

1 Clifford A. Chanler, State Bar No. 135534
2 Brian Johnson, State Bar No. 235965
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 cliff@chanler.com
10 brian@chanler.com

11 Attorneys for Plaintiff
12 PETER ENGLANDER

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SANTA CLARA

15 UNLIMITED CIVIL JURISDICTION

16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 GONZALES ENTERPRISES, INC.; *et al.*,

20 Defendants.

Case No. 17CV304838

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*, and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant Gonzales Enterprises, Inc., (“Gonzales”), with Englander and Gonzales
5 each individually referred to as a “Party” and collectively as 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 Defendant**

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

14 **1.4 General Allegations**

15 Englander alleges that Gonzales sells and distributes for sale in California, earphones with
16 cords containing di(2-ethylhexyl) phthalate (“DEHP”), and that it does so without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm.
19 Gonzales denies Englander’s allegations.

20 **1.5 Product Description**

21 For purposes of this Consent Judgment, “Products” are defined as earphones with cords
22 containing DEHP that are manufactured, imported, sold or distributed for sale in California by
23 Gonzales including, without limitation, the cord component of the *Music + Muscles Earbuds*,
24 CHIN0249, UPC #8 88886 29385 9.

25 **1.6 Notice of Violation**

26 On October 14, 2016, Englander served Gonzales, the California Attorney General, and all
27 other requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”). The
28

1 Notice alleges that Gonzales violated Proposition 65 when they failed to warn their customers and
2 consumers in California that earphone cords expose users to DEHP.

3 **1.7 Complaint**

4 On or about January 4, 2017, Plaintiff filed the instant action (“Complaint”), naming
5 Gonzales as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are
6 the subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Gonzales as to the allegations in the Complaint, that venue is proper in the Santa
19 Clara County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court approves this Consent Judgment, including any unopposed tentative ruling.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 Commencing on the Effective Date, Gonzales shall only ship, sell or distribute for sale in or
26 into California, Reformulated Products. For purposes of this Consent Judgment, “Reformulated
27 Products” are products with a maximum DEHP concentration of 1,000 parts per million (0.1%) when
28

analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or any equivalent methods used by state or federal agencies to determine DEHP content in a solid substance.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code section 25249.7(b), in settlement of all claims alleged in the Notice and Complaint, and referred to in this Consent Judgment, Gonzales shall pay a civil penalty of \$3,000. Gonzales' payment will be allocated pursuant to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and remaining twenty-five percent (25%) of the penalty retained by Englander. Gonzalez shall deliver its payment in two checks made payable to (a) "OEHHA" in the amount of \$2,250, and (b) "Peter Englander, Client Trust Account" in the amount of \$750. Englander's counsel shall deliver OEHHA's penalty payment to OEHHA.

3.2 Reimbursement of 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, thereby leaving the issue to be resolved after the material terms of their settlement had been finalized. Shortly after the other settlement terms had been finalized, Gonzales and Englander's 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 section 1021.5 for all work performed through the mutual execution of this Consent Judgment. Under these legal principles, Gonzales agrees to pay \$25,000 for all fees and costs incurred investigating, bringing this matter to Gonzales' attention, and litigating and negotiating a settlement in the public interest. Gonzales shall deliver its payment in a single check payable to "The Chanler Group."

3.3 Payment Procedures

All settlement payments due under this Consent Judgment shall be delivered to Gonzales' counsel within fifteen (15) days of the date that this Consent Judgment is fully executed by the

Parties. Gonzales' counsel shall provide Englander's counsel with written confirmation upon its receipt of Gonzales' settlement funds. Thereafter, Gonzales' counsel shall hold the settlement payments in trust until, and disburse the payments within two days after, the Effective Date.

3.4 Payment Address

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

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 Public Release of Proposition 65 Claims

Englander, acting on his own behalf and in the public interest, releases Gonzales and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and attorneys ("Releasees") and each entity to whom Gonzales directly or indirectly distributes or sells the Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors, and licensees ("Downstream Releasees") for any violation arising under Proposition 65 alleging a failure to warn about exposures to DEHP in Products sold by Gonzales prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the failure to about exposures to DEHP in Products sold by Gonzales after the Effective Date.

4.2 Englander's Individual Release of Claims

Englander, in his individual capacity only and *not* in his representative capacity, also provides a release to Gonzales, Releasees, and Downstream Releasees 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, arising out of alleged or actual exposures to DEHP in Products manufactured, imported, sold or distributed for sale by Gonzales before the Effective Date.

1 **4.3 Gonzales' Release of Englander**

2 Gonzales, on its own behalf, and on behalf of its past and current agents, representatives,
3 attorneys, successors, and assignees, hereby waives all claims against Englander and his attorneys
4 and other representatives, for any actions taken or statements made, whether in the course of
5 investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to
6 the Products.

7 **5. COURT APPROVAL**

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

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of California
17 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
18 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Gonzales may
19 provide written notice to Englander of any asserted change in the law, and shall have no further
20 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
21 Products are so affected.

22 **8. NOTICE**

23 Unless specified herein, all correspondence and notice required by this Consent Judgment
24 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
25 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
26
27
28

1 For Gonzales:

2 Daniel Gonzales, Chief Executive Officer
3 Gonzales Enterprises, Inc.
4 495 Ryan Avenue
Chico, CA 95973

5 Joseph R. Kafka, Esq.
6 Joseph R. Kafka Law Offices
1541 The Alameda
San Jose, California 95126

7 For Englander:

8 The Chanler Group
9 Attn: Proposition 65 Coordinator
2560 Ninth Street
10 Parker Plaza, Suite 214
Berkeley, CA 94710

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
16 same document.

17 **10. POST EXECUTION ACTIVITIES**

18 Englander agrees to comply with the reporting form requirements referenced in Health and
19 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
20 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
21 furtherance of obtaining such approval, Englander and Gonzales agree to mutually employ their best
22 efforts, and that of their counsel, to support the entry of this agreement as judgment, and to obtain
23 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"
24 shall include, at a minimum, supporting the motion for approval, responding to any objection or
25 opposition any third-party may file or lodge, and appearing before the Court at the hearing, if so
26 requested.

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and have read, understand,
7 and agree to all of the terms and conditions set forth herein.

8
9 **AGREED TO:**

10 Date: 3/28/2017

11
12 By:  _____
13 PETER ENGLANDER

14 **AGREED TO:**

15
16 Date: _____

17
18 By: _____
19 Clint Smith, Director of Business and Legal Affairs
20 GONZALES ENTERPRISES, INC.

1 **11. MODIFICATION**

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

5 **12. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and have read, understand,
7 and agree to all of the terms and conditions set forth herein.

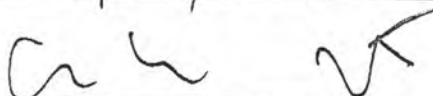
8 **AGREED TO:**

9
10 Date: _____

11
12 By: _____
13 PETER ENGLANDER

14 **AGREED TO:**

15
16 Date: 3/29/2017

17
18 By: 
19 Clint Smith, Director of Business and Legal Affairs
GONZALES ENTERPRISES, INC.