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12 ANTHONY E. HELD, PH.D., P.E.;
13 PETER ENGLANDER;
14 WHITNEY R. LEEMAN, PH.D.; and
15 JOHN MOORE

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF ALAMEDA
18 UNLIMITED CIVIL JURISDICTION

19 ANTHONY E. HELD, PH.D., P.E.; PETER
20 ENGLANDER; WHITNEY R. LEEMAN,
21 PH.D.; and JOHN MOORE,

22 Plaintiffs,

23 v.

24 READY AMERICA, INC.; ABLE PLANET,
25 INCORPORATED; E.S.I. CASES &
26 ACCESSORIES, INC.; GROCERY OUTLET
27 INC.; QUICK FITTING, INC.; TAP
28 PLASTICS, INC., A CALIFORNIA
CORPORATION; and DOES 1-150, inclusive,

Defendants.

Case No. RG16803507

**[PROPOSED] CONSENT JUDGMENT
AS TO GROCERY OUTLET, INC.**

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiffs Whitney R. Leeman, Ph.D.
4 ("Leeman") and Peter Englander ("Englander") (collectively "Plaintiffs"), and defendant Grocery
5 Outlet, Inc. ("Grocery Outlet"), with Leeman, Englander, and Grocery Outlet each individually
6 referred to as a "Party" and collectively as the "Parties."

7 **1.2 Plaintiffs**

8 Leeman and Englander are individuals residing in California who seek to promote awareness
9 of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Grocery Outlet**

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

15 **1.4 General Allegations**

16 a. Leeman alleges that Able Planet, Inc. ("Able Planet") and Grocery Outlet
17 manufacture, distribute, import, sell, and offer for sale in California, headphones with PVC/vinyl
18 components that contain di(2-ethylhexyl)phthalate ("DEHP"), including the *Able Planet Linx Audio*
19 *Musicians' Choice Foldable Active Noise Cancelling Headphones, Model NC180BMT, UPC #8*
20 *16246 01472 1* ("Able Planet Headphones"), without first providing the exposure warning required
21 by Proposition 65. Grocery Outlet alleges that said Headphones were sold by Able Planet to Chateau
22 Manis, Inc., which in turn resold the Able Planet Headphones to Grocery Outlet. DEHP is listed
23 under Proposition 65 as a chemical known to the State of California to cause birth defects and other
24 reproductive harm.

25 b. Englander alleges that E.S.I. Cases & Accessories ("E.S.I.") and Grocery
26 Outlet manufacture, distribute, import, sell, and offer for sale in California, headphones with
27 PVC/vinyl cords that contain DEHP, including the *Duracell Folding Stereo Headphones with*
28 *Microphone, Model GDU9539, UPC #6 80988 95339 2* ("E.S.I. Duracell Headphones"), without first

1 providing the exposure warning required by Proposition 65. Grocery Outlet alleges that said
2 Headphones were sold by E.S.I. to XS Merchandise, Inc., and which in turn resold the E.S.I. Duracell
3 Headphones to Grocery Outlet.

4 **1.5 Product Description**

5 The products covered by this Consent Judgment are headphones with PVC/vinyl components,
6 including cords, containing DEHP that are imported, sold, or distributed for sale in California by
7 Grocery Outlet, including but not limited to, the Able Planet Headphones and the E.S.I. Duracell
8 Headphones, described in §§1.4(a) and (b), hereinafter the “Products.”

9 **1.6 Notices of Violation**

10 a. On or about August 20, 2015, Leeman served Grocery Outlet, and certain
11 requisite public enforcement agencies with a “60-Day Notice of Violation” (“Leeman Notice”)
12 alleging that Grocery Outlet violated Proposition 65 by failing to warn its customers and consumers
13 in California that the Able Planet Headphone Products expose users to DEHP. To the best of the
14 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
15 set forth in the Leeman Notice.

16 b. On or about September 24, 2015, Englander served Grocery Outlet, and certain
17 requisite public enforcement agencies with a “60-Day Notice of Violation” (“Englander Notice”)
18 alleging that Grocery Outlet violated Proposition 65 by failing to warn its customers and consumers
19 in California that the E.S.I. Duracell Headphone Products expose users to DEHP. To the best of the
20 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
21 set forth in the Englander Notice.

22 **1.7 Grocery Outlet’s Actions Following Notice**

23 As soon as practicable after the Leeman and Englander Notices, Grocery Outlet removed
24 from retail sale all Able Planet Headphones and the E.S.I. Duracell Headphones, and returned
25 remaining inventory to the respective manufacturers.

26 **1.8 Complaint**

27 On February 10, 2016, Anthony E. Held, PH.D., P.E. filed the instant action naming Ready
28 America as a defendant for alleged violations of California Health and Safety Code section 25249.6

1 that are the subject of a separate 60-Day Notice of Violation. On February 16, 2016, Plaintiffs filed
2 the first amended complaint (“Complaint”) against E.S.I., Able Planet, and Grocery Outlet and
3 additional defendants for the alleged violations of California Health and Safety Code section 25249.6
4 that are the subject of the Notices in defined in §§1.6(a) and (b).

5 **1.9 No Admission**

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

14 **1.10 Jurisdiction and Venue**

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

19 **1.11 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
21 the Motion for Approval of the Consent Judgment is granted by the Court.

22 **2. INJUNCTIVE RELIEF: REFORMULATION**

23 **2.1 Reformulated Products**

24 Commencing on the Effective Date, and continuing thereafter, Grocery Outlet shall only
25 purchase for sale, manufacture, sell, or distribute for sale in California, (a) “Reformulated Products”
26 or (b) Products that are sold with a clear and reasonable warning pursuant and subject to Section 2.2.
27 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products that contain
28 DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to

1 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
2 methodology utilized by federal or state government agencies for the purpose of determining DEHP
3 content in a solid substance.

4 **2.2 Clear and Reasonable Warnings**

5 Commencing on the Effective Date and continuing thereafter, for any Products sold or
6 distributed for sale in California by Grocery Outlet that are not Reformulated Products, Grocery
7 Outlet agrees to only offer such Products for sale with a clear and reasonable warning in accordance
8 with this Section. The warning requirement of this section shall not apply to Products manufactured
9 or purchased for sale in California before the Effective Date, for which a civil penalty is being paid
10 pursuant to Section 3.1, herein.

11 Grocery Outlet further agrees that any warning used will be prominently placed in relation to
12 the Product with such conspicuousness when compared with other words, statements, designs, or
13 devices as to render it likely to be read and understood by an ordinary individual under customary
14 conditions of purchase or use. For purposes of this Consent Judgment, a clear and reasonable
15 warning shall consist of a warning affixed directly to a Product or its accompanying labeling or
16 packaging sold in California containing the following statement:

17
18 **WARNING:** This product contains DEHP, a chemical known to the State of
California to cause birth defects and other reproductive harm.

19 In the event that Grocery Outlet sells Products via an internet website to customers located in
20 California, the warning requirements of this section shall be satisfied if the foregoing warning
21 appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the
22 same page as the price for the Product; or (c) on one or more web pages displayed to a purchaser
23 prior to purchase during the checkout process. Alternatively, a symbol may appear adjacent to or
24 immediately following the display, description, price, or checkout listing of the Product, provided
25 that the warning statement also appears elsewhere on the same web page.

26 Alternatively, where more than one Product is "sold in proximity"¹ to other like items or to
27

28 ¹ For purposes of the Consent Judgment, "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

(Footnote continues on next page.)

1 those that do not require a warning (e.g., Reformulated Products as defined in Section 2.2), Grocery
2 Outlet may provide warning signs in close proximity to the point of display of the Products, using the
3 bracketed language:

4
5 **WARNING:** This product [The following products] contain[s] DEHP, a
6 chemical known to the State of California to cause birth defects
7 and other reproductive harm.

8 [list products for which warning is required, as applicable]

9
10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Civil Penalty Payments**

12 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
13 this Consent Judgment, Grocery Outlet shall pay six thousand dollars (\$6,000.00) in civil penalties.
14 The civil penalty payment shall be allocated according to Health and Safety Code section
15 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of
16 Environmental Health Hazard Assessment (“OEHHA”), twelve and one half percent (12.5%) of the
17 funds remitted to Leeman, and twelve and one half percent (12.5%) of the funds remitted to
18 Englander.

19 Grocery Outlet shall make the civil penalty payment following the procedure set forth in
20 section 3.3 and 3.4 below in three checks for the following amounts made payable to: (a) “OEHHA”
21 in the amount of four thousand five hundred dollars \$4,500.00; (b) “Dr. Whitney R. Leeman, client
22 Trust Account” in the amount of seven hundred and fifty Dollars (\$750.00) and (c) “Peter Englander,
23 Client Trust Account” in the amount of seven hundred and fifty dollars (\$750.00). Plaintiffs’ counsel
24 shall be responsible for delivering OEHHA’s portion of the penalty payment under this Consent
25 Judgment to OEHHA.

26
27 (Footnote continued from previous page.)

28 customary conditions of purchase, could not reasonably determine which of the two products is
subject to the warning sign.

1 **3.2 Reimbursement of Attorney’s Fees and Costs**

2 The parties acknowledge that Plaintiffs and their counsel offered to reach preliminary
3 agreement on the material terms of this dispute before reaching terms on the amount of fees and costs
4 to be reimbursed to them. The Parties thereafter negotiated the compensation due Plaintiffs and their
5 counsel under general contract principles and the private attorney general doctrine codified at
6 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
7 execution of this Consent Judgment, Court approval and entry of the same, but exclusive of fees and
8 costs on appeal, if any. Grocery Outlet shall pay forty thousand dollars (\$40,000) for the fees and
9 costs incurred in the aggregate by both Leeman and Englander for investigating and bringing this
10 matter to Grocery Outlet’s attention, litigating, and negotiating a settlement in the public interest.

11 **3.3 Payments**

12 All payments due under this agreement shall be delivered within five (5) days after the
13 Effective Date to the address found in Section 3.4 below.

14 **3.4 Payment Address**

15 All payments required by this Consent Judgment shall be delivered to the following
16 address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Plaintiffs’ Public Release of Proposition 65 Claims**

23 Plaintiffs, each respectively acting on his or her own behalf and in the public interest, release
24 (i) Grocery Outlet, (ii) Grocery Outlet’s parents, subsidiaries, affiliated entities under common
25 ownership, directors, officers, employees, and attorneys, and (iii) XS Merchandise, Inc.
26 (collectively the “Releasees”), for any violations arising under Proposition 65 for unwarned
27 exposures to DEHP from Products sold by Grocery Outlet prior to the Effective Date, as set forth in
28 the Leeman Notice and Englander Notice. Compliance with the terms of this Consent Judgment

1 constitutes compliance with Proposition 65 with respect to exposures to DEHP from Products sold
2 or distributed by Grocery Outlet after the Effective Date.

3 **4.2 Plaintiffs' Individual Release of Claims**

4 Plaintiffs, in their individual capacities only and *not* in their representative capacities, also
5 respectively provide a release to all Releasees, said release shall be effective as a full and final accord
6 and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
7 damages, losses, claims, liabilities and demands of Plaintiffs of any nature, character or kind, whether
8 known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP in
9 the Products sold or distributed for sale by Grocery Outlet before the Effective Date.

10 **4.3 Grocery Outlet's Release of Plaintiffs**

11 Grocery Outlet, on its own behalf, and on behalf of its past and current agents,
12 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
13 Plaintiffs and their attorneys and other representatives, for any and all actions taken or statements
14 made by Plaintiffs and their attorneys and other representatives, whether in the course of
15 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
16 respect to the Products.

17 **4.4 Mutual Waiver of California Civil Code Section 1542**

18 The Parties each acknowledge he/it is familiar with Section 1542 of the Civil Code, which
19 provides as follows:

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

25 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
26 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and
27 all rights and benefits which they may have under, or which may be conferred upon them by the
28 provisions of Civil Code section 1542 as well as under any other state or federal statute or
common law principle of similar effect, to the fullest extent he/it may lawfully waive such rights

1 or benefits pertaining to the released matters, as specifically defined by Sections 4.2 and 4.3,
2 above.

3 **5. COURT APPROVAL**

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

7 **6. ENFORCEMENT AND PREVAILING PARTY**

8 In the event any dispute between the Parties arises out of this Consent Judgment, the Parties
9 shall meet and confer in an attempt to resolve the dispute informally. If after thirty (30) days such
10 attempts at informal resolution fail, the disputing party may pursue enforcement of this Consent
11 Judgment through any legal means available including by motion or application for an order to show
12 cause before the Court. The prevailing party shall be entitled to recover its reasonable attorney's fees
13 and costs incurred as a result of such motion or application.

14 **7. SUCCESSORS AND ASSIGNS**

15 This Consent Judgment shall be binding upon and inure to the benefit of the Parties hereto
16 and their respective divisions, subdivisions, and subsidiaries, and the successors or assigns of any of
17 them.

18 **8. SEVERABILITY**

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

22 **9. GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the state of California
24 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
25 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Grocery Outlet
26 may provide written notice to Leeman and/or Englander of any asserted change in the law, and shall
27 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
28

1 the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
2 Grocery Outlet from any obligation to comply with any pertinent state or federal toxics control laws.

3 **10. NOTICE**

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

7 **Grocery Outlet**

8 Pamela Burke
9 Grocery Outlet, Inc.
10 5650 Hollis Street
Emeryville, CA 94608

with a copy to:
Joshua A. Bloom., Esq.
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607

11 **Leeman**

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

15 **Englander**

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

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

21 **11. COUNTERPARTS; FACSIMILE SIGNATURES**

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

25 **12. POST EXECUTION ACTIVITIES**

26 Englander agrees to comply with the reporting form requirements referenced in Health and
27 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
28 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In

1 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
2 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
3 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
4 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
5 supporting the motion, and appearing at the hearing before the Court.

6 **13. MODIFICATION**

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

10 **14. AUTHORIZATION**

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

13 **AGREED TO:**

AGREED TO:

14
15 Date: 5/24/2016

Date: 6/11/16

16
17 By: 

PETER ENGLANDER

By: 

Pamela Burke
for GROCERY OUTLET, INC.

18
19 **AGREED TO:**

20
21 Date: 5/24/2016

22
23 By: 

WHITNEY R. LEEMAN, PH.D.