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10 PETER ENGLANDER

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

14 PETER ENGLANDER,

15 Plaintiff,

16 v.

17 WINSTON PRODUCTS LLC; *et al.*,

18 Defendants.
19

Case No. RG13667215

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff, Peter Englander
4 (“Englander”), and defendant, Winston Products LLC (“Winston”), with Englander and Winston
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 Winston employs ten or more persons and is a person in the course of doing business for
12 purposes of The Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code
13 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Winston sold SmartStraps[®] tow ropes and SmartStraps[®] ratchet tie
16 downs containing lead without first providing the clear and reasonable warning required by
17 Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to the State of
18 California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are towing straps, ropes and tiedowns
21 containing lead that are imported, manufactured, sold, or distributed for sale by Winston in California
22 (collectively “Products”) including, but not limited to, the *SmartStraps[®] Tow Rope, #133 (#8 75195*
23 *001336)*, the *SmartStraps[®] Endless Ratchet Tie Down, #835 (#8 75195 008359)*, and the
24 *SmartStraps[®] 4 Pack 10 ft Standard Ratchet Tie Down, #845 (#8 75195 008458)*.

25 **1.6 Notices of Violation**

26 On or about August 1, 2012, Englander served Winston and the requisite public enforcement
27 agencies with a 60-Day Notice of Violation, a document that informed the recipients of Englander’s
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1 allegation that Winston was in violation of Proposition 65 for failing to warn its customers and
2 consumers in California that the tow rope hand grips expose users to lead. On February 22, 2013,
3 Englander served Winston, Wal-Mart Stores, Inc. and various public enforcement agencies with a
4 document entitled Supplemental 60-Day Notice of Violation, a document that informed Winston and
5 the public enforcers of Englander’s allegation that Winston was in violation of Proposition 65 for
6 failing to warn its customers and consumers in California that Winston’s towing straps, ropes and
7 tiedowns expose users to lead (collectively, “Notices”). No public enforcer or private citizen
8 enforcer has diligently prosecuted the allegations set forth in the Notices.

9 **1.7 Complaint**

10 On February 13, 2013, Englander filed the instant action against Winston for the alleged
11 violations of Health & Safety Code § 25249.6 that are the subject of the Notice dated August 1,
12 2012. On May 10, 2013, Englander filed a First Amended Complaint to include the violations of
13 Proposition 65 alleged in the Supplemental Notice with respect to the Products (towing straps, ropes
14 and tiedowns) (“Complaint.”).

15 **1.8 No Admission**

16 Winston denies the material, factual and legal allegations contained in the Notices and
17 Complaint, and it maintains that all of the products that it has sold and distributed in California,
18 including the Products, have been, and are, in compliance with all laws including Proposition 65.
19 Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion
20 of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute
21 or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of
22 law. This Section shall not, however, diminish or otherwise affect Winston’s obligations,
23 responsibilities, and duties under this Consent Judgment.

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Winston as to the allegations in the Complaint, that venue is proper in Alameda
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1 County, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
2 Judgment.

3 **1.10 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean May 31, 2013.

5 **2. INJUNCTIVE RELIEF**

6 **2.1 Reformulation Commitment**

7 Commencing on the Effective Date and continuing thereafter, Winston shall either: 1) only
8 import, manufacture, sell or distribute for sale in California “Reformulated Products” (Products that
9 meet the Reformulation Standards of Section 2.2 below; or 2) provide clear and reasonable
10 warnings on the Products as set forth in Section 2.3 below.

11 **2.2 Reformulation Standards**

12 Reformulated Products shall mean that each accessible component of each Product contains
13 the Listed Chemical in concentrations that do not exceed 100 parts per million (ppm) lead content in
14 any accessible component (i.e., any component that may be touched or handled during a reasonably
15 foreseeable use) when analyzed pursuant to Environmental Protection Agency testing methodologies
16 3050B and/or 6010B, and that yield a result of more than 1.0 micrograms of lead when analyzed
17 pursuant to the NIOSH 9100 testing protocol.

18 Winston may ship, sell or offer to be shipped for sale in California a Product that does not
19 meet the Reformulated Products standard, if it complies with the warning requirements set forth in
20 Section 2.3 below for all Products beginning on the Effective Date. Prior to providing a warning as
21 set forth in Section 2.3 below, Winston commits to use its best efforts to first determine that: (i) no
22 Reformulated Product is “reasonably commercially available”; and (ii) the Product is not primarily
23 intended for use by individuals twelve years of age or younger; and (iii). For purposes of this
24 Section “reasonably commercially available” shall include consideration of the following factors:
25 availability and supply of a Reformulated Product; cost of the Reformulated Product; performance
26 characteristics of the Reformulated Product including, but not limited to, performance, safety and
27 stability.
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1 **2.3 Product Warnings**

2 Commencing on the Effective Date, Winston shall, for all Products other than Reformulated
3 Products sold in California, provided the conditions in Section 2.2 are met, provide clear and
4 reasonable warnings as set forth below. Each warning shall be prominently placed with such
5 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
6 to be read and understood by an ordinary individual under customary conditions before purchase or
7 use. Each warning shall be provided in a manner such that the consumer or user understands to
8 which *specific* Product the warning applies, so as to minimize the risk of consumer confusion. For
9 Products containing lead, beginning on the Effective Date, Winston shall provide one of the
10 following warnings:

11 **WARNING: This product contains chemicals known to the State of**
12 **California to cause cancer, birth defects or other**
13 **reproductive harm.**

14 OR:

15 **WARNING: This product contains lead, a chemical known to the**
16 **state of California to cause birth defects and other**
17 **reproductive harm. Wash hands after handling.**

17 **2.4 Vendor Notification Requirement**

18 To the extent is has not already done so, no more than thirty (30) days after the Effective
19 Date, Winston shall provide the reformulation standards specified in section 2.2 for
20 Reformulated Products to any and all of its vendors of Products that will be sold or offered
21 for sale to California consumers, and shall instruct each vendor to use its best efforts to
22 provide only Reformulated Products, as such Products are defined in Section 2.2.

23 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

24 In settlement of all the claims referred to in this Consent Judgment, Winston shall pay a total
25 of \$34,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated
26 in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds
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1 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
2 remaining 25% of the penalty remitted to Englander, as follows:

3 **3.1 Initial Civil Penalty**

4 On or before the Effective Date, Winston shall deliver to Plaintiff’s counsel \$9,500.00 to be
5 held in trust for payment of an initial civil penalty. Winston shall issue two separate checks for
6 payment of the initial civil penalty to: (a) “Office of Environmental Health Hazard Assessment” in
7 the amount of \$7,125.00; and (b) “The Chanler Group in Trust for Peter Englander” in the amount of
8 \$2,375.00.

9 **3.2 Final Civil Penalty**

10 Winston shall pay a final civil penalty of \$24,500 on or before January 1, 2014. The final
11 civil penalty shall be waived in its entirety, however, if, no later than December 15, 2013, an officer
12 of Winston provides Englander with written certification that, as of the date of such certification and
13 continuing into the future, Winston has met the reformulation standard specified in Section 2.2 above,
14 such that all Products manufactured, imported, distributed, sold and offered for sale in California by
15 Winston are Reformulated Products. Englander must receive any such certification on or before
16 December 15, 2013. The certification in lieu of a final civil penalty payment provided by this Section
17 is a material term, and time is of the essence. The final civil penalty shall be paid in two separate
18 checks to: (a) “Office of Environmental Health Hazard Assessment” in the amount of \$18,375; and
19 (b) “The Chanler Group in Trust for Peter Englander” in the amount of \$6,125. These checks shall
20 be delivered to the addresses set forth in Section 3.3 on or before January 1, 2014 or, if Court
21 approval and entry of this Consent Judgment has not occurred prior to January 1, 2014, within five
22 (5) business days of the Court’s approval and entry of this Consent Judgment.

23 **3.3 Payment Procedures**

24 **3.3.1. Issuance of Payments.** All payments made under this Consent Judgment
25 (except for the payment required by Section 3.2, which shall be paid if not waived in accordance
26 with the terms of Section 3.2) shall be held in trust by counsel for Plaintiff until the Court approves
27 and enters this Consent Judgment.
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1 Payments shall be delivered as follows:

2 (a) All payments owed to Englander, pursuant to Sections 3.1 through 3.2,
3 shall be delivered to the following payment address:

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

9 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Sections
10 3.1 through 3.2, shall be delivered directly to OEHHA (Memo line “Prop
11 65 Penalties”) at the following addresses:

12 For United States Postal Service Delivery:

13 Mike Gyrics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
17 Sacramento, CA 95812-4010

18 For Non-United States Postal Service Delivery:

19 Mike Gyrics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 1001 I Street
23 Sacramento, CA 95814

24 With a copy of the checks payable to OEHHA mailed to The Chanler
25 Group at the address set forth above in 3.1.1(a), as proof of payment to
26 OEHHA.

27 **3.3.2 Issuance of 1099 Forms.** After each penalty payment, Winston shall cause
28 separate 1099 forms to be issued for each payment to Englander, whose address and tax
identification number shall be furnished upon request after this Consent Judgment has been fully
executed by the Parties, and OEHHA at the addresses listed in Section 3.3.1 above.

29 **4. REIMBURSEMENT OF FEES AND COSTS**

30 The parties acknowledge that Englander and his counsel offered to resolve this dispute
31 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this

1 fee issue to be resolved after the material terms of the agreement had been settled. Englander then
2 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
3 finalized. The parties then attempted to (and did) reach an accord on the compensation due to
4 Englander and his counsel under general contract principles and the private attorney general doctrine
5 codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual
6 execution of this agreement. Winston shall pay \$32,850.00 for fees and costs incurred as a result of
7 investigating, bringing this matter to Winston’s attention, and negotiating a settlement in the public
8 interest.

9 On or before the Effective Date, Winston shall deliver to Plaintiff’s counsel \$32,850.00, made
10 payable to “The Chanler Group,” to be held in trust for payment of fees and costs incurred by
11 Englander. Winston shall deliver this check to the address listed in section 3.3.1(a) above. Winston
12 shall issue a 1099 for fees and costs (EIN: 94-3171522).

13 **5. CLAIMS COVERED AND RELEASED**

14 **5.1 Englander’s Public Release of Proposition 65 Claims**

15 Englander, acting on his own behalf and in the public interest, releases Winston and each of
16 its downstream distributors, wholesalers, dealers, customers, purchasers, retailers, including, but not
17 limited to, Wal-Mart Stores, Inc. and its affiliates and subsidiaries, and Winston’s corporate
18 affiliates, parents, subsidiaries and each of their members, shareholders, officers, directors,
19 attorneys, agents and employees (the “Releasees”) from all claims for violations of Proposition 65
20 up through the Effective Date based on exposures to lead from the Products, as set forth in the
21 Notices or that could have been set forth in the Complaint in this action. Compliance with the terms
22 of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
23 lead from the Products sold or offered for sale by Winston and/or the Releasees before the Effective
24 Date, as set forth in the Notices.

25 **5.2 Englander’s Individual Release of Claims**

26 Englander, on behalf of himself and his past and current agents, representatives, attorneys,
27 successors, and/or assignees but *not* in his representative capacity, provides a general release to
28

1 Winston and all the Releasees, which shall be effective as a full and final accord and satisfaction,
2 waiver of, and bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
3 damages, penalties, fines losses, claims, liabilities and demands of Englander of any nature,
4 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
5 actual exposures to lead in the Products imported, manufactured, sold or distributed for sale by
6 Winston and/or the Releasees before the Effective Date. Englander further acknowledges that he is
7 familiar with Civil Code § 1542, which provides:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
9 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
10 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,
11 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
12 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

13 Englander, on behalf of himself and his past and current agents, representatives, attorneys,
14 successors, and/or assignees but *not* in his representative capacity, expressly waives any and all rights
15 and benefits which he may have under Civil Code § 1542 or any other similar state or federal statute
16 or common law principle of similar effect to the fullest extent that he may lawfully waive any such
17 rights, with respect to exposures to lead from the Products sold or offered for sale by Winston and/or
18 the Releasees before the Effective Date, as set forth in the Notices.

19 **5.3 Winston's Release of Englander**

20 Winston on behalf of itself and on behalf of its past and current agents, representatives,
21 attorneys, successors, and/or assignees, hereby waives any and all claims against Englander and his
22 attorneys and other representatives, for any and all actions taken or statements made by Englander
23 and his attorneys and other representatives, whether in the course of investigating claims about the
24 Products or otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to
25 the Products.

26 Winston further acknowledges that it is familiar with Civil Code § 1542, which provides:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
28 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS
 OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE,

1 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
2 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

3 Winston, on behalf of itself and its past and current agents, representatives, attorneys, successors,
4 and/or assignees, expressly waives any and all rights and benefits which it may have under Civil
5 Code § 1542 or any other similar state or federal statute or common law principle of similar effect to
6 the fullest extent that it may lawfully waive any such rights, with respect to exposures to lead from
7 the Products sold or offered for sale by Winston and/or the Releasees before the Effective Date, as set
8 forth in the Notices.

9 **6. COURT APPROVAL**

10 This Consent Judgment is not effective until it is approved and entered by the Court and
11 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
12 after it has been fully executed by all Parties, in which event any monies that have been provided to
13 Plaintiff or his counsel pursuant to sections 3 and 4 shall be refunded within thirty (30) days after
14 receiving written notice from Winston that the one-year period has expired.

15 **7. SEVERABILITY**

16 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
17 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not be
18 adversely affected.

19 **8. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the state of California
21 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
22 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Winston may
23 provide written notice to Englander of any asserted change in the law, and shall have no further
24 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
25 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Winston from any
26 obligation to comply with any pertinent state or federal toxics control laws.

1 **9. NOTICES**

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

5 For Winston:

6 Winston Breeden
7 Winston Products LLC
8 30339 Diamond Parkway, Suite 105
9 Cleveland, OH 44139

10 with a copy to:

11 Matthew I. Kaplan, Esq.
12 Tucker Ellis LLP
13 515 South Flower St., 42nd Floor
14 Los Angeles, CA 90071

15 For Englander:

16 The Chanler Group
17 Attn: Proposition 65 Coordinator
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

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

23 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

27 **11. POST EXECUTION ACTIVITIES**

28 Englander agrees to comply with the reporting form requirements referenced in Health &
Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety Code
§ 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance
of obtaining such approval, Englander and Winston agree to mutually employ their best efforts, and

1 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
2 judicial approval of the settlement in a timely manner. For purposes of this Section, “best efforts”
3 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
4 and supporting the motion for judicial approval.

5 **12. MODIFICATION**

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

9 **13. AUTHORIZATION**

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

12
13 **AGREED TO:**

AGREED TO:

14
15 Date: 5/20/13

Date: _____

16
17 By:  _____
18 PETER ENGLANDER

By: _____
19 Scott Jared, President
20 WINSTON PRODUCTS LLC.

1 that of their counsel, to support the entry of this agreement as a Consent Judgment, and to obtain
2 judicial approval of the settlement in a timely manner. For purposes of this Section, "best efforts"
3 shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
4 and supporting the motion for judicial approval.

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7 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
8 application of any Party and the entry of a modified consent judgment by the Court.

9 **13. AUTHORIZATION**

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

12
13 **AGREED TO:**

AGREED TO:

14
15 Date: _____

Date: May 20, 2013

16
17 By: _____
PETER ENGLANDER

18 By:  _____
Scott Jared, President
WINSTON PRODUCTS LLC.