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12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF ALAMEDA
15 UNLIMITED CIVIL JURISDICTION
16

17 PETER ENGLANDER

18 Plaintiff,

19 v.

20 ASHLEY FURNITURE INDUSTRIES,
21 INC., et al.

22 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

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
28

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.

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 OEHHA (EIN: 68-0284486), pursuant to
20 Section 4.1, shall be delivered directly to OEHHA (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:

Attn: Proposition 65 Coordinator
The Chanler Group
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.
26
27
28

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.

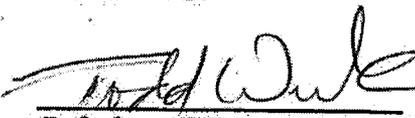
12 **12. AUTHORIZATION**

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:**

AGREED TO:

17 
18 _____
19 Plaintiff PETER ENGLANDER


20 _____
21 Defendant ASHLEY FURNITURE
22 INDUSTRIES, INC.

23 Dated: November 13, 2013

24 Dated: 11/26/13

25
26
27
28

1 **EXHIBIT A**

2
3 I. Settling Defendant: **Ashley Furniture Industries, Inc. ("Ashley")**

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

8 III. Settling Defendant's Required Settlement Payments:

9 A. Initial Payment: \$68,000

10 1. Initial Civil Penalty: \$20,000

11 2. Attorneys' Fees and Costs: \$ 48,000

12 B. Second Civil Penalty: \$24,000

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

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

15 C. Third Civil Penalty: \$10,000

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

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

18 IV. Persons to receive notices under Section 8:

19 Todd Wanek, President
20 Ashley Furniture Industries, Inc.
21 One Ashley Way
22 Arcadia, WI 54612

23 With a copy to:

24 General Counsel
25 Ashley Furniture Industries, Inc.
26 One Ashley Way
27 Arcadia, WI 54612
28 Fax: 608-323-5060