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

15 PETER ENGLANDER,

16 Plaintiff,

17 v.

18 GENERAL FOAM PLASTICS CORP.; *et al.*,

19 Defendants.

Case No. CIV1602600

[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 Peter Englander (“Englander”) on the
4 one hand, and defendants General Foam Plastics Corp., and Beckett Corporation, (“Defendants”) on
5 the other hand, with Englander and Defendants each individually referred to as a “Party” and
6 collectively as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendants**

12 Defendants employ ten or more persons and are a “person in the course of doing business” for
13 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
14 section 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Englander alleges that Defendants manufacture, import, sell, or distribute for sale in
17 California, vinyl/PVC tubing containing di(2-ethylhexyl) phthalate (“DEHP”), without first providing
18 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
19 chemical known to the State of California to cause birth defects and other reproductive harm.

20 **1.5 Product Description**

21 Defendants products that are covered by this Consent Judgment are defined as vinyl/PVC
22 tubing, containing DEHP including, without limitation, the *Vinyl Tubing ½ in. x 20 ft., #084-030280,*
23 *#2012BSP, #7209510, UPC #0 52309 72095 0,* and products bearing General Foam’s base item
24 numbers: 7206910, 7207010, 7209610, 7209710, 7209810, 7209910, 7216210, 7216310,
25 CB201TUL, CB251ULHT, CB252ULHT, CB501ULHT, CB501ULHTS, CB502ULHT,
26 CB502ULHTS, CB504UL, CB504ULHT, CB504ULHTS, IPC13AT, and MS601UL, which are

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1 manufactured, imported, distributed, sold and/or offered for sale by Defendants in the State of
2 California, hereinafter the “Products.”

3 **1.6 Notice of Violation**

4 On March 23, 2016, Englander served Defendants and certain requisite public enforcement
5 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Defendants violated
6 Proposition 65 when they failed to warn their customers and consumers in California that the
7 Products expose users to DEHP.

8 **1.7 Complaint**

9 On or about July 19, 2016, Plaintiff filed the instant action (“Complaint”), naming Defendants
10 as defendants for its alleged violations of Health and Safety Code section 25249.6 that are the subject
11 of the Notice.

12 **1.8 No Admission**

13 Defendants deny the material, factual, and legal allegations contained in the Notice and
14 Complaint, and maintain that all of the products that they have sold and distributed for sale in
15 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
16 Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of
17 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
18 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
19 Section shall not, however, diminish or otherwise affect Defendants’ obligations, responsibilities, and
20 duties under this Consent Judgment.

21 **1.9 Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in the County
24 of Marin, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
25 Judgment.

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
3 the Court approves this Consent Judgment, including any unopposed tentative rulings.

4 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

5 **2.1 Reformulation Standards**

6 Commencing on the Effective Date, Defendants shall not manufacture, import, distribute, sell
7 or offer the Products for sale in California unless they are Reformulated Products, or contain
8 appropriate health hazard warnings, per Section 2.2. For purposes of this Consent Judgment,
9 “Reformulated Products” are products that contain DEHP in concentrations of less than 0.1 percent
10 (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing
11 methodologies 3580A and 8270C, or any other methodology utilized by federal or state agencies for
12 the purpose of determining the DEHP content in a solid substance.

13 **2.2 Product Warnings**

14 Commencing within five (5) business days of the Effective Date, Defendants shall provide
15 clear and reasonable warnings for all Products as set forth in subsections 2.2(a) and (b) for all
16 Products that do not currently have warnings and that do not qualify as Reformulated Products. Each
17 warning shall be prominently placed with such conspicuousness as compared with other words,
18 statements, designs, or devices as to render it likely to be read and understood by an ordinary
19 individual under customary conditions before purchase or use. Each warning shall be provided in a
20 manner such that the consumer or user understands to which *specific* Product the warning applies, so
21 as to minimize the risk of consumer confusion.

22 **(a) Retail Store Sales.**

23 **(i) Product Labeling.** Defendants shall affix a warning to the packaging,
24 labeling, or directly on each Product provided for sale in retail outlets in California that states:

25 **WARNING:** This product contains DEHP, a chemical
26 known to the State of California to cause
 birth defects and other reproductive harm.

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1 Or,

2 **WARNING:** This product contains a chemical
3 known to the State of California to cause cancer
4 and birth defects and other reproductive harm.

5 (ii) **Point-of-Sale Warnings.** Alternatively, Defendants may provide warning
6 signs in the form below to its customers in California with instructions to post the warnings in close
7 proximity to the point of display of the Products. Such instruction sent to Defendants' customers
8 shall be sent by certified mail, return receipt requested.

9 **WARNING:** This product contains DEHP, a chemical
10 known to the State of California to cause
11 birth defects and other reproductive harm.

12 Or,

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

16 Where more than one Product is sold in proximity to other like items or to those that do not
17 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
18 shall be used:¹

19 **WARNING:** The following products contain DEHP, a chemical
20 known to the State of California to cause birth defects
21 and other reproductive harm:

22 *[list products for which warning is required]*

23 Or,

24 **WARNING:** The following products contain a chemical
25 known to the State of California to cause cancer
26 and birth defects and other reproductive harm.

27 *[list products for which warning is required]*

28 (b) **Mail Order Catalog and Internet Sales.** In the event that Defendants sell Products
via mail order catalog and/or the internet, to customers located in California, after the Effective Date,
that are not Reformulated Products, Defendants shall provide warnings for such Products sold via

¹For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 mail order catalog or the internet to California residents. Warnings given in the mail order catalog or
2 on the internet shall identify the *specific* Product to which the warning applies as further specified in
3 Sections 2.2(b)(i) and (ii).

4 (i) **Mail Order Catalog Warning.** Any warning provided in a mail order catalog
5 shall be in the same type size or larger than the Product description text within the catalog. The
6 following warning shall be provided on the same page and in the same location as the display and/or
7 description of the Product:

8 **WARNING:** This product contains DEHP, a chemical
9 known to the State of California to cause
10 birth defects and other reproductive harm.

11 Or,

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

15 Where it is impracticable to provide the warning on the same page and in the same location as
16 the display and/or description of the Product, Defendants may utilize a designated symbol to cross
17 reference the applicable warning and shall define the term “designated symbol” with the following
18 language on the inside of the front cover of the catalog or on the same page as any order form for the
19 Product(s):

20 **WARNING:** Certain products identified with this symbol ▼
21 and offered for sale in this catalog contain DEHP,
22 a chemical known to the State of California to cause
23 birth defects and other reproductive harm.

24 Or,

25 **WARNING:** Certain products identified with this symbol ▼
26 and offered for sale in this catalog contain
27 a chemical known to the State of California to cause
28 cancer and birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display
and/or description of the Product. On each page where the designated symbol appears, Defendants
must provide a header or footer directing the consumer to the warning language and definition of the
designated symbol.

1 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
2 sale of the Products via the internet, which warning shall appear either: (a) on the same web page on
3 which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the
4 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
5 during the checkout process. The following warning statement shall be used and shall appear in any
6 of the above instances adjacent to or immediately following the display, description, or price of the
7 Product for which it is given in the same type size or larger than the Product description text:

8 **WARNING:** This product contains DEHP, a chemical
9 known to the State of California to cause
 birth defects and other reproductive harm.

10 Or,

11 **WARNING:** This product contains a chemical
12 known to the State of California to cause
 cancer and birth defects and other reproductive harm.

13 Alternatively, the designated symbol may appear adjacent to or immediately following the
14 display, description, or price of the Product for which a warning is being given, provided that the
15 following warning statement also appears elsewhere on the same web page, as follows:

16 **WARNING:** This product contains DEHP, a chemical
17 known to the State of California to cause
 birth defects and other reproductive harm.

18 Or,

19 **WARNING:** This product contains a chemical
20 known to the State of California to cause
 cancer and birth defects and other reproductive harm.

21 **3. MONETARY SETTLEMENT TERMS**

22 **3.1 Civil Penalty Payments**

23 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
24 to in this Consent Judgment, Defendants shall pay \$27,000 in civil penalties. Each civil penalty
25 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with
26 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
27 Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of the funds allocated to Englander.
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1 **3.1.1 Initial Civil Penalty**

2 Defendants shall pay an initial civil penalty in the amount of \$9,000 within five (5)
3 days of the Effective Date. Defendants shall issue the check to: “Peter Englander, Client Trust
4 Account” in the amount of \$9,000. Englander and his counsel will then ensure the proper portion of
5 the payment is made to OEHHA. All penalty payments shall be delivered to the addresses listed in
6 Section 3.3 below.

7 **3.1.2 Final Civil Penalty**

8 On or before April 1, 2017, Defendants shall make a final civil penalty payment of
9 \$18,000. Englander agrees that the final civil penalty payment shall be waived in its entirety if, no
10 later than March 23, 2017, an officer of Defendants provide Englander with written certification that
11 they are no longer offering or distributing for sale in California the Products, or that, except for
12 Products bearing General Foam base numbers 7206910, 7216210, and 7207010, they are only
13 manufacturing, importing, offering for sale and distributing for sale in California, Reformulated
14 Products as defined in section 2.1, above. The option to certify reformulation in lieu of making the
15 final civil penalty payment required by this Section is a material term and time is of the essence.

16 **3.2 Reimbursement of Fees and Costs**

17 The parties acknowledge that Englander and his counsel offered to resolve this dispute
18 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
19 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
20 the other settlement terms had been finalized, Defendants expressed a desire to resolve Englander’s
21 fees and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
22 Englander and his counsel under general contract principles and the private attorney general doctrine
23 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
24 mutual execution of this Consent Judgment. Defendants shall pay \$30,000 for the fees and costs
25 incurred by Englander investigating, bringing this matter to Defendants’ attention, litigating and
26 negotiating a settlement in the public interest. Defendants shall tender payment for the attorney’s
27 fees and costs by check payable to “The Chanler Group” to the address found in Section 3.4 below.

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1 **3.3 Payment Procedures**

2 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
3 this agreement shall be delivered to Defendants’ counsel of record within ten (10) days of the date
4 that this Consent Judgment is fully executed by the Parties, and held in trust by Defendants’ counsel
5 until the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.
6 Within five (5) business days of the Court’s approval of this Consent Judgment, Defendants’ counsel
7 shall tender the initial civil penalty payments and attorneys’ fee and costs reimbursements required
8 by Sections 3.1.1 and 3.2 to the address specified in Section 3.4.

9 **3.4 Payment Address**

10 All payments required by this Consent Judgment shall be delivered to the following
11 address:

12 The Chanler Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710

15 **4. CLAIMS COVERED AND RELEASED**

16 **4.1 Englander’s Public Release of Proposition 65 Claims**

17 Englander, acting on his own behalf and in the public interest, releases Defendants and their
18 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
19 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
20 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,
21 franchisers, cooperative members, licensors, and licensees (“Downstream Releasees”) from all
22 claims for violations of Proposition 65 for unwarned exposures to DEHP from the Products sold by
23 Defendants prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
24 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
25 from Products, as set forth in the Notice.

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1 **4.2 Englander’s Individual Release of Claims**

2 Englander, in his individual capacity only and *not* in his representative capacity, also provides
3 a release to Defendants, Releasees, and Downstream Releasees which shall be effective as a full and
4 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
5 attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any nature, character
6 or kind, arising out of alleged or actual exposures to DEHP from the Products sold or distributed for
7 sale by Defendants before the Effective Date.

8 **4.3 Defendants’ Release of Englander**

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

15 **5. COURT APPROVAL**

16 This Consent Judgment is not effective until it is approved and entered by the Court and shall
17 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
18 has been fully executed by the Parties.

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 Defendants
27 may provide written notice to Englander of any asserted change in the law, and shall have no further
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1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
2 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Defendants from any
3 obligation to comply with any pertinent state or federal toxics control laws.

4 **8. NOTICE**

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

8 For Defendants:

9 Stephen T. Holzer, Esq.
10 Lewitt, Hackman, Shapiro, Marshall & Harlan, APC
11 16633 Ventura Blvd., 11th Floor
12 Encino, CA 91436-1865

13 With a copy to:

14 Stephen E. Story, Esq.
15 Kaufman & Canoles, P.C.
16 P.O. Box 3037
17 Norfolk, VA 23514

18 For Englander:

19 The Chanler Group
20 Attn: Proposition 65 Coordinator
21 2560 Ninth Street
22 Parker Plaza, Suite 214
23 Berkeley, CA 94710

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

26 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

10. 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

1 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
2 furtherance of obtaining such approval, Englander and Defendants agree to mutually employ their
3 best efforts, and that of their counsel, to support the entry of this agreement as judgment, and to
4 obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best
5 efforts" shall include, at a minimum, cooperating with the drafting and filing of the necessary moving
6 papers, and supporting the motion for judicial approval.

7 **11. MODIFICATION**

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

11 **12. AUTHORIZATION**

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

14 **AGREED TO:**

15 Date: 9/6/2016

16 By: 
17
18 Peter Englander

14 **AGREED TO:**

15 Date: 8/31/2016

16 By: 
17
18 Stan Hobbs, CFO
19 General Foam Plastics Corp.

20 **AGREED TO:**

21 Date: 8/31/2016

22 By: 
23
24 Stan Hobbs, CFO
25 Beckett Corporation

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