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11

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION
11

12 PETER ENGLANDER
13 Plaintiff
14 v.
15 LIFETIME BRANDS, INC.,
16 Defendant.
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Case No. 115CV288690

**[PROPOSED] CONSENT
JUDGMENT**

Action Filed: December 3, 2015

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1. INTRODUCTION

1.1 Peter Englander and Lifetime Brands, Inc.

This Consent Judgment is entered into by and between Peter Englander (“Englander”) and Lifetime Brands, Inc. (“Lifetime”), with Englander and Lifetime collectively referred to as the “Parties.”

1.2 Peter Englander

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.

1.3 Lifetime Brands, Inc.

Lifetime 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”).

1.4 General Allegations

Englander alleges that Lifetime has manufactured, imported, sold and/or distributed for sale in California, products with vinyl/PVC components containing di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer and birth defects and other reproductive harm.

1.5 Listed Chemicals

DEHP is a phthalate chemical listed under Proposition 65 as a chemical known to the State of California to cause birth defects or other reproductive harm. Other phthalate chemicals listed under Proposition 65 as chemicals known to the State of California to cause birth defects or other reproductive harm include, but are not limited to, butyl benzyl phthalate (“BBP”), di-n-butyl phthalate (“DBP”) and Di-isodecyl phthalate (“DIDP”). In addition, DEHP and Diisononyl phthalate (“DINP”) have been listed under Proposition 65 as chemicals known to the State of California to cause cancer. DEHP, DBP, DIDP and DINP are collectively referred to herein as the “Listed Chemicals.”

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2 **1.6 Product Description**

3 The products that are covered by this Settlement Agreement are defined as wine boxes
4 with vinyl/PVC gripping components including, but not limited to, Elements Purple Merlot Wine
5 Box Item #5121613, UPC #0 28225 66282 7, and which are or have been manufactured, imported,
6 sold and/or distributed for sale in California by Lifetime (hereinafter the “Products”).

7 **1.7 Notices of Violation**

8 On September 24, 2015, Englander served Lifetime and certain requisite public
9 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) that provided the recipients
10 with notice of alleged violations of Proposition 65 based on Lifetime’s alleged failure to warn its
11 customers, consumers, and other individuals that the Products exposed users in California to DEHP.
12 To the best of the Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting
13 the allegations set forth in the Notice. On December 1, 2015, Englander served Lifetime and certain
14 requisite public enforcement agencies with a “Supplement 60-Day Notice of Violation” (“Notice”) that
15 provided the recipients with notice of alleged violations of Proposition 65 based on Lifetime’s
16 alleged failure to warn its customers, consumers, and other individuals that the Products exposed
17 users in California to DBP, DINP, and DIDP as well as DEHP. If no public enforcer commences an
18 action against Lifetime within 60 days of the issuance of the Supplemental Notice (plus any
19 applicable time for service upon the public prosecutors thereof), the Complaint described in Section
20 1.8 below shall be deemed to have been amended to include the additional allegations set forth in the
21 Supplemental Notice and the release in the public interest provided by Section 4.1 below shall be
22 deemed extended to cover DBP, DINP, and DIDP in addition to DEHP.

23 **1.8 Complaint**

24 As no authorized public prosecutor of Proposition 65 filed a claim against Lifetime
25 based on the allegations set forth in the Notice within 60 days of its issuance, Englander filed a
26 complaint on December 3, 2015 in the Superior Court of California for the County of Santa Clara
27 (the “Court”), *Englander v. Lifetime Brands, Inc., et al.*, Case No. 115CV288690, naming Lifetime as
28 a defendant and alleging claims for violations of Health and Safety Code section 25249.6, based on
the alleged exposures to DEHP in Products distributed for sale or sold by Lifetime in the State of

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2 California (hereinafter “Action” or “Complaint”).

3 **1.9 Consent to Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
5 subject matter jurisdiction over the allegations in the Complaint and personal jurisdiction over
6 Lifetime as to the allegations in the Complaint, that venue is proper in the County of Santa Clara, and
7 that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

8 **1.10 No Admission**

9 Lifetime denies the material, factual, and legal allegations contained in Englander’s
10 Notice and Complaint and maintains that all products that it has sold, manufactured, imported and/or
11 distributed in California, including the Products and Additional Products, have been and are in
12 compliance with all laws. Nothing in this Consent Judgment is or shall be construed as an admission
13 by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance
14 with the Consent Judgment constitute or be construed as an admission by Lifetime of any fact,
15 conclusion of law, issue of law, or violation of law. This section shall not, however, diminish or
16 otherwise affect Lifetime’s obligations, responsibilities, and duties under this Consent Judgment.

17 **1.11 Effective Date**

18 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
19 on which this Consent Judgment is approved by the Court, including any tentative ruling that is
20 unopposed.

21 **2. INJUNCTIVE RELIEF**

22 **2.1 Reformulation Standards**

23 Reformulated Products are defined as those containing Listed Chemicals in concentrations at
24 or less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
25 Protection Agency (“EPA”) testing methodologies 3580A and 8270C or any other methodology
26 utilized by federal or state agencies for the purpose of determining the phthalate content in a solid
27 substance.

28 **2.2 Reformulation Commitment**

As of the Effective Date, all Products manufactured, imported, or acquired for sale in

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2 initial civil penalty payment to: (a) "OEHHA" in the amount of \$3,000; and (b) "Peter Englander,
3 Client Trust Account" in the amount of \$1,000. The checks shall then be transmitted to the address
4 show in Section 3.3.A below.

5 **3.1.2 Final Civil Penalty**

6 Lifetime will make a final civil penalty payment of \$4,000 by no later than July 31,
7 2016. Pursuant to title 11 California Code of Regulations, section 3203(c), this final civil penalty
8 payment shall be waived, however, if by no later than June 30, 2016, a duly authorized official of
9 Lifetime certifies in writing to Englander that it has extended its reformulation commitment to also
10 control the level of BBP in the Products to a concentrations of 1,000 parts per million or less on or
11 before that date. Time is of the essence with respect to the date identified for the provision of the
12 certification to implementing such extended reformulation for the Products in lieu of making the final
13 civil penalty payment under this subsection. Unless waived, the final penalty payment shall be
14 allocated according to Health & Safety Code § 25249.12(c)(1) and (d) with 75% of the penalty
15 amount paid to OEHHA, and the remaining 25% of the penalty paid to Englander, and it shall be
16 delivered to the address listed in Section 3.3.A below.

17 **3.2 Reimbursement of Plaintiff's Fees and Costs**

18 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
20 issue to be resolved after the material terms of the agreement had been settled. Shortly after all other
21 settlement terms had been finalized, Lifetime expressed a desire to resolve the fees and costs. The
22 Parties then attempted to (and did) reach an accord on the compensation due to Englander and his
23 counsel under general contract principles and the private attorney general doctrine codified at Code
24 of Civil Procedure section 1021.5 for all work performed or to be performed by Englander and his
25 counsel in this matter, exclusive of fees and costs incurred on appeal, if any. Under these legal
26 principles, on or before five (5) days following the mutual execution of this Consent Judgment by the
27 Parties, Lifetime shall issue a check in the amount of \$36,000 to its counsel's client trust account,
28 which shall be held pending the Court's approval of this Consent Judgment. Lifetime or its counsel
shall provide The Chanler Group with written confirmation within five days of the funds being

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2 deposited as specified above. Within five days of the date that this Consent Judgment is approved by
3 the Court, counsel for Lifetime shall direct its client trust account to issue a check payable to “The
4 Chanler Group” in the amount of \$36,000 and send it to the address found in Section 3.3.A below.

5 **3.3 Payment Procedures**

6 **3.3.A Issuance of Payments.**

7 All payments owed pursuant to Section 3.1 and 3.2 shall be delivered to the following
8 address:

9 The Chanler Group
10 Attn: Proposition 65 Controller
(Englander v. Lifetime Consent Judgment)
11 2560 Ninth Street
Parker Plaza, Suite 214
12 Berkeley, CA 94710

13 **3.3.B Court Approval; Reimbursement.**

14 If the Court does not approve the Consent Judgment, all funds tendered into any trust
15 or escrow account, or otherwise received by The Chanler Group from Lifetime in settlement of this
16 Action, shall be refunded in full as required by Section 6 below.

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

19 In consideration of the promises and commitments contained herein, Plaintiff on
20 behalf of himself and in the public interest, hereby releases Lifetime, its parents, subsidiaries,
21 affiliated entities that are under common ownership or control, directors, officers, employees, and
22 attorneys (“Releasees”), and each entity to whom they directly or indirectly distribute or sell
23 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees,
24 cooperative members, licensors, and licensees (“Downstream Defendant Releasees”), from all claims
25 for violations of Proposition 65 based on unwarned exposure to DEHP from Products acquired,
26 distributed or sold by Lifetime prior to the Effective Date. Upon entry of this Consent Judgment by
27 the Court, going forward, Lifetime’s compliance with the terms of Section 2.1 of this Consent
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2 Judgment shall be deemed to constitute compliance with Proposition 65 with respect to DEHP in the
3 Products.²

4 **4.2 Plaintiff's Release of Additional Claims**

5 Englander, in his individual capacity only and *not* in his representative capacity, also
6 provides a release to Lifetime, its Releasees, and its Downstream Defendant Releases which shall be
7 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
8 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
9 Englander of any nature, character or kind, whether known or unknown, suspected or unsuspected,
10 arising out of alleged or actual exposures to BBP or other chemicals listed under Proposition 65 as
11 present in the Products acquired, distributed, or sold by Lifetime before the Effective Date.

12 **4.3 Lifetime's Release of Englander**

13 Lifetime on behalf of itself, its past and current agents, representatives, attorneys,
14 successors and/or assignees, hereby waives any and all claims against Englander, his attorneys, and
15 other representatives for any and all actions taken or statements made (or those that could have been
16 taken or made) by Englander and his attorneys and other representatives, whether in the course of
17 investigating claims or otherwise seeking enforcement of Proposition 65 against Lifetime in this
18 matter.

19 **5. SEVERABILITY**

20 If, subsequent to the Court's approval of this Consent Judgment, any of the provisions
21 contained herein are held by a court to be unenforceable, the validity of the enforceable provisions
22 remaining shall not be adversely affected unless the Court finds that any unenforceable provision is
23 not severable from the remainder of the Consent Judgment.

24 **6. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court
26 and shall be null and void if, for any reason, it is not approved and entered by Court within twelve
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28 ² The term "Listed Chemicals" shall be deemed to replace "DEHP" in this Section under the conditions set forth in the final sentence of Section 1.7 above.

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2 months of it being fully executed by the Parties, at which time, any funds being held in Trust or in
3 escrow for purposes of this agreement shall be fully reimbursed to Lifetime.

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and apply within the State of California. In the event that Proposition 65 is repealed or
7 otherwise rendered inapplicable by reason of law generally, or as to the Covered Products or the
8 Additional Products, then Lifetime shall provide written notice to Englander of any asserted change
9 in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to,
10 and to the extent that, the Products or Additional Products are so affected. Nothing in this Consent
11 Judgment shall be interpreted to relieve Lifetime from any obligation to comply with any other state
12 or federal law.

13 **8. ENFORCEMENT**

14 Any Party may, by motion or application for an order to show cause before this Court,
15 enforce the terms and conditions contained in this Consent Judgment.

16 **9. NOTICES**

17 Unless specified herein, all correspondence and notices required to be provided
18 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
19 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by
20 the other party at the following

21 To Englander:

22 The Chanler Group
23 Attn: Proposition 65 Coordinator
(Englander v. Lifetime Consent Judgment)
24 Parker Plaza
25 2560 Ninth Street, Suite 214
26 Berkeley, CA 94710
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To Lifetime:
Sara Shindel, General Counsel
Lifetime Brands, Inc.
1000 Stewart Avenue
Garden City, NY 11530
with a copy to:
Robert Falk
Morrison & Foerster LLP
425 Market Street, 32nd Fl.
San Francisco, CA 94105

Any Party may modify the person and address to whom the notice is to be sent by sending each other Party notice by mail and/or other verifiable form of written communication.

10. MODIFICATION

Except as provided in this Section, this Consent Judgment may be modified only by a written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon or by the Court upon motion for good cause shown and entry of a modified Consent Judgment by the Court.

11. ADDITIONAL POST-EXECUTION ACTIVITIES

Englander agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to California Health & Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Englander shall take the lead on drafting the required motion and the Parties and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. For purposes of this paragraph, “best efforts” shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the required motion for judicial approval. If any third party objection to the noticed motion is filed, Englander and Lifetime shall work together through counsel to file a joint reply and appear at any hearing before the Court. This provision is a material component of the Consent Judgment and shall be treated as such in the event of a breach.

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12. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the parties. No representations, oral or otherwise, express or implied, other than those contained herein, have been made by any party hereto. No other agreements shall be deemed to exist or to bind any of the parties.

13. 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 be deemed to constitute one and the same document.

14. AUTHORIZATION

Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and to legally bind that Party.

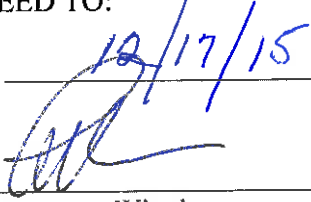
AGREED TO:

Date: 12/15/2015

By: 
Peter Englander

AGREED TO:

Date: 12/17/15

By: 
Lawrence Winoker,
Senior VP-Finance and CFO
Lifetime Brands, Inc.