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David H. ...
By: M. Rawson
Clerk

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10 PETER ENGLANDER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SANTA CLARA
13 UNLIMITED CIVIL JURISDICTION

14 PETER ENGLANDER,
15
16 Plaintiff,
17
18 v.
19 TARGET CORPORATION; *et al.*,
20
21 Defendants.

Case No. 112CV232815

**[PROPOSED] JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT**

Date: November 7, 2013
Time: 9:00 a.m.
Dept.: 13
Judge: Hon. James L. Stoelker

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1 Plaintiff Peter Englander and defendant DAP Incorporated, having agreed through
2 their respective counsel that Judgment be entered pursuant to the terms of their settlement
3 agreement in the form of a Consent Judgment, and following this Court's issuance of an
4 Order approving the Proposition 65 settlement and Consent Judgment,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
6 Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6,
7 judgment is hereby entered in accordance with the terms of the Consent Judgment attached
8 hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to
9 enforce the settlement pursuant to Code of Civil Procedure section 664.6.

10 **IT IS SO ORDERED.**

11
12 Dated: NOV - 7 2013

James L. Stoelker
JUDGE OF THE SUPERIOR COURT

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15 Plaintiff,
16 v.
17 TARGET CORPORATION; *et al.*,
18 Defendants.

Case No. 112CV232815
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties.** This Consent Judgment is entered into by and between plaintiff, Peter
3 Englander (“Englander”), and defendant, DAP, Incorporated (“DAP”), with Englander and DAP each
4 individually referred to as a “Party” and collectively as the “Parties.”

5 **1.2 Plaintiff.** Englander is an individual residing in California who seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products.

8 **1.3 Defendant.** DAP employs ten or more persons and is a “person in the course of doing
9 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
10 Safety Code section 25249.6 *et seq.* (“Proposition 65”).

11 **1.4 General Allegations.** Englander alleges that DAP imports, manufactures, tape
12 measures with vinyl components containing di(2-ethylhexyl)phthalate (“DEHP”) without first
13 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
14 65 as a chemical known to the state of California to cause birth defects or other reproductive harm.

15 **1.5 Product Description.** The products that are covered by this Consent Judgment, and
16 to which this Consent Judgment is specifically limited, are tape measures with vinyl components
17 containing DEHP that are imported, manufactured, sold, or distributed for sale by DAP (“Products”).
18 In addition to the Products, tools with vinyl grips or other components containing DEHP that are
19 imported, manufactured, sold, or distributed for sale by DAP are also subject to this Consent
20 Judgment. All such tools with vinyl grips or other components containing DEHP are referred to
21 collectively as “Additional Products.”

22 **1.6 Notices of Violation**

23 **1.6.1 Initial Notice.** On or about June 15, 2012, Englander served DAP’s retail
24 customer in California, Target Corporation, and certain requisite public enforcement agencies with a
25 “60-Day Notice of Violation” (“Notice”) alleging that Target was in violation of Proposition 65 for
26 failing to warn its customers and consumers in California that the Products expose users to DEHP.

27 **1.6.2 Supplemental Notice.** On or about February 22, 2013, Englander served
28 Target, DAP, and certain requisite public enforcement agencies with a “Supplemental 60-Day Notice

1 of Violation” (“Supplemental Notice”) alleging, in addition to the allegations regarding Target, that
2 DAP also violated Proposition 65 when it failed to warn its customers and consumers in California
3 that the Products expose users to DEHP. The Notice and Supplemental Notice are referred to
4 collectively as the “Notices.” To the best of the Parties’ knowledge, no public enforcer has
5 commenced and is diligently prosecuting the allegations set forth in the Notices.

6 **1.7 Complaint**

7 **1.7.1 Initial Pleading.** On September 21, 2012, Englander filed the instant action,
8 naming Target as a defendant for the alleged violations that are the subject of the Notice.

9 **1.7.2 First Amended Complaint.** On November 28, 2012, Englander filed a first
10 amended complaint (“FAC”), which limited the scope of the products at issue in this action to tape
11 measures imported, manufactured, distributed or sold through Target Corporation by DAP.

12 **1.7.3 Second Amended Complaint.** On May 28, 2013, Englander filed a Second
13 Amended Complaint (“Complaint”), the operative pleading in this action, alleging violations of
14 Proposition 65 by DAP and Target, based on unwarned exposures to DEHP from the Products.

15 **1.8 No Admission.** DAP denies the material, factual, and legal allegations contained in
16 the Notices and Complaint, and maintains that all of the products that it has sold in California,
17 including the Products and Additional Products, have been, and are, in compliance with all laws.
18 Nothing in this Consent Judgment shall be construed as an admission by DAP of any fact, finding,
19 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
20 constitute or be construed as an admission by DAP of any fact, finding, conclusion of law, issue of
21 law, or violation of law. This Section shall not, however, diminish or otherwise affect DAP’s
22 obligations, responsibilities, and duties under this Consent Judgment.

23 **1.9 Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
24 stipulate that the Court has jurisdiction over DAP as to the allegations in the Complaint, that venue is
25 proper in Santa Clara County, and that the Court has jurisdiction to enter and enforce the provisions
26 of this Consent Judgment.

27 **1.10 Effective Date.** For purposes of this Consent Judgment, the term “Effective Date”
28 shall mean August 15, 2013.

1 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

2 **2.1 Reformulated Products.** Commencing on November 15, 2013, and continuing
3 thereafter, DAP shall only purchase for sale, manufacture for sale, or distribute for sale in California
4 “Reformulated Products.” For purposes of this Consent Judgment, Reformulated Products are
5 Products or Additional Products that contain a maximum of 1,000 parts per million (0.1%) DEHP
6 content in any Accessible Component (i.e., any component that may be touched or handled during
7 reasonably foreseeable use) when analyzed pursuant to EPA testing methodologies 3580A and
8 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of
9 determining DEHP content in a solid substance.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Payments pursuant to Health and Safety Code § 25249.7(b)**

12 In settlement of all the claims referred to in this Consent Judgment, DAP shall pay \$35,000 in
13 civil penalties. Each civil penalty payment shall be allocated according to Health and Safety Code
14 section 25249.7(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California
15 Office of Environmental Health Hazard Assessment and twenty-five percent (25%) of the funds
16 remitted to Englander. All civil penalty payments shall be delivered to the payment addresses
17 provided in Section 3.3.1.

18 **3.1.1 Initial Civil Penalty.** Within five days of the Effective Date, DAP shall make
19 an initial civil penalty payment of \$15,000. DAP shall provide its payment in two checks for the
20 following amounts made payable to: (a) “OEHHHA” in the amount of \$11,250; and (b) “The Chanler
21 Group in Trust for Peter Englander” in the amount of \$3,750.

22 **3.1.2 Final Civil Penalty.** On or before October 31, 2013, DAP shall make a final
23 civil penalty payment of \$20,000. Pursuant to California Code of Regulations title 11, section
24 3203(c), the final civil penalty payment shall be waived in its entirety if, no later than October 15,
25 2013, the General Manager of DAP, Simon Hopper, provides Englander’s counsel with written
26 certification that all of the Products and Additional Products purchased for sale or manufactured for
27 sale in California are Reformulated Products, and that DAP will continue to offer only Reformulated
28 Products in California. The written certification of reformulation in lieu of the final civil penalty

1 payment required by this Section is a material term, and time is of the essence. Unless waived, DAP
2 shall issue two checks for the following amounts payable to: (a) "OEHHA" in the amount of \$15,000;
3 and (b) "The Chanler Group in Trust for Peter Englander" in the amount of \$5,000.

4 **3.2 Reimbursement of Fees and Costs**

5 The parties acknowledge that Englander and his counsel offered to resolve this dispute
6 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
7 the issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly
8 after the other settlement terms had been finalized, DAP expressed a desire to resolve the fee and
9 cost issue. The Parties then attempted to (and did) reach an accord on the compensation due to
10 Englander and his counsel under general contract principles and the private attorney general doctrine
11 codified at Code of Civil Procedure section 1021.5 for all work performed through the mutual
12 execution of this Consent Judgment. DAP shall pay \$39,500 for fees and costs incurred as a result
13 of investigating, bringing this matter to DAP's attention, and negotiating a settlement in the public
14 interest. DAP's payment of fees and costs shall be delivered within five days of the Effective Date
15 to the payment address provided in Section 3.3.1(a).

16 **3.3 Payment Procedures**

17 **3.3.1. Payment Addresses.** All payments required by this Consent Judgment shall
18 be delivered to the following payees at the following addresses:

19 (a) Payments to Englander and The Chanler Group shall be delivered to the
20 following address:

21 The Chanler Group
22 Attn: Proposition 65 Controller
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710

26 (b) All payments to OEHHA shall be delivered directly to OEHHA (Memo line
27 "Prop 65 Penalties") at the following addresses depending on the place of mailing:

28 (i) For United States Postal Service Delivery:

1 Mike Gyrics
2 Fiscal Operations Branch Chief
3 Office of Environmental Health Hazard Assessment
4 P.O. Box 4010
5 Sacramento, CA 95812-4010

6 (ii) For Non-United States Postal Service Delivery:

7 Mike Gyrics
8 Fiscal Operations Branch Chief
9 Office of Environmental Health Hazard Assessment
10 1001 I Street
11 Sacramento, CA 95814

12 **3.3.2 Proof of Payment.** DAP will provide Englander's counsel with a copy of the
13 check(s) payable to OEHHHA mailed to the address provided in Section 3.3.1(a), as proof of payment.

14 **3.3.3 Required Tax Documentation.** DAP agrees to provide any necessary tax
15 documentation for its payments to each of the following payees:

16 (a) "Office of Environmental Health Hazard Assessment" (EIN: 68-0284486)
17 1001 I Street, Sacramento, CA 95814;

18 (b) "Peter Englander," whose address and tax identification number shall be
19 furnished after this Consent Judgment is fully executed by the Parties; and

20 (c) "The Chanler Group" (EIN: 94-3171522) at the address provided in Section
21 3.3.1(a) for fees and costs reimbursed under this Consent Judgment.

22 **3.3.4 Payments Held In Trust.** All payments under this Consent Judgment will be
23 held in trust until such time as the Court approves the settlement. Within five days of the Effective
24 Date, DAP will transmit all of the settlement funds in a single sum of \$54,500 into its attorneys'
25 trust account. Thereafter, on or before September 15, 2013, DAP's attorney shall disburse DAP's
26 settlement payments to Englander, and Englander's counsel in the form of two checks for the
27 following amounts made payable to:

28 (a) "The Chanler Group in Trust for Peter Englander" in the amount of \$3,750
shall be delivered to the payment address in Section 3.3.1(a); and

(b) "The Chanler Group in Trust" in the amount of \$39,500.

DAP's penalty payment to OEHHHA shall be held in trust by DAP's counsel, and shall be disbursed
within 15 days of a ruling from the Court granting the motion to approve this Consent Judgment

1 contemplated by Section 5.2. At such time, DAP's counsel shall deliver to the appropriate address
2 in Section 3.3.1(b) a check made payable to "OEHHA" in the amount of \$11,250.

3 **3.3.5 Payments Contingent On Court Approval.** In the event that the Consent
4 Judgment is not approved and entered by the Court, and the Parties decide pursuant to Section 5.3
5 not to resubmit the agreement or submit a modified consent judgment for approval, then Englander
6 agrees that any and all monies DAP has paid to Englander or his counsel under this Consent
7 Judgment will be returned to DAP within 15 days of DAP's request for reimbursement of the same.

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Englander's Public Release of Proposition 65 Claims.** Englander, acting on his
10 own behalf and in the public interest, releases DAP and its parents, subsidiaries, affiliated entities
11 under common ownership, directors, officers, employees, and attorneys ("Releasees") and each
12 entity to whom they directly or indirectly distribute or sell the Products, including but not limited to
13 its downstream distributors, wholesalers, customers (including, without limitation, Target
14 Corporation), retailers, franchisers, cooperative members, licensors and licensees ("Downstream
15 Releasees") for any violations arising under Proposition 65 for unwarned exposures to DEHP from
16 the Products sold by DAP prior to the Effective Date, as set forth in the Notices. Compliance with
17 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
18 exposures to DEHP from the Products.

19 **4.2 Englander's Individual Release of Claims.** Englander, in his individual capacity
20 only and *not* in his representative capacity, also provides a release to DAP, Releasees, and
21 Downstream Releasees which shall be effective as a full and final accord and satisfaction, as a bar
22 to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
23 liabilities and demands of Englander of any nature, character or kind, whether known or unknown,
24 suspected or unsuspected, arising out of alleged or actual exposures to DEHP in the Products or
25 Additional Products sold or distributed for sale by DAP before the Effective Date.

26 **4.3 DAP's Release of Englander.** DAP, on its own behalf, and on behalf of its past and
27 current agents, representatives, attorneys, successors, and assignees, hereby waives any and all
28 claims against Englander and his attorneys and other representatives, for any and all actions taken

1 or statements made by Englander and his attorneys and other representatives, whether in the course
2 of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
3 respect to the Products or Additional Products.

4 **5. COURT APPROVAL**

5 **5.1** By this Consent Judgment and upon its approval, the Parties waive their right to trial
6 on the merits, and waive rights to seek appellate review of any and all interim rulings, including all
7 pleading, procedural, and discovery orders.

8 **5.2** The Parties acknowledge that, pursuant to California Health and Safety Code section
9 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this Consent Judgment,
10 which Englander shall file. DAP shall support the entry of this Consent Judgment.

11 **5.3** If this Consent Judgment is not approved by the Court, (a) this Consent Judgment and
12 any and all prior agreements between the Parties merged herein shall terminate and become null and
13 void, and the action shall revert to the status that existed prior to the execution date of this Consent
14 Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation,
15 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
16 nor shall any such matter be admissible in evidence for any purpose in this action, or in any other
17 proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of
18 the Consent Judgment and to resubmit it for approval.

19 **5.4** This Consent Judgment contains the sole and entire agreement and understanding of
20 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and all
21 prior discussions, negotiations, commitments, or understandings related thereto, if any, are deemed
22 merged. There are no warranties, representations, or other agreements between the Parties except as
23 expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or
24 implied, other than those specifically referred to in this Consent Judgment have been made by any
25 party. No other agreements not specifically contained or referenced in this Consent Judgment, oral or
26 otherwise, shall be deemed to exist or to bind any of the Parties. No supplementation, modification,
27 waiver or termination of this Consent Judgment shall be binding unless executed in writing by the
28 party to be bound. No waiver of any of the provisions of this Consent Judgment shall be deemed or

1 shall constitute a waiver of any of the other provisions whether or not similar, nor shall such waiver
2 constitute a continuing waiver.

3 **6. GOVERNING LAW**

4 **6.1** The terms of this Consent Judgment shall be governed by the laws of the state of
5 California and apply within the state of California. In the event that Proposition 65 is repealed,
6 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products or
7 Additional Products, then DAP may provide written notice to Englander of any asserted change in the
8 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to
9 the extent that, the Products or Additional Products are so affected. Nothing in this Consent
10 Judgment shall be interpreted to relieve DAP from any obligation to comply with any pertinent state
11 or federal toxics control laws.

12 **6.2** The Parties, including their counsel, have participated in the preparation of this
13 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
14 Consent Judgment was subject to revision and modification by the Parties and has been accepted and
15 approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
16 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
17 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees
18 that any statute or rule of construction providing that ambiguities are to be resolved against the
19 drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
20 regard, the Parties hereby waive California Civil Code section 1654.

21 **8. NOTICE**

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

25 For DAP:

26 Simon Hopper, General Manager
27 DAP, Incorporated
28 Shanghe Village, Wenyao Town, Xiaoshan
Hangzhou, Zhejiang Province, China 311258

1 with a copy to:

2 John P. McGonagle, Esq.
3 800 Hingham Street - 2N
4 Rockland, MA 02370

4 For Englander:

5 The Chanler Group
6 Attn: Proposition 65 Coordinator
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

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

10 **9. ENFORCEMENT; ARBITRATION**

11 **9.1 Enforcement of Settlement as a Judgment.** Any Party may, by motion or
12 application for an order to show cause before this Court, enforce the terms and conditions contained
13 in this Consent Judgment.

14 **9.2 Enforcement; Arbitration.** In addition to the judicial enforcement provisions in
15 Section 9.1, any dispute, controversy or claim arising out of or relating to this Consent Judgment,
16 including the formation, interpretation, breach or termination thereof, may, at the election of the Party
17 seeking to enforce the terms contained herein, be referred to and finally determined by arbitration in
18 accordance with the JAMS International Arbitration Rules. In such a case, the tribunal will consist of
19 a sole arbitrator. The place of arbitration will be in either San Francisco, California or Hong Kong,
20 China, at the discretion of the Party alleging a breach or otherwise seeking to enforce the agreement.
21 The language to be used in the arbitral proceedings will be English. Judgment upon the award
22 rendered by the arbitrator may be entered by any court having jurisdiction thereof, including those in
23 Hong Kong, China and/or the United States. Any award rendered may be executed by attachment to
24 DAP assets located in Hong Kong or elsewhere, as DAP has represented it has such assets totaling
25 more than \$10,000,000 specifically in Hong Kong. If Englander successfully enforces the provisions
26 of this Consent Judgment against DAP after arbitration, Englander shall be entitled to the
27 reimbursement of his reasonable attorneys' fees and costs incurred obtaining such relief pursuant to
28 Code of Civil Procedure section 1021.5.

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

5 **11. PUBLIC ENFORCMENT**

6 Nothing in this Consent Judgment is intended to, or shall be construed to, infringe upon or
7 preclude the right of any public enforcer, including the Office of the Attorney General of the State of
8 California to bring a public enforcement action under Proposition 65.

9 **12. DISMISSAL OF TARGET CORPORATION**

10 Within ten days of an order entered by the Court granting approval of this Consent Judgment,
11 Englander shall file a Request for Dismissal without prejudice as to defendant Target Corporation.

12 **13. MODIFICATION**

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

16 **14. AUTHORIZATION**

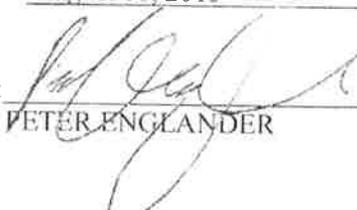
17 The undersigned are authorized to execute this Consent Judgment and have read, understood,
18 and agree to all of the terms and conditions contained herein.

19 **AGREED TO:**

AGREED TO:

20
21 Date: August 16, 2013

Date: _____

22
23 By:  _____

PETER ENGLANDER

By: _____

Simon Hopper, General Manager
DAP, INCORPORATED

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

19 **AGREED TO:**

AGREED TO:

20
21 Date: _____

Date: 14th August 2013

22
23 By: _____
24 **PETER ENGLANDER**

By: Simon Hopper
Simon Hopper, General Manager
DAP, INCORPORATED