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3 THE CHANLER GROUP  
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9 Attorneys for Plaintiff  
10 PETER ENGLANDER

11  
12  
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF ALAMEDA  
15 UNLIMITED CIVIL JURISDICTION  
16

17 PETER ENGLANDER

18 Plaintiff,

19 v.

20 SMITH VENTURES, LTD.; and DOES 1-  
21 150, inclusive,

22 Defendants.

Case No. RG-17-848400

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and  
Code of Civil Procedure § 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 SMITH VENTURES, LTD., (“Smith Ventures”), with Englander and  
5 Smith Ventures each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Englander is a resident of the State of California who seeks to promote awareness of  
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful  
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Smith Ventures employs ten or more persons and is a person in the course of doing business  
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and  
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Smith Ventures manufactures, imports, sells and/or distributes for  
16 sale in California, vinyl/PVC exercise balls containing Di(2-ethylhexyl)phthalate (“DEHP”).  
17 DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects and other  
18 reproductive harm. Englander alleges that Smith Ventures failed to provide the health hazard  
19 warning allegedly required by Proposition 65 for exposures to DEHP from its vinyl/PVC exercise  
20 balls.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC exercise balls containing  
23 DEHP sold and/or distributed for sale in California by Smith Ventures including, but not limited to,  
24 *Rage Fitness Slam Balls, UPC #8 18905 01018 1* (“Products”).

25 **1.6 Notice of Violation**

26 On October 14, 2016, Englander served Smith Ventures and certain requisite public  
27 enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Smith Ventures  
28 violated Proposition 65 when it failed to warn its customers and consumers in California that the

1 Products expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has  
2 commenced and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On February 6, 2017, Englander commenced the instant action, naming Smith Ventures as a  
5 defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

6 **1.8 No Admission**

7 Smith Ventures denies the material, factual, and legal allegations contained in the Notice  
8 and Complaint, and maintains that all of the products that it has sold or distributed for sale in  
9 California, including the Products, have been, and are, in compliance with all laws. Nothing in this  
10 Consent Judgment shall be construed as an admission by Smith Ventures of any fact, finding,  
11 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent  
12 Judgment constitute or be construed as an admission by Smith Ventures of any fact, finding,  
13 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or  
14 otherwise affect Smith Ventures'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 Smith Ventures as to the allegations contained in the Complaint, that venue is  
19 proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the  
20 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure  
21 section 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that  
24 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

25 **2. INJUNCTIVE SETTLEMENT TERMS**

26 **2.1 Reformulation Commitment**

27 On or before the Effective Date and continuing thereafter, Smith Ventures agrees to only  
28 manufacture for sale or purchase for sale in or into California, (a) "Reformulated Products"

1 Pursuant to Section 2.2 or (b) Product that is labeled with a clear and reasonable warning pursuant  
2 to Section 2.3.

3 **2.2 Reformulation Standard**

4 For purposes of this Settlement Agreement, "Reformulated Products" are Products  
5 containing DEHP in concentrations less than 1,000 parts per million ("ppm") (0.1%) when analyzed  
6 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or  
7 other methodology utilized by federal or state governmental agencies for the purpose of  
8 determining DEHP content in a solid substance or some similar test method.

9 **2.3 Clear and Reasonable Warnings**

10 For purposes of this Settlement Agreement, a Product is labeled with a clear and reasonable  
11 warning under Section 2.1 if Smith Ventures affixes a warning to the Product packaging or labeling  
12 using language similar to the warning below. For Products sold prior to August 30, 2018, Smith  
13 Ventures shall provide:

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

16 Or

17 **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl)  
18 phthalate, which is known to the State of California to cause birth  
19 defects or other reproductive harm. For more information go to  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

20 Or

21 **WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

22 For Products sold after August 30, 2018, Smith Ventures shall provide:

23 **WARNING:** This product can expose you to chemicals including Di(2-ethylhexyl)  
24 phthalate, which is known to the State of California to cause birth  
25 defects or other reproductive harm. For more information go to  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

26 Or

27 **WARNING:** Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).  
28

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

3 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims  
4 referred to in this Consent Judgment, Smith Ventures shall pay \$2,000 in civil penalties in  
5 accordance with this Section. The penalty payment will be allocated in accordance with California  
6 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds, or \$1,500, made payable to  
7 “California Office of Environmental Health Hazard Assessment” (“OEHHA”) and the remaining  
8 25% of the penalty, or \$500, made payable to “Peter Englander.” Smith Ventures’s penalty  
9 payments made pursuant to this Section 3.1 shall be delivered to the address in Section 3.4, and  
10 Englander’s counsel shall be responsible for remitting Smith Ventures’s penalty payment(s) under  
11 this Consent Judgment to OEHHA and Englander.

12 **3.2 Reimbursement of Attorneys’ 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  
15 the issue to be resolved after the material terms of the agreement had been settled. Shortly after  
16 the other settlement terms had been finalized, Smith Ventures expressed a desire to resolve  
17 Englander’s fees and costs. The Parties then negotiated a resolution of the compensation due to  
18 Englander and his counsel under general contract principles and the private attorney general  
19 doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through  
20 the mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees  
21 and costs on appeal, if any, Smith Ventures shall reimburse Englander and his counsel \$16,000.  
22 Smith Ventures’s payment shall be delivered to the address in Section 3.4 in the form of a check  
23 payable to “The Chanler Group.” The reimbursement shall cover all fees and costs incurred by  
24 Englander investigating, bringing this matter to Smith Ventures attention, litigating, and  
25 negotiating a settlement of the matter in the public interest.

26 **3.3 Payment Timing; Payments Held In Trust**

27 Within five days of the execution of this Consent Judgment, Smith Ventures shall place in  
28 the mail to its counsel the penalty payments required under Section 3.1, above, and one payment of

1 \$1,000 required under Section 3.2 above. Thereafter, Smith Ventures shall provide the remaining  
2 payments under Section 3.2 above in the form of five checks made payable to “The Chanler  
3 Group” according to the following schedule: (a) on or before April 15, 2018, Smith Ventures shall  
4 deliver a check for \$3,000; (b) on or before May 15, 2018, Smith Ventures shall deliver a check for  
5 \$3,000; (c) on or before June 15, 2018, Smith Ventures shall deliver a check for \$3,000; (d) on or  
6 before July 15, 2018, Smith Ventures shall deliver a check for \$3,000; and (e) on or before August  
7 15, 2018, Smith Ventures shall deliver a check for \$3,000. Prior to the Effective Date, Smith  
8 Ventures shall deliver all payments to its counsel, and Smith Ventures counsel shall confirm  
9 receipt of each settlement payment in writing to Englander’s counsel and, thereafter, hold the  
10 amounts paid in trust until such time as the Court grants the motion for approval of the Parties’  
11 settlement contemplated by Section 5. Within two days of the Effective Date, Smith Ventures  
12 counsel shall place in the mail all settlement payments it has received and that it has held in trust to  
13 Englander’s counsel at the address provided in Section 3.4. After the Effective Date, Smith  
14 Ventures shall make all remaining payments directly to Englander’s counsel at the address  
15 provided in Section 3.4

16 **3.4 Payment Address**

17 All payments required by this Consent Judgment shall be delivered to the following  
18 address:

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

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Englander’s Release of Proposition 65 Claims**

26 Englander, acting on his own behalf and in the public interest, releases Smith Ventures and  
27 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,  
28 and attorneys (“Releasees”) and each entity to whom Smith Ventures directly or indirectly  
distributes or sells the Products including, but not limited to, its downstream distributors,

1 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees  
2 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures  
3 to DEHP from the Products manufactured, imported, distributed or sold by Smith Ventures prior to  
4 the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment  
5 constitutes compliance with Proposition 65 by Smith Ventures with respect to the alleged or actual  
6 failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale  
7 by Smith Ventures after the Effective Date.

#### 8 **4.2 Englander’s Individual Release of Claims**

9 ENGLANDER, in his individual capacity only and *not* in his representative capacity, also  
10 provides a release to Defendants, Releasees, and Downstream Releasees which shall be effective as  
11 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,  
12 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any  
13 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of  
14 alleged or actual exposures to DEHP in Products manufactured, imported, distributed or sold by  
15 Smith Ventures before the Effective Date.

#### 16 **4.3 Smith Ventures Release of Englander**

17 Smith Ventures, on its own behalf and on behalf of its past and current agents,  
18 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against  
19 Englander and his attorneys and other representatives, for any and all actions taken or statements  
20 made by Englander and his attorneys and other representatives in the course of investigating and  
21 enforcing claims relating to the Products, or otherwise with respect to the Products.

### 22 **5. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and  
24 shall be null and void if, for any reason, it is not approved and entered by the Court within one year  
25 after it has been fully executed by all Parties. Englander and Smith Ventures agree to support the  
26 entry of this agreement as a judgment, and to obtain the Court’s approval of their settlement in a  
27 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code  
28 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,

1 which motion Englander shall draft and file and Smith Ventures shall support, appearing at the  
2 hearing if so requested. If any third-party objection to the motion is filed, Englander and Smith  
3 Ventures agree to work together to file a reply and appear at any hearing. This provision is a  
4 material component of the Consent Judgment and shall be treated as such in the event of a breach.

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

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

16 **8. NOTICE**

17 Unless specified herein, all correspondence and notice required to be provided pursuant to  
18 this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class,  
19 registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any  
20 Party by the other at the following addresses:

21 **For Smith Ventures:**

22 Tamara Smith, CFO  
23 SMITH VENTURES, LTD.  
24 13333 East 37<sup>th</sup> Avenue  
25 Denver, CO 80239

21 **For Englander:**

22 Proposition 65 Coordinator  
23 The Chanler Group  
24 2560 Ninth Street  
25 Parker Plaza, Suite 214  
26 Berkeley, CA 94710-2565



**with copy to Smith Ventures's counsel:**

Charles E. Merrill, Esq.  
Husch Blackwell LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105

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

**9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

This Consent Judgment may be executed in counterparts and by facsimile or portable 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. COMPLIANCE WITH REPORTING REQUIREMENTS**

Englander and his counsel agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

**11. MODIFICATION**

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of any party and the entry of a modified Consent Judgment by the Court thereon.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

**AGREED TO:**

**AGREED TO:**

  
\_\_\_\_\_  
PETER ENGLANDER

\_\_\_\_\_  
SMITH VENTURES, LTD.

Dated: 3/13/2018

By: \_\_\_\_\_  
(Print Name)

Its: \_\_\_\_\_  
(Title)

Dated: \_\_\_\_\_

**with copy to Smith Ventures's counsel:**

Charles E. Merrill, Esq.  
Husch Blackwell LLP  
190 Carondelet Plaza, Suite 600  
St. Louis, MO 63105

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**12. AUTHORIZATION**

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**AGREED TO:**

\_\_\_\_\_  
PETER ENGLANDER

Dated: \_\_\_\_\_

**AGREED TO:**

  
\_\_\_\_\_  
SMITH VENTURES, LTD.

By: Tamara Smith  
(Print Name)

Its: Owner / CFO  
(Title)

Dated: 3/19/18