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PETER ENGLANDER

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF SANTA CLARA  
11 UNLIMITED CIVIL JURISDICTION

12 PETER ENGLANDER,

13 Plaintiff,

14 v.

15 MSC INDUSTRIAL DIRECT CO., INC., *et*  
16 *al.*,

17 Defendants.

Case No. 16CV299556

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*, and  
Cal. Code Civ. Proc. § 664.6)

1     **1.     INTRODUCTION**

2             **1.1     Parties**

3             This Consent Judgment is entered into by and between plaintiff Peter Englander  
4     ("Englander"), and defendant MSC Industrial Direct Co., Inc. ("MSC"), with Englander and MSC  
5     each individually referred to as a "Party" and collectively as the "Parties."

6             **1.2     Plaintiff**

7             Englander represents that he is an individual residing in California who seeks to promote  
8     awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating  
9     hazardous substances contained in consumer products.

10            **1.3     Defendant**

11            MSC employs ten or more individuals and Englander alleges that it 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 MSC manufactures, imports, sells, and distributes for sale in  
16    California, fuel pump nozzles with vinyl/PVC covers that contain di(2-ethylhexyl)phthalate  
17    ("DEHP"), and that it does so without first providing the warning required by Proposition 65. DEHP  
18    is listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth  
19    defects (and other reproductive harm).

20            **1.5     Product Description**

21            The category of products covered by this Consent Judgment is fuel pump nozzles with  
22    vinyl/PVC covers allegedly containing DEHP that are imported, sold, or distributed for sale in  
23    California by MSC including, but not limited to, the *PROLUBE 3/4" Gasoline Automatic Fuel Nozzle*,  
24    *MSC SKU #54251491* (the category of products is referred to hereinafter as the "Products").

25            **1.6     Notice of Violation**

26            Englander alleges that on March 23, 2016, he served MSC, the California Attorney General,  
27    and all other requisite public enforcement agencies with a 60-Day Notice of Violation ("Notice"),  
28    alleging that MSC violated Proposition 65 when it failed to warn its customers and consumers in

1 California of the health hazards associated with exposures to DEHP from the Products. No public  
2 enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in  
3 the Notice.

#### 4 **1.7 Complaint**

5 On September 2, 2016, Englander filed the instant action (“Complaint”), for the violations of  
6 Proposition 65 that are the subject of the Notice.

#### 7 **1.8 No Admission**

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

#### 16 **1.9 Jurisdiction**

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

#### 21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which  
23 the motion for approval of the Consent Judgment contemplated by Section 5 is granted by the Court.

## 24 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

### 25 **2.1 Reformulated Products**

26 Commencing within 30 days of the Effective Date, and continuing thereafter, MSC agrees to  
27 only sell in California or distribute for sale in California, “Reformulated Products” or Products  
28 affixed with warning labels as described in paragraph 2.2 below. For purposes of this Consent

1 Judgment, "Reformulated Products" are defined as Products with a maximum DEHP concentration of  
2 1,000 parts per million (0.1 %) in any component analyzed pursuant to U.S. Environmental  
3 Protection Agency testing methodologies 3580A and 8270C, or equivalent methodologies utilized by  
4 state or federal agencies for the purpose of determining DEHP content in a solid substance.

## 5 **2.2 Warnings**

6 Commencing within 30 days of the Effective Date, MSC shall ensure that any of its Products  
7 that are not Reformulated Products as defined in paragraph 2.1 herein that MSC reasonably believes  
8 are being sold in California or distributed for sale in California shall contain a clear and reasonable  
9 warning.

10 For purposes of this Consent Judgment, a clear and reasonable warning for the Products  
11 satisfying these criteria shall consist of a warning on the packaging, labeling, or directly on each  
12 Product that states:

13 **WARNING:** This product contains a chemical known  
14 to the State of California to cause cancer  
15 and birth defects or other reproductive  
harm.

16 Consistent with Title 27, section 25602(e) of the California Code of Regulations, the Products'  
17 labeling includes any label or other written, printed or graphic matter affixed to or accompanying the  
18 Products or its container or wrapper, including a packing slip accompanying the Products.

19 The foregoing shall satisfy the clear and reasonable warning requirement of this Consent  
20 Judgment unless and until the amendments to Article 6, Clear and Reasonable Warnings, of the  
21 California Code of Regulations approved for adoption on August 30, 2016 by the Office of  
22 Administrative Law ("Prop 65 Amendments") become effective and require a different clear and  
23 reasonable warning, which shall under those circumstances then be required to satisfy the clear and  
24 reasonable warning requirement of this Consent Judgment.

## 25 **3. MONETARY SETTLEMENT TERMS**

### 26 **3.1 Civil Penalty Payment**

27 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred  
28 to in this Consent Judgment, MSC shall pay \$4,200 in civil penalties. The civil penalty payment

1 shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-  
2 five percent (75%) of the funds paid to the California Office of Environmental Health Hazard  
3 Assessment (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Englander. MSC  
4 shall provide its payment in two checks for the following amounts made payable to: (a) “OEHHA” in  
5 the amount of \$3,150; and (b) “Peter Englander, Client Trust Account” in the amount of \$1,050.  
6 Englander’s counsel shall be responsible for delivering the penalty payment made under this Consent  
7 Judgment to OEHHA.

### 8 **3.2 Reimbursement of Attorney’s Fees and Costs**

9 The parties acknowledge that Englander and his counsel offered to resolve this dispute  
10 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the  
11 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after  
12 the other settlement terms had been finalized, MSC expressed a desire to resolve Englander’s fees  
13 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to  
14 Englander and his counsel under general contract principles and the private attorney general doctrine  
15 codified at Code of Civil Procedure section 1021.5 for all work performed through the mutual  
16 execution of this Consent Judgment. MSC shall pay \$35,800 in a check payable on its behalf to “The  
17 Chanler Group” for the fees and costs incurred by Englander investigating, bringing this matter to the  
18 attention of MSC’s management, litigating, and negotiating a settlement in the public interest.

### 19 **3.3 Payments Held in Trust**

20 All payments due under this Consent Judgment shall be delivered by MSC to Englander’s  
21 counsel within five calendar days of notice of entry of the Consent Judgment.

### 22 **3.4 Payment Address**

23 All payments required by this Consent Judgment shall be delivered to Englander’s counsel  
24 at the following address:

25 The Chanler Group  
26 Attn: Proposition 65 Controller  
27 2560 Ninth Street  
28 Parker Plaza, Suite 214  
Berkeley, CA 94710

1     **4. CLAIMS COVERED AND RELEASED**

2             **4.1 Englander’s Public Release of Proposition 65 Claims**

3             Englander, acting on his own behalf and in the public interest, releases MSC and its parents,  
4 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and  
5 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the  
6 Products including, but not limited to, it’s downstream distributors, wholesalers, customers,  
7 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) and,  
8 with respect to the exemplar product and any other Pro-Lube branded Products, which are MSC  
9 private label Products, its private label manufacturers, distributors, and wholesalers (“Private Label  
10 Manufacturer Releasees”) for any violations arising under Proposition 65 for the failure to warn  
11 about exposures to DEHP from Products manufactured for sale or distributed for sale by MSC prior  
12 to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment  
13 constitutes compliance with Proposition 65 with respect to the failure to warn about exposures to  
14 DEHP in Products sold by MSC after the Effective Date.

15             **4.2 Englander’s Individual Release of Claims**

16             Englander, in his individual capacity only and *not* in his representative capacity, also provides  
17 a release to MSC, Releasees, Private Label Manufacturer Releasees, and Downstream Releasees  
18 which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of  
19 action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands  
20 of Englander of any nature, character or kind, whether known or unknown, suspected or unsuspected,  
21 arising out of alleged or actual exposures to DEHP in Products manufactured for sale or distributed  
22 for sale by MSC before the Effective Date.

23             **4.3 Mutual Waiver of California Civil Code Section 1542**

24             The Parties each acknowledge that he/they is/are familiar with Section 1542 of the Civil  
25 Code, which provides as follows:

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

1 The Parties, each on his/their own behalf (and Englander in his individual capacity only and  
2 *not* in any representative capacity), and on behalf of his/their past and current agents, representatives,  
3 counsel, successors, and/or assignees, expressly waive and relinquish any and all rights and benefits  
4 which they may have under, or which may be conferred upon them by the provisions of Civil Code  
5 section 1542 as well as under any other state or federal statute or common law principle of similar  
6 effect, to the fullest extent he/they may lawfully waive such rights or benefits pertaining to the  
7 released matters, as defined by Sections 4.2 and 4.4.

#### 8 **4.4 MSC's Release of Englander**

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

#### 14 **5. COURT APPROVAL**

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

#### 19 **6. SEVERABILITY**

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

#### 23 **7. GOVERNING LAW**

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

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

3 **8. NOTICE**

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

7 For MSC:

8 Erik Gershwind, President  
9 MSC Industrial Direct Co., Inc.  
10 75 Maxess Road  
11 Melville, NY 11747

12 with a copy to:

13 Brent Clark, Esq.  
14 Seyfarth Shaw LLP  
15 131 S. Dearborn Street, Ste 2400  
16 Chicago, IL 60603

17 For Englander:

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

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

**10. ADDITIONAL POST EXECUTION ACTIVITIES**

Englander and MSC agree to mutually employ their best efforts to support the entry of this  
agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a  
timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code section



1 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which  
2 Englander shall draft and file. If any third-party objection to the noticed motion is filed, Englander  
3 and MSC shall work together to file a joint reply and appear at any hearing before the Court. This  
4 provision is a material component of the Consent Judgment and shall be treated as such in the event  
5 of a breach.

6 **11. ENFORCEMENT OF CONSENT JUDGMENT**

7 In the event any dispute between the Parties arises out of this Consent Judgment, the Parties  
8 shall meet and confer in an attempt to resolve the dispute informally. If after thirty (30) days such  
9 attempts at information resolution fail, the disputing party may pursue enforcement of this Consent  
10 Judgment through any legal means available including by motion or application for an order to show  
11 cause.

12 **12. MODIFICATION**

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

16 **13. 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.

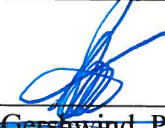
19 **AGREED TO:**

**AGREED TO:**

20  
21 Date: 12/19/2016

Date: 12/19/16

22  
23 By:   
PETER ENGLANDER

By:   
~~Erik Gershwind, President~~  
MSC INDUSTRIAL DIRECT CO., INC.

  
Steve Armstrong  
General Counsel