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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16 UNLIMITED CIVIL JURISDICTION
17

18 PETER ENGLANDER,

19 Plaintiff,

20 v.

21 ASA ELECTRONICS LLC, *et al.*,

22 Defendants.

Case No. CGC 16-556169

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
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 ASA Electronics LLC (“ASA”), with Englander and ASA 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 ASA employs ten or more individuals 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 and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that ASA imports, sells, or distributes for sale in California headphones
16 with vinyl/PVC head bands and ear cushions that contain di(2-ethylhexyl)phthalate (“DEHP”)
17 without first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to
18 Proposition 65 as a chemical 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 headphones with vinyl/PVC
21 head bands and ear cushions containing DEHP that are imported, sold, or distributed for sale in
22 California by ASA, including, but not limited to, the *Jensen Heavy Duty Bluetooth Wireless*
23 *Headphones, JXHDBT1, UPC #6 81787 01709 4.*

24 **1.6 Notice of Violation**

25 On October 14, 2016, Englander served ASA, and the requisite public enforcement agencies
26 with a 60-Day Notice of Violation (“Notice”) alleging that ASA violated Proposition 65 by failing to
27 warn its customers and consumers in California of the health hazards associated with exposures to
28

1 DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an action
2 to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On December 27, 2016, Englander filed the instant action (“Complaint”), naming ASA as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over ASA as to the allegations in the Complaint, that venue is proper in the County of
19 San Francisco, 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 Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

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

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing within 30 days of the Effective Date and continuing thereafter, ASA shall only
28 manufacture for sale, purchase for sale, or import for sale in California, Products that are either: (a)

1 Reformulated Products as defined by Section 2.2, below; or (b) Products that are offered by ASA
2 with a clear and reasonable warning pursuant to Section 2.3.

3 **2.2 Reformulation Standard**

4 For the purposes of this Consent Judgment, "Reformulated Products" are defined as Products that
5 contain DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed
6 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
7 methodology utilized by federal or state government agencies for the purpose of determining DEHP
8 content in a solid substance.

9 **2.3 Clear and Reasonable Warning**

10 Commencing within 30 days of the Effective Date and continuing thereafter, for any Products
11 offered for sale in California by ASA that are not Reformulated Products, ASA agrees to only offer
12 such Products for sale with a clear and reasonable warning in accordance with this Section. ASA
13 further agrees that any warning used will be prominently placed in relation to the Product with such
14 conspicuousness when compared with other words, statements, designs, or devices as to render it
15 likely to be read and understood by an ordinary individual under customary conditions of purchase or
16 use. For purposes of this Consent Judgment, a clear and reasonable warning for the Products
17 satisfying these criteria shall consist of a warning affixed directly to a Product or its accompanying
18 labeling or packaging sold in California containing one of the following statements:

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20 **WARNING:** This product can expose you to chemicals
21 including DEHP, which is known to the
22 State of California to cause birth defects
or other reproductive harm.

23 **WARNING:** Cancer and Reproductive Harm
24 www.Prop65Warning.ca.gov.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
4 referred to in the Notice, Complaint, and this Consent Judgment, ASA shall pay \$3,100 in civil
5 penalties. Each civil penalty payment shall be allocated according to Health and Safety Code section
6 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
7 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
8 (25%) of the penalty retained by Englander. ASA shall provide its payment in two checks for the
9 following amount made payable to (a) “OEHHA” in the amount of \$2325; and (b) “Peter Englander,
10 Client Trust Account” in the amount of \$775. Englander’s counsel shall be responsible for remitting
11 ASA’s payment under this Consent Judgment to OEHHA.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Englander and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
15 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
16 the other settlement terms had been finalized, the Parties negotiated the compensation due to
17 Englander and his counsel under general contract principles and the private attorney general doctrine
18 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
19 mutual execution of this Consent Judgment, and court approval of the same, but exclusive of fees and
20 costs on appeal, if any. Under these legal principles, ASA shall pay \$31,000 for all fees and costs
21 incurred by Englander investigating, bringing this matter to ASA’s attention, litigating and
22 negotiating a settlement in the public interest.

23 **3.3 Payment Timing; Payments Held in Trust**

24 All payments due under this Consent Judgment shall be held in trust until such time as the
25 Court approves the Parties’ settlement. Within ten business days of the date that this Consent
26 Judgment is fully executed by the Parties, all payments due under this agreement shall be delivered
27 to ASA’s counsel and held in trust until the Effective Date. ASA’s counsel shall provide
28 Englander’s counsel with written confirmation upon its receipt of the settlement payments. Within

1 five days of the Effective Date, ASA's counsel shall deliver the civil penalty and attorneys' fee
2 reimbursement payments to Englander's counsel.

3 **3.4 Payment Address**

4 Within five days of the Effective Date, all payments required by this Consent Judgment shall
5 be delivered to:

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

11 **4. CLAIMS COVERED AND RELEASED**

12 **4.1 Englander's Public Release of Proposition 65 Claims**

13 Englander, acting on his own behalf and in the public interest, releases ASA and its parents,
14 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
15 attorneys ("Releasees"), and each entity to whom ASA directly or indirectly distributes or sells the
16 Products including, but not limited to, its downstream customers, distributors, wholesalers, and
17 retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to the
18 failure to warn about exposures to DEHP from Products sold or distributed for sale by ASA prior to
19 the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
20 constitutes compliance with Proposition 65 with respect to exposures to DEHP from Products sold
21 or distributed for sale by ASA after the Effective Date.

22 **4.2 Englander's Individual Release of Claims**

23 Englander, in his individual capacity only and *not* in any representative capacity, also
24 provides a release to ASA, Releasees, and Downstream Releasees, which shall be effective as a full
25 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
26 attorneys' fees, damages, losses, claims, liabilities and demands of Englander of any nature, character
27 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
28 exposures to DEHP in Products sold or distributed for sale by ASA before the Effective Date.

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4.3 ASA's Release of Englander

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

5. COURT APPROVAL

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

6. SEVERABILITY

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

7. GOVERNING LAW

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

1 **8. NOTICE**

2 Unless specified herein, all correspondence and notice 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 ASA:

6 Brent Barrow, President
7 ASA Electronics LLC
8 2602 Marina Drive
9 Elkhart, IN 46514

9 with a copy to:

10 Larry Stopol
11 Levy, Stopol & Camelo, LLP
12 1425 RXR Plaza
13 Uniondale, NY 11556-1425

12 For Englander:

13 Proposition 65 Coordinator
14 The Chanler Group
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710-2565

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
21 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
22 same document.

23 **10. POST EXECUTION ACTIVITIES**

24 Englander agrees to comply with the reporting form requirements referenced in Health and
25 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
26 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
27 which motion Moore shall draft and file. In furtherance of obtaining such approval, the Parties agree
28 to mutually employ their best efforts, and those of their counsel, to support the entry of this

1 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
2 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
3 approval, responding to any objection that any third-party may file or lodge, and appearing at the
4 hearing before the Court if so requested.

5 **11. MODIFICATION**

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

9 **12. AUTHORIZATION**

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

12
13 **AGREED TO:**

14 Date: 5/22/2017

15 By: _____

16 
PETER ENGLANDER

13 **AGREED TO:**

14 Date: May 17 2017

15 By: _____

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Brent Barrow, President
17 ASA ELECTRONICS LLC
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