

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

8 Attorneys for Plaintiff
9 PETER ENGLANDER

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER)	Case No. RG13685328
)	
Plaintiff,)	
)	Assigned for All Purposes to
v.)	Judge George C. Hernandez, Jr.,
)	Department 17
HOME MERIDIAN HOLDINGS, INC.; et)	
al.)	
)	[PROPOSED] CONSENT JUDGMENT AS
Defendants.)	TO STEVE SILVER COMPANY
)	
)	(Health & Safety Code § 25249.6 et seq.)
)	
)	Complaint Filed: June 26, 3013

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and Steve Silver Company (“Steve Silver”), with Englander and the Steve Silver
5 collectively referred to as the “Parties.”

6 **1.2 Peter Englander**

7 Peter Englander is an individual residing in the State of California who seeks to promote
8 awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating
9 hazardous substances contained in consumer and commercial products.

10 **1.3 Steve Silver Company**

11 Steve Silver 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 Englanders alleges that Steve Silver manufactured, imported, sold and/or
16 distributed for sale in California, certain furniture products with foam cushioned components
17 containing tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) and/or tris(2-chloroethyl) phosphate
18 (“TCEP”) without the requisite Proposition 65 health hazard warnings.

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

23 1.4.3 Pursuant to Proposition 65, on October 28, 2011, California identified and
24 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
25 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
26 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

27
28

1 TDCPP and TCEP are hereinafter collectively referred to as the “Listed Chemicals.”
2 Englander alleges that the Listed Chemicals escape from foam padding, leading to human
3 exposures.

4 1.5 Product Description

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

10 1.6 Notices of Violation

11 On or about March 18, 2013, Englander served Steve Silver, other defendants and certain
12 requisite public enforcement agencies with “60-Day Notices of Violation” (“Notice”) that provided
13 the recipients with notice of alleged violations of Proposition 65 based on the alleged failure to
14 warn customers, consumers, and workers in California that the Products expose users to TDCPP.

15 On or about June 19, 2013, based on his further investigation, Englander also issued a
16 supplemental 60-day notice (“Supplemental Notice”) to Steve Silver and other defendants alleging
17 that the Products contain and expose Californians to TDCPP, TCEP and/or di(2-
18 ethylhexyl)phthalate (“DEHP”). DEHP and other phthalates including butyl benzyl phthalate
19 (“BBP”) and Di-n-butyl phthalate (“DBP”) are listed under Proposition 65 as chemicals known to
20 cause birth defects and other reproductive harm.

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

24 1.7 Complaint

25 On June 26, 2013, Englander filed a Complaint in the Superior Court in and for the County
26 of Alameda against Steve Silver, other defendants and Does 1 through 150, *Peter Englander v.*
27 *Home Meridian Holdings, Inc., et al.*, Case No. RG13685328 alleging violations of Proposition 65,
28 based on the alleged unwarned exposures to TDCPP contained in the Products.

1 Upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc pro*
2 *tunc* to include the violations of Proposition 65 alleged by Englander in the Supplemental Notice
3 including exposures from use of the Products to the Listed Chemicals and DEHP.

4 **1.8 No Admission**

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

13 **1.9 Consent to Jurisdiction**

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

18 **2. DEFINITIONS**

19 **2.1 California Customers**

20 “California Customer” shall mean any customer that Steve Silver reasonably understands is
21 located 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.

23 **2.2 Detectable**

24 “Detectable” shall mean containing more than 25 parts per million (“ppm”) (the equivalent
25 of .0025%) of any one Listed Chemical in any material, component, or constituent of a
26 subject product, when analyzed by an accredited laboratory pursuant to EPA testing methodologies
27 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
28 presence, and measure the quantity, of TDCPP and/or TCEP in a solid substance.

1 2.3 **Effective Date**

2 “Effective Date” shall mean the date the Court approves this Consent Judgment.

3 2.4 **Private Label Covered Products**

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

7 2.5 **Reformulated Products**

8 “Reformulated Products” means Products or Additional Products that contain no Detectable
9 amount of TDCPP and TCEP.¹

10 2.6 **Reformulation Standard**

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

13 2.7 **Retailer**

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

16 **3. INJUNCTIVE RELIEF: REFORMULATION**

17 3.1 **Reformulation Commitment**

18 Commencing on August 30, 2014 Steve Silver shall not manufacture or import for
19 distribution or sale to California Customers, or cause to be manufactured or imported for
20 distribution or sale to California Customers, any Products that are not Reformulated Products.

21

22

23

24

25 ¹ The term “Reformulated Products” further requires that the Products for which claims
26 concerning DEHP were noticed (the “Phthalate Products”) contain no more than 1000 ppm each of
27 DEHP, BBP, and DBP in each Accessible Component when analyzed pursuant to U.S.
28 Environmental Protection Agency testing methodologies 3580A and 8270C or any other
methodology utilized by federal or state agencies for the purpose of determining DEHP, BBP, and
DBP content in a solid substance. “Accessible component” as used in this Consent Judgment
means a component of a Product that can be touched by a person during reasonably foreseeable
use.-

1 **3.2 Vendor Notification/Certification**

2 On or before April 15, 2014, Steve Silver shall provide written notice to all of its then-
3 current vendors of the Products, instructing each such vendor to use reasonable efforts to provide it
4 with only Reformulated Products. In addressing the obligation set forth in the preceding sentence,
5 Steve Silver shall not employ statements that will encourage a vendor to delay compliance with the
6 Reformulation Standard. Steve Silver shall subsequently obtain written certifications, no later than
7 June 1, 2014, from such vendors, and any newly engaged vendors, that the Products manufactured
8 by such vendors are in compliance with the Reformulation Standard. Certifications shall be held by
9 Steve Silver for at least two years after their receipt and shall be made available to Englander upon
10 his reasonable request.

11 **3.3 Products No Longer in a Steve Silver’s Control**

12 No later than the May 15, 2014, Steve Silver shall send a letter, electronic or otherwise
13 (“Notification Letter”) to: (1) each California Customer and/or Retailer which it, after October 28,
14 2011, supplied the item for resale in California described as an exemplar in the Notice(s) Steve
15 Silver received from Englander (“Exemplar Product”); and (2) any California Customer and/or
16 Retailer that Steve Silver reasonably understands or believes had any inventory for resale in
17 California of Exemplar Products as of the relevant Notice’s dates. The Notification Letter shall
18 advise the recipient that the Exemplar Product “contains TDCPP and/or TCEP, chemicals known to
19 the State of California to cause cancer,” and request that the recipient either: (a) label the Exemplar
20 Products remaining in inventory for sale in California, or to California Customers, pursuant to
21 Section 3.5; or (b) return, at Steve Silver’s sole expense, all units of the Exemplar Product held for
22 sale in California, or to California Customers, to Steve Silver or a party Steve Silver has otherwise
23 designated. The Notification Letter shall require a response from the recipient within 15 days
24 confirming whether the Exemplar Product will be labeled or returned. Steve Silver shall maintain
25 records of all correspondence or other communications generated pursuant to this Section for two
26 years after the Effective Date and shall produce copies of such records upon Englander’s reasonable
27 written request.
28

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

5 **3.5.2 Internet Website Warning**

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

12 **WARNING:** This product contains [TDCPP and/or
13 TCEP]flame retardant chemicals
14 known to the State of California to
cause cancer.⁴

15 **3.6 Alternatives to Interim Warnings**

16 The obligations of Steve Silver under Section 3.3 shall be relieved if Steve Silver certifies
17 on or before June 1, 2014 that only Exemplar Products meeting the Reformulation Standard have
18 been and will be offered for sale in California, or to California Customers for sale in California,
19 after June 1, 2014. The obligations of Steve Silver under Section 3.4 shall be relieved provided
20 Steve Silver certifies on or before June 1, 2014 that, after September 1, 2014, it will only distribute
21 or cause to be distributed for sale in, or sell in, California, or to California Customers for sale in
22 California, Products (i.e., Products beyond the Exemplar Product) meeting the Reformulation
23 Standard. The certifications provided by this Section are material terms and time is of the essence.

24 ³ The characteristics of the template warnings are as follows: (a) a yellow hang tag
25 measuring 3" x 5", with no less than 12 point font, with the warning language printed on each side
26 of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring
27 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
directly to the Product packaging.

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

1 **4. MONETARY PAYMENTS**

2 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

3 In settlement of all the claims referred to in this Consent Judgment, Steve Silver shall pay
4 the civil penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment
5 will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d),
6 with 75% of the funds remitted to the California Office of Environmental Health Hazard
7 Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to “The Chanler Group in
8 Trust for Englander.” Each penalty payment shall be made within two business days of the date it
9 is due and be delivered to the addresses listed in Section 4.5 below. Steve Silver shall be liable for
10 payment of interest, at a rate of 10% simple interest, for all amounts due and owing under this
11 Section that are not received within two business days of the due date.

12 4.1.1 Initial Civil Penalty. Within ten days of the date that this Consent Judgment
13 is fully executed by the Parties, Steve Silver shall issue a check for its initial civil penalty payment
14 in the amount identified on Exhibit A to “Rogers Joseph O’Donnell Client Trust Account.” Rogers
15 Joseph O’Donnell shall provide The Chanler Group with written confirmation within five days of
16 receipt that the funds have been deposited in a trust account. Within five business days of the date
17 that this Consent Judgment is approved by the Court, Rogers Joseph O’Donnell shall issue two
18 separate checks for the initial civil penalty payment to “OEHHA” and “The Chanler Group in Trust
19 for Peter Englander.”

20
21 4.1.2 Second Civil Penalty. On or before July 1, 2014, Steve Silver shall make a
22 second civil penalty payment in the amount identified on Exhibit A. The amount of the second
23 penalty may be reduced according to any penalty waiver Steve Silver is eligible for under Sections
24 4.1.4(i) and 4.1.4(iii), below.

25 4.1.3 Third Civil Penalty. On or before November 30, 2014, Steve Silver shall
26 make a third civil penalty payment in the amount identified on Exhibit A. The amount of the third
27 penalty may be reduced according to any penalty waiver Steve Silver is eligible for under Sections
28 4.1.4(ii) and 4.1.4(iv), below.

1 4.1.4 Reductions to Civil Penalty Payment Amounts. Steve Silver may reduce the
2 amount of the second and/or third civil penalty payments identified Exhibit A by providing
3 Englander with certification of certain efforts undertaken to reformulate its Products or limit the
4 ongoing sale of non-reformulated Products in California. The options to provide a written
5 certification in lieu of making a portion of a civil penalty payment constitute material terms of this
6 Consent Judgment, and with regard to such terms, time is of the essence.

7 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of**
8 **Products Sold or Offered for Sale in California.**

9 If Steve Silver so elects on Exhibit A, a portion of the second civil penalty shall be waived,
10 to the extent that Steve Silver has agreed that, as of April 30, 2014, and continuing into the future, it
11 shall only manufacture or import for distribution or sale to California Customers or cause to be
12 manufactured or imported for distribution or sale to California Customers, Reformulated Products.
13 An officer or other authorized representative of Steve Silver that has exercised this election shall
14 provide Englander with a written certification confirming compliance with such conditions, which
15 certification must be received by Englander’s counsel on or before June 1, 2014.

16 4.1.4(ii) **Partial Penalty Waiver for Extended Reformulation.**

17 If Steve Silver so elects on Exhibit A, a portion of the third civil penalty shall be waived, to
18 the extent that Steve Silver has agreed that, as of April 30, 2014, and continuing into the future, it
19 shall only manufacture or import for distribution or sale in California or cause to be manufactured
20 or imported for distribution or sale in California, Reformulated Products which also do not contain
21 tris(2,3-dibromopropyl)phosphate (“TDBPP”) in a detectable amount of more than 25 parts per
22 million (“ppm”) (the equivalent of .0025%) in any material, component, or constituent of the
23 Products, when analyzed by an accredited laboratory pursuant to EPA testing methodologies 3545
24 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
25 presence, and measure the quantity, of TDBPP in a solid substance. An officer or other authorized
26 representative of Steve Silver that has exercised this election shall provide Englander with a written
27 certification confirming compliance with such conditions, which certification must be received by
28 Englander’s counsel on or before June 1, 2014.

1 4.1.4(iii) **Partial Penalty Waiver for Withdrawal of Unreformulated**
2 **Exemplar Products from the California Market.**

3 As shown on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or
4 other authorized representative of Steve Silver provides Englander with written certification, by
5 June 1, 2014, confirming that each individual or establishment in California to which it supplied the
6 Exemplar Product after October 28, 2011, has elected to return all remaining Exemplar Products
7 held for sale in California.⁵

8 4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to**
9 **California of Unreformulated Inventory.**

10 As shown on Exhibit A, a portion of the third civil penalty shall be waived, if an officer or
11 other authorized representative of Steve Silver provides Englander with written certification, on or
12 before June 1, 2014, confirming that, as of September 1, 2014, it has and will continue to distribute,
13 offer for sale, or sell in California, or to California Customers, only Reformulated Products.

14 4.2 **Representations**

15 Steve Silver represents that the sales data and other information concerning its size,
16 knowledge of Listed Chemicals, and prior reformulation and/or warning efforts, that it provided to
17 Englander in negotiating this Consent Judgment was truthful to its knowledge at the time of
18 execution of this Consent Judgment, and a material factor upon which Englander relied to
19 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this
20 Consent Judgment. If, within nine months of the Effective Date, Englander discovers and presents
21 to Steve Silver, evidence demonstrating that the preceding representation and warranty was
22 materially inaccurate, then Steve Silver shall have 30 days to meet and confer regarding
23 Englander's contention. Should this 30 day period pass without any such resolution between
24 Englander and Steve Silver, Englander shall be entitled to file a formal legal claim including, but
25 not limited to, a claim for damages for breach of contract.

26
27 ⁵ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Englander has, prior to August 31, 2013, provided the Steve Silver 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 Steve Silver further represents that in implementing the requirements set forth in Sections
2 3.1 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts to achieve
3 reformulation of its Products and Additional Products on a nationwide basis and not employ
4 statements that will encourage a vendor to limit its compliance with the Reformulation Standard to
5 goods intended for sale to California Consumers.

6 **4.3 Stipulated Penalties for Certain Violations of the Reformulation**
7 **Standard.**

8 If Englander provides notice and appropriate supporting information to Steve Silver,
9 including but not limited to any test results, that levels of a Listed Chemical in excess of the
10 Reformulation Standard have been detected in one or more Products labeled or otherwise marked in
11 an identifiable manner as manufactured or imported after a deadline for meeting the Reformulation
12 Standard has arisen for Steve Silver under Sections 3.1 or 3.6 above, Steve Silver may elect to pay a
13 stipulated penalty to relieve any further potential liability under Proposition 65 or sanction under
14 this Consent Judgment as to Products sourced from the vendor in question.⁶ The stipulated penalty
15 shall be \$1,500 if the violation level is below 100 ppm and \$3,000 if the violation level is between
16 100 ppm and 249 ppm, this being applicable for any amount in excess of the Reformulation
17 Standards but under 250 ppm.⁷ Englander shall further be entitled to reimbursement of his
18 associated expense in an amount not to exceed \$5,000 regardless of the stipulated penalty level.
19 Steve Silver, under this Section must provide notice and appropriate supporting information relating
20 to the purchase (e.g. vendor name and contact information including representative, purchase order,
21 certification (if any) received from vendor for the exemplar or subcategory of products), test results,
22 and a letter from a company representative or counsel attesting to the information provided, to
23 Englander within 30 calendar days of receiving test results from Englander's counsel. Any
24

25 ⁶ This Section shall not be applicable where the vendor in question had previously been
26 found by Steve Silver to have provided unreliable certifications as to meeting the Reformulation
27 Standard in its Products on more than one occasion. Notwithstanding the foregoing, a stipulated
28 penalty for a second exceedance by Steve Silver's vendor at a level between 100 and 249 ppm shall
not be available after July 1, 2015.

⁷ Any stipulated penalty payments made pursuant to this Section shall be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 violation levels at or above 250 ppm shall be subject to the full remedies provided pursuant to this
2 Consent Judgment and at law. Before any payment is required or motion to enforce is filed under
3 this Section, Steve Silver shall be entitled to present any evidence rebutting Englander’s claim and
4 the parties shall meet and confer in a good faith attempt to resolve any dispute.

5 **4.4 Reimbursement of Fees and Costs**

6 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
7 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
8 this fee reimbursement issue to be resolved after the material terms of the agreement had been
9 settled. Shortly after the other settlement terms had been finalized, Steve Silver expressed a desire
10 to resolve the fee and cost issue. Steve Silver then agreed to pay Englander and his counsel under
11 general contract principles and the private attorney general doctrine codified at California Code of
12 Civil Procedure section 1021.5 for all work performed through the mutual execution of this
13 agreement, including the fees and costs incurred as a result of investigating, bringing this matter to
14 Steve Silver’s attention, negotiating a settlement in the public interest, and seeking court approval
15 of the same. In addition, the negotiated fee and cost figure expressly includes the anticipated
16 significant amount of time Englander’s counsel will incur to monitor various provisions in this
17 agreement over the next two years, with the exception of additional fees that may be incurred
18 pursuant to Steve Silver’s election in Section 11. Steve Silver more specifically agreed, upon the
19 Court’s approval and entry of this Consent Judgment, to pay Englander’s counsel the amount of
20 fees and costs indicated on Exhibit A. Steve Silver shall, within ten days of the mutual execution of
21 this Consent Judgment by the Parties, issue a check payable to “Rogers Joseph O’Donnell Client
22 Trust Account” in the amount of fees and costs indicated on Exhibit A to be held in trust by Rogers
23 Joseph O’Donnell for The Chanler Group. Rogers Joseph O’Donnell shall provide The Chanler
24 Group with written confirmation within five days of receipt that the funds have been deposited in a
25 trust account. Within five business days of the date this Consent Judgment is approved by the
26 Court, Rogers Joseph O’Donnell shall issue a check payable to “The Chanler Group” to the address
27 found in Section 8 below.
28

1 **4.5 Payment Procedures**

2 4.5.1 Issuance of Payments.

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

5 The Chanler Group
6 Attn: Proposition 65 Controller
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710

10 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
11 Section 4.1, shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one
12 of the following addresses, as appropriate:

13 For United States Postal Service Delivery:

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

19 For Non-United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
22 Office of Environmental Health Hazard Assessment
23 1001 I Street
24 Sacramento, CA 95814

25 4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA
26 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in
27 Section 4.5.1(a) above, as proof of payment to OEHHA.

28 4.5.3 Tax Documentation. Steve Silver and/or Rogers Joseph O’Donnell 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) 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 4.5.1(a) above.

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, hereby releases Steve Silver,
4 its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
5 employees, attorneys, and each entity to whom Steve Silver directly or indirectly distributes or sells
6 the Products, including, but not limited to, downstream distributors, wholesalers, customers,
7 retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), from all
8 claims for any violations of Proposition 65 through the Effective Date based on unwarmed
9 exposures to the Listed Chemicals in the Products, as set forth in the Notices. Compliance with the
10 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
11 exposures to the Listed Chemicals from the Products, as set forth in the Notices. The Parties further
12 understand and agree that this Section 5.1 release shall not extend upstream to any entities, other
13 than Steve Silver, that manufactured the Products or any component parts thereof, or any
14 distributors or suppliers who sold the Products or any component parts thereof to Steve Silver,
15 except that any entity upstream of Steve Silver that is a Retailer of a Private Labeled Covered
16 Product shall be released as to the Private Labeled Covered Products offered for sale in California,
17 or to California Customers, by the Retailer in question.⁸

18 **5.2 Englander’s Individual Releases of Claims**

19 Englander, in his individual capacity only and *not* in his representative capacity, on behalf
20 of himself, his past and current agents, representatives, attorneys, successors, and assignees,
21 provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar
22 to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
23 claims, liabilities, and demands of Steve Silver of any nature, character, or kind, whether known or
24 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
25 TDCPP, TCEP, and/or TDBPP in the Products or Additional Products (as defined in Section 11.1
26 and delineated on Exhibit A) manufactured, imported, distributed, or sold by Steve Silver prior to

27 _____
28 ⁸ For purposes of this Section, as to the Phthalate Products, the term “Listed Chemicals” shall include DEHP.

1 the Effective Date.⁹ The Parties further understand and agree that this Section 5.2 release shall not
2 extend upstream to any entities that manufactured the Products or Additional Products, or any
3 component parts thereof, or any distributors or suppliers who sold the Products or Additional
4 Products, or any component parts thereof to Steve Silver, except that any entity upstream of Steve
5 Silver that is a Retailer of a Private Labeled Product or Additional Product shall be released as to
6 the Private Labeled Product or Additional Product offered for sale in California by the Retailer in
7 question. Nothing in this Section affects Englanders rights to commence or prosecute an action
8 under Proposition 65 against a Releasee that does not involve Steve Silver’s Products or Additional
9 Products.¹⁰

10 **5.3 Steve Silver’s Release of Englander**

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

17 **6. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and
19 shall be null and void if, for any reason, it is not approved in its entirety and entered by the Court
20 within one year after it has been fully executed by all Parties. If the Court does not approve the
21 Consent Judgment, the Parties shall meet and confer as to whether to modify the language or appeal
22 the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall
23 proceed in its normal course on the Court’s trial calendar. If the Court’s approval is ultimately
24 overturned by an appellate court, the Parties shall meet and confer as to whether to modify the
25 terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take,

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

28 ¹⁰ For purposes of this Section, as to the Phthalate Products, the term “Listed Chemicals”
shall include DEHP, BBP and DBP.

1 then the case shall proceed in its normal course on the Court’s trial calendar. In the event that this
2 Consent Judgment is entered by the Court and subsequently overturned by any appellate court, any
3 monies that have been provided to OEHHA, Englander or his counsel pursuant to Section 4, above,
4 shall be refunded within 15 days of the appellate decision becoming final. If the Court does not
5 approve and enter the Consent Judgment within one year of the Effective Date, any monies that
6 have been provided to OEHHA or held in trust for Englander or his counsel pursuant to Section 4,
7 above, shall be refunded to Steve Silver within 15 days.

8 **7. GOVERNING LAW**

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

18 **8. NOTICES**

19 Unless specified herein, all correspondence and notices required to be provided pursuant to
20 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class
21 registered or certified mail, return receipt requested; or (iii) overnight courier to any party by the
22 other party at the following addresses:
23
24
25
26
27
28

1 To Steve Silver:

To Englander:

2 At the address shown on Exhibit A

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

3
4
5
6 Any Party, from time to time, may specify in writing to the other Party a change of address to
7 which all notices and other communications shall be sent.

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

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

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

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

15 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

16 11.1 In addition to the Products, where Steve Silver has identified on Exhibit A additional
17 products that contain Listed Chemicals and that are sold or offered for sale by it in California, or to
18 California Customers, (“Additional Products”), then by no later than June 1, 2014, Steve Silver may
19 (but is not required to) provide Englander with additional information or representations necessary
20 to enable him to issue a 60-Day Notice of Violation and valid Certificate of Merit therefore,
21 pursuant to Health & Safety Code section 25249.7, that includes the Additional Products.
22 Polyurethane foam that is supplied, shaped or manufactured by Steve Silver for use as a component
23 of a product, such as upholstered furniture, is specifically excluded from the definition of
24 Additional Products and shall not be identified on Exhibit A as an Additional Product. Except as
25 agreed upon by Englander, Steve Silver shall not include a product, as an Additional Product, that is
26 the subject of an existing 60-day notice issued by Englander or any other private enforcer at the
27 time of execution of this Consent Judgment. After receipt of the required information, Englander
28 agrees to issue a supplemental 60-day notice in compliance with all statutory and regulatory

1 requirements for the Additional Products. Englander will, and in no event later than October 1,
2 2014, prepare and file an amendment to this Consent Judgment to incorporate the Additional
3 Products within the defined term “Products” and serve a copy thereof and its supporting papers
4 (including the basis for supplemental stipulated penalties, if any) on the Office of the California
5 Attorney General; upon the Court’s approval and finding that the supplemental stipulated penalty
6 amount, if any, is reasonable, the Additional Products shall become subject to Section 5.1 in
7 addition to Section 5.2. Steve Silver shall, at the time it elects to utilize this Section and tenders the
8 additional information or representations regarding the Additional Products to Englander, tender to
9 The Chanler Group’s trust account an amount not to exceed \$8,750 as stipulated penalties and
10 attorneys’ fees and costs incurred by Englander in issuing the new notice and engaging in other
11 reasonably related activities, which may be released from the trust as awarded by the Court upon
12 Englander’s application. Any fee award associated with the modification of the Consent Judgment
13 to include Additional Products shall not offset any associated supplemental penalty award, if any.
14 (Any tendered funds remaining in the trust thereafter shall be refunded to Steve Silver within 15
15 days). Such payment shall be made to “in trust for The Chanler Group” and delivered as per
16 Section 4.5.1(a) above.

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

24 **12. MODIFICATION**

25 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
26 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
27 of any party and entry of a modified Consent Judgment by the Court.
28

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

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

13 **12. MODIFICATION**

14 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
15 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
16 of any party and entry of a modified Consent Judgment by the Court.

17 **13. AUTHORIZATION**

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

21
22 AGREED TO:

23 
24 _____
25 Plaintiff Peter Englander
26 Date: March 31, 2014

22 AGREED TO:

23 
24 _____
25 Defendant Steve Silver
26 Date: March 31, 2014

EXHIBIT A

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. Name of Settling Defendants (Mandatory)

STEVE SILVER COMPANY

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

INCLUDING BUT NOT LIMITED TO MATHIS BROS. OKLAHOMA CITY LLC

III. Types of Covered Products Applicable to Settling Defendant (Check All That Match 60-Day Notice or Supplemental Notice Received)

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

Upholstered furniture

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

Car seats, strollers

Other (specify):

a. Padded Upholstered Chairs containing TDCPP and/or TCEP

b. Chairs with Vinyl/PVC Upholstery containing DEHP

IV. Types of Additional Products the Settling Defendant Elects to Address (if any):

Sofas,

Ottomans _____

V. Settlement Payments:

A. Civil Penalties of \$81,000, shall be paid as follows:

\$15,000 initial payment due within five business days of the Court's approval of the Consent Judgment;

\$42,000 second payment due on or before June 1, 2014, of which \$23,000 may be waived pursuant to Section 4.1.4(i) and \$19,000 may be waived pursuant to Section 4.1.4(iii); and

\$24,000 collective third payment due on or before November 30, 2014, of which \$14,000 may be waived pursuant to Section 4.1.4(ii) and \$10,000 may be waived pursuant to Section 4.1.4(iv).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Payment to The Chanler Group of \$38,000 for reimbursement of attorneys' fees and costs within 5 business days of the date this Consent Judgment is approved by the Court:

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

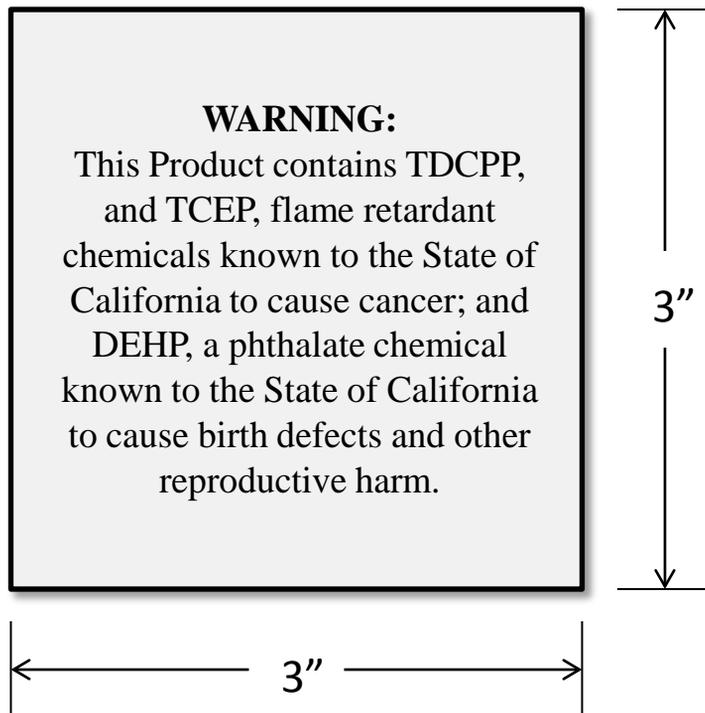
Steve Silver Company
Attn: David R. Corbin
Chief Operating Officer
1000 FM 548
Forney, TX 75126

With a copy to:

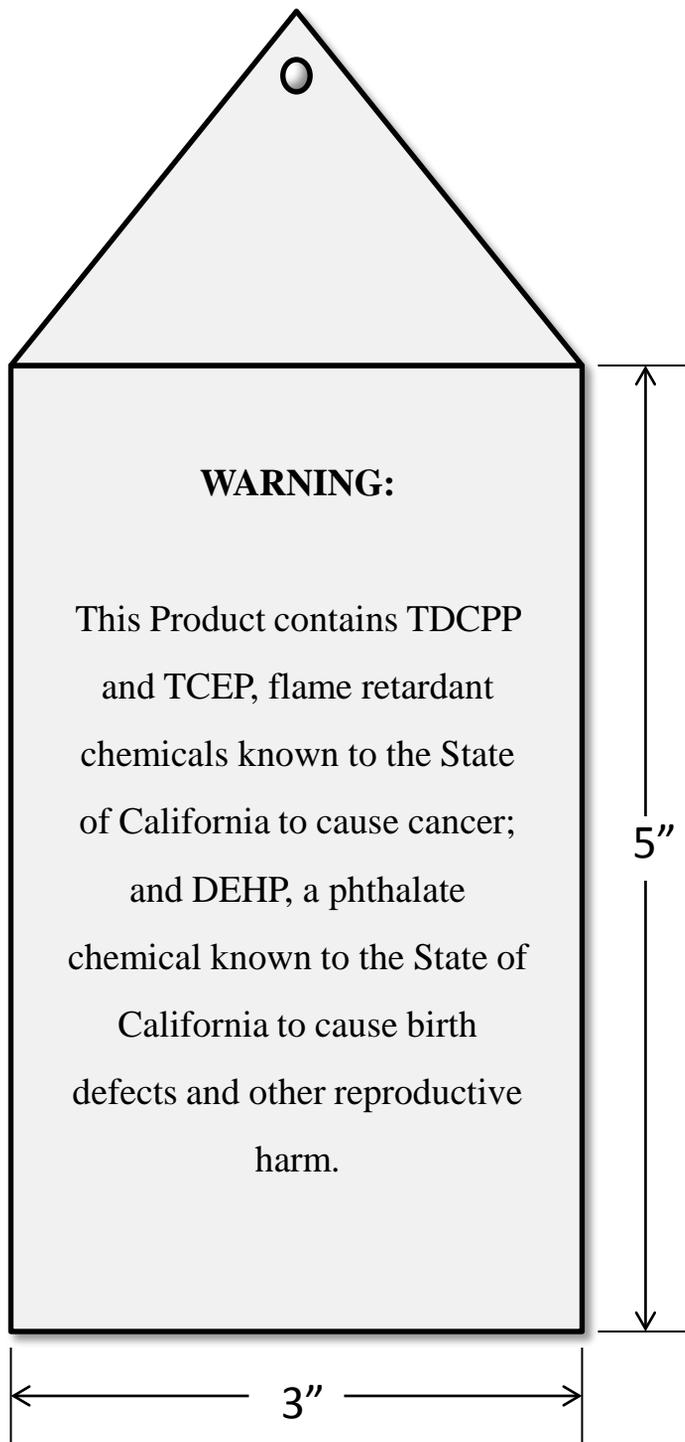
James Robert Maxwell
Rogers Joseph O'Donnell
311 California Street, 10th Floor
San Francisco, CA 94104

EXHIBIT B
(ILLUSTRATIVE WARNINGS)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



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



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

WARNING:

This Product contains TDCPP and TCPEP, flame retardant chemicals known to the State of California to cause cancer; and DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

8.5"

11"

INSTRUCTIONS:

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