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17 Attorneys for Defendants
18 WALMART, INC.
19 and SAM'S WEST, INC.

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

PETER ENGLANDER,

Plaintiff,

v.

WAL-MART STORES, INC.; *et al.*,

Defendants.

Case No. RG17879706

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered by and between plaintiff Peter Englander (“Englander”),
4 and defendants Walmart Inc. (“Walmart”) and Sam’s West, Inc. (“Sam’s”). Englander, Walmart, and
5 Sam’s are 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 allegedly seeks to promote awareness of
8 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 Englander alleges that Walmart and Sam’s employ ten or more individuals and are each a
12 “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic
13 Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Walmart and Sam’s sell and distribute for sale in California, cases with
16 vinyl/PVC coverings or other components containing di(2-ethylhexyl) phthalate (“DEHP”), and that
17 they do so without first providing a warning in violation of Proposition 65. DEHP is listed pursuant
18 to Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

19 Walmart and Sam’s deny the allegations. Walmart and Sam’s purchased certain items from
20 Ningbo Meiqi Tool Co. Ltd. (“Ningbo”), and have tendered this matter to Ningbo.

21 **1.5 Product Description**

22 For purposes of this Consent Judgment, “Products” are defined as Member’s Mark Rugged
23 Protective Cases with vinyl/PVC handles containing DEHP that are specifically manufactured by
24 Ningbo and/or sold or distributed for sale in California by Walmart and Sam’s including, but not
25 limited to, the *Member’s Mark Rugged Protective Case, #483489, UPC #0 78742 16033 7, Member’s*
26 *Mark 22” Safety Protective Box, UPC # 0 78742 28842 0, Member’s Mark 20” Protective Box,*
27 *UPC# 0 78742 24729 8, and others* identified in Englander’s Notices.
28

1 **1.6 Notices of Violation**

2 On August 1, 2017, Englander served Wal-Mart Stores, Inc. (“Wal-Mart Stores”), the
3 California Attorney General, and other requisite public enforcers with a 60-Day Notice of Violation
4 (“Notice”). The Notice alleges that Wal-Mart Stores violated Proposition 65 by failing to warn its
5 customers and consumers in California of the health risks associated with exposures to DEHP from
6 the Products. No public enforcer has commenced or is diligently prosecuting an action to enforce the
7 violations alleged in the Notice.

8 On July 25, 2018, Englander served Wal-Mart Stores, Inc., Walmart Inc., Sam’s West, Inc.,
9 the California Attorney General, and other requisite public enforcers with a Supplemental 60-Day
10 Notice of Violation (“Supplemental Notice”). The Supplemental Notice alleges that Defendants
11 violated Proposition 65 by failing to warn their customers and consumers in California of the health
12 risks associated with exposures to DEHP from the Products. No public enforcer has commenced or is
13 diligently prosecuting an action to enforce the violations alleged in the Supplemental Notice.

14 Walmart and Sam’s represent that they do not manufacture, import or otherwise sell the
15 Products presently in California. The Parties agree and affirm that Walmart and Sam’s cross-claims
16 against any and all manufacturers and suppliers shall remain.

17 **1.7 Complaint**

18 On October 23, 2017, Englander filed the instant action, Alameda County Superior Court case
19 number Case No. RG17879706 (the “Action”), naming Wal-Mart Stores as a defendant for the
20 alleged violations that are the subject of the Notice. On January 4, 2019, Plaintiff filed the First
21 Amended Complaint (“Complaint”), adding defendants, Walmart Inc. and Sam’s West, Inc.

22 On or about February 22, 2019, Walmart and Sam’s filed a Cross-Complaint Ningbo Meiqi
23 Tool Co. Ltd. (“Ningbo”) and others regarding the Products.

24 **1.8 No Admission and Claims Against Ningbo**

25 Walmart and Sam’s deny the material, factual, and legal allegations contained in the Notice
26 and Complaint, and maintain that all the products that they have sold or distributed for sale in
27 California, including the Products, comply with all laws. Nothing in this Consent Judgment shall be
28 construed as, nor shall compliance with this Consent Judgment constitute or be construed as, an

admission by Walmart and Sam's of any fact, finding, conclusion of law, issue of law, or violation of law. The Parties affirm that nothing in this Consent Judgment shall limit or effect the rights of Walmart and/or Sam's against Ningbo and any other successor or related party as to the Cross-Complaint.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that the Court has jurisdiction over Walmart and Sam's as to the allegations in the Complaint, that venue is proper in Alameda County, 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 section 664.6.

1.10 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 any unopposed tentative ruling granting approval.

2. INJUNCTIVE RELIEF OR WARNINGS:

2.1 Lack of Sales

Walmart, Wal-Mart Stores, and Sam's have discontinued the sale of Products to customers in California but that the Products may be otherwise available for sale by third parties in the State of California over whom Walmart, Wal-Mart Stores, and Sam's have no control or obligation. While Walmart and Sam's do not anticipate selling Ningbo Products to consumers in California, commencing on the Effective Date, and continuing thereafter, if Sam's does resell the specified Ningbo Products, then the Ningbo Products shall be manufactured for sale, imported for sale, and purchased for resale in California only if they are Reformulated Products as defined by Section 2.2.

2.2 Reformulated Products Defined

For purposes of this Consent Judgment, "Reformulated Products" are defined as the Ningbo Products containing no more than 1,000 parts per million DEHP content (0.1%) in each accessible component when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization. For purposes of compliance with this reformulation standard, testing samples shall be prepared and extracted by Ningbo using Consumer Product Safety

Commission (CPSC) methodology CPSC-CH-C1001.09.3 and analyzed using U.S. Environmental Protection Agency (EPA) methodology 8270D, or other methodologies utilized by federal or state government agencies to determine phthalate 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 the claims referred to in this Consent Judgment, Walmart shall pay \$3,600 in civil penalties. Sam's civil penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and twenty-five percent (25%) of the funds remitted to Englander. Englander's counsel shall be responsible for delivering OEHHA's portion of the penalty payment. Within five (5) days after the Effective Date, Sam's shall deliver its payment in two checks for the following amounts made payable to: (a) "OEHHA" in the amount of \$2,700; and (b) "Peter Englander, Client Trust Account" in the amount of \$900. Englander's counsel shall send OEHHA's portion of the penalties paid by Sam's to OEHHA within ten (10) days of receipt.

3.2 Attorney's Fees and Costs

As part of the settlement, the Parties negotiated a reimbursement 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. Accordingly, Sam's agrees to pay \$15,000 for all fees and costs incurred by Englander investigating, bringing this matter to Walmart and Sam's attention, litigating and negotiating a settlement in the public interest, and obtaining court approval of the same. Walmart's payment shall be delivered to the address in Section 3.3, within ten (10) calendar days after the Effective Date, in the form of a check payable to "The Chanler Group."

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1 **3.3 Payment Address**

2 All payments under this Consent Judgment shall be delivered to:

3 The Chanler Group
4 Attn: Proposition 65 Controller
5 2550 Ninth Street, Suite 205
6 Berkeley, CA 94710

7 **4. CLAIMS COVERED, RELEASED AND ASSIGNED**

8 **4.1 Englander's Public Release of Proposition 65 Claims**

9 Englander, acting on his own behalf and in the public interest, releases Walmart, Sam's,
10 Walmart Inc., Wal-Mart Stores, Inc., Sam's West, Inc., Jet.com, and Walmart.com USA, LLC, and
11 their parents, subsidiaries, affiliated entities under common ownership, directors, officers,
12 employees, shareholders and attorneys ("Releasees"), and each entity to whom Walmart and/or
13 Sam's directly or indirectly distributes or sells the Products including, but not limited to, their
14 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
15 licensors and licensees ("Downstream Releasees") for any violation arising under Proposition 65
16 based on a failure to warn about exposures to DEHP in Products manufactured, imported, sold, or
17 distributed for sale by Walmart, Wal-Mart Stores, and/or Sam's prior to the Effective Date as
18 alleged in the Notices.

19 **4.2 Englander's Individual Release of Claims**

20 Englander, in his individual capacity only also releases, discharges and acquits Walmart, Wal-
21 Mart Stores, Sam's, Releasees, and Downstream Releasees which shall be effective as a full and final
22 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
23 attorneys' fees, damages, losses, claims, liabilities, and demands of Englander of any nature,
24 character or kind, whether known or unknown, suspected or unsuspected, arising out of and/or related
25 to the Products manufactured, imported, sold, distributed and/or offered for sale by Walmart and/or
26 Sam's.

27 **4.3 Englander's Civil Code Section 1542**

28 Englander acknowledges that he is familiar with Section 1542 of Civil Code, which provides
as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR
2 RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
3 AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER,
4 WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
5 DEBTOR OR RELEASED PARTY.

6 Englander, on behalf of himself and his past and current agents, representatives, attorneys,
7 successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which
8 he may have under, or which may be conferred on him by the provisions of California Civil Code
9 § 1542 as well as under any other state or federal statute or common law principle of similar effect
10 (“as they pertain to the Products at issue”), to the fullest extent that he may lawfully waive such rights
11 or benefits pertaining to the released matters up through and including the Effective Date. The release
12 in this section shall have no force or effect until the full amount of payments set forth below are paid
13 in full.

14 **4.4 Walmart Release of Englander**

15 Walmart, on its own behalf, and on behalf of its past and current agents, representatives,
16 attorneys, successors, and assignees, hereby waives all claims against Englander and his attorneys
17 and other representatives as to the Products at issue, for any action taken or statement made, whether
18 in the course of investigating claims, otherwise seeking to enforce Proposition 65 with respect to the
19 Products.

20 **4.5 Walmart’s Civil Code Section 1542**

21 Walmart acknowledges that it is familiar with Section 1542 of Civil Code, which provides as
22 follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR
24 RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
25 AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER,
26 WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
27 DEBTOR OR RELEASED PARTY.

28 Walmart, on behalf of itself and its past and current agents, representatives, attorneys,
successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which
it may have under, or which may be conferred on it by the provisions of California Civil Code § 1542
as to Plaintiff Englander, his attorneys and representatives only, as well as under any other state or

1 federal statute or common law principle of similar effect (“as they pertain to the Products at issue”),
2 to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released
3 matters up through and including the Effective Date.

4 **4.6 Continuation of Walmart’s and Sam’s Claims Against Ningbo**

5 Upon approval of the Consent Judgment, any and all of its claims, demands, and causes of
6 action by Walmart and Sam’s, including, but not limited to, cross-claims, demands and causes of
7 action against Ningbo, shall continue and not be diminished.

8 **4.7 Englander’s Dismissal of Claims**

9 Within ten (10) calendar days of the Effective Date, Englander shall file a dismissal, without
10 prejudice, as to defendants Wal-Mart Stores, Inc., Walmart Inc., and Sam’s.

11 **5. COURT APPROVAL**

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

15 **6. ENFORCEMENT OF CONSENT JUDGMENT**

16 **6.1 Only a Party May Enforce the Consent Judgment**

17 Only the Parties may enforce this Consent Judgment. Any Party seeking to enforce this
18 Consent Judgment, however, must do so in compliance with this Section 6.

19 **6.2 Notice of Breach and Meet and Confer Requirement**

20 No action to enforce this Consent Judgment may be commenced or maintained, and no Notice
21 of Violation related to the Products may be served or filed against Walmart, Wal-Mart Stores, Sam’s,
22 Releasees, and Downstream Releasees, unless Englander first provides Walmart with thirty (30)
23 day’s written notice, indicating the specific acts alleged to breach this Consent Judgment (“Notice of
24 Breach”). Any Notice of Breach must contain (a) the name of the product, (b) the date(s) on which
25 the Product was sold, purchased, or witnessed as being available for sale or purchase, (c) the name
26 and address for the seller of the Product Englander believes violates the Consent Judgment, (d)
27 images of the Products with all packaging and labeling, including any model, SKU (stock keeping
28 unit), item, or batch number visible on the Product labeling; (e) copies of any test results tending to

1 show that a Product sold without a warning is not a “Reformulated Product” as defined by Section
2 2.2, and (f) any other evidence supporting or tending to support the allegations in the Notice of
3 Breach.

4 **6.3 Right to Cure Violations Alleged in Notice of Breach**

5 Within thirty (30) days of receiving a Notice of Breach from Englander, Walmart, Wal-Mart
6 Stores, and/or Sam’s shall either (1) send the store(s) where the accused Product is offered for sale, a
7 letter directing that the Product be immediately removed from inventory and returned to an address
8 specified by Walmart in the letter; or (2) refute the information provided in Englander’s Notice of
9 Breach by meeting and conferring with Englander for not less than thirty (30) days in an effort to
10 resolve the alleged breach informally to Englander’s reasonable satisfaction.

11 Englander shall agree a violation alleged in a Notice of Breach has been resolved, and take no
12 subsequent action to enforce, if Walmart, Wal-Mart Stores, and/or Sam’s cures the claimed breached,
13 reasonably refutes it, and/or directs the store to remove the offending product from its inventory as
14 described above within thirty (30) days of receiving a Notice of Breach from Englander. If Walmart
15 cures the alleged breach by complying as set forth above, then Englander shall not pursue further
16 enforcement of the alleged breach of the Consent Judgment.

17 **7. SEVERABILITY**

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

21 **8. GOVERNING LAW AND POTENTIAL CHANGES**

22 The terms of this Consent Judgment shall be governed by the laws of the state of California
23 and apply within the state of California.

24 If Proposition 65 and/or its related regulations are changed, amended, repealed, preempted, or
25 otherwise rendered inapplicable to or allowing compliance for the Products, then Walmart, Wal-Mart
26 Stores, Sam’s, Releasees, and Downstream Releasees shall have no further injunctive obligations
27 pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are so
28 affected.

9. NOTICE

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

For Walmart:

J. David Bournazian, Esq.
Kutak Rock LLP
5 Park Plaza, Suite 1500
Irvine, CA 92614-8595
Telephone: (949) 417-0999
Facsimile: (949) 417-5394
Email: david.bournazian@kutakrock.com

For Englander:

Proposition 65 Coordinator
The Chanler Group
2550 Ninth Street, Suite 205
Berkeley, CA 94710

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

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. 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 Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent Judgment, which Englander shall take the lead to draft and file and Sam's shall support, including appearing at the hearing if so required.

12. MODIFICATION

This Consent Judgment may be modified only by a written agreement of the Parties and entry of a modified consent judgment by the Court.

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1 **13. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understand,
3 and agree to all the terms and conditions contained herein.

4 **AGREED TO:**

5
6 Date: 7/2/19

7
8 By: 

PETER ENGLANDER

AGREED TO:

9
10 Date: Leigh Anne Yeargan

11 By: Leigh Anne Yeargan

12 WALMART, INC.

AGREED TO:

13 Date: 7/22/2019 | 09:20 CDT

14 By: Leigh Anne Yeargan
15 SAM'S WEST, INC.

16 **IT IS SO ORDERED, ADJUDGED,**
17 **AND DECREED.**

18
19 Dated: _____

20 _____
21 Judge of the Superior Court