one check to “Paul Englander, Client Trust

Account” in the amount of \$750; and shall issue another check to the “Office of Environmental Health Hazard Assessment” in the amount of \$2,250. 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 Reimbursement of Attorneys’ 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 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, ProMark expressed a desire to resolve Englander’s fees and costs. The Parties then negotiated a resolution of 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, ProMark shall reimburse Englander and his counsel \$23,000. ProMark’s payment shall be delivered to the address in Section 3.3, on or before the Effective Date, in the form of a check payable to “The Chanler Group.” The reimbursement shall cover all fees and costs incurred by Englander investigating, bringing this matter to ProMark’s attention and negotiating a settlement of the matter.

### **3.3 Payment Address**

All payments required by this Settlement Agreement shall be delivered to the following address:

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

## **4. CLAIMS COVERED AND RELEASED**

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

Englander acting on his own behalf, and *not* on behalf of the public, releases ProMark, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents

employees, attorneys, and each entity to whom ProMark directly or indirectly distribute or sell Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to DEHP in the Products, as set forth in the Notice. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products, as set forth in the Notice. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to ProMark.

#### **4.2 Englander’s Individual Releases of Claims**

Englander, in his individual capacity only and *not* in his representative capacity, 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 of Englander of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the Products manufactured, imported, distributed, or sold by ProMark prior to the Effective Date. The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to ProMark. Nothing in this Section affects Englander’s right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve ProMark’s Products.

#### **4.3 ProMark’s Release of Englander**

ProMark, on behalf of itself, its past and current agents, representatives, attorneys, successors, and 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 or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**5. 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.

**6. 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 ProMark shall provide written notice to Englander of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve ProMark from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

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 ProMark:

Bill Skinner, President  
Team ProMark, LLC  
14052 Valley Drive  
Longmont, CO 80504

With a Copy to:

Bruce Nye, Esq.  
The Scali Law Firm  
1901 Harrison Street, 14<sup>th</sup> Floor  
Oakland, CA 94612

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.

**8. 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.

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

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

**10. MODIFICATION**

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

11. **AUTHORIZATION**

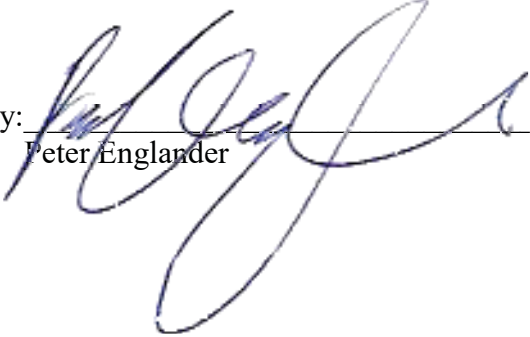
The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: 11/27/2017

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

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

By: \_\_\_\_\_  
Bill Skinner, President  
Team ProMark, LLC

11. **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: 11/21/17 \_\_\_\_\_

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

By: Bill Skinner \_\_\_\_\_  
Bill Skinner, President  
Team ProMark, LLC