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5 Attorneys for Plaintiff
6 PETER ENGLANDER

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SANTA CLARA
9 UNLIMITED CIVIL JURISDICTION
10

11
12 PETER ENGLANDER,
13 Plaintiff,
14 v.
15 CYCLE GEAR, INC., *et al.*,
16 Defendants.

Case No. 18CV326923
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant Cycle Gear, Inc. (“Cycle Gear”), with Englander and Cycle Gear each
5 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 Cycle Gear employs ten or more persons and is a person in the course of doing business for
12 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 Cycle Gear manufactures, imports, sells and/or distributes for sale in
16 California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without
17 providing the health hazard warning that Englander alleges is required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are vinyl/PVC tape including, but not
20 limited to, *Speedmetal Reflective PVC Tape, #520034, # 320032-35, UPC #0 884475 022480* and
21 *Speedmetal Reflective PVC Tape, #520032, UPC #0 884475 022466* that are manufactured,
22 imported, distributed, sold and/or offered for sale in California by Cycle Gear (“Products”).

23 **1.6 Notice of Violation**

24 On August 1, 2017, Englander served Cycle Gear and the requisite public enforcement
25 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Cycle Gear violated
26 Proposition 65 when it failed to warn its customers and consumers in California that the Products
27 expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced
28 and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

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1.7 Complaint

On April 20, 2018, Englander commenced the instant action, naming Cycle Gear as one of the defendants for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

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

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Cycle Gear as to the allegations contained in the Complaint, that venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this Consent Judgment is approved by the Court, including an unopposed tentative ruling.

2. INJUNCTIVE SETTLEMENT TERMS

2.1 Commitment to Reformulate or Warn

Within 90 days of the Effective Date all Products manufactured, imported, distributed, sold and/or offered for sale in the State of California by Cycle Gear shall be Products that qualify as Reformulated Products as defined in Section 2.2 or shall be Products that bear a warning as set forth in Section 2.3

1 \$2,000 in civil penalties. Cycle Gear’s civil penalty payment will be allocated according to Health
2 and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty
3 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the
4 remaining twenty-five percent (25%) of the penalty payment retained by Englander. Cycle Gear
5 shall issue its payment in two checks for the following amounts made payable to (a) “OEHHA” in
6 the amount of \$1,500; and (b) “Peter Englander, Client Trust Account” in the amount of \$500.
7 Englander’s counsel shall be responsible for delivering OEHHA’s portion of the penalty payment.
8 Cycle Gear shall issue three separate 1099 forms to OEHHA, Englander, and The Chanler Group
9 for the respective amount paid to each under this agreement.

10 **3.2 Reimbursement of Attorneys’ Fees and Costs**

11 The parties acknowledge that Englander and his counsel offered to resolve this dispute
12 without reaching terms on their fees and costs. Shortly after the other settlement terms had been
13 finalized, the Parties negotiated the compensation to be paid to Englander and his counsel under
14 general contract principles and the private attorney general doctrine codified at California Code of
15 Civil Procedure section 1021.5 for all work performed through the mutual execution of this Consent
16 Judgment and court approval of the same, but exclusive of fees and costs on appeal, if any. Cycle
17 Gear agrees to pay \$28,000 by a check made payable to “The Chanler Group” for all fees and costs
18 incurred investigating, bringing this matter to Cycle Gear’s attention, litigating, and negotiating a
19 settlement in the public interest.

20 **3.3 Payment Timing; Payments Held in Trust**

21 All payments due under this Consent Judgment shall be held in trust until the Court
22 approves the Parties’ settlement. Cycle Gear shall deliver its civil penalty and attorneys’ fee
23 reimbursement payments to its counsel within fifteen (15) days of the date that this Consent
24 Judgment is fully executed by the Parties. Cycle Gear’s counsel shall provide Englander’s counsel
25 with written confirmation following its receipt of the settlement funds. Thereafter, Cycle Gear’s
26 counsel shall hold the settlement funds in trust until, and disburse the funds to Englanders’ counsel
27 within five (5) days after the court approves the settlement, including an uncontested tentative
28 ruling.

1 **3.4 Payment Address**

2 All payments required by this Consent Judgment shall be delivered to the following
3 address:

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

7 **4. CLAIMS COVERED AND RELEASED**

8 **4.1 Englander’s Release of Proposition 65 Claims**

9 Englander, acting on his own behalf and in the public interest, releases Cycle Gear and its
10 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
11 and attorneys (“Releasees”) and each entity to whom Cycle Gear directly or indirectly distributes or
12 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
13 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for
14 any violations arising under Proposition 65 for unwarned exposures to DEHP from the Products
15 manufactured, imported, distributed or sold by Cycle Gear prior to the Effective Date, as set forth in
16 the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
17 Proposition 65 by Cycle Gear with respect to the alleged or actual failure to warn about exposures
18 to DEHP from Products manufactured, sold or distributed for sale by Cycle Gear after the Effective
19 Date.

20 **4.2 Englander’s Individual Release of Claims**

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

1 **4.3 Cycle Gear’s Release of Englander**

2 Cycle Gear, on its own behalf and on behalf of its past and current agents, representatives,
3 attorneys, successors and/or assignees, hereby waive any and all claims against Englander and his
4 attorneys and other representatives, for any and all actions taken or statements made (or those that
5 could have been taken or made) by Englander and his attorneys and other representatives in the
6 course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with
7 respect to the Products.

8 **5. COURT APPROVAL**

9 This Consent Judgment shall be null and void if, for any reason, it is not approved and
10 entered by the Court within one year after it has been fully executed by all Parties. Englander and
11 Cycle Gear agree to support the entry of this agreement as a judgment, and to obtain the Court’s
12 approval of their settlement in a timely manner. The Parties acknowledge that, pursuant to
13 California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial
14 approval of this Consent Judgment, which motion Englander shall draft and file and Cycle Gear
15 shall support, appearing at the hearing if so requested.

16 **6. SEVERABILITY**

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

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California
22 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
23 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Cycle
24 Gear may provide Englander with written notice of any asserted change in the law, and shall have
25 no further injunctive obligations pursuant to this Consent Judgment, with respect to, and to the
26 extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to
27 relieve Cycle Gear from its obligation to comply with any pertinent state or federal law or
28 regulation.

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 any Party by the other at the
5 following addresses:

6 To Cycle Gear:

7 Dana P. Palmer, Esq.
8 McGuire Woods LLP
9 1800 Century Park East, 8th Floor
10 Los Angeles, CA 90067
dpalmer@mcguirewoods.com

To Englander:

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

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

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

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

17 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

20 **11. ENTIRE AGREEMENT**

21 This Consent Judgment contains the sole and entire agreement and understanding of the
22 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
23 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and
24 therein. There are no warranties, representations, or other agreements between the Parties except as
25 expressly set forth herein. No representations, oral or otherwise, express or implied, other than
26 those specifically referred to in this Consent Judgment have been made by any Party hereto. No
27 other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed
28 to exist or to bind any of the Parties hereto.

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12. 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.

13. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 6/15/18 _____

Date: _____

By:  _____
PETER ENGLANDER

By: _____
CYCLE GEAR, INC.

1 **12. 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.

5 **13. AUTHORIZATION**

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

9 **AGREED TO:**

AGREED TO:

10 Date: _____

Date: June 15, 2018

11 By: _____
12 PETER ENGLANDER

By: 
CYCLE GEAR, INC.

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