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Brian Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
PETER ENGLANDER

**ENDORSED
FILED
ALAMEDA COUNTY**

FEB 28 2014

CLERK OF THE SUPERIOR COURT
By YOLANDA ESTRADA deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER

Plaintiff,

v.

ASHLEY FURNITURE INDUSTRIES,
INC., *et al.*,

Defendants.

Case No. RG13672407

**~~PROPOSED~~ JUDGMENT PURSUANT
TO TERMS OF PROPOSITION 65
SETTLEMENTS AND CONSENT
JUDGMENTS AS TO DEFENDANTS
ASHLEY FURNITURE INDUSTRIES,
INC., BLUMENTHAL DISTRIBUTING,
INC. AND LIFESTYLE SOLUTIONS,
INC.**

Date: February 28, 2014
Time: 9:00 a.m.
Dept.: 17
Judge: Hon. George C. Hernandez, Jr.

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health and Safety Code section 25249.7(f)(4) and Code of Civil Procedure section 664.6, judgment is hereby entered in accordance with the terms of the Consent Judgments attached hereto as **Exhibits 1, 2, and 3**, and as further modified by the Order approving the Proposition 65 settlements and Consent Judgments. By stipulation of the parties, the Court will retain jurisdiction to enforce the settlements pursuant to Code of Civil Procedure section 664.6.

IT IS SO ORDERED.

Dated: FEB 28 2014

GEORGE C. HERNANDEZ, JR.
JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 PETER ENGLANDER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14 PETER ENGLANDER

15 Plaintiff,

16 v.

17 ASHLEY FURNITURE INDUSTRIES,
18 INC., et al.

19 Defendants.

Case No. RG13672407

*Assigned for All Purposes to
The Hon. George C. Hernandez, Jr.,
Department 17*

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT ASHLEY FURNITURE
INDUSTRIES, INC.**

(Health & Safety Code § 25249.5 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant Ashley Furniture Industries, Inc. (“Ashley”), with Englander and
5 Ashley each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Englander is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Ashley employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Englander alleges that Ashley manufactured, imported, sold and/or
16 distributed for sale in California, upholstered furniture with foam padding containing tris(1,3-
17 dichloro-2-propyl) phosphate (“TDCPP”) without providing the clear and reasonable health hazard
18 warnings required by Proposition 65.

19 1.4.2 On October 28, 2011, California identified and listed TDCPP Pursuant to
20 Proposition 65, as a chemical known to cause cancer. TDCPP became subject to the “clear and
21 reasonable warning” requirements of the act one year later on October 28, 2012. Cal. Code Regs.,
22 tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander alleges that
23 TDCPP escapes from the foam padding components resulting in human exposures.

24 **1.5 Product Description**

25 The categories of products that are covered by this Consent Judgment are identified on
26 Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied, shaped or manufactured for
27 use as a component of another product, such as upholstered furniture, but which is not itself a
28 finished product, is specifically excluded from the definition of Products included on Exhibit A.

1 **1.6 Notices of Violation**

2 On January 4, 2013, Englander served Ashley and certain requisite public enforcement
3 agencies with 60-Day Notices of Violation (“Notice”) alleging that Ashley violated Proposition 65
4 when it failed to warn customers, consumers, and workers in California that the Products expose
5 users to TDCPP. To the best of the Parties’ knowledge, no public enforcer has commenced and is
6 diligently prosecuting the allegations set forth in the Notice.

7 **1.7 Complaint**

8 On March 21, 2013, Englander commenced the instant action. Thereafter, on July 9, 2013,
9 Englander filed a Second Amended Complaint (“Complaint”), the operative pleading in this action,
10 naming Ashley as a defendant, and asserting a cause of action for the alleged violations of
11 Proposition 65 that are the subject of the Notice.

12 **1.8 No Admission**

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

21 **1.9 Consent to Jurisdiction**

22 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Ashley as to the allegations contained in the Complaint, that venue is proper in the
24 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
25 Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section 664.6.

26 **2. DEFINITIONS**

27 **2.1 California Customer**

28 “California Customer” shall mean any customer of Ashley that Ashley reasonably

1 understands is located in California, has a California warehouse or distribution center, maintains a
2 retail outlet in California, or has distributed Products for sale in California, online via the internet or
3 by any other means, on or after January 1, 2011.

4 **2.2 No Detectable Amount**

5 “No Detectable Amount” shall mean no more than 25 parts per million (“ppm”) (the
6 equivalent of .0025%) of any one chemical in any material, component, or constituent of a
7 subject product, when analyzed by a laboratory accredited by NVLAP (National Volunteer
8 Laboratory Accreditation Program), American Association for Lab Accreditation (A2LA), ANSI-
9 ASQ National Accreditation Board (ANAB) – ACLASS brand (an ANAB company), International
10 Accreditation Service, Inc. (IAS), Laboratory Accreditation Bureau (L-A-B), Perry Johnson
11 Laboratory Accreditation, Inc. (PJLA), or International Laboratory Accreditation
12 Cooperation(ILAC) (such laboratory referred to as an “Accredited Lab”) pursuant to EPA testing
13 methodologies 3545 and 8270C, or equivalent methodologies utilized by such Accredited
14 Laboratory or federal or state agencies to determine the presence, or measure the amount, of
15 TDCPP or TCEP in a solid substance (such methodologies referred to as “Approved
16 Methodologies”).

17 **2.3 Effective Date**

18 “Effective Date” shall mean November 15, 2013.

19 **2.4 Private Label Covered Products**

20 “Private Label Covered Products” means Products that bear a brand or trademark owned or
21 licensed by a Retailer or affiliated entity that are sold or offered for sale by a Retailer in the State of
22 California.

23 **2.5 Reformulated Products**

24 “Reformulated Products” shall mean Products that contain No Detectable Amount of
25 TDCPP or TCEP.

26 **2.6 Reformulation Standard**

27 The “Reformulation Standard” shall mean containing no more than 25 ppm for each of
28 TDCPP and TCEP.

1 2.7 **Retailer**

2 “Retailer” means a person that offers a Product directly for sale to consumers in California.3.

3 **INJUNCTIVE RELIEF: REFORMULATION**

4 3.1 **Reformulation Commitment**

5 Commencing on March 31, 2014, and continuing thereafter, Ashley shall not manufacture
6 or import for distribution or sale to California Customers for sale in California, or cause to be
7 manufactured or imported for distribution or sale to California Customers for sale in California, any
8 Products that are not Reformulated Products.

9 3.2 **Vendor Notification/Certification**

10 No later than 30 days after the Effective Date, Ashley shall provide written notice to all of
11 its then-current vendors of Products that are sold or offered for sale in California, or sold or offered
12 for sale to California Customers, instructing each such vendor to use reasonable efforts to provide
13 only Reformulated Products. In addressing the obligation set forth in the preceding sentence,
14 Ashley shall not employ statements to encourage a vendor to delay compliance with the
15 Reformulation Standard. No later than April 1, 2014, Ashley shall obtain a written certification
16 from each such vendor, and any other vendors engaged as of that date, that the Products it
17 manufactures comply with the Reformulation Standard. Such certifications shall be held by Ashley
18 for at least two years from receipt, and shall be made available to Englander upon request.

19 3.3 **Products No Longer in Ashley’s Control**

20 No later than 30 days after the Effective Date, Ashley shall send a letter (“Notification
21 Letter”), electronic or otherwise, to: (1) each California Customer and/or Retailer which it, after
22 October 28, 2011, supplied the item for resale in California described as an exemplar in the Notice
23 (“Exemplar Product”); and (2) any California Customer and/or Retailer which it, before October 28,
24 2011, supplied the Exemplar Product for resale in California and that Ashley has reason to believe
25 has any inventory of Exemplar Products for resale in California as of the January 1, 2013. The
26 Notification Letter shall advise the recipient that the Exemplar Product “contains TDCPP and/or
27 TCEP, chemicals known to the State of California to cause cancer,” and request that the recipient
28 either: (a) label the Exemplar Products remaining in inventory prior to offering them for sale in

1 California, or to California Customers, pursuant to Section 3.5; or (b) return, at Ashley's expense,
2 all units of the Exemplar Product held for sale in California, or to California Customers, to Ashley
3 or a party Ashley has otherwise designated. The Notification Letter shall require a response from
4 the recipient within 20 days confirming whether the Exemplar Product will be labeled or returned.
5 The Settling Defendant shall maintain records of all Notification Letters and responses for two
6 years after the Effective Date and shall promptly produce copies of such records upon Englander's
7 written request.

8 3.4 Current Inventory

9 Any Products in, or manufactured and en route to, Ashley's inventory as of or after
10 December 31, 2013, that do not qualify as Reformulated Products, and that Ashley has reason to
11 believe may be sold or distributed for sale in California, shall contain a clear and reasonable
12 warning as set forth in Section 3.5 below unless Section 3.6 applies.

13 3.5 Product Warnings

14 3.5.1 **Product Labeling.** Any warning provided under Section 3.3 or 3.4 above
15 shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be
16 prominently placed with such conspicuousness when compared with other words, statements,
17 designs, or devices as to render it likely to be read and understood by an ordinary individual under
18 customary conditions before purchase. Each warning shall be provided in a manner such that the
19 consumer or user understands to which specific Product the warning applies, so as to minimize the
20 risk of consumer confusion.

21 A warning provided pursuant to this Consent Judgment shall state:

22 **WARNING:** This product contains [TDCPP and/or
23 TCEP], flame retardant chemicals

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known to the State of California to
cause cancer.¹

3.5.2 **Internet Website Warning.** For any Product for which a warning is provided pursuant to Section 3.5.1, a warning also shall be given in conjunction with Ashley's sale of the Products into California, or to California Customers online via the internet. The warning shall appear on one or more web pages displayed to a purchaser prior to completing payment and/or during the "checkout" process. The following warning statement shall be used and shall: (a) appear adjacent to or immediately following the display, description, or price of the Product; (b) appear as a pop-up box; or (c) otherwise appear automatically to the consumer. The warning text shall be the same type size or larger than the Product description text, and shall state:

WARNING: This product contains [TDCPP and/or TCEP], flame retardant chemicals known to the State of California to cause cancer.²

3.6 Alternatives to Interim Warnings

3.6.1 **Re Product No Longer in Ashley's Control.** Ashley's obligation under Section 3.3 shall be relieved if it provides Englander with written notice on or before December 15, 2013 certifying that only Exemplar Products meeting the Reformulation Standard will be offered for sale by Ashley in California, or to California Customers for sale in California, after December 31, 2013.

3.6.2 **Re Current Inventory.** The obligations of Ashley under Section 3.4 shall be relieved upon Englander's receipt of Ashley's written certification on or before December 15, 2013, that, as of June 30, 2014, it will only distribute or cause to be distributed for sale, or sell in California, or to California Customers for sale in California, Products (i.e., Products beyond the

¹ The regulatory safe harbor warning language specified in 27 Cal. Code Regs. § 25603.2(a)1 shall be deemed acceptable under this Consent Judgment, if Ashley had employed it prior to the Effective Date. Ashley must obtain Court approval for any alternative warning statement other than that set forth above or the regulatory safe harbor language found at 27 Cal. Code Regs. § 25603.2(a)1, and/or for any proposed alternate method of warning transmission. In doing so, Ashley agrees to provide all Parties and the Office of the Attorney General with timely notice and an opportunity to oppose or comment on the proposed warning or transmission method before the Court acts on the request. The Parties agree that the following hybrid warning language shall not be deemed to meet the requirements of 27 Cal. Code Regs. § 25601 et seq., and shall not be used pursuant to this Consent Judgment: (a) "cancer or birth defects or other reproductive harm"; and (b) "cancer, birth defects or other reproductive harm."

² The preceding footnote applies in this context as well.

1 Exemplar Product) meeting the Reformulation Standard. The certifications provided by this
2 Section are material terms and time is of the essence.

3 **4. MONETARY PAYMENTS**

4 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

5 In settlement of all the claims referred to in this Consent Judgment, Ashley shall pay the
6 civil penalties shown on Exhibit A. Each penalty payment will be allocated in accordance with
7 California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to
8 the California Office of Environmental Health Hazard Assessment ("OEHHA"), 25% of the penalty
9 remitted to "The Chanler Group in Trust for Englander." Each penalty payment shall be delivered
10 within two business days of the date it is due at the addresses provided in Section 4.5, below.

11 Ashley shall be liable for payment of simple interest at a rate of 10% for all amounts due and owing
12 that are not received within two business days of the date they are due, if any.

13 **4.1.1 Initial Civil Penalty.** On or before the Effective Date, Ashley shall make an
14 initial civil penalty payment in the amount identified on Exhibit A.

15 **4.1.2 Second Civil Penalty.** On or before January 15, 2014, Ashley shall make a
16 second civil penalty payment in the amount identified on Exhibit A. The amount of the second
17 penalty may be reduced according to any penalty waiver for which Ashley is eligible under
18 Sections 4.1.4(i) and 4.1.4(iii), below.

19 **4.1.3 Third Civil Penalty.** On or before November 30, 2014, Ashley shall make a
20 third civil penalty payment in the amount identified on Exhibit A. The amount of the third penalty
21 may be reduced according to any penalty waiver for which Ashley is eligible under Sections
22 4.1.4(ii) and 4.1.4(iv), below.

23 **4.1.4 Reductions to Civil Penalty Payment Amounts.** Ashley may reduce the
24 amount of the second and/or third civil penalty payments identified on Exhibit A by providing
25 Englander with certification of certain efforts undertaken to reformulate its Products or limit the
26 ongoing sale of non-reformulated Products in California. The option to provide a written
27 certification in lieu of making a portion of Ashley's second or third civil penalty payments
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1 constitutes a material term of this Consent Judgment, and with regard to such term, time is of the
2 essence.

3 **4.1.4(i) Partial Penalty Waiver for Accelerated Reformulation of
4 Products Sold or Offered for Sale in California.**

5 As shown on Exhibit A, a portion of the second civil penalty shall be waived, if, as of
6 November 1, 2013, and continuing thereafter, Ashley agrees that it will only manufacture or import
7 for distribution or sale to California Customers for sale in California or cause to be manufactured or
8 imported for distribution or sale to California Customers for sale in California, Reformulated
9 Products. An officer or other authorized representative shall provide Englander with a written
10 certification confirming compliance with such conditions, no later than December 15, 2013.

11 **4.1.4(ii) Partial Penalty Waiver for Extended Reformulation.**

12 As shown on Exhibit A, a portion of the third civil penalty shall be waived, if, as of March
13 15, 2014, and continuing thereafter, Ashley agrees that it will only manufacture or import for
14 distribution or sale in California or cause to be manufactured or imported for distribution or sale in
15 California, Reformulated Products which also do not contain tris(2,3-dibromopropyl)phosphate
16 ("TDBPP") in a detectable amount of more than 25 parts per million ("ppm") (the equivalent of
17 .0025%) in any material, component, or constituent of a subject product, when analyzed by by an
18 Accredited Lab pursuant to an Approved Methodology. An officer or other authorized
19 representative shall provide Englander with a written certification confirming compliance with such
20 conditions, no later than November 15, 2014.

21 **4.1.4(iii) Partial Penalty Waiver for Withdrawal of Non-Reformulated
22 Exemplar Products from the California Market.**

23 As shown on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or
24 other authorized representative of Ashley provides Englander with written certification, by
25 December 15, 2013, confirming that each California Customer or Retailer to which it supplied the
26 Exemplar Product for resale in California after October 28, 2011, has elected, pursuant to Section
27 3.3, to return all Exemplar Products held for sale in California.³

28 ³ For purposes of this Section, the term Exemplar Products shall further include Products for which Englander has, prior to August 31, 2013, provided Ashley with test results from a NVLAP accredited laboratory showing the presence of a Listed Chemical at a level in excess of 250 ppm pursuant to EPA testing methodologies 3545 or 8270C.

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4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to California of Inventory of Non-Reformulated Products.**

As shown on Ashley's Exhibit A, a portion of the third civil penalty shall be waived, if an officer or other authorized representative of Ashley provides Englander with written certification, on or before November 15, 2014, confirming that, as of July 1, 2014, it has and will continue to distribute, offer for sale, or sell in California, or to California Customers, only Reformulated Products.

4.2 **Representations and Warranties**

Ashley represents that the sales data and information concerning its size, knowledge of TDCPP/TCEP presence, and prior reformulation and/or warning efforts, provided to Englander were true and accurate based on its knowledge and are material factors upon which Englander relied to determine the amount of civil penalties assessed pursuant to Health and Safety Code section 25249.7(b). If, within nine months of the Effective Date, Englander discovers and presents to Ashley, evidence demonstrating that the preceding representation and warranty was materially inaccurate, then Ashley shall have 30 days to meet and confer regarding Englander's contention. Should this 30 day period pass without any resolution between Englander and Ashley, Englander shall be entitled to file a formal legal claim including, but not limited to, a claim for damages for breach of contract; Ashley reserves all defenses respecting any such claim. Ashley further represents that in implementing the requirements set forth in Sections 3.1 and 3.2 of this Consent Judgment, it will voluntarily employ commercially reasonable best efforts to achieve reformulation of its Products on a nationwide basis and not employ statements that will encourage a vendor to limit its compliance with the Reformulation Standard to goods intended for sale to California Consumers.

4.3 **Penalties for Certain Violations of the Reformulation Standard.**

If Englander provides notice and credible supporting information to Ashley that levels of TDCPP in excess of the Reformulation Standard have been detected in one or more Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a deadline for meeting the Reformulation Standard under Sections 3.1 or 3.6 above, has commenced, then

1 Ashley may elect to pay a stipulated penalty to relieve any further potential liability under
2 Proposition 65 or sanction under this Consent Judgment as to Products sourced from the vendor in
3 question.⁴ The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000
4 if the violation level is between 100 ppm and 249 ppm, this being applicable for any amount in
5 excess of the Reformulation Standards but under 250 ppm.⁵ Englander shall further be entitled to
6 reimbursement of his actual associated expenses in an amount not to exceed \$5,000 regardless of
7 the stipulated penalty level. If the Parties proceed under this Section, Ashley must provide notice
8 and appropriate supporting information relating to the purchase (e.g. vendor name and contact
9 information including representative, purchase order, certification (if any) received from vendor for
10 the exemplar or subcategory of products), test results, and a letter from a company representative or
11 counsel attesting to the information provided to Englander within 30 calendar days of receiving
12 notice and credible supporting evidence from Englander's counsel. Any violation levels at or above
13 250 ppm shall be subject to the full remedies provided pursuant to this Consent Judgment and at
14 law.

15 4.4 Reimbursement of Fees and Costs

16 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
17 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
18 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
19 other settlement terms had been finalized, Ashley expressed a desire to resolve Englander's
20 outstanding fees and costs. Under general contract principles and the private attorney general
21 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
22 through the mutual execution of this agreement, including the fees and costs incurred as a result of
23 investigating, bringing this matter to Ashley's attention, negotiating a settlement in the public
24

25 ⁴ This Section shall not be applicable where the vendor in question had previously been
26 found pursuant to this Section to have provided unreliable certifications as to meeting the
27 Reformulation Standard in its Products on two or more occasions. Notwithstanding the foregoing, a
stipulated penalty for a second exceedance by Ashley's vendor at a level between 100 and 249 ppm
shall not be available after July 1, 2015.

28 ⁵ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 interest, and seeking court approval of the same. In addition, the negotiated fee and cost figure
2 expressly includes the anticipated significant amount of time Englander's counsel will incur to
3 monitor various provisions in this agreement over the next two years, with the exception of
4 additional fees that may be incurred pursuant to Ashley's election under Section 11, if any. Ashley
5 agreed to pay Englander, upon the Court's approval and entry of this Consent Judgment, the
6 amount of fees and costs indicated on Exhibit A. Ashley further agreed to tender and shall tender
7 its payment in full under this Section to Englander's counsel's trust account – payable to "The
8 Chanler Group in Trust" – within two business days of the Effective Date. Such funds shall be
9 disbursed upon the Court's approval and entry of this Consent Judgment.

10 **4.5 Payment Procedures**

11 **4.5.1 Payment Addresses.**

12 (a) All payments owed to Englander and his counsel, pursuant to
13 Sections 4.1 and 4.2 shall be delivered to the following address:

14 The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
17 Parker Plaza, Suite 214
18 Berkeley, CA 94710

19 (b) All payments owed to OEHHHA (EIN: 68-0284486), pursuant to
20 Section 4.1, shall be delivered directly to OEHHHA (Memo line "Prop 65 Penalties") at one of the
21 following addresses, as appropriate:

22 For United States Postal Service Delivery:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 P.O. Box 4010
27 Sacramento, CA 95812-4010

28 For Non-United States Postal Service Delivery or Courier:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

1 4.5.2 **Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
2 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in
3 Section 4.3.1(a) above.

4 4.5.3 **Tax Documentation.** Ashley shall provide a separate 1099 form for each
5 payment required by this Consent Judgment to: (a) Peter Englander, whose address and tax
6 identification number shall be furnished upon request after this Consent Judgment has been fully
7 executed by the Parties; (b) "California Office of Environmental Health Hazard Assessment" (EIN:
8 68-0284486); and (c) "The Chanler Group" (EIN: 94-3171522) , and deliver such form to the payee
9 at the payment addresses provided in Section 4.3.1, above.

10 4.6 **Court Approval Prerequisite to Release of Funds Held in Trust.** All payments to
11 Englander and his counsel under this Consent Judgment are to be held in trust until such time as the
12 Court grants the motion for approval contemplated by Section 6, below.

13 4.6.1 **Payments to Englander and His Counsel.** With the exception of the
14 contingent civil penalty payments that are the subject of Sections 4.1.2 and 4.1.3, all payments to
15 Englander and his counsel shall be delivered to Englander's counsel within two business days of
16 the Effective Date, in the form of two checks made payable to: (a) "The Chanler Group in Trust
17 for Peter Englander"; and (b) "The Chanler Group in Trust. " in the amounts indicated on Exhibit
18 A. In the event the Court does not approve the Consent Judgment, the Parties shall proceed
19 pursuant to Section 6 to determine the appropriate course of action.

20 4.6.3 **Payments to OEHHA.** All payments to OEHHA made under this Consent
21 Judgment are to be delivered directly to OEHHA (Memo line "Prop 65 Penalties"). The initial
22 civil penalty payment shall be made within 10 days of the date the time for appeal of an Order
23 granting approval of this Consent Judgment has run without an appeal being taken or the date the
24 Order granting approval of this Consent Judgment is affirmed on appeal. Provided the Consent
25 Judgment has been approved, all additional civil penalty payments are to be made the date
26 provided herein. All payments under this Consent Judgment shall be delivered to one of the
27 addresses provided in Section 4.5.1.

28

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Englander's Release of Proposition 65 Claims**

3 Englander, acting on his own behalf and in the public interest, releases Ashley, its parents,
4 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
5 attorneys, and each entity to whom Ashley directly or indirectly distributes or sells the Products,
6 including, but not limited, to downstream distributors, wholesalers, customers, retailers,
7 franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims
8 alleging violations of Proposition 65 through the Effective Date based on unwarned exposures to
9 the Listed Chemicals in the Products, as set forth in the Notices. Compliance with the terms of this
10 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to TDCPP
11 from the Products, as set forth in the Notice. The Parties further understand and agree that this
12 Section 5.1 release shall not extend upstream to any entity that manufactured the Products or any
13 component parts thereof, or any distributor or supplier who sold the Products or any component
14 parts thereof to Ashley, except that entities upstream who provided a Private Labeled Covered
15 Product to Ashley, if any, shall be released as to the Private Labeled Covered Products Ashley has
16 offered for sale in California, or to California Customers.

17 **5.2 Englander's Individual Releases of Claims**

18 Englander, in his individual capacity only and *not* in any representative capacity, provides a
19 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
20 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
21 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
22 unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP, and/or
23 TDBPP in Products manufactured, imported, distributed, or sold by Ashley prior to the Effective
24 Date. The Parties further understand and agree that this Section 5.2 release shall not extend
25 upstream to any entity that manufactured any Products, or any component parts thereof, or any
26 distributors or suppliers who sold any Products, or any component parts thereof, except to the
27 extent, and solely to the extent, those Products, or any component parts thereof, were offered for
28 sale in California by Ashley, including but not limited to Private Labeled Covered Products offered

1 for sale in California by Ashley. Nothing in this Section affects Englander's right to commence or
2 prosecute an action under Proposition 65 against a Releasee that does not involve Ashley's
3 Products.

4 **5.3 Ashley's Release of Englander**

5 Ashley, on its own behalf, and on behalf of its past and current agents, representatives,
6 attorneys, successors, and assignees, hereby waives any and all claims against Englander and his
7 attorneys and other representatives, through the Effective Date, for any and all actions taken or
8 statements made (or those that could have been taken or made) by Englander and his attorneys and
9 other representatives, whether in the course of investigating claims, otherwise seeking to enforce
10 Proposition 65 against it in this matter, or with respect to the Products.

11 **6. COURT APPROVAL**

12 This Consent Judgment is not effective until it is approved in its entirety and entered by the
13 Court and shall be null and void if, for any reason, it is not approved and entered by the Court
14 within one year after it has been fully executed by all Parties. Englander and Ashley agree to
15 support the entry of this agreement as a Consent Judgment and to obtain approval of the Consent
16 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
17 Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
18 Consent Judgment, which motion Englander shall draft and file and Ashley shall support, appearing
19 at the hearing if so requested. If any third-party objection to the motion is filed, Englander and
20 Ashley agree to work together to file a reply and appear at any hearing. This provision is a material
21 component of the Consent Judgment and shall be treated as such in the event of a breach.

22 If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to
23 whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course
24 of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If
25 the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and
26 confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly
27 agree on a course of action to take, then the case shall proceed in its normal course on the Court's
28 trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently

1 overturned by any appellate court, any monies that have been provided to OEHHA, Englander or
2 his counsel pursuant to Section 3, above, shall be refunded within 15 days of the appellate decision
3 becoming final. If the Court does not approve and enter the Consent Judgment within one year of
4 the Effective Date, any monies that have been provided to OEHHA or held in trust for Englander or
5 his counsel pursuant to Section 3, above, shall be refunded to the Ashley within 15 days.

6 **7. GOVERNING LAW**

7 The terms of this Consent Judgment shall be governed by the laws of the State of California.
8 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
9 reason of law generally, or as to the Products, then Ashley may provide Englander with notice of
10 any asserted change in the law, and shall have no further obligations pursuant to this Consent
11 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
12 Consent Judgment shall be interpreted to relieve Ashley from its obligation to comply with any
13 pertinent state or federal law or regulation.

14 **8. NOTICE**

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

19 To Ashley:

20 At the address shown on Exhibit A

To Englander:

21 Attn: Proposition 65 Coordinator
22 The Chanler Group
23 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

24 Any Party, from time to time, may specify in writing to the other Party a change of address to
25 which all notices and other communications shall be sent.
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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, and as valid as, an original, and
4 all of which, when taken together, shall constitute one and the same document.

5 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

6 Englander and his counsel agree to comply with the reporting form requirements referenced
7 in California Health and Safety Code section 25249.7(f).

8 **11. MODIFICATION**

9 This Consent Judgment may be modified only: (i) by written agreement of the Parties and
10 upon entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion
11 of any party and entry of a modified Consent Judgment by the Court.

12 **12. AUTHORIZATION**

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

16 **AGREED TO:**
17 
18 _____
19 Plaintiff PETER ENGLANDER

AGREED TO:

_____ Defendant ASHLEY FURNITURE
INDUSTRIES, INC.

20 Dated: November 13, 2013

Dated: 11/26/13

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EXHIBIT A

I. Settling Defendant: **Ashley Furniture Industries, Inc. ("Ashley")**

II. Types of Covered Products: Upholstered Furniture manufactured or distributed by Ashley (including, but not limited to, sofas, loveseats, chairs, stools, ottomans, headboards, and other furniture that utilizes polyurethane foam) and replacement parts and components manufactured or distributed by Ashley for said Upholstered Furniture.

III. Settling Defendant's Required Settlement Payments:

A. Initial Payment: \$68,000

1. Initial Civil Penalty: \$20,000
2. Attorneys' Fees and Costs: \$ 48,000

B. Second Civil Penalty: \$24,000

1. Section 4.1.4(i) Partial Penalty Waiver, if applicable: \$14,000
2. Section 4.1.4(iii) Partial Penalty Waiver, if applicable: \$10,000

C. Third Civil Penalty: \$10,000

1. Section 4.1.4(ii) Partial Penalty Waiver, if applicable: \$6,000
2. Section 4.1.4(iv) Partial Penalty Waiver, if applicable: \$4,000

IV. Persons to receive notices under Section 8:

Todd Wanek, President
Ashley Furniture Industries, Inc.
One Ashley Way
Arcadia, WI 54612

With a copy to:

General Counsel
Ashley Furniture Industries, Inc.
One Ashley Way
Arcadia, WI 54612
Fax: 608-323-5060

Exhibit 2

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 PETER ENGLANDER

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14 PETER ENGLANDER

15 Plaintiff,

16 v.

17 ASHLEY FURNITURE INDUSTRIES,
18 INC., et al.

19 Defendants.

Case No. RG13672407

*Assigned for All Purposes to the Hon.
George C. Hernandez, Jr., Department 17*

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT BLUMENTHAL
DISTRIBUTING, INC.**

(Health & Safety Code § 25249.5 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant Blumenthal Distributing, Inc. (“Blumenthal”), with Englander and
5 Blumenthal each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Englander is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Blumenthal employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Blumenthal manufactured, imported, sold and/or distributed for sale
16 in California, stools with vinyl upholstery containing di(2-ethylhexyl)phthalate (“DEHP”),
17 upholstered furniture with foam padding containing tris(1,3-dichloro-2-propyl)phosphate
18 (“TDCPP”), and upholstered furniture with foam padding containing tris(2-chloroethyl) (“TCEP”)
19 without providing the clear and reasonable health hazard warnings required by Proposition 65.

20 **1.5 Listed Chemicals**

21 1.5.1 On April 1, 1992, California listed TCEP pursuant to Proposition 65, as a
22 chemical known to cause cancer. TDCPP became subject to the “clear and reasonable warning”
23 requirements of the act one year later on October 28, 2012. Cal. Code Regs., tit. 27, § 27001(b);
24 Health & Safety Code §§ 25249.8 and 25249.10(b). Englander alleges that TDCPP escapes from
25 the foam padding components resulting in human exposures.

26 1.5.2 On October 24, 2003, California listed DEHP pursuant to Proposition 65, as
27 a chemical known to cause reproductive harm or birth defects. DEHP became subject to the “clear
28 and reasonable warning” requirements of the act one year later on October 24, 2004. Cal. Code

1 Regs., tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander alleges
2 that TDCPP escapes from the foam padding components resulting in human exposures.

3 1.5.3 On October 28, 2011, California listed TDCPP pursuant to Proposition 65, as
4 a chemical known to cause cancer. TDCPP became subject to the “clear and reasonable warning”
5 requirements of the act one year later on October 28, 2012. Cal. Code Regs., tit. 27, § 27001(b);
6 Health & Safety Code §§ 25249.8 and 25249.10(b). Englander alleges that TDCPP escapes from
7 the foam padding components resulting in human exposures.

8 **1.6 Product Description**

9 The categories of products that are covered by this Consent Judgment are: (a) upholstered
10 furniture with foam padding containing TDCPP and/or TCEP (“Foam Padded Products”), and (b)
11 stools with vinyl upholstery containing DEHP (“Vinyl Products” and, collectively with Foam
12 Padded Products” the “Products”).

13 **1.7 Notices of Violation**

14 On January 8, 2013, February 25, 2013, and June 19, 2013, Englander served Blumenthal
15 and certain requisite public enforcement agencies with three separate 60-Day Notices of Violation
16 (“Notices”) alleging that Blumenthal violated Proposition 65 when it failed to warn its customers,
17 consumers, and workers in California that the identified products expose users to TDCPP, TCEP
18 and DEHP, respectively. To the best of the Parties’ knowledge, no public enforcer has commenced
19 and is diligently prosecuting the allegations set forth in any of the Notices.

20 **1.8 Complaint**

21 On March 21, 2013, Englander commenced the instant action. Thereafter, on July 9, 2013,
22 Englander filed a Second Amended Complaint (“Complaint”), the operative pleading in this action,
23 naming Blumenthal as a defendant, and stating a cause of action for violations of Proposition 65
24 relating to unwarned exposures to TDCPP and TCEP as alleged in the January 8, 2013 and
25 February 25, 2013 Notices. At the time the Complaint was filed, Englander had not perfected
26 standing to file an action for the alleged unwarned exposures to DEHP from the vinyl/PVC
27 upholstered stools that are the subject of the June 19, 2013 60-day notice of violation. Upon the
28 latter of the day that is seventy-one days from the date of issue of the DEHP notice, or Court

1 approval of this Consent Judgment, provided no public enforcer has elected to enforce the
2 violations alleged in the June 19, 2013, notice of violation, the Complaint shall be deemed amended
3 *nunc pro tunc* to include Englander's allegations against Blumenthal for unwarned exposures to
4 DEHP from Vinyl Products sold in California.

5 **1.9 No Admission**

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

14 **1.10 Jurisdiction**

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

20 **2. DEFINITIONS**

21 **2.1 California Customer**

22 "California Customer" shall mean any customer of Blumenthal that Blumenthal reasonably
23 understands is located in California, has a California warehouse or distribution center, maintains a
24 retail outlet in California, or has distributed Products for sale in California, online via the internet or
25 by any other means, on or after January 1, 2011.

26 **2.2 No Detectable Amount**

27 "No Detectable Amount" shall mean no more than 25 parts per million ("ppm") (the
28 equivalent of .0025%) of any one chemical in any material, component, or constituent of a subject

1 product, when analyzed by a domestic NVLAP (National Volunteer Laboratory Accreditation
2 Program) or similarly accredited domestic laboratory pursuant to EPA testing methodologies 3545
3 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
4 presence, or measure the amount, of TDCPP and/or TCEP in a solid substance.

5 **2.3 Effective Date**

6 "Effective Date" shall mean November 6, 2013.

7 **2.4 Reformulated Products**

8 "Reformulated Foam Padded Products" shall mean upholstered furniture with foam padding
9 that contain No Detectable Amount of TDCPP or TCEP, and "Reformulated Vinyl Products" shall
10 mean stools with vinyl upholstery containing no more than 1,000 ppm DEHP.

11 **2.6 Reformulation Standard**

12 The "Reformulation Standard for Foam Padding" shall mean upholstered furniture with
13 foam padding with components containing no more than 25 ppm for each of TDCPP and TCEP,
14 "Reformulation Standard for Vinyl Products" shall mean stools with a maximum of 1,000 ppm
15 DEHP content in any vinyl/PVC upholstery.

16 **2.7 Retailer**

17 "Retailer" means an individual or entity that offers a Product for sale to consumers in
18 California.

19 **2.8 The Listed Chemicals**

20 "Listed Chemicals" means TDCPP, TCEP, and DEHP.

21 **3. INJUNCTIVE RELIEF: REFORMULATION**

22 **3.1 Reformulation Commitment**

23 Commencing on March 31, 2014, and continuing thereafter, Blumenthal shall not
24 manufacture or import for distribution or sale to California Customers, or cause to be manufactured
25 or imported for distribution or sale to California Customers, any Foam Padded Products that do not
26 meet the definition of Reformulated Foam Padded Products established by Section 2.5. With regard
27 to Vinyl Products, Blumenthal agrees and commits that one-hundred percent of the Vinyl Products
28

1 manufactured or imported for distribution or sale to California Customers as of December 1, 2013,
2 will comply with the DEHP content limits applicable to Reformulated Vinyl Products.

3 **3.2 Vendor Notification/Certification**

4 On or before the Effective Date, Blumenthal shall provide written notice to all of its then-
5 current vendors of Foam Padded Products that are sold or offered for sale in California, or to
6 California Customers, instructing each such vendor to use reasonable efforts to provide only
7 Reformulated Foam Padded Products. In addressing the obligation set forth in the preceding
8 sentence, Blumenthal shall not employ statements to encourage a vendor to delay compliance with
9 the Reformulation Standard for Foam Padding. No later than April 1, 2014, Blumenthal shall
10 obtain a written certification from each such vendor, and any newly engaged vendors, that the Foam
11 Padded Products it manufactures or supplies comply with the Reformulation Standard for Foam
12 Padding. Such certifications shall be held by Blumenthal for at least two years from receipt, and
13 shall be made available to Englander upon request.

14 **3.3 Foam Padded Products No Longer in Blumenthal's Control**

15 No later than 45 days after the Effective Date, Blumenthal shall send a letter ("Notification
16 Letter"), electronic or otherwise, to: (1) each California Customer and/or Retailer which it, after
17 October 28, 2011, supplied the item for resale in California described as an exemplar in a notice of
18 violation that Englander has alleged contains TDCPP or TCEP ("Exemplar Product"); and (2) any
19 California Customer and/or Retailer that Blumenthal believes is reasonably likely to have had any
20 inventory of an Exemplar Product for resale in California as of January 1, 2013. The Notification
21 Letter shall advise the recipient that the Exemplar Product "contains TDCPP and/or TCEP,
22 chemicals known to the State of California to cause cancer," and request that the recipient either:
23 (a) label the Exemplar Products remaining in inventory prior to offering them for sale in California,
24 or to California Customers, pursuant to Section 3.5; or (b) return, at Blumenthal's expense, all units
25 of the Exemplar Product held for sale in California, or to California Customers, to Blumenthal or a
26 party Blumenthal has otherwise designated. The Notification Letter shall require a response from
27 the recipient within 15 days confirming whether the Exemplar Product will be labeled or returned.
28 Blumenthal shall maintain records of all correspondence or other communications generated

1 pursuant to this Section for two years after the Effective Date and shall promptly produce copies of
2 such records upon Englander's written request.

3 **3.4 Current Inventory**

4 Any Foam Padded Products in, or manufactured and en route to, Blumenthal's inventory as
5 of or after December 31, 2013, that do not qualify as Reformulated Foam Padded Products, and that
6 Blumenthal has reason to believe may be sold or distributed for sale in California, shall contain a
7 clear and reasonable warning as set forth in Section 3.5 below unless Section 3.6 applies.

8 **3.5 Product Warnings**

9 **3.5.1 Product Labeling.** Any warning provided under Section 3.3 or 3.4 above
10 shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be
11 prominently placed with such conspicuousness when compared with other words, statements,
12 designs, or devices as to render it likely to be read and understood by an ordinary individual under
13 customary conditions before purchase. Each warning shall be provided in a manner such that the
14 consumer or user understands to which specific Product the warning applies, so as to minimize the
15 risk of consumer confusion.

16 A warning provided pursuant to this Consent Judgment shall state:

17 **WARNING:** This product contains [TDCPP and/or
18 TCEP] flame retardant chemicals that are
19 known to the state of California to cause
cancer.

20 **3.5.2 Internet Website Warning.** A warning shall be given in conjunction with
21 the sale of the Foam Padded Products into California, or to California Customers online via the
22 internet. The warning shall appear on one or more web pages displayed to a purchaser prior to
23

24 ¹ The regulatory safe harbor warning language specified in 27 Cal. Code Regs. § 25603.2
25 may also be used if Blumenthal employed such warning prior to the Effective Date. If Blumenthal
26 seeks to use alternative warning language, other than the language specified above or the safe
27 harbor warning specified in 27 Cal. Code Regs. § 25603.2, or seeks to use an alternate method of
28 transmission of the warning, it must obtain the Court's approval of its proposed alternative warning
statement and/or method of transmission, and provide all Parties and the Office of the Attorney
General with timely notice and the opportunity to comment or object before the Court acts on the
request. The Parties agree that the following warning language does not meet the requirements of
27 CCR § 25601 et seq. and shall not be used under this Consent Judgment: (a) "cancer or birth
defects or other reproductive harm" and (b) "cancer, birth defects or other reproductive harm."

1 it is due at the addresses provided in Section 4.5. Blumenthal shall be liable for payment of simple
2 interest at a rate of 10% for all amounts due and owing that are not received within two business
3 days of the due date, if any.

4 **4.1.1 Initial Civil Penalty.** On or before the Effective Date, Blumenthal shall
5 make an initial civil penalty payment in the amount identified on Exhibit A.

6 **4.1.2 Second Civil Penalty.** On or before January 15, 2014, Blumenthal shall
7 make a second civil penalty payment in the amount identified on Exhibit A. The amount of the
8 second penalty may be reduced according to any penalty waiver for which Blumenthal is eligible
9 under Sections 4.1.4(i) and 4.1.4(iii), below.

10 **4.1.3 Third Civil Penalty.** On or before November 30, 2014, Blumenthal shall
11 make a third civil penalty payment in the amount identified on Exhibit A. The amount of the third
12 penalty may be reduced according to any penalty waiver for which Blumenthal is eligible under
13 Sections 4.1.4(ii) and 4.1.4(iv), below.

14 **4.1.4 Reductions to Civil Penalty Amounts.** Blumenthal may reduce the amount
15 of the second and/or third civil penalty payments identified on Exhibit A by providing Englander
16 with certification of certain efforts undertaken to reformulate its Foam Padded Products or limit the
17 ongoing sale of non-reformulated Foam Padded Products in California. The option to provide a
18 written certification in lieu of making a portion of Blumenthal's second or third civil penalty
19 payments constitutes a material term of this Consent Judgment, and with regard to such term, time
20 is of the essence.

21 **4.1.4(i) Partial Penalty Waiver for Accelerated Reformulation of
22 Foam Padded Products Sold or Offered for Sale in California.**

23 If Blumenthal so Elects on Exhibit A, a portion of the second civil penalty shall be waived,
24 if, as of November 1, 2013, and continuing thereafter, Blumenthal agrees that it will only
25 manufacture or import for distribution or sale to California Customers or cause to be manufactured
26 or imported for distribution or sale to California Customers, Reformulated Foam Padded Products.
27 An officer or other authorized representative shall provide Englander with a written certification
28 confirming compliance with such conditions, no later than December 15, 2013.

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4.1.4(ii) Partial Penalty Waiver for Extended Reformulation of Foam Padded Products.

As set forth on Exhibit A, a portion of the third civil penalty shall be waived, if, as of March 15, 2014, and continuing thereafter, Blumenthal agrees that it will only manufacture or import for distribution or sale in California or cause to be manufactured or imported for distribution or sale in California, Reformulated Foam Padded Products which also do not contain tris(2,3-dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than 25 parts per million (the equivalent of .0025%) in any material, component, or constituent of a subject product, when analyzed by a NVLAP or similarly accredited laboratory pursuant to EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the presence, and measure the quantity, of TDBPP in a solid substance. An officer or other authorized representative shall provide Englander with a written certification confirming compliance with such conditions, no later than November 15, 2014.

4.1.4(iii) Partial Penalty Waiver for Withdrawal of Non-Reformulated Foam Padded Exemplar Products from the California Market.

As set forth on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or other authorized representative of Blumenthal provides Englander with written certification, by December 15, 2013, confirming that each individual or establishment in California to which it supplied the Foam Padded Exemplar Product after October 28, 2011, has elected, pursuant to Section 3.3, to return all Foam Padded Exemplar Products held for sale in California or confirmed that it no longer has any Foam Padded Exemplar Products in its inventory.

4.1.4(iv) Partial Penalty Waiver for Termination of Distribution to California of Inventory of Non-Reformulated Foam Padded Products.

As set forth on Exhibit A, a portion of the third civil penalty shall be waived, if an officer or other authorized representative of Blumenthal provides Englander with written certification, on or before November 15, 2014, confirming that, as of July 1, 2014, it has and will continue to distribute, offer for sale, or sell in California, or to California Customers, only Reformulated Foam Padded Products.

1 4.2 **Representations Regarding Sales and Other Information**

2 Blumenthal represents that the sales data and other information concerning its size,
3 knowledge of TDCPP/TCEP presence, and prior reformulation and/or warning efforts, provided to
4 Englander is true and accurate based on its knowledge and are material factors upon which
5 Englander relied to determine the amount of civil penalties assessed pursuant to Health and Safety
6 Code section 25249.7(b). If, within nine months of the Effective Date, Englander discovers and
7 presents to Blumenthal, evidence demonstrating that the preceding representations and warranties
8 are materially inaccurate, then Blumenthal shall have 30 days to meet and confer regarding the
9 Englander's contention. Should this 30 day period pass without any resolution between Englander
10 and Blumenthal, Englander shall be entitled to file a formal legal claim including, but not limited
11 to, a claim for damages for breach of contract.

12 Blumenthal further represents that in implementing the requirements set forth in Sections
13 3.1 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts to achieve
14 reformulation of its Foam Padded Products and Additional Products on a nationwide basis and not
15 employ statements that will encourage a vendor to limit its compliance with the Reformulation
16 Standard to goods intended for sale to California Consumers.

17 4.3 **Penalties for Certain Violations of the Reformulation Standard for**
18 **Foam Padding.**

19 If Englander provides notice and appropriate supporting information to Blumenthal that
20 levels of TDCPP or TCEP in excess of the Reformulation Standard for Foam Padding have been
21 detected in one or more Foam Padded Products labeled or otherwise marked in an identifiable
22 manner as manufactured or imported after a deadline for meeting the Reformulation Standard for
23 Foam Padding under Sections 3.1 or 3.6 above, has commenced, then Blumenthal may elect to pay
24 a stipulated penalty to relieve any further potential liability under Proposition 65 or sanction under
25 this Consent Judgment as to Foam Padded Products sourced from the vendor in question.³ The

26 ³ This Section shall not be applicable where the vendor in question had previously been
27 found by Blumenthal to have provided unreliable certifications as to meeting the Reformulation
28 Standard for Foam Padding in its Foam Padded Products on more than one occasion. Notwithstanding the foregoing, a stipulated penalty for a second exceedance by Blumenthal's vendor at a level between 100 and 249 ppm shall not be available after July 1, 2015.

1 stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000 if the violation
2 level is between 100 ppm and 249 ppm, this being applicable for any amount in excess of the
3 Reformulation Standards for Foam Padding but under 250 ppm.⁴ Englander shall further be entitled
4 to reimbursement of his associated expenses in an amount not to exceed \$5,000 regardless of the
5 stipulated penalty level. If the Parties proceed under this Section, Blumenthal must provide notice
6 and appropriate supporting information relating to the purchase (e.g. vendor name and contact
7 information including representative, purchase order, certification (if any) received from vendor for
8 the exemplar or subcategory of products), test results, and a letter from a company representative or
9 counsel attesting to the information provided to Englander within 30 calendar days of receiving test
10 results from Englander's counsel. Any violation levels at or above 250 ppm shall be subject to the
11 full remedies provided pursuant to this Consent Judgment and at law.

12 4.4 Reimbursement of Fees and Costs

13 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
15 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
16 other settlement terms had been finalized, Blumenthal expressed a desire to resolve Englander's
17 outstanding fees and costs. Under general contract principles and the private attorney general
18 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
19 through the mutual execution of this agreement, including the fees and costs incurred as a result of
20 investigating, bringing this matter to Blumenthal's attention, negotiating a settlement in the public
21 interest, and seeking court approval of the same. In addition, the negotiated fee and cost figure
22 expressly includes the anticipated significant amount of time plaintiffs' counsel will incur to
23 monitor various provisions in this agreement over the next two years, with the exception of
24 additional fees that may be incurred pursuant to a Settling Defendant's election in Section 11.
25 Blumenthal agrees to pay Englander, upon the Court's approval and entry of this Consent
26 Judgment, the amount of fees and costs indicated on Exhibit A. Blumenthal further agrees to tender
27

28 ⁴ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Section 4.1.

1 and shall tender its payment in full under this Section to Englander's counsel's trust account –
2 payable to "The Chanler Group in Trust" – within two business days of the Effective Date. Such
3 funds shall be disbursed upon the Court's approval and entry of this Consent Judgment.

4 **4.5 Payment Procedures**

5 **4.5.1 Payment Addresses.**

6 (a) All payments and tax documentation to be provided to Englander and
7 his counsel under this Consent Judgment shall be delivered to the following address:

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

13 (b) All payments and tax documentation to be provided to OEHHA under
14 this Consent Judgment shall be delivered directly to OEHHA (Memo line "Prop 65
15 Penalties") at one of the following addresses, as appropriate:

16 For United States Postal Service Delivery:

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

22 For Non-United States Postal Service Delivery or Courier:

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

28 4.5.2 **Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
shall be mailed, simultaneous with payment, to The Chanler Group at the address provided in
Section 4.3.1(a).

 4.5.3 **Tax Documentation.** Blumenthal shall provide a separate 1099 form for its
payments to each of the following payees: (a) Peter Englander, whose address and tax
identification number shall be furnished upon request after this Consent Judgment has been fully

1 executed by the Parties; (b) "California Office of Environmental Health Hazard Assessment" (EIN:
2 68-0284486); and (c) "The Chanler Group" (EIN: 94-3171522).

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1 Englander's Release of Proposition 65 Claims**

5 Englander, acting on his own behalf and in the public interest, releases Blumenthal, its
6 parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
7 employees, attorneys, and each entity to whom Blumenthal directly or indirectly distributes or sells
8 the Products, including, but not limited, to downstream distributors, wholesalers, customers,
9 retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all
10 claims alleging violations of Proposition 65 through the Effective Date based on unwarned
11 exposures to the TDCPP, TCEP and DEHP in the Products, as set forth in the Notices. Compliance
12 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
13 exposures to TDCPP, TCEP and DEHP from the Products, as set forth in the Notices. The Parties
14 further understand and agree that this Section 5.1 release shall not extend upstream to any entity
15 that manufactured the Products or any component parts thereof, or any distributor or supplier who
16 sold the Products or any component parts thereof to Blumenthal, except that entities upstream who
17 provided a Private Labeled Covered Product to Blumenthal, if any, shall be released as to the
18 Private Labeled Covered Products Blumenthal has offered for sale in California, or to California
19 Customers.

20 **5.2 Englander's Individual Releases of Claims**

21 Englander, in his individual capacity only and *not* in any representative capacity, provides a
22 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
23 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
24 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
25 unsuspected, limited to and arising out of alleged or actual exposures to DEHP, BBP, DBP,
26 TDCPP, TCEP, and/or TDBPP in Products or Additional Products (as defined in Section 11.1 and
27 delineated on Exhibit A) manufactured, imported, distributed, or sold by Blumenthal prior to the
28 Effective Date. The Parties further understand and agree that this Section 5.2 release shall not

1 extend upstream to any entity that manufactured any Products or Additional Products, or any
2 component parts thereof, or any distributors or suppliers who sold any Products or Additional
3 Products, or any component parts thereof to Blumenthal, except that entities upstream of
4 Blumenthal that is a Retailer of a Private Labeled Covered (or Additional) Product shall be released
5 as to the Private Labeled Covered (or Additional) Products offered for sale in California by the
6 Blumenthal. Nothing in this Section affects Englander's right to commence or prosecute an action
7 under Proposition 65 against a Releasee that does not involve Blumenthal's Products or Additional
8 Products.

9 **5.3 Blumenthal' Release of Englander**

10 Blumenthal, on its own behalf, and on behalf of its past and current agents, representatives,
11 attorneys, successors, and assignees, hereby waives any and all claims against Englander and his
12 attorneys and other representatives, for any and all actions taken or statements made (or those that
13 could have been taken or made) by Englander and his attorneys and other representatives, whether
14 in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this
15 matter, or with respect to the Products or Additional Products.

16 **6. COURT APPROVAL**

17 This Consent Judgment is not effective until it is approved and entered by the Court and
18 shall be null and void if, for any reason, it is not approved in its entirety and entered by the Court
19 within one year after it has been fully executed by all Parties. If the Court does not approve the
20 Consent Judgment, the Parties shall meet and confer as to whether to modify the language or appeal
21 the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall
22 proceed in its normal course on the Court's trial calendar. If the Court's approval is ultimately
23 overturned by an appellate court, the Parties shall meet and confer as to whether to modify the
24 terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take,
25 then the case shall proceed in its normal course on the Court's trial calendar. In the event that this
26 Consent Judgment is entered by the Court and subsequently overturned by any appellate court, any
27 monies that have been provided to OEHHA, Englander or his counsel under this Consent Judgment
28 shall be refunded within 15 days of the appellate decision becoming final. If the Court does not

1 approve and enter the Consent Judgment within one year of the Effective Date, any monies that
2 have been provided to OEHHA or held in trust for Englander or his counsel pursuant to Section 3,
3 above, shall be refunded to the Blumenthal within 15 days.

4 **7. GOVERNING LAW**

5 The terms of this Consent Judgment shall be governed by the laws of the State of California.
6 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
7 reason of law generally, or as to the Products, then Blumenthal may provide Englander with notice
8 of any asserted change in the law, and shall have no further obligations pursuant to this Consent
9 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
10 Consent Judgment shall be interpreted to relieve Blumenthal from its obligation to comply with any
11 pertinent state or federal law or regulation.

12 **8. NOTICE**

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

17 To Blumenthal:

18 At the address shown on Exhibit A

To Englander:

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

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

24 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

25 This Consent Judgment may be executed in counterparts and by facsimile or portable
26 document format (pdf) signature, each of which shall be deemed, and as valid as, an original, and
27 all of which, when taken together, shall constitute one and the same document.

28

1 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

2 Englander and his counsel agree to comply with the reporting form requirements referenced
3 in California Health and Safety Code section 25249.7(f).

4 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

5 11.1 In addition to the Products identified on Exhibit A, on or before October 15, 2013,
6 Blumenthal may provide Englander with additional information or representations necessary to
7 enable him to issue a 60-day notice of violation and valid certificate of merit pursuant to Health &
8 Safety Code section 25249.7 for "Additional Products" that contain TDCPP, TCEP, and/or other
9 Proposition 65-listed chemicals ("Additional Products"). Polyurethane foam that is supplied,
10 shaped or manufactured for use as a component of a product, such as upholstered furniture, is
11 specifically excluded from the definition of Additional Products and shall not be identified by
12 Blumenthal on Exhibit A as an Additional Product. Except as agreed upon by Englander,
13 Blumenthal shall not include a product as an Additional Product that is the subject of an existing
14 60-day notice, issued by Englander or any other private enforcer at the time Blumenthal elects to
15 proceed under this Section.

16 After receipt of the required information, Englander agrees to issue a supplemental 60-day
17 notice of violation of Health and Safety Code section 25249.6 in compliance with all statutory and
18 regulatory requirements for the Additional Products identified by Blumenthal, if any. On or before
19 October 1, 2014, Englander will prepare and file an amendment to this Consent Judgment to
20 incorporate the Additional Products within the defined term "Products" and serve a copy thereof
21 and its supporting papers (including the basis for supplemental stipulated penalties, if any) on the
22 Office of the California Attorney General, upon the Court's approval and finding that the
23 supplemental stipulated penalty amount, if any, is reasonable, the Additional Products shall become
24 subject to Sections 5.1 and 5.2. Blumenthal shall, at the time it elects to proceed under this Section
25 and tenders the additional information or representations regarding any Additional Products to
26 Englander, tender to The Chanler Group's trust account an amount not to exceed \$8,750 as
27 stipulated penalties and attorneys' fees and costs incurred by Englander and his counsel in issuing
28 the new notice of violation, and engaging in other reasonably related activities, which may be

1 released from the trust as awarded by the Court upon Englander's application for approval of the
2 amendment to this Consent Judgment. Any fee award associated with the modification of the
3 Consent Judgment to include Additional Products shall not offset any associated supplemental
4 penalty award, if any. (Any tendered funds remaining in the trust thereafter shall be refunded to
5 Blumenthal within 15 days). Such payment shall be made to "in trust for The Chanler Group" and
6 delivered as per Section 4.5.1(a) above.

7 11.2 Englander and Blumenthal agree to support the entry of this agreement as a Consent
8 Judgment and to obtain approval of the Consent Judgment by the Court in a timely manner. The
9 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
10 noticed motion is required for judicial approval of this Consent Judgment, which motion Englander
11 shall draft and file and Blumenthal shall support, appearing at the hearing if so requested. If any
12 third-party objection to the motion is filed, Englander and Blumenthal agree to work together to file
13 a reply and appear at any hearing. This provision is a material component of the Consent Judgment
14 and shall be treated as such in the event of a breach.

15 **13. MODIFICATION**

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

19 **14. AUTHORIZATION**

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

23 **AGREED TO:**

24 Date: October 18, 2013

25
26 By: 
27 PETER ENGLANDER
28

AGREED TO:

Date: 11/7/13

By: 
Richard Blumenthal, President
BLUMENTHAL DISTRIBUTING, INC.

1 **EXHIBIT A**

- 2
- 3 I. Settling Defendant: **Blumenthal Distributing, Inc.**
- 4 II. Names of Releases (Optional; May be Partial):
- 5 III. Types of Covered Products: Upholstered Furniture, Stools with Vinyl Upholstery (DEHP)
- 6 IV. Types of Additional Products: None
- 7 V. Settling Defendant's Required Settlement Payments:
- 8 A. Initial Civil Penalty and Fee Reimbursement: \$60,000
- 9 1. Initial Civil Penalty: \$21,000
- 10 2. Attorneys' Fees and Costs: \$ 39,000
- 11 B. Second Civil Penalty Payment: \$25,000
- 12 1. Section 4.1.4(i) Partial Penalty Waiver, if applicable: \$15,000
- 13 2. Section 4.1.4(iii) Partial Penalty Waiver, if applicable: \$10,000
- 14 C. Third Civil Penalty Payment: \$10,000
- 15 1. Section 4.1.4(ii) Partial Penalty Waiver, if applicable: \$6,000
- 16 2. Section 4.1.4(iv) Partial Penalty Waiver, if applicable: \$4,000

17 VI. Persons to receive notice under Section 8:

18 Richard Blumenthal
19 Blumenthal Distributing, Inc.
20 1901 S. Archibald Ave.
21 Ontario, California 91761
22 Email: Richard.Blumenthal@officestar.net
23 Fax: (909) 458-6033

24 With a copy to:

25 Michael J. Stiles, Esq.
26 Stiles Law Group
27 790 E. Green Street
28 Pasadena, CA 91101
Email: mstiles@stileslawgroup.com
Fax: (626) 389-0599

Exhibit 3

1 Clifford A. Chanler, State Bar No. 135534
Troy C. Bailey, State Bar No. 277424
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 PETER ENGLANDER

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION
10

11 PETER ENGLANDER,
12 Plaintiff,

13 v.

14 ASHLEY FURNITURE INDUSTRIES,
INC.; *et al.*,
15 Defendants.
16

) Case No. RG 13672407
)
)

) Assigned for All Purposes to
) Judge George C. Hernandez, Jr.,
) Department 17

) **[PROPOSED] CONSENT JUDGMENT AS
) TO LIFESTYLE SOLUTIONS, INC.**

) **(Health & Safety Code § 25249.6 et seq.**
) **Second Amended Complaint Filed: July 9, 2013)**
)
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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant Lifestyle Solutions, Inc. (“Lifestyle Solutions”) with Englander and
5 Lifestyle Solutions 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 exposures to toxic chemicals and to improve human health by reducing or
9 eliminating hazardous substances contained in consumer and commercial products.

10 **1.3 Lifestyle Solutions, Inc.**

11 Lifestyle Solutions employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Englander alleges that Lifestyle Solutions manufactured, imported, sold
16 and/or distributed for sale in California, padded upholstered furniture including ottomans
17 containing tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) without the requisite Proposition 65
18 health hazard warnings.

19 1.4.2 Pursuant to Proposition 65, on October 28, 2011, California identified and
20 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
21 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal.
22 Code Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander
23 alleges that the TDCPP escapes from foam padding, leading to human exposures.

24 1.4.3 Englander also alleges that Lifestyle Solutions manufactured, imported, sold
25 and/or distributed for sale in California, vinyl/PVC coffee tables containing di(2-
26 ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 health hazard warnings.

1 1.4.5 Pursuant to Proposition 65, on October 24, 2003, California identified and
2 listed DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP
3 became subject to the “clear and reasonable warning” requirements of Proposition 65 one year
4 later on October 24, 2004. Cal. Code Regs., tit. 27, § 27001(c); Health & Safety Code §§ 25249.8
5 and 25249.10(b).

6 TDCPP and DEHP shall hereinafter be referred to as the “Listed Chemicals.”

7 **1.5 Product Description**

8 The categories of products that are covered by this Consent Judgment as to Lifestyle
9 Solutions are identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied,
10 shaped or manufactured for use as a component of a product, such as upholstered furniture, is
11 specifically excluded from the definition of Products and shall not be identified by Lifestyle
12 Solutions on Exhibit A as a Product.

13 **1.6 Notices of Violation**

14 On January 10, 2013, Englander served Lifestyle Solutions and certain requisite public
15 enforcement agencies with a “60-Day Notice of Violation” (“January 10, 2013, Notice”) that
16 provided the recipients with notice of alleged violations of Proposition 65 based on the alleged
17 failure to warn customers, consumers, and workers in California that certain Products expose users
18 to TDCPP.

19 Based on further investigation, Englander issued a “60-Day Notice of Violation” to
20 Lifestyle Solutions on April 11, 2013 (“April 11, 2013, Notice”), alleging that certain vinyl/PVC
21 coffee tables contain and expose Californians to DEHP (“Phthalate Products”). DEHP and other
22 phthalates including butyl benzyl phthalate (“BBP”) and Di-n-butyl phthalate (“DBP”) are listed
23 under Proposition 65 as chemicals known to cause birth defects and other reproductive harm.

24 The January 10, 2013, Notice and April 11, 2013, Notice shall hereinafter collectively be
25 referred to as the “Notices.” To the best of the Parties’ knowledge, no public enforcer has
26 commenced or is diligently prosecuting the allegations set forth in the Notices.

1 **1.7 Complaint**

2 On March 21, 2013, Englander filed a Complaint in the Superior Court in and for
3 the County of Alameda against Lifestyle Solutions, other defendants and Does 1 through 150,
4 *Peter Englander v. Ashley Furniture Industries, Inc., et al.*, Case No. RG 13-672407, alleging
5 violations of Proposition 65, based in part on the alleged unwarned exposures to TDCPP contained
6 in the Products. On April 22, 2013, Englander filed a First Amended Complaint alleging
7 violations of Proposition 65 against Lifestyle Solutions. On July 9, 2013, Englander filed a
8 Second Amended Complaint ("Complaint"), alleging additional violations of Proposition 65
9 against Lifestyle Solutions, including unwarned exposures to the Listed Chemicals.

10 **1.8 No Admission**

11 Lifestyle Solutions denies the material, factual and legal allegations contained in
12 Englander's Notice and Complaint and maintains that all products that it has manufactured,
13 imported, distributed, and/or sold in California, including the Products, have been and are in
14 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by
15 Lifestyle Solutions of any fact, finding, conclusion, issue of law, or violation of law, nor shall
16 compliance with this Consent Judgment constitute or be construed as an admission by Lifestyle
17 Solutions of any fact, finding, conclusion, issue of law, or violation of law. However, this section
18 shall not diminish or otherwise affect Lifestyle Solutions' obligations, responsibilities, and duties
19 under this Consent Judgment.

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Lifestyle Solutions as to the allegations contained in the Notices and Complaint,
23 that venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and
24 enforce the provisions of this Consent Judgment pursuant to Proposition 65 and California Code of
25 Civil Procedure § 664.6.

1 **2. DEFINITIONS**

2 **2.1 California Customers**

3 "California Customer" shall mean any customer that Lifestyle Solutions reasonably
4 understands is located in California, has a California warehouse or distribution center, maintains a
5 retail outlet in California, or has made internet sales into California on or after March 4, 2011.

6 **2.2 Detectable**

7 "Detectable" shall mean containing more than 25 parts per million ("ppm") (the equivalent
8 of .0025%) of any one chemical in any material, component, or constituent of a
9 subject product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing
10 methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies
11 to determine the presence, and measure the quantity, of TDCPP and/or tris(2-chloroethyl)
12 phosphate ("TCEP") in a solid substance.

13 **2.3 Effective Date**

14 "Effective Date" shall mean October 15, 2013.

15 **2.4 Private Label Covered Products**

16 "Private Label Covered Products" means Products that bear a brand or trademark owned or
17 licensed by a Retailer or affiliated entity that are sold or offered for sale by a Retailer in the State
18 of California.

19 **2.5 Reformulated Products**

20 "Reformulated Products" shall mean Products that contain no Detectable amount of
21 TDCPP or TCEP and Phthalate Products which contain no more than 1000 ppm each of, DEHP,
22 BBP, and DBP.

23 **2.6 Reformulation Standard**

24 The "Reformulation Standard" shall mean containing no more than 25 ppm for each of
25 TDCPP and TCEP, and for Phthalate Products, no more than 1000 ppm each of, DEHP, BBP, and
26 DBP.

1 contain TDCPP, a chemical known to the State of California to cause cancer and/or DEHP, a
2 chemical known to the State of California to cause birth defects and other reproductive harm, as
3 appropriate depending on the allegations on the Notices, and request that the recipient either: (a)
4 label the Exemplar Product(s) remaining in inventory for sale in California, or to California
5 Customers, pursuant to Section 3.5; or (b) return, at Lifestyle Solutions' sole expense, all units of
6 the Exemplar Product(s) held for sale in California, or to California Customers, to Lifestyle
7 Solutions or a party Lifestyle Solutions has otherwise designated. The Notification Letter shall
8 require a response from the recipient within 15 days confirming whether the Exemplar Product(s)
9 will be labeled or returned. Lifestyle Solutions shall maintain records of all correspondence or
10 other communications generated pursuant to this Section for two years after the Effective Date and
11 shall promptly produce copies of such records upon Englander's written request.

12 3.4 Current Inventory

13 Any Products in, or manufactured and en route to, Lifestyle Solutions' inventory as of or
14 after December 31, 2013, that do not qualify as Reformulated Products and that Lifestyle Solutions
15 has reason to believe may be sold or distributed for sale in California, shall contain a clear and
16 reasonable warning as set forth in Section 3.5 below unless Section 3.6 applies.

17 3.5 Product Warnings

18 3.5.1 Product Labeling

19 Any warning provided under Section 3.3 or 3.4 above shall be affixed to the packaging,
20 labeling, or directly on each Product. Each warning shall be prominently placed with such
21 conspicuousness as compared with other words, statements, designs, or devices as to render it
22 likely to be read and understood by an ordinary individual under customary conditions before
23 purchase. Each warning shall be provided in a manner such that the consumer or user understands
24 to which specific Product the warning applies, so as to minimize the risk of consumer confusion.

25 A warning provided pursuant to this Consent Judgment shall state:
26
27
28

1 **WARNING:** This product contains TDCPP, a
2 flame retardant chemical known to
3 the State of California to cause
4 cancer.

5 And, for Phthalate Products:

6 **WARNING:** This product contains DEHP, a
7 chemical known to the State of
8 California to cause birth defects and
9 other reproductive harm.
10

11 Attached as Exhibit B are template warnings developed by Englander that are deemed to be
12 clear and reasonable for purposes of this Consent Judgment.² Provided that the other requirements
13 set forth in this Section are addressed, including as to the required warning statement and method
14 of transmission as set forth above, Lifestyle Solutions remains free not to utilize the template
15 warnings.

16 3.5.2 Internet Website Warning

17 A warning shall be given in conjunction with the sale of the Products to California, or
18 California Customers, via the internet, which warning shall appear on one or more web pages
19 displayed to a purchaser during the checkout process. The following warning statement shall be
20 used and shall: (a) appear adjacent to or immediately following the display, description, or price of
21 the Product; (b) appear as a pop-up box; or (c) otherwise appear automatically to the customer.
22 The warning text shall be the same type size or larger than the Product description text: :

23 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be
24 used if Lifestyle Solutions had begun to use it, prior to the Effective Date. If Lifestyle Solutions
25 seeks to use alternative warning language, other than the language specified above or the safe
26 harbor warning specified in 27 CCR § 25603.2, or seeks to use an alternate method of transmission
27 of the warning, it must obtain the Court's approval of its proposed alternative and provide all
28 Parties and the Office of the Attorney General with timely notice and the opportunity to comment
29 or object before the Court acts on the request. The Parties agree that the following warning
30 language shall not be deemed to meet the requirements of 27 CCR § 25601 *et seq.* and shall not be
31 used pursuant to this Consent Judgment: (a) "cancer or birth defects or other reproductive harm";
32 and (b) "cancer, birth defects or other reproductive harm."

33 ² The characteristics of the template warnings are as follows: (a) a yellow hang tag
34 measuring 3" x 5", with no less than 12 point font, with the warning language printed on each side
35 of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring
36 8.5" x 11", with no less than 32 point font, with the warning language printed on each side, which
37 shall be affixed directly to the Product; and (c) for Products sold at retail in a box or packaging, a
38 yellow warning sticker measuring 3" x 3", with no less than 12 point font, which shall be affixed
39 directly to the Product packaging.

1
2 **WARNING:** This product contains TDCPP, a
3 flame retardant chemical known to
4 the State of California to cause
5 cancer.

6 And, for Phthalate Products:

7 **WARNING:** This product contains DEHP, a
8 chemical known to the State of
9 California to cause birth defects and
10 other reproductive harm.³

11 **3.6 Alternatives to Interim Warnings**

12 The obligations of Lifestyle Solutions under Section 3.3 shall be relieved provided
13 Lifestyle Solutions certifies on or before December 15, 2013, that only Exemplar Products meeting
14 the Reformulation Standard will be offered for sale in California, or to California Customers for
15 sale in California, after December 31, 2013. The obligations of Lifestyle Solutions under Section
16 3.4 shall be relieved provided Lifestyle Solutions certifies on or before December 15, 2013, that,
17 after June 30, 2014, it will only distribute or cause to be distributed for sale in, or sell in,
18 California, or to California Customers for sale in California. Products (i.e., Products beyond the
19 Exemplar Product) meeting the Reformulation Standard. The certifications provided by this
20 Section are material terms and time is of the essence.

21 **4. MONETARY PAYMENTS**

22 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

23 In settlement of all the claims referred to in this Consent Judgment, Lifestyle
24 Solutions shall pay the civil penalties shown for it on Exhibit A in accordance with this Section.
25 Each penalty payment will be allocated in accordance with California Health & Safety Code
26 § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
27 Health Hazard Assessment ("OEHHA"), and 25% of the penalty remitted to "The Chanler Group
28 in Trust for Englander." Each penalty payment shall be made within two business days of the date
 it is due and be delivered to the addresses listed in Section 4.5 below. Lifestyle Solutions shall be

³ Footnote 1, *supra*, applies in this context as well.

1 liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing
2 under this Section that are not received within two business days of the due date.

3 4.1.1 Initial Civil Penalty. On or before the Effective Date, Lifestyle Solutions
4 shall make an initial civil penalty payment in the amount identified on Lifestyle Solutions' Exhibit
5 A.

6 4.1.2 Second Civil Penalty. On or before January 15, 2014, Lifestyle Solutions
7 shall make a second civil penalty payment in the amount identified on Lifestyle Solutions' Exhibit
8 A. The amount of the second penalty may be reduced according to any penalty waiver Lifestyle
9 Solutions is eligible for under Sections 4.1.4(i) and 4.1.4(iii), below.

10 4.1.3 Third Civil Penalty. On or before November 30, 2014, Lifestyle Solutions
11 shall make a third civil penalty payment in the amount identified on Lifestyle Solutions' Exhibit A.
12 The amount of the third penalty may be reduced according to any penalty waiver Lifestyle
13 Solutions is eligible for under Sections 4.1.4(ii) and 4.1.4(iv), below.

14 4.1.4 Reductions to Civil Penalty Payment Amounts. Lifestyle Solutions may
15 reduce the amount of the second and/or third civil penalty payments identified on Lifestyle
16 Solutions' Exhibit A by providing Englander with certification of certain efforts undertaken to
17 reformulate their Products or limit the ongoing sale of non-reformulated Products in California.
18 The options to provide a written certification in lieu of making a portion of Lifestyle Solutions'
19 civil penalty payment constitute material terms of this Consent Judgment, and with regard to such
20 terms, time is of the essence.

21 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of**
22 **Products Sold or Offered for Sale in California.**

23 If Lifestyle Solutions so elects on Exhibit A, a portion of the second civil penalty shall be
24 waived, to the extent that it has agreed that, as of November 1, 2013, and continuing into the
25 future, it shall only manufacture or import for distribution or sale to California Customers or cause
26 to be manufactured or imported for distribution or sale to California Customers, Reformulated
27 Products. An officer or other authorized representative of Lifestyle Solutions that has exercised
28

1 this election shall provide Englander with a written certification confirming compliance with such
2 conditions, which certification must be received by Englander's counsel on or before December
3 15, 2013.

4 **4.1.4(ii) Partial Penalty Waiver for Extended Reformulation.**

5 If Lifestyle Solutions so elects on Exhibit A, a portion of the third civil penalty shall be
6 waived, to the extent that it has agreed that, as of March 31, 2014, and continuing into the future, it
7 shall only manufacture or import for distribution or sale in California or cause to be manufactured
8 or imported for distribution or sale in California, Reformulated Products which also do not contain
9 tris(2,3-dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than 25 parts per
10 million ("ppm") (the equivalent of .0025%) in any material, component, or constituent of a subject
11 product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing methodologies
12 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
13 presence, and measure the quantity, of TDBPP in a solid substance. An officer or other authorized
14 representative of Lifestyle Solutions that has exercised this election shall provide Englander with a
15 written certification confirming compliance with such conditions, which certification must be
16 received by Englander's counsel on or before November 15, 2014.

17 **4.1.4(iii) Partial Penalty Waiver for Withdrawal of Unreformulated**
18 **Exemplar Products from the California Market.**

19 As shown on Lifestyle Solutions' Exhibit A, a portion of the second civil penalty shall be waived,
20 if an officer or other authorized representative of Lifestyle Solutions provides Englander with
21 written certification, by December 15, 2013, confirming that each individual or establishment in
22 California to which it supplied the Exemplar Product after October 28, 2011, has elected to return
23 all remaining Exemplar Products held for sale in California.⁴

24
25 _____
26 ⁴ For purposes of this Section, the term Exemplar Products shall further include Products
27 for which Englander has, prior to August 31, 2013, provided Lifestyle Solutions with test results
28 from a NVLAP accredited laboratory showing the presence of the Listed Chemicals at a level in
excess of 250 ppm pursuant to EPA testing methodologies 3545 or 8270C.

1 4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to**
2 **California of Unreformulated Inventory.**

3 As shown on Lifestyle Solutions' Exhibit A, a portion of the third civil penalty shall be
4 waived, if an officer or other authorized representative of Lifestyle Solutions provides Englander
5 with written certification, on or before November 15, 2014, confirming that, as of July 1, 2014, it
6 has and will continue to distribute, offer for sale, or sell in California, or to California Customers,
7 only Reformulated Products.

8 4.2 **Representations**

9 Lifestyle Solutions represents that the sales data and other information concerning its size,
10 knowledge of the Listed Chemicals, and prior reformulation and/or warning efforts, it provided to
11 Englander was truthful to its knowledge and a material factor upon which Englander has relied to
12 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in
13 this Consent Judgment.

14 If, within nine months of the Effective Date, Englander discovers and presents to Lifestyle
15 Solutions, evidence demonstrating that the preceding representation and warranty was materially
16 inaccurate, then Lifestyle Solutions shall have 30 days to meet and confer regarding the
17 Englander's contention. Should this 30 day period pass without any such resolution between the
18 Englander and Lifestyle Solutions, Englander shall be entitled to file a formal legal claim
19 including, but not limited to, a claim for damages for breach of contract.

20 Lifestyle Solutions further represents that in implementing the requirements set forth in
21 Sections 3.1 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts
22 to achieve reformulation of its Products and Additional Products on a nationwide basis and not
23 employ statements that will encourage a vendor to limit its compliance with the Reformulation
24 Standard to goods intended for sale to California Consumers.

1 4.3 **Stipulated Penalties for Certain Violations of the Reformulation**
2 **Standard.**

3 If Englander provides notice and appropriate supporting information to Lifestyle Solutions
4 that levels of the Listed Chemicals in excess of the Reformulation Standard have been detected in
5 one or more Products labeled or otherwise marked in an identifiable manner as manufactured or
6 imported after a deadline for meeting the Reformulation Standard has arisen for Lifestyle Solutions
7 under Sections 3.1 or 3.6 above, Lifestyle Solutions may elect to pay a stipulated penalty to relieve
8 any further potential liability under Proposition 65 or sanction under this Consent Judgment as to
9 Products sourced from the vendor in question.⁵ The stipulated penalty shall be \$1,500 if the
10 violation level is below 100 ppm and \$3,000 if the violation level is between 100 ppm and 249
11 ppm, this being applicable for any amount in excess of the Reformulation Standards but under 250
12 ppm.⁶ Englander shall further be entitled to reimbursement of his associated expense in an amount
13 not to exceed \$5,000 regardless of the stipulated penalty level. Lifestyle Solutions under this
14 Section must provide notice and appropriate supporting information relating to the purchase (e.g.
15 vendor name and contact information including representative, purchase order, certification (if
16 any) received from vendor for the exemplar or subcategory of products), test results, and a letter
17 from a company representative or counsel attesting to the information provided, to Englander
18 within 30 calendar days of receiving test results from Englander's counsel. Any violation levels at
19 or above 250 ppm shall be subject to the full remedies provided pursuant to this Consent Judgment
20 and at law.

21
22
23
24 ⁵ This Section shall not be applicable where the vendor in question had previously been
25 found by Lifestyle Solutions to have provided unreliable certifications as to meeting the
26 Reformulation Standard in its Products on more than one occasion. Notwithstanding the
foregoing, a stipulated penalty for a second exceedance by Lifestyle Solutions' vendor at a level
between 100 and 249 ppm shall not be available after July 1, 2015.

27 ⁶ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 **4.4 Reimbursement of Fees and Costs**

2 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
4 this fee reimbursement issue to be resolved after the material terms of the agreement had been
5 settled. Shortly after the other settlement terms had been finalized, Lifestyle Solutions expressed a
6 desire to resolve the fee and cost issue. Lifestyle Solutions then agreed to pay Englander and his
7 counsel under general contract principles and the private attorney general doctrine codified at
8 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
9 execution of this agreement, including the fees and costs incurred as a result of investigating,
10 bringing this matter to Lifestyle Solutions' attention, negotiating a settlement in the public interest,
11 and seeking court approval of the same. In addition, the negotiated fee and cost figure expressly
12 includes the anticipated significant amount of time Englander's counsel will incur to monitor
13 various provisions in this agreement over the next two years, with the exception of additional fees
14 that may be incurred pursuant to Lifestyle Solution's election in Section 11. Lifestyle Solutions
15 more specifically agreed, upon the Court's approval and entry of this Consent Judgment, to pay
16 Englander's counsel the amount of fees and costs indicated on Lifestyle Solutions' Exhibit A.
17 Lifestyle Solutions further agreed to tender and shall tender its full required payment under this
18 Section to a trust account at The Chanler Group (made payable "In Trust for The Chanler Group")
19 within two business days of the Effective Date. Such funds shall be released from the trust
20 account upon the Court's approval and entry of this Consent Judgment.

21 **4.5 Payment Procedures**

22 4.5.1 Issuance of Payments.

23 (a) All payments owed to Englander and his counsel, pursuant to
24 Sections 4.1, 4.3 and 4.4 shall be delivered to the following payment address:

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

1 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Section 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one
3 of the following addresses, as appropriate:

4 For United States Postal Service Delivery:

5 Mike Gyurics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery:

9 Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 1001 I Street
13 Sacramento, CA 95814

12 4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA
13 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth
14 in Section 4.5.1(a) above, as proof of payment to OEHHA.

15 4.5.3 Tax Documentation. Lifestyle Solutions shall issue a separate 1099 form
16 for each payment required by this Section to: (a) Peter Englander, whose address and tax
17 identification number shall be furnished upon request after this Consent Judgment has been
18 fully executed by the Parties; (b) OEHHA, who shall be identified as "California Office of
19 Environmental Health Hazard Assessment" (EIN: 68-0284486) in the 1099 form, to be
20 delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814; and (c) "The
21 Chanler Group" (EIN: 94-3171522) to the address set forth in Section 4.5.1(a) above.

22 **5. CLAIMS COVERED AND RELEASED**

23 **5.1 Englander's Release of Proposition 65 Claims**

24 Englander, acting on his own behalf and in the public interest, releases Lifestyle Solutions,
25 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
26 employees, attorneys, and each entity to whom Lifestyle Solutions directly or indirectly distribute
27

1 or sell Products, including, but not limited, to downstream distributors, wholesalers, customers,
2 retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all
3 claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to
4 the Listed Chemicals in the Products, as set forth in the Notices. Compliance with the terms of this
5 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to the
6 Listed Chemicals from the Products, as set forth in the Notices. The Parties further understand and
7 agree that this Section 5.1 release shall not extend upstream to any entities, other than Lifestyle
8 Solutions, that manufactured the Products or any component parts thereof, or any distributors or
9 suppliers who sold the Products or any component parts thereof to Lifestyle Solutions, except that
10 an entity upstream of Lifestyle Solutions that is a Retailer of a Private Labeled Covered Product
11 shall be released as to the Private Labeled Covered Products offered for sale in California, or to
12 California Customers, by the Retailer in question.

13 5.2 Englander's Individual Releases of Claims

14 Englander, in his individual capacity only and *not* in his representative capacity, provides a
15 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
16 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
17 liabilities, and demands of Englander of any nature, character, or kind, whether known or
18 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
19 TDCPP, TCEP, TDBPP, DEHP, DBP, and/or BBP in the Products or Additional Products (as
20 defined in Section 11.1 and delineated on Lifestyle Solution's Exhibit A) manufactured, imported,
21 distributed, or sold by Lifestyle Solutions prior to the Effective Date.⁷ The Parties further
22 understand and agree that this Section 5.2 release shall not extend upstream to any entities that
23 manufactured the Products or Additional Products, or any component parts thereof, or any
24 distributors or suppliers who sold the Products or Additional Products, or any component parts
25

26 ⁷ The injunctive relief requirements of Section 3 shall apply to Additional Products as
27 otherwise specified.

1 thereof to Lifestyle Solutions, except that an entity upstream of Lifestyle Solutions that is a
2 Retailer of a Private Labeled Covered (or Additional) Product shall be released as to the Private
3 Labeled Covered (or Additional) Products offered for sale in California by the Retailer in question.
4 Nothing in this Section affects Englander's right to commence or prosecute an action under
5 Proposition 65 against a Releasee that does not involve Lifestyle Solution's Products or Additional
6 Products.

7 **5.3 Lifestyle Solutions' Release of Englander**

8 Lifestyle Solutions, on behalf of itself, its past and current agents, representatives,
9 attorneys, successors, and assignees, hereby waives any and all claims against Englander and his
10 attorneys and other representatives, for any and all actions taken or statements made (or those that
11 could have been taken or made) by Englander and his attorneys and other representatives, whether
12 in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in
13 this matter with respect to the Products or Additional Products.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and
16 shall be null and void if, for any reason, it is not approved in its entirety and entered by the Court
17 within one year after it has been fully executed by all Parties. If the Court does not approve the
18 Consent Judgment, the Parties shall meet and confer as to whether to modify the language or
19 appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the case
20 shall proceed in its normal course on the Court's trial calendar. If the Court's approval is
21 ultimately overturned by an appellate court, the Parties shall meet and confer as to whether to
22 modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of
23 action to take, then the case shall proceed in its normal course on the Court's trial calendar In the
24 event that this Consent Judgment is entered by the Court and subsequently overturned by any
25 appellate court, any monies that have been provided to OEHHA, Englander or his counsel pursuant
26 to Section 4, above, shall be refunded within 15 days of the appellate decision becoming final. If
27 the Court does not approve and enter the Consent Judgment within one year of the Effective Date,
28

1 any monies that have been provided to OEHHA or held in trust for Englander or his counsel
2 pursuant to Section 4, above, shall be refunded to Lifestyle Solutions within 15 days.

3 **7. GOVERNING LAW**

4 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
6 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
7 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
8 rendered inapplicable by reason of law generally as to the Products, then Lifestyle Solutions may
9 provide written notice to Englander of any asserted change in the law, and shall have no further
10 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products
11 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Lifestyle
12 Solutions from any obligation to comply with any pertinent state or federal law or regulation.

13 **8. NOTICES**

14 Unless specified herein, all correspondence and notices required to be provided pursuant to
15 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
16 registered or certified mail, return receipt requested; or (iii) overnight courier to any party by the
17 other party at the following addresses:

18 To Lifestyle Solutions:

19 At the address shown on Exhibit A

To Englander:

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

23 Any Party, from time to time, may specify in writing to the other Party a change of address to
24 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 pdf signature,
3 each of which shall be deemed an original, and all of which, when taken together, shall constitute
4 one and the same document. A facsimile or pdf signature shall be as valid as the original.

5 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

6 Englander and his attorneys agree to comply with the reporting form requirements
7 referenced in California Health & Safety Code § 25249.7(f).

8 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

9 11.1 In addition to the Products, where Lifestyle Solutions has identified on Exhibit A
10 additional products that contain TDCPP and that are sold or offered for sale by it in California, or
11 to California Customers, ("Additional Products"), then by no later than October 15, 2013,
12 Lifestyle Solutions may provide Englander with additional information or representations
13 necessary to enable him to issue a 60-Day Notice of Violation and valid Certificate of Merit
14 therefore, pursuant to Health & Safety Code § 25249.7, that includes the Additional Products.
15 Polyurethane foam that is supplied, shaped or manufactured for use as a component of a product,
16 such as upholstered furniture, is specifically excluded from the definition of Additional Products
17 and shall not be identified by Lifestyle Solutions on Exhibit A as an Additional Product. Except as
18 agreed upon by Englander, Lifestyle Solutions shall not include a product, as an Additional
19 Product, that is the subject of an existing 60-day notice issued by Englander or any other private
20 enforcer at the time of execution. After receipt of the required information, Englander agrees to
21 issue a supplemental 60-day notice in compliance with all statutory and regulatory requirements
22 for the Additional Products. Englander will, and in no event later than October 1, 2014, prepare
23 and file an amendment to this Consent Judgment to incorporate the Additional Products within the
24 defined term "Products" and serve a copy thereof and its supporting papers (including the basis for
25 supplemental stipulated penalties, if any) on the Office of the California Attorney General upon the
26 Court's approval and finding that the supplemental stipulated penalty amount, if any, is reasonable,
27 the Additional Products shall become subject to Section 5.1 in addition to Section 5.2. Lifestyle
28

1 Solutions shall, at the time it elects to utilize this Section and tenders the additional information or
2 representations regarding the Additional Products to Englander, tender to The Chanler Group's
3 trust account an amount not to exceed \$8,750 as stipulated penalties and attorneys' fees and costs
4 incurred by Englander in issuing the new notice and engaging in other reasonably related activities,
5 which may be released from the trust as awarded by the Court upon Englander's application. Any
6 fee award associated with the modification of the Consent Judgment to include Additional
7 Products shall not offset any associated supplemental penalty award, if any. (Any tendered funds
8 remaining in the trust thereafter shall be refunded to Lifestyle Solutions within 15 days). Such
9 payment shall be made to "in trust for The Chanler Group" and delivered as per Section 4.5.1(a)
10 above.

11 11.2 Englander and Lifestyle Solutions agree to support the entry of this agreement as a
12 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.
13 The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed
14 motion is required to obtain judicial approval of this Consent Judgment, which Englander shall
15 draft and file. If any third party objection to the noticed motion is filed, Englander and Lifestyle
16 Solutions shall work together to file a reply and appear at any hearing before the Court. This
17 provision is a material component of the Consent Judgment and shall be treated as such in the
18 event of a breach.

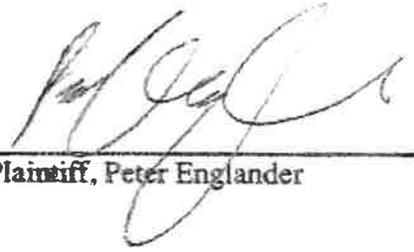
19 **12. MODIFICATION**

20 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
21 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
22 of any party and entry of a modified Consent Judgment by the Court.
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1 **13. AUTHORIZATION**

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

5
6 **AGREED TO:**

7
8 
9 _____
10 **Plaintiff, Peter Englander**

11 **Date: October __, 2013**

6 **AGREED TO:**

7 **Defendant**
8 **Lifestyle Solutions, Inc.**

9 **By:** _____
10 **Name:**
11 **It's:**

12 **Date: October __, 2013**

1 **13. AUTHORIZATION**

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

5
6 AGREED TO:

AGREED TO:

Defendant
Lifestyle Solutions, Inc.

7
8
9
10 _____
Plaintiff, Peter Englander

By: 

Name: SEAN P. ...

It's:

11 Date: September __, 2013

12 Date: September __, 2013

10/1/13

EXHIBIT A

I. Name of Settling Defendant: LIFESTYLE SOLUTIONS, INC.

II. Names of Releasees (optional/partial):

III. Types of Covered Products Applicable to the Settling Defendant:

a) Padded upholstered ottomans containing TDCPP;

b) Vinyl/PVC coffee tables containing DEHP.

IV. Types of Additional Products Lifestyle Solutions, Inc. Elects to Address (if any):

V. Lifestyle Solutions, Inc.'s Required Settlement Payments

A. Penalties of \$43,000, as follows:

\$5,000 initial payment due on or before the Effective Date;

\$24,000 second payment due on or before January 15, 2014, of which \$14,000 may be waived pursuant to Section 4.1.4(i) and \$10,000 may be waived pursuant to Section 4.1.4(iii); and

\$14,000 third payment due on or before November 30, 2014, of which \$8,000 may be waived pursuant to Section 4.1.4(ii) and \$6,000 may be waived pursuant to Section 4.1.4(iv).

B. Payment to The Chanler Group for reimbursement of attorneys' fees and costs attributable to Lifestyle Solutions, Inc.: \$28,000.

VI. Person(s) to receive Notices pursuant to Section 8

Kevin C. Mayer

Name

Attorney

Title

Company/Firm Name

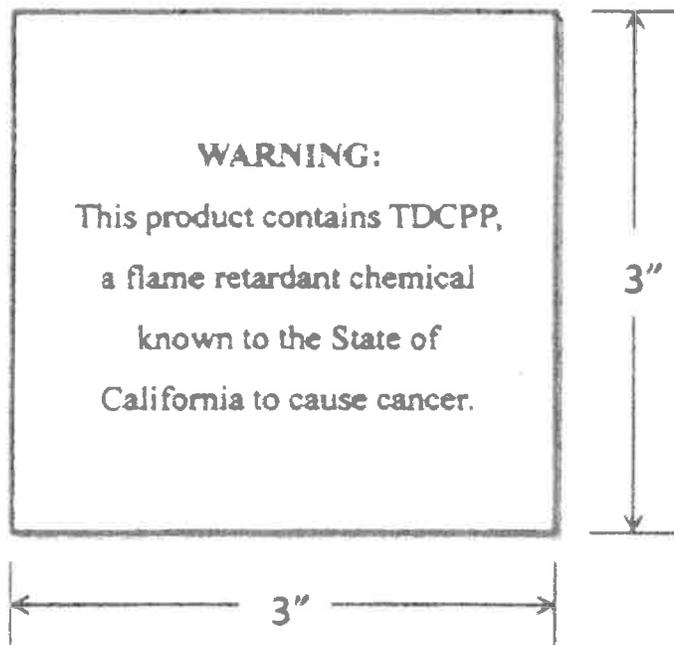
Address Crowell & Moring LLP

515 South Flower Street, 40th Floor

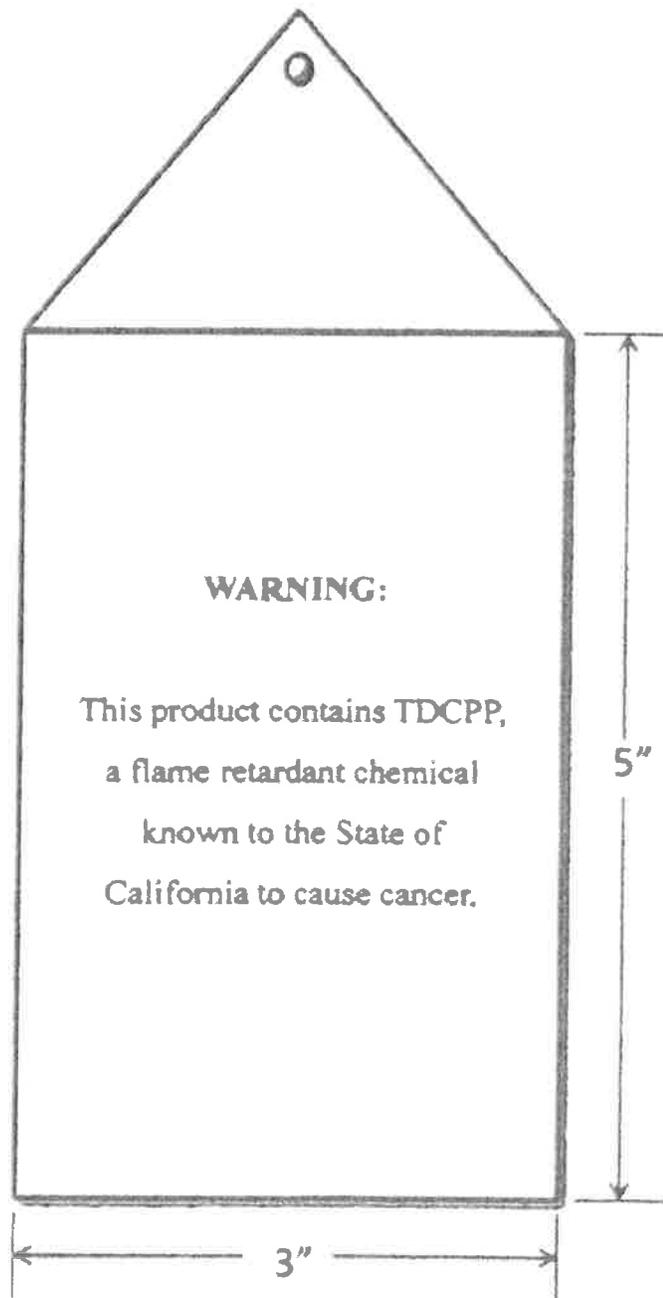
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EXHIBIT B
(ILLUSTRATIVE WARNINGS)



INSTRUCTIONS: Minimum 12 pt. font. "WARNING:" text must be bold.



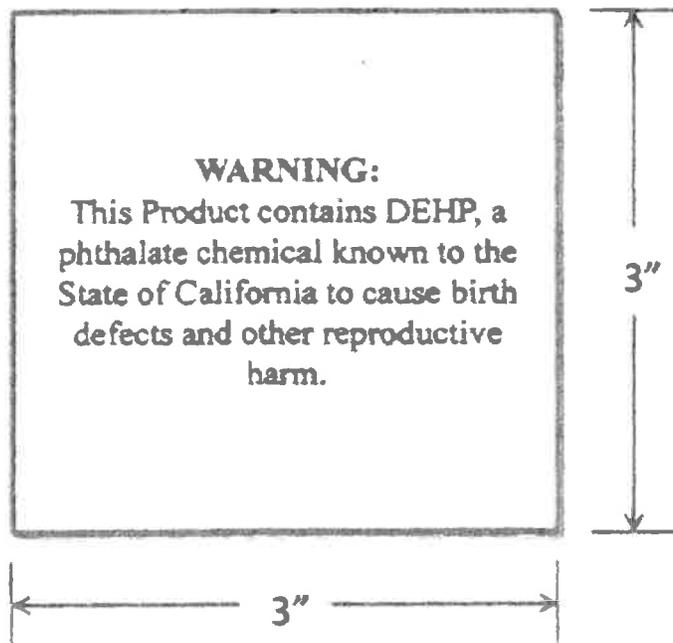
INSTRUCTIONS: Print warning on each side of hang tag.
Minimum 12 pt. font. "WARNING:" text must be bold.

WARNING:

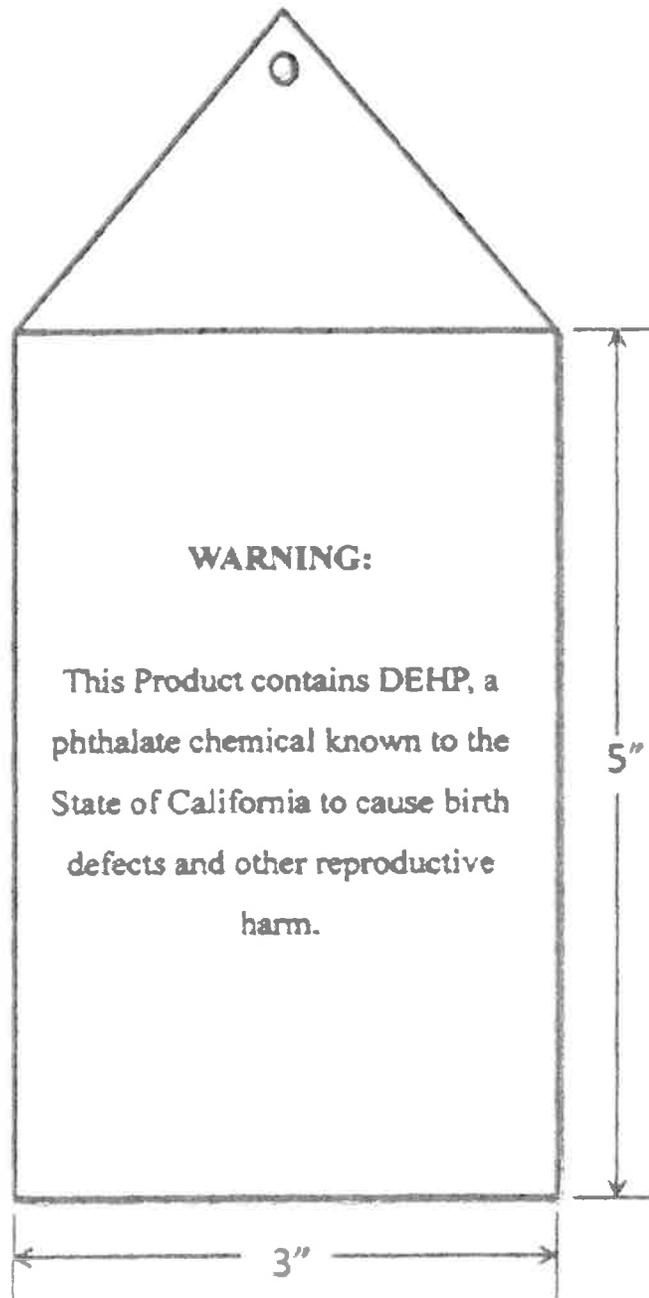
This product contains TDCPP, a flame retardant
chemical known to the State of California to
cause cancer.



INSTRUCTIONS: Minimum 32 pt. Font. "WARNING:" text must be bold and underlined



INSTRUCTIONS: Minimum 12 pt. font. "WARNING:" text must be bold.



INSTRUCTIONS: Print warning on each side of hang tag.
Minimum 12 pt. font. "WARNING:" text must be bold.

WARNING:

This Product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

8.5"

11"

INSTRUCTIONS: Minimum 32 pt. Font. "WARNING:" text must be bold and underlined.