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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 TWELVE, INC., *et al.*,

17 Defendants.
18

Case No. CGC-17-562406

[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 Twelve, Inc. (“Twelve”), with Englander and Twelve each individually referred
5 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 Twelve 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 Twelve has imported, sold, or distributed for sale in California,
16 headphones with vinyl/PVC components that contain di(2-ethylhexyl)phthalate (“DEHP”) without
17 first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to
18 Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are headphones with vinyl/PVC components
21 containing DEHP, including, but not limited to, the *Headphones, UPC #8 15974 02235 0*,
22 manufactured, imported, distributed, sold and/or offered for sale in California by Twelve
23 (“Products”).

24 **1.6 Notice of Violation**

25 On August 1, 2017, Englander served Twelve, its retail customer in California, Macy’s Inc.,
26 and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging
27 that Twelve violated Proposition 65 by failing to warn its customers and consumers in California of
28

1 the health hazards associated with exposures to DEHP from the Products. No public enforcer has
2 commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On November 9, 2017, Englander filed the instant action (“Complaint”), naming Twelve as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 Twelve 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 Twelve’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 Twelve as to the allegations in the Complaint, that venue is proper in the County of
19 San Francisco, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 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.

25 **2. INJUNCTIVE RELIEF: PRODUCT REFORMULATION AND WARNINGS**

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing on the Effective Date and continuing thereafter, Twelve agrees to only
28 manufacture, import, distribute, sell or offer for sale in California, Products that are either (a)

1 Reformulated Products as defined by Section 2.2, below, or (b) Products that bear a clear and
2 reasonable health hazard warning pursuant to Section 2.3 below. The parties agree that Products that
3 entered the stream of commerce prior to the Effective Date are subject to the releases provided in
4 Section 4.1 and 4.2 below.

5 **2.2 Reformulation Standard**

6 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
7 that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%) when analyzed
8 pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies 3580A and 8270C
9 or equivalent methodologies utilized by state or federal agencies for the purpose of determining
10 DEHP content in a solid substance.

11 **2.3 Clear and Reasonable Warnings**

12 Commencing on the Effective Date, Twelve shall provide clear and reasonable health hazard
13 warnings for all non-Reformulated Products it sells or distributes in California after the Effective
14 Date. Twelve agrees to only offer such non-Reformulated Products for sale with a clear and
15 reasonable warning in accordance with this Section, or Title 27 California Code of Regulations
16 section 25602 and 25603. Twelve agrees that the warning will be prominently placed with such
17 conspicuousness when compared with other words, statements, designs, or devices as to render it
18 likely to be read and understood by an ordinary individual under customary conditions before
19 purchase or use. For purposes of this Consent Judgment, a clear and reasonable warning shall consist
20 of a warning affixed to or printed on the packaging, label, tag, or directly to a Product sold in
21 California and containing the following statement:

22
23 **⚠WARNING:** This product can expose you to chemicals
24 including DEHP, which is known to the
25 State of California to cause birth defects
26 or other reproductive harm. For more
27 information go to www.P65Warnings.ca.gov.
28

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
4 referred to in the Notice, Complaint, and this Consent Judgment, Twelve shall pay \$2,000 in civil
5 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section
6 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
7 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
8 (25%) of the penalty retained by Englander. Englander’s counsel shall be responsible for delivering
9 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment. Twelve shall
10 provide its payment in a check made payable to “Peter Englander, Client Trust Account” in the
11 amount of \$500 and a check made payable to “OEHHA” in the amount of \$1,500 to be delivered to
12 the address provided in Section 3.3, below.

13 **3.2 Reimbursement of Attorney’s Fees and Costs**

14 The parties acknowledge that Englander and his counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
16 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
17 the other settlement terms had been finalized, the Parties negotiated the compensation due to
18 Englander and his counsel under general contract principles and the private attorney general doctrine
19 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
20 mutual execution of this Consent Judgment, and court approval of the same, but exclusive of fees and
21 costs on appeal, if any. Under these legal principles, Twelve shall pay \$10,000 for all fees and costs
22 incurred by Englander investigating, bringing this matter to Twelve’s attention, litigating and
23 negotiating a settlement in the public interest. Twelve’s payment shall be delivered to the address in
24 Section 3.4 in a check payable to “The Chanler Group.”

1 **3.3 Payment Timing; Payments Held in Trust**

2 All payments due under this Consent Judgment shall be held in trust until such time as the
3 Court approves the Parties' settlement. Within five (5) days of the date that this Consent Judgment is
4 fully executed by the Parties, all payments due under this agreement shall be delivered to Twelve's
5 counsel and held in trust until the Effective Date. Twelve's counsel shall provide Englander's
6 counsel with written confirmation upon its receipt of the settlement payments. Within five days of
7 the Effective Date, Twelve's counsel shall deliver the civil penalty and attorneys' fee reimbursement
8 payments to Englander's counsel.

9 **3.4 Payment Address**

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

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

14 **4. CLAIMS COVERED AND RELEASED**

15 **4.1 Englander's Public Release of Proposition 65 Claims**

16 Englander, acting on his own behalf and in the public interest, releases Twelve and its
17 parents, subsidiaries, insurers, affiliated entities under common ownership, directors, officers,
18 employees, and attorneys ("Releasees"), and each entity to whom Twelve directly or indirectly
19 distributes or sells the Products including, without limitation, its downstream customers,
20 distributors, wholesalers, and retailers (including without limitation, Macy's Inc.) (collectively,
21 "Downstream Releasees") for any violation arising under Proposition 65 pertaining to the failure to
22 warn about exposures to DEHP from Products sold or distributed for sale by Twelve prior to the
23 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
24 constitutes compliance with Proposition 65 with respect to exposures to DEHP from Products sold
25 or distributed for sale by Twelve after the Effective Date.

26 **4.2 Englander's Individual Release of Claims**

27 Englander, in his individual capacity only and *not* in any representative capacity, also
28 provides a release to Twelve, Releasees, and Downstream Releasees, which shall be effective as a

1 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
2 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Englander of any
3 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
4 alleged or actual exposures to DEHP in Products sold or distributed for sale by Twelve before the
5 Effective Date.

6 **4.3 Twelve's Release of Englander**

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

12 **5. COURT APPROVAL**

13 This Consent Judgment is not effective until it is approved and entered by the Court and shall
14 be null and void if it is not approved and entered by the Court within one year after it has been fully
15 executed by the Parties, or by such additional time as the Parties may agree in writing. In the event
16 that on one or more provisions of this Consent Judgment is not approved, Englander and Twelve
17 agree to meet and confer to obtain approval of the Consent Judgment in a timely manner.

18 **6. SEVERABILITY**

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

22 **7. GOVERNING LAW**

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

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 the following addresses:

5 For Twelve:

6 Katherine Wickes Conovitz, President
7 Twelve Inc.
8 45 Main Street, Suite 615
9 Brooklyn, NY 11201

10 with a copy to:

11 Steven M. Lucks, Esq.
12 Fishkin Lucks
13 277 Broadway, Suite 408
14 New York, New York 10007

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 signature, each of
25 which shall be deemed an original, and all of which, when taken together, shall constitute one and the
26 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 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 as judgment, and to obtain judicial approval of their settlement in a timely manner. For

1 purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for
2 approval, and responding to any objection that any third-party may file or lodge.

3 **11. MODIFICATION**

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

7 **12. AUTHORIZATION**

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

10
11 **AGREED TO:**

12
13 Date: 4/25/2018

14
15 By:

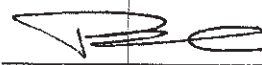
16 
17 PETER ENGLANDER

11 **AGREED TO:**

12
13 Date:

14 4/23/17

15 By:

16 
17 Brandon Conovitz, Chief, Global Operations
18 TWELVE, INC.