

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

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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.,
Department 17*

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT ROSS STORES, 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 Ross Stores, Inc. (“Ross”), each referred to individually as a “Party”
5 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 Ross 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 Ross manufactured, imported, sold and/or distributed
16 for sale in California, upholstered furniture with foam padding containing tris(1, 3-dichloro-2-
17 propyl)phosphate (“TDCPP”) and tris(2-chloroethyl)phosphate (“TCEP”) without providing the
18 clear and reasonable health hazard warnings required by Proposition 65.

19 1.4.2 On April 1, 1992, California listed TCEP pursuant to Proposition 65, as a
20 chemical known to cause cancer. TCEP became subject to the “clear and reasonable warning”
21 requirements of the act one year later on April 1, 1993. Cal. Code Regs., tit. 27, § 27001(b); Health
22 & Safety Code §§ 25249.8 and 25249.10(b).

23 1.4.3 On October 28, 2011, California listed TDCPP pursuant to Proposition 65,
24 as a chemical known to cause cancer. TDCPP became subject to the “clear and reasonable
25 warning” requirements of the act one year later on October 28, 2013. Cal. Code Regs., tit. 27, §
26 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander further alleges that
27 TDCPP and TCEP escape from the foam padding components in the Settling Ross’s products
28 resulting in human exposures.

1 **1.5 Product Description**

2 The products that are covered by this Consent Judgment are upholstered furniture supplied
3 to Ross by Perfect Generation World Limited (“Perfect Generation”) and offered for sale by Ross in
4 California including, but not limited to, *Ottoman, Zebra, #400077414714, D1052 C6424*. The
5 upholstered furniture identified above and sold by Ross in California is referred to collectively
6 hereinafter as the “Products”. Polyurethane foam that is supplied, shaped or manufactured for use
7 as a component of another product, such as upholstered furniture, but which is not itself a finished
8 product, is specifically excluded from the definition of Products.

9 **1.6 Notices of Violation**

10 1.6.1 On January 2, 2013, Englander served Ross and certain requisite public
11 enforcement agencies with a 60-Day Notice of Violation (“First Ross Notice”) alleging that Ross
12 violated Proposition 65 when it failed to warn its customers, consumers, and workers in California
13 that the Products expose users to TDCPP.

14 1.6.2 On February 25, 2013, Englander served Ross and the same requisite public
15 enforcement agencies with a 60-Day Notice of Violation (“Second Ross Notice”) alleging that Ross
16 violated Proposition 65 when it failed to warn its customers, consumers, and workers in California
17 that the Products expose users to TCEP.

18 1.6.3 The First Ross Notice and Second Ross Notice are referred to collectively as
19 the “Notices.” To the best of the Parties’ knowledge, no public enforcer has commenced and is
20 diligently prosecuting the allegations set forth in any of the Notices.

21 **1.7 Complaint**

22 On March 21, 2013, Englander commenced the instant action, naming Ross as a defendant
23 for the alleged violations of Proposition 65 that are the subject of the Notices. Thereafter, on July
24 9, 2013, Englander filed a Second Amended Complaint (“Complaint”), the operative pleading in
25 this action.

26 **1.8 No Admission**

27 Ross denies the material, factual, and legal allegations contained in the Notices and
28 Complaint, and maintains that all of the products that it has sold or distributed for sale in California,

1 including the Products, have been and are in compliance with all laws. Nothing in this Consent
2 Judgment shall be construed as an admission by Ross of any fact, finding, conclusion of law, issue
3 of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
4 construed as an admission by Ross of any fact, finding, conclusion of law, issue of law, or violation
5 of law. This Section shall not, however, diminish or otherwise affect Ross’s obligations,
6 responsibilities, and duties under this Consent Judgment.

7 **1.9 Jurisdiction**

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

12 **2. DEFINITIONS**

13 **2.1 No Detectable Amount**

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

19 **2.3 Effective Date**

20 “Effective Date” shall mean the date on which this Consent Judgment is entered by the
21 Court.

22 **2.4 Reformulated Products**

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

25 **2.6 Reformulation Standard**

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

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1 **3. INJUNCTIVE RELIEF: REFORMULATION**

2 **3.1 Reformulation Commitment**

3 Commencing on April 1, 2014 and continuing thereafter, Ross shall not sell and/or offer for
4 sale in California any Products unless it has obtained a written certification from its supplier of the
5 Products that such Products meet the definition of Reformulated Products established by this
6 Consent Judgment. Ross shall maintain any supplier certification obtained pursuant to this Section
7 for three years.

8 **3.2 Interim Product Warnings**

9 3.2.1 Any Products received by Ross before December 31, 2013, that Ross knows
10 or has reason to believe do not qualify as Reformulated Products, and that Ross sells or offers for
11 sale in California, may be sold thereafter but shall contain a clear and reasonable warning as set
12 forth in this Section 3.2.

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

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

21 **WARNING:** This product contains [TDCPP and/or
22 TCEP,] flame retardant chemicals
23 known to the State of California to
24 cause cancer.¹

25 _____
26 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be
27 used if Ross or its vendor had employed it for Products prior to the Effective Date. If Ross seeks to
28 use alternative warning language, other than the language specified above or the safe 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), Ross shall pay \$15,000 in civil penalties according to this Section
5 4.1. Each penalty payment will be allocated in accordance with California Health & Safety Code
6 section 25249.12(c)(1) and (d), with 75% of the penalty payment remitted to the California Office
7 of Environmental Health Hazard Assessment (“OEHHA”), and 25% of the penalty payment
8 retained by Englander. Ross shall be liable for payment of simple interest at a rate of 10% for all
9 amounts due and owing that are not received within five business days of the due date.

10 **4.1.1 Initial Civil Penalty.** Within five business days of the Effective Date, Ross
11 shall make an initial civil penalty payment of \$5,000. Ross shall provide its payment in two checks
12 for the following amounts made payable to: (a) “OEHHA” in the amount of \$3,750; and (b) “The
13 Chanler Group in Trust for Peter Englander” in the amount of \$1,250.

14 **4.1.2 Final Civil Penalty.** On or before June 15, 2014, Ross shall make a final
15 civil penalty payment of \$10,000. Ross shall provide its payment in two checks for the following
16 amounts made payable to: (a) “OEHHA” in the amount of \$7,500; and (b) “The Chanler Group in
17 Trust for Peter Englander” in the amount of \$2,500. The amount of the final civil penalty may be
18 reduced according to any penalty waiver for which Ross is eligible under Sections 4.1.3(i) and 4.1.3
19 (ii), below. In the event a portion of the final civil penalty is waived as a result of a partial penalty
20 credit, then the remaining portion shall be allocated according to Section 4.1 and the Health and
21 Safety Code such that 75% of any amount paid is paid to OEHHA, and the remaining 25% of any
22 amount paid is retained by Englander.

23 **4.1.3 Partial Final Civil Penalty Waivers**

24 **(i) Partial Waiver for Accelerated Reformulation.** \$6,000 of Ross’s
25 final civil penalty payment shall be waived, if, as of February 1, 2014, and continuing thereafter,
26 Ross requires its vendor of the Products to provide it with a written certification stating that the
27 vendor’s Products comply with the 25 ppm standard applicable to TCEP and TDCPP for
28 Reformulated Products. To obtain the penalty waiver, an officer or other authorized representative

1 of Ross shall provide Englander with a written certification confirming that it has complied with
2 this requirement, no later than March 31, 2104.

3 (ii) **Partial Waiver for Extended Reformulation.** \$4,000 of Ross's
4 final civil penalty payment shall be waived, if, as of June 1, 2014, and continuing thereafter, Ross
5 agrees to require its vendor of the Products to provide it with written certification that all of the
6 vendor's Products contain no more than 25 ppm tris(2,3-dibromopropyl)phosphate ("TDBPP") in a
7 detectable amount of more than 25 parts per million ("ppm") (the equivalent of .0025%) in any
8 material, component, or constituent of a subject product, when analyzed by an accredited Lab
9 pursuant to an Approved Methodology. To obtain the penalty waiver, an officer or other authorized
10 representative of Ross must provide Englander's counsel with a written certification confirming that
11 it has complied with the above requirement, no later than May 15, 2014.

12 4.2 **Representations Regarding Sales and Other Information**

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

22 4.3 **Reimbursement of Fees and Costs**

23 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
24 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
25 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
26 other settlement terms had been finalized, Ross expressed a desire to resolve Englander's
27 outstanding fees and costs. Under general contract principles and the private attorney general
28 doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed

1 through the mutual execution of this agreement, including the fees and costs incurred as a result of
2 investigating, bringing this matter to Ross's attention, negotiating a settlement in the public interest,
3 and seeking court approval of the same, Ross agrees to pay Englander, \$30,000. Ross shall tender
4 its payment in full payable to "The Chanler Group" within five business days of the Effective Date.

5 **4.4 Payment Procedures**

6 **4.4.1 Payment Addresses.**

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

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

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

17 For United States Postal Service Delivery:

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

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

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

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

4.4.3 **Tax Documentation.** Ross shall provide a separate 1099 form for its
payments to each of the following payees: (a) Peter Englander, whose address and tax

1 identification number shall be furnished upon request after this Consent Judgment has been fully
2 executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment” (EIN:
3 68-0284486); and (c) “The Chanler Group” (EIN: 94-3171522) , and deliver such form to the payee
4 at the payment addresses provided in Section 4.4.1.

5 **5. ENFORCEMENT OF CONSENT JUDGMENT**

6 **5.1 General Enforcement Provisions**

7 **5.2** Any Party may, by motion, application or any other remedy afforded by law, enforce
8 the terms and conditions contained in this Consent Judgment. A Party may file such a motion or
9 application only after that Party first provides 30 days’ notice to the Party allegedly failing to
10 comply with the terms and conditions of this Consent Judgment and attempts to resolve such
11 Party’s failure to comply in an open and good faith manner for a period of no less than 30 days.
12 Any action to enforce alleged violations of Section 3.1 shall be brought exclusively pursuant to
13 Section 5.2.

14 **5.3 Notice Regarding Violation**

15 Within 10 days of receiving a written notice of violation from Englander (“NOV”)
16 containing: (a) a copy of the sales receipt from Ross showing the date and location from which the
17 Product was purchased, and the identification of the Product, including the SKU and/or other
18 identification number(s); and (b) all test data obtained by Englander regarding the Product and
19 supporting documentation sufficient for validation of the test results, including any laboratory
20 reports, quality assurance reports and quality control reports associated with the testing of a Product
21 demonstrating that the Product contains more than 25 ppm TCEP and/or TDCPP. Upon Ross’s
22 receipt of an NOV and the necessary supporting information from Englander, Ross shall
23 discontinue the sale of that Product in California and provide a copy of the certification obtained
24 from its vendor pursuant to Section 3.1 with respect to the Product at issue, and shall have no
25 further liability under this Consent Judgment or Proposition 65 with respect to the Product and
26 TCEP and/or TDCPP. An NOV shall be based upon testing from an independent laboratory
27 pursuant to Environmental Protection Agency testing methodologies 3545 and 8270C or any other
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1 methodology utilized by federal and state agencies for the purpose of determining TCEP and/or
2 TDCPP content in a solid substance.

3 **5.4 Monetary Payments for Violating Section 3.1**

4 5.4.1 In the event that Englander purchases a Product in California that contains
5 more than 25 ppm TCEP and/or TDCPP more than 60 days after the Effective Date and Ross fails
6 to provide a copy of the certification obtained from its vendor regarding the Product at issue, in
7 addition to Ross discontinuing sale of the Product in California, Ross shall pay \$5,000 in civil
8 penalties. The civil penalty shall be apportioned in accordance with Section 4.1 and Health and
9 Safety Code section 25249.12(c)(1) and (d).

10 5.4.2 In addition to the above, Ross shall reimburse Englander and his counsel
11 \$12,000 for fees and costs incurred as a result of investigating and identifying the violation.
12 Payment shall be made in accordance with Section 4.3 and shall be delivered to Englander's
13 counsel at the address found in Section 4.4.1(a) within five business days of the expiration of the 30
14 day period Ross has to provide the written certification.

15 5.4.3 This Section 5.4 shall not apply to any Products that were received by Ross
16 prior to December 31, 2013 and which bear a clear and reasonable warning pursuant to Section 3.2.

17 **6. CLAIMS COVERED AND RELEASED**

18 **6.1 Englander's Release of Proposition 65 Claims**

19 Englander, acting on his own behalf and in the public interest, releases Ross, its parents,
20 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
21 attorneys, and each entity to whom Ross directly or indirectly distributes or sells the Products,
22 including, but not limited to, downstream distributors, wholesalers, customers, retailers,
23 franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims
24 alleging violations of Proposition 65 through the Effective Date based on unwarned exposures to
25 TCEP and/or TDCPP in the Products, as set forth in the Notices. Compliance with the terms of this
26 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to TCEP
27 and/or TDCPP from the Products, as set forth in the Notices. The Parties further understand and
28 agree that this Section 6.1 release shall not extend upstream to any entity that manufactured the

1 Products or any component parts thereof, or any distributor or supplier who sold the Products or
2 any component parts thereof to Ross.

3 **6.2 Englander's Individual Releases of Claims**

4 Englander, in his individual capacity only and *not* in any representative capacity, provides a
5 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
6 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
7 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
8 unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP, and/or
9 TDBPP in Products manufactured, imported, distributed, or sold by Ross prior to the Effective
10 Date. The Parties further understand and agree that this Section 6.2 release shall not extend
11 upstream to any entity that manufactured any Products or any component parts thereof, or any
12 distributors or suppliers who sold any Products or any component parts thereof to Ross. Nothing in
13 this Section affects Englander's right to commence or prosecute an action under Proposition 65
14 against a Releasee that does not involve Ross's Products.

15 **6.3 Ross's Release of Englander**

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

22 **7. COURT APPROVAL**

23 7.1 This Consent Judgment is not effective until it is approved and entered by the Court
24 and shall be null and void if, for any reason, it is not approved and entered by the Court within one
25 year after it has been fully executed by all Parties.

26 7.2 Englander and Ross agree to support the entry of this agreement as a Consent
27 Judgment and to obtain approval of the Consent Judgment by the Court in a timely manner. The
28 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a

1 noticed motion is required for judicial approval of this Consent Judgment, which motion Englander
2 shall draft and file and Ross shall support, including appearing at the hearing if so requested. This
3 provision is a material component of the Consent Judgment and shall be treated as such in the event
4 of a breach.

5 7.3 If the Court does not approve the Consent Judgment, the Parties shall meet and
6 confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree
7 on a course of action to take, then the case shall proceed in its normal course on the Court's trial
8 calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall
9 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not
10 jointly agree on a course of action to take, then the case shall proceed in its normal course on the
11 Court's trial calendar. In the event that this Consent Judgment is entered by the Court and
12 subsequently overturned by any appellate court, any monies that have been provided to OEHHA,
13 Englander or his counsel under this Consent Judgment shall be refunded within 15 days of the
14 appellate decision becoming final.

15 **8. GOVERNING LAW**

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

23 **9. NOTICE**

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

General Counsel
Ross Stores, Inc.
4440 Rosewood Drive
Pleasanton, CA 94588

To Englander:

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

With a copy to:

Jeffrey B. Margulies
Fulbright & Jaworski LLP
555 South Flower Street
41st Floor
Los Angeles, California 90071

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

10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

11. COMPLIANCE WITH REPORTING REQUIREMENTS

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

12. MODIFICATION

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

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 **AGREED TO:**

AGREED TO:

6
7 Date: March 5, 2014

Date: March 9, 2014

8
9 By: 
10 PETER ENGLANDER

By: 
11 ROSS STORES, INC.
12 Group Vice President,
13 Corporate Counsel

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