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11 Attorneys for Plaintiff  
12 PETER ENGLANDER

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN FRANCISCO  
UNLIMITED CIVIL JURISDICTION

14 PETER ENGLANDER,

15 Plaintiff,

16 v.

17 BED BATH & BEYOND, INC.; HOT  
18 HEADZ INTERNATIONAL INC.; *et al.*,

19 Defendants.

Case No. CGC-17-561337

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and  
Code Civ. Proc. § 664.6)

21 **1. INTRODUCTION**

22 **1.1 Parties**

23 This Consent Judgment is entered into by and between plaintiff Peter Englander  
24 (“Englander”) and Bed Bath & Beyond, Inc. (“Bed Bath & Beyond”), with Englander and Bed Bath  
25 & Beyond each individually referred to as a “Party” and, collectively, as the “Parties.”

26 **1.2 Plaintiff**

27 Englander is an individual residing in California who seeks to promote awareness of  
28 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous

1 substances contained in consumer products.

2 **1.3 Bed Bath & Beyond**

3 Bed Bath & Beyond employs ten or more individuals and is a “person in the course of doing  
4 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and  
5 Safety Code § 25249.6, *et seq.* (“Proposition 65”).

6 **1.4 General Allegations**

7 Englander alleges that Bed Bath & Beyond distributes, sells, and/or offers for sale, in  
8 California, certain vinyl/PVC inflatables containing di(2-ethylhexyl)phthalate (“DEHP”) without the  
9 “clear and reasonable warning” required pursuant to Proposition 65. DEHP is listed pursuant to  
10 Proposition 65 as a chemical known to cause birth defects or other reproductive harm.

11 **1.5 Covered Products**

12 For purposes of this Consent Judgment, “Covered Products” are defined as vinyl/PVC  
13 inflatables containing DEHP that are manufactured by Hot Headz International, Inc. and distributed,  
14 sold or offered for sale, in California, by Bed Bath & Beyond, including, but not limited to, the  
15 *Kitchen Imagination Inflatable Bar/Buffer*, UPC #8 78845 01224 9.

16 **1.6 Notice of Violation**

17 On May 31, 2017, Englander served Bed Bath & Beyond, Hot Headz International Inc., and  
18 the requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging  
19 that Bed Bath & Beyond violated Proposition 65 by failing to warn its customers and consumers in  
20 California of the health hazards associated with exposures to DEHP from the Covered Products. To  
21 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting  
22 an action to enforce the violations alleged in the Notice.

23 **1.7 Complaint and First Amended Complaint**

24 On September 18, 2017, Englander filed a complaint in the Superior Court for the County of  
25 San Francisco against Hot Headz International, Inc. for the alleged violations of Health and Safety  
26 Code § 25249.6 that are the subject of the Notice. On February 13, 2018, Englander filed a first  
27 amended complaint (“FAC”), the operative pleading in this action, adding Bed Bath & Beyond as a  
28 defendant for the alleged violations that are the subject of the Notice.



1           **1.8     No Admission**

2           Bed Bath & Beyond denies the material, factual, and legal allegations contained in the Notice  
3 and the FAC and maintains that all of its Covered Products sold and distributed for sale in California  
4 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be  
5 construed as an admission by Bed Bath & Beyond of any fact, finding, conclusion of law, issue of  
6 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed  
7 as an admission by Bed Bath & Beyond of any fact, finding, conclusion of law, issue of law, or  
8 violation of law. This Section shall not, however, diminish or otherwise affect Bed Bath &  
9 Beyond’s obligations, responsibilities, and duties under this Consent Judgment.

10           **1.9     Consent to Jurisdiction**

11           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
12 jurisdiction over Bed Bath & Beyond as to the allegations in the FAC, that venue is proper in the  
13 County of San Francisco, and that the Court has jurisdiction over the Parties to enter and enforce the  
14 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure §  
15 664.6.

16           **1.10    Effective Date**

17           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on  
18 which the Motion for Approval of the Consent Judgment is granted by the Court, including any  
19 unopposed Tentative Ruling.

20 **2.     INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

21           **2.1     Commitment to Reformulate or Provide Warnings**

22           Commencing on the Effective Date and continuing thereafter, Bed Bath & Beyond shall only  
23 sell or distribute for sale, in California, Covered Products that are either: (a) Reformulated Products,  
24 as defined in Section 2.2; or (b) Covered Products bearing a clear and reasonable health hazard  
25 warning, as detailed in Sections 2.3 and 2.4, below.

26           **2.2     Reformulated Products Defined**

27           For purposes of this Consent Judgment, “Reformulated Products” are defined as Products  
28 containing DEHP in a maximum concentration of 1,000 parts per million in any accessible

1 component (i.e., any component that may be touched during a reasonably foreseeable use) when  
2 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and  
3 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of  
4 determining DEHP content in a solid substance.

### 5 **2.3 Clear and Reasonable Warnings**

6 Commencing on the Effective Date and continuing thereafter, Bed Bath & Beyond shall  
7 provide clear and reasonable warnings as set forth in this section for all Covered Products sold or  
8 distributed for sale, in California, that do not qualify as Reformulated Products. Each warning shall  
9 be prominently placed with such conspicuousness as compared with other words, statements,  
10 designs, or devices as to render it likely to be read and understood by an ordinary individual under  
11 customary conditions *before* purchase or use. Each warning shall be provided in a manner such that  
12 the consumer or user understands to which *specific* Covered Product the warning applies, so as to  
13 minimize the risk of consumer confusion. For purposes of this Consent Judgment, a clear and  
14 reasonable warning displayed or transmitted according the above criteria, and containing the one of  
15 the following statements, shall satisfy these requirements:


16 For Covered Products:


17  
18 **⚠ WARNING:** This product can expose you to chemicals, including  
19 DEHP, which is known to the State of California to cause  
20 cancer and birth defects or other reproductive harm. For more  
information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

21 **⚠ WARNING:** This product can expose you to chemicals, including  
22 DEHP, which is known to the State of California to cause birth  
defects or other reproductive harm. For more information go to  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

23 Or, if placed directly on a Covered Product or the Covered Product's packaging and/or  
24 labeling, Bed Bath & Beyond may use one of the following short-form warning statements, provided  
25 it appears in a type size no smaller than the largest type size used for other consumer information on  
26 the Covered Product's label and in no case smaller than 6-point type:  
27  
28



1  
2  **WARNING:** Cancer and Reproductive Harm -  
3 [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)

4  **WARNING:** Reproductive Harm -  
5 [www.P65Warnings.ca.gov/product](http://www.P65Warnings.ca.gov/product)

## 6 **2.4 Internet Product Warnings**

7 In the event Bed Bath & Beyond sells Covered Products that do not qualify as Reformulated  
8 Products via the Internet to customers located in California, the warning requirements of this Section  
9 shall be satisfied if, prior to purchase: (a) one of the foregoing warnings, described in Section 2.3,  
10 appears on the same page, in the same type size or larger than the Covered Product description text,  
11 as the Covered Product; (b) a warning appears on the same web page as the price for the Covered  
12 Product, in the same type size or larger than the Covered Product description text; (c) a warning  
13 appears on one or more web pages displayed to the consumer prior to purchase, in the same type size  
14 or larger than the Covered Product description text; or (d) a hyperlink, clearly marked  
15 “WARNING,” appears on the Covered Product display page, in type large enough so that the  
16 consumer does not have to search for it, and a prominently placed warning appears elsewhere, such  
17 as on the Covered Product description page, in a manner that clearly associates it with the Covered  
18 Product to which the warning applies, prior to checkout or purchase.

## 19 **3. MONETARY SETTLEMENT TERMS**

### 20 **3.1 Civil Penalty Payment**

21 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims referred to  
22 in the Notice, the FAC and this Consent Judgment, Bed Bath & Beyond shall pay three thousand five  
23 hundred dollars (\$3,500) in civil penalties. The civil penalty payment shall be allocated according to  
24 Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty  
25 paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the  
26 remaining twenty-five percent (25%) of the penalty paid to Englander. The penalty payment due  
27 under this section shall be in the form of two separate checks, made payable as follows: (a)  
28 “OEHHA” in the amount of two thousand six hundred twenty five dollars (\$2,625); and (b) “Peter

1 Englander, Client Trust Account” in the amount of eight hundred seventy five dollars (\$875).  
2 Englander’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment  
3 made under this Consent Judgment.

4 **3.2 Reimbursement of Attorney’s Fees and Costs**

5 The parties acknowledge that Englander and his counsel offered to resolve this dispute  
6 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the  
7 issue to be resolved after the material terms of this Consent Judgment were settled. After the Parties  
8 reached an agreement as to all other settlement terms, the Parties then reached an accord on the  
9 compensation due to Englander and his counsel, under general contract principles and the private  
10 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work  
11 performed through the mutual execution of this Consent Judgment. Under these legal principles,  
12 Bed Bath & Beyond agrees to pay thirty two thousand dollars (\$32,000.00) to Englander and his  
13 counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Bed  
14 Bath & Beyond’s management, and negotiating a settlement in the public interest. Bed Bath &  
15 Beyond’s payment shall be delivered in the form of a check payable to “The Chanler Group.”

16 **3.3 Payment Timing; Payments Held in Trust**

17 All payments due under this Consent Judgment shall be held in trust until such time as the  
18 Court approves the Parties’ settlement. Within five (5) days of the mutual execution of this  
19 Consent Judgment, all payments required by this agreement shall be delivered to Bed Bath &  
20 Beyond’s counsel, Reed Smith LLP, and held in trust by Reed Smith LLP, until the Court grants the  
21 motion for approval of this Consent Judgment, as contemplated by Section 5. Reed Smith LLP  
22 shall provide written confirmation to Englander’s counsel that it is holding Bed Bath & Beyond’s  
23 payments in trust. Within ten (10) business days of the Effective Date, Bed Bath & Beyond’s  
24 counsel shall deliver the civil penalty and attorneys’ fee reimbursement payments, due under this  
25 agreement, to Englander’s counsel.

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1           **3.4    Payment Address**

2           All payments required by this Consent Judgment shall be delivered to:

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

8           **4.    CLAIMS COVERED AND RELEASED**

9                   **4.1    Englander’s Public Release of Proposition 65 Claims**

10           This Consent Judgment is a full, final, and binding resolution of all claims that were or  
11           could have been asserted in the FAC arising out of Bed Bath and Beyond’s alleged failure to  
12           provide Proposition 65 warnings for exposures to DEHP from the Covered Products. Englander,  
13           acting on his own behalf and in the public interest, releases Bed Bath & Beyond and its parents,  
14           subsidiaries, affiliated entities under common ownership, directors, officers, employees, and  
15           attorneys (“Releasees”), and each entity to whom Bed Bath & Beyond directly or indirectly  
16           distributes or sells the Covered Products, including, without limitation, its downstream customers,  
17           distributors, wholesalers, and retailers (“Downstream Releasees”), for any violation arising under  
18           Proposition 65 pertaining to the failure to warn about exposures to DEHP from Covered Products  
19           sold or distributed for sale by Bed Bath & Beyond prior to the Effective Date, as set forth in the  
20           Notice. Upon entry of this Consent Judgment, Bed Bath and Beyond’s compliance with the terms  
21           of this Consent Judgment shall be deemed to constitute compliance with Proposition 65 with  
22           respect to exposures to DEHP from Covered Products sold or distributed for sale by Bed Bath &  
23           Beyond after the Effective Date. The Parties agree and acknowledge that the releases provided  
24           under this Consent Judgment shall not extend upstream to any entity that manufactured the  
25           Covered Products, or any components part thereof, or to any entity that distributed or sold the  
26           Covered Products, or any component parts thereof, to Bed Bath & Beyond.

27                   **4.2    Englander’s Individual Release of Claims**

28           Englander, in his individual capacity only and *not* in his representative capacity, also  
provides a release to Bed Bath & Beyond, Releasees, and Downstream Releasees which shall be  
effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,

1 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of  
2 Englander of any nature, character or kind, whether known or unknown, suspected or unsuspected,  
3 arising out of alleged or actual exposures to DEHP in Covered Products sold or distributed for sale  
4 by Bed Bath & Beyond prior to the Effective Date.

5 **4.3 Bed Bath & Beyond's Release of Englander**

6 Bed Bath & Beyond, on its own behalf, and on behalf of its past and current agents,  
7 representatives, attorneys, successors, and assignees, hereby waives any and all claims against  
8 Englander and his attorneys and other representatives, for any and all actions taken or statements  
9 made by Englander and his attorneys and other representatives, whether in the course of  
10 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with  
11 respect to the Covered Products.

12 **5. COURT APPROVAL**

13 This Consent Judgment is not effective until it is approved and entered by the Court, and it  
14 shall be null and void if it is not approved and entered by the Court within one year after it has been  
15 fully executed by the Parties, or within such additional time as the Parties may agree to in writing.

16 ///

17 **6. SEVERABILITY**

18 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any  
19 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be  
20 adversely affected.

21 **7. GOVERNING LAW**

22 The terms of this Consent Judgment shall be governed by the laws of the State of California  
23 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise  
24 rendered inapplicable, by reason of law generally or as to the Covered Products, including without  
25 limitation the delisting of DEHP, then Bed Bath & Beyond may provide written notice to Englander  
26 of any asserted change in the law, and shall have no further injunctive obligations pursuant to this  
27 Consent Judgment, with respect to, and to the extent that, the Covered Products are so affected.

28



1 **8. NOTICE**

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

5 For Bed Bath & Beyond:

6 Allan N. Rauch  
7 General Counsel  
8 Bed Bath & Beyond, Inc.  
9 650 Liberty Avenue  
10 Union, NJ 07083

11 with a copy to Bed Bath & Beyond's counsel:

12 Todd O. Maiden, Esq.  
13 Reed Smith LLP  
14 101 Second Street  
15 San Francisco, CA 94105-3659

16 For Englander:

17 Proposition 65 Coordinator  
18 The Chanler Group  
19 2560 Ninth Street  
20 Parker Plaza, Suite 214  
21 Berkeley, CA 94710-2565

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

24 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

25 This Consent Judgment may be executed in counterparts and by facsimile signature, each of  
26 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
27 the same document.

28 **10. POST-EXECUTION ACTIVITIES**

Englander agrees to comply with the reporting form requirements referenced in Health and  
Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code  
§ 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In  
furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and

1 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial  
2 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall  
3 include, at a minimum, supporting the motion for approval, responding to any objection that any  
4 third-party may file or lodge, and appearing at the hearing before the Court if so requested.

5 **11. MODIFICATION**

6 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and  
7 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application  
8 of any Party, and the entry of a modified consent judgment thereon by the Court.

9 **12. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment and acknowledge that they  
11 have read, understand, and agree to all of the terms and conditions contained herein.

12 **AGREED TO:**

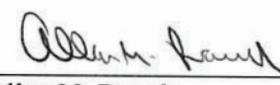
**AGREED TO:**

13

14 Date: 10/23/18 \_\_\_\_\_

Date: October 19, 2018 \_\_\_\_\_

15 By:  \_\_\_\_\_  
16 PETER ENGLANDER

15 By:  \_\_\_\_\_ *KAR*  
16 Allan N. Rauch  
17 General Counsel  
18 BED BATH & BEYOND, INC.

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