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Attorneys for Plaintiff
PETER ENGLANDER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER,

Plaintiff,

v.

TOO GOOD GOURMET, INC., *et al.*,

Defendants.

Case No. CGC-17-562573
[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 Too Good Gourmet, Inc. (“Too Good”), with Englander and Too Good each
5 individually 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 Too Good employs ten or more individuals and is a “person in the course of doing business”
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Too Good imports, sells, or distributes for sale in California, mugs with
16 exterior designs that contain lead without first providing the exposure warning required by
17 Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth defects
18 or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are mugs with exterior designs containing
21 lead, including, but not limited to, the *Too Good Gourmet Dark Chocolate Cocoa Mix and Mug Set*,
22 *UPC #6 59422 22255 4* that are manufactured, imported, distributed, sold and/or offered for sale in
23 California (“Products”).

24 **1.6 Notice of Violation**

25 On August 1, 2017, Englander served Too Good, and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”) alleging that Too Good violated Proposition
27 65 by failing to warn its customers and consumers in California of the health hazards associated with
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1 exposures to lead from the Products. No public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On November 20, 2017, Englander filed the instant action (“Complaint”), naming Too Good
5 as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the
6 subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

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2 **2. INJUNCTIVE RELIEF: PRODUCT REFORMULATION**

3 **2.1 Commitment to Reformulate**

4 Commencing on the Effective Date and continuing thereafter, Too Good agrees to only
5 manufacture, import, distribute, sell or offer for sale in California, Products that are Reformulated
6 Products as defined by Section 2.2, below.

7 **2.2 Reformulation Standard**

8 On or before the Effective Date and continuing thereafter, Too Good agrees to only
9 manufacture, import, distribute, sell or offer for sale in or into California, "Reformulated Products".
10 For the purposes of this Settlement Agreement, Reformulated Products are defined as Products that
11 (a) contain lead in concentrations of no more than 100 parts per million ("ppm") in any exterior
12 decorations analyzed pursuant to U.S. Environmental Protection Agency ("EPA") testing
13 methodologies 3050B and 6010B; (b) yield a result of no more than 1.0 micrograms of lead on any
14 surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol; and (c) yield a result of
15 "Non-detect" (defined as no more than 25 ppm Lead content) in any decoration(s) located in the
16 upper 20 centimeters of a Product, i.e., the "Lip-and-Rim" area of the vessel, or on any decoration(s)
17 located on the interior surface of the Product (i.e., the beverage-containing portion) when analyzed
18 pursuant to EPA testing methodologies 3050B and 6010B. In addition to the testing methodologies
19 provided above, the Parties may use equivalent methodologies utilized by state or federal agencies for
20 the purpose of determining lead content in a solid substance to analyze a Product for the purpose of
21 determining whether it qualifies as a Reformulated Product under this Settlement Agreement.

22 **3. MONETARY SETTLEMENT TERMS**

23 **3.1 Civil Penalty Payments**

24 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
25 referred to in the Notice, Complaint, and this Consent Judgment, Too Good shall pay \$2,500 in civil
26 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section
27 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
28 of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent

1 (25%) of the penalty retained by Englander. Englander’s counsel shall be responsible for delivering
2 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment. Too Good shall
3 provide its payment in a check made payable to “Peter Englander, Client Trust Account” in the
4 amount of \$1,875 and a check made payable to “OEHHA” in the amount of \$625 to be delivered to
5 the address provided in Section 3.3, below.

6 **3.2 Reimbursement of Attorney’s Fees and Costs**

7 The parties acknowledge that Englander and his counsel offered to resolve this dispute
8 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
9 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
10 the other settlement terms had been finalized, the Parties negotiated the compensation due to
11 Englander and his counsel under general contract principles and the private attorney general doctrine
12 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
13 mutual execution of this Consent Judgment, and court approval of the same, but exclusive of fees and
14 costs on appeal, if any. Under these legal principles, Too Good shall pay \$23,500 for all fees and
15 costs incurred by Englander investigating, bringing this matter to Too Good’s attention, litigating and
16 negotiating a settlement in the public interest. Too Good agrees to make 2 equal installments, with
17 the first installment due within five (5) days of the Effective Date or November 1, 2018, whichever is
18 later, and the second installment due within forty-five (45) days of the Effective Date or January 15,
19 2019, whichever is later. Too Good’s payment shall be delivered to the address in Section 3.4 in a
20 check payable to “The Chanler Group.”

21 **3.4 Payment Address**

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

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Englander’s Public Release of Proposition 65 Claims**

3 Englander, acting on his own behalf and in the public interest, Englander releases Too Good
4 and its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
5 employees, and attorneys (“Releasees”), and each entity to whom Too Good directly or indirectly
6 distributes or sells the Products including, without limitation, its downstream customers,
7 distributors, wholesalers, and retailers (“Downstream Releasees”) for any violation arising under
8 Proposition 65 pertaining to the failure to warn about exposures to lead from Products sold or
9 distributed for sale by Too Good prior to the Effective Date, as set forth in the Notice. Compliance
10 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
11 exposures to lead from Products sold or distributed for sale by Too Good after the Effective Date.

12 **4.2 Englander’s Individual Release of Claims**

13 Englander, in his individual capacity only and *not* in any representative capacity, also
14 provides a release to Too Good, Releasees, and Downstream Releasees, which shall be effective as a
15 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
16 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any
17 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
18 alleged or actual exposures to lead in Products sold or distributed for sale by Too Good before the
19 Effective Date.

20 **4.3 Too Good’s Release of Englander**

21 Too Good, on its own behalf, and on behalf of its past and current agents, representatives,
22 attorneys, successors, and assignees, hereby waives any and all claims against Englander, and his
23 attorneys and other representatives, for any and all actions taken or statements made by Englander,
24 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
25 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

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1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if it is not approved and entered by the Court within one year after it has been fully
4 executed by the Parties, or by such additional time as the Parties may agree in writing.

5 **6. SEVERABILITY**

6 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
7 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
8 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, or is otherwise
12 rendered inapplicable by reason of law generally or as to the Products, then Too Good may provide
13 written notice to Englander of any asserted change in the law, and shall have no further injunctive
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected.

16 **8. NOTICE**

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

20 For Too Good:

21 Jennifer Finley, President
22 Too Good Gourmet, Inc.
23 2380 Grant Avenue
San Lorenzo, CA 94580

For Englander:

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

24 with a copy to:

25 Mark R. Kaster, Esq.
26 Dorsey & Whitney LLP
305 Lytton Ave
Palo Alto, CA 94301

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile signature, each of
3 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
4 same document.

5 **10. POST EXECUTION ACTIVITIES**

6 Englander agrees to comply with the reporting form requirements referenced in Health and
7 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
8 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement,
9 which motion Englander shall draft and file. In furtherance of obtaining such approval, the Parties
10 agree to mutually employ their best efforts, and those of their counsel, to support the entry of this
11 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
12 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
13 approval, responding to any objection that any third-party may file or lodge, and appearing at the
14 hearing before the Court if so requested.

15 **11. MODIFICATION**

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

19 **12. AUTHORIZATION**

20 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
21 have read, understand, and agree to all of the terms and conditions contained herein.

22 **AGREED TO:**

AGREED TO:

23
24 Date: 9/21/2018

Date: _____

25
26 By:  _____
PETER ENGLANDER

By: _____
Jennifer Finley, President
TOO GOOD GOURMET, INC.

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22 **AGREED TO:**

AGREED TO:

23
24 Date: _____

Date: 10-4-18 _____

25
26 By: _____
PETER ENGLANDER

By:  _____
Jennifer Finley, President
TOO GOOD GOURMET, INC.