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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

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

**[PROPOSED] CONSENT
JUDGMENT AS TO DEFENDANT
BEST BUY STORES, L.P.,
erroneously sued as BEST BUY CO.,
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 Best Buy Stores, L.P., erroneously sued as Best Buy Co., Inc. (“Best
5 Buy”). Englander and Best Buy are each referred to individually as a “Party” and collectively as
6 the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 1.4.1 Englander alleges that Best Buy manufactured, imported, sold and/or
17 distributed for sale in California, upholstered furniture including ottomans with foam padding
18 containing tris(1,3-dichloro-2-propyl)phosphate (“TDCPP”) and vinyl/PVC upholstery containing
19 di(2-ethylhexyl)phthalate (“DEHP”) without providing the clear and reasonable health hazard
20 warnings required by Proposition 65.

21 1.4.2 On October 28, 2011, California listed TDCPP pursuant to Proposition 65 as
22 a 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, 2013. Cal. Code Regs., tit. 27, § 27001(b);
24 Health & Safety Code §§ 25249.8 and 25249.10(b). Englander further alleges that TDCPP escapes
25 from the foam padding components in Best Buy’s products resulting in human exposures.

26 1.4.3 On October 24, 2003, California listed DEHP pursuant to Proposition 65 as a
27 chemical known to cause developmental and reproductive harm. DEHP became subject to the
28 “clear and reasonable warning” requirements of the act one year later on October 24, 2004. Cal.

1 Code Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander
2 further alleges that consumers and other individuals are exposed to DEHP as result of direct dermal
3 contact, and by ingestion as a result of hand-to-mouth contact during and following use.

4 **1.5 Product Description**

5 The products that are covered by this Consent Judgment are upholstered furniture with foam
6 padding containing TDCPP and/or PVC/vinyl upholstery containing DEHP that are supplied to Best
7 Buy by Critical Mass LLC (“Critical Mass”) including, but not limited to, the *Goodies Sturdy*
8 *Storage Ottoman, LFO17BR (UPC No. 8 52109 00284 9)*. The upholstered furniture identified
9 above and sold by Critical Mass and Best Buy in California is referred to collectively hereinafter as
10 the “Products.”

11 **1.6 Notice of Violation**

12 1.6.1 On January 2, 2013, Englander served Best Buy and certain requisite public
13 enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Best Buy violated
14 Proposition 65 when it failed to warn its customers, consumers, and workers in California that the
15 Products expose users to TDCPP and DEHP.

16 **1.7 Complaint**

17 On March 21, 2013, Englander commenced the instant action, naming Best Buy as a
18 defendant for the alleged violations of Proposition 65 that are the subject of the Notice. Thereafter,
19 on July 9, 2013, Englander filed a Second Amended Complaint (“Complaint”), the operative
20 pleading in this action.

21 **1.8 No Admission**

22 Best Buy denies the material, factual, and legal allegations contained in the Notice and
23 Complaint and maintains that all of the products that it has sold or distributed for sale in California,
24 including the Products, have been and are in compliance with all laws. Nothing in this Consent
25 Judgment shall be construed as an admission by Best Buy of any fact, finding, conclusion of law,
26 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
27 construed as an admission by Best Buy of any fact, finding, conclusion of law, issue of law, or
28

1 violation of law. This Section shall not, however, diminish or otherwise affect Best Buy's
2 obligations, responsibilities, and duties under this Consent Judgment.

3 **1.9 Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Best Buy as to the allegations contained in the Complaint, that venue is proper in
6 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of
7 this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section
8 664.6.

9 **2. DEFINITIONS**

10 **2.1 No Detectable Amount**

11 "No Detectable Amount" shall mean no more than 25 parts per million ("ppm") (the
12 equivalent of .0025%) of any one chemical in any material, component, or constituent of a subject
13 product, when analyzed by an accredited laboratory pursuant to EPA testing methodologies 3545
14 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
15 presence, or measure the amount, of TDCPP in a solid substance.

16 **2.3 Effective Date**

17 "Effective Date" shall mean the date on which this Consent Judgment is entered by the
18 Court.

19 **2.4 Reformulated Products**

20 "Reformulated Products" shall mean Products that contain No Detectable Amount of
21 TDCPP in excess of the Reformulation Standard and Phthalate Products which contain no more
22 than 1,000 parts per million of DEHP.

23 **2.6 Reformulation Standard**

24 The "Reformulation Standard" shall mean Products with components containing no more
25 than 25 ppm of TDCPP and no more than 1,000 ppm of DEHP.

26 **3. INJUNCTIVE RELIEF: REFORMULATION**

27 **3.1 Reformulation Commitment**

28 Commencing on September 1, 2014, and continuing thereafter, Best Buy shall not sell or

1 offer for sale in California any Product unless it has obtained a written certification from its vendor
2 that the Products meet the definition of Reformulated Products established by this Consent
3 Judgment. Best Buy shall maintain any supplier certification obtained pursuant to this Section for
4 three years.

5 **3.2 Interim Product Warnings**

6 **3.2.1 Existing Inventory Sales.** Any Products received by Best Buy before
7 December 31, 2013, that Best Buy knows or has reason to believe do not qualify as Reformulated
8 Products, and that Best Buy sells or offers for sale in California, may be sold thereafter but shall
9 contain a clear and reasonable warning as set forth in this Section 3.2.

10 **3.2.2 Product Labeling.** Any warning provided under this Consent Judgment
11 shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be
12 prominently placed with such conspicuousness when compared with other words, statements,
13 designs, or devices as to render it likely to be read and understood by an ordinary individual under
14 customary conditions before purchase. Each warning shall be provided in a manner such that the
15 consumer or user understands to which specific Product the warning applies, so as to minimize the
16 risk of consumer confusion.

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

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

20 Or, for Products containing DEHP and TDCPP:

21 **WARNING:** This product contains DEHP and
22 TDCPP chemicals known to the State
23 of California to cause cancer, and birth
defects or other reproductive harm.

24
25 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be
26 used if Best Buy or its vendor had employed it for Products prior to the Effective Date. If Best Buy
27 seeks to use alternative warning language, other than the language specified above or the safe
28 harbor warning specified in 27 CCR § 25603.2, or seeks to use an alternate method of transmission
of the warning, it must obtain the Court's approval of its proposed alternative 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.

1 **4. MONETARY PAYMENTS**

2 **4.1 Civil Penalties**

3 In settlement of all the claims referred to in this Consent Judgment, pursuant to Health and
4 Safety Code section 25249.7(b), Best Buy shall pay up to \$14,500 in civil penalties according to
5 this Section. Each penalty payment will be allocated in accordance with California Health & Safety
6 Code section 25249.12(c)(1) and (d), with 75% of the penalty payment remitted to the California
7 Office of Environmental Health Hazard Assessment (“OEHHA”), and 25% of the penalty payment
8 retained by Englander. Best Buy shall be liable for payment of simple interest at a rate of 10% for
9 all amounts due and owing that are not received within five business days of the due date.

10 **4.1.1 Initial Civil Penalty.** Within ten (10) business days of the later of the
11 Effective Date and Best Buy’s receipt of Internal Revenue Service Forms W-9 from Englander, and
12 “OEHHA”, Best Buy shall make an initial civil penalty payment of \$4,500. Best Buy shall provide
13 its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount
14 of \$3,375; and (b) “Peter Englander, Client Trust Account” in the amount of \$1,125.

15 **4.1.2 Final Civil Penalty.** On or before April 15, 2015, Best Buy shall make a
16 final civil penalty payment of \$10,000. The final civil penalty payment will be waived in its
17 entirety if, no later than April 1, 2015, Best Buy provides Englander with written certification that it
18 is no longer offering or distributing for sale in California the Products or is only offering for sale
19 and distributing for sale in California, Reformulated Products, as defined by Section 2.4, above.
20 The option to provide a certification of reformulation in lieu of making the final civil penalty
21 payment under this Consent Judgment is a material term, and time is of the essence.

22 **4.2 Representations Regarding Sales and Other Information**

23 Best Buy represents that the sales data and other information concerning its sales of the
24 Products provided to Englander over the course of the litigation and settlement discussions in this
25 action are true and accurate based on its knowledge, and are material factors upon which Englander
26 relied to determine the amount of civil penalties assessed pursuant to Health and Safety Code
27 section 25249.7(b).

28

1 **4.3 Reimbursement of Fees and Costs**

2 Under general contract principles and the private attorney general doctrine codified at
3 California Code of Civil Procedure section 1021.5, for all work performed through the mutual
4 execution of this agreement, including the fees and costs incurred as a result of investigating,
5 bringing this matter to Best Buy’s attention, negotiating a settlement in the public interest, and
6 seeking court approval of the same, Best Buy agrees to arrange payment to Englander of \$28,000.

7 **4.4 Payment Procedures**

8 With the exception of the final civil penalty required by Section 4.1.2, all payments under this
9 Consent Judgment are due within ten business days of the later of the Effective Date and Best
10 Buy’s receipt of Internal Revenue Service Forms W-9 from Englander, “OEHHA”, and “The
11 Chanler Group”, and shall be made and delivered according to the following subsections.

12 **4.4.1 Payment Addresses.**

13 (a) All payments and tax documentation required for Englander and his
14 counsel under this Consent Judgment shall be delivered to the following address:

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

20 All payments and tax documentation required for OEHHA under this Consent Judgment shall be
21 delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of the following addresses, as
22 appropriate:

23 For United States Postal Service Delivery:

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

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

30 Mike Gyurics
31 Fiscal Operations Branch Chief
32 Office of Environmental Health Hazard Assessment
33 1001 I Street
34 Sacramento, CA 95814

1 4.4.2 **Proof of Payment to OEHHA.** A copy of Best Buy’s check payable to
2 OEHHA shall be mailed, simultaneous with payment to Englander, to The Chanler Group at the
3 address provided in Section 4.4.1(a).

4 **5. ENFORCEMENT OF CONSENT JUDGMENT**

5 5.1 **General Enforcement Provisions**

6 Any Party may, by motion, application or any other remedy afforded by law, enforce the
7 terms and conditions contained in this Consent Judgment. A Party may file such a motion or
8 application only after that Party first provides 30 days notice to the Party allegedly failing to
9 comply with the terms and conditions of this Consent Judgment and attempts to resolve such
10 Party’s failure to comply in an open and good faith manner for a period of no less than 30 days.

11 **6. CLAIMS COVERED AND RELEASED**

12 6.1 **Englander’s Public Release of Proposition 65 Claims**

13 Englander, acting on his own behalf and in the public interest, releases Best Buy, its parents,
14 subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, and
15 attorneys, and each entity to whom Best Buy directly or indirectly distributes or sells the Products,
16 including, but not limited, to downstream distributors, wholesalers, customers, retailers,
17 franchisees, cooperative members, and licensees (collectively, “Releasees”), from all claims
18 alleging violations of Proposition 65 through the Effective Date based on unwarned exposures to
19 the TDCPP and/or DEHP in the Products, as set forth in the Notice. Compliance with the terms of
20 this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to
21 TDCPP and/or DEHP from the Products, as set forth in the Notice. The Parties further understand
22 and agree that this Section 6.1 release shall not extend upstream to any entity that manufactured the
23 Products or any component parts thereof, or any distributor or supplier who sold the Products or
24 any component parts thereof to Best Buy.

25 6.2 **Englander’s Individual Release of Claims**

26 Englander, in his individual capacity only and *not* in any representative capacity, provides a
27 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
28 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,

1 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
2 unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP, TDBPP
3 and/or DEHP in Products manufactured, imported, distributed, or sold by Best Buy prior to the
4 Effective Date. The Parties further understand and agree that this Section 6.2 release shall not
5 extend upstream to any entity that manufactured any Products or any component parts thereof, or
6 any distributors or suppliers who sold any Products or any component parts thereof to Best Buy.

7 **6.3 Best Buy's Release of Englander**

8 Best Buy, on its own behalf, and on behalf of 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 in
12 connection with the claims asserted in this matter, whether in the course of investigating claims,
13 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

14 **7. COURT APPROVAL**

15 7.1 This Consent Judgment is not effective until it is approved and entered by the Court
16 and shall be null and void if, for any reason, it is not approved and entered by the Court within one
17 year after it has been fully executed by all Parties.

18 7.2 Englander and Best Buy agree to support the entry of this agreement as a Consent
19 Judgment and to obtain approval of the Consent Judgment by the Court in a timely manner. The
20 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
21 noticed motion is required for judicial approval of this Consent Judgment, which motion Englander
22 shall draft and file and Best Buy shall support, including appearing at the hearing if so requested.
23 This provision is a material component of the Consent Judgment and shall be treated as such in the
24 event of a breach.

25 7.3 If the Court does not approve the Consent Judgment, the Parties shall meet and
26 confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree
27 on a course of action to take, then the case shall proceed in its normal course on the Court's trial
28 calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall

1 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not
2 jointly agree on a course of action to take, then the case shall proceed in its normal course on the
3 Court's trial calendar. In the event that this Consent Judgment is entered by the Court and
4 subsequently overturned by any appellate court, any monies that have been provided to OEHHA,
5 Englander or his counsel under this Consent Judgment shall be refunded within 15 days of the
6 appellate decision becoming final.

7 **8. GOVERNING LAW**

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

15 **9. NOTICE**

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

20 To Best Buy:

21 General Counsel
22 Best Buy Stores, L.P.
23 7601 Penn Avenue South
24 Richfield, MN 55423

25 With a copy to:

26 Gary J. Smith, Esq.
27 Beveridge & Diamond, PC
28 456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251

To Englander:

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

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

3 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

7 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

10 **12. MODIFICATION**

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

14 **13. AUTHORIZATION**

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

18 **AGREED TO:**

19
20 Date: January 21, 2015

21
22 By: 
23 PETER ENGLANDER

AGREED TO:

20 Date: 1/20/2015

21
22 By: 
23 Jason Bonfig / Senior Category Officer
24 BEST BUY STORES, L.P.