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11 PETER ENGLANDER

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

12
13 PETER ENGLANDER
14 Plaintiff,
15
16 v.
17 ASHLEY FURNITURE INDUSTRIES,
18 INC., et al.
19 Defendants.

Case No. RG13672407
*Assigned for All Purposes to
The Hon. George C. Hernandez, Jr.,
Department 17*
**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT THE TJX COMPANIES,
INC.**
(Health & Safety Code § 25249.5 *et seq.*)

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 TJX Companies, Inc. and its operating subsidiaries (collectively
5 “TJX”), 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 TJX 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 and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 **1.4.1** Englander alleges that TJX manufactured, imported, sold and/or distributed
16 for sale in California, upholstered furniture including ottomans with foam padding containing
17 tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) without providing the clear and reasonable health
18 hazard warnings required by Proposition 65.

19 **1.4.2** On October 28, 2011, California listed TDCPP pursuant to Proposition 65, as
20 a chemical known to cause cancer. TDCPP became subject to the “clear and reasonable warning”
21 requirements of the act one year later on October 28, 2013. Cal. Code Regs., tit. 27, § 27001(b);
22 Health & Safety Code §§ 25249.8 and 25249.10(b). Englander further alleges that TDCPP escapes
23 from the foam padding components in TJX’s products resulting in human exposures.

24 **1.5 Product Description**

25 The products that are covered by this Consent Judgment are upholstered furniture, including
26 ottomans, supplied to TJX by Steven Rhoades Ceramic Designs including, but not limited to,
27 *Storage Ottoman Style 262576*. The upholstered furniture identified above and sold by TJX in
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1 California is referred to collectively hereinafter as the “Products”. Polyurethane foam that is
2 supplied, shaped or manufactured for use as a component of another product, such as upholstered
3 furniture, but which is not itself a finished product, is specifically excluded from the definition of
4 Products.

5 **1.6 Notices of Violation**

6 1.6.1 On January 10, 2013, Englander served TJX and certain requisite public
7 enforcement agencies with two separate 60-Day Notices of Violation (“TJX Notices”) alleging that
8 TJX violated Proposition 65 when it failed to warn its customers, consumers, and workers in
9 California that the Products expose users to TDCPP.

10 **1.7 Complaint**

11 On March 21, 2013, Englander commenced the instant action, naming TJX as a defendant
12 for the alleged violations of Proposition 65 that are the subject of the Notices. Thereafter, on July
13 9, 2013, Englander filed a Second Amended Complaint (“Complaint”), the operative pleading in
14 this action.

15 **1.8 No Admission**

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

24 **1.9 Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over TJX as to the allegations contained in the Complaint, that venue is proper in the
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1 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
2 Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section 664.6.

3 **2. DEFINITIONS**

4 **2.1 No Detectable Amount**

5 “No Detectable Amount” shall mean no more than 25 parts per million (“ppm”) (the
6 equivalent of .0025%) of any one chemical in any material, component, or constituent of a subject
7 product, when analyzed by an accredited laboratory pursuant to EPA testing methodologies 3545
8 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
9 presence, or measure the amount, of TDCPP in a solid substance.

10 **2.3 Effective Date**

11 “Effective Date” shall mean the date on which this Consent Judgment is entered by the
12 Court.

13 **2.4 Reformulated Products**

14 “Reformulated Products” shall mean Products that contain No Detectable Amount of
15 TDCPP.

16 **2.6 Reformulation Standard**

17 The “Reformulation Standard” shall mean Products with components containing no more
18 than 25 ppm of TDCPP.

19 **3. INJUNCTIVE RELIEF: REFORMULATION**

20 **3.1 Reformulation Commitment**

21 Commencing on April 1, 2014 and continuing thereafter, TJX shall not sell and/or offer for
22 sale in California any Products unless it has obtained a written certification from its supplier of the
23 Products that such Products meet the definition of Reformulated Products established by this
24 Consent Judgment. TJX shall maintain any supplier certification obtained pursuant to this Section
25 for three years.
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1 3.2 **Interim Product Warnings**

2 3.2.1 Any Products received by TJX before December 31, 2013, that TJX knows
3 or has reason to believe do not qualify as Reformulated Products, and that TJX sells or offers for
4 sale in California, may be sold thereafter but shall contain a clear and reasonable warning as set
5 forth in this Section 3.2.

6 3.2.2 **Product Labeling.** Any warning provided under this Consent Judgment
7 shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be
8 prominently placed with such conspicuousness when compared with other words, statements,
9 designs, or devices as to render it likely to be read and understood by an ordinary individual under
10 customary conditions before purchase. Each warning shall be provided in a manner such that the
11 consumer or user understands to which specific Product the warning applies, so as to minimize the
12 risk of consumer confusion.

13 A warning provided pursuant to this Consent Judgment shall state:

14 **WARNING:** This product contains [TDCPP,] a
15 flame retardant chemical known to the
16 State of California to cause cancer.¹

17 4. **MONETARY PAYMENTS**

18 4.1 **Civil Penalties**

19 In settlement of all the claims referred to in this Consent Judgment, pursuant to Health and
20 Safety Code section 25249.7(b), TJX shall pay \$15,000 in civil penalties according to this Section
21 4.1. Each penalty payment will be allocated in accordance with California Health & Safety Code
22 section 25249.12(c)(1) and (d), with 75% of the penalty payment remitted to the California Office
23 of Environmental Health Hazard Assessment (“OEHHA”), and 25% of the penalty payment
24 retained by Englander. TJX shall be liable for payment of simple interest at a rate of 10% for all
25 amounts due and owing that are not received within five business days of the due date.

26 ¹ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be
27 used if TJX or its vendor had employed it for Products prior to the Effective Date. If TJX seeks to
28 use alternative warning language, other than the language specified above or the safe harbor
warning specified in 27 CCR § 25603.2, or seeks to use an alternate method of transmission of the
warning, it must obtain the Court’s approval of its proposed alternative and provide all Parties and
the Office of the Attorney General with timely notice and the opportunity to comment or object
before the Court acts on the request.

1 4.1.1 **Initial Civil Penalty.** Within five business days of the Effective Date, TJX
2 shall make an initial civil penalty payment of \$5,000. TJX shall provide its payment in two checks
3 for the following amounts made payable to: (a) “OEHHA” in the amount of \$3,750; and (b) “The
4 Chanler Group in Trust for Peter Englander” in the amount of \$1,250.

5 4.1.2 **Final Civil Penalty.** On or before June 15, 2014, TJX shall make a final
6 civil penalty payment of \$10,000. TJX shall provide its payment in two checks for the following
7 amounts made payable to: (a) “OEHHA” in the amount of \$7,500; and (b) “The Chanler Group in
8 Trust for Peter Englander” in the amount of \$2,500. The amount of the final civil penalty may be
9 reduced according to any penalty waiver for which TJX is eligible under Sections 4.1.3(i) and 4.1.3
10 (ii), below. In the event a portion of the final civil penalty is waived as a result of a partial penalty
11 credit, then the remaining portion shall be allocated according to Section 4.1 and the Health and
12 Safety Code such that 75% of any amount paid is paid to OEHHA, and the remaining 25% of any
13 amount paid is retained by Englander.

14 4.1.3 **Partial Final Civil Penalty Waivers**

15 (i) **Partial Waiver for Accelerated Reformulation.** \$6,000 of TJX’s
16 final civil penalty payment shall be waived, if, as of February 1, 2014, and continuing thereafter,
17 TJX requires its vendor of the Products to provide it with a written certification stating that the
18 vendor’s Products comply with the 25 ppm standard applicable to TDCPP for Reformulated
19 Products. To obtain the penalty waiver, an officer or other authorized representative of TJX shall
20 provide Englander with a written certification confirming that it has complied with this
21 requirement, no later than March 31, 2104.

22 (ii) **Partial Waiver for Extended Reformulation.** \$4,000 of TJX’s final
23 civil penalty payment shall be waived, if, as of June 1, 2014, and continuing thereafter, TJX agrees
24 to require its vendor of the Products to provide it with written certification that all of the vendor’s
25 Products reformulated to contain no more than 25 parts per million (“ppm”), of two additional
26 flame retardant chemicals, tris(2,3-dibromopropyl)phosphate (“TDBPP”) and tris(2-
27 chloroethyl)phosphate (“TCEP”), in any material, component, or constituent of a subject product,
28 when analyzed by an accredited Lab pursuant to an approved methodology. To obtain the penalty

1 waiver, an officer or other authorized representative of TJX must provide Englander's counsel with
2 a written certification confirming that it has complied with the above requirement, no later than
3 May 15, 2014.

4 **4.2 Representations Regarding Sales and Other Information**

5 TJX represents that the sales data and other information concerning its size, knowledge of
6 TDCPP presence, and prior reformulation and/or warning efforts, provided to Englander are true
7 and accurate based on its knowledge, and are material factors upon which Englander relied to
8 determine the amount of civil penalties assessed pursuant to Health and Safety Code section
9 25249.7(b). If, within nine months of the Effective Date, Englander discovers and presents to TJX,
10 evidence demonstrating that the preceding representations and warranties are materially inaccurate,
11 then TJX shall have 30 days to meet and confer regarding the Englander's contention. Should this
12 30 day period pass without any resolution, Englander shall be entitled to file a formal legal claim
13 including, but not limited to, a claim for damages for breach of contract.

14 **4.3 Reimbursement of Fees and Costs**

15 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
17 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
18 other settlement terms had been finalized, TJX expressed a desire to resolve Englander's
19 outstanding fees and costs. Under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed
21 through the mutual execution of this agreement, including the fees and costs incurred as a result of
22 investigating, bringing this matter to TJX's attention, negotiating a settlement in the public interest,
23 and seeking court approval of the same, TJX agrees to pay Englander, \$30,000. TJX shall tender its
24 payment in full payable to "The Chanler Group" within five business days of the Effective Date.

25 **4.4 Payment Procedures**

26 4.4.1 Payment Addresses.

27 (a) All payments and tax documentation required for Englander and his
28 counsel under this Consent Judgment shall be delivered to the following address:

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

6 (b) All payments and tax documentation required for OEHHA under this
7 Consent Judgment shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of
8 the following addresses, as appropriate:

9 For United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 P.O. Box 4010
14 Sacramento, CA 95812-4010

15 For Non-United States Postal Service Delivery or Courier:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

21 4.4.2 **Proof of Payment to OEHHA.** A copy of TJX's check payable to OEHHA
22 shall be mailed, simultaneous with payment to Englander to The Chanler Group at the address
23 provided in Section 4.4.1(a).

24 4.4.3 **Tax Documentation.** TJX shall provide a separate 1099 form for its
25 payments to each of the following payees: (a) Peter Englander, whose address and tax
26 identification number shall be furnished upon request after this Consent Judgment has been fully
27 executed by the Parties; (b) "California Office of Environmental Health Hazard Assessment" (EIN:
28 68-0284486); and (c) "The Chanler Group" (EIN: 94-3171522) , and deliver such form to the payee
at the payment addresses provided in Section 4.4.1.

29 **5. ENFORCEMENT OF CONSENT JUDGMENT**

30 **5.1 General Enforcement Provisions**

31 5.2 Any Party may, by motion, application or any other remedy afforded by law, enforce
32 the terms and conditions contained in this Consent Judgment. A Party may file such a motion or
33 application only after that Party first provides 30 days' notice to the Party allegedly failing to

1 comply with the terms and conditions of this Consent Judgment and attempts to resolve such
2 Party's failure to comply in an open and good faith manner for a period of no less than 30 days.
3 Any action to enforce alleged violations of Section 3.1 shall be brought exclusively pursuant to
4 Section 5.2.

5 5.3 Notice Regarding Violation

6 Within 10 days of receiving a written notice of violation from Englander ("NOV")
7 containing: (a) a copy of the sales receipt from TJX showing the date and location from which the
8 Product was purchased, and the identification of the Product, including the SKU and/or other
9 identification number(s); and (b) all test data obtained by Englander regarding the Product and
10 supporting documentation sufficient for validation of the test results, including any laboratory
11 reports, quality assurance reports and quality control reports associated with the testing of a Product
12 demonstrating that the Product contains more than 25 ppm TDCPP. Upon TJX's receipt of an
13 NOV and the necessary supporting information from Englander, TJX shall discontinue the sale of
14 that Product in California and provide a copy of the certification obtained from its vendor pursuant
15 to Section 3.1 with respect to the Product at issue, and shall have no further liability under this
16 Consent Judgment or Proposition 65 with respect to the Product and TDCPP. An NOV shall be
17 based upon testing from an independent laboratory pursuant to Environmental Protection Agency
18 testing methodologies 3545 and 8270C or any other methodology utilized by federal and state
19 agencies for the purpose of determining TDCPP content in a solid substance.

20 5.4 Monetary Payments for Violating Section 3.1

21 5.4.1 In the event that Englander purchases a Product in California that contains
22 more than 25 ppm TDCPP more than 60 days after the Effective Date and TJX fails to provide a
23 copy of the certification obtained from its vendor regarding the Product at issue, in addition to TJX
24 discontinuing sale of the Product in California, TJX shall pay \$5,000 in civil penalties. The civil
25 penalty shall be apportioned in accordance with Section 4.1 and Health and Safety Code section
26 25249.12(c)(1) and (d).

27 5.4.2 In addition to the above, TJX shall reimburse Englander and his counsel
28 \$12,000 for fees and costs incurred as a result of investigating and identifying the violation.

1 Payment shall be made in accordance with Section 4.3 and shall be delivered to Englander's
2 counsel at the address found in Section 4.4.1(a) within five business days of the expiration of the 30
3 day period TJX has to provide the written certification.

4 5.4.3 This Section 5.4 shall not apply to any Products that were received by TJX
5 prior to December 31, 2013 and which bear a clear and reasonable warning pursuant to Section 3.2.

6 **6. CLAIMS COVERED AND RELEASED**

7 **6.1 Englander's Release of Proposition 65 Claims**

8 Englander, acting on his own behalf and in the public interest, releases TJX, its parents,
9 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
10 attorneys, and each entity to whom TJX directly or indirectly distributes or sells the Products,
11 including, but not limited, to downstream distributors, wholesalers, customers, retailers,
12 franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims
13 alleging violations of Proposition 65 through the Effective Date based on unwarned exposures to
14 the TDCPP in the Products, as set forth in the Notices. Compliance with the terms of this Consent
15 Judgment constitutes compliance with Proposition 65 with respect to exposures to TDCPP from the
16 Products, as set forth in the Notices. The Parties further understand and agree that this Section 6.1
17 release shall not extend upstream to any entity that manufactured the Products or any component
18 parts thereof, or any distributor or supplier who sold the Products or any component parts thereof to
19 TJX.

20 **6.2 Englander's Individual Releases of Claims**

21 Englander, in his individual capacity only and *not* in any representative capacity, provides a
22 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
23 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
24 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
25 unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP and/or
26 TDBPP in Products manufactured, imported, distributed, or sold by TJX prior to the Effective Date.
27 The Parties further understand and agree that this Section 6.2 release shall not extend upstream to
28 any entity that manufactured any Products or any component parts thereof, or any distributors or

1 suppliers who sold any Products or any component parts thereof to TJX. Nothing in this Section
2 affects Englander's right to commence or prosecute an action under Proposition 65 against a
3 Releasee that does not involve TJX's Product.

4 **6.3 TJX's Release of Englander**

5 TJX, on its own behalf, and on behalf of its past and current agents, representatives,
6 attorneys, successors, and assignees, hereby waives any and all claims against Englander and his
7 attorneys and other representatives, for any and all actions taken or statements made (or those that
8 could have been taken or made) by Englander and his attorneys and other representatives, whether
9 in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this
10 matter, or with respect to the Products or Additional Products.

11 **7. COURT APPROVAL**

12 7.1 This Consent Judgment is not effective until it is approved and entered by the Court
13 and shall be null and void if, for any reason, it is not approved and entered by the Court within one
14 year after it has been fully executed by all Parties.

15 7.2 Englander and TJX agree to support the entry of this agreement as a Consent
16 Judgment and to obtain approval of the Consent Judgment by the Court in a timely manner. The
17 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
18 noticed motion is required for judicial approval of this Consent Judgment, which motion Englander
19 shall draft and file and TJX shall support, including appearing at the hearing if so requested. This
20 provision is a material component of the Consent Judgment and shall be treated as such in the event
21 of a breach.

22 7.3 If the Court does not approve the Consent Judgment, the Parties shall meet and
23 confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree
24 on a course of action to take, then the case shall proceed in its normal course on the Court's trial
25 calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall
26 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not
27 jointly agree on a course of action to take, then the case shall proceed in its normal course on the
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1 Court's trial calendar. In the event that this Consent Judgment is entered by the Court and
2 subsequently overturned by any appellate court, any monies that have been provided to OEHHA,
3 Englander or his counsel under this Consent Judgment shall be refunded within 15 days of the
4 appellate decision becoming final.

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California.
7 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
8 reason of law generally, or as to the Products, then TJX may provide Englander with notice of any
9 asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment
10 with respect to, and to the extent that, the Products are so affected. Nothing in this Consent
11 Judgment shall be interpreted to relieve TJX from its obligation to comply with any pertinent state
12 or federal law or regulation.

13 **9. NOTICE**

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

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19 To TJX:

20 General Counsel
21 The TJX Companies, Inc.
22 770 Cochituate Road
23 Framingham, MA 01701-4666

24 With a copy to:

25 Jeffrey B. Margulies
26 Fulbright & Jaworski LLP
27 555 South Flower Street
28 41st Floor
Los Angeles, California 90071

To Englander:

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

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

3 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

7 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

10 **12. MODIFICATION**

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

14 **13. AUTHORIZATION**


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

19 **AGREED TO:**

AGREED TO:

20
21 Date: March 5, 2014

Date: March 6, 2014

22
23 By: 
24 PETER ENGLANDER

By: 
THE TJX COMPANIES, INC.

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