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Jennifer Henry, State Bar No. 208221
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
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Attorneys for Plaintiff
PETER ENGLANDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER,

Plaintiff,

v.

PETSMART, INC.; *et al.*,

Defendants.

Case No. RG13672243

[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" or "Plaintiff"), and defendants, PetSmart, Inc. ("PetSmart") and LittleGifts, Inc.
5 ("LittleGifts") (sometimes referred to as "Defendants"), (collectively, "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 improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendants**

11 Defendants employ ten or more persons and are each 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 Defendants sold hand tool grips and vinyl/PVC key covers containing
16 di(2-ethylhexyl)phthalate ("DEHP") without first providing the clear and reasonable exposure
17 warnings required by Proposition 65. 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 Notices of Violation**

20 On or about September 21, 2012, Englander served PetSmart and certain requisite public
21 enforcement agencies with a "60-Day Notice of Violation" ("Notice") alleging that PetSmart was in
22 violation of Proposition 65 for failing to warn its customers and consumers in California that hand
23 tool grips, including, but not limited to, the *Whisker City Litter Scoop* (#7 37257 22896 2), and
24 vinyl/PVC key covers, including, but not limited to, the *LittleGifts 2-pack Key Covers Pug* (#8 46998
25 04105 8) expose users to DEHP. On or about April 19, 2013, Englander served PetSmart, LittleGifts
26 and certain requisite public enforcement agencies with a "Supplemental 60-Day Notice of Violation"
27 ("Supplemental Notice") alleging that PetSmart and LittleGifts were in violation of Proposition 65
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1 for failing to warn their customers and consumers in California that hand tool grips, including, but
2 not limited to, the *Whisker City Litter Scoop* (#7 37257 22896 2), and vinyl/PVC key covers,
3 including, but not limited to, the *LittleGifts 2-pack Key Covers Pug* (#8 46998 04105 8) expose users
4 to DEHP (collectively, “Notices”). No public enforcer has diligently prosecuted the allegations set
5 forth in the Notices.

6 **1.6 Complaint**

7 On March 20, 2013, Englander filed the instant action against PetSmart (“Complaint”) for the
8 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notices.
9 Upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to
10 name LittleGifts as a defendant and to include the violations of Proposition 65 based on the alleged
11 exposures to DEHP contained in Covered Products as defined herein by LittleGifts as set forth in the
12 Supplemental Notice.

13 **1.8 No Admission**

14 Defendants deny the material, factual, and legal allegations contained in the Notices and
15 Complaint, and they maintain that all of the products that they have sold and distributed in California,
16 including Covered Products as defined herein, have been, and are, in compliance with all laws.
17 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
18 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute
19 or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
20 law. This Section shall not, however, diminish or otherwise affect Defendants’ obligations,
21 responsibilities, and duties under this Consent Judgment.

22 **1.7 Consent to Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in Alameda
25 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
26 Judgment.

1 **2. DEFINITIONS**

2 **2.1 Covered Products**

3 The term “Covered Products” shall mean as follows:

4 2.1.1 As to PetSmart, “Covered Products” shall mean hand tools with vinyl/PVC
5 grips, including, but not limited to *Whisker City Litter Scoop* (#7 37257 22896 2), containing
6 DEHP, that bear a brand or trademark owned by PetSmart or its affiliated entities and that are
7 sold, or offered for sale by in California.

8 2.1.2 As to LittleGifts, “Covered Products” shall mean vinyl/PVC key covers,
9 including, but not limited to, *LittleGifts 2-pack Key Covers Pug* (#8 46998 04105 8), (or any
10 other dog breeds), containing DEHP, that are imported, manufactured, sold, or distributed for
11 sale by LittleGifts in California.

12 2.1.3 “DEHP Standard” shall mean a maximum of 1,000 parts per million (0.1%)
13 DEHP content in any accessible component of a Covered Product (i.e., any component that
14 may be touched or handled during a reasonably foreseeable use) when analyzed pursuant to
15 EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized by state
16 or federal agencies for the purpose of determining DEHP content in a solid substance.

17 **2.2 Exemplar Products**

18 “Exemplar Products” shall mean *Whisker City Litter Scoop* (#7 37257 22896 2) and
19 *LittleGifts 2-pack Key Covers Pug* (#8 46998 04105 8).

20 **2.3 Effective Date**

21 The term “Effective Date” shall mean the date on which the Court approves this Consent
22 Judgment.

23 **3. INJUNCTIVE RELIEF: REFORMULATION**

24 **3.1 PetSmart**

25 3.1.1 Commencing on November 1, 2013, PetSmart shall only sell or offer for sale
26 in California Exemplar Products that comply with the DEHP Standard.
27
28

1 3.1.2 Commencing on January 31, 2014, and continuing thereafter, PetSmart shall
2 only import or purchase for sale in California Covered Products that comply with the DEHP
3 Standard.

4 **3.2 LittleGifts**

5 Commencing on the Effective Date, and continuing thereafter, LittleGifts shall only
6 distribute, sell, or offer for sale in California Covered Products that comply with the DEHP Standard.

7 **4. MONETARY SETTLEMENT TERMS**

8 **4.1 Payments pursuant to Health and Safety Code § 25249.7(b)**

9 In settlement of all the claims referred to in this Consent Judgment, Defendants shall pay
10 \$60,500 in civil penalties. Each civil penalty payment shall be allocated according to Health and
11 Safety Code section 25249.7(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the
12 California Office of Environmental Health Hazard Assessment and twenty-five percent (25%) of the
13 funds remitted to Englander. All civil penalty payments shall be delivered to the address provided in
14 section 4.3.1.

15 **4.1.1 Initial Civil Penalty**

16 Within five days of the Effective Date, Defendants shall make an initial civil penalty payment
17 of \$15,500. Defendants shall provide their payment in two checks for the following amounts made
18 payable to: (a) "OEHHA" in the amount of \$11,625; and (b) "The Chanler Group in Trust for Peter
19 Englander" in the amount of \$3,875.

20 **4.1.2 Final Civil Penalty**

21 (a) On or before March 31, 2014, PetSmart shall make a final civil penalty
22 payment of \$35,000. Pursuant to title 11 California Code of Regulations, section 3203(c), the final
23 civil penalty payment shall be waived in its entirety if, no later than March 15, 2014, an officer of
24 PetSmart provides Englander with written certification that all Covered Products purchased or
25 imported by PetSmart for sale in California, and that may in the future be purchased or imported for
26 sale in California by PetSmart will comply with the DEHP Standard. The written certification of
27 reformulation in lieu of the final civil penalty payment required by this section is a material term, and
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1 time is of the essence. Unless waived, no later than March 31, 2014, Defendants shall issue two
2 checks for the following amounts payable to: (a) "OEHHA" in the amount of \$26,250; and (b) "The
3 Chanler Group in Trust for Peter Englander" in the amount of \$8,750.

4 (b) On or before February 14, 2014, LittleGifts shall make a final civil
5 penalty payment of \$10,000. Pursuant to title 11 California Code of Regulations, section 3203(c), the
6 final civil penalty payment shall be waived in its entirety if, no later than January 31, 2014, an officer
7 of LittleGifts provides Englander with written certification that all Covered Products distributed,
8 sold, or offered for sale by LittleGifts for sale in California, and that may in the future be distributed,
9 sold, or offered for sale in California by LittleGifts, will comply with the DEHP Standard. The
10 written certification of reformulation in lieu of the final civil penalty payment required by this section
11 is a material terms, and time is of the essence. Unless waived, no later than February 14, 2014,
12 Defendants shall issue two checks for the following amounts payable to: (a) "OEHHA" in the amount
13 of \$7,500; and (b) "The Chanler Group in Trust for Peter Englander" in the amount of \$2,500.

14 **4.2 Reimbursement of Fees and Costs**

15 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
17 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
18 the other settlement terms had been finalized, Defendants expressed a desire to resolve the fee and
19 cost issue. The Parties then attempted to (and did) reach an accord on the compensation due to
20 Englander and his counsel under general contract principles and the private attorney general doctrine
21 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
22 mutual execution of this Consent Judgment. Defendants shall pay \$39,500 for fees and costs incurred
23 as a result of investigating, bringing this matter to Defendants' attention, and negotiating and
24 obtaining judicial approval of a settlement in the public interest. Defendants' payment of fees and
25 costs shall be delivered within five days of the Effective Date to the payment address provided in
26 section 4.3.1.

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1 **4.3 Payment Procedures**

2 **4.3.1 Payment Address**

3 (a) All payments owed to Englander and The Chanler Group shall be
4 delivered to the following address:

5 The Chanler Group
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

10 (b) All payments to OEHHA (EIN: 68-0284486) made pursuant to section
11 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at the following
12 addresses:

13 For United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 P.O. Box 4010
18 Sacramento, CA 95812-4010

19 For Non-United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
23 1001 I Street
24 Sacramento, CA 95814

25 With a copy of the checks payable to OEHHA mailed to The Chanler
26 Group at the payment address provided in section 4.3.1(a), as proof of
27 payment to OEHHA.

28 **4.3.2 Required Tax Documentation**

 (a) For each penalty payment to OEHHA, a 1099 shall be issued to the
Office of Environmental Health Hazard Assessment, 1001 I Street, Sacramento, CA 95814
(EIN: 68-0284486) in the amount of 75% of the total penalty payment;

1 (b) For each penalty payment to Englander, a 1099 shall be issued to “Peter
2 Englander,” whose address and tax identification number shall be furnished upon request after
3 this Consent Judgment is fully executed by the Parties.

4 (c) For the reimbursement of fees and costs pursuant to section 3.3,
5 Defendants shall issue a separate 1099 form to “The Chanler Group” (EIN: 94-3171522).

6 **5. CLAIMS COVERED AND RELEASED**

7 **5.1 Englander’s Public Release of Proposition 65 Claims**

8 Englander, acting on his own behalf and in the public interest, releases Defendants and their
9 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
10 attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or sell Covered
11 Products, including but not limited to, their downstream distributors, wholesalers, customers,
12 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
13 any violations arising under Proposition 65 for unwarned exposures to DEHP contained in Covered
14 Products sold by Defendants prior to the Effective Date, as set forth in the Notices. Compliance with
15 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
16 exposures to DEHP from Covered Products sold by Defendants, as set forth in the Notices.

17 **5.2 Englander’s Individual Release of Claims**

18 Englander, in his individual capacity only and *not* in his representative capacity, also provides
19 a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
20 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
21 attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any nature, character
22 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
23 exposures to DEHP in Covered Products sold or distributed for sale by Defendants before the
24 Effective Date.

25 **5.3 Defendants’ Release of Englander**

26 Defendants, on their own behalf, and on behalf of their past and current agents,
27 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
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1 Englander and his attorneys and other representatives, for any and all actions taken or statements
2 made by Englander and his attorneys and other representatives, whether in the course of investigating
3 claims, otherwise seeking to enforce Proposition 65 against them in this matter, or with respect to
4 Covered Products.

5 **6. ENFORCEMENT OF CONSENT JUDGMENT**

6 Any Party may, by motion, application for an order to show cause before the Alameda County
7 Superior Court, or any other appropriate action, enforce the terms and conditions contained in this
8 Consent Judgment. A Party may file such a motion, action or application only after that Party first
9 provides 30 days' notice to the Party allegedly failing to comply with the terms and conditions of this
10 Consent Judgment and attempts to resolve such Party's failure to comply in an open and good faith
11 manner for a period of no less than 30 days.

12 **7. COURT APPROVAL**

13 7.1 By this Consent Judgment and upon its approval, the Parties waive their right to trial
14 on the merits, and waive rights to seek appellate review of any and all interim rulings, including all
15 pleading, procedural, and discovery orders.

16 7.2 The Parties acknowledge that, pursuant to California Health & Safety Code §25249.7,
17 a noticed motion is required to obtain judicial approval of this Consent Judgment, which Englander
18 shall file. Defendants shall support the entry of this Consent Judgment.

19 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment and
20 any and all prior agreements between the Parties merged herein shall terminate and become null and
21 void, and the action shall revert to the status that existed prior to the execution date of this Consent
22 Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation,
23 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
24 nor shall any such matter be admissible in evidence for any purpose in this action, or in any other
25 proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of
26 the Consent Judgment and to resubmit it for approval.

1 **8. GOVERNING LAW**

2 8.1 The terms of this Consent Judgment shall be governed by the laws of the state of
3 California and apply within the state of California. Nothing in this Consent Judgment shall be
4 interpreted to relieve Defendants from any obligation to comply with any pertinent state or federal
5 toxics control laws.

6 8.2 This Consent Judgment contains the sole and entire agreement and understanding of
7 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and all
8 prior discussions, negotiations, commitments, or understandings related thereto, if any, are deemed
9 merged. There are no warranties, representations, or other agreements between the Parties except as
10 expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or
11 implied, other than those specifically referred to in this Consent Judgment have been made by any
12 party. No other agreements not specifically contained or referenced in this Consent Judgment, oral or
13 otherwise, shall be deemed to exist or to bind any of the Parties. No supplementation, modification,
14 waiver or termination of this Consent Judgment shall be binding unless executed in writing by the
15 party to be bound. No waiver of any of the provisions of this Consent Judgment shall be deemed or
16 shall constitute a waiver of any of the other provisions whether or not similar, nor shall such waiver
17 constitute a continuing waiver.

18 8.3 The Parties, including their counsel, have participated in the preparation of this
19 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
20 Consent Judgment was subject to revision and modification by the Parties and has been accepted and
21 approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
22 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
23 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees
24 that any statute or rule of construction providing that ambiguities are to be resolved against the
25 drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
26 regard, the Parties hereby waive California Civil Code § 1654.

1 **9. NOTICES**

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

5 For PetSmart:

6 Rob Edmund
7 Vice President and Associate General Counsel
8 PetSmart, Inc.
9 19601 North 27th Avenue
10 Phoenix, AZ 85027

11 with a copy to:

12 Jeffrey Margulies, Esq.
13 Fulbright & Jaworski L.L.P.
14 555 South Flower Street, 41st Floor
15 Los Angeles, CA 90071

16 For LittleGifts:

17 Daniel Troiano, President
18 Littlegifts, Inc.
19 600 Meadowlands Parkway, Suite 131
20 Secaucus, NJ 07095

21 with a copy to:

22 Jeffrey Margulies, Esq.
23 Fulbright & Jaworski L.L.P.
24 555 South Flower Street, 41st Floor
25 Los Angeles, CA 90071

26 For Englander:

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

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

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10. COUNTERPARTS; FACSIMILE SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (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. 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.

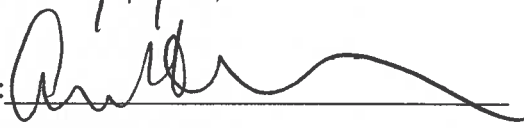
AGREED TO:

AGREED TO:

Date: January 15, 2014

Date: 1/18/14

By: 
PETER ENGLANDER

By: 

PETSMART, INC.
AGREED TO:

Date: _____

By: _____
Daniel Troiano, President
LITTLE GIFTS, INC

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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3 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
4 taken together, shall constitute one and the same document.

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7 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
8 application of any Party and the entry of a modified consent judgment by the Court.

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: _____

Date: _____

15

16 By: _____
PETER ENGLANDER

By: _____

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PETSMART, INC.
AGREED TO:

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19

Date: 11/10/14

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By: 
Daniel Troiano, President
LITTLE GIFTS, INC

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