

FILED

JUN 29 2018

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Berg, Deputy

1 Brian Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118
9 brian@chanler.com
10 josh@chanler.com

11 Attorneys for Plaintiff
12 PETER ENGLANDER

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 FOR MARIN COUNTY
15 UNLIMITED CIVIL JURISDICTION

16 PETER ENGLANDER
17 Plaintiff,
18 v.
19 VICMARR AUDIO INC.; et al.,
20 Defendants.

Case No. CIV1703888

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

Date: June 29, 2018
Time: 1:30 p.m.
Dept.: E
Judge: Hon. Paul M. Haakenson

EXHIBIT 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brian Johnson, State Bar No. 235965
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118
brian@chanler.com

Attorneys for Plaintiff
PETER ENGLANDER

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

PETER ENGLANDER,
Plaintiff,
v.
VICMARR AUDIO INC.; *et al.*,
Defendants.

Case No. CIV1703888

[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 defendant Vicmarr Audio Inc. (“Vicmarr”) with Englander and Vicmarr each individually
5 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 to improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Englander alleges that Vicmarr sells and distributes for sale in California, vinyl/PVC audio
16 cables containing di(2-ethylhexyl) phthalate (“DEHP”), and that it does so without first providing a
17 warning in violation of Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical
18 known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment, “Products” are defined as audio cables with
21 vinyl/PVC insulation or other exterior coatings or components containing DEHP that are sold or
22 distributed for sale in California by Vicmarr including, but not limited to, the *Technical Pro ¼” to*
23 *¼” 16 Gauge Speaker Cable, item number CQQ1612* identified in Englander’s Notice.

24 **1.6 Notice of Violation**

25 On May 31, 2017, Englander served Vicmarr, Vicmarr’s customer, Fry’s Electronics, Inc.
26 (“Fry’s Electronics”) the California Attorney General, and all other requisite public enforcers with a
27 60-Day Notice of Violation (“Notice”). The Notice alleges that Vicmarr and Fry’s Electronics
28 violated Proposition 65 by failing to warn their customers and consumers in California of the health

1 risks associated with exposures to DEHP from the Products. No public enforcer has commenced or is
2 diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On October 17, 2017, Englander filed the instant action (“Complaint”), naming Vicmarr as a
5 defendant for the alleged violations that are the subject of the Notice.

6 **1.8 No Admission**

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

15 **1.9 Jurisdiction**

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

20 **1.10 Effective Date**

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

24 **2. INJUNCTIVE RELIEF: Reformulated Products**

25 **2.1 Commitment to Provide Reformulated Products or Warnings**


26 Commencing on the Effective Date, and continuing thereafter, Vicmarr agrees to sell or
27 distribute for sale in California only either (a) “Reformulated Products,” as defined by Section 2.2, or
28 (b) Products sold with a clear and reasonable warning pursuant to Section 2.3.

1 **2.2. Reformulated Products Defined**

2 For purposes of this Consent Judgment, Reformulated Products are defined as Products
3 containing no more than 1,000 parts per million DEHP content (0.1%) in any component analyzed
4 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
5 equivalent methodologies used by state or federal agencies to determine DEHP content in a solid
6 substance.

7 **2.3 Clear and Reasonable Warnings**

8 Commencing on the Effective Date, for all Products that do not meet the definition of
9 Reformulated Products established by Section 2.2, Vicmarr shall provide clear and reasonable
10 warnings in accordance with this Section 2.3, or title 27 California Code of Regulations section
11 25602 and 25603. Vicmarr further agrees that any warning used will be prominently placed in
12 relation to the Product(s) with such conspicuousness when compared with other words, statements,
13 designs, or devices as to render it likely to be read and understood by an ordinary individual under
14 customary conditions of purchase or use. For purposes of this Consent Judgment, a warning for the
15 Products displayed or transmitted according to the above criteria that is affixed directly to a Product
16 or its accompanying labeling or packaging that contains the following statement shall be deemed
17 clear:

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

22 If Vicmarr sells Products via an internet website to customers located in California, the warning
23 requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same
24 web page on which a Product is displayed and/or described; (b) on the same page as the price for the
25 Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the
26 checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or
27 white equilateral triangle may appear adjacent to or immediately following the display, description,
28

1 price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web
2 page in a manner that clearly associates it with the product(s) to which the warning applies.

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Civil Penalty Payment**

5 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
6 to in this Consent Judgment, Vicmarr shall pay \$3,250.00 in civil penalties. Vicmarr's civil penalty
7 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with
8 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
9 Hazard Assessment ("OEHHA"), and twenty-five percent (25%) of the funds remitted to Englander.
10 Vicmarr shall provide its payment in two checks for the following amounts made payable to: (a)
11 "OEHHA" in the amount of \$2,437.50; and (b) "Peter Englander, Client Trust Account" in the
12 amount of \$821.50. Englander's counsel shall be responsible for delivering the penalty payment to
13 OEHHA.

14 **3.2 Reimbursement of Attorneys' Fees and Costs**

15 The parties acknowledge that Englander and his counsel offered to resolve this dispute
16 without reaching terms on the fees and costs to be reimbursed, thereby leaving the issue to be
17 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
18 settlement terms had been finalized, the Parties negotiated a reimbursement of the compensation due
19 to Englander and his counsel under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
21 through the mutual execution of this Consent Judgment. Accordingly, Vicmarr agrees to pay \$24,000
22 for all fees and costs incurred by Englander investigating, bringing this matter to Vicmarr's attention,
23 litigating and negotiating a settlement in the public interest, and obtaining court approval of the same.

24 **3.3 Payments Held in Trust**

25 All payments due under this Consent Judgment shall be delivered within thirty (30) days of
26 the date that this Consent Judgment is fully executed by the Parties, and held in trust by Vicmarr's
27 counsel until the Court grants the motion for approval of this Consent Judgment contemplated by
28 Section 5. Vicmarr's counsel shall provide Englander's counsel with written notice following its

1 receipt of the settlement funds from Vicmarr. Thereafter, Vicmarr's counsel shall hold the funds in
2 trust until, and disburse the payments to Englander's counsel within five (5) days after the Effective
3 Date.

4 **3.4 Payment Address**

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

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

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Englander's Public Release of Proposition 65 Claims**

12 Englander, acting on his own behalf and in the public interest, releases Vicmarr and its
13 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
14 shareholders and attorneys ("Releasees"), and each entity to whom Vicmarr directly or indirectly
15 distributes or sells the Products including, but not limited to, its downstream distributors,
16 wholesalers, customers (including, without limitation, Fry's Electronics), retailers, franchisers,
17 cooperative members, licensors and licensees ("Downstream Releasees") for any violation arising
18 under Proposition 65 based on a failure to warn about exposures to DEHP in Products
19 manufactured, imported, sold, or distributed for sale by Vicmarr prior to the Effective Date.

20 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
21 with respect to the alleged or actual failure to warn about exposures to DEHP in Products
22 manufactured, imported, sold, or distributed for sale by Vicmarr after the Effective Date.

23 The Parties agree and understand that the releases provided under this Consent Judgment shall
24 not extend upstream to any entity that manufactured the Products, or any component parts thereof for
25 Vicmarr, or supplied the Products, or any component parts thereof to Vicmarr, except to the extent
26 such Products are/were sold or distributed for sale in California by Vicmarr.

27 **4.2 Englander's Individual Release of Claims**

28 Englander, in his individual capacity only and *not* in his representative capacity, also provides
a release to Vicmarr, Releasees, and Downstream Releasees which shall be effective as a full and

1 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
2 attorneys' fees, damages, losses, claims, liabilities, and demands of Englander of any nature,
3 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
4 actual exposures to DEHP in Products manufactured, imported, sold, distributed and/or offered for
5 sale by Vicmarr before the Effective Date.

6 **4.3 Vicmarr's Release of Englander**

7 Vicmarr, on its own behalf, and on behalf of its past and current agents, representatives,
8 attorneys, successors, and assignees, hereby waives all claims against Englander and his attorneys
9 and other representatives, for any action taken or statement made, whether in the course of
10 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
11 respect to the Products.

12 **5. DISMISSAL OF RETAIL CUSTOMER IN CALIFORNIA**

13 Englander agrees that within 15 days of the Effective Date, or Englander's receipt of the
14 settlement payments required by Section 3, whichever is later, he will file a request for dismissal with
15 prejudice, dismissing Fry's Electronics, Inc. from the action.

16 **6. COURT APPROVAL**

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

20 **7. SEVERABILITY**

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

24 **8. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the state of California
26 and apply within the state of California. If Proposition 65 is repealed, preempted, or otherwise
27 rendered inapplicable by reason of law generally, or as to the Products, then Vicmarr may provide
28 written notice to Englander of any asserted change in the law, and shall have no further injunctive

1 obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are
2 so affected.

3 **9. NOTICE**

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

7 For Vicmarr:

8 Jeffrey Dweck, Esq.
9 The Law Firm of Jeffrey S. Dweck, P.C.
10 43 West 33rd Street, Suite 304
11 New York, New York 10001

12 Victor Cohen, President
13 Vicmarr Audio Inc.
14 9 Kilmer Court
15 Edison, NJ 08817

16 For Englander:

17 Proposition 65 Coordinator
18 The Chanler Group
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710-2565

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

24 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

28 **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 draft and file and Vicmarr shall support, including appearing at the
hearing if so required.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. MODIFICATION

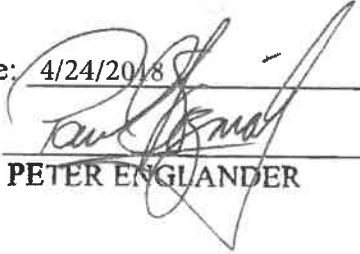
This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any Party, and the entry of a modified consent judgment by the Court.

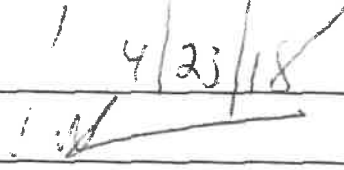
13. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 4/24/2018
By: 
PETER ENGLANDER

Date: 4/23/18
By: 
Victor Cohen, President
VICMARR AUDIO INC.