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9
10 Attorneys for Plaintiff
11 PETER ENGLANDER

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

13 PETER ENGLANDER,) CASE NO. RG13692128
14 Plaintiff,)
15 v.)
16 ALPHAGARY CORPORATION and) **[PROPOSED] CONSENT JUDGMENT**
17 DOES 1-150, inclusive)
18 Defendants.)

1 **1. INTRODUCTION**

2 **1.1 Peter Englander and AlphaGary Corporation**

3 This Consent Judgment is entered into by and between Peter Englander (hereinafter
4 “Englander”) and AlphaGary Corporation (hereinafter “AlphaGary”), with Englander and
5 AlphaGary collectively referred to as the “Parties.” Englander is an individual residing in
6 California who seeks to promote awareness of exposures to toxic chemicals and improve human
7 health by reducing or eliminating hazardous substances contained in consumer products.
8 AlphaGary employs ten or more persons and is a person in the course of doing business for
9 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
10 Code section 25249.6, et seq. (“Proposition 65”).

11 **1.2 General Allegations**

12 Englander alleges that AlphaGary has manufactured, distributed, sold and offered for sale
13 in the State of California black PVC material containing di(2-ethylhexyl)phthalate (“DEHP”)
14 which is, in turn, used to make a variety of consumer goods including vinyl grips placed on hand
15 tools. DEHP is listed under Proposition 65 as a chemical known to cause birth defects and other
16 reproductive harm.

17 **1.3 Product Description**

18 The product that is addressed by this Consent Judgment is PVC material containing
19 DEHP which is manufactured, imported, shipped, distributed, sold, and/or offered for sale by
20 AlphaGary and in turn is used to make a variety of consumer goods including vinyl grips placed
21 on hand tools and medical devices containing DEHP which are manufactured, imported,
22 distributed, sold and/or offered for sale in the State of California, hereinafter the “Product(s).”

23 **1.4 Notices of Violation**

24 On May 3, 2013, Englander served AlphaGary, others and various public enforcement
25 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the
26 recipients with notice that AlphaGary was in violation of California Health & Safety Code §
27 25249.6 for failing to warn consumers that hand tool grips exposed users in California to DEHP.
28 No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1 On May 21, 2013, Englander served AlphaGary and various public enforcement agencies
2 with a document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”)
3 that provided the recipients with notice that AlphaGary was in violation of California Health &
4 Safety Code § 25249.6 for failing to warn consumers that the Product exposed users in California
5 to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the
6 Supplemental Notice.

7 The Notice and the Supplemental Notice shall hereinafter collectively be referred to as the
8 “Notices.”

9 **1.5 Complaint**

10 On or about August 16, 2013, Englander, acting in the interest of the general public of
11 California, filed a complaint in the Superior Court in and for the County of Alameda against
12 AlphaGary, and Does 1-150, *Peter Englander v. AlphaGary Corporation, et al.*, Case No.
13 RG13692128, alleging violations of Proposition 65, based on, *inter alia*, the alleged exposures to
14 DEHP in the Product (“Complaint”).

15 **1.6 No Admission**

16 AlphaGary denies all of the allegations in Englander’s Notices and Complaint and
17 specifically denies that any of its Products have been unlawfully manufactured, distributed, sold,
18 or offered for sale in California. Nothing in this Consent Judgment shall be construed as an
19 admission by AlphaGary, of any fact, finding, issue of law, or violation of law; nor shall
20 compliance with this Consent Judgment constitute or be construed as an admission by AlphaGary
21 of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by
22 AlphaGary. However, this section shall not diminish or otherwise affect the obligations,
23 responsibilities and duties of AlphaGary under this Consent Judgment.

24 **1.7 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over AlphaGary as to the allegations contained in the Complaint, that venue is proper
27 in the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions
28 of this Consent Judgment. As an express part of this Consent Judgment, pursuant to Code of

1 Civil Procedure section 664.6, the Court in which this Complaint was filed shall retain
2 jurisdiction over the Parties to enforce the settlement until performance in full of the terms of the
3 settlement.

4 **1.8 Effective Date**

5 For purposes of this Consent Judgment, the term “Effective Date” shall mean January 1,
6 2015.

7 **2. INJUNCTIVE RELIEF:**

8 **2.1 Warning Commitment**

9 As of the Effective Date, all Products manufactured, imported, shipped, distributed, sold
10 and/or offered for sale by AlphaGary shall be accompanied by the Proposition 65 warnings in
11 accordance with Section 2.2 below.

12 **2.2 Product Warnings**

13 As of the Effective Date, AlphaGary implemented a warning program, providing the
14 following warning in “SECTION XV - Regulatory Information” of the Safety Data Sheet:

15 **CALIFORNIA PROPOSITION 65 – Safe Drinking
16 Water and Toxic Enforcement Act of 1986**

17 **WARNING:** This product contains one or more
18 substances, including DEHP, known to the state of
19 California to cause cancer, birth defects or other
20 reproductive harm.

21 As of December 1, 2015 or 30 days after this Consent Judgment is approved by the Court,
22 whichever is earlier, and continuing into the future, AlphaGary shall provide the following
23 warning in “SECTION XV - Regulatory Information” of the Safety Data Sheet, which AlphaGary
24 provides to each customer with the initial shipment, and with the first shipment after a safety data
25 sheet is updated, pursuant to requirements set forth by the Occupational Safety and Health
26 Administration, using the font and print boldness consistent with similar information provided in
27 that section:

28 **CALIFORNIA PROPOSITION 65 – Safe Drinking
Water and Toxic Enforcement Act of 1986**

WARNING: This product contains DEHP, a chemical
known to the state of California to cause cancer and birth

defects and other reproductive harm.

If AlphaGary has reasonable knowledge that a Product contains two or more chemicals in a form subject to a listing of the chemical as a carcinogen or reproductive toxin under Proposition 65 and at levels that would require a Proposition 65 warning, the warning shall state:

CALIFORNIA PROPOSITION 65 – Safe Drinking Water and Toxic Enforcement Act of 1986

WARNING: This product contains chemicals, including DEHP, known to the state of California to cause cancer and birth defects and other reproductive harm.

In addition, the following notice will continue to be printed on or attached to each shipping package containing the Product.

CONSULT SDS FOR INSTRUCTIONS ABOUT
CA PROPOSITION 65- Refer to the Safety Data Sheet for
this product for applicable Proposition 65 information.

3. PENALTIES PURSUANT TO HEALTH AND SAFETY CODE SECTION

25249.7(b)

In settlement of all the claims referred to in this Consent Judgment, AlphaGary shall pay civil penalties in the amount of \$11,000. Any penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to “The Chanler Group in Trust for Englander.” Any penalty payment shall be made within ten business days after Venable receives written notice that this Consent Judgment has been approved by the Court, and be delivered to the addresses listed in Section 3.3.1 below. AlphaGary shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing under this Section that are not received within two business days of the due date.

3.3 Payment Procedures

3.3.1. Issuance of Payments. Payments shall be delivered as follows:

All payments owed to Englander and Englander’s counsel pursuant to

1 Sections 3, shall be delivered to the following payment address:

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

7 A copy of the checks payable to OEHHA shall be mailed to The Chanler
8 Group at the address set forth above in Section 3.3.1(a), as proof of payment to OEHHA.

9 **3.3.2 Issuance of 1099 Forms.** After any penalty payment, AlphaGary shall
10 issue separate 1099 forms for each payment to Englander, whose address and tax identification
11 number shall be furnished to AlphaGary after this Consent Judgment has been fully executed by
12 the Parties, and OEHHA (EIN: 68-0284486) at the following addresses:

13 For United States Postal Service Delivery:

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

19 For Non-United States Postal Service Delivery:

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

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

26 The Parties acknowledge the Englander and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
28 this fee issue to be resolved after the material terms of the agreement had been settled. Englander
then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms
had been finalized. The Parties reached an accord on the compensation due to Englander and his
counsel under the private attorney general doctrine and principles codified at California Code of
Civil Procedure section 1021.5, for all work performed through the mutual execution of this
agreement. Under these legal principles, AlphaGary shall reimburse Englander's counsel for fees
and costs, incurred as a result of investigating, bringing this matter to AlphaGary's attention, and

1 negotiating a settlement in the public interest. AlphaGary has issued a check payable to “Venable
2 LLP” in the amount of \$33,000 to be held in trust by the law office of Venable LLP for The
3 Chanler Group. Within five business days after Venable receives written notice that this Consent
4 Judgment has been approved by the Court, Venable LLP shall issue and send by certified mail a
5 check payable to “The Chanler Group” at the following address:

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

11 **5. RELEASE OF ALL CLAIMS**

12 **5.1 Release of AlphaGary and Downstream Customers and Entities**

13 Englander acting on his own behalf and in the public interest, releases AlphaGary and its
14 past, present and future parents, subsidiaries, affiliated entities under common ownership,
15 directors, officers, agents, employees, attorneys and each entity to whom AlphaGary directly or
16 indirectly distributes or sells Products including, but not limited to, downstream distributors,
17 wholesalers, customers, retailers, franchisees, cooperative members and licensees and their past,
18 present and future parents, subsidiaries, affiliated entities under common ownership, directors,
19 officers, agents, employees, and attorneys (collectively “Releasees”), from all claims for
20 violations of Proposition 65 through the Effective Date based on their failure to warn about
21 alleged exposures to the DEHP contained in the Products that were manufactured, distributed,
22 sold and/or offered for sale by AlphaGary. Compliance with the terms of this Consent Judgment
23 constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Product.

24 In further consideration of the promises and agreements herein contained, and for the
25 payments to be made pursuant to Sections 3 and 4 above, Englander, on behalf of himself, his
26 past and current agents, representatives, attorneys, successors and/or assignees, provides a release
27 herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions,
28 causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities,
and demands of AlphaGary or the Releasees of any nature, character, or kind, whether known or

1 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposure to the
2 DEHP in the Products.

3 **5.2 AlphaGary's Release of Englander**

4 AlphaGary, on behalf of itself, its past and current agents, representatives, attorneys,
5 successors and/or assignees, hereby waives any and all claims against Englander, his attorneys
6 and other representatives, for any and all actions taken or statements made (or those that could
7 have been taken or made) by Englander and his attorneys and other representatives, whether in
8 the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it
9 in this matter, and/or with respect to the Products.

10 **6. REPRESENTATIONS AND WARRANTIES**

11 AlphaGary represents and warrants that it did not sell PVC material containing DEHP to
12 any of the entities on the April 30, 2015 list provided by The Chanler Group that have been
13 noticed by clients of The Chanler Group under Proposition 65 regarding alleged DEHP in
14 consumer products.

15 **7. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved by the Court, including any
17 tentative rulings not challenged by either of the Parties, and shall be null and void if, for any
18 reason, it is not approved by the Court within one year after it has been fully executed by all
19 Parties. In the event the Court does not approve this Consent Judgment within one year, (a) this
20 Consent Judgment and any and all prior agreements between the Parties merged herein shall
21 terminate and become null and void, and the action shall revert to the status that existed prior to
22 the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
23 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
24 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
25 purpose in this action, or in any other proceeding; and (c) the Parties agree to meet and confer to
26 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

1 **8. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
4 provisions remaining shall not be adversely affected.

5 **9. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of
7 California and apply within the State of California. In the event that Proposition 65 is repealed or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
9 AlphaGary shall provide written notice to Englander of any asserted change in the law, and shall
10 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
11 that, the Products are so affected.

12 **10. NOTICES**

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

17 For AlphaGary:

18 William N. Hall, Esq.
19 Venable LLP
20 575 7th Street, NW
21 Washington, DC 20004
22 Ben D. Whitwell (SBN 138426)
Jennifer Levin (SBN 252420)
2049 Century Park East, Suite 2100
Los Angeles, CA 90067

For Englander:

Proposition 65 Coordinator
The Chanler Group
Parker Plaza
2560 Ninth Street, Suite 214
Berkeley, CA 94710

23 Any Party may specify in writing to the other Party a change of address to which all
24 notices and other communications shall be sent.
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26
27
28

1 **11. COUNTERPARTS; SIGNATURES**

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

5 **12. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(f)**

6 Englander agrees to comply with the reporting form requirements referenced in Health
7 and Safety Code section 25249.7(f).

8 **13. MODIFICATION**

9 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
10 upon entry of a modified Consent Judgment thereon; or (2) upon a successful motion of any Party
11 and entry of a modified Consent Judgment by the Court.

12 **14. AUTHORIZATION**

13 The undersigned are authorized to execute this Consent Judgment and have read,
14 understood and agree to all of the terms and conditions of this Consent Judgment.


15
16 **AGREED TO:**

17 Date: 9/1, 2015

18
19 By: 
20 Peter Englander

16 **AGREED TO:**

17 Date: 8/31, 2015

18
19 By: 
20 Name: Daniel J. DeLisly
21 Title: General Manager
22 AlphaGary Corporation