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10 PETER ENGLANDER

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 DC FIRST AID, INC.; *et al.*,

20 Defendants.

Case No. CGC-18-563917

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5 et seq., and
Code Civ. Proc. § 664.6)

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CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered by and between Peter Englander (“Englander”) on the
4 one hand, and DC First Aid, Inc. (“DC First Aid”) and DC Safety Sales Co., Inc. (“DC Safety
5 Sales”) on the other hand, with Englander, DC First Aid, and DC Safety Sales each individually
6 referred to as a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Englander is an individual residing in the State of California who seeks to promote
9 awareness of exposures to toxic chemicals, and to improve human health by reducing or
10 eliminating hazardous substances used in consumer products.

11 **1.2 Defendants**

12 DC First Aid, Inc. and DC Safety Sales Co., Inc. (collectively, “DC First Aid”) each
13 employ ten or more individuals and are a person in the course of doing business for purposes of
14 the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code
15 section 25249.6 *et seq.* (“Proposition 65”).

16 **1.3 General Allegations**

17 Englander alleges that DC First Aid manufactures, sells, and distributes for sale in
18 California: (i) vinyl/PVC zipper pulls containing di(2-ethylhexyl) phthalate (“DEHP”); (ii)
19 vinyl/PVC electrical tape containing DEHP; (iii) gloves with vinyl/PVC components containing
20 DEHP; and (iv) bungee cord hooks containing Lead, and that it does so without first providing the
21 health hazard warning required by Proposition 65. DEHP and lead are listed pursuant to
22 Proposition 65 as chemicals known to cause birth defects or other reproductive harm.

23 **1.4 Product Description**

24 For purposes of this Consent Judgment “Products” are defined as: (i) vinyl/PVC zipper
25 pulls containing DEHP; (ii) vinyl/PVC electrical tape containing DEHP; (iii) gloves with
26 vinyl/PVC components containing DEHP; and (iv) bungee cord hooks containing Lead, that are
27 manufactured, sold, or distributed for sale in California by DC First Aid including, but not limited
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1 to the gloves, zipper pull, electrical tape, and bungee cords offered in connection with the
2 *TopGear Premium Roadside Assistance Kit (Bag, Electrical Tape, Gloves, Bungee Cord)*, P/N:
3 *160410*.

4 **1.5 Notice of Violation**

5 On August 17, 2017, Englander served DC First Aid, DC Safety Sales, the California
6 Attorney General, and all other requisite public enforcers with a 60-Day Notice of Violation
7 (“Notice”). The Notice alleges that the defendants violated Proposition 65 by failing to warn their
8 customers and consumers in California of the health risks associated with exposures to DEHP and
9 Lead from the Products. No public enforcer has commenced and is diligently prosecuting an
10 action to enforce the violations alleged in the Notice.

11 **1.6 Complaint**

12 On January 29, 2018, Englander filed the instant action (“Complaint”) naming DC First
13 Aid and DC Safety Sales as defendants for the alleged violations that are the subject of the
14 Notice.

15 **1.7 No Admission**

16 DC First Aid and DC Safety Sales each deny the material, factual, and legal allegations in
17 the Notice, and maintain that all the products they have manufactured, sold, or distributed for sale
18 in California, including the Products, have been, and are, in compliance with all laws. Nothing in
19 this Consent Judgment shall be construed as an admission by either DC First Aid or DC Safety
20 Sales of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with
21 this Consent Judgment constitute or be construed as an admission by either DC First Aid or DC
22 Safety Sales of any fact, finding, conclusion, issue of law, or violation of law, such being
23 specifically denied by DC First Aid and DC Safety Sales. This Section shall not, however,
24 diminish or otherwise affect DC First Aid and DC Safety Sales’ obligations, responsibilities, and
25 duties under this Consent Judgment.

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1.8 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over DC First Aid and DC Safety Sales as to the allegations in the Complaint, that venue is proper in the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

1.9 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the motion for approval of the Consent Judgment is granted by the Court, including the date of any unopposed tentative ruling.

2. INJUNCTIVE RELIEF: REFORMULATION

2.1 Commitment to Reformulate or Provide Warnings

Commencing on the Effective Date and continuing thereafter, DC First Aid agrees to only manufacture for sale, purchase for sale, or distribute for sale in California either (a) “Reformulated Products” as defined by subsection 2.2 below; or (b) Products sold and offered for sale with a clear and reasonable warning pursuant to subsection 2.3, below.

2.2 Reformulated Products Defined

a. DEHP Limits Applicable to Reformulated Products

With respect to their DEHP content, Reformulated Products are defined as Products containing no more than 1,000 parts per million (0.1%) DEHP in any component sampled and analyzed pursuant to Consumer Product Safety Commission (“CPSC”) methodology CPSC-CH-C1001.09.3, U.S. Environmental Protection Agency testing methodologies 8270C, or equivalent methodologies approved by California or federal agencies to test for DEHP content in a solid substance.


b. Lead Limits Applicable to Reformulated Products

With respect to their Lead content, Reformulated Products are defined as Products that (a) contain no more than 100 parts per million (“ppm”) (0.01%) Lead in any accessible

1 component analyzed pursuant to U.S. Environmental Protection Agency testing methodologies
2 3050B and 6010B; and (b) yield a result of no more than 1.0 micrograms of lead when sampled
3 and analyzed pursuant to NIOSH 9100 testing protocol. In addition, the Parties may use
4 equivalent methodologies approved by California or federal agencies to test for Lead content in a
5 solid substance.

6 **2.3 Clear and Reasonable Warnings**

7 Commencing on the Effective Date and continuing thereafter, for any Products sold or
8 distributed for sale in California by DC First Aid that are not Reformulated Products, DC First
9 Aid agrees to only sell or distribute such Products for sale in California with a clear and
10 reasonable warning in accordance with this Section or Title 27 California Code of Regulations
11 section 25602 and 25603. DC First Aid further agrees that any warning used will be prominently
12 placed in relation to the Products with such conspicuousness when compared with other words,
13 statements, designs, or devices as to render it likely to be read and understood by an ordinary
14 individual under customary conditions of purchase or use. For purposes of this Consent
15 Judgment, a clear and reasonable warning for the Products shall consist of a warning affixed to
16 the packaging, label, tag, or directly to a Product sold in California and containing the following
17 statement:

18  **WARNING:** This product can expose you to chemicals
19 including [DEHP] [Lead], which is known to the
20 State of California to cause birth defects or
21 other reproductive harm. For more information
go to www.P65Warnings.ca.gov¹

22 In the event that DC First Aid sells Products via an internet website to customers located in
23 California, the warning requirements of this section shall be satisfied if the warning appears
24 either: (a) on the same web page on which a Product is displayed and/or described; (b) on the
25 same page as the price for the Product; or (c) on one or more web pages displayed prior to
26 purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation

27 ¹ The warning must refer to the chemical(s) present in the product that exceeds the respective concentration level set
28 forth above in Section 2.2.

1 point in a yellow or white equilateral triangle may appear adjacent to or immediately following
2 the display, description, price, or checkout listing of the Product, provided the warning statement
3 appears elsewhere on the same web page in a manner that clearly associates it with the product(s)
4 to which the warning applies.

5 **3. MONETARY SETTLEMENT TERMS**

6 **3.1 Civil Penalty Payments**

7 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
8 alleged in the Notice or referred to in this Consent Judgment, DC First Aid agrees to pay \$3,500
9 in civil penalties. The penalty payment will be allocated in accordance with Health and Safety
10 Code section 25249.12(c)(1) & (d), with 75% of the penalty paid to the California Office of
11 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty
12 retained by Englander. DC First Aid shall deliver its payment to Englander’s counsel within five
13 days of the Effective Date in two checks made payable to: (a) “OEHHA” in the amount of
14 \$2,625; and (b) “Peter Englander, Client Trust Account” in the amount of \$875. Englander’s
15 counsel shall be responsible for delivering OEHHA’s portion of the penalties paid under this
16 Consent Judgment. DC First Aid shall issue three separate 1099 forms to OEHHA, Englander,
17 and The Chanler Group for the respective amount paid to each under this agreement.

18 **3.2 Attorneys’ Fees and Costs**

19 The Parties reached an accord on the compensation due to Englander and his counsel
20 under general contract principles and the private attorney general doctrine codified at Code of
21 Civil Procedure section 1021.5 for all work performed in this matter. Under these legal
22 principles, DC First Aid agrees to pay \$25,050 to Englander and his counsel for all fees and costs
23 incurred investigating, bringing this matter to the attention of DC First Aid’s management, and
24 negotiating a settlement that provides a significant public benefit. DC First Aid’s payment shall
25 be delivered within five days of the Effective Date in a check payable to “The Chanler Group.”

26 **3.3 Payment Timing; Payments Held in Trust**

27 All payments due under this Consent Judgment shall be held in trust until such time as
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1 the Court approves the Parties' settlement. Within fifteen (15) days of the date this Consent
2 Judgment is fully executed by the Parties, all payments due under this agreement shall be
3 delivered to and held in trust by DC First Aid's counsel, Porzio, Bromberg & Newman P.C. DC
4 First Aid's counsel shall provide Englander's counsel with written confirmation following its
5 receipt of DC First Aid's settlement payments. Thereafter, DC First Aid's counsel shall hold the
6 funds in trust and disburse the funds to Englander's counsel within five (5) days after the
7 Effective Date.

8 **3.4 Payment Address**

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

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Englander's Public Release of Proposition 65 Claims**

15 Englander, acting on his own behalf and in the public interest, releases DC First Aid and
16 DC Safety Sales, and their parents, subsidiaries, affiliated entities under common ownership,
17 directors, officers, employees, and attorneys ("Releasees"), and each entity to whom DC First
18 Aid and/or DC Safety Sales directly or indirectly distributes or sells the Products including,
19 without limitation, their downstream customers, distributors, wholesalers, and retailers
20 ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to the
21 exposure to or failure to warn about exposures to DEHP and/or Lead in Products sold or
22 distributed for sale by DC First Aid or DC Safety Sales prior to the Effective Date, as set forth in
23 the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
24 Proposition 65 with respect to the failure to warn about exposures to DEHP and/or Lead in
25 Products sold or distributed for sale by DC First Aid or DC Safety Sales after the Effective Date.

26 **4.2 Englander's Individual Release of Claims**

27 Englander, in his individual capacity only and *not* in any representative capacity, also
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1 provides a release to DC First Aid, DC Safety Sales, Releasees, and Downstream Releasees which
2 shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of
3 action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and
4 demands of Englander of any nature, character or kind, whether known or unknown, suspected or
5 unsuspected, arising out of alleged or actual exposures to DEHP or Lead in Products sold or
6 distributed for sale by DC First Aid before the Effective Date.

7 **4.3 DC First Aid's Release of Englander**

8 DC First Aid and DC Safety Sales, each on its own behalf, and on behalf of its past and
9 current agents, representatives, attorneys, successors, and assignees, hereby waives any and all
10 claims against Englander and his attorneys and other representatives, for any and all actions
11 taken or statements made, whether in the course of investigating claims, otherwise seeking to
12 enforce Proposition 65 against it in this matter, or with respect to the Products.

13 **5. COURT APPROVAL**

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

17 **6. SEVERABILITY**

18 If, after the execution of this Consent Judgment, any provision of this agreement is held by
19 a court to be unenforceable, the validity of the remaining provisions shall not be adversely
20 affected.

21 **7. GOVERNING LAW**

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

1 **8. NOTICE**

2 Unless specified herein, all correspondence and notice required to be provided pursuant to
3 this Consent Judgment shall be in writing and sent by: (a) personal delivery; (b) first-class,
4 registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any
5 Party by the other at the following addresses:

6 For DC First Aid:

7 Adam Chefetz, President
8 DC First Aid, Inc. / DC Safety Sales Co., Inc.
9 40 Commerce Drive
10 Hauppauge, NY 11788

11 Richard J. Oparil, Esq.
12 Porzio, Bromberg & Newman, P.C.
13 1200 New Hampshire Avenue, NW, Suite 710
14 Washington, DC 20036-6802

15 For Englander:

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

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,
26 when taken together, shall constitute one and the same document.

27 **10. POST EXECUTION ACTIVITIES**

28 Englander agrees to comply with the reporting form requirements referenced in Health and
Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts,
and those of their counsel, to support the entry of this agreement as judgment, and to obtain

1 judicial approval of their settlement in a timely manner. For purposes of this Section, “best
2 efforts” shall include, at a minimum, supporting the motion for settlement approval, responding to
3 any objection or opposition a third-party may file, and appearing at the hearing before the Court if
4 so requested.

5 **11. MODIFICATION**

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

9 **12. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understand, and agree to all the terms and conditions of this
12 Consent Judgment.

13
14 **AGREED TO:**

AGREED TO:

15 Date: 7/2/18

Date: _____

16
17 By:  _____

PETER ENGLANDER

By: _____

Adam Chefetz, Chief Operating Officer
DC FIRST AID, INC. and
DC SAFETY SALES CO., INC.

1 judicial approval of their settlement in a timely manner. For purposes of this Section, "best
2 efforts" shall include, at a minimum, supporting the motion for settlement approval, responding to
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11 respective Parties and have read, understand, and agree to all the terms and conditions of this
12 Consent Judgment.


13 **AGREED TO:**

AGREED TO:

14 Date: _____

Date: July 3, 2018

15 By: _____

16 By: 

17 PETER ENGLANDER

18 Adam Chefetz, Chief Operating Officer
19 DC FIRST AID, INC. and
20 DC SAFETY SALES CO., INC.

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