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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 POLARIS INDUSTRIES INC.; *et al.*,

20 Defendants.
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Case No. CGC-17-562780

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.5 *et seq.*, and Cal.
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered by and between plaintiff Peter Englander (Englander), and
4 defendant Polaris Industries Inc. (Polaris) with Englander and Polaris each individually referred to as
5 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 Polaris 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 Polaris manufactures, distributes for sale or otherwise sells in
16 California, beverageware with exterior designs containing lead, and that it does so without first
17 providing a Proposition 65 health hazard warning. Lead is listed pursuant to Proposition 65 as a
18 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 beverageware with exterior
21 designs containing lead that are sold or distributed for sale in California by Polaris including, but not
22 limited to, the (i) *Indian Shot Glasses, Part #2863915*, and the (ii) *Indian Pint Glass, Part #2866265*,
23 identified in Englander’s Notices.

24 **1.6 Notices of Violation**

25 On August 1, 2017, and April 28, 2018, Englander served Polaris, the California Attorney
26 General, and all other requisite public enforcers with a 60-Day Notice of Violation and Supplemental
27 60-Day Notice of Violation respectively (Notices). The Notices allege that Polaris violated
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1 Proposition 65 by failing to warn its customers and consumers in California of the health risks
2 associated with exposures to lead from the Indian's beverageware. No public enforcer has
3 commenced or is diligently prosecuting an action to enforce the violations alleged in either of the
4 Notices.

5 **1.7 Complaint**

6 On November 30, 2017, Englander filed the instant action (Complaint), naming Polaris as a
7 defendant for the alleged violations that are the subject of the Notices. At the time he commenced
8 this action, Englander had not issued and did not have standing to bring a claim to enforce the alleged
9 violations pertaining to all of Polaris' pint glass or other beverageware products. However, the
10 Parties stipulate and agree that upon the date of the Court's approval of the Parties' settlement, or the
11 date that is sixty-six days after service of the April 28, 2018, Supplemental Notice, whichever is later,
12 the Complaint shall be deemed amended *nunc pro tunc* to include the allegations in both Notices
13 pertaining the alleged violations and exposures to lead without prior warning in Polaris'
14 beverageware products, i.e., the Product(s).

15 **1.8 No Admission**

16 Polaris denies the material, factual, and legal allegations contained in the Notices and
17 Complaint, and maintains that all the products that it has sold or distributed for sale in California,
18 including the Products, comply with all laws. Nothing in this Consent Judgment shall be construed
19 as an admission by Polaris of any fact, finding, conclusion of law, issue of law, or violation of law,
20 nor shall compliance with this Consent Judgment constitute or be construed as an admission by
21 Polaris of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
22 not, however, diminish or otherwise affect Polaris's obligations, responsibilities, and duties under this
23 Consent Judgment.

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1 **1.9 Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that the Court has
3 jurisdiction over Polaris as to the allegations in the Complaint, that venue is proper in the County of
4 San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
5 Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
8 the Motion for Approval of the Consent Judgment is granted by the Court.

9 **2. INJUNCTIVE RELIEF: REFORMULATION**

10 **2.1 Commitment to Reformulate Products or Provide Warnings**

11 Commencing on the Effective Date, and continuing thereafter, Polaris agrees to only purchase
12 for sale or manufacture for sale in California only Reformulated Products,” as defined by Section 2.2,
13 below.

14 **2.2 Reformulated Products Defined**

15 For purposes of this Consent Judgment, Reformulated Products are defined as Products that
16 (a) contain lead in concentrations that do not exceed 90 parts per million (ppm), equivalent to
17 0.009%, in any exterior decorations, when analyzed pursuant to U.S. Environmental Protection
18 Agency (EPA) testing methodologies 3050B and 6010B; and (b) yield a result of no more than 1.0
19 micrograms of lead when sampled according to NIOSH 9100 protocol and analyzed according to
20 EPA 6010B. In addition to the above test methodologies, the Parties may use equivalent
21 methodologies utilized by a state or federal agency to determine lead content in a solid substance.

22 **2.3 Clear and Reasonable Warnings**

23 Commencing on the Effective Date, for all Products Polaris sells or distributes for sale in
24 California that do not meet the definition of Reformulated Products established by Section 2.1,
25 Polaris shall provide clear and reasonable warnings in accordance with this Section 2.3, or title 27
26 California Code of Regulations sections 25602 and 25603. Polaris further agrees that any warning
27 used will be prominently placed in relation to the Product with such conspicuousness when compared
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1 with other words, statements, designs, or devices as to render it likely to be read and understood by
2 an ordinary individual under customary conditions of purchase or use. For purposes of this Consent
3 Judgment, a warning for the Products displayed or transmitted according to the above criteria that is
4 affixed directly to a Product or its accompanying labeling or packaging that contains the following
5 statement shall be deemed clear:

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7 **⚠ WARNING:** This product can expose you to chemicals,
8 including lead, which is known to the State
9 of California to cause birth defects or other
reproductive harm. For more information
go to www.P65Warnings.ca.gov.

10 The following short-form warning statement may be used when affixed directly to the Product(s):

11 **⚠ WARNING:** Reproductive Harm – www.P65Warnings.ca.gov¹

12 If Polaris sells Products via an internet website to customers located in California, the warning
13 requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same
14 web page on which a Product is displayed and/or described; (b) on the same page as the price for the
15 Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the
16 checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or
17 white equilateral triangle may appear adjacent to or immediately following the display, description,
18 price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web
19 page in a manner that clearly associates it with the product(s) to which the warning applies.

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26 ¹ This short-form warning may be used only on a Product, Product label, or as part of an internet or catalog
27 warning, provided it is also located directly on a Product and/or its immediate packaging/labeling. If used, the short-form
28 warning must be in a type size no smaller than the largest type size used for consumer information on the product and, in
no case, in any text less than a 6-point type size. The short-form warning may not be used on a warning sign, *e.g.*, point-
of-sale or shelf signs.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payment**

3 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
4 to in this Consent Judgment, Polaris shall pay \$3,300 in civil penalties. Polaris’s civil penalty
5 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with
6 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
7 Hazard Assessment (OEHHA), and twenty-five percent (25%) of the funds remitted to Englander.
8 Polaris shall provide its payment in two checks for the following amounts made payable to: (a)
9 “OEHHA” in the amount of \$2,475; and (b) “Peter Englander, Client Trust Account” in the amount
10 of \$825. Englander’s counsel shall be responsible for delivering the penalty payment to OEHHA.

11 **3.2 Reimbursement of Attorney’s Fees and Costs**

12 The parties acknowledge that Englander and his counsel offered to resolve this dispute
13 without reaching terms on the fees and costs to be reimbursed, thereby leaving the issue to be
14 resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
15 settlement terms had been finalized, the Parties negotiated a reimbursement of the compensation due
16 to Englander and his counsel under general contract principles and the private attorney general
17 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
18 through the mutual execution of this Consent Judgment. Accordingly, Polaris agrees to pay \$36,500
19 for all fees and costs incurred by Englander investigating, bringing this matter to Polaris’s attention,
20 litigating and negotiating a settlement in the public interest, and obtaining court approval of the same.

21 **3.3 Payment Timing**

22 Within five business days of the Effective Date, all payments due under this Consent
23 Judgment shall be delivered to Englander’s counsel at the address provided in Section 3.4 below via
24 a tracked delivery service.

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1 **3.4 Payment Address**

2 All payments under this Consent Judgment shall be delivered to:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Englander’s Public Release of Proposition 65 Claims**

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

21 **4.2 Englander’s Individual Release of Claims**

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

1 **4.3 Polaris's Release of Englander**

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

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 if it is not approved and entered by the Court within one year after it has been fully
10 executed by the Parties, or by such additional time to which the Parties may agree in writing.

11 **6. ENFORCEMENT OF CONSENT JUDGMENT**

12 Only the Parties may enforce this Consent Judgment.

13 **7. SEVERABILITY**

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

17 **8. GOVERNING LAW**

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

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1 **9. 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 Polaris:

6 General Counsel
7 Polaris Industries Inc.
8 2100 Highway 55
9 Medina, MN 55340

10 with a copy to:

11 William Troutman, Esq.
12 Norton Rose Fulbright US LLP
13 555 South Flower Street, Forty-First Floor
14 Los Angeles, CA 90071

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 section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
Code section 25249.7(f), a noticed motion is required to obtain judicial approval of this Consent
Judgment, which Englander shall take the lead to draft and file and Polaris shall support, including
appearing at the hearing if so required.

1 **11. ENTIRE AGREEMENT**

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

10 **12. MODIFICATION**

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

14 **13. AUTHORIZATION**

15 The undersigned are authorized to execute this Consent Judgment and have read, understand,
16 and agree to all the terms and conditions contained herein.

17 **AGREED TO:**

AGREED TO:

18
19 Date: 6/14/2018

Date: 6/14/18

20 By: 
21 PETER ENGLANDER

By: 
POLARIS INDUSTRIES, INC.

22 S. Mike Gentile
23 Regulatory Affairs Attorney
24 Polaris Industries, Inc.
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