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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION
12

13 PETER ENGLANDER,
14 Plaintiff,
15 v.
16 THE ORVIS COMPANY, INC.; *et al.*,
17 Defendants.

Case No. CGC-17-561346

[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 The Orvis Company, Inc. (“Orvis”), with Englander and Orvis 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 Orvis 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 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Orvis manufactures, imports, sells, or distributes for sale, in California,
16 tool grips containing di(2-ethylhexyl)phthalate (“DEHP”) without first providing the exposure
17 warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known
18 to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as nippers, forceps, snips and
21 scissors with grips containing DEHP that are or were sold or distributed for sale, in California, by
22 Orvis, including, but not limited to: (a) the *Orvis Rod and Tackle Comfy Grip TC Nipper, #5A04-*
23 *000*; (b) the *Orvis Ergonomic Snips, #78L7-10-00*; (c) the *Orvis Comfy Grip Scissors, #2H0T-00-00*;
24 and (d) the *Orvis Power Jaw Forceps, #74GH-100* (collectively, the “Products.”)

25 **1.6 Notice of Violation**

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

1 health hazards associated with exposures to DEHP from the Products. At the time this proposed
2 Consent Judgment is executed by the Parties, no public enforcer has commenced and is diligently
3 prosecuting an action to enforce the violations alleged in the Notice.

4 **1.7 Complaint**

5 On September 18, 2017, Englander filed the instant action (“Complaint”), naming Orvis as a
6 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
7 Notice.

8 **1.8 No Admission**

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

17 **1.9 Jurisdiction**

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

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
24 the Court grants the motion for approval of the Consent Judgment contemplated by Section 5.
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1 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

2 Commencing on the Effective Date and continuing thereafter, Orvis shall only manufacture
3 for sale, purchase for sale, distribute for sale, or offer for sale, in California, “Reformulated
4 Products.” For purposes of this Consent Judgment, Reformulated Products are defined as Products
5 containing DEHP in a maximum concentration of 1,000 parts per million (0.1%) when analyzed
6 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
7 equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP
8 content in a solid substance.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Civil Penalty Payments**

11 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims referred to in
12 the Notice, Complaint, and this Consent Judgment, Orvis shall pay \$4,750 in civil penalties. The
13 civil penalty payment shall be allocated according to Health and Safety Code §§ 25249.12(c)(1) and
14 (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental
15 Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty
16 retained by Englander.

17 Orvis shall provide its payment in two checks for the following amounts: (a) “OEHHA” in the
18 amount of \$3,562.50; and (b) “Peter Englander, Client Trust Account” in the amount of \$1,187.50.
19 Englander’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment
20 made under this Consent Judgment.

21 **3.2 Reimbursement of Attorney’s Fees and Costs**

22 The parties acknowledge that Englander and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
24 issue to be resolved after the material terms of this Consent Judgment had been settled. After the
25 Parties reached an agreement as to all other settlement terms, the Parties then reached an accord on
26 the compensation due to Englander and his counsel, under general contract principles and the private
27 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work
28 performed through the mutual execution of this Consent Judgment, and court approval of the same,

1 Under these legal principles, Orvis shall pay \$28,000 to Englander and his counsel for all fees and
2 costs incurred in investigating, bringing this matter to Orvis' attention, and litigating and negotiating
3 a settlement in the public interest. Orvis' payment shall be delivered in the form of a check payable
4 to "The Chanler Group."

5 **3.3 Payment Timing; Payments Held in Trust**

6 All payments due under this Consent Judgment shall be held in trust until such time as the
7 Court approves the Parties' settlement. Within five (5) days of the date this Consent Judgment is
8 fully executed by the Parties, all payments due under this agreement shall be delivered to Orvis'
9 counsel, Baker & Hostetler LLP, and held in trust by Baker & Hostetler LLP until the Court grants
10 the motion for approval of this Consent Judgment, as contemplated by Section 5. Orvis' counsel
11 shall provide Englander's counsel with written confirmation upon its receipt of the settlement
12 payments. Within five (5) days of the Court's approval of this Consent Judgment, Orvis's counsel
13 shall deliver the civil penalty and attorneys' fee reimbursement payments to Englander's counsel.

14 **3.4 Payment Address**

15 All payments required by this Consent Judgment shall be delivered to:

16 The Chanler Group
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Englander's Public Release of Proposition 65 Claims**

23 Englander, acting on his own behalf and in the public interest, releases Orvis and its parents,
24 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
25 attorneys ("Releasees"), and each entity to whom Orvis directly or indirectly distributes or sells the
26 Products including, without limitation, its downstream customers, distributors, wholesalers, and
27 retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to the
28 failure to warn about exposures to DEHP from Products sold or distributed for sale by Orvis prior to
the Effective Date.

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

2 Englander, in his individual capacity only and *not* in any representative capacity, also
3 provides a release to Orvis, Releasees, and Downstream Releasees, which shall be effective as a full
4 and 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, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
7 exposures to DEHP in Products sold or distributed for sale by Orvis before the Effective Date.
8 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
9 with respect to exposures to DEHP from Products sold or distributed for sale by Orvis after the
10 Effective Date.

11 **4.3 Orvis’ Release of Englander**

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

17 **4.4 Mutual California Civil Code Section 1542 Waiver**

18 The Parties, including Englander in his individual capacity and Orvis, each acknowledge that
19 he/it is familiar with Section 1542 of Civil Code, which provides as follows:

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

1 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
2 representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any and all
3 rights and benefits which he/it may have under, or which may be conferred on him/it by the
4 provisions of Civil Code § 1542 as well as under any other state or federal statute or common law
5 principle of similar effect, to the fullest extent that he/it may lawfully waive such rights or benefits
6 pertaining to the released matters set forth in Sections 4.2 and 4.3 above.

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court and shall
9 be null and void (and all payments due from Orvis under this Consent Judgment shall be released to
10 Orvis) if it is not approved and entered by the Court.

11 **6. SEVERABILITY**

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

15 **7. GOVERNING LAW**

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

22 **8. NOTICE**

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

2 Kenneth J. Smith
3 Vice-President, Customer Operations
4 The Orvis Company, Inc.
5 178 Conservation Way
6 Sunderland, VT 05250
7 smithk@orvis.com

8 with a copy to:

9 Ryan Fischbach, Esq.
10 Baker & Hostetler LLP
11 11601 Wilshire Boulevard
12 Suite 1400
13 Los Angeles, CA 90025-0509
14 rfischbach@bakerlaw.com

15 For Englander:

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

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

27 **10. POST EXECUTION ACTIVITIES**

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

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

AGREED TO:

13
14 Date: 11/3/2017

Date: 10/26/17

15
16 By: 

PETER ENGLANDER

THE ORVIS COMPANY

17
18 By: 

Kenneth J. Smith
Vice-President, Customer Operations