

1 Clifford A. Chanler, State Bar No. 135534
THE CHANLER GROUP
2 2560 Ninth Street
Parker Plaza, Suite 214
3 Berkeley, CA 94710
Telephone: (510) 848-8880
4 Facsimile: (510) 848-8118
clifford@chanler.com
5
6 Attorneys for Plaintiff
PETER ENGLANDER

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION
11

12 PETER ENGLANDER,

13 Plaintiff,

14 v.

15 THE HOME DEPOT, INC.; and DOES 1-
16 150, inclusive,

17 Defendants.

Case No. CIV1800115

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendant The Home Depot, Inc. (“Home Depot”), with Englander and Home
5 Depot each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Englander is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Home Depot employs ten or more persons and is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Englander alleges that Home Depot manufactures, imports, sells and/or distributes for sale
16 in California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without
17 providing the health hazard warning that Englander alleges is required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are *Glacier Bay White Soft Round Toilet*
20 *Seat, UPC# 6932162500095, Sku# 54218* and *Glacier Bay White Soft Elongated Toilet Seat UPC#*
21 *6932162500118, Sku# 543812* containing DEHP, that are manufactured, imported, distributed, sold
22 and/or offered for sale in California by Home Depot (“Products”).

23 **1.6 Notice of Violation**

24 On August 1, 2017, Englander served Home Depot and the requisite public enforcement
25 agencies with a 60-Day Notice of Violation (the “Notice”), alleging that Home Depot violated
26 Proposition 65 when it failed to warn its customers and consumers in California that the Products
27 expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced
28 and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

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

1.7 Complaint

On January 11, 2018, Englander commenced the instant action, naming Home Depot as one of the defendants for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

Home Depot denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it has sold or distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Home Depot of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Home Depot of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Home Depot’s obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Home Depot as to the allegations contained in the Complaint, that venue is proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

2. INJUNCTIVE SETTLEMENT TERMS

2.1 Reformulation Standard

“Reformulated Products” are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining DEHP content in a solid substance.

1 **2.2 Reformulation/Warning Commitment**


2 As of 60 days after the Effective Date, Home Depot shall not manufacture, import,
3 distribute, sell or offer the Products for sale in the State of California unless they are Reformulated
4 Products pursuant to Section 2.1 above, or carry appropriate health hazard warnings per section 2.3,
5 below.

6 **2.3 Product Warnings**

7 As of 60 days after the Effective Date, Home Depot shall provide clear and reasonable
8 warnings as set forth in subsections 2.3(a) and (b) for all Products that do not qualify as
9 Reformulated Products. Each warning shall be prominently placed with such conspicuousness as
10 compared with other words, statements, designs, or devices as to render it likely to be read and
11 understood by an ordinary individual under customary conditions before purchase or use. Each
12 warning shall be provided in a manner such that the consumer or user understands to which *specific*
13 Product the warning applies, so as to minimize the risk of consumer confusion.

14 **(a) Retail Store Sales.**


15 **(i) Product Labeling.** Home Depot shall affix a warning to the packaging,
16 labeling, or directly on each Product provided for sale in retail outlets in California that states:

17  **WARNING:** This product can expose you to DEHP, which is known to
18 the State of California to cause cancer and birth defects or
19 other reproductive harm. For more information go to
www.P65Warnings.ca.gov.


20 **(b) Internet Sales.** In the event that Home Depot sells Products via mail order catalog
21 and/or the internet, to customers located in California, after the Effective Date, that are not
22 Reformulated Products, Home Depot shall provide warnings for such Products sold via mail order
23 catalog or the internet to California residents. Warnings given in the mail order catalog or on the
24 internet shall identify the *specific* Product to which the warning applies as further specified in
25 Sections 2.3(b)(i) and (ii).

26 **(i) Internet Website Warning.** A warning shall be given in conjunction with
27 the sale of the Products via the internet, which warning shall appear either: (a) on the same web
28 page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c)

1 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
2 purchaser during the checkout process. The following warning statement shall be used and shall
3 appear in any of the above instances adjacent to or immediately following the display, description,
4 or price of the Product for which it is given in the same type size or larger than the Product
5 description text:

6  **WARNING:** This product can expose you DEHP, which is known to the
7 State of California to cause cancer and birth defects or
8 other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

9 Alternatively, where it is impracticable to provide the warning on the same page and in the
10 same location as the display and/or description of the Product, Home Depot may utilize a
11 designated symbol to cross reference the applicable warning with a “designated symbol” which
12 may appear adjacent to or immediately following the display, description, or price of the Product
13 for which a warning is being given, provided that the following warning statement also appears
14 elsewhere on the same web page, as follows:

15  **WARNING:** Certain products identified with this symbol ▼ and offered
16 for sale in this website can expose you to DEHP, which is
17 known to the State of California to cause cancer and birth
18 defects or other reproductive harm. For more information
go to www.P65Warnings.ca.gov.

19 **3. MONETARY SETTLEMENT TERMS**

20 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

21 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
22 claims referred to in this Consent Judgment, Home Depot shall pay a total of \$12,000 in civil
23 penalties in accordance with this Section. The penalty payment will be allocated in accordance
24 with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
25 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
26 25% of the penalty remitted to Englander, as follows: Home Depot shall, within ten business days
27 of the Effective Date, issue the following checks: (1) to “Peter Englander, Client Trust Account”
28

1 totaling \$3,000; and (2) to the “Office of Environmental Health Hazard Assessment” totaling
2 \$9,000. Upon receipt, The Chanler Group will then ensure payment to OEHHA. All penalty
3 payments shall be delivered to the address listed in Section 3.3 below. Home Depot shall issue three
4 separate 1099 forms to OEHHA, Englander, and The Chanler Group for the respective amount paid
5 to each under this agreement.

6 **3.2 Reimbursement of Attorneys’ Fees and Costs**

7 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
8 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
9 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
10 the other settlement terms had been finalized, Home Depot expressed a desire to resolve
11 Englander’s fees and costs. The Parties then negotiated a resolution of the compensation due to
12 Englander and his counsel under general contract principles and the private attorney general
13 doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through
14 the mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees
15 and costs on appeal, if any, Home Depot shall reimburse Englander and his counsel \$30,000.
16 Home Depot shall, within ten business days of the Effective Date issue a check to “The Chanler
17 Group” in the amount of \$30,000, and shall deliver it to the address listed in Section 3.3 below.
18 The reimbursement shall cover all fees and costs incurred by Englander investigating, bringing this
19 matter to Home Depot’s attention, litigating, and negotiating a settlement of the matter in the
20 public interest.

21 **3.3 Payment Address**

22 All payments required by this Consent Judgment shall be delivered to the following
23 address:

24 The Chanler Group
25 Attn: Proposition 65 Controller
26 2560 Ninth Street
27 Parker Plaza, Suite 214
28 Berkeley, CA 94710

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Englander’s Release of Proposition 65 Claims**

3 Englander, acting on his own behalf and in the public interest, releases Home Depot and its
4 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
5 and attorneys (“Releasees”) and each entity to whom Home Depot directly or indirectly distributes
6 or sells the Products including, but not limited to, its downstream distributors, wholesalers,
7 customers, retailers, franchisers, cooperative members, licensors and licensees (“Downstream
8 Releasees”) for any violations arising under Proposition 65 for unwarned exposures to DEHP from
9 the Products manufactured, imported, distributed or sold by Home Depot prior to the Effective
10 Date, as set forth in the Notice.

11 **4.2 Englander’s Individual Release of Claims**

12 Englander, in his individual capacity only and *not* in his representative capacity, also
13 provides a release to Home Depot, Releasees, and Downstream Releasees which shall be effective
14 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
15 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Englander of any
16 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
17 alleged or actual exposures to DEHP in Products manufactured, imported, distributed or sold by
18 Home Depot before the Effective Date.

19 **4.3 Home Depot’s Release of Englander**

20 Home Depot, on its own behalf and on behalf of its past and current agents,
21 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
22 Englander and his attorneys and other representatives, for any and all actions taken or statements
23 made (or those that could have been taken or made) by Englander and his attorneys and other
24 representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in
25 this matter, or with respect to the Products.

26 **5. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved and entered by the Court and
28 shall be null and void if, for any reason, it is not approved and entered by the Court within one year

1 after it has been fully executed by all Parties. The Parties acknowledge that, pursuant to California
2 Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
3 Consent Judgment, which motion Englander shall draft and file. If any third-party objection to the
4 motion is filed, Englander and Home Depot agree to work together to address the objection. This
5 provision is a material component of the Consent Judgment and shall be treated as such in the event
6 of a breach.

7 **6. SEVERABILITY**

8 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment,
9 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
10 remaining provisions shall not be adversely affected unless contrary to the intent of the Parties.

11 **7. GOVERNING LAW**

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

19 **8. NOTICE**

20 Unless specified herein, all correspondence and notice required by this Consent Judgment
21 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
22 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
23 following addresses:

24
25
26
27
28

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

To Home Depot:

General Counsel
Home Depot, Inc.
2455 Paces Ferry Road, N.W.
Atlanta, Georgia 30339

To Englander:

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

With copy to:

Jeffrey Margulies, Esq.
Norton Rose Fulbright US LLP
555 South Flower Street
Forty-First Floor
Los Angeles, CA 90071

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

9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

10. COMPLIANCE WITH REPORTING REQUIREMENTS

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

11. MODIFICATION

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

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agreed to all of the terms and conditions of this
4 Consent Judgment.

5
6 **AGREED TO:**

7 
8 _____
9 PETER ENGLANDER

10 Dated: 6/28/2018

6 **AGREED TO:**

7 
8 _____
9 THE HOME DEPOT, INC.

10 By: DAVID STEELE
11 (Print Name)

12 Its: Asst. Sec.
13 (Title)

14 Dated: 6/28/18

15
16
17
18
19
20
21
22
23
24
25
26
27
28