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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION
11

12 PETER ENGLANDER,
13 Plaintiff,
14 v.
15 KIRKLAND'S, INC.; *et al.*,
16 Defendant.

Case No. 17CV320045

[PROPOSED] CONSENT JUDGMENT

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

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered by and between plaintiff Peter Englander (“Englander”),
4 and Kirkland’s, Inc. (“Kirkland’s”) with Englander and Kirkland’s each individually referred to as a
5 “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 Englander alleges that Kirkland’s employs ten or more individuals and is a “person in the
12 course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of
13 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Kirkland’s manufactures, sells, and distributes for sale in California
16 glass canisters with exterior designs, as identified in Section 1.5, containing lead, and that it does so
17 without first providing the health hazard warning required by Proposition 65. Lead is listed pursuant
18 to Proposition 65 as a 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 the following glass
21 canisters with exterior designs, specifically the *Homestead Living Canister Glass, SKU #26-157062*,
22 that are imported, manufactured, sold, or distributed for sale in California by Kirkland’s.

23 **1.6 Notice of Violation**

24 On August 17, 2017, Englander represents and warrants that he served Kirkland’s, the
25 California Attorney General, and all other requisite public enforcers with a 60-Day Notice of
26 Violation (“Notice”). The Notice alleges that Kirkland’s violated Proposition 65 by failing to warn
27 its customers and consumers in California of the health risks associated with exposures to lead from
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1 the Products. No public enforcer has commenced or is diligently prosecuting an action to enforce the
2 violations alleged in the Notice.

3 **1.7 Complaint**

4 On December 5, 2017, Englander filed the instant action (“Complaint”), naming Kirkland’s as
5 a defendant for the alleged violations that are the subject of the Notice.

6 **1.8 No Admission**

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

15 **1.9 Jurisdiction**

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

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
22 the Motion for Approval of the Consent Judgment is granted, including any unopposed tentative
23 ruling of the court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

25 **2.1 Commitment to Reformulate Products or Provide Warnings**

26 Commencing 30 days from the Effective Date and continuing thereafter, Kirkland’s shall only
27 purchase for sale or manufacture for sale in California “Reformulated Products” as defined by
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1 Section 2.2, or Products that are labeled with a clear and reasonable warning as set forth under
2 Sections 2.3 through 2.6.


3 **2.2 Reformulated Products Defined**

4 For purposes of this Consent Judgment, Reformulated Products are defined as Products that:
5 (a) contain lead in concentrations of no more than 90 parts per million (“ppm”) in any exterior
6 decorations analyzed pursuant to U.S. Environmental Protection Agency (“EPA”) testing
7 methodologies 3050B and 6010B; and (b) yield a result of no more than 1.0 micrograms of lead on
8 any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol. In addition to the
9 testing methodologies provided above, the Parties may use equivalent methodologies utilized by state
10 or federal agencies for the purpose of determining lead content in a solid substance to analyze a
11 Product for the purpose of determining whether it qualifies as a Reformulated Product under this
12 Consent Judgment.

13 **2.3 Clear and Reasonable Warnings**

14 Commencing on or before the Effective Date, Kirkland’s shall provide clear and reasonable
15 warnings for all Products provided for sale to customers in California in accordance with this Section
16 and/or Title 27, California Code of Regulations, § 25600, *et seq.*, as amended from time to time.
17 Each warning shall be prominently placed with such conspicuousness as compared with other words,
18 statements, designs, or devices as to render it likely to be read and understood by an ordinary
19 individual under customary conditions before purchase or use and shall be provided in a manner such
20 that it is clearly associated with the specific Product to which the warning applies.

21 (a) **Warning.** The warning shall consist of the following statement (Warning):

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

1 **(b) Short-Form Warning.** Kirkland’s may, but is not required to, use the
2 following short-form warning as set forth in this subsection 2.3(b) (Short-Form Warning), and subject
3 to the additional requirements in Sections 2.5 and 2.6, as follows:

4  **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov

5
6 **2.4 Product Warnings**

7 Kirkland’s shall affix a warning to the Product label or otherwise directly on each Product
8 provided for sale in retail outlets in California or sold via mail order catalog and/or the internet to
9 customers located in California. For the purpose of this agreement, “Product label” means a display
10 of written, printed or graphic material that is printed on or affixed to a Product or its immediate
11 container or wrapper. The entire warning shall appear in a type size of at least 6-point type and no
12 smaller than the largest type size used for other consumer information on the product. The warning
13 shall consist of either the Warning, or the Short-Form Warning described in subsection 2.3(a) or (b),
14 respectively.

15 **2.5 Mail Order Catalog Warnings**

16 In the event that, after the Effective Date, Kirkland’s prints new catalogs and sells Products
17 via mail order through such catalogs to customers located in California, Kirkland’s shall provide a
18 warning for each Product both on the Product label in accordance with Section 2.4, and in the catalog
19 in a manner that clearly associates the warning with the specific Product being purchased. Any
20 warning provided in a mail order catalog shall be in the same type size or larger than other consumer
21 information provided for the Product within the catalog and shall be provided on the same page and
22 in the same location as the display and/or description of the Product. The catalog warning may use
23 the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product
24 label also uses the Short-Form Warning content.

25 **2.6 Internet Warnings**

26 If, after the Effective Date, Kirkland’s sells Products via the internet to customers located in
27 California, Kirkland’s shall provide warnings for each Product both on the Product label in
28 accordance with Section 2.4, and by prominently displaying the warning to the customer prior to

1 completing the purchase or during the purchase of the Products without requiring customers to seek
2 out the warning. Warnings given in conjunction with the sale of the Products via the internet shall
3 appear either: (i) on the same web page on which the Product is displayed; (ii) on the same web page
4 as the order form for the Product; or (iii) on one or more web pages displayed to a purchaser during
5 the checkout process. The warning shall appear in any of the above instances adjacent to or
6 immediately following the display or description of the Product for which it is given in the same type
7 size or larger than the Product description text. The internet warning may use the Short-Form
8 Warning content described in Section 2.3(b) if the warning provided on the Product label also uses
9 the Short-Form Warning content. Kirkland's may also comply with this Section by providing the
10 warning using a clearly marked hyperlink that includes the word "WARNING" on the same web
11 page and in the same location as the display and/or description of the Product.

12 **3. MONETARY SETTLEMENT TERMS**

13 **3.1 Civil Penalty Payment**

14 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
15 to in the Notice, Complaint, and this Consent Judgment, Kirkland's shall pay a total of \$4,000 in civil
16 penalties. Kirkland's civil penalty payment shall be allocated according to Health and Safety Code
17 section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California
18 Office of Environmental Health Hazard Assessment ("OEHHA"), and twenty-five percent (25%) of
19 the funds remitted to Englander. Kirkland's shall provide its payment in two checks for the following
20 amounts made payable to: (a) "OEHHA" in the amount of \$3,000; and (b) "Peter Englander, Client
21 Trust Account" in the amount of \$1,000. Englander's counsel shall be responsible for delivering the
22 penalty payment to OEHHA. Kirkland's shall issue three separate 1099 forms to OEHHA,
23 Englander and The Chanler Group for the respective amount paid to each under this agreement.

24 **3.2 Reimbursement of Attorney's Fees and Costs**

25 The parties acknowledge that Englander and his counsel offered to resolve this dispute
26 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to
27 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
28 other settlement terms had been finalized, the Parties negotiated a reimbursement of the

1 compensation due to Englander and his counsel under general contract principles and the private
2 attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all work
3 performed through the approval and entry of this Consent Judgment, but exclusive of fees on appeal,
4 if any. Accordingly, Kirkland's agrees to pay \$25,700 to "The Chanler Group" for all fees and costs
5 incurred by Englander investigating, bringing this matter to Kirkland's attention, litigating and
6 negotiating a settlement in the public interest, and obtaining court approval of the same.

7 **3.3 Payment Timing; Payments Held in Trust**

8 All payments due under this Consent Judgment shall be held in trust until the Court approves
9 the Parties' settlement. Kirkland's shall deliver its civil penalty and attorneys' fee reimbursement
10 payments to its counsel within fifteen (15) days of the date that this Consent Judgment is fully
11 executed by the Parties. Kirkland's counsel shall provide Englander's counsel with written
12 confirmation following its receipt of the settlement funds. Thereafter, Kirkland's counsel shall hold
13 the settlement funds in trust until, and disburse the funds to Englander's counsel within five (5) days
14 after the court approves the settlement, including an uncontested tentative ruling.

15 **3.4 Payment Address**

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

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 **4. CLAIMS COVERED AND RELEASED**

23 **4.1 Englander's Release of Proposition 65 Claims**

24 Englander, acting in the public interest and acting on his own behalf and on behalf of his past
25 and current attorneys, agents, representatives, successors, and assigns, waives all rights to institute or
26 participate in (directly or indirectly) any form of legal action, and releases and waives all actions,
27 causes of action, obligations, costs, expenses, fees (including, but not limited to, attorneys' fees,
28 investigation fees, and expert fees), damages, losses, claims, liabilities and demands (collectively,
"Claims") against Kirkland's, its parents, subsidiaries, affiliated entities under common ownership,
directors, officers, shareholders, employees, attorneys, representatives, successors, and assigns, and

1 each entity to whom Kirkland’s directly or indirectly distributes or sells Products, including, but not
2 limited to, its downstream distributors, wholesalers, customers, retailers, franchisers, franchisees,
3 cooperative members, licensors, licensees, and the manufacturers, importers, and suppliers of the
4 Products (collectively, “Releasees”), with respect to any alleged violations arising under Proposition
5 65 for unwarned exposures to lead from the Products manufactured, imported, distributed, or sold by
6 Kirkland’s prior to the Effective Date, as set forth in the Notice and Complaint. This Consent
7 Judgment is a full, final, and binding resolution as to the Claims referenced in this Section 4.1.
8 Compliance with the terms of this Consent Judgment by Kirkland’s constitutes compliance with
9 Proposition 65 by Releasees with respect to any exposures to lead in Products manufactured,
10 imported, sold, or distributed for sale by Kirkland’s after the Effective Date.

11 **4.2 Englander’s Individual Release of Claims**

12 Englander, in his individual capacity only and *not* in his representative capacity, also provides
13 a release on behalf of himself, his past and current agents, representatives, attorneys, successors, and
14 assigns as to all Releasees, which shall be effective as a full and final accord and satisfaction, as a bar
15 to all Claims of any nature, character, or kind, whether known or unknown, suspected or unsuspected,
16 arising out of alleged or actual exposures to lead in Products imported, manufactured, distributed, or
17 sold by Kirkland’s before the Effective Date.

18 **4.3 Kirkland’s Release of Englander**

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

24 **5. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and shall
26 be null and void if it is not approved and entered by the Court within one year after it has been fully
27 executed by the Parties, or by such additional time to which the Parties may agree in writing.
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1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. If Proposition 65 is repealed, preempted, or otherwise
8 rendered inapplicable by reason of law generally, or as to the Products, then Kirkland’s may provide
9 written notice to Englander of any asserted change in the law, and shall have no further injunctive
10 obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products are
11 so affected.

12 **8. NOTICE**

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

16 For Kirkland’s:

17 President
18 Kirkland’s, Inc.
19 5310 Maryland Way
20 Brentwood, TN 37027

21 For Englander:

22 Proposition 65 Coordinator
23 The Chanler Group
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710-2565

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

1 **9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or portable
3 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
4 taken together, shall constitute one and the 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 this Consent
9 Judgment, which Englander shall take the lead to draft and file, and Kirkland's shall support,
10 including appearing at the hearing if so required.

11 **11. MODIFICATION**

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

15 **12. AUTHORIZATION**

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

18 **AGREED TO:**

AGREED TO:

19
20 Date: August 29, 2018

Date: August 29, 2018

21
22 By: 

PETER ENGLANDER

21
22 By: 

KIRKLAND'S INC.