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10 PETER ENGLANDER

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

14 PETER ENGLANDER

15 Plaintiff,

16 v.

17 ASHLEY FURNITURE INDUSTRIES,
18 INC., et al.

19 Defendants.

Case No. RG13673710

*Assigned for All Purposes to Judge George C.
Hernandez, Jr., Department 17*

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT HUMAN TOUCH, LLC**

(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 Human Touch, LLC (“Human Touch”), with Englander and Human
5 Touch 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 Human Touch 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 Human Touch manufactured, imported, sold and/or distributed for
16 sale in California, upholstered furniture with foam padding containing tris(1,3-dichloro-2-propyl)
17 phosphate (“TDCPP”) and upholstered furniture with foam padding containing tris(2-chloroethyl)
18 (“TCEP”) without providing the clear and reasonable health hazard warnings required by
19 Proposition 65.

20 **1.5 Listed Chemicals**

21 1.5.1 On April 1, 1992, California listed TCEP pursuant to Proposition 65, as a
22 chemical known to cause cancer. TCEP became subject to the “clear and reasonable warning”
23 requirements of the act one year later on April 1, 1993. Cal. Code Regs., tit. 27, § 27001(b); Health
24 & Safety Code §§ 25249.8 and 25249.10(b).

25 1.5.2 On October 28, 2011, California identified and listed TDCPP Pursuant to
26 Proposition 65, as a chemical known to cause cancer. TDCPP became subject to the “clear and
27 reasonable warning” requirements of the act one year later on October 28, 2012. Cal. Code Regs.,
28 tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). TDCPP and TCEP are

1 referred to collectively herein after as the “Listed Chemicals.” Englander alleges that TDCPP and
2 TCEP escape from the foam padding, resulting in human exposures.

3 **1.5 Product Description**

4 The categories of products that are covered by this Consent Judgment are identified on
5 Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied, shaped or manufactured for
6 use as a component of another product, such as upholstered furniture, but which is not itself a
7 finished product, is specifically excluded from the definition of Products included on Exhibit A.

8 **1.6 Notices of Violation**

9 On January 10, 2013, and February 26, 2013, Englander served Human Touch and certain
10 requisite public enforcement agencies with two separate 60-Day Notices of Violation (“Notices”)
11 alleging that Human Touch violated Proposition 65 when it failed to warn customers, consumers,
12 and workers in California that the Products expose users to TDCPP and TCEP. To the best of the
13 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations
14 set forth in the Notices.

15 **1.7 Complaint**

16 On March 21, 2013, Englander commenced the instant action. Thereafter, on July 9, 2013,
17 Englander filed a Second Amended Complaint (“Complaint”), the operative pleading in this action,
18 naming Human Touch as a defendant, and stating a cause of action for the alleged violations of
19 Proposition 65 that are the subject of the Notices.

20 **1.8 No Admission**

21 Human Touch denies the material, factual, and legal allegations contained in the Notices
22 and Complaint and maintains that all of the products that it has sold or distributed for sale in
23 California, including the Products, have been and are in compliance with all laws. Nothing in this
24 Consent Judgment shall be construed as an admission by Human Touch of any fact, finding,
25 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
26 Judgment constitute or be construed as an admission by Human Touch of any fact, finding,
27 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
28

1 otherwise affect Human Touch’s obligations, responsibilities, and duties under this Consent
2 Judgment.

3 **1.9 Jurisdiction**

4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Human Touch as to the allegations contained in the Complaint, that venue is
6 proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the
7 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
8 Procedure section 664.6.

9 **2. DEFINITIONS**

10 **2.1 California Customer**

11 “California Customer” shall mean any customer that Human Touch reasonably understands
12 is located in California, has a California warehouse or distribution center, maintains a retail outlet in
13 California, or has distributed Products for sale in California, online via the internet or by any other
14 means, on or after January 1, 2011.

15 **2.2 No Detectable Amount**

16 “No Detectable Amount” shall mean no more than 25 parts per million (“ppm”) (the
17 equivalent of .0025%) of any one chemical in any material, component, or constituent of a
18 subject product, when analyzed by a domestic NVLAP (National Volunteer Laboratory
19 Accreditation Program) accredited laboratory pursuant to EPA testing methodologies 3545 and
20 8270C, or equivalent methodologies utilized by federal or state agencies to determine the presence,
21 or measure the amount, of TDCPP and/or TCEP in a solid substance.

22 **2.3 Effective Date**

23 “Effective Date” means December 22, 2013.

24 **2.4 Private Label Covered Products**

25 “Private Label Covered Products” means Products that bear a brand or trademark owned or
26 licensed by a Retailer or affiliated entity that are sold or offered for sale by a Retailer in the State of
27 California.

28

1 **2.5 Reformulated Products**

2 “Reformulated Products” shall mean Products that contain No Detectable Amount of
3 TDCPP or TCEP.

4 **2.6 Reformulation Standard**

5 The “Reformulation Standard” shall mean containing no more than 25 ppm for each of
6 TDCPP and TCEP.

7 **2.7 Retailer**

8 “Retailer” means an individual or entity that offers a Product for sale to consumers in
9 California.

10 **3. INJUNCTIVE RELIEF: REFORMULATION**

11 **3.1 Reformulation Commitment**

12 Commencing on April 30, 2014, and continuing thereafter, Human Touch shall not
13 manufacture or import for distribution or sale to California Customers, or cause to be manufactured
14 or imported for distribution or sale to California Customers, any Products that are not Reformulated
15 Products.

16 **3.2 Vendor Notification/Certification**

17 Within 30 days of the Effective Date, Human Touch shall provide written notice to all of its
18 then-current vendors of Products that are sold or offered for sale in California, or to California
19 Customers, instructing each such vendor to use reasonable efforts to provide only Reformulated
20 Products. In addressing the obligation set forth in the preceding sentence, Human Touch shall not
21 employ statements to encourage a vendor to delay compliance with the Reformulation Standard.
22 No later than May 1, 2014, Human Touch shall obtain a written certification from each such
23 vendor, and any newly engaged vendors, that the Products it manufactures comply with the
24 Reformulation Standard. Such certifications shall be held by Human Touch for at least two years
25 from receipt, and shall be made available to Englander upon request.

26 **3.3 Products No Longer in Human Touch’s Control**

27 No later than 45 days after the Effective Date, Human Touch shall send a letter
28 (“Notification Letter”), electronic or otherwise, to: (a) each California Customer and/or Retailer

1 which it, after October 28, 2011, supplied the item for resale in California described as an exemplar
2 in the Notice (“Exemplar Product”); and (b) any California Customer and/or Retailer that Human
3 Touch believes is reasonably likely to have any inventory of Exemplar Products for resale in
4 California as of January 1, 2013.

5 The Notification Letter shall advise the recipient that the Exemplar Product “contains
6 TDCPP and/or TCEP, chemicals known to the State of California to cause cancer,” and request that
7 the recipient either: (a) label the Exemplar Products remaining in inventory prior to offering them
8 for sale in California, or to California Customers, pursuant to Section 3.5; or (b) return, at Human
9 Touch’s expense, all units of the Exemplar Product held for sale in California, or to California
10 Customers, to Human Touch or a party Human Touch has otherwise designated. The Notification
11 Letter shall require a response from the recipient within 15 days confirming whether the Exemplar
12 Product will be labeled or returned. Human Touch shall maintain records of all correspondence
13 generated pursuant to this Section for two years after the Effective Date and shall promptly produce
14 copies of such records upon Englander’s written request.

15 3.4 Current Inventory

16 Any Products in, or manufactured and en route to, Human Touch’s inventory on or after
17 January 31, 2014, that do not qualify as Reformulated Products, and that Human Touch has reason
18 to believe may be sold or distributed for sale in California, shall contain a clear and reasonable
19 warning as set forth in Section 3.5 below unless Section 3.6 applies.

20 3.5 Product Warnings

21 3.5.1 **Product Labeling.** Any warning provided under Section 3.3 or 3.4 above
22 shall be affixed to the packaging, labeling, or directly on each Product. Each warning shall be
23 prominently placed with such conspicuousness when compared with other words, statements,
24 designs, or devices as to render it likely to be read and understood by an ordinary individual under
25 customary conditions before purchase. Each warning shall be provided in a manner such that the
26 consumer or user understands to which specific Product the warning applies, so as to minimize the
27 risk of consumer confusion.

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

1 **WARNING:** This product contains [TDCPP and/or
2 TCEP], flame retardant chemicals
3 known to the State of California to
 cause cancer.¹

4 **3.5.2 Internet Website Warning.** A warning shall be given in conjunction with
5 Human Touch’s sale of the Products over its website online via the internet into California, or to
6 California Customers. The warning shall appear on one or more web pages displayed to a
7 purchaser prior to completing payment and/or during the “checkout” process. The following
8 warning statement shall be used and shall: (a) appear adjacent to or immediately following the
9 display, description, or price of the Product; (b) be accessible via a hyperlink that appears adjacent
10 to or immediately following the display, description, or price of the Product; or (c) appear as a pop-
11 up box. The warning, hyperlink and/or pop-up box text shall be the same type size or larger than
12 the Product description text, and shall state:

13 **WARNING:** This product contains [TDCPP and/or
14 TCEP], flame retardant chemicals
 known to the State of California to
 cause cancer.²

15 **3.6 Alternatives to Interim Warnings**

16 Human Touch’s obligation under Section 3.3 shall be relieved if it provides Englander with
17 written notice on or before January 15, 2014 certifying that only Exemplar Products meeting the
18 Reformulation Standard will be offered for sale in California, or to California Customers for sale in
19 California, after January 31, 2014. The obligations of Human Touch under Section 3.4 shall be
20 relieved upon Englander’s receipt of Human Touch’s written certification on or before January 15,
21

22 ¹ The regulatory safe harbor warning language specified in 27 Cal. Code Regs. §
23 25603.2(a)(1) shall be deemed acceptable under this Consent Judgment, if Human Touch employed
24 it prior to the Effective Date. Human Touch must obtain Court approval for any alternative
25 warning statement other than that set forth above or the regulatory safe harbor language found at 27
26 Cal. Code Regs. § 25603.2(a)(1), and/or for any proposed alternate method of warning
27 transmission. In doing so, Human Touch agrees to provide the Parties and the Office of the
28 Attorney General with timely notice and an opportunity to oppose or comment on before the Court
acts on the request. The Parties agree that the following hybrid warning language shall not be
deemed to meet the requirements of 27 Cal. Code Regs. § 25601 et seq., and shall not be used
pursuant to this Consent Judgment: (a) “cancer or birth defects or other reproductive harm;” and (b)
“cancer, birth defects or other reproductive harm” unless Human Touch knows the Product to
which such warning is applied contains a Proposition 65-listed chemical in addition to TDCPP or
TCEP that is known to cause birth defects or other reproductive harm.

² The preceding footnote applies in this context as well.

1 2014, that, as of July 30, 2014, it will only distribute or cause to be distributed for sale, or sell in
2 California, or to California Customers for sale in California, Products (i.e., Products beyond the
3 Exemplar Product) meeting the Reformulation Standard. The certifications provided by this
4 Section are material terms and time is of the essence.

5 **4. MONETARY PAYMENTS**

6 **4.1 Civil Penalties**

7 Pursuant to Health & Safety Code § 25249.7(b), and in settlement of all the claims referred
8 to in this Consent Judgment, Human Touch shall pay the civil penalties shown on Exhibit A. Each
9 penalty payment will be allocated in accordance with California Health & Safety Code section
10 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
11 Health Hazard Assessment (“OEHHA”), 25% of the penalty remitted to “The Chanler Group in
12 Trust for Englander.” Each penalty payment shall be delivered within two business days of the date
13 it is due at the addresses provided in Section 4.5, below. Human Touch shall be liable for payment
14 of simple interest at a rate of 10% for all amounts due and owing that are not received within two
15 business days of the date they are due, if any.

16 **4.1.1 Initial Civil Penalty.** Within five days of the Effective Date, Human Touch
17 shall make an initial civil penalty payment in the amount identified on Exhibit A.

18 **4.1.2 Second Civil Penalty.** On or before February 15, 2014, Human Touch shall
19 make a second civil penalty payment in the amount identified on Exhibit A. The amount of the
20 second penalty may be reduced according to any penalty waiver for which Human Touch is eligible
21 under Sections 4.1.4(i) and 4.1.4(iii), below.

22 **4.1.3 Third Civil Penalty.** On or before December 31, 2014, Human Touch shall
23 make a third civil penalty payment in the amount identified on Exhibit A. The amount of the third
24 penalty may be reduced according to any penalty waiver for which Human Touch is eligible under
25 Sections 4.1.4(ii) and 4.1.4(iv), below.

26 **4.1.4 Reductions to Civil Penalty Payment Amounts.** Human Touch may
27 reduce the amount of the second and/or third civil penalty payments identified on Exhibit A by
28 providing Englander with certification of certain efforts undertaken to reformulate its Products or

1 limit the ongoing sale of non-reformulated Products in California. The option to provide a written
2 certification in lieu of making a portion of Human Touch’s second or third civil penalty payments
3 constitutes a material term of this Consent Judgment, and with regard to such terms, time is of the
4 essence.

5 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of
6 Products Sold or Offered for Sale in California.**

7 If Human Touch so elects on Exhibit A, a portion of the second civil penalty shall be
8 waived, if, as of February 1, 2014, and continuing thereafter, Human Touch agrees that it will only
9 manufacture or import for distribution or sale to California Customers or cause to be manufactured
10 or imported for distribution or sale to California Customers, Reformulated Products. An officer or
11 other authorized representative shall provide Englander with a written certification confirming
12 compliance with such conditions, no later than January 15, 2014.

13 4.1.4(ii) **Partial Penalty Waiver for Accelerated Extended
14 Reformulation.**

15 As shown on Exhibit A, a portion of the third civil penalty shall be waived, if, as of April 15,
16 2014, and continuing thereafter, Human Touch agrees that it will only manufacture or import for
17 distribution or sale in California, or cause to be manufactured or imported for distribution or sale in
18 California, Reformulated Products which also do not contain tris(2,3-dibromopropyl)phosphate
19 (“TDBPP”) in a detectable amount of more than 25 ppm (.0025%) in any material, component, or
20 constituent of a subject product, when analyzed by a NVLAP accredited laboratory pursuant to
21 EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or
22 state agencies to determine the presence, and measure the quantity, of TDBPP in a solid substance.
23 An officer or other authorized representative shall provide Englander with a written certification
24 confirming compliance with such conditions, no later than November 15, 2014.

25 4.1.4(iii) **Partial Penalty Waiver for Withdrawal of Non-Reformulated
26 Exemplar Products from the California Market.**

27 As shown on Exhibit A, a portion of the second civil penalty shall be waived, if an officer or
28 other authorized representative of Human Touch provides Englander with written certification, by
January 15, 2014, confirming that each individual or establishment in California to which it

1 supplied the Exemplar Product after October 28, 2011, has elected, pursuant to Section 3.3, to
2 return all Exemplar Products held for sale in California.³

3 4.1.4(iv) **Partial Penalty Waiver for Termination of Distribution to**
4 **California of Inventory of Non-Reformulated Products.**

5 As shown on Exhibit A, a portion of the third civil penalty shall be waived, if an officer or
6 other authorized representative of Human Touch provides Englander with written certification, on
7 or before November 15, 2014, confirming that, as of July 1, 2014, it has and will continue to
8 manufacture for sale or purchase for sale in California, or to California Customers, only
9 Reformulated Products.

10 4.2 **Representations Regarding Sales and Other Information**

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

21 Human Touch further represents that in implementing the requirements set forth in Sections
22 3.1 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts to achieve
23 reformulation of its Products and Additional Products on a nationwide basis and not employ
24 statements that will encourage a vendor to limit its compliance with the Reformulation Standard to
25 goods intended for sale to California Consumers.

26
27 ³ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Englander have, prior to August 31, 2013, provided Human Touch with test results from a
NVLAP accredited laboratory showing the presence of a Listed Chemical at a level in excess of 250
ppm pursuant to EPA testing methodologies 3545 or 8270C.

1 4.3 **Penalties for Certain Violations of the Reformulation Standard.**

2 If Englander provides notice and appropriate supporting information to Human Touch that
3 levels of a TDCPP in excess of the Reformulation Standard have been detected in one or more
4 Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a
5 deadline for meeting the Reformulation Standard under Section 3.1 or 3.6, has commenced, then
6 Human Touch may elect to pay a stipulated penalty to relieve any further potential liability under
7 Proposition 65 or sanction under this Consent Judgment as to Products sourced from the vendor in
8 question.⁴ The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000
9 if the violation level is between 100 ppm and 249 ppm, this being applicable for any amount in
10 excess of the Reformulation Standards but under 250 ppm.⁵ Englander shall further be entitled to
11 reimbursement of his associated expenses in an amount not to exceed \$5,000 regardless of the
12 stipulated penalty level. If the Parties proceed under this Section, Human Touch must provide
13 notice and appropriate supporting information relating to the purchase (e.g. vendor name and
14 contact information including representative, purchase order, certification (if any) received from
15 vendor for the exemplar or subcategory of products), test results, and a letter from a company
16 representative or counsel attesting to the information provided to Englander within 30 calendar days
17 of receiving test results from Englander’s counsel. Any violation levels at or above 250 ppm shall
18 be subject to the full remedies provided pursuant to this Consent Judgment and at law.

19 4.4 **Reimbursement of Fees and Costs**

20 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
21 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
22 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
23 other settlement terms had been finalized, Human Touch expressed a desire to resolve Englander’s
24

25 ⁴ This Section shall not be applicable where the vendor in question had previously been
26 found by Human Touch to have provided unreliable certifications as to meeting the Reformulation
27 Standard in its Products on more than one occasion. Notwithstanding the foregoing, a stipulated
penalty for a second exceedance by Human Touch’s vendor at a level between 100 and 249 ppm
shall not be available after July 1, 2015.

28 ⁵ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner provided in Sections 4.1 and 4.5.

1 outstanding fees and costs. Under general contract principles and the private attorney general
2 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
3 through the mutual execution of this agreement, including the fees and costs incurred as a result of
4 investigating, bringing this matter to Human Touch’s attention, negotiating a settlement in the
5 public interest, and seeking court approval of the same. In addition, the negotiated fee and cost
6 figure expressly includes the anticipated significant amount of time Englander’s counsel will incur
7 to monitor various provisions in this agreement over the next two years, with the exception of
8 additional fees that may be incurred pursuant to any election made by Human Touch under Section
9 11. Human Touch agrees to pay Englander, upon the Court’s approval and entry of this Consent
10 Judgment, the amount of fees and costs indicated on Exhibit A. Human Touch further agrees to
11 tender its payment in full under this Section to “The Chanler Group in Trust” within five business
12 days of the Effective Date, which amounts shall not be disbursed until the Court’s approval and
13 entry of this Consent Judgment.

14 **4.5 Payment Procedures**

15 **4.5.1 Payment Addresses.** All payments and tax forms for Englander and his
16 counsel under this Consent Judgment shall be delivered to the following addresses:

17 (a) All payments to Englander and his counsel shall be delivered to:

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

21 (b) All payments and tax forms required for OEHHA under this Consent
22 Judgment shall be delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of
23 the following addresses, as appropriate:

24 For United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
27 P.O. Box 4010
Sacramento, CA 95812-4010

28

1 Private Labeled Covered Products Human Touch has offered for sale in California, or to California
2 Customers.

3 **5.2 Englander’s Individual Releases of Claims**

4 Englander, in his individual capacity only and *not* in any representative capacity, provides a
5 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
6 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
7 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
8 unsuspected, limited to and arising out of alleged or actual exposures to TDCPP, TCEP, and/or
9 TDBPP in Products or Additional Products (as defined in Section 11.1 and delineated on Exhibit A)
10 manufactured, imported, distributed, or sold by Human Touch prior to the Effective Date.⁶ The
11 Parties further understand and agree that this Section 5.2 release shall not extend upstream to any
12 entity that manufactured any Products or Additional Products, or any component parts thereof, or
13 any distributors or suppliers who sold any Products or Additional Products, or any component parts
14 thereof to Human Touch, except that entities upstream of Human Touch that is a Retailer of a
15 Private Labeled Covered (or Additional) Product shall be released as to the Private Labeled
16 Covered (or Additional) Products offered for sale in California by the Human Touch. Nothing in
17 this Section affects Englander’s right to commence or prosecute an action under Proposition 65
18 against a Releasee that does not involve Human Touch’s Products or Additional Products.

19 **5.3 Human Touch’ Release of Englander**

20 Human Touch, on its own behalf, and on behalf of its past and current agents,
21 representatives, attorneys, successors, and 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, whether in the course of investigating claims, otherwise seeking to enforce
25 Proposition 65 against it in this matter, or with respect to the Products or Additional Products.

26
27 _____
28 ⁶ The injunctive relief requirements of Section 3 shall apply to Additional Products as otherwise specified.

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved in its entirety and entered by the Court
4 within one year after it has been fully executed by the Parties. Englander and Human Touch agree
5 to support the entry of this agreement as a Consent Judgment and to obtain approval of the Consent
6 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
7 Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
8 Consent Judgment, which motion Englander shall draft and file and Human Touch shall support,
9 appearing at the hearing if so requested. If any third-party objection to the motion is filed,
10 Englander and Human Touch agree to work together to file a reply and appear at any hearing. This
11 provision is a material component of the Consent Judgment and shall be treated as such in the event
12 of a breach.

13 If the Court does not approve the Consent Judgment, the Parties agree to meet and confer as
14 to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a
15 course of action to take, then the case shall proceed in its normal course on the Court’s trial
16 calendar. If the Court’s approval is ultimately overturned by an appellate court, the Parties shall
17 meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not
18 jointly agree on a course of action to take, then the case shall proceed in its normal course on the
19 Court’s trial calendar. In the event that this Consent Judgment is entered by the Court and
20 subsequently overturned by any appellate court, any monies that have been provided to OEHHA,
21 Englander or his counsel under this Consent Judgment shall be refunded within 15 days of the
22 appellate decision becoming final. If the Court does not approve and enter the Consent Judgment
23 within one year of the Effective Date, any monies that have been provided to OEHHA or held in
24 trust for Englander or his counsel pursuant to Section 4 shall be refunded to the Human Touch
25 within 15 days.

26 **7. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of California.
28 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by

1 reason of law generally, or as to the Products, then Human Touch may provide Englander with
2 notice of any asserted change in the law, and shall have no further obligations pursuant to this
3 Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in
4 this Consent Judgment shall be interpreted to relieve Human Touch from its obligation to comply
5 with any pertinent state or federal law or regulation.

6 **8. NOTICE**

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

11 To Human Touch:

To Englander:

12 At the address shown on Exhibit A

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

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

18 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

22 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

25 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

26 In addition to the Products identified on Exhibit A, on or before December 22, 2013, Human
27 Touch may provide Englander with additional information or representations necessary to enable
28 him to issue a 60-day notice of violation and valid certificate of merit pursuant to Health & Safety

1 Code section 25249.7 for “Additional Products” that contain TDCPP, TCEP, and/or other
2 Proposition 65-listed chemicals (“Additional Products”). Polyurethane foam that is supplied,
3 shaped or manufactured for use as a component of a product, such as upholstered furniture, is
4 specifically excluded from the definition of Additional Products and shall not be identified by
5 Human Touch on Exhibit A as an Additional Product. Except as agreed upon by Englander,
6 Human Touch shall not include a product as an Additional Product that is the subject of an existing
7 60-day notice, issued by Englander or any other private enforcer at the time Human Touch elects to
8 proceed under this Section.

9 After receipt of the required information, Englander agrees to issue a supplemental 60-day
10 notice of violation of Health and Safety Code section 25249.6 in compliance with all statutory and
11 regulatory requirements for the Additional Products identified by Human Touch, if any. On or
12 before October 1, 2014, Englander will prepare and file an amendment to this Consent Judgment to
13 incorporate the Additional Products within the defined term “Products” and serve a copy thereof
14 and its supporting papers (including the basis for supplemental stipulated penalties, if any) on the
15 Office of the California Attorney General; upon the Court’s approval thereof and finding that the
16 supplemental stipulated penalty amount, if any, is reasonable, the Additional Products shall become
17 subject to Sections 5.1 and 5.2. Human Touch shall, at the time it elects to proceed under this
18 Section and tenders the additional information or representations regarding any Additional Products
19 to Englander, tender to The Chanler Group’s trust account an amount not to exceed \$8,750 as
20 stipulated penalties and attorneys’ fees and costs incurred by Englander and his counsel in issuing
21 the new notice of violation, and engaging in other reasonably related activities, which may be
22 released from the trust as awarded by the Court upon Englander’s application for approval of the
23 amendment to this Consent Judgment. Any fee award associated with the modification of the
24 Consent Judgment to include Additional Products shall not offset any associated supplemental
25 penalty award, if any. (Any tendered funds remaining in the trust thereafter shall be refunded to
26 Human Touch within 15 days). Such payment shall be made to “in trust for The Chanler Group”
27 and delivered to the address provided in Section 4.5.1(a).

28

1 **13. MODIFICATION**

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

5 **14. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment on behalf of their
7 respective Parties and have read, understood, and agree to all of the terms and conditions of this
8 Consent Judgment.

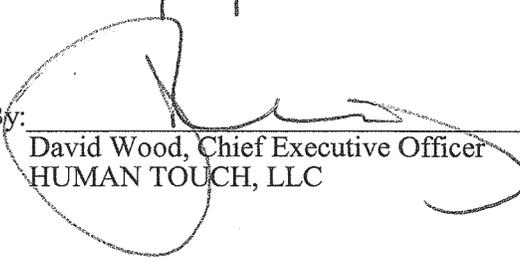
9 **AGREED TO:**

AGREED TO:

10
11 Date: December 20, 2013

Date: 12/22/2013

12
13 By: 
14 PETER ENGLANDER

15
16 By: 
17 David Wood, Chief Executive Officer
18 HUMAN TOUCH, LLC

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EXHIBIT A

I. Settling Defendant: **Human Touch, LLC (“Human Touch”)**

II. Types of Covered Products: Upholstered Furniture manufactured or distributed by Human Touch (including, but not limited to, ottomans, footstools, and other furniture that utilizes polyurethane foam) and replacement parts and components manufactured or distributed by Human Touch for the same.

III. Human Touch’s Settlement Payments:

A. Initial Settlement Payments: \$40,000

- 1. Initial Civil Penalty: \$8,000
- 2. Attorneys’ Fees and Costs: \$ 32,000

B. Second Civil Penalty: \$12,000

- 1. Section 4.1.4(i) Partial Penalty Waiver, if applicable: \$8,000
- 2. Section 4.1.4(iii) Partial Penalty Waiver, if applicable: \$4,000

C. Third Civil Penalty: \$5,000

- 1. Section 4.1.4(ii) Partial Penalty Waiver, if applicable: \$3,000
- 2. Section 4.1.4(iv) Partial Penalty Waiver, if applicable: \$2,000

IV. Persons to receive notice under Section 8:

David Wood, Chief Executive Officer
Human Touch, LLC
3030 Walnut Avenue
Long Beach, CA 90807

With a copy to:

Patrick W. Dennis, Esq.
Vanessa C. Adriance, Esq.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Email: vadriance@gibsondunn.com
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Fax: (213) 229-6754
Fax: (213) 229-6567