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

16 LAURENCE VINOCUR, *et al.*,

17 Plaintiffs,

18 v.

19 ABAD FOAM, INC., *et al.*,

20 Defendants.

Case No. RG14710984

[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT FLEXIBLE FOAM
PRODUCTS, INC.

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1. INTRODUCTION

1.1. This Consent Judgment is entered into by plaintiff Peter Englander (“Englander”) and defendant Flexible Foam Products, Inc. (“Flexible Foam”) to settle claims asserted by Englander against Flexible Foam as set forth in the Complaint filed by Englander in the captioned action. Englander and Flexible Foam are referred to individually as a “Party” and collectively as the “Parties.”

1.2. On June 14, 2013, Englander served a 60-Day Notice of Violation, on Flexible Foam, the California Attorney General, and other requisite public enforcers, alleging that Flexible Foam violated Proposition 65 when it failed to warn its customers and consumers in California of the health hazards associated with exposures to tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a toxic flame retardant chemical applied to certain “Foam” (as defined herein) used as padding in upholstered furniture and other consumer products sold by Flexible Foam in California.

1.3. On January 22, 2014, Englander filed the instant action (“Complaint” or “Action”) naming Flexible Foam as a defendant for the alleged violations that are the subject of the Notice.

1.4. Flexible Foam is a “person in the course of doing business” as that phrase is defined by Proposition 65, that employs ten (10) or more persons, and that manufactures, distributes, and/or sells Covered Products (as defined in Section 2.2 herein) containing Foam (as defined in Section 2.4 herein) in the State of California.

1.5. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has jurisdiction over the allegations of violations contained in the Notice and Complaint, and personal jurisdiction over Flexible Foam as to the acts alleged in the Complaint; (ii) venue is proper in the County of Alameda; and (iii) this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were or could have been raised in the Complaint based on the facts alleged in the Notice and Complaint with respect to Foam manufactured, sold and/or distributed for Sale in California by Flexible Foam.

1.6. The Parties enter into this Consent Judgment as a full and final settlement of all claims which were or could have been raised in the Complaint or Notice arising out of the facts or conduct related to Flexible Foam alleged therein. By execution of this Consent Judgment and agreeing to

1 comply with its terms, Flexible Foam does not admit any fact, conclusion of law, or violation of law,
2 nor shall compliance with the Consent Judgment constitute or be construed as an admission by
3 Flexible Foam of any fact, conclusion of law, or violation of law. Moreover, Flexible Foam denies
4 the material, factual, and legal allegations in the Notice and Complaint and expressly denies any
5 wrongdoing whatsoever. Except as specifically and expressly provided herein, nothing in this
6 Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense either
7 Party may have in this or any other pending or future legal proceeding. This Consent Judgment is a
8 product of negotiation and compromise and is accepted by the Parties solely for purposes of settling,
9 compromising, and resolving issues disputed in this Action.

10 **2. DEFINITIONS**

11 2.1. “Chemical Flame Retardant” means any halogenated or phosphorous-based chemical
12 compound used for the purpose of resisting or retarding the spread of fire. “Chemical Flame
13 Retardant” does not include any chemical that has been rated as a Benchmark 4 chemical pursuant to
14 Clean Production Action’s GreenScreen (<http://www.cleanproduction.org/Green.Greenscreen.php>).

15 2.2. “Covered Products” means Foam containing TDCPP manufactured, distributed, and/or
16 sold by Flexible Foam in California.

17 2.3. “Effective Date” means the date on which the Court approves this Consent Judgment.

18 2.4. “Foam” means polyurethane foam manufactured, distributed and/or sold by Flexible
19 Foam for use as a raw material in the manufacture or fabrication of various consumer products sold in
20 California, including, but not limited to (1) foam-cushioned upholstered furniture, such as, by way of
21 example only, foam-cushioned chairs, ottomans, sofas, futons, and back cushions; (2) foam-cushioned
22 pads for infants and children to lie on, such as foam-cushioned pads and mats used for sleeping or
23 resting, diaper changing pads, infant walkers, and/or car safety seats; and (3) foam-cushioned mattress
24 toppers.

25 2.5. “Listed Chemical Flame Retardants” means tris(1,3-dichloro-2-propyl) phosphate
26 (“TDCPP”), tris(2-chloroethyl) phosphate (“TCEP”), and tris(2,3-dibromopropyl)phosphate
27 (“TDBPP”).
28

1 2.6. “TB 117” means Technical Bulletin No. 117, entitled “Requirements, Test Procedures
2 and Apparatus for Testing the Flame Retardance of Filling Materials Used in Upholstered Furniture,”
3 dated March 2000.

4 2.7. “TB 117-2013” means Technical Bulletin 117-2013, entitled “Requirements, Test
5 Procedures and Apparatus for Testing the Smolder Resistance of Materials Used in Upholstered
6 Furniture,” approved by the State of California on November 21, 2013.

7 2.8. “TB 117-2013 Effective Date” means January 1, 2015.

8 2.9. “Treated” means the intentional addition or application of any Chemical Flame
9 Retardant to any polyurethane foam used as filling material in any Covered Product.

10 2.10. “Untreated Foam” means polyurethane foam that has not been Treated with any
11 Chemical Flame Retardant.

12 **3. INJUNCTIVE RELIEF**

13 3.1. **Reformulation of Foam and Covered Products.** Flexible Foam shall comply with
14 the following requirements to reformulate its Foam and/or the Covered Products:

15 3.1.1. **Listed Chemical Flame Retardants – Covered Products.** As of the Effective
16 Date, Flexible Foam shall not distribute, sell, or offer for sale in California any Covered Product that
17 has been treated with any Listed Chemical Flame Retardant and which has a manufacture date that is
18 on or later than the Effective Date.

19 3.1.2. **Listed Chemical Flame Retardants – Foam.** As of the Effective Date,
20 Flexible Foam shall not distribute, sell, or offer for sale in California any Foam that, to Flexible
21 Foam’s knowledge, will be, or is reasonably likely to be, sold in California that has been treated with
22 any Listed Chemical Flame Retardant and which have a manufacture date that is on or later than the
23 Effective Date.

24 3.1.3. **Interim Compliance – TDCPP.** Any Covered Products in which the
25 polyurethane foam has intentionally-added TDCPP and which are distributed, sold, or offered for sale
26 by Flexible Foam in California after the Effective Date shall be accompanied by a Clear and
27 Reasonable Warning that complies with Section 3.1.6.
28

1 Product with such conspicuousness, as compared with other words, statements, or designs as to render
2 it likely to be read and understood by an ordinary individual prior to purchase or use. For internet,
3 catalog, or any other sale where the consumer is not physically present and cannot see a warning
4 displayed on the Covered Product or the packaging of the Covered Product prior to purchase or
5 payment, the warning statement shall be displayed in such a manner that it is likely to be read and
6 understood prior to the authorization of or actual payment.¹

7 **3.2 Making Untreated Foam Available to Customers.** After the Effective Date, Flexible
8 Foam will continue to offer and make available for sale Untreated Foam to all of its customers located
9 in California as well as those customers located outside California on the same basis as it currently
10 offers customers.

11 **3.3 Optional Additional Reformulation for Covered Products – Use of Untreated**
12 **Foam.** In order for Flexible Foam to be eligible for a waiver of the additional penalty payment set
13 forth in Section 4.1.5 below, Flexible Foam shall undertake the additional actions to reduce or
14 eliminate the use of Chemical Flame Retardants as set forth herein. As of the TB117-2013 Effective
15 Date, Flexible Foam shall not manufacture for sale in California any Covered Product that has been
16 Treated. In order to avoid the additional payments, within 30 days following the TB117-2013
17 Effective Date, Flexible Foam must provide written certification to Englander of its use of only
18 Untreated Foam in Covered Products.

19 **4. PENALTIES AND PAYMENTS**

20 4.1. Flexible Foam shall initially pay to Englander the total sum of forty-five thousand
21 dollars (\$45,000), which shall be allocated as follows:

22 4.1.1. Ten thousand dollars (\$10,000) shall constitute a civil penalty pursuant to
23 California Health & Safety Code § 25249.7(b), such money is to be apportioned by Englander in
24 accordance with Cal. Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty
25

26 _____
27 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if Flexible Foam
28 employed it prior to the Effective Date. Should Flexible Foam seek to use alternative warning language, other than the
language specified above or the safe harbor warning specified in 27 CCR § 25603.2, or seek to use an alternate method of
warning transmission, it must obtain Court approval of its proposed alternate warning and/or transmission method, and
shall provide Englander and the Office of the Attorney General with timely notice and the opportunity to comment or
object before the Court acts on its request.

1 payment going to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and
2 the remaining 25% of the penalty paid to Englander.

3 4.1.2. Thirty-five thousand dollars (\$35,000) shall constitute reimbursement of
4 Englander’s reasonable attorneys’ fees and costs.

5 4.1.3. The payments required under Sections 4.1.1 and 4.1.2 shall be made in three
6 separate checks, all to be delivered within 10 days following the Effective Date. The payments
7 required pursuant to Sections 4.1.1 shall each be in the form of two checks for the following amounts
8 made payable to: (a) “OEHHA” in the amount of \$7,500; and (b) “Peter Englander, Client Trust
9 Account” in the amount of \$2,500. The payment required pursuant to Section 4.1.2 shall be made
10 payable to The Chanler Group. All settlement payments shall be tendered in accordance with Section
11 8 of this Consent Judgment.

12 4.1.4. By and upon its execution of this Consent Judgment, Flexible Foam hereby
13 certifies its Compliance with the requirements set forth in Section 3.3 such that the otherwise
14 applicable additional civil penalty payment in the amount of twenty thousand dollars (\$20,000) may
15 be waived. Englander, by and upon his execution of this Consent Judgment agrees and commits that
16 the additional penalty payment has been waived in exchange for Flexible Foam’s certification of its
17 compliance with the requirements of Section 3.3, above.

18 **5. ENFORCEMENT OF CONSENT JUDGMENT**

19 5.1. Englander may, by motion or application for an order to show cause before the
20 Superior Court of Alameda County, enforce the terms and conditions contained in this Consent
21 Judgment. Prior to bringing any motion or application to enforce the requirements of Section 3 above,
22 Englander shall provide Flexible Foam with notice of its alleged violation or breach of this Consent
23 Judgment, and a copy of any test result(s) which purportedly support Englander’s allegation of
24 noncompliance or breach. The Parties shall then meet and confer regarding the basis for Englander’s
25 anticipated motion or application in an attempt to resolve the alleged violation informally, including
26 providing Flexible Foam a reasonable opportunity of at least thirty (30) days to cure any alleged
27 violation. Should the Parties’ attempts at an informal resolution fail, Englander may file his
28 enforcement motion or application. The prevailing party on any motion to enforce this Consent

1 Judgment shall be entitled to its reasonable attorney’s fees and costs incurred as a result of such
2 motion or application. This Consent Judgment may only be enforced by the Parties.

3 **6. MODIFICATION OF CONSENT JUDGMENT**

4 6.1. This Consent Judgment may only be modified by a written agreement of the Parties,
5 and entry of a modified consent judgment by the Court thereon, or upon a motion or application
6 brought by any Party, and entry of a modified consent judgment by a Court thereon.

7 **7. CLAIMS COVERED AND RELEASED**

8 7.1. This Consent Judgment is a full, final, and binding resolution and release between
9 Englander acting on his own behalf and in the public interest and Flexible Foam and Flexible Foam’s
10 parents, officers, directors, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates,
11 entities under common ownership, including, but not limited to, Ohio Decorative Products, and their
12 respective successors and assigns (inclusively and collectively, the “Defendant Releasees”) and all
13 entities to whom Defendant Releasees directly or indirectly distribute or sell, or have distributed or
14 sold, Covered Products, including, but not limited to, distributors, wholesalers, customers, retailers,
15 franchisees, cooperative members, and licensees (“Downstream Releasees”), of all claims alleged in
16 the Notice or Complaint in this Action arising from any violation of Proposition 65 that have been or
17 could have been asserted in the public interest against Flexible Foam, Defendant Releasees, and
18 Downstream Releasees, regarding the failure to warn about exposures to TDCPP in Covered Products
19 manufactured, distributed, or sold by Flexible Foam prior to the Effective Date, as alleged in the
20 Notice.

21 7.2. This Consent Judgment is also a full, final, and binding resolution and release between
22 Englander acting in the public interest and Flexible Foam with regard to Flexible Foam’s
23 manufacture, distribution and sale of Foam of all claims alleged in the Notice or Complaint in this
24 Action arising from any violation or alleged violation of Proposition 65 that have been or could have
25 been asserted in the public interest against Flexible Foam, Defendant Releasees, and Downstream
26 Releasees regarding the failure to warn about exposures to TDCPP in Foam manufactured, distributed,
27 or sold by Flexible Foam prior to the Effective Date. Compliance with the terms of this Consent
28 Judgment by Flexible Foam shall constitute compliance with Proposition 65 with respect to any

1 alleged failure to warn about TDCPP in Covered Products and Foam manufactured, distributed, or
2 sold by Flexible Foam after the Effective Date.

3 7.3. This is a full and final release applying to all unknown and unanticipated injuries or
4 damages relating to or arising out of the claims alleged in the Notice and Complaint, as well as those
5 now known, whether or not disclosed, and Englander, on his own behalf only, hereby relinquishes and
6 waives all rights or benefits conferred upon him by the provisions of Section 1542 of the California
7 Civil Code, which reads as follows:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
9 THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN
10 HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE,
11 WHICH IF KNOWN BY HIM, MUST HAVE MATERIALLY
12 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

11 8. PROVISION OF NOTICE

12 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
13 notice shall be sent by first class and electronic mail as follows:

14 8.1.1. **Notice to Flexible Foam.** The persons for Flexible Foam to receive notices
15 pursuant to this Consent Judgment shall be:

16 Levi W. Heath, Esq.
17 2029 Century Park East
18 Suite 300
19 Los Angeles, CA 90067
20 Email: levi.heath@BTLaw.com

21 8.1.2. **Notice to Englander.** The persons for Englander to receive notices pursuant to
22 this Consent Judgment shall be:

23 Attn: Prop 65 Coordinator
24 The Chanler Group
25 2560 Ninth Street
26 Parker Plaza Suite 214
27 Berkeley, CA 94710
28 Email: brian@chanler.com

8.2. Any Party may, from time to time, modify the person and/or address to whom the
notice is to be sent by sending notice to the other Party by first class and electronic mail.

1 **9. COURT APPROVAL**

2 9.1. This Consent Judgment shall become effective on the Effective Date, provided
3 however, that Englander shall prepare and file a Motion for Approval of this Consent Judgment and
4 Flexible Foam shall support approval of such Motion and entry of this Consent Judgment as a
5 judgment.

6 9.2. If this Consent Judgment is not entered by the Court, it shall be of no force or effect
7 and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

8 **10. GOVERNING LAW AND CONSTRUCTION**

9 10.1. The terms and obligations arising from this Consent Judgment shall be construed and
10 enforced in accordance with the laws of the State of California.

11 **11. ENTIRE AGREEMENT**

12 11.1. This Consent Judgment contains the sole and entire agreement and understanding of
13 Englander and Flexible Foam with respect to the entire subject matter hereof, and any and all prior
14 discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged
15 herein and therein.

16 11.2. There are no warranties, representations, or other agreements between Englander and
17 Flexible Foam except as expressly set forth herein. No representations, oral or otherwise, express or
18 implied, other than those specifically referred to in this Consent Judgment have been made by any
19 Party hereto.

20 11.3. No other agreements not specifically contained or referenced herein, oral or otherwise,
21 shall be deemed to exist or to bind any Party. Any agreements specifically contained or referenced
22 herein, oral or otherwise, shall be deemed to exist or to bind any Party hereto only to the extent that
23 they are expressly incorporated herein.

24 11.4. No supplementation, modification, waiver, or termination of this Consent Judgment
25 shall be binding unless executed in writing by the Party to be bound thereby.

26 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall
27 constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver
28 constitute a continuing waiver.

1 **12. RETENTION OF JURISDICTION**

2 12.1. This Court shall retain jurisdiction of this matter to enforce or modify this Consent
3 Judgment pursuant to the agreement of the Parties, Proposition 65, and Code of Civil Procedure §
4 664.6.

5 **13. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

6 13.1. Each signatory to this Consent Judgment certifies that he or she is fully authorized by
7 the Party he or she represents to stipulate to this Consent Judgment, and to enter into and execute the
8 Consent Judgment on behalf of the Party represented and to legally bind that Party.

9 **14. NO EFFECT ON OTHER SETTLEMENTS**

10 14.1. Nothing in this Consent Judgment shall preclude Englander from resolving any claim
11 against another entity on terms that are different from those contained in this Consent Judgment.

12 **15. EXECUTION IN COUNTERPARTS**

13 15.1. The stipulations to this Consent Judgment may be executed in counterparts and by
14 means of facsimile, which taken together shall be deemed to constitute one document.

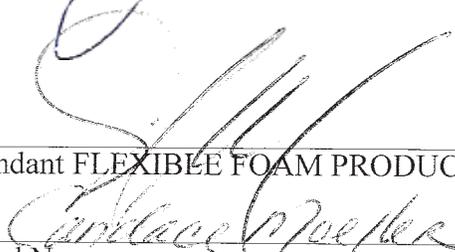
15 **AGREED TO:**

16 Dated: January 13, 2015

17 
18 _____
19 Plaintiff PETER ENGLANDER

20 **AGREED TO:**

21 Dated: December 31, 2014

22 
23 _____
24 Defendant FLEXIBLE FOAM PRODUCTS, INC.

25 Printed Name

26 
27 _____
28 Title