

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff PETER
3 ENGLANDER in the public interest of the citizens of the State of California to enforce the
4 People's right to be informed of the presence of tris(1,3-dichloro-2-propyl) phosphate
5 ("TDCPP") and di(2-ethylhexyl)phthalate ("DEHP"), toxic chemicals found in products sold in
6 California. TDCPP is a toxic chemical that is used to treat polyurethane foam, which is used as
7 padding or cushioning in a variety of products, including upholstered furniture. DEHP is used
8 in the manufacture of vinyl/PVC used in various products, including furniture.

9 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to
10 warn citizens, consumers, and other individuals throughout California about the health hazard
11 risks associated with exposures to TDCPP and/or DEHP present in and on the products
12 manufactured, distributed, sold, and offered for sale by defendants.

13 3. Detectable levels of DEHP and TDCPP are commonly found in and on the
14 products defendants manufacture, distribute, sell, and offer for sale or use without warning in
15 California. Citizens, consumers, and other individuals in California, including infants and
16 children, are exposed to TDCPP in the following ways: (i) by inhalation when they inhale
17 TDCPP present in ambient particles released from upholstered furniture and other products
18 containing TDCPP-treated foam; (ii) by dermal exposure when they touch TDCPP-treated foam
19 directly or contact ambient particles containing TDCPP that are released from upholstered
20 furniture and other products that use TDCPP-treated foam; and (iii) by route of ingestion as a
21 result of hand-to-mouth contact with TDCPP-treated foam or with ambient particles released
22 from upholstered furniture and other products that use TDCPP-treated foam. These same
23 individuals are exposed to DEHP via dermal contact directly with products containing DEHP
24 during use, and through ingestion via hand-to-mouth contact during and after use.

25 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986 codified at
26 Health and Safety Code Section 25249.5 et seq. ("Proposition 65), "[n]o person in the course of
27 doing business shall knowingly and intentionally expose any individual to a chemical known to
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1 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
2 warning to such individual . . .” (Health & Safety Code § 25249.6.)

3 5. TDCPP has been used in consumer products as an additive flame retardant since
4 the 1960s. In the late 1970s, based on findings that exposures to TDCPP could have mutagenic
5 effects, the United States Consumer Product Safety Commission banned the use of TDCPP in
6 children’s pajamas. DEHP is used as a plasticizer in the vinyl/PVC manufacturing process,
7 however, state and federal laws ban DEHP in quantities greater than 1,000 parts per million
8 (0.1%) in certain children’s and childcare products.

9 6. On October 24, 2003, California identified and listed DEHP pursuant to
10 Proposition 65 as a chemical known to cause birth defects and other reproductive harm. DEHP
11 became subject to the “clear and reasonable warning” requirements of the Act one year later on
12 October 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
13 25249.10(b).

14 7. On October 28, 2011, California identified and listed TDCPP, pursuant to
15 Proposition 65, as a chemical known to cause cancer. TDCPP became subject to the “clear and
16 reasonable warning” requirements of the Act one year later on October 28, 2012. (Cal. Code
17 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

18 8. Defendants Big Lots, Inc. and Big Lots Stores, Inc. manufacture, distribute,
19 import, sell, and/or offer for sale in California without a warning, padded upholstered stools
20 with foam padding that contain TDCPP and stools with vinyl/PVC upholstery containing
21 DEHP. Defendants’ products include, but are not limited to: (i) *Metro S/2 Barstools, Item*
22 *#CBRA-653AB2-L, SKU#612010106* (“METRO BARSTOOL”); and, (ii) *Airlift Euro Barstool-*
23 *Red, Item# WA-D020R, SKU# 810077470* (“AIRLIFT EURO BARSTOOL”).

24 9. All such padded upholstered stools and stools with vinyl/PVC upholstery that
25 contain TDCPP and/or DEHP described in paragraph 8 above, shall hereinafter be collectively
26 be referred to as “PRODUCTS.”

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1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
2 California courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

4 **(Violation of Proposition 65 - Against All Defendants)**

5 21. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
6 Paragraphs 1 through 20, inclusive.

7 22. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
8 Enforcement Act of 1986, the People of California expressly declared their right "[t]o be
9 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
10 harm."

11 23. Proposition 65 states, "[n]o person in the course of doing business shall
12 knowingly and intentionally expose any individual to a chemical known to the state to cause
13 cancer or reproductive toxicity without first giving clear and reasonable warning to such
14 individual . . ." (Health & Safety Code § 25249.6.)

15 24. On March 18, 2013, PETER ENGLANDER provided a sixty-day notice of
16 violation of Proposition 65, together with the requisite certificate of merit, to BIG LOTS, BIG
17 LOTS STORES and certain required public enforcement agencies, stating that as a result of
18 DEFENDANTS' sales of the METRO BARSTOOL, purchasers and users in California were
19 being exposed to TDCPP resulting from their reasonably foreseeable uses of the METRO
20 BARSTOOL, without the individual purchasers and users first having been provided with a
21 "clear and reasonable warning" regarding the health hazards of such toxic exposures, as
22 required by Proposition 65.

23 25. On May 24, 2013, PETER ENGLANDER provided a supplemental sixty-day
24 notice of violation of Proposition 65, together with the requisite certificate of merit, to BIG
25 LOTS, BIG LOTS STORES and the required public enforcement agencies, stating that as a
26 result of DEFENDANTS' sales of the PRODUCTS, purchasers and users in California were
27 being exposed to TDCPP and/or DEHP resulting from their reasonably foreseeable uses of the
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1 PRODUCTS, without the individual purchasers and users first having been provided with a
2 “clear and reasonable warning” regarding the health hazards of such toxic exposures, as
3 required by Proposition 65.

4 26. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
5 and offering of the PRODUCTS for sale or use in California in violation of Health and Safety
6 Code section 25249.6, and DEFENDANTS’ violations have continued to occur beyond their
7 receipt of plaintiff’s sixty-day notices of violation. As such, DEFENDANTS’ violations are
8 ongoing and continuous in nature, such that they will continue to occur in the future.

9 27. After receiving plaintiff’s sixty-day notices of violation, the appropriate public
10 enforcement agencies have failed to commence and diligently prosecute a cause of action
11 against DEFENDANTS under Proposition 65.

12 28. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell and offer
13 for sale or use in California contain TDCPP and/or DEHP such that they require a “clear and
14 reasonable” warning under Proposition 65.

15 29. DEFENDANTS knew or should have known that the PRODUCTS they
16 manufacture, import, distribute, sell, and offer for sale or use in California contain TDCPP
17 and/or DEHP.

18 30. TDCPP and/or DEHP are present in or on the PRODUCTS in such a way as to
19 expose individuals to TDCPP through dermal contact, ingestion, and/or inhalation, and/or
20 DEHP through dermal contact and/or ingestion, during reasonably foreseeable uses of the
21 PRODUCTS including through workplace exposure to the PRODUCTS.

22 31. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
23 continue to cause, consumer products exposures and occupational exposures to TDCPP and/or
24 DEHP, as such exposures are defined by Title 27 of the California Code of Regulations, section
25 25602(b).

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1 32. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
2 of the PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or
3 inhalation, and/or to DEHP through dermal contact and/or ingestion.

4 33. DEFENDANTS intended that such exposures to TDCPP and/or DEHP from the
5 reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate,
6 non-accidental participation in the manufacture, importation, distribution, sale, and offering of
7 the PRODUCTS for sale or use to individuals in the State of California.

8 34. DEFENDANTS failed to provide a "clear and reasonable warning" to those
9 consumers and other individuals in the State of California who were or who would become
10 exposed to TDCPP through dermal contact, ingestion, and/or inhalation, and/or DEHP through
11 dermal contact and/or ingestion, during the reasonably foreseeable uses of the PRODUCTS.

12 35. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
13 directly by California voters, individuals exposed to TDCPP through dermal contact, ingestion,
14 and/or inhalation, and/or to DEHP through dermal contact and/or ingestion, resulting from the
15 reasonably foreseeable uses of the PRODUCTS including through workplace exposure to the
16 PRODUCTS sold by DEFENDANTS without a "clear and reasonable warning," have suffered,
17 and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate
18 remedy at law.

19 36. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
20 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
21 for each violation.

22 37. As a consequence of the above-described acts, Health and Safety Code
23 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
24 DEFENDANTS.

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1 **PRAYER FOR RELIEF**

2 Wherefore, plaintiff prays for judgment against each of the DEFENDANTS as follows:

3 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
4 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

5 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
6 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
7 offering the PRODUCTS for sale or use in California without first providing a "clear and
8 reasonable warning" as defined by Title 27 of the California Code of Regulations, section 25601
9 et seq., as to the harms associated with exposures to TDCPP and DEHP;

10 3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue
11 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
12 currently in the chain of commerce in California without a "clear and reasonable warning" as
13 defined by California Code of Regulations title 27, section 25601 et seq.;

14 4. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

15 5. That the Court grant such other and further relief as may be just and proper.
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17 Dated: May 14, 2014

THE CHANLER GROUP

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19 By: 
20 _____
21 Troy C. Bailey
22 Attorneys for Plaintiff
23 PETER ENGLANDER
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