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Clifford A. Chanler, State Bar No. 135534
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THE CHANLER GROUP
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102 b 6/4/14

Attorneys for Plaintiff
PETER ENGLANDER

FILED
SAN MATEO COUNTY

JUN - 9 2014

Clerk of the Superior Court
By [Signature]
DEPUTY CLERK

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

PETER ENGLANDER,
Plaintiff,
v.
TOPCO HOLDINGS, INC.; et al.,
Defendants.

Case No. CIV519234
~~PROPOSED~~ ^{102 b} JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENT AND CONSENT
JUDGMENT
Date:
Time: 9:00 a.m.
Dept. 7
Judge: Hon. Steven L. Dylina

1 Plaintiff Peter Englander and Defendant Topco Holdings, Inc., having agreed
2 through their respective counsel that Judgment be entered pursuant to the terms of their
3 settlement agreement in the form of a Consent Judgment, and following this Court's
4 issuance of an order approving the Proposition 65 settlement and Consent Judgment,

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to
6 Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6,
7 judgment is hereby entered in accordance with the terms of the Consent Judgment attached
8 hereto as Exhibit 1. By stipulation of the parties, the Court will retain jurisdiction to
9 enforce the terms of the settlement under Code of Civil Procedure section 664.6.

10 **IT IS SO ORDERED.**

11
12
13 Dated: 6/4/14
14 *Nunc pro tunc to*
15 *10/17/13*

Deborah J. Bennett

JUDGE OF THE SUPERIOR COURT

ex. A

1 THE CHANLER GROUP
2 CLIFFORD A. CHANLER, State Bar No. 135534
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17 Attorneys for Defendant
18 TOPCO HOLDINGS, INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SAN MATEO
21 UNLIMITED CIVIL JURISDICTION

22 PETER ENGLANDER,
23 Plaintiff,

24 v.

25 TOPCO HOLDINGS, INC. and DOES 1-150,
26 inclusive,
27 Defendants.

Case No. CIV519234

**CONSENT TO JUDGMENT AS
TO TOPCO HOLDINGS, INC.**

Date:
Time:
Dept:
Judge:

1 **1. INTRODUCTION**

2 **1.1 Peter Englander and Topco Holdings, Inc.**

3 This Consent To Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander” or “Plaintiff”) and defendant Topco Holdings, Inc. (“Topco” or “Defendant”), with
5 Englander and Topco collectively referred to as the “Parties”.

6 **1.2 Peter Englander**

7 Englander is an individual residing in the State of California who seeks to promote
8 awareness of exposure to toxic chemicals and improve human health by reducing or eliminating
9 hazardous substances contained in consumer and commercial products.

10 **1.3 General Allegations**

11 Englander alleges that Topco has manufactured, imported, distributed and/or sold
12 aquarium nets with vinyl/PVC handles containing Di(2-ethylhexyl)phthalate (“DEHP”) for use in
13 the State of California without the requisite health hazard warnings. DEHP is listed pursuant to
14 Proposition 65 as a chemical known to the State of California to cause birth defects and other
15 reproductive harm.

16 **1.4 Notice of Violation**

17 On October 26, 2012, Englander served Topco and various public enforcement agencies
18 with a document entitled “60-Day Notice of Violation,” that alleged that Topco violated
19 Proposition 65 by failing to warn consumers that aquarium nets with vinyl/PVC handles
20 including, but not limited to, the *Fin's Finest Easy Net, Item #84071, QN3T, (#0 36800 84071 3)*
21 (“Covered Products”), exposed users in California to a chemical called DEHP.

22 **1.5 Complaint**

23 On January 17, 2013, Englander, acting in the interest of the general public in California,
24 filed a Complaint in the instant action (“Complaint”) naming Topco as a defendant and alleging
25 violations of Health & Safety Code section 25249.6, *et seq.*, based on, *inter alia*, alleged
26 occupational and consumer exposures to the DEHP contained in the Covered Products sold in
27 California without the clear and reasonable warning required by Proposition 65.

28

1 **1.6 No Admission**

2 The Parties enter into this Consent To Judgment as a full and final settlement of all claims
3 that were raised in the Complaint or that could have been raised in the Complaint, arising out of
4 the facts or conduct alleged therein. By execution of this Consent To Judgment and agreeing to
5 comply with its terms, Topco does not admit any facts or conclusions of law including, but not
6 limited to, any facts or conclusions of law suggesting or demonstrating any violations of
7 Proposition 65 or any other statutory, common law or equitable requirements relating to DEHP in
8 Covered Products. Nothing in this Consent To Judgment shall be construed as an admission by
9 Topco of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with
10 the Consent To Judgment constitute or be construed as an admission by Topco of any fact,
11 conclusion of law, issue of law, or violation of law. Nothing in this Consent To Judgment shall
12 prejudice, waive or impair any right, remedy, argument or defense Topco may have in this or any
13 other or future legal proceedings. This Consent To Judgment is the product of negotiation and
14 compromise and is accepted by Topco for purposes of settling, compromising, and resolving
15 issues disputed in this action. However, this section shall not diminish or otherwise affect the
16 obligations, responsibilities and duties of Topco under this Consent To Judgment.

17 **1.7 Consent to Jurisdiction**

18 For purposes of this Consent To Judgment only, Topco stipulates that this Court has
19 jurisdiction over Topco as to the allegations contained in the Complaint, that venue is proper in
20 the County of San Mateo and that this Court has jurisdiction to enter and enforce the provisions of
21 this Consent To Judgment.

22 **2. DEFINITIONS**

23 **2.1** "Covered Product[s]" means aquarium nets with vinyl/PVC handles.

24 **2.2** "Effective Date" means the date this Consent To Judgment is approved by the
25 court.

26 **2.3** "DEHP Limits" means the maximum concentration of DEHP and DEHP
27 composites by weight specified in Section 3.2.

28

1 **2.4** “Manufactured” and “Manufactures” have the meaning defined in Section 3(a)(10)
2 of the Consumer Product Safety Act (“CPSA”) [15 U.S.C. § 2052(a)(10)],¹ as amended from time
3 to time.

4 **2.5** “Vendor” means a person or entity that Manufactures, imports, distributes, or
5 supplies a product to Topco.

6 **3. INJUNCTIVE RELIEF: REFORMULATION**

7 **3.1 Specification Compliance Date**

8 To the extent it has not already done so, no later than the Effective Date, Topco shall
9 provide the DEHP Limits to its Vendors of Covered Products that will be sold or offered for sale
10 to California consumers and shall instruct each Vendor to use reasonable efforts to provide
11 Covered Products that comply with the DEHP Limits on a nationwide basis.

12 **3.2 DEHP Limits**

13 As of thirty (30) days after the Effective Date, Topco shall not issue a purchase order,
14 manufacture, or cause to be Manufactured, any Covered Product that will be sold or offered for
15 sale to California consumers that exceeds the following DEHP Limits:

16 DEHP in concentrations more than 0.1 percent
17 (1,000 parts per million) by weight in each accessible
18 component when analyzed pursuant to U.S. Environmental
19 Protection Agency testing methodologies 3580A and
20 8270C or any other methodology authorized by federal
 or state agencies for the purpose of determining the DEHP
 content in a solid substance.

21 **4. ENFORCEMENT OF CONSENT TO JUDGMENT**

22 **4.1** After the Effective Date, any Party may, after meeting and conferring, by motion
23 or application for an order to show cause before this Court, enforce the terms and conditions
24 contained in this Consent To Judgment. Enforcement of the terms and conditions of Section 3.2
25 of this Consent To Judgment shall be brought exclusively pursuant to Sections 4.2 through 4.4.

26
27 ¹ As of the Effective Date, the term “Manufactured” and “Manufactures” means to manufacture,
28 produce, or assemble.

1 **4.2** Within 30 days after the Effective Date, Topco shall notify Englander of any
2 information sufficient to allow Englander to identify Covered Products supplied or offered for
3 sale by Topco on or after that date (for example, by a unique brand name or product characteristic
4 system of assigned product number or other labeling). Information provided by Topco to
5 Englander under this Section 4.2, including the identity of parties to contracts between Topco and
6 third parties, may be designated by Topco as competitively sensitive, confidential business
7 information. If so designated by Topco along with the identification information, such
8 information shall not be disclosed to any person by Englander, outside of his attorneys, without
9 the written permission of Topco. Any motions or pleadings or other Court filings that include
10 information designated by Topco as competitively sensitive confidential business information
11 under this Section 4.2 shall be submitted to the Court in accordance with California Rules of
12 Court Rule 8.160 and Rule 2.550, et seq.

13 **4.3** **Notice of Violation.** Englander may seek to enforce the requirements of Section
14 3.2 by issuing a Notice of Violation pursuant to this Section 4.3.

15 **4.3.1 Service of Notice.** Englander shall serve the Notice of Violation on Topco
16 within 45 days of the date the alleged violation(s) was or were observed, provided,
17 however, that Englander may have up to an additional 45 days to provide Topco with the
18 test data required by Section 4.3.2(d) below if it has not yet obtained it from its laboratory.

19 **4.3.2 Supporting Documentation.** The Notice of Violation shall, at a minimum,
20 set forth for each Covered Product: (a) the date(s) the alleged violation(s) was observed,
21 (b) the location at which the Covered Product was offered for sale, (c) a description of the
22 Covered Product giving rise to the alleged violation, and of each Accessible Component²
23 that is alleged not to comply with the DEHP Limits, including a picture of the Covered
24 Product and all identifying information on tags and labels, and (d) all test data obtained by
25 Englander regarding the Covered Product. Wipe, swipe, x-ray fluorescence, and swab
26

27 _____
28 ² "Accessible Component" means a soft plastic, vinyl, or synthetic leather component that could
be touched by a person during reasonably foreseeable use.

1 testing are not by themselves sufficient to support a Notice of Violation, although any
2 such testing may be used as additional support for a Notice.

3 **4.3.3 Multiple Notices.** If Topco has received more than four Notices of
4 Violation in any 12-month period, at Englander's option, Englander may seek whatever
5 fines, costs, penalties, or remedies are provided by law for failure to comply with the
6 Consent To Judgment. For purposes of determining the number of Notices of Violation
7 pursuant to this Section 4.3.3, the following shall be excluded:

8 (a) Multiple notices identifying Covered Products Manufactured for or
9 sold to Topco from the same Vendor; and

10 (b) A Notice of Violation that meets one or more of the provisions of
11 Section 4.4.3(b).

12 **4.4 Notice of Election.** Within 30 days of receiving a Notice of Violation pursuant to
13 Section 4.2, including the test data required pursuant to 4.3.2(d), Topco shall provide written
14 notice to Englander stating whether it elects to contest the allegations contained in the Notice of
15 Violation. Any such written notice from Topco to Englander under this Section shall be referred
16 to as a "Notice of Election." Failure to provide a Notice of Election shall be deemed an election
17 not to contest the Notice of Violation.

18 **4.4.1 Contested Notices.** If the Notice of Violation is contested, the Notice of
19 Election shall include all then-available documentary evidence regarding the alleged
20 violation, including any test data. Within 30 days the parties shall meet and confer to
21 attempt to resolve their dispute. Should such attempts at meeting and conferring fail,
22 Englander may file an enforcement motion or application pursuant to Section 4.1. If
23 Topco withdraws its Notice of Election to contest the Notice of Violation before any
24 motion concerning the violations alleged in the Notice of Violation is filed pursuant to
25 Section 4.1, Topco shall pay a civil penalty in the amount of \$12,500 to be apportioned in
26 accordance with the provision of Section 5.1 hereunder, and shall comply with all of the
27 non-monetary provisions of Section 4.4.2. If, at any time prior to reaching an agreement
28 or obtaining a decision from the Court, Englander or Topco acquires additional test or

1 other data regarding the alleged violation, it shall promptly provide all such data or
2 information to the other Party.

3 **4.4.2 Non-Contested Notices.** If the Notice of Violation is not contested, Topco
4 shall include in its Notice of Election a detailed description of corrective action that it has
5 undertaken or proposes to undertake to address the alleged violation. Any such correction
6 shall, at a minimum, provide reasonable assurance that the Covered Product will no longer
7 be offered by Topco or its customers for sale in California. If there is a dispute over the
8 sufficiency of the proposed corrective action or its implementation, Englander shall
9 promptly notify Topco and the Parties shall meet and confer before seeking the
10 intervention of the Court to resolve the dispute. In addition to the corrective action, Topco
11 shall pay a civil penalty in the amount of \$10,000 to be apportioned in accordance with
12 the provision of Section 5.1 hereunder unless one of the provisions of Section 4.4.3
13 applies.

14 **4.4.3 Limitations in Non-Contested Matters.**

15 (a) The monetary liability of Topco if it elects not to contest a Notice
16 of Violation before any motion concerning the violation(s) at issue has been filed shall be
17 limited to the contributions required by this Section 4.4.3, if any.

18 (b) The civil penalty shall be:

19 (i) One thousand seven hundred fifty dollars (\$1,750) to be
20 apportioned in accordance with the provision of Section 5.1 hereunder, if Topco,
21 prior to receiving and accepting for distribution or sale the Covered Product
22 identified in the Notice of Violation, obtained test results demonstrating that all of
23 the Accessible Components in the Covered Product identified in the Notice of
24 Violation complied with the applicable DEHP Limits, and further provided that
25 such test results would be sufficient to support a Notice of Violation and that the
26 testing was performed within two years prior to the date of the sales transaction on
27 which the Notice of Violation is based. Topco shall provide copies of such test
28 results and supporting documentation to Englander with its Notice of Election; or

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(ii) Not required or payable, if the Covered Product is otherwise released from liability for alleged violations of Proposition 65 with respect to DEHP by the terms of a separate settlement agreement or Consent To Judgment entered into under Health and Safety Code Section 25249.7 ("Qualified Settlement"); or

(iii) Not required or payable, if the Notice of Violation identifies the same Covered Product or Covered Products, differing only in size or color, that already have been the subject of another Notice of Violation within the preceding 12 months.

5. MONETARY PAYMENTS

5.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)

In settlement of all the claims referred to in this Consent To Judgment, Topco shall pay a total of \$12,000 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Englander, as follows:

5.1.1 Initial Civil Penalty. Topco shall pay an initial civil penalty in the amount of \$2,000 on or before August 31, 2013. Topco shall issue two separate checks to: (a) OEHHA in the amount of \$1,500; and (b) "The Chanler Group in Trust for Peter Englander" in the amount of \$500. All penalty payments shall be delivered to the addresses listed in Section 5.2 below.

5.1.2 Final Civil Penalty. Topco shall pay a final civil penalty of \$10,000 on or before February 28, 2014. The final civil penalty shall be waived in its entirety, however, if, no later than February 15, 2014, an officer of Topco provides Englander with written certification that, as of the date of such certification and continuing into the future, Topco has complied with Paragraphs 3.1 and 3.2. Englander must receive any such certification on or before February 15, 2014. The certification in lieu of a final civil penalty payment provided by this Section is a material term, and time is of the essence. If Topco fails to provide certification by the above-referenced date, Topco shall issue two separate checks for its final civil penalty payments to: (a)

1 OEHHA in the amount of \$7,500; and (b) "The Chanler Group in Trust for Peter Englander" in
2 the amount of \$2,500.

3 **5.2 Payment Procedures**

4 **5.2.1. Issuance of Payments.** Payments shall be delivered as follows:

5 (a) All payments owed to Englander, pursuant to Section 5.1, shall be
6 delivered to the following payment address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
13 Section 5.1, shall be delivered directly to OEHHA (Memo line "Prop
14 65 Penalties") at the following addresses:

15 For United States Postal Service Delivery:

16 Mike Gyrics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 P.O. Box 4010
20 Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

22 Mike Gyrics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 1001 I Street
26 Sacramento, CA 95814

27 With a copy of the checks payable to OEHHA mailed to The Chanler
28 Group at the address set forth above in 5.2.1(a), as proof of payment to
OEHHA.

29 **5.2.2 Issuance of 1099 Forms.** After each penalty payment, Topco shall issue
30 separate 1099 forms for each payment to OEHHA at the address listed in Section 5.2.1(b), and to
31 Englander, whose address and tax identification number shall be furnished upon request after
32 this Consent To Judgment has been fully executed by the Parties.

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5.3 Reimbursement of Plaintiff's Fees and Costs

The Parties acknowledge that Englander and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Topco then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Englander and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter, except fees that may be incurred on appeal. Under these legal principles, Topco shall pay the amount of \$18,000 for fees and costs incurred investigating, litigating and enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court's approval of this Consent To Judgment in the public interest.

This payment shall be delivered and made payable to The Chanler Group no later than August 31, 2013, at the address listed in Section 5.2.1(a) above.

6. CLAIMS COVERED AND RELEASE

6.1 This Consent To Judgment is a full, final, and binding resolution between Englander and Topco and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, and sister companies and their successors and assigns, including but not limited to Topco Associates, LLC, Lucky Stores, and Save Mart Supermarkets ("Defendant Releasees"), and their downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees, members, and any other person or entity to whom they directly or indirectly distribute or sell Covered Products, ("Downstream Defendant Releasees"), of any violation of Proposition 65 that has been asserted by Englander in the public interest, through a Proposition 65 60-Day Notice of Violation against Topco, Defendant Releasees, and Downstream Defendant Releasees regarding the failure to warn about exposure to DEHP in Covered Products. Defendant Releasees' compliance with this Consent To Judgment shall constitute compliance with Proposition 65 with respect to DEHP in Covered Products after the Effective Date.

1 **6.2** Englander on behalf of himself, his past and current agents, representatives,
2 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all
3 rights to institute or participate in, directly or indirectly, any form of legal action and releases all
4 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,
5 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,
6 but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever,
7 whether known or unknown, fixed or contingent (collectively "Claims"), against Topco,
8 Defendant Releasees, and Downstream Defendant Releasees arising from any violation of
9 Proposition 65 regarding the failure to warn about exposure to DEHP in Covered Products.

10 **6.3** Englander also, in his individual capacity only and *not* in his representative
11 capacity, provides a general release herein which shall be effective as a full and final accord and
12 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
13 damages, losses, claims, liabilities and demands of Englander of any nature, character or kind,
14 known or unknown, suspected or unsuspected, arising out of the subject matter of the Complaint.
15 Englander acknowledges that he is familiar with Section 1542 of the California Civil Code, which
16 provides as follows:

17 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
18 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
19 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
20 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
21 HER SETTLEMENT WITH THE DEBTOR.

22 Englander, in his individual capacity only and *not* in his representative capacity, expressly waives
23 and relinquishes any and all rights and benefits which he may have under, or which may be
24 conferred on him by the provisions of Section 1542 of the California Civil Code as well as under
25 any other state or federal statute or common law principle of similar effect, to the fullest extent
26 that he may lawfully waive such rights or benefits pertaining to the released matters. In
27 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
28 complete release notwithstanding the discovery or existence of any such additional or different
claims or facts arising out of the released matters.

1 This release is expressly limited to those claims that arise under Proposition 65, as such
2 claims relate to Defendant's alleged failure to warn about exposures to or identification of the
3 DEHP contained in the Covered Products, as such claims are identified in the Proposition 65 60-
4 Day Notice to Defendant and to the extent that any alleged violations occur prior to thirty (30)
5 days after the Effective Date. This Release does not release any person, party or entity from any
6 liability for any violation of Proposition 65 regarding the Covered Products that occur more than
7 thirty (30) days after the Effective Date.

8 The Parties further understand and agree that this release shall not extend upstream to any
9 entities, other than Defendant, that Manufactured the Covered Products or any component parts
10 thereof, or any distributors or suppliers who sold the Covered Products or any component parts
11 thereof to Defendant.

12 **6.4** Topco waives any and all Claims against Englander, his attorneys, and other
13 representatives for any and all actions taken or statements made (or those that could have been
14 taken or made) by Englander and his attorneys and other representatives, whether in the course of
15 investigating claims or otherwise seeking enforcement of Proposition 65 against them in this
16 matter, and/or with respect to the Covered Products.

17 **6.5** Topco also provides a general release herein which shall be effective as a full and
18 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
19 attorneys' fees, damages, losses, claims, liabilities and demands of Topco of any nature, character
20 or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the
21 Action. Topco acknowledges that it is familiar with Section 1542 of the California Civil Code,
22 which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
25 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
26 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
27 HER SETTLEMENT WITH THE DEBTOR.

26 Topco expressly waives and relinquishes any and all rights and benefits which it may have under,
27 or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as
28 well as under any other state or federal statute or common law principle of similar effect, to the

1 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.
2 In furtherance of such intention, the release hereby given shall be and remain in effect as a full
3 and complete release notwithstanding the discovery or existence of any such additional or
4 different claims or facts arising out of the released matters.

5 **7. COURT APPROVAL**

6 **7.1** By this Consent To Judgment and upon its approval, the Parties waive their right
7 to trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
8 including all pleadings, procedural, and discovery orders.

9 **7.2** The parties acknowledge that, pursuant to California Health & Safety Code §
10 25249.7, a noticed motion is required to obtain judicial approval of this Consent To Judgment,
11 which Englander shall file and Topco shall join.

12 **7.3** If this Consent To Judgment is not approved by the Court, (a) this Consent To
13 Judgment and any and all prior agreements between the Parties merged herein shall terminate and
14 become null and void, and the action shall revert to the status that existed prior to the execution
15 date of this Consent To Judgment; (b) no term of this Consent To Judgment or any draft thereof,
16 or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions,
17 shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this
18 action, or in any other proceeding; (c) the Parties agree to meet and confer to determine whether
19 to modify the terms of the Consent To Judgment and to resubmit it for approval, and (d) if the
20 Parties choose not to pursue a modified Consent Judgment or to appeal a decision denying
21 approval within 30 days of said denial or other non-approval, or in the event the Court approves
22 this Consent Judgment and any person successfully appeals that approval, all payments made
23 pursuant to this Consent Judgment will be returned to Defendant within fifteen (15) days of
24 written notice made to Englander.

25 **8. ATTORNEYS' FEES**

26 **8.1** Should Plaintiff prevail on any motion, application for an order to show cause or
27 other proceeding to enforce a violation of this Consent To Judgment, Plaintiff shall be entitled to
28 his reasonable attorneys' fees and costs incurred as a result of such motion or application. Should

1 Topco prevail on any motion application for an order to show cause or other proceeding, Topco
2 shall be awarded its reasonable attorneys' fees and costs as a result of such motion or application
3 upon a finding by the court that Plaintiff's prosecution of the motion or application lacked
4 substantial justification. For purposes of this Consent To Judgment, the term substantial
5 justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of
6 Civil Procedure Section 2016, *et seq.*

7 **8.2** Except as otherwise provided in this Consent To Judgment, each Party shall bear
8 its own attorneys' fees and costs.

9 **8.3** Nothing in this Section 8 shall preclude a Party from seeking an award of
10 sanctions pursuant to law.

11 **9. GOVERNING LAW**

12 **9.1** The terms of this Consent To Judgment shall be governed by the laws of the State
13 of California, and shall apply only to Covered Products offered for sale in the State of California.
14 In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
15 generally, or as to the Covered Products, then Topco shall have no further obligations pursuant to
16 this Consent To Judgment with respect to, and to the extent that, the Covered Products are so
17 affected.

18 **9.2** The Parties, including their counsel, have participated in the preparation of this
19 Consent To Judgment and this Consent To Judgment is the result of the joint efforts of the
20 Parties. This Consent To Judgment was subject to revision and modification by the Parties and
21 has been accepted and approved as to its final form by all Parties and their counsel. Accordingly,
22 any uncertainty or ambiguity existing in this Consent To Judgment shall not be interpreted against
23 any Party as a result of the manner of the preparation of this Consent To Judgment. Each Party to
24 this Consent To Judgment agrees that any statute or rule of construction providing that
25 ambiguities are to be resolved against the drafting Party should not be employed in the
26 interpretation of this Consent To Judgment and, in this regard, the Parties hereby waive California
27 Civil Code § 1654.

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1 **10. NOTICES**

2 **10.1** Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent To Judgment shall be in writing and personally delivered or sent by: (i)
4 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
5 Party by the other Party at the following addresses:

6 To Topco:

7 General Counsel
8 Topco Holdings, Inc.
9 7711 Gross Point Road
10 Skokie, Illinois 60077-2697

11 With a copy to:

12 Edward P. Sangster, Esq.
13 Megan Cesare-Eastman, Esq.
14 K&L Gates LLP
15 4 Embarcadero Center, Suite 1200
16 San Francisco, CA 94111

17 To Englander:

18 Proposition 65 Coordinator
19 The Chanler Group
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710-2565

23 **10.2** Any Party, from time to time, may specify in writing to the other Party a change of
24 address to which all notices and other communications shall be sent.

25 **11. MODIFICATION**

26 **11.1 Modification.** This Consent To Judgment may be modified by written agreement
27 of the Parties and upon entry of a modified Consent To Judgment by the court, or by motion of
28 any Party and entry of a modified Consent To Judgment by the court.

11.2 Subsequent Legislation. If, subsequent to the Effective Date, legislation or
regulation is adopted that addresses the DEHP content of Covered Products sold in California,
any Party shall be entitled to request that the Court modify the DEHP Limits of Section 3.2 of this
Consent To Judgment for good cause shown.

1 **11.3 Notice; Meet and Confer.** Any Party seeking to modify this Consent To
2 Judgment shall attempt in good faith to meet and confer with the other Party prior to filing a
3 motion to modify the Consent To Judgment.

4 **12. ENTIRE AGREEMENT**

5 **12.1** This Consent To Judgment contains the sole and entire agreement and
6 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
7 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby
8 merged herein and therein. No supplementation, modification, waiver, or termination of this
9 Consent To Judgment shall be binding unless executed in writing by the Party to be bound
10 thereby. No waiver of any of the provisions of this Consent To Judgment shall be deemed or
11 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall
12 such waiver constitute a continuing waiver.

13 **13. RETENTION OF JURISDICTION**

14 **13.1** This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent To Judgment and shall retain jurisdiction to enforce this Consent To Judgment, or any
16 provision thereof, under California Code of Civil Procedure section 664.6.

17 **14. COUNTERPARTS; FACSIMILE SIGNATURES**


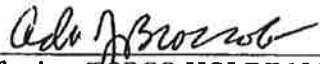
18 **14.1** This Consent To Judgment may be executed in counterparts and by facsimile or
19 portable document format (pdf), each of which shall be deemed an original, and all of which,
20 when taken together, shall constitute one and the same document.

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15. AUTHORIZATION

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

AGREED TO:	AGREED TO:
Date: <u>August 12, 2013</u>	Date: <u>8/8/13</u>
By:  <u>Plaintiff PETER ENGLANDER</u>	By:  <u>Defendant TOPCO HOLDINGS, INC.</u>