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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA
12 UNLIMITED CIVIL JURISDICTION

13 LAURENCE VINOCUR, *et al.*,
14 Plaintiffs,
15 v.
16 ABAD FOAM, INC., *et al.*,
17 Defendants.

Case No. RG14710984

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

1 **1. INTRODUCTION**

2 1.1. This Consent Judgment is entered into by plaintiff Peter Englander (“Englander”)
3 Englander and defendant Future Foam, Inc. (“Future Foam”) to settle claims asserted by Englander
4 against Future Foam as set forth in the First Amended Complaint (“FAC”) filed by Englander in the
5 captioned action. Englander and Future Foam are referred to individually as a “Party” and
6 collectively as the “Parties.”

7 1.2. On June 14, 2013, Englander served a 60-Day Notice of Violation (“Notice”), on
8 Future Foam, the California Attorney General, and the other requisite public enforcers, alleging that
9 Future Foam violated Proposition 65 when it failed to warn its customers and consumers in California
10 of the health hazards associated with exposures to tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a
11 flame retardant chemical allegedly applied to the Covered Products (as defined herein).

12 1.3. Future Foam employs ten (10) or more persons and is a “person in the course of doing
13 business” as that phrase is defined by Proposition 65.

14 1.4. For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has
15 jurisdiction over the allegations of violations contained in the Notice and FAC and personal
16 jurisdiction over Future Foam as to the acts alleged in the FAC; (ii) venue is proper in the County of
17 Alameda; and (iii) this Court has jurisdiction pursuant to Proposition 65 and Code of Civil Procedure
18 section 664.6 to enter, enforce or modify the provisions in this Consent Judgment.

19 1.5. The Parties enter into this Consent Judgment as a full and final settlement of all claims
20 which were or could have been raised in the FAC or Notice arising out of the facts or conduct related
21 to Future Foam alleged therein. By execution of this Consent Judgment and agreeing to comply with
22 its terms, the Parties do not admit any fact, conclusion of law, or violation of law, nor shall
23 compliance with the Consent Judgment constitute or be construed as an admission by the Parties of
24 any fact, conclusion of law, or violation of law. Future Foam denies the material, factual, and legal
25 allegations in the Notice and FAC and maintains that all products that it has manufactured, distributed
26 and/or sold in California, including the Covered Products, have been and are in compliance with all
27 applicable laws. Except as specifically and expressly provided herein, nothing in this Consent
28 Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any Party may

1 have in this or any other pending or future legal proceedings. This Consent Judgment is the product
2 of negotiation and compromise and is accepted by the Parties solely for purposes of settling,
3 compromising, and resolving issues disputed in this action.

4 **2. DEFINITIONS**

5 2.1. "Covered Products" means foam intended for use as padding in upholstered furniture
6 that contains TDCPP and is manufactured, distributed, and/or sold by Future Foam in California.

7 2.2. "Effective Date" means the date on which the Court enters this Consent Judgment.

8 2.3. "Listed Chemical Flame Retardants" means Tris(1,3-dichloro-2-propyl) phosphate
9 ("TDCPP"), Tris(2-chloroethyl) phosphate ("TCEP"), and Tris(2,3-dibromopropyl)phosphate
10 ("TDBPP").

11 **3. INJUNCTIVE RELIEF**

12 3.1. **Reformulation of Covered Products.** Future Foam shall comply with the following
13 requirements to reformulate the Covered Products:

14 3.1.1. **Reformulation – TDCPP.** As of the Effective Date, Future Foam shall not
15 distribute, sell, or offer for sale in California any Covered Product that has been treated with TDCPP
16 and which has a manufacture date that is on or later than the Effective Date.

17 3.1.2. **Compliance – TDCPP.** Any Covered Products in which the polyurethane
18 foam has intentionally added TDCPP and which is distributed, sold, or offered for sale by Future
19 Foam in California after the Effective Date shall be accompanied by a Clear and Reasonable Warning
20 that complies with Section 3.1.4.

21 3.1.3. **Warnings for Covered Products in the Stream of Commerce.** Within 30
22 days of the Effective Date, Future Foam shall provide clear and reasonable Proposition 65 warning
23 materials to each of its California retailers or distributors to whom Future Foam reasonably believes it
24 sold Covered Products that contained or may have contained intentionally added TDCPP within the
25 twelve (12) months prior to the Effective Date. Such warning materials shall include a reasonably
26 sufficient number of warning labels in order to permit the retailer or distributor to place a warning
27 label on each Covered Product such customer has purchased from Future Foam. The warning label
28 shall contain the warning language set forth in Section 3.1.4. The warning materials shall also include

1 a letter of instruction for the placement of the warning label, and a Notice and Acknowledgment
2 postcard.

3 **3.1.4. Proposition 65 Warnings.** A clear and reasonable warning under this Consent
4 Judgment shall contain one of the following statements:

5 **WARNING:** This product contains tris(1,3-dichloro-2-
6 propyl) phosphate (“TDCPP”), a chemical
7 known to the State of California to cause
8 cancer.

9 or

10 **WARNING:** This product contains chemicals known to the
11 State of California to cause cancer, birth
12 defects or other reproductive harm.

13 A clear and reasonable warning shall not be preceded by, surrounded by, or include any additional
14 words or phrases that contradict, obfuscate, or otherwise undermine the warning. The warning
15 statement shall be prominently displayed on the Covered Product or the packaging of the Covered
16 Product with such conspicuousness, as compared with other words, statements, or designs as to render
17 it likely to be read and understood by an ordinary individual prior purchase. For internet, catalog, or
18 any other sale where the consumer is not physically present and cannot see a warning displayed on the
19 Covered Product or the packaging of the Covered Product prior to purchase or payment, the warning
20 statement shall be displayed in such a manner that it is likely to be read and understood prior to the
21 authorization of or actual payment.

22 **3.2 Optional Additional Reformulation For Covered Products – Listed Chemical**
23 **Flame Retardants.** The additional penalty payment set forth in Section 4.1.4 below shall be waived
24 if Future Foam agrees that, within 30 days of the Effective Date, it shall not manufacture for sale in
25 California any Covered Product that has been treated with any Listed Chemical Flame Retardants.
26 Future Foam shall provide written certification to Englander confirming compliance with such
27 conditions within 30 days following the Effective Date in order to avoid the additional payment set
28 forth in Section 4.1.4.

29 **4. PENALTIES AND PAYMENT**

30 4.1. Future Foam shall pay to Englander the total sum of thirty thousand five hundred
dollars (\$30,500), which shall be allocated as follows:

1 4.1.1. \$3,500 shall constitute a civil penalty pursuant to California Health & Safety
2 Code § 25249.7(b), such money to be apportioned by Englander in accordance with Cal. Health &
3 Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty payment going to the California Office
4 of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid
5 to Englander.

6 4.1.2. \$27,000 shall constitute reimbursement of Englander’s reasonable attorneys’
7 fees and costs.

8 4.1.3. The payments required under Sections 4.1.1-4.1.2 shall be made in two separate
9 checks, all to be delivered within 10 days of the Effective Date. The payment required pursuant to
10 Section 4.1.1 shall be remitted in a single check made payable to “Peter Englander, Client Trust
11 Account” and Englander’s counsel shall be responsible for delivering OEHHA’s portion of the
12 penalty payment to OEHHA. The payment required by Section 4.1.2 shall be in a single check made
13 payable to “The Chanler Group.”

14 4.1.4. In the event that Future Foam elects not to certify its compliance with Section
15 3.2 in accordance with that Section, within 150 days following the Effective Date, Future Foam must
16 make an additional civil penalty payment of \$11,500. The additional penalty payment will also be
17 allocated according to Health & Safety Code § 25249.12(c)(1) and (d), however, Future Foam shall
18 remit the payment in a single check made payable to “Peter Englander, Client Trust Account” and
19 Englander’s counsel shall be responsible for delivering OEHHA’s portion of the penalty payment to
20 OEHHA.

21 **5. ENFORCEMENT OF CONSENT JUDGMENT**

22 5.1. The terms of this Consent Judgment may only be enforced by the Parties by means of
23 notice motion or order application for an order to show cause before the Alameda County Superior
24 Court. Prior to bringing any motion or application to enforce the requirements of Section 3 above,
25 Englander shall provide Future Foam with a draft notice of violation and a copy of any test result(s)
26 which purportedly support Englander’s claimed violation(s). The Parties shall then meet and confer
27 regarding the basis for Englander’s anticipated motion or application in an attempt to resolve the
28 allegation informally, including providing Future Foam a reasonable opportunity of at least thirty (30)

1 days to cure the alleged violation(s) to Englander's reasonable satisfaction. Should the Parties'
2 attempts at an informal resolution fail, Englander may file his enforcement motion or application. The
3 prevailing party on any motion to enforce this Consent Judgment shall be entitled to its reasonable
4 attorney's fees and costs incurred as a result of such motion or application.

5 **6. MODIFICATION OF CONSENT JUDGMENT**

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

9 **7. COVERED CLAIMS AND RELEASES**

10 7.1. This Consent Judgment is a full, final, and binding resolution and release between
11 Englander acting in his individual capacity and in the public interest and Future Foam and Future
12 Foam's parents, officers, directors, shareholders, divisions, subdivisions, subsidiaries, partners,
13 affiliates, entities under common ownership, and their respective successors and assigns (inclusively
14 and collectively, the "Defendant Releasees") and all entities to whom Defendant Releasees directly or
15 indirectly distribute or sell, or have distributed or sold, Covered Products, including, but not limited
16 to, distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees
17 ("Downstream Releasees"), of all claims alleged, or that could have been alleged, in the Notice or
18 FAC arising from any violation of Proposition 65 that has been, or could have been asserted in the
19 public interest against Future Foam, Defendant Releasees, and Downstream Releasees, regarding the
20 failure to warn about exposures to TDCPP in Covered Products manufactured, distributed, or sold by
21 Future Foam prior to the Effective Date. The releases in this Consent Judgment include a release by
22 Englander and his attorneys of any and all claims they might have for attorneys' fees, except as
23 explicitly provided in Section 4.1.2, above.

24 7.2. Compliance with the terms of this Consent Judgment by Future Foam shall constitute
25 compliance with Proposition 65 with respect to the alleged failure to warn about exposures to the
26 Listed Chemical Flame Retardants in Covered Products manufactured, distributed, or sold by Future
27 Foam after the Effective Date.
28

1 7.3. Englander, in his individual capacity only, on his own behalf and on behalf of his past
2 and current agents, representatives, attorneys, successors, and assignees, also releases Future Foam,
3 Defendant Releasees, and Downstream Releasees from any and all claims that he may have, and
4 waives any right to institute or participate in, directly or indirectly, any form of legal action arising
5 under Proposition 65 including, without limitation, all actions and causes of action in law and in
6 equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses
7 including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising from the
8 alleged or actual failure to warn about exposures to the Listed Chemical Flame Retardants in Covered
9 Products sold or distributed for sale by Future Foam before the Effective Date. Compliance with the
10 terms of this Consent Judgment by Future Foam shall constitute compliance with Proposition 65 with
11 respect to the alleged failure to warn about exposures to the Listed Chemical Flame Retardants in
12 Covered Products manufactured, distributed, or sold by Future Foam after the Effective Date.

13 **8. PROVISION OF NOTICE**

14 8.1. When any Party is entitled to receive any notice under this Consent Judgment, the
15 notice shall be sent by first class and electronic mail as follows:

16 8.1.1. **Notice to Future Foam.** The persons for Future Foam to receive notices
17 pursuant to this Consent Judgment shall be:

18 Alison Mackenzie, Esq.
19 Caldwell Leslie & Proctor, PC
20 725 South Figueroa Street, 31st Floor
21 Los Angeles, CA 90017-5524
22 Tel 213.629.9040 Fax 213.629.9022
23 Email: leslie@caldwell-leslie.com

24 8.1.2. **Notice to Englander.** The persons for Englander to receive notices pursuant to
25 this Consent Judgment shall be:

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

1 8.2. Any Party may, from time to time, modify the person and/or address to whom the
2 notice is to be sent by sending notice to the other Party by first class and electronic mail.

3 **9. COURT APPROVAL**

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

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

9 **10. GOVERNING LAW AND CONSTRUCTION**

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

12 **11. ENTIRE AGREEMENT**

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

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

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

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

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1 11.5. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall
2 constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver
3 constitute a continuing waiver.

4 **12. RETENTION OF JURISDICTION**

5 12.1. This Court shall retain jurisdiction of this matter to enforce or modify this Consent
6 Judgment pursuant to the agreement of the Parties, Proposition 65 and Code of Civil Procedure
7 section 664.6.

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

9 13.1. Each signatory to this Consent Judgment certifies that he/it is fully authorized by the
10 Party he or she represents to stipulate to this Consent Judgment, and to enter into and execute the
11 Consent Judgment on behalf of the Party represented and to legally bind that Party.

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

13 14.1. Nothing in this Consent Judgment shall preclude Englander from resolving any claim
14 against another entity on terms that are different from those contained in this Consent Judgment.

15 **15. EXECUTION IN COUNTERPARTS**

16 15.1. This Consent Judgment may be executed in counterparts and by means of facsimile or
17 pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall
18 be deemed to constitute one document.

19 **16. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)**

20 16.1. Englander agrees to comply with the reporting form requirements referenced in Health
21 & Safety Code § 25249.7(f) and to file a motion for approval of this Consent Judgment.

22 **17. SEVERANCE**

23 17.1. If, subsequent to Court approval of this Consent Judgment, any of the provisions of this
24 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
25 remaining shall not be adversely affected, unless the Court finds that any unenforceable provision is
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27
28

1 not severable from the remainder of the Consent Judgment.

2

3 **AGREED TO:**

4

Dated: 6/17/2015, 2015

5



Plaintiff PETER ENGLANDER

6

AGREED TO:

7

Dated: June 16, 2015

8



Defendant FUTURE FOAM, INC.

9

Randall E. Lake

Printed Name

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11

General manager

Title

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