

1 Josh Voorhees, State Bar No. 241436
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 Plaintiffs
6 PETER ENGLANDER and
ANTHONY E. HELD, PH.D., P.E.

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

11 PETER ENGLANDER and
12 ANTHONY E. HELD, PH.D., P.E.

13 Plaintiffs,

14 v.

15 Z GALLERIE, et al.

16 Defendants.

) Case No. RG14716959
)
)
)

) **[PROPOSED] CONSENT JUDGMENT AS**
) **TO Z GALLERIE**
)

) **(Health & Safety Code § 25249.6 et seq.**
) **Complaint Filed: March 11, 2014)**
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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiffs Peter Englander
4 (“Englander”), Anthony E. Held, Ph.D., P.E. (“Held”) and the defendant Z Gallerie (“ZG”) with
5 Englander, Held and ZG collectively referred to as the “Parties.”

6 **1.2 Plaintiffs**

7 Englander and Held are individuals residing in the State of California who seek to promote
8 awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating
9 hazardous substances contained in consumer and commercial products.

10 **1.3 Z Gallerie**

11 ZG 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 &
13 Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Englander alleges that ZG manufactured, imported, sold and/or distributed
16 for sale in California, padded upholstered chairs containing tris(1,3-dichloro-2-propyl) phosphate
17 (“TDCPP”) without the requisite Proposition 65 health hazard warnings. Englander alleges that
18 TDCPP escapes from foam padding, leading to human exposures.

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. Code
22 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

23 1.4.3 Held alleges that ZG manufactured, imported, sold and/or distributed for sale
24 in California chairs with vinyl/PVC upholstery containing di(2-ethylhexyl)phthalate (“DEHP”)
25 without the requisite Proposition 65 health hazard warnings.

26 1.4.4 Pursuant to Proposition 65, on October 24, 2003, California identified and
27 listed di(2-ethylhexyl)phthalate (“DEHP”) as a chemical known to cause birth defects and other
28 reproductive harm. DEHP became subject to the “clear and reasonable warning” requirements of

1 Proposition 65 one year later on October 24, 2004. Cal. Code Regs., tit. 27, § 27001(c); Health &
2 Safety Code §§ 25249.8 and 25249.10(b).

3 TDCPP and DEHP shall hereinafter be collectively referred to as the “Listed
4 Chemicals.”

5 **1.5 Product Description**

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

11 **1.6 Notices of Violation**

12 On or about March 18, 2013, Englander served ZG and certain requisite public enforcement
13 agencies with a “60-Day Notice of Violation” (“Englander Notice”) that provided the recipients
14 with notice of alleged violations of Proposition 65 based on the alleged failure to warn customers,
15 consumers, and workers in California that padded upholstered chairs expose users to TDCPP (“Tris
16 Products”).

17 On December 13, 2013, Held issued a “60-Day Notice of Violation” to ZG and certain
18 requisite public enforcement agencies (“Held Notice”), alleging that the chairs with vinyl/PVC
19 upholstery expose users to DEHP (“Phthalate Products”). DEHP and other phthalates, including
20 butyl benzyl phthalate (“BBP”) and Di-n-butyl phthalate (“DBP”) are listed under Proposition 65 as
21 chemicals known to cause birth defects and other reproductive harm.

22 The Englander Notice and the Held Notice shall hereinafter collectively be referred to as the
23 “Notices.” To the best of the Parties’ knowledge, no public enforcer has commenced or is
24 diligently prosecuting the allegations set forth in the Notices.

25 **1.7 Complaint**

26 On March 11, 2014 Plaintiffs filed a Complaint in and for the County of Alameda against
27 ZG, other defendants, and Does 1 through 150, *Peter Englander and Anthony E. Held, Ph.D., P.E.*
28 *v. Z Gallerie, et al.*, Case No. RG14716959, alleging violations of Proposition 65, based on the

1 alleged unwarned exposures to TDCPP contained in the Tris Products and unwarned exposures to
2 DEHP contained in the Phthalate Products.

3 **1.8 No Admission**

4 ZG denies the material factual and legal allegations contained in Notices and Complaint and
5 maintains that all products that it has manufactured, imported, distributed, and/or sold in California,
6 including the Products, have been and are in compliance with all laws. Nothing in this Consent
7 Judgment shall be construed as an admission by ZG of any fact, finding, conclusion, issue of law,
8 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
9 an admission by ZG of any fact, finding, conclusion, issue of law, or violation of law. However,
10 this section shall not diminish or otherwise affect ZG’s obligations, responsibilities, and duties
11 under this Consent Judgment.

12 **1.9 Consent to Jurisdiction**

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

18 **2. DEFINITIONS**

19 **2.1 California Customers**

20 “California Customer” shall mean any customer that ZG reasonably understands is located
21 in California, has a California warehouse or distribution center, maintains a retail outlet in
22 California, or has made internet sales into California on or after January 1, 2011 (“California
23 Customer” does not include individuals who purchased the Products for their own use).”

24 **2.2 Detectable**

25 “Detectable” shall mean containing more than 25 parts per million (“ppm”) (the equivalent
26 of .0025%) of any one chemical in any material, component, or constituent of Tris Product, when
27 analyzed pursuant to EPA testing methodologies 3545 and 8270C, or equivalent methodologies
28 utilized by federal or state agencies to determine the presence, and measure the quantity, of TDCPP

1 in a solid substance. As to the Phthalate Products, “Detectable” shall mean containing
2 concentrations less than 0.1%, or 1000 ppm of DEHP in an accessible component of a Phthalate
3 Product. For purposes of this Agreement “accessible component” means polyvinyl chloride or any
4 soft plastic, vinyl or synthetic leather component of a Phthalate Product that could be touched by a
5 person during reasonably foreseeable use.

6 **2.3 Effective Date**

7 “Effective Date” shall mean March 28, 2014.

8 **2.4 Private Label Covered Products**

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

12 **2.5 Reformulated Products**

13 As to Tris Products, “Reformulated Products” shall mean Products that contain no
14 Detectable amount of TDCPP. As to Phthalate Products, “Reformulated Products” shall mean
15 Phthalate Products which contain concentrations less than 0.1%, or 1000 ppm each of, DEHP in
16 accessible components.

17 **2.6 Reformulation Standard**

18 As to Tris Products, the “Reformulation Standard” shall mean containing no more than 25
19 ppm for each of TDCPP. As to Phthalate Products, “Reformulation Standard” shall mean Phthalate
20 Products containing concentrations less than 0.1%, or 1000 ppm of DEHP in accessible
21 components.

22 **2.7 Retailer**

23 “Retailer” means an individual or entity that offers a Product for retail sale to consumers in
24 the State of California.

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1 **3. INJUNCTIVE RELIEF: REFORMULATION**

2 **3.1 Reformulation Commitment**

3 Commencing on August 15, 2014, ZG shall not manufacture or import for distribution or
4 sale to California Customers, or cause to be manufactured or imported for distribution or sale to
5 California Customers, any Tris Products that are not Reformulated Products.¹

6 **3.2 Vendor Notification/Certification**

7 On or before the Effective Date, ZG shall provide written notice to all of its then-current
8 vendors of the Tris Products that will be sold or offered for sale in California, or to California
9 Customers, instructing each such vendor to use reasonable efforts to provide only Reformulated
10 Tris Products for potential sale in California. In addressing the obligation set forth in the preceding
11 sentence, ZG shall not employ statements that will encourage a vendor to delay compliance with the
12 Reformulation Standard applicable to Tris Products. ZG shall subsequently obtain written
13 certifications, no later than August 15, 2014, from such vendors, and any newly engaged vendors,
14 that the Tris Products manufactured by such vendors are in compliance with the Reformulation
15 Standard applicable to Tris Products. Certifications shall be held by ZG for at least two years after
16 their receipt and shall be made available to Plaintiffs upon request.

17 **3.3 Products No Longer in ZG's Control**

18 No later than 30 days after the Effective Date, ZG shall send a letter, electronic or otherwise
19 ("Notification Letter") to: (1) each California Customer (except those who purchased Products for
20 personal use only) and/or Retailer which it, after October 28, 2011, supplied the *Rencourt Side*
21 *Chair – Molasses, Item Code: 013623597* ("Exemplar Product"); and (2) any California Customer
22 and/or Retailer that ZG reasonably understands or believes had any inventory for resale in
23 California of the Exemplar Product(s) as of the Englander Notice's dates. The Notification Letter
24

25 ¹ Commencing on August 15, 2014, ZG shall not manufacture or import for distribution or
26 sale to California Customers, or cause to be manufactured or imported for distribution or sale to
27 California Customers, or distribute, sell or offer for sale in California, any Phthalate Products that
28 are not Reformulated Products. On or before the Effective Date, ZG shall provide written notice to
all of its then-current vendors of the Phthalate Products, instructing each such vendor to use
reasonable efforts to provide it with only Reformulated Phthalate Products. In addressing the
obligation set forth in the preceding sentence, ZG shall not employ statements that will encourage a
vendor to delay compliance with the Reformulation Standard applicable to Phthalate Products.

1 shall advise the recipient that each Exemplar Product(s) contains TDCPP, a chemical known to the
2 State of California to cause cancer, and request that the recipient either: (a) label the Exemplar
3 Product(s) remaining in inventory for sale in California, or to California Customers, pursuant to
4 Section 3.5; or (b) return, at ZG's sole expense, all units of the Exemplar Product(s) held for sale in
5 California, or to California Customers, to ZG or a party ZG has otherwise designated. The
6 Notification Letter shall require a response from the recipient within 20 days confirming whether
7 the Exemplar Product(s) will be labeled or returned. ZG shall maintain records of all
8 correspondence or other communications generated pursuant to this Section for two years after the
9 Effective Date and shall promptly produce copies of such records upon Plaintiffs' written request.

10 3.4 Current Inventory

11 Any Products in, or manufactured and en route to, ZG's inventory as of or after May 1,
12 2014, that do not qualify as Reformulated Products and that ZG has reason to believe may be sold
13 or distributed for sale in California, shall contain a clear and reasonable warning as set forth in
14 Section 3.5 below unless Section 3.6 applies.

15 3.5 Product Warnings

16 3.5.1 Product Labeling

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

23 For Tris Products, a warning provided pursuant to this Consent Judgment shall state:

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

26 Or, for Phthalate Products:
27
28

1 **WARNING:** This product contains DEHP, a
2 chemical known to the State of
 California to cause birth defects and
 other reproductive harm.²

3 Attached as Exhibit B are template warnings developed by Plaintiffs that are deemed to be
4 clear and reasonable for purposes of this Consent Judgment.³ Provided that the other requirements
5 set forth in this Section are addressed, including as to the required warning statement and method of
6 transmission as set forth above, ZG remains free not to utilize the template warnings.

7 **3.5.2 Internet Website Warning**

8 A warning shall be given in conjunction with the sale of the Products to California, or
9 California Customers, via the internet, which warning shall appear on one or more web pages
10 displayed to a purchaser during the checkout process. The following warning statement shall be
11 used and shall: (a) appear adjacent to or immediately following the display, description, or price of
12 the Product; (b) appear as a pop-up box; or (c) otherwise appear automatically to the customer. The
13 warning text shall be the same type size or larger than the Product description text:⁴

14 For Tris Products:

15 **WARNING:** This product contains TDCPP, a flame
16 retardant chemical known to the State
17 of California to cause cancer.

18 Or, for Phthalate Products:

19

20 ² The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be
21 used if ZG had begun to use it, prior to the Effective Date. If ZG seeks to use alternative warning
22 language, other than the language specified above or the safe harbor warning specified in 27 CCR §
23 25603.2, or seeks to use an alternate method of transmission of the warning, it obtain the Court's
24 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.
 The Parties agree that the following warning language shall not be deemed to meet the requirements
 of 27 CCR § 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."

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

⁴ Footnote 2, *supra*, applies in this context as well.

1
2 **WARNING:** This product contains DEHP, a
3 chemical known to the State of
4 California to cause birth defects and
5 other reproductive harm.⁵

6 **3.6 Alternatives to Interim Warnings**

7 The obligations of ZG under Section 3.3 shall be relieved provided ZG certifies on or before
8 March 28, 2014 that only Exemplar Products meeting the Reformulation Standard will be offered
9 for sale in California, or to California Customers for sale in California, after April 15, 2014. The
10 obligations of ZG under Section 3.4 for Tris Products shall be relieved provided ZG certifies on or
11 before March 28, 2014 that, after May 1, 2014, it will only distribute or cause to be distributed for
12 sale in, or sell in California, or to California Customers for sale in California, Products (i.e.,
13 Products beyond the Exemplar Product(s)) meeting the Reformulation Standard. The certifications
14 provided by this Section are material terms and time is of the essence.

15 **4. MONETARY PAYMENTS**

16 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

17 In settlement of all the claims referred to in this Consent Judgment, ZG shall pay the
18 civil penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment
19 will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d),
20 with 75% of the funds remitted to the California Office of Environmental Health Hazard
21 Assessment (“OEHHA”), 25% of the penalty remitted in two equal payments to “The Chanler
22 Group in Trust for Englander” and “The Chanler Group in Trust for Held.” Each penalty payment
23 shall be made within two business days of the date it is due and be delivered to the addresses listed
24 in Section 4.5 below. ZG shall be liable for payment of interest, at a rate of 10% simple interest, for
25 all amounts due and owing under Section 4 that are not received within two business days of the
26 due date.

27 4.1.1 Initial Civil Penalty. On or before the Effective Date, ZG shall make an
28 initial civil penalty payment in the amount identified on ZG’s Exhibit A, addressing the alleged Tris
29 Products and Phthalate Products violations, to “Grimaldi Law Offices.” The Grimaldi Law Offices

⁵ Footnote 1, *supra*, applies in this context as well.

1 shall provide The Chanler Group with written confirmation within five days of receipt that the
2 funds have been deposited in a trust account. Within two days of the date that this Consent
3 Judgment is approved by the Court, The Grimaldi law Office shall issue separate checks for the
4 initial civil penalty payment to “OEHHA,” “The Chanler Group in Trust for Peter Englander” and
5 “The Chanler Group in Trust for Anthony E. Held, Ph.D., P.E.”

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

10 4.1.3 Third Civil Penalty. On or before April 1, 2015, ZG shall make a third civil
11 penalty payment in the amount identified on ZG’s Exhibit A. The amount of the third penalty may
12 be reduced according to any penalty waiver ZG is eligible for under Sections 4.1.4(ii) and 4.1.4(iv),
13 below.

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

20 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of Tris**
21 **Products Sold or Offered for Sale in California.**

22 As shown on ZG’s Exhibit A, a portion of the second civil penalty shall be waived, to the
23 extent that it has agreed that, as of June 1, 2014, and continuing into the future, it shall only
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, Reformulated Tris Products. An
26 officer or other authorized representative of ZG that has exercised this election shall provide
27 Plaintiffs with a written certification confirming compliance with such conditions, which
28 certification must be received by Plaintiffs’ counsel on or before May 1, 2014.

1 4.1.4(ii) **Partial Penalty Waiver for Extended Reformulation of Tris**
2 **Products.**

3 If ZG so elects, a portion of the third civil penalty shall be waived, to the extent that it has
4 agreed that, as of August 15, 2014, and continuing into the future, it shall only manufacture or
5 import for distribution or sale to California Customers, Reformulated Tris Products which also do
6 not contain tris(2,3-dibromopropyl)phosphate (“TDBPP”) and tris(2-chloroethyl) phosphate
7 (“TCEP”) in a detectable amount of more than 25 parts per million (“ppm”) (the equivalent of
8 .0025%) in any material, component, or constituent of a subject product, when analyzed pursuant to
9 EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or
10 state agencies to determine the presence, and measure the quantity, of TDBPP and/or TCEP in a
11 solid substance. An officer or other authorized representative of ZG that has exercised this election
12 shall provide Plaintiffs with a written certification confirming compliance with such conditions,
13 which certification must be received by Plaintiffs’ counsel on or before February 15, 2015.

14 4.1.4(iii) **Partial Penalty Waiver for Withdrawal of Unreformulated**
15 **Exemplar Products from the California Market.**

16 As shown on ZG’s Exhibit A, a portion of the second civil penalty shall be waived, if an
17 officer or other authorized representative of ZG provides Plaintiffs with written certification, by
18 May 15, 2014, confirming that each individual or establishment in California to which it supplied
19 the Exemplar Product after October 28, 2011, has elected to return all remaining Exemplar Products
20 held for sale in California, except for those who purchased the Product for individual use.⁶

21 4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to**
22 **California of Unreformulated Tris Products Inventory.**

23 As shown on ZG’s Exhibit A, a portion of the third civil penalty shall be waived, if an
24 officer or other authorized representative of ZG provides Plaintiffs with written certification, on or
25 before December 31, 2014, confirming that, as of February 28, 2015, it has and will continue to

26 _____
27 ⁶ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Plaintiffs have, prior to August 31, 2013, provided ZG with test results from an 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 distribute, offer for sale, or sell in California, or to California Customers, only Reformulated Tris
2 Products.

3 4.2 Representations

4 ZG represents that the sales data and other information concerning its size, knowledge of
5 Listed Chemicals, and prior reformulation and/or warning efforts, it provided to Plaintiffs were
6 truthful to its knowledge and a material factor upon which Plaintiffs have relied to determine the
7 amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this Consent
8 Judgment.

9 If, within nine months of the Effective Date, Plaintiffs discover and presents to ZG,
10 evidence demonstrating that the preceding representation and warranty was materially inaccurate,
11 then ZG shall have 30 days to meet and confer regarding the Plaintiffs contention. Should this 30
12 day period pass without any such resolution between the Plaintiffs and ZG, Plaintiffs shall be
13 entitled to file a formal legal claim including, but not limited to, a claim for damages for breach of
14 contract.

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

20 4.3 Stipulated Penalties for Certain Violations of the Reformulation 21 Standard Applicable to Tris Products.

22 If Plaintiffs provide notice and appropriate supporting information to ZG that levels of the
23 TDCPP in excess of the respective Reformulation Standard have been detected in one or more
24 Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a
25 deadline for meeting the Reformulation Standard has arisen for ZG under Sections 3.1 or 3.6 above,
26 ZG may elect to pay a stipulated penalty to relieve any further potential liability under Proposition
27 65 or sanction under this Consent Judgment as to Tris Products sourced from the vendor in
28

1 question.⁷ Supporting information to be provided to ZG shall include, but is not limited to, the
2 following: a copy of the test report(s) identifying the laboratory undertaking the testing, the test
3 method(s) used, and the test result(s); a statement of the material/component/constituent of the
4 Product that was tested; a photo of the Product that was tested; and the receipt(s) demonstrating the
5 place, date and amount of purchase of the Tris Product, although certain information related to the
6 identity of the purchaser will be redacted. The stipulated penalty shall be \$1,500 if the violation
7 level is below 100 ppm and \$3,000 if the violation level is between 100 ppm and 249 ppm, this
8 being applicable for any amount in excess of the Reformulation Standards but under 250 ppm.⁸
9 Plaintiffs shall further be entitled to reimbursement of their associated expense in an amount not to
10 exceed \$5,000 regardless of the stipulated penalty level. ZG under this Section must provide notice
11 and appropriate supporting information relating to the purchase (e.g. vendor name and contact
12 information including representative, purchase order, certification (if any) received from vendor for
13 the exemplar or subcategory of Tris Products), test results, and a letter from a company
14 representative or counsel attesting to the information provided, to Plaintiffs within 30 calendar days
15 of receiving test results from Plaintiffs' counsel. Any violation levels at or above 250 ppm shall be
16 subject to the full remedies provided pursuant to this Consent Judgment and at law.

17 4.4 Reimbursement of Fees and Costs

18 The Parties acknowledge that Plaintiffs and their counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this fee reimbursement issue to be resolved after the material terms of the agreement had been
21 settled. Shortly after the other settlement terms had been finalized, ZG expressed a desire to resolve
22 the fee and cost issue. ZG then agreed to pay Plaintiffs and their counsel under general contract
23 principles and the private attorney general doctrine codified at California Code of Civil Procedure
24

25 ⁷ This Section shall not be applicable where the vendor in question had previously been
26 found by ZG to have provided unreliable certifications as to meeting the Reformulation Standard in
27 its Tris Products on more than one occasion. Notwithstanding the foregoing, a stipulated penalty
28 for a second exceedance by ZG's vendor at a level between 100 and 249 ppm shall not be available
after July 1, 2015.

⁸ 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 section 1021.5 for all work performed through the mutual execution of this agreement, including
2 the fees and costs incurred as a result of investigating, bringing this matter to ZG's attention,
3 negotiating a settlement in the public interest, and seeking court approval of the same. In addition,
4 the negotiated fee and cost figure expressly includes the anticipated significant amount of time
5 Plaintiffs' counsel will incur to monitor various provisions in this agreement over the next two
6 years, with the exception of additional fees that may be incurred pursuant to ZG's election in
7 Section 11. ZG more specifically agreed, upon the Court's approval and entry of this Consent
8 Judgment, to pay Plaintiffs' counsel the amount of fees and costs indicated on ZG's Exhibit A. ZG
9 shall, within five days of the mutual execution of this Consent Judgment by the Parties, issue a
10 check payable to "Grimaldi Law Office" in the amount of fees and costs indicated on Exhibit A to
11 be held in trust by Grimaldi Law Office for The Chanler Group. Grimaldi Law Office shall provide
12 The Chanler Group with written confirmation within five days of receipt that the funds have been
13 deposited in a trust account. Within two business days of the date this Consent Judgment is
14 approved by the Court, Grimaldi Law Office shall issue a check payable to "The Chanler Group" to
15 the address found in Section 8 below.

16 **4.5 Payment Procedures**

17 4.5.1 Issuance of Payments.

18 (a) All payments owed to Plaintiffs and their counsel, pursuant to
19 Sections 4.1, 4.3, and 4.4 shall be delivered to the following payment address:

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

26 For United States Postal Service Delivery:

27 Mike Gyurics
28 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010

Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

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

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 set forth in Section 4.5.1(a) above, as proof of payment to OEHHA.

4.5.3 Tax Documentation. ZG shall issue a separate 1099 form for each payment required by this Section to: (a) Peter Englander, whose address and tax identification number shall be furnished upon request after this Consent Judgment has been fully executed by the Parties; (b) Anthony E. Held, Ph.D., P.E., whose address and tax identification number shall be furnished upon request after this Consent Judgment has been fully executed by the Parties; (c) OEHHA, who shall be identified as “California Office of Environmental Health Hazard Assessment” (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814, and (c) “The Chanler Group” (EIN: 94-3171522) to the address set forth in Section 4.3.1(a) above.

5. CLAIMS COVERED AND RELEASED

5.1 Plaintiffs’ Release of Proposition 65 Claims

Plaintiffs, acting on their own behalf and in the public interest, release ZG, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom ZG directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), from all claims for violations of Proposition 65 through the Effective Date, based on unwarned exposures to TDCPP and/or DEHP in the Products, as set forth in the Notices. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to TDCPP and/or DEHP from the Products, as set forth in the Notices. The Parties further understand and agree that this Section

1 5.1 release shall not extend upstream to any entities, other than ZG, that manufactured the Products
2 or any component parts thereof, or any distributors or suppliers who sold the Products or any
3 component parts thereof to ZG, except that entities upstream of ZG that is a Retailer of a Private
4 Labeled Covered Product shall be released as to the Private Labeled Covered Products offered for
5 sale in California, or to California Customers, by the Retailer in question. This Consent Judgment
6 is a full, final and binding resolution of all claims that were or could have been asserted in this
7 action against ZG.

8
9 **5.2 Plaintiffs' Individual Releases of Claims**

10 Plaintiffs, in their individual capacity and not in their representative capacity, provide a
11 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
12 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
13 liabilities, and demands of Plaintiffs against Releasees of any nature, character, or kind, whether
14 known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual
15 exposures to TDCPP, TCEP, TDBPP, and/or DEHP in the Products or Additional Products (as
16 defined in Section 11.1 and delineated on ZG's Exhibit A) manufactured, imported, distributed, or
17 sold by ZG prior to the Effective Date.⁹ The Parties further understand and agree that this Section
18 5.2 release shall not extend upstream to any entities that manufactured the Products or Additional
19 Products, or any component parts thereof, or any distributors or suppliers who sold the Products or
20 Additional Products, any component parts thereof to ZG, except that entities upstream of ZG that is
21 a Retailer of a Private Labeled Covered Product (or Additional) Product shall be released as to the
22 Private Labeled Covered (or Additional) Products offered for sale in California by the Retailer in
23 question. Nothing in this Section affects Plaintiffs' right to commence or prosecute an action under
24 Proposition 65 against a Releasee that does not involve ZG's Products or Additional Products.

25 //

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27 _____
28 ⁹ The injunctive relief requirements of Section 3 shall apply to Additional Products as otherwise specified.

1 **5.3 ZG’s Release of Plaintiffs**

2 ZG, on behalf of itself, its past and current agents, representatives, attorneys, successors,
3 and assignees, hereby waives any and all claims against Plaintiffs and their attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Plaintiffs and their attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Products or Additional Products.

8 **6. COURT APPROVAL**

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

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of California.
26 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
27 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
28 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered

1 inapplicable by reason of law generally as to the Products, then ZG may provide written notice to
2 Plaintiffs of any asserted change in the law, and shall have no further obligations pursuant to this
3 Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in
4 this Consent Judgment shall be interpreted to relieve ZG from any obligation to comply with any
5 pertinent state or federal law or regulation.

6 **8. NOTICES**

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

11
12
13 To ZG:

14 At the address shown on Exhibit A

To Plaintiffs:

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

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

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

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

26 **10. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

27 Plaintiffs and their attorneys agree to comply with the reporting form requirements
28 referenced in California Health & Safety Code section 25249.7(f).

1 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

2 11.1 In addition to the Products, where ZG has identified on Exhibit A additional
3 products that contain the Listed Chemicals and that are sold or offered for sale by it in California, or
4 to California Customers, (“Additional Products”), then by no later than April 15, 2014, ZG may
5 provide Plaintiffs with additional information or representations necessary to enable them to issue a
6 60-Day Notice of Violation and valid Certificate of Merit therefore, pursuant to Health & Safety
7 Code section 25249.7, that includes the Additional Products. Polyurethane foam that is supplied,
8 shaped or manufactured for use as a component of a product, such as upholstered furniture, is
9 specifically excluded from the definition of Additional Products and shall not be identified by ZG
10 on Exhibit A as an Additional Product. Except as agreed upon by Plaintiffs, ZG shall not include a
11 product, as an Additional Product, that is the subject of an existing 60-day notice issued by
12 Plaintiffs or any other private enforcer at the time of execution. After receipt of the required
13 information, Plaintiffs agree to issue a supplemental 60-day notice in compliance with all statutory
14 and regulatory requirements for the Additional Products. Plaintiffs will, and in no event later than
15 November 1, 2014, prepare and file an amendment to this Consent Judgment to incorporate the
16 Additional Products within the defined term “Products” and serve a copy thereof and its supporting
17 papers (including the basis for supplemental stipulated penalties, if any) on the Office of the
18 California Attorney General, upon the Court’s approval and finding that the supplemental stipulated
19 penalty amount, if any, is reasonable, the Additional Products shall become subject to Section 5.1 in
20 addition to Section 5.2. ZG shall, at the time it elects to utilize this Section and tenders the
21 additional information or representations regarding the Additional Products to Plaintiffs, tender to
22 The Chanler Group’s trust account an amount not to exceed \$8,750 as stipulated penalties and
23 attorneys’ fees and costs incurred by Plaintiffs in issuing the new notice and engaging in other
24 reasonably related activities, which may be released from the trust as awarded by the Court upon
25 Plaintiffs’ application. Any fee award associated with the modification of the Consent Judgment to
26 include Additional Products shall not offset any associated supplemental penalty award, if any.
27 (Any tendered funds remaining in the trust thereafter shall be refunded to ZG within 15 days). Such
28

1 payment shall be made to “in trust for The Chanler Group” and delivered as per Section 4.5.1(a)
2 above.

3 11.2 Plaintiffs and ZG agree to support the entry of this agreement as a Consent Judgment
4 and obtain approval of the Consent Judgment by the Court in a timely manner. The Parties
5 acknowledge that, pursuant to California Health & Safety Code section 25249.7, a noticed motion
6 is required to obtain judicial approval of this Consent Judgment, which Plaintiffs shall draft and
7 file. If any third party objection to the noticed motion is filed, Plaintiffs and ZG shall work together
8 to file a reply and appear at any hearing before the Court. This provision is a material component
9 of the Consent Judgment and shall be treated as such in the event of a breach.

10 **12. MODIFICATION**

11 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
12 upon entry of a modified Consent Judgment by the Court thereon; or (2) 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
19 AGREED TO:

AGREED TO:

Defendant:
Z Gallerie

20
21
22 
23 _____
Plaintiff, Peter Englander

By: _____
Name:
Its:

24 Date: March 20, 2014

Date: March __, 2014

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2 above.

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16 respective Parties and have read, understood, and agree to all of the terms and conditions of this
17 Consent Judgment.

18
19 AGREED TO:

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21
22 _____
23 Plaintiff, Peter Englander

24
25 Date: March __, 2014

AGREED TO:

Defendant:
Z Gallerie



By: _____

Name: MALCOLM H. WORK

Its: VICE PRESIDENT, FINANCE

26
27
28 Date: March 20, 2014

1 AGREED TO:

2 *Anthony E Held*
3 _____

4 Plaintiff, Anthony E. Held, Ph.D., P.E.

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6 Date: March 20, 2014

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1 EXHIBIT A

2
3 I. Name of Settling Defendant (Mandatory)

4 Z Gallerie

5 II. Names of Releasees (Optional; May be Partial)

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7
8 III. Types of Covered Products Applicable to Z Gallerie (Check All That Match 60-Day Notice
9 or Supplemental Notice Received)

10 Foam-cushioned pads for children and infants to lie on, such as rest mats

11 Upholstered furniture:

12 a) Padded Upholstered Chairs containing TDCPP, including but not limited to *The Rencourt*
13 *Side Chair – Molasses, Item Code: 013623597.*

14 b) Chairs with vinyl/PVC upholstery containing DEHP, including but not limited to,
15 *Malcolm Low Back Office Chair, SKU: 015974197, SNOF00674GRY, #727511920121*

16 Foam-filled mattresses, mattress toppers, pillows, cushions, travel beds

17 Car seats, strollers

18 Other (specify):

19 IV. Types of Additional Products Z Gallerie Elects to Address (if any):

20 V. Settling Defendant's Required Settlement Payments

21 A. Penalties for Z Gallerie, \$45,000, as follows:

22 \$13,000 initial payment due on or before the Effective Date;

23 \$18,000 second payment due on or before June 15, 2014, of which \$11,000 may be
24 waived pursuant to Section 4.1.4(i) and \$7,000 may be waived pursuant to Section
25 4.1.4(iii); and

26 \$14,000 third payment due on or before April 1, 2015, of which \$9,000 may be
27 waived pursuant to Section 4.1.4(ii) and \$5,000 may be waived pursuant to Section
28 4.1.4(iv).

VI. Payment to The Chanler Group for reimbursement of attorneys' fees and costs:

A. Fees and Costs for Z Gallerie: \$46,000.

1 VII. Person(s) to receive Notices pursuant to Section 8

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Ann Grimaldi
Name

Malcolm Wolk
Name

Attorney
Title

Vice President of Finance, CFO
Title

Address

Address

Grimaldi Law Offices
50 California Street, Suite 1500
San Francisco, CA 94111

Z Gallerie
1855 West 139th Street
Gardena, CA 90249