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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION
11

12
13 PETER ENGLANDER,
14 Plaintiff,
15 v.
16 HI-WAY DISTRIBUTING CORP. OF
AMERICA; and DOES 1-150, inclusive,
17 Defendants.
18

Case No. CIV 1704270
[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” or “Plaintiff”) and defendant Hi-Way Distributing Corp. Of America (“Hi-Way” or
5 “Defendant”), with Englander and Hi-Way each referred to individually as a “Party” and
6 collectively as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Englander alleges that Hi-Way manufactures, imports, sells and/or distributes for sale in
17 California certain gloves containing di(2-ethylhexyl)phthalate (“DEHP”) without providing a
18 required Proposition 65 warning.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are gloves containing DEHP including, but
21 not limited to, *Truck Stuff Hi-Visibility Work Gloves/Wild Wear Hi-Vis Deluxe Mechanics Glove,*
22 *RN #119514, UPC #0 98974 72518 0,* that are manufactured, imported, distributed, sold and/or
23 offered for sale in California by Hi-Way (the “Products”).

24 **1.6 Notice of Violation**

25 On May 31, 2017, Englander served Hi-Way and the requisite public enforcement agencies
26 with a 60-Day Notice of Violation (the “Notice”), alleging that Hi-Way violated Proposition 65
27 when it failed to warn its customers and consumers in California that the Products expose users to
28

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

3 **1.7 Complaint**

4 On November 20, 2017, Englander commenced the instant action, naming Hi-Way as one of
5 the defendants for the alleged violations of Proposition 65 that are the subject of the Notice (the
6 "Complaint").

7 **1.8 No Admission**

8 The Parties enter into this Settlement Agreement as a full and final settlement of all claims
9 that were raised or that could have been raised in the Notice and Complaint, arising out of the facts
10 and/or conduct alleged therein. Hi-Way denies the material, factual, and legal allegations contained
11 in the Notice and Complaint, and maintains that all of the products that it has sold or distributed for
12 sale in California, including the Products, have been, and are, in compliance with all laws and are
13 completely safe for their intended use. Nothing in this Consent Judgment shall be construed as an
14 admission by Hi-Way of any fact, finding, conclusion of law, issue of law, or violation of law, nor
15 shall compliance with this Consent Judgment constitute or be construed as an admission by Hi-Way
16 of any fact, finding, conclusion of law, issue of law, or violation of law. This section shall not,
17 however, diminish or otherwise affect Hi-Way's obligations, responsibilities, and duties under this
18 Consent Judgment.

19 **1.9 Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Hi-Way as to the allegations contained in the Notice and Complaint, that venue is
22 proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the
23 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
24 section 664.6.

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
27 the Court grants the motion for approval of this Consent Judgment, including any unopposed
28 tentative ruling.

1 **2. INJUNCTIVE SETTLEMENT TERMS**

2 **2.1 Reformulation Standards**

3 “Reformulated Products” are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
5 Protection Agency testing methodologies 3580A and 8270C or other methodologies utilized by
6 federal or state government agencies for the purpose of determining DEHP content in a solid
7 substance. Products manufactured after the Effective Date for distribution or sale in California
8 shall either be Reformulated Products or bear product warnings as set forth below.

9 **2.3 Product Warnings**

10 Products manufactured after the Effective Date for distribution or sale in California that do
11 not qualify as Reformulated Products shall contain a Proposition 65 warning affixed to the
12 packaging, labeling, or directly on each Product provided for sale in retail outlets in California. The
13 warning shall state either:

14 **⚠ [California Proposition 65] WARNING:** This product can
15 expose you to DEHP, which is known to the State of
16 California to cause cancer, and birth defects or other
17 reproductive harm. For more information go to
www.P65Warnings.ca.gov.

17 Or:

18 **⚠ [California Proposition 65] WARNING:** Cancer and
19 Reproductive Harm - www.P65Warnings.ca.gov.

20 In the event that Hi-Way has information indicating the presence of an additional
21 Proposition 65-listed chemical in the Products, the warning shall state either:

22 **⚠ [California Proposition 65] WARNING:** This product can
23 expose you to chemicals including DEHP, which are
24 known to the State of California to cause cancer, and
25 birth defects or other reproductive harm. For more
26 information go to www.P65Warnings.ca.gov.

25 Or:

26 **⚠ [California Proposition 65] WARNING:** Cancer and
27 Reproductive Harm - www.P65Warnings.ca.gov.

28 Language in brackets for all options is optional.

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 the
4 claims referred to in this Consent Judgment, Hi-Way shall pay a total of \$4,000 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 remitted to the California
7 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
8 penalty remitted to Englander. Within ten business days of the date that this Consent Judgment is
9 executed, Hi-Way shall issue a check payable to its counsel’s law firm in the amount of \$4,000, to
10 be held in trust by its counsel. Counsel for Hi-Way shall provide The Chanler Group with written
11 confirmation within three days of receipt that the funds have been deposited in a trust account.
12 Within five business days of the Effective Date, Defendant’s counsel shall issue the following
13 checks: (1) to “Peter Englander, Client Trust Account” totaling \$1,000; and (2) to the “Office of
14 Environmental Health Hazard Assessment” totaling \$3,000. Upon receipt, Englander and his
15 counsel shall be solely responsible for transmitting OEHHA’s payment to OEHHA. All penalty
16 payments shall be delivered to the address listed in Section 3.3 below.

17 **3.2 Reimbursement of Attorneys’ Fees and Costs**

18 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this issue to be resolved after the material terms of the agreement had been settled. Shortly after
21 the other settlement terms had been finalized, Hi-Way expressed a desire to resolve Englander’s
22 fees and costs. The Parties then negotiated a resolution of the compensation due to Englander and
23 his counsel under general contract principles and the private attorney general doctrine codified at
24 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
25 execution of this agreement and the Court’s approval of the same, but exclusive of fees and costs
26 on appeal, if any, Hi-Way shall reimburse Englander and his counsel \$38,000. Hi-Way shall,
27 within ten business days of the date that this Consent Judgment is executed, issue a check payable
28 to its counsel’s law firm in the amount of \$38,000, to be held in trust by its counsel. Counsel for

1 Hi-Way shall provide The Chanler Group with written confirmation within five days of receipt that
2 the funds have been deposited in a trust account. Within three business days of the Effective Date,
3 counsel shall issue a check to "The Chanler Group" in the amount of \$38,000, and shall deliver it
4 to the address listed in Section 3.3 below. The reimbursement shall cover all fees and costs
5 incurred by Englander investigating, bringing this matter to Hi-Way's attention, litigating and
6 negotiating a settlement of the matter in the public interest, and obtaining court approval of this
7 consent judgment.

8 **3.3 Payment Address**

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

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

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 Englander's Release of Proposition 65 Claims**

18 Englander, acting on his own behalf and in the public interest, releases Hi-Way and its
19 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
20 and attorneys ("Releasees") and each entity to whom Hi-Way directly or indirectly distributes or
21 sells the Products, including, but not limited to, its downstream distributors, wholesalers, customers,
22 retailers, franchisers, cooperative members, licensors and licensees ("Downstream Releasees"), for
23 any violations arising under Proposition 65 for unwarned exposures to DEHP from the Products
24 manufactured, imported, distributed or sold by Hi-Way prior to the Effective Date, as set forth in
25 the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
26 Proposition 65 by Hi-Way with respect to the alleged or actual failure to warn about exposures to
27 DEHP from Products manufactured, imported, sold or distributed for sale by Hi-Way after the
28 Effective Date.

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

2 Englander, in his individual capacity only and *not* in his representative capacity, and
3 on behalf of his current agents, hereby also provides a release to Hi-Way, Releasees, and
4 Downstream Releasees, which shall be effective as a full and final accord and satisfaction, as a bar
5 to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
6 claims, liabilities and demands of Englander of any nature, character or kind, whether known or
7 unknown, suspected or unsuspected, arising out of the presence of phthalates in Products
8 manufactured, imported, distributed or sold by Hi-Way before the Effective Date. Englander, in his
9 individual capacity only and *not* in his representative capacity, hereby also provides a release to the
10 supplier of the Products but only as to the specific units actually manufactured, distributed for sale
11 or sold in California by Hi-Way prior to the Effective Date. Englander further acknowledges that
12 he is familiar with Civil Code section 1542, which provides as follows:

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

18 Englander, on behalf of himself, his past and current agents, representatives, attorneys, successors,
19 and/or assignees, expressly waives and relinquishes any and all rights and benefits that he may have
20 under, or which may be conferred on him by the provisions of Civil Code section 1542 as well as
21 under any other state or federal statute or common law principle of similar effect, to the fullest
22 extent that he may lawfully waive such rights or benefits pertaining to the released matters herein.

23 **4.3 Hi-Way’s Release of Englander**

24 Hi-Way, on its own behalf and on behalf of its past and current agents, representatives,
25 attorneys, successors and/or assignees, hereby waives any and all claims against Englander and his
26 attorneys and other representatives, for any and all actions taken or statements made (or those that
27 could have been taken or made) by Englander and his attorneys and other representatives in the
28 course of investigating this matter, seeking to enforce Proposition 65 against it in this matter, or
with respect to phthalates in the Products.

1 Defendant further acknowledges that it is familiar with Civil Code section 1542, which
2 provides as follows:

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

8 Defendant, on behalf of itself, its past and current agents, representatives, attorneys, successors,
9 and/or assignees, expressly waives and relinquishes any and all rights and benefits that it may have
10 under, or which may be conferred on it by the provisions of Civil Code section 1542 as well as
11 under any other state or federal statute or common law principle of similar effect, to the fullest
12 extent that it may lawfully waive such rights or benefits pertaining to the released matters herein.

13 **5. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
16 after it has been fully executed by all Parties. Englander and Hi-Way agree to support the entry of
17 this agreement as a judgment, and to seek the Court's approval of their settlement in a timely
18 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
19 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
20 motion Englander shall draft and file and Hi-Way shall support, appearing at the hearing if so
21 requested. If any third-party objection to the motion is filed, Englander and Hi-Way agree to work
22 together to file a reply and appear at any hearing. This provision is a material component of the
23 Consent Judgment and shall be treated as such in the event of a breach.

24 **6. SEVERABILITY**

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

2 The terms of this Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
4 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Hi-Way
5 may provide Englander with written notice of any asserted change in the law, and shall have no
6 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
7 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Hi-Way
8 from its obligation to comply with any pertinent state or federal law or regulation.

9 **8. NOTICE**

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

14 To Hi-Way:

15 Mr. Jeff Hornak
16 Hi-Way Distributing
17 3716 E. State Road
18 Barberton, OH 44203

19 J. Robert Maxwell
20 Rogers Joseph O'Donnell
21 311 California Street, 10th fl | San
22 Francisco, CA 94104

To Englander:

Attn: Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

2 The Parties have jointly participated in the preparation of this Consent Judgment and this
3 Consent Judgment is the result of the joint efforts of the Parties. Accordingly, any uncertainty or
4 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
5 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
6 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
7 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
8 regard, the Parties hereby waive California Civil Code § 1654.

9 **10. ENTIRE AGREEMENT**

10 This Consent Judgment contains the sole and entire agreement and understanding of the
11 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
12 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein. No
13 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
14 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of
15 this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions
16 hereof whether or not similar, nor shall such waiver constitute a continuing waiver unless set forth
17 in writing between the Parties.

18 **11. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

22 **12. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

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1 **13. MODIFICATION**

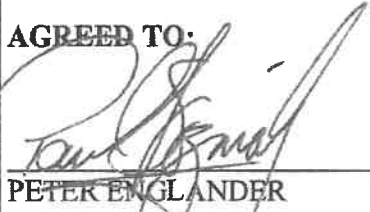
2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
4 any party and the entry of a modified Consent Judgment by the Court thereon. No party shall bring
5 a motion to enforce the terms of this Consent Judgment without first providing notice to the other
6 party and meeting and conferring about the alleged violation for a period of at least 30 days.

7 **14. AUTHORIZATION**

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

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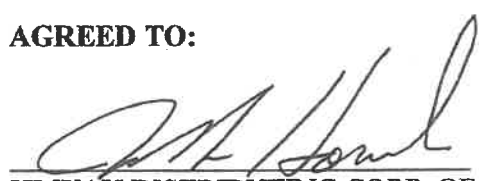
AGREED TO:



PETER ENGLANDER

Dated: 4/3/2018

AGREED TO:



HI-WAY DISTRIBUTING CORP. OF AMERICA

By: Jeff Horvath
(Print Name)

Its: President
(Title)

Dated: 4.5.18