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

11 PETER ENGLANDER

12 Plaintiff,

13 v.

14 COSTCO WHOLESALE
15 CORPORATION; et al.,

16 Defendants.

) Case No. RG 13-672233
)
)
) Assigned for All Purposes to
) Judge George C. Hernandez, Jr.,
) Department 17
)
) **[PROPOSED] CONSENT JUDGMENT AS**
) **TO KINWAI USA INC.**
)
) **(Health & Safety Code § 25249.6 et seq.)**
)
)
) First Amended Complaint Filed: April 12, 2013
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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and Kinwai USA Inc. (“Kinwai”), with Englander and Kinwai collectively referred
5 to as the “Parties.”

6 **1.2 Peter Englander**

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

10 **1.3 Kinwai USA Inc.**

11 Kinwai 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 &
13 Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Englander alleges that Kinwai manufactured, imported, sold and/or
16 distributed for sale in California, products with foam cushioned components containing tris(1,3-
17 dichloro-2-propyl) phosphate (“TDCPP”) without the requisite Proposition 65 health hazard
18 warnings.

19 1.4.2 Pursuant to Proposition 65, on October 28, 2011, California identified and
20 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
21 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
22 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

23 TDCPP shall hereinafter be referred to as the “Listed Chemical.” Englander alleges that the
24 Listed Chemical escapes from foam padding, leading to human exposures.

25 **1.5 Product Description**

26 The categories of products that are covered by this Consent Judgment as to Kinwai are
27 identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied, shaped or
28 manufactured for use as a component of another product, such as upholstered furniture, but which is

1 not itself a finished product, is specifically excluded from the definition of Products and shall not be
2 identified by Kinwai on Exhibit A as a Product.

3 **1.6 Notice of Violation**

4 On or about January 2, 2013, Englander served Kinwai and certain requisite public
5 enforcement agencies with a "60-Day Notice of Violation" ("Notice") that provided Kinwai with
6 notice of alleged violations of Proposition 65 based on the alleged failure to warn customers,
7 consumers, and workers in California that the Products expose users to the Listed Chemical. To the
8 best of the Parties' knowledge, no public enforcer has commenced or is diligently prosecuting the
9 allegations set forth in the Notice.

10 **1.7 Complaint**

11 On April 12, 2013, Englander filed a First Amended Complaint in the Superior
12 Court in and for the County of Alameda against Kinwai, other defendants and Does 4 through 150,
13 *Laurence Vinocur, John Moore and Peter Englander v. Costco Wholesale Corporation, et al.*, Case
14 No. RG 13-672233, alleging violations of Proposition 65, based in part on the alleged unwarned
15 exposures to TDCPP contained in the Products ("Complaint").

16 **1.8 No Admission**

17 Kinwai denies the material factual and legal allegations contained in Englander's Notice and
18 Complaint and maintains that all products that it has manufactured, imported, distributed, and/or
19 sold in California, including the Products, have been and are in compliance with all laws. Nothing
20 in this Consent Judgment shall be construed as an admission by Kinwai of any fact, finding,
21 conclusion, issue of law, or violation of law, nor shall compliance with this Consent Judgment
22 constitute or be construed as an admission by Kinwai of any fact, finding, conclusion, issue of law,
23 or violation of law. However, this section shall not diminish or otherwise affect Kinwai's
24 obligations, responsibilities, and duties under this Consent Judgment.

25 **1.9 Consent to Jurisdiction**

26 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over Kinwai as to the allegations contained in the Notice and Complaint, that venue is
28 proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the

1 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
2 Procedure § 664.6.

3 **2. DEFINITIONS**

4 **2.1 California Customers**

5 “California Customer” shall mean any customer that Kinwai reasonably understands is
6 located in California, has a California warehouse or distribution center, maintains a retail outlet in
7 California, or has made internet sales into California on or after January 1, 2011.

8 **2.2 Detectable**

9 “Detectable” shall mean containing more than 25 parts per million (“ppm”) (the equivalent
10 of .0025%) of any one chemical in any material, component, or constituent of a
11 subject product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing
12 methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to
13 determine the presence, and measure the quantity, of TDCPP and/or tris(2-chloroethyl) phosphate
14 (“TCEP”) in a solid substance.

15 **2.3 Effective Date**

16 “Effective Date” shall mean October 15, 2013.

17 **2.4 Private Label Covered Products**

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

21 **2.5 Reformulated Products**

22 “Reformulated Products” shall mean Products that contain no Detectable amount of TDCPP,
23 or TCEP.

24 **2.6 Reformulation Standard**

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

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1 **2.7 Retailer**

2 “Retailer” means an individual or entity that offers a Product for retail sale to consumers in
3 the State of California.

4 **3. INJUNCTIVE RELIEF: REFORMULATION**

5 **3.1 Reformulation Commitment**

6 Commencing on March 31, 2014, Kinwai shall not manufacture or import for distribution or
7 sale to California Customers, or cause to be manufactured or imported for distribution or sale to
8 California Customers, any Products that are not Reformulated Products.

9 **3.2 Vendor Notification/Certification**

10 On or before the Effective Date, Kinwai shall provide written notice to all of its then-current
11 vendors of the Products that will be sold or offered for sale in California, or to California
12 Customers, instructing each such vendor to use reasonable efforts to provide only Reformulated
13 Products for potential sale in California. In addressing the obligation set forth in the preceding
14 sentence, Kinwai shall not employ statements that will encourage a vendor to delay compliance
15 with the Reformulation Standard. Kinwai shall subsequently obtain written certifications, no later
16 than April 1, 2014, from such vendors, and any newly engaged vendors, that the Products
17 manufactured by such vendors are in compliance with the Reformulation Standard. Certifications
18 shall be held by Kinwai for at least two years after their receipt and shall be made available to
19 Englander upon request.

20 **3.3 Products No Longer in Kinwai’s Control**

21 No later than 45 days after the Effective Date, Kinwai shall send a letter, electronic or
22 otherwise (“Notification Letter”) to: (1) each California Customer and/or Retailer which it, after
23 October 28, 2011, supplied the item for resale in California described as an exemplar in the
24 Notice(s) Kinwai received from Englander (“Exemplar Product”); and (2) any California Customer
25 and/or Retailer that Kinwai reasonably understands or believes had any inventory for resale in
26 California of Exemplar Products as of the relevant Notice’s dates. The Notification Letter shall
27 advise the recipient that the Exemplar Product(s) contains TDCPP, a chemical known to the State of
28 California to cause cancer and request that the recipient either: (a) label the Exemplar Products

1 remaining in inventory for sale in California, or to California Customers, pursuant to Section 3.5; or
2 (b) return, at Kinwai's sole expense, all units of the Exemplar Product held for sale in California, or
3 to California Customers, to Kinwai or a party Kinwai has otherwise designated. The Notification
4 Letter shall require a response from the recipient within 15 days confirming whether the Exemplar
5 Product will be labeled or returned. Kinwai shall maintain records of all correspondence or other
6 communications generated pursuant to this Section for two years after the Effective Date and shall
7 promptly produce copies of such records upon Englander's written request.

8 **3.4 Current Inventory**

9 Any Products in, or manufactured and en route to, Kinwai's inventory as of or after
10 December 31, 2013, that do not qualify as Reformulated Products and that Kinwai has reason to
11 believe may be sold or distributed for sale in California, shall contain a clear and reasonable
12 warning as set forth in Section 3.5 below unless Section 3.6 applies.¹

13 **3.5 Product Warnings**

14 **3.5.1 Product Labeling**

15 Any warning provided under Section 3.3 or 3.4 above shall be affixed to the packaging,
16 labeling, or directly on each Product. Each warning shall be prominently placed with such
17 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
18 to be read and understood by an ordinary individual under customary conditions before purchase.
19 Each warning shall be provided in a manner such that the consumer or user understands to which
20 specific Product the warning applies, so as to minimize the risk of consumer confusion.

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

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28 ¹ This shall not apply to Products which are Private Label Covered Products in Kinwai's
inventory as of December 31, 2013.

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WARNING: This product contains TDCPP, a flame retardant chemical known to the State of California to cause cancer.²

Attached as Exhibit B are template warnings developed by Englander that are deemed to be clear and reasonable for purposes of this Consent Judgment.³ Provided that the other requirements set forth in this Section are addressed, including as to the required warning statements and method of transmission as set forth above, Settling Defendants remain free not to utilize the template warnings.

3.5.2 Internet Website Warning

A warning shall be given in conjunction with the sale of the Products to California, or California Customers, via the internet, which warning shall appear on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall: (a) appear adjacent to or immediately following the display, description, or price of the Product; (b) appear as a pop-up box; or (c) otherwise appear automatically to the consumer.

The warning text shall be the same type size or larger than the Product description text:

WARNING: This product contains TDCPP, a flame retardant chemical known to the State of California to cause cancer.⁴

² The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if Kinwai had begun to use it, prior to the Effective Date. If Kinwai seeks to 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. The Parties agree that the following warning language shall not be deemed to meet the requirements of 27 CCR § 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.”

³ The characteristics of the template warnings are as follows: (a) a yellow hang tag measuring 3” x 5”, with no less than 12 point font, with the warning language printed on each side of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring 8.5” x. 11”, with no less that 32 point font, with the warning language printed on each side, which shall be affixed directly to the Product; and (c) for Products sold at retail in a box or packaging, a yellow warning sticker measuring 3” x 3”, with no less than 12 point font, which shall be affixed directly to the Product packaging.

⁴ Footnote 2, *supra*, applies in this context as well.

1 **3.6 Alternatives to Interim Warnings**

2 The obligations of Kinwai under Section 3.3 shall be relieved provided Kinwai certifies on
3 or before December 15, 2013 that only Exemplar Products meeting the Reformulation Standard will
4 be offered for sale in California, or to California Customers for sale in California, after December
5 31, 2013. The obligations of Kinwai under Section 3.4 shall be relieved provided Kinwai certifies
6 on or before December 15, 2013 that, after June 30, 2014, it will only distribute or cause to be
7 distributed for sale in, or sell in, California, or to California Customers for sale in California,
8 Products (i.e., Products beyond the Exemplar Product) meeting the Reformulation Standard. The
9 certifications provided by this Section are material terms and time is of the essence.

10 **4. MONETARY PAYMENTS**

11 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

12 In settlement of all the claims referred to in this Consent Judgment, Kinwai shall pay the
13 civil penalties shown for it on Exhibit A in accordance with this Section. Each penalty payment
14 will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d),
15 with 75% of the funds remitted to the California Office of Environmental Health Hazard
16 Assessment (“OEHHA”), and 25% of the penalty remitted to “The Chanler Group in Trust for
17 Peter Englander.” Each penalty payment shall be made within two business days of the date it is
18 due and be delivered to the addresses listed in Section 4.5 below. Kinwai shall be liable for
19 payment of interest, at a rate of 10% simple interest, for all amounts due and owing under this
20 Section that are not received within two business days of the due date.

21 4.1.1 Initial Civil Penalty. On or before the Effective Date, Kinwai shall make an
22 initial civil penalty payment in the amount identified on Kinwai’s Exhibit A.

23 4.1.2 Second Civil Penalty. On or before January 15, 2014, Kinwai shall make a
24 second civil penalty payment in the amount identified on Kinwai’s Exhibit A. The amount of the
25 second penalty may be reduced according to any penalty waiver Kinwai is eligible for under
26 Sections 4.1.4(i) and 4.1.4(iii), below.

27 4.1.3 Third Civil Penalty. On or before November 30, 2014, Kinwai shall make a
28 third civil penalty payment in the amount identified on Kinwai’s Exhibit A. The amount of the

1 third penalty may be reduced according to any penalty waiver Kinwai is eligible for under Sections
2 4.1.4(ii) and 4.1.4(iv), below.

3 4.1.4 Reductions to Civil Penalty Payment Amounts. Kinwai may reduce the
4 amount of the second and/or third civil penalty payments identified on Kinwai's Exhibit A by
5 providing Englander with certification of certain efforts undertaken to reformulate their Products or
6 limit the ongoing sale of non-reformulated Products in California. The options to provide a written
7 certification in lieu of making a portion of Kinwai's civil penalty payment constitute material terms
8 of this Consent Judgment, and with regard to such terms, time is of the essence.

9 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of**
10 **Products Sold or Offered for Sale in California.**

11 As shown on Kinwai's Exhibit A, a portion of the second civil penalty shall be waived, to
12 the extent that it has agreed that, as of November 1, 2013, and continuing into the future, it shall
13 only manufacture or import for distribution or sale to California Customers or cause to be
14 manufactured or imported for distribution or sale to California Customers, Reformulated Products.
15 An officer or other authorized representative of Kinwai shall provide Englander with a written
16 certification confirming compliance with such conditions, which certification must be received by
17 Englander's counsel on or before December 15, 2013.

18 4.1.4(ii) **Partial Penalty Waiver for Extended Reformulation.**

19 As shown on Kinwai's Exhibit A, a portion of the third civil penalty shall be waived, to the
20 extent that it has agreed that, as of March 31, 2014, and continuing into the future, it shall only
21 manufacture or import for distribution or sale in California or cause to be manufactured or imported
22 for distribution or sale in California, Reformulated Products which also do not contain tris(2,3-
23 dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than 25 parts per million
24 ("ppm") (the equivalent of .0025%) in any material, component, or constituent of a subject product,
25 when analyzed by a NVLAP accredited laboratory pursuant to EPA testing methodologies 3545 and
26 8270C, or equivalent methodologies utilized by federal or state agencies to determine the presence,
27 and measure the quantity, of TDBPP in a solid substance. An officer or other authorized
28 representative of Kinwai that has exercised this election shall provide Englander with a written

1 certification confirming compliance with such conditions, which certification must be received by
2 Englander's counsel on or before November 15, 2014.

3 **4.1.4(iii) Partial Penalty Waiver for Withdrawal of Unreformulated**
4 **Exemplar Products from the California Market.**

5 As shown on Kinwai's Exhibit A, a portion of the second civil penalty shall be waived, if an
6 officer or other authorized representative of Kinwai provides Englander with written certification,
7 by December 15, 2013, confirming that each individual or establishment in California to which it
8 supplied the Exemplar Product after October 28, 2011, has elected to return all remaining Exemplar
9 Products held for sale in California.⁵

10 **4.1.4(iv) Partial Penalty Waiver for Termination of Distribution to**
11 **California of Unreformulated Inventory.**

12 As shown on Kinwai's Exhibit A, a portion of the third civil penalty shall be waived, if an
13 officer or other authorized representative of Kinwai provides Englander with written certification,
14 on or before November 15, 2014, confirming that, as of October 15, 2014, it has and will continue
15 to distribute, offer for sale, or sell in California, or to California Customers, only Reformulated
16 Products.

17 **4.2 Representations**

18 Kinwai represents that the sales data and other information concerning its size, knowledge
19 of the Listed Chemical, and prior reformulation and/or warning efforts, it provided to Englander
20 was truthful to its knowledge and a material factor upon which Englander has relied to determine
21 the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this Consent
22 Judgment. If, within nine months of the Effective Date, Englander discovers and presents to
23 Kinwai, evidence demonstrating that the preceding representation and warranty was materially
24 inaccurate, then Kinwai shall have 30 days to meet and confer regarding Englander's contention.
25 Should this 30 day period pass without any such resolution between Englander and Kinwai,
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27 ⁵ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Englander has, prior to August 31, 2013, provided Kinwai with test results from a NVLAP
accredited laboratory showing the presence of the Listed Chemical at a level in excess of 250 ppm
pursuant to EPA testing methodologies 3545 or 8270C.

1 Englander shall be entitled to file a formal legal claim including, but not limited to, a claim for
2 damages for breach of contract.

3 Kinwai further represents that in implementing the requirements set forth in Sections 3.1
4 and 3.2 of this Consent Judgment, it will voluntarily employ commercial best efforts to achieve
5 reformulation of its Products and Additional Products on a nationwide basis and not employ
6 statements that will encourage a vendor to limit its compliance with the Reformulation Standard to
7 goods intended for sale to California Consumers.

8 **4.3 Stipulated Penalties for Certain Violations of the Reformulation**
9 **Standard.**

10 If Englander provides notice and appropriate supporting information to Kinwai that levels of
11 the Listed Chemical in excess of the Reformulation Standard have been detected in one or more
12 Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a
13 deadline for meeting the Reformulation Standard has arisen for Kinwai under Sections 3.1 or 3.6
14 above, Kinwai may elect to pay a stipulated penalty to relieve any further potential liability under
15 Proposition 65 or sanction under this Consent Judgment as to Products sourced from the vendor in
16 question.⁶ The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000
17 if the violation level is between 100 ppm and 249 ppm, this being applicable for any amount in
18 excess of the Reformulation Standards but under 250 ppm.⁷ Englander shall further be entitled to
19 reimbursement of their associated expense in an amount not to exceed \$5,000 regardless of the
20 stipulated penalty level. Kinwai, under this Section, must provide notice and appropriate
21 supporting information relating to the purchase (e.g. vendor name and contact information
22 including representative, purchase order, certification (if any) received from vendor for the
23 exemplar or subcategory of products), test results, and a letter from a company representative or
24 counsel attesting to the information provided, to Englander within 30 calendar days of receiving test

25 _____
26 ⁶ This Section shall not be applicable where the vendor in question had previously been
27 found by Kinwai to have provided unreliable certifications as to meeting the Reformulation
28 Standard in its Products on more than one occasion. Notwithstanding the foregoing, a stipulated
penalty for a second exceedance by Kinwai's vendor at a level between 100 and 249 ppm shall not
be available after July 1, 2015.

⁷ Any stipulated penalty payments made pursuant to this Section should be allocated and
remitted in the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 results from Englander's counsel. Any violation levels at or above 250 ppm shall be subject to the
2 full remedies provided pursuant to this Consent Judgment and at law.

3 **4.4 Reimbursement of Fees and Costs**

4 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
5 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
6 this fee reimbursement issue to be resolved after the material terms of the agreement had been
7 settled. Shortly after the other settlement terms had been finalized, Kinwai expressed a desire to
8 resolve the fee and cost issue. Kinwai then agreed to pay Englander and his counsel under general
9 contract principles and the private attorney general doctrine codified at California Code of Civil
10 Procedure section 1021.5 for all work performed through the mutual execution of this agreement,
11 including the fees and costs incurred as a result of investigating, bringing this matter to Kinwai's
12 attention, negotiating a settlement in the public interest, and seeking court approval of the same. In
13 addition, the negotiated fee and cost figure expressly includes the anticipated significant amount of
14 time Englander's counsel will incur to monitor various provisions in this agreement over the next
15 two years, with the exception of additional fees that may be incurred pursuant to Kinwai's election
16 in Section 11. Kinwai more specifically agreed, upon the Court's approval and entry of this
17 Consent Judgment, to pay Englander's counsel the amount of fees and costs indicated on Kinwai's
18 Exhibit A. Kinwai further agreed to tender and shall tender its full required payment under this
19 Section to a trust account at The Chanler Group (made payable "In Trust for The Chanler Group")
20 within two business days of the Effective Date. Such funds shall be released from the trust account
21 upon the Court's approval and entry of this Consent Judgment.

22 **4.5 Payment Procedures**

23 **4.5.1 Issuance of Payments.**

24 (a) All payments owed to Englander and his counsel, pursuant to
25 Sections 4.1, 4.3 and 4.4 shall be delivered to the following payment address:

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

1 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
2 Section 4.1, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one
3 of the following addresses, as appropriate:

4 For United States Postal Service Delivery:

5 Mike Gyurics
6 Fiscal Operations Branch Chief
7 Office of Environmental Health Hazard Assessment
8 P.O. Box 4010
9 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery:

9 Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 1001 I Street
13 Sacramento, CA 95814

12 4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA
13 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in
14 Section 4.5.1(a) above, as proof of payment to OEHHA.

15 4.5.3 Tax Documentation. Kinwai shall issue a separate 1099 form for each
16 payment required by this Section to: (a) Peter Englander, whose address and tax identification
17 number shall be furnished upon request after this Consent Judgment has been fully executed by the
18 Parties; and (b) OEHHA, who shall be identified as "California Office of Environmental Health
19 Hazard Assessment" (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O.
20 Box 4010, Sacramento, CA 95814; and (d) "The Chanler Group" (EIN: 94-3171522) to the address
21 set forth in Section 4.5.1(a) above.

22 **5. CLAIMS COVERED AND RELEASED**

23 **5.1 Englander's Release of Proposition 65 Claims**

24 Englander, acting on his own behalf and in the public interest, releases Kinwai, its parents,
25 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
26 attorneys, and each entity to whom Kinwai directly or indirectly distributes or sells Products,
27 including, but not limited, to downstream distributors, wholesalers, customers, retailers,
28 franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims for

1 violations of Proposition 65 through the Effective Date based on unwarned exposures to the Listed
2 Chemical in the Products, as set forth in the Notice. Compliance with the terms of this Consent
3 Judgment constitutes compliance with Proposition 65 with respect to exposures to the Listed
4 Chemical from the Products, as set forth in the Notice. The Parties further understand and agree that
5 this Section 5.1 release shall not extend upstream to any entities, other than Kinwai, that
6 manufactured the Products or any component parts thereof, or any distributors or suppliers who
7 sold the Products or any component parts thereof to Kinwai, except that entities upstream of Kinwai
8 that is a Retailer of a Private Labeled Covered Product shall be released as to the Private Labeled
9 Covered Products offered for sale in California, or to California Customers, by the Retailer in
10 question.

11 **5.2 Englander’s Individual Releases of Claims**

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

27 _____
28 ⁸ The injunctive relief requirements of Section 3 shall apply to Additional Products as otherwise specified.

1 **5.3 Kinwai’s Release of Englander**

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

8 **6. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and
10 shall be null and void if, for any reason, it is not approved in its entirety and entered by the Court
11 within one year after it has been fully executed by all Parties. If the Court does not approve the
12 Consent Judgment, the Parties shall meet and confer as to whether to modify the language or appeal
13 the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall
14 proceed in its normal course on the Court’s trial calendar. If the Court’s approval is ultimately
15 overturned by an appellate court, the Parties shall meet and confer as to whether to modify the
16 terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take,
17 then the case shall proceed in its normal course on the Court’s trial calendar. In the event that this
18 Consent Judgment is entered by the Court and subsequently overturned by any appellate court, any
19 monies that have been provided to OEHHA, Englander or his counsel pursuant to Section 4, above,
20 shall be refunded within 15 days of the appellate decision becoming final. If the Court does not
21 approve and enter the Consent Judgment within one year of the Effective Date, any monies that
22 have been provided to OEHHA or held in trust for Englander or his counsel pursuant to Section 4,
23 above, shall be refunded to the associated Settling Defendant within 15 days.

24 **7. GOVERNING LAW**

25 The terms of this Consent Judgment shall be governed by the laws of the State of California.
26 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
27 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
28 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered

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

6 **8. NOTICES**

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) overnight courier to any party by the
10 other party at the following addresses:

11 To Kinwai:

To Englander:

12 At the address shown on each Exhibit A

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

16 Any Party, from time to time, may specify in writing to the other Party a change of address to
17 which all 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 pdf signature,
20 each of which shall be deemed an original, and all of which, when taken together, shall constitute
21 one and the same document. A facsimile or pdf signature shall be as valid as the original.

22 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

25 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

26 11.1 In addition to the Products, where Kinwai has identified on Exhibit A additional
27 products that contain the Listed Chemical and that are sold or offered for sale by it in California, or
28 to California Customers, ("Additional Products"), then by no later than October 15, 2013, Kinwai

1 may provide Englander with additional information or representations necessary to enable them to
2 issue a 60-Day Notice of Violation and valid Certificate of Merit therefore, pursuant to Health &
3 Safety Code § 25249.7, that includes the Additional Products. Polyurethane foam that is supplied,
4 shaped or manufactured for use as a component of a product, such as upholstered furniture, is
5 specifically excluded from the definition of Additional Products and shall not be identified by
6 Kinwai on Exhibit A as an Additional Product. Except as agreed upon by Englander, Kinwai shall
7 not include a product, as an Additional Product, that is the subject of an existing 60-day notice
8 issued by Englander or any other private enforcer at the time of execution. After receipt of the
9 required information, Englander agrees to issue a supplemental 60-day notice in compliance with
10 all statutory and regulatory requirements for the Additional Products. Englander will, and in no
11 event later than October 1, 2014, prepare and file an amendment to this Consent Judgment to
12 incorporate the Additional Products within the defined term “Products” and serve a copy thereof
13 and its supporting papers (including the basis for supplemental stipulated penalties, if any) on the
14 Office of the California Attorney General; upon the Court’s approval and finding that the
15 supplemental stipulated penalty amount, if any, is reasonable, the Additional Products shall become
16 subject to Section 5.1 in addition to Section 5.2. Kinwai shall, at the time it elects to utilize this
17 Section and tenders the additional information or representations regarding the Additional Products
18 to Englander, tender to The Chanler Group’s trust account an amount not to exceed \$8,750 as
19 stipulated penalties and attorneys’ fees and costs incurred by Englander in issuing the new notice
20 and engaging in other reasonably related activities, which may be released from the trust as
21 awarded by the Court upon Englander’s application. Any fee award associated with the
22 modification of the Consent Judgment to include Additional Products shall not offset any associated
23 supplemental penalty award, if any. (Any tendered funds remaining in the trust thereafter shall be
24 refunded to Kinwai within 15 days). Such payment shall be made to “in trust for The Chanler
25 Group” and delivered as per Section 4.5.1(a) above.

26 11.2 Englander and Kinwai agree to support the entry of this agreement as a Consent
27 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The
28 Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion

1 is required to obtain judicial approval of this Consent Judgment, which Englander shall draft and
2 file. If any third party objection to the noticed motion is filed, Englander and Kinwai shall work
3 together to file a reply and appear at any hearing before the Court. This provision is a material
4 component of the Consent Judgment and shall be treated as such in the event of a breach.

5 **12. MODIFICATION**

6 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
7 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
8 of any party and entry of a modified Consent Judgment by the Court.

9 **13. AUTHORIZATION**

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

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AGREED TO:



Plaintiff: Peter Englander

Date: November 8, 2013

AGREED TO:

By: _____
Name:
It's:

Date: October __, 2013

1 is required to obtain judicial approval of this Consent Judgment, which Englander shall draft and
2 file. If any third party objection to the noticed motion is filed, Englander and Kinwai shall work
3 together to file a reply and appear at any hearing before the Court. This provision is a material
4 component of the Consent Judgment and shall be treated as such in the event of a breach.

5 **12. MODIFICATION**

6 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
7 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
8 of any party and entry of a modified Consent Judgment by the Court.


9 **13. AUTHORIZATION**

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

14 AGREED TO:

AGREED TO:

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16 _____
17 Plaintiff: Peter Englander

By: 
Name: Joey Wu
It's: Manager

18 Date: October __, 2013

Date: October __, 2013 November 4, 2013

EXHIBIT A

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I. Name of Settling Defendant: KINWAI USA INC.

II. Names of Releasees (optional/partial):

III. Types of Covered Products Applicable to Settling Defendant:

Padded upholstered furniture including ottomans containing TDCPP

IV. Types of Additional Products the Settling Defendant Elects to Address (if any):

V. Settling Defendant's Required Settlement Payments

A. Penalties of \$55,000, as follows:

\$10,000 initial payment due on or before the Effective Date;

\$28,000 second payment due on or before January 15, 2014, of which \$18,000 may be waived pursuant to Section 4.1.4(i) and \$10,000 may be waived pursuant to Section 4.1.4(iii); and

\$17,000 third payment due on or before November 30, 2014, of which \$11,000 may be waived pursuant to Section 4.1.4(ii) and \$6,000 may be waived pursuant to Section 4.1.4(iv).

B. Payment to The Chanler Group for reimbursement of attorneys' fees and costs attributable to Kinwai USA Inc.: \$31,000.

VI. Person(s) to receive Notices pursuant to Section 8

Kevin C. Mayer
Name

Attorney
Title

Company/Firm Name

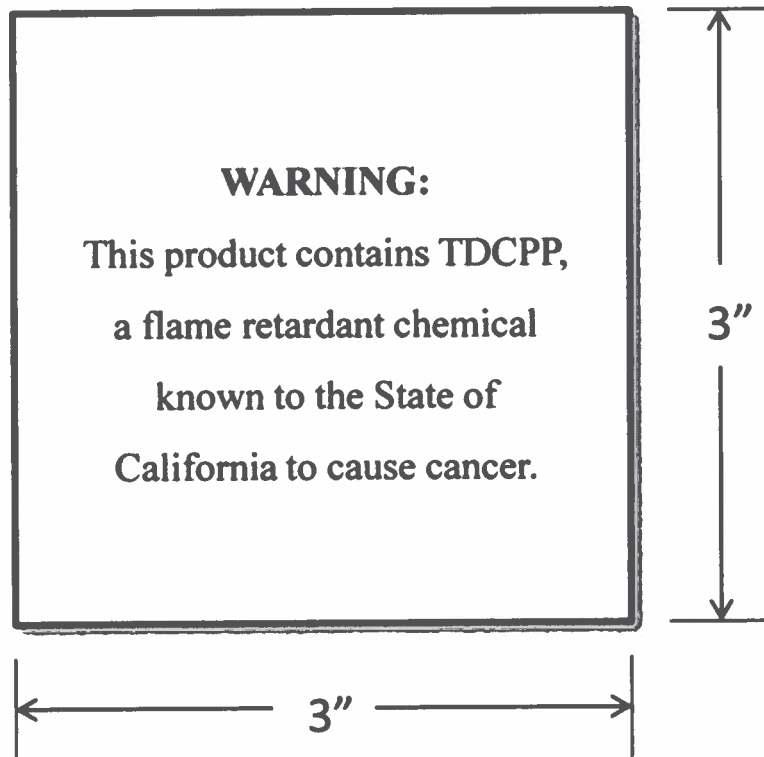
Address Crowell & Moring LLP

515 South Flower Street, 40th Floor

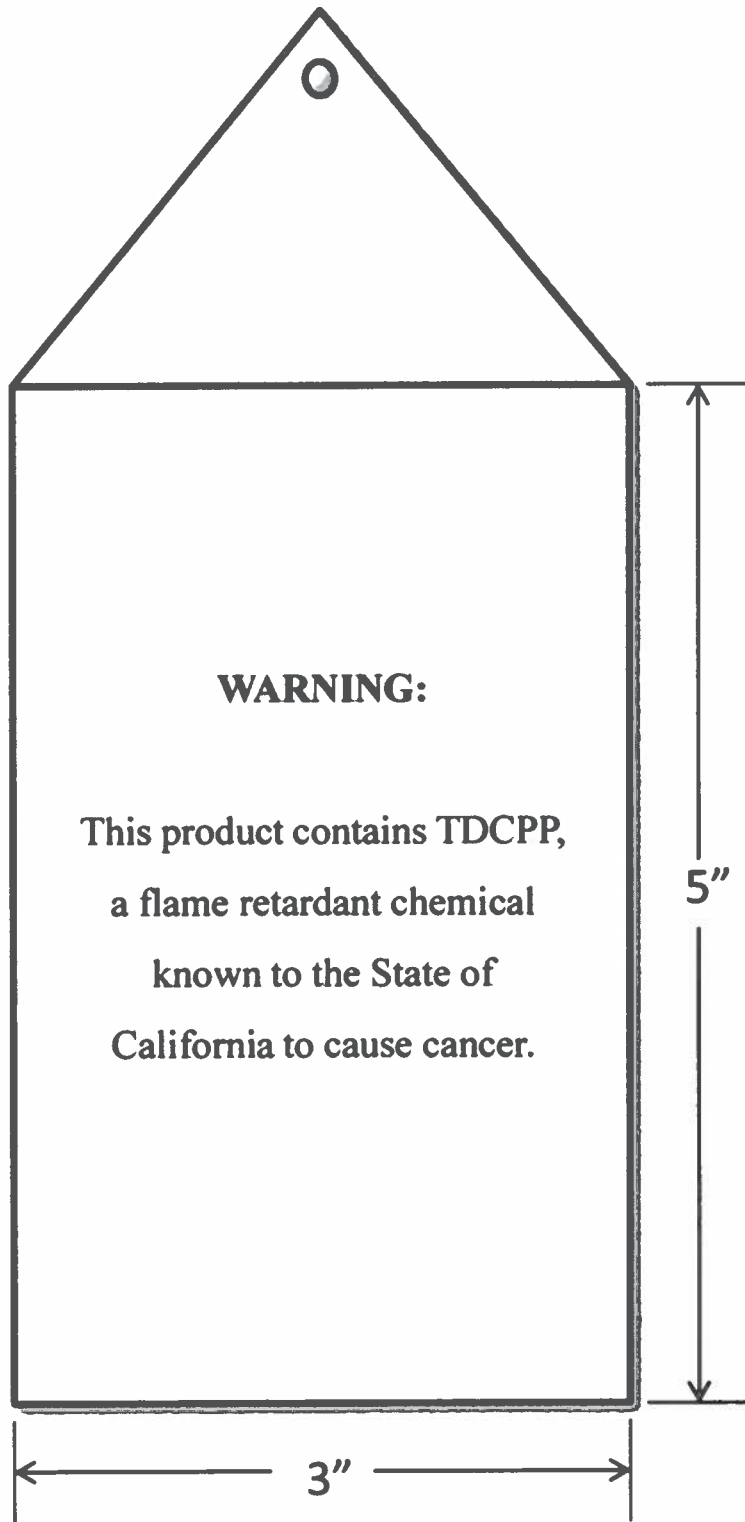
Los Angeles, CA 90071

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EXHIBIT B
(ILLUSTRATIVE WARNINGS)



INSTRUCTIONS: Minimum 12 pt. font. "WARNING:" text must be bold.



INSTRUCTIONS: Print warning on each side of hang tag.
Minimum 12 pt. font. "WARNING:" text must be bold.

WARNING:

This product contains TDCPP, a flame retardant
8.5"
chemical known to the State of California to
cause cancer.



INSTRUCTIONS:

Minimum 32 pt. Font. "WARNING:" text must be bold and underlined.