

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Peter Englander
4 (“Englander”) and defendants L. Powell Acquisition Corp. (“L. Powell”) and Linon Home Décor
5 Products, Inc. (“Linon”) (collectively the “Settling Defendants”), with Englander and the Settling
6 Defendants collectively referred to as the “Parties.”

7 **1.2 Peter Englander**

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

11 **1.3 Settling Defendants**

12 Each Settling Defendant employs ten or more persons and is a person in the course of doing
13 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
14 Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

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

20 1.4.2 Pursuant to Proposition 65, on April 1, 1992, California identified and listed
21 TCEP as a chemical known to cause cancer. TCEP became subject to the “clear and reasonable
22 warning” requirements of the Act one year later on April 1, 1993. Cal. Code Regs., Tit. 27, §
23 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

24 1.4.3 Pursuant to Proposition 65, on October 28, 2011, California identified and
25 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
26 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
27 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b).

1 1.4.4 Englander alleges that Linon also manufactured, imported, sold and/or
2 distributed for sale in California, chairs with vinyl/PVC containing di(2-ethylhexyl)phthalate
3 (“DEHP”) without the requisite Proposition 65 health hazard warnings.

4 1.4.5 Pursuant to Proposition 65, on October 24, 2003, California identified and
5 listed di(2-ethylhexyl)phthalate (“DEHP”) as a chemical known to cause birth defects and other
6 reproductive harm. DEHP became subject to the “clear and reasonable warning” requirements of
7 Proposition 65 one year later on October 24, 2004. Cal. Code Regs., tit. 27, § 27001(c); Health &
8 Safety Code §§ 25249.8 and 25249.10(b).

9 TDCPP and TCEP are hereinafter collectively referred to as the “Listed Chemicals.”
10 Plaintiffs allege that the Listed Chemicals escape from foam padding, leading to human exposures.

11 1.5 **Product Description**

12 The categories of products that are covered by this Consent Judgment as to each Settling
13 Defendant are identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is supplied,
14 shaped or manufactured for use as a component of another product, such as upholstered furniture,
15 but which is not itself a finished product, is specifically excluded from the definition of Products
16 and shall not be identified by a Settling Defendant on Exhibit A as a Product.

17 1.6 **Notices of Violation**

18 On January 4, 2013, Englander served Linon, others and certain requisite public
19 enforcement agencies with a “60-Day Notice of Violation” (“January 4, 2013 Notice”) that
20 provided the recipients with notice of alleged violations of Proposition 65 based on the alleged
21 failure to warn customers, consumers, and workers in California that the Products expose users to
22 TDCPP.

23 On January 30, 2013, Englander served L. Powell and certain requisite public enforcement
24 agencies with a “60-Day Notice of Violation” (“January 30, 2013 Notice”) that provided the
25 recipients with notice of alleged violations of Proposition 65 based on the alleged failure to warn
26 customers, consumers, and workers in California that the Products expose users to TDCPP.

1 Based on further investigation, Englander also issued two additional 60-Day notices to L.
2 Powell, others and certain requisite enforcement agencies on the following dates : (i) February 26,
3 2013 (“February 26, 2013 Notice”), which provided the recipients with notice of alleged violations
4 of Proposition 65 based on the alleged failure to warn customers, consumers, and workers in
5 California that the Products expose users to TCEP; and (ii) July 24, 2013 (“July 24, 2013 Notice”),
6 which provided the recipients with notice of alleged violations of Proposition 65 based on the
7 alleged failure to warn customers, consumers, and workers in California that the Products expose
8 users to DEHP.

9 The January 4, 2013 Notice, January 30, 2013 Notice, February 26, 2013 Notice and July
10 24, 2013 Notice shall hereinafter collectively be referred to as the “Notices.” To the best of the
11 Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting the allegations
12 set forth in the Notices.

13 1.7 **Complaint**

14 On April 12, 2013, Englander filed a First Amended Complaint in the Superior Court in and
15 for the County of Alameda against Linon, other defendants and Does 1 through 150, *Peter*
16 *Englander v. Costco Wholesale Corporation, et al.*, Case No. RG 13672233, alleging violations of
17 Proposition 65, based in part on the alleged unwarned exposures to TDCPP contained in the
18 Products.

19 On June 26, 2013, Englander filed a Complaint in the Superior Court in and for the County
20 of Alameda against L. Powell, other defendants and Does 1 through 150, *Peter Englander v. Home*
21 *Meridian Holdings, Inc., et al.*, Case No. RG 13685328, alleging violations of Proposition 65, based
22 in part on the alleged unwarned exposures to TDCPP contained in the Products.

23 Upon entry of this Consent Judgment, and provided no public enforcer has elected to
24 enforce the violations alleged in the February 26, 2013 Notice and July 24, 2013 Notice, the
25 Complaint shall be deemed amended *nunc pro tunc* to include the violations of Proposition 65
26 alleged by Englander in the February 26, 2013 Notice and July 24, 2013 Notice.
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1 **1.8 No Admission**

2 The Settling Defendants deny the material factual and legal allegations contained in
3 Englander’s Notices and Complaints and maintain that all products that they have manufactured,
4 imported, distributed, and/or sold in California, including the Products, have been and are in
5 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by
6 a Settling Defendant of any fact, finding, conclusion, issue of law, or violation of law, nor shall
7 compliance with this Consent Judgment constitute or be construed as an admission by any Settling
8 Defendant of any fact, finding, conclusion, issue of law, or violation of law. However, this section
9 shall not diminish or otherwise affect a Settling Defendant’s obligations, responsibilities, and duties
10 under this Consent Judgment.

11 **1.9 Consent to Jurisdiction**

12 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
13 jurisdiction over the Settling Defendants as to the allegations contained in the Complaints, that
14 venue is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce
15 the provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
16 Procedure § 664.6.

17 **2. DEFINITIONS**

18 **2.1 California Customers**

19 “California Customer” shall mean any customer that a Settling Defendant reasonably
20 understands is located in California, has a California warehouse or distribution center, maintains a
21 retail outlet in California, or has made internet sales into California on or after January 1, 2011.

22 **2.2 Detectable**

23 “Detectable” shall mean containing more than 25 parts per million (“ppm”) (the equivalent
24 of .0025%) of any one chemical 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 TDCPP and/or TCEP in a solid substance.

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1 compliance with the Reformulation Standard. The Settling Defendant shall subsequently obtain
2 written certifications, no later than April 1, 2014, from such vendors, and any newly engaged
3 vendors, that the Products manufactured by such vendors are in compliance with the Reformulation
4 Standard. Certifications shall be held by the Settling Defendant for at least two years after their
5 receipt and shall be made available to Englander upon request.

6 3.3 Products No Longer in a Settling Defendant's Control

7 No later than 45 days after the Effective Date, each Settling Defendant shall send a letter,
8 electronic or otherwise ("Notification Letter") to: (1) each California Customer and/or Retailer
9 which it, after October 28, 2011, supplied the item for resale in California described as an exemplar
10 in the Notice(s) the Settling Defendant received from Englander ("Exemplar Product(s)"); and (2)
11 any California Customer and/or Retailer that the Settling Defendant reasonably understands or
12 believes had any inventory for resale in California of Exemplar Products as of the relevant Notice's
13 dates. The Notification Letter shall advise the recipient that the Exemplar Product "contains
14 TDCPP and/or TCEP, chemicals known to the State of California to cause cancer, and/or DEHP, a
15 chemical known to the State of California to cause birth defects and other reproductive harm" as
16 appropriate depending on the allegations in the January 4, 2013 Notice, January 30, 2013 Notice,
17 February 26, 2013 Notice and July 24, 2013 Notice, and request that the recipient either and request
18 that the recipient either: (a) label the Exemplar Products remaining in inventory for sale in
19 California, or to California Customers, pursuant to Section 3.5; or (b) return, at the Settling
20 Defendant's sole expense, all units of the Exemplar Product held for sale in California, or to
21 California Customers, to the Settling Defendant or a party the Settling Defendant has otherwise
22 designated. The Notification Letter shall require a response from the recipient within 15 days
23 confirming whether the Exemplar Product will be labeled or returned. The Settling Defendant shall
24 maintain records of all correspondence or other communications generated pursuant to this Section
25 for two years after the Effective Date and shall promptly produce copies of such records upon
26 Englander's written request.

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Or, for Phthalate Products:

WARNING: This product contains DEHP, a chemical known to the State of California to cause birth defects and reproductive harm.³

Attached as Exhibit B are template warnings developed by Englander that are deemed to be clear and reasonable for purposes of this Consent Judgment.⁴ Provided that the other requirements set forth in this Section are addressed, including as to the required warning statement 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:

For Linon:

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

³ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if the Settling Defendant had begun to use it, prior to the Effective Date. A Settling Defendant that seeks to use alternative warning language, other than the language specified above or the safe harbor warning specified in 27 CCR § 25603.2, or that seeks to use an alternate method of transmission of the warning, 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.”

⁴ 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.

1 For L. Powell:

2 **WARNING:** This product contains TDCPP and
3 TCEP, flame retardant chemicals
4 known to the State of California to
5 cause cancer.

6 Or, for Phthalate Products:

7 **WARNING:** This product contains DEHP, a
8 chemical known to the State of
9 California to cause birth defects and
10 reproductive harm.⁵

11 3.6 Alternatives to Interim Warnings

12 The obligations of a Settling Defendant under Section 3.3 shall be relieved provided the
13 Settling Defendant certifies on or before December 15, 2013 that only Exemplar Products meeting
14 the Reformulation Standard will be offered for sale in California, or to California Customers for
15 sale in California, after December 31, 2013. The obligations of a Settling Defendant under Section
16 3.4 shall be relieved provided the Settling Defendant certifies on or before December 15, 2013 that,
17 after June 30, 2014, it will only distribute or cause to be distributed for sale in, or sell in, California,
18 or to California Customers for sale in California, Products (i.e., Products beyond the Exemplar
19 Product) meeting the Reformulation Standard. The certifications provided by this Section are
20 material terms and time is of the essence.

21 4. MONETARY PAYMENTS

22 4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)

23 In settlement of all the claims referred to in this Consent Judgment, the Settling
24 Defendants shall pay the civil penalties shown for it on Exhibit A in accordance with this Section.
25 Each penalty payment will be allocated in accordance with California Health & Safety Code
26 § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
27 Health Hazard Assessment (“OEHHA”) and 25% of the penalty remitted to “The Chanler Group in
28 Trust for Englander.” Each penalty payment shall be made within two business days of the date it
is due and be delivered to the addresses listed in Section 4.5 below. The Settling Defendants shall

⁵ Footnote 3, *supra*, applies in this context as well.

1 be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing
2 under this Section that are not received within two business days of the due date.

3 4.1.1 Initial Civil Penalty. On or before the Effective Date, the Settling
4 Defendants shall make an initial civil penalty payment in the amount identified on the Settling
5 Defendants' Exhibit A.

6 4.1.2 Second Civil Penalty. On or before January 15, 2014, the Settling
7 Defendants shall make a second civil penalty payment in the amount identified on the Settling
8 Defendants' Exhibit A. The amount of the second penalty may be reduced according to any penalty
9 waiver the Settling Defendants are eligible for under Sections 4.1.4(i) and 4.1.4(iii), below.

10 4.1.3 Third Civil Penalty. On or before November 30, 2014, the Settling
11 Defendants shall make a third civil penalty payment in the amount identified on the Settling
12 Defendants' Exhibit A. The amount of the third penalty may be reduced according to any penalty
13 waiver the Settling Defendants are eligible for under Sections 4.1.4(ii) and 4.1.4(iv), below.

14 4.1.4 Reductions to Civil Penalty Payment Amounts. The Settling Defendants
15 may reduce the amount of the second and/or third civil penalty payments identified on the Settling
16 Defendants' Exhibit A by providing Englander with certification of certain efforts undertaken to
17 reformulate their Products or limit the ongoing sale of non-reformulated Products in California.
18 The options to provide a written certification in lieu of making a portion of a Settling Defendants'
19 civil penalty payment constitute material terms of this Consent Judgment, and with regard to such
20 terms, time is of the essence.

21 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of**
22 **Products Sold or Offered for Sale in California.**

23 As shown on an electing Settling Defendant's Exhibit A, a portion of the second civil
24 penalty shall be waived, to the extent that it has agreed that, as of November 1, 2013, and
25 continuing into the future, it shall only manufacture or import for distribution or sale to California
26 Customers or cause to be manufactured or imported for distribution or sale to California Customers,
27 Reformulated Products. An officer or other authorized representative of a Settling Defendant that
28 has exercised this election shall provide Englander with a written certification confirming

1 compliance with such conditions, which certification must be received by Englander's counsel on
2 or before December 15, 2013.

3 **4.1.4(ii) Partial Penalty Waiver for Extended Reformulation.**

4 As shown on an electing Settling Defendant's Exhibit A, a portion of the third civil penalty
5 shall be waived, to the extent that it has agreed that, as of March 15, 2014, and continuing into the
6 future, it shall only manufacture or import for distribution or sale in California or cause to be
7 manufactured or imported for distribution or sale in California, Reformulated Products which also
8 do not contain tris(2,3-dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than
9 25 parts per million ("ppm") (the equivalent of .0025%) in any material, component, or constituent
10 of a subject product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing
11 methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to
12 determine the presence, and measure the quantity, of TDBPP in a solid substance. An officer or
13 other authorized representative of a Settling Defendant that has exercised this election shall provide
14 Englander with a written certification confirming compliance with such conditions, which
15 certification must be received by Englander's counsel on or before November 15, 2014.

16 **4.1.4(iii) Partial Penalty Waiver for Withdrawal of Unreformulated**
17 **Exemplar Products from the California Market.**

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

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27 ⁶ For purposes of this Section, the term Exemplar Products shall further include Products for
28 which Englander has, prior to **August 31, 2013**, provided the Settling Defendants 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 **4.1.4(iv) Partial Penalty Waiver for Termination of Distribution to**
2 **California of Unreformulated Inventory.**

3 As shown on a Settling Defendant's Exhibit A, a portion of the third civil penalty shall be
4 waived, if an officer or other authorized representative of a Settling Defendant provides Englander
5 with written certification, on or before November 15, 2014, confirming that, as of July 1, 2014, it
6 has and will continue to distribute, offer for sale, or sell in California, or to California Customers,
7 only Reformulated Products.

8 **4.2 Representations**

9 Each Settling Defendant represents that the sales data and other information concerning its
10 size, knowledge of the Listed Chemicals, and prior reformulation and/or warning efforts, it
11 provided to Englander was truthful to its knowledge and a material factor upon which Englander
12 has relied to determine the amount of civil penalties assessed pursuant to Health & Safety Code §
13 25249.7 in this Consent Judgment. If, within nine months of the Effective Date, Englander
14 discover and present to a Settling Defendant, evidence demonstrating that the preceding
15 representation and warranty was materially inaccurate, then a Settling Defendant shall have 30 days
16 to meet and confer regarding the Englander's contention. Should this 30 day period pass without
17 any such resolution between Englander and the Settling Defendant, Englander shall be entitled to
18 file a formal legal claim including, but not limited to, a claim for damages for breach of contract.

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

24 **4.3 Stipulated Penalties for Certain Violations of the Reformulation**
25 **Standard.**

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

17 4.4 Reimbursement of Fees and Costs

18 The Parties acknowledge that Englander and his counsel offered to resolve this dispute
19 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
20 this fee reimbursement issue to be resolved after the material terms of the agreement had been
21 settled. Shortly after the other settlement terms had been finalized, the Settling Defendants
22 expressed a desire to resolve the fee and cost issue. The Settling Defendants then agreed to pay
23 Englander and his counsel under general contract principles and the private attorney general
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25 ⁷ This Section shall not be applicable where the vendor in question had previously been
26 found by the Settling Defendant to have provided unreliable certifications as to meeting the
27 Reformulation Standard in its Products on more than one occasion. Notwithstanding the foregoing,
a stipulated penalty for a second exceedance by a Settling Defendant's vendor at a level between
100 and 249 ppm shall not be available after July 1, 2015.

28 ⁸ 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 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
2 through the mutual execution of this agreement, including the fees and costs incurred as a result of
3 investigating, bringing this matter to the Settling Defendant's attention, negotiating a settlement in
4 the public interest, and seeking court approval of the same. In addition, the negotiated fee and cost
5 figure expressly includes the anticipated significant amount of time plaintiffs' counsel will incur to
6 monitor various provisions in this agreement over the next two years, with the exception of
7 additional fees that may be incurred pursuant to a Settling Defendant's election in Section 11. Each
8 Settling Defendant more specifically agreed, upon the Court's approval and entry of this Consent
9 Judgment, to pay Englander's counsel the amount of fees and costs indicated on the Settling
10 Defendant's Exhibit A. Each Settling Defendant further agreed to tender and shall tender its full
11 required payment under this Section to a trust account at The Chanler Group (made payable "In
12 Trust for The Chanler Group") within two business days of the Effective Date. Such funds shall be
13 released from the trust account upon the Court's approval and entry of this Consent Judgment.

14 **4.5 Payment Procedures**

15 **4.5.1 Issuance of Payments.**

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

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

21 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to
22 Section 4.1 and 4.3, shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties")
23 at one of the following addresses, as appropriate:

24 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

7 4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA
8 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in
9 Section 4.5.1(a) above, as proof of payment to OEHHA.

10 4.5.3 Tax Documentation. A Settling Defendant shall issue a separate 1099 form
11 for each payment required by this Section to: (a) Peter Englander, whose address and tax
12 identification number shall be furnished upon request after this Consent Judgment has been fully
13 executed by the Parties; (b) OEHHA, who shall be identified as "California Office of
14 Environmental Health Hazard Assessment" (EIN: 68-0284486) in the 1099 form, to be delivered
15 directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814, and (c) "The Chanler Group" (EIN:
16 94-3171522) to the address set forth in Section 4.5.1(a) above.

17 **5. CLAIMS COVERED AND RELEASED**

18 **5.1 Englander's Release of Proposition 65 Claims**

19 Englander, acting on their own behalf and in the public interest, release each Settling
20 Defendant, its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
21 agents employees, attorneys, and each entity to whom the Settling Defendant directly or indirectly
22 distribute or sell Products, including, but not limited, to downstream distributors, wholesalers,
23 customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"),
24 from all claims for violations of Proposition 65 through the Effective Date based on unwarned
25 exposures to the Listed Chemicals in the Products, as set forth in the Notices. Compliance with the
26 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
27 exposures to the Listed Chemicals from the Products, as set forth in the Notices. The Parties further
28 understand and agree that this Section 5.1 release shall not extend upstream to any entities, other
than Settling Defendants, that manufactured the Products or any component parts thereof, or any
distributors or suppliers who sold the Products or any component parts thereof to a Settling
Defendant, except that entities upstream of a Settling Defendant that is a Retailer of a Private

1 Labeled Covered Product shall be released as to the Private Labeled Covered Products offered for
2 sale in California, or to California Customers, by the Retailer in question.⁹

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

4 Englander, in his individual capacity only and *not* in his 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 Englander of any nature, character, or kind, whether known or unknown,
8 suspected or unsuspected, limited to and arising out of alleged or actual exposures to TDCPP,
9 TCEP, and/or TDBPP in the Products or Additional Products (as defined in Section 11.1 and
10 delineated on a Settling Defendant's Exhibit A) manufactured, imported, distributed, or sold by
11 Settling Defendants prior to the Effective Date.¹⁰ The Parties further understand and agree that this
12 Section 5.2 release shall not extend upstream to any entities that manufactured the Products or
13 Additional Products, or any component parts thereof, or any distributors or suppliers who sold the
14 Products or Additional Products, or any component parts thereof to Settling Defendants, except that
15 entities upstream of a Settling Defendant that is a Retailer of a Private Labeled Covered (or
16 Additional) Product shall be released as to the Private Labeled Covered (or Additional) Products
17 offered for sale in California by the Retailer in question. Nothing in this Section affects
18 Englander's rights to commence or prosecute an action under Proposition 65 against a Releasee that
19 does not involve a Settling Defendant's Products or Additional Products.¹¹

20 **5.3 Settling Defendants' Release of Englander**

21 Each Settling Defendant, on behalf of itself, its past and current agents, representatives,
22 attorneys, successors, and assignees, hereby waives any and all claims against Englander and his
23 counsel and other representatives, for any and all actions taken or statements made (or those that
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25 ⁹ With respect to Linon, for purposes of this Section, as to the Phthalate Products, the term
26 "Listed Chemicals" shall include DEHP.

27 ¹⁰ The injunctive relief requirements of Section 3 shall apply to Additional Products as
28 otherwise specified.

¹¹ With respect to Linon, for purposes of this Section, as to the Phthalate Products, the term
"Listed Chemicals" shall include DEHP, BBP and DBP.

1 could have been taken or made) by Englander and his counsel and other representatives, whether in
2 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
3 matter with respect to the Products and/or Additional Products.

4 **6. COURT APPROVAL**

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

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California.
22 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
23 reason of law generally, or if any of the provisions of this Consent Judgment are rendered
24 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered
25 inapplicable by reason of law generally as to the Products, then a Settling Defendant may provide
26 written notice to Englander of any asserted change in the law, and shall have no further obligations
27 pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so
28

1 affected. Nothing in this Consent Judgment shall be interpreted to relieve a Settling Defendant
2 from any obligation to comply with any pertinent state or federal law or regulation.

3 **8. NOTICES**

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

8 To Settling Defendants:

To Englander:

9 At the address shown on Exhibit A

10 Proposition 65 Coordinator
11 The Chanler Group
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710-2565

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

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

16 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
17 each of which shall be deemed an original, and all of which, when taken together, shall constitute
18 one and the same document. A facsimile or pdf signature shall be as valid as the original.

19 **10. COMPLIANCE WITH HEALTH & SAFETY CODE SECTION 25249.7(f)**

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

22 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

23 11.1 In addition to the Products, where a Settling Defendant has identified on Exhibit A
24 additional products that contain Listed Chemicals and that are sold or offered for sale by it in
25 California, or to California Customers, (“Additional Products”), then by no later than October 15,
26 2013, the Settling Defendant may provide Englander with additional information or representations
27 necessary to enable them to issue a 60-Day Notice of Violation and valid Certificate of Merit
28 therefore, pursuant to Health & Safety Code section 25249.7, that includes the Additional Products.

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

23 11.2 Englander and Settling Defendant(s) agree to support the entry of this agreement as a
24 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.
25 The Parties acknowledge that, pursuant to California Health & Safety Code section 25249.7, a
26 noticed motion is required to obtain judicial approval of this Consent Judgment, which Englander
27 shall draft and file. If any third party objection to the noticed motion is filed, Englander and each
28 Settling Defendant shall work together to file a reply and appear at any hearing before the Court.

1 This provision is a material component of the Consent Judgment and shall be treated as such in the
2 event of a breach.

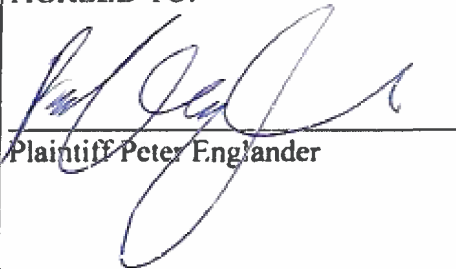
3 **12. MODIFICATION**

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

7 **13. AUTHORIZATION**

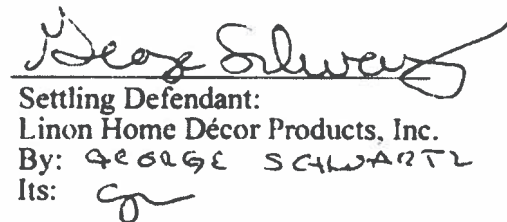

8 The undersigned are authorized to execute this Consent Judgment on behalf of their
9 respective Parties and have read, understood, and agree to all of the terms and conditions of this
10 Consent Judgment.

11
12 AGREED TO:

13 
14 _____
15 Plaintiff Peter Englander

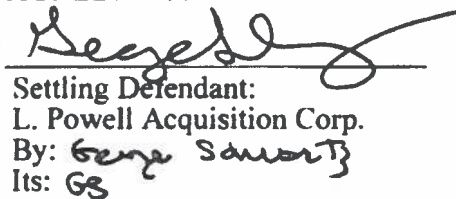
16
17 Date: November 21, 2013

12 AGREED TO:

13 
14 _____
15 Settling Defendant:
16 Linon Home Décor Products, Inc.
17 By: GEORGE SCHWARTZ
18 Its: 

19 Date: October 31, 2013

20 AGREED TO:

21 
22 _____
23 Settling Defendant:
24 L. Powell Acquisition Corp.
25 By: Gene Schwartz
26 Its: GS

27 Date: October 31, 2013

EXHIBIT A

I. Name of Settling Defendants (Mandatory):

LINON HOME DÉCOR PRODUCTS, INC.

L. POWELL ACQUISITION CORP.

II. Names of Releasees (Optional; May be Partial)

TUESDAY MORNING CORP. as to the Products sold, imported, manufactured and/or distributed by LINON HOME DÉCOR PRODUCTS, INC.

HAYNEEDLE, INC. as to the Products sold, imported, manufactured and/or distributed by L. POWELL ACQUISITION CORP.

III. Types of Covered Products Applicable to Settling Defendant (Check All That Match 60-Day Notice or Supplemental Notice Received):

1. As to Defendant Linon Home Décor Products, Inc. and its Releasees Tuesday Morning Corp:

a. Padded upholstered stool containing TDCPP

2. As to Defendant L. Powell Acquisition Corp. and its Releasees Hayneedle, Inc.:

a. Padded upholstered chairs containing TDCPP

b. Padded upholstered chairs containing TCEP

c. Padded upholstered chairs with vinyl/PVC containing DEHP

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

V. Settling Defendants' Collectively Settlement Payments:

A. Civil Penalties of \$101,000, to be paid collectively as follows:

\$35,000 collective initial payment due on or before the Effective Date;

\$42,000 collective second payment due on or before January 15, 2014, of which \$23,000 may be waived pursuant to Section 4.1.4(i) and \$19,000 may be waived pursuant to Section 4.1.4(iii); and

\$24,000 collective third payment due on or before November 30, 2014, of which \$14,000 may be waived pursuant to Section 4.1.4(ii) and \$10,000 may be waived pursuant to Section 4.1.4(iv).

B. Payment to The Chanler Group for reimbursement of attorneys' fees and costs:

a. Fees and costs for Settling Defendants collectively: \$42,000.

b. Additional Fees and Costs:

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\$12,000 collectively supplemental fee for 60-Day Notices issued by Englander before the Effective Date, to Tuesday Morning Corp. and Hayneedle, Inc., who are released by the Settling Defendants' participation in the Consent Judgment.

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

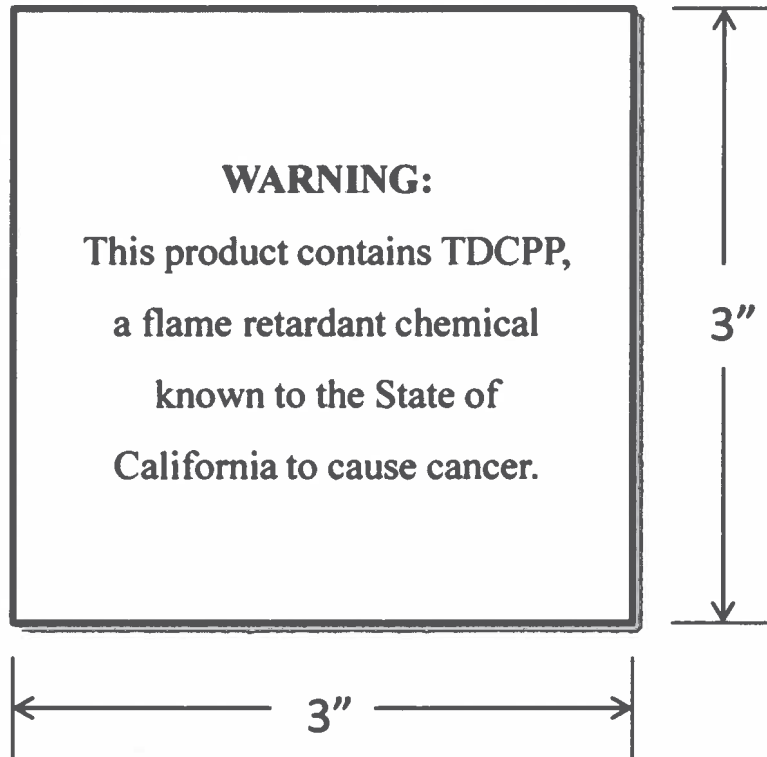
Kevin C. Mayer
Name

Attorney
Title

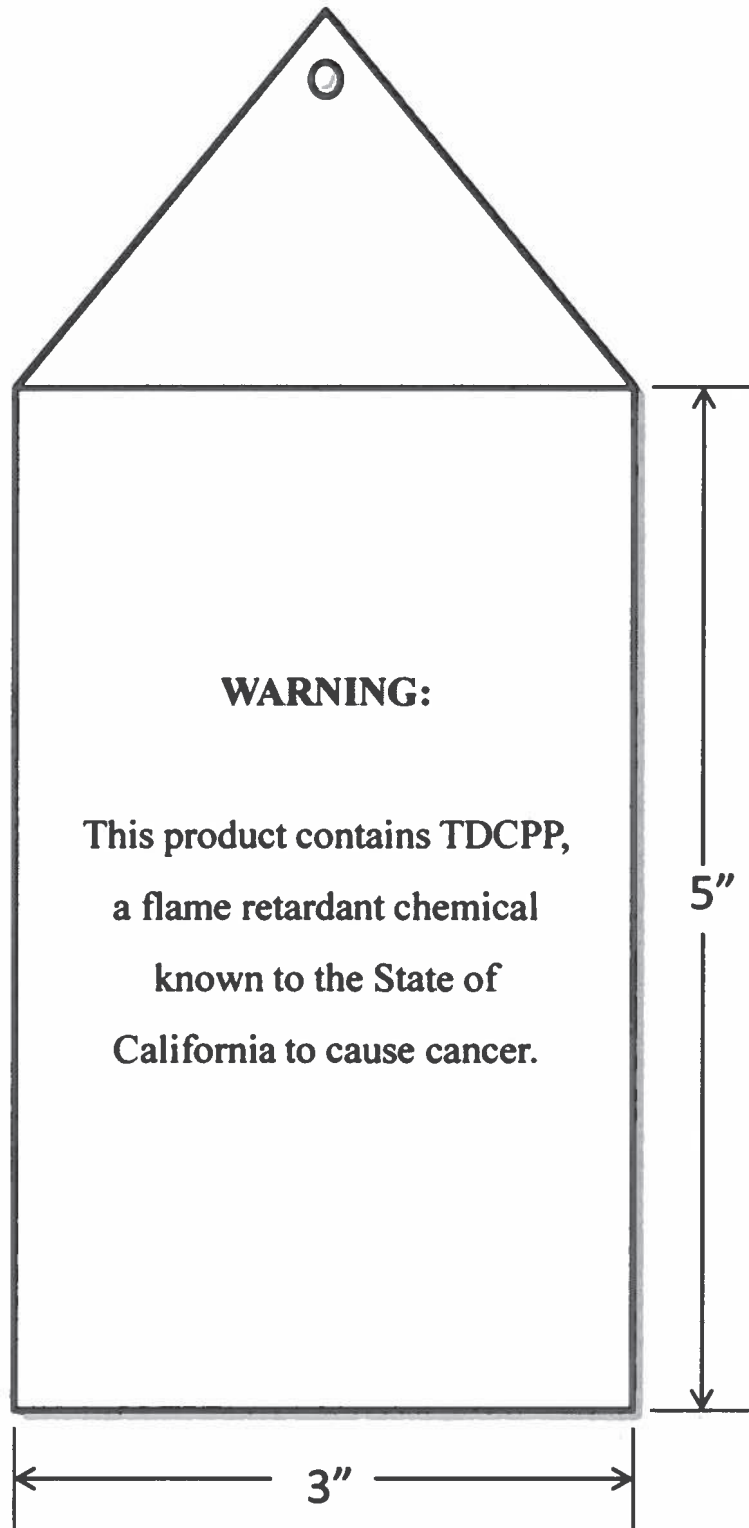
Address Crowell & Morning LLP
515 South Flower Street, 40th Floor
Los Angeles, CA 90071

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EXHIBIT B
(ILLUSTRATIVE WARNINGS)



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

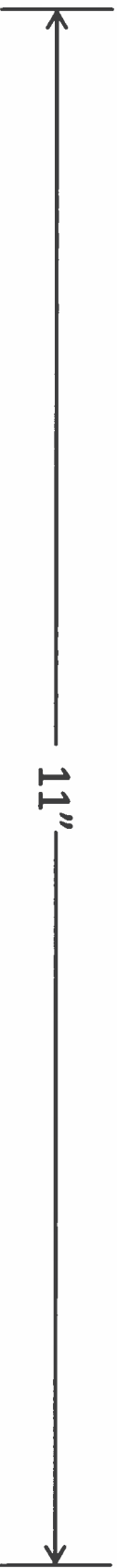


INSTRUCTIONS: Print warning on each side of hang tag.
Minimum 12 pt. font. "WARNING:" text must be bold.

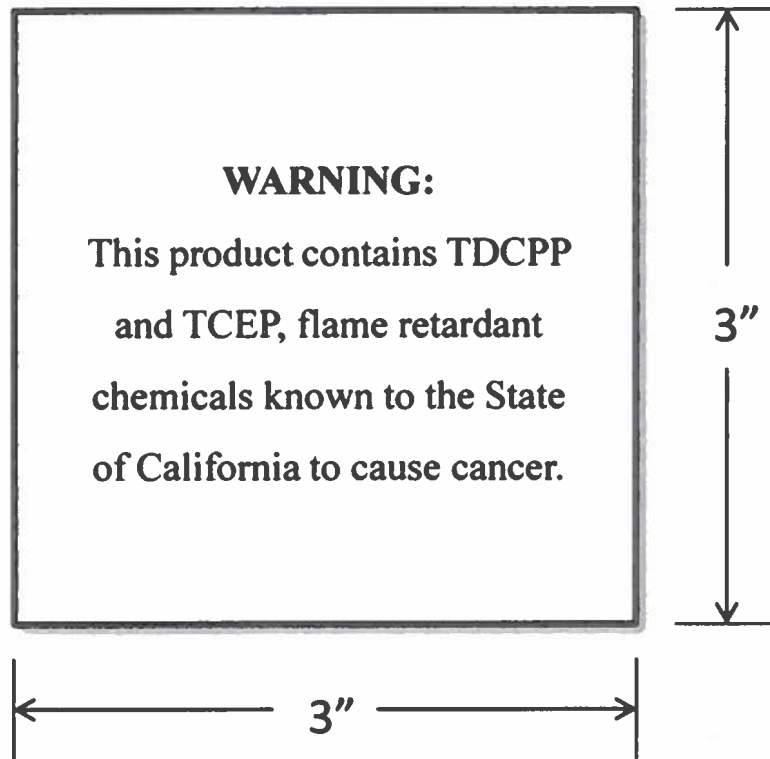
WARNING:

This product contains TDCPP, a flame retardant 8.5"

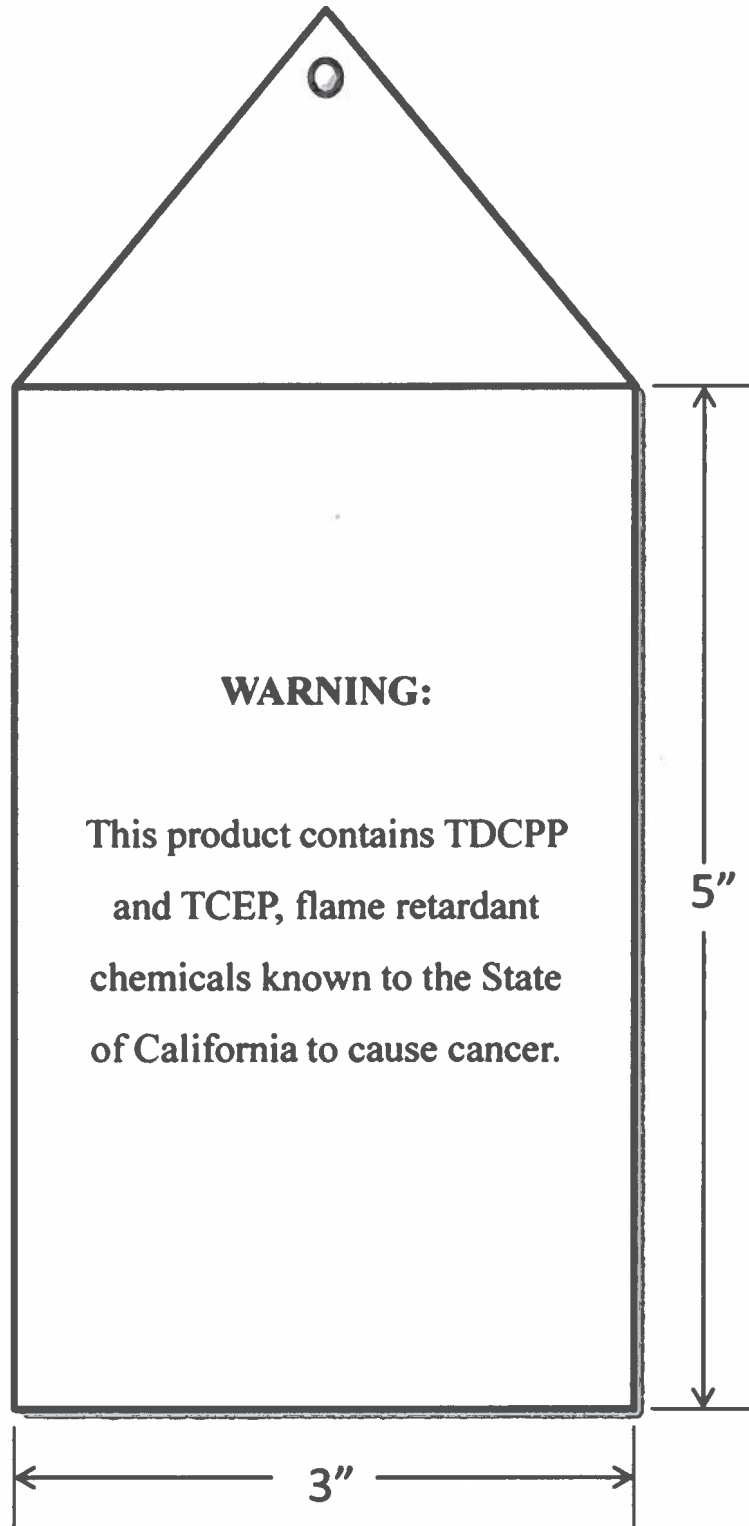
chemical known to the State of California to
cause cancer.



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



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.

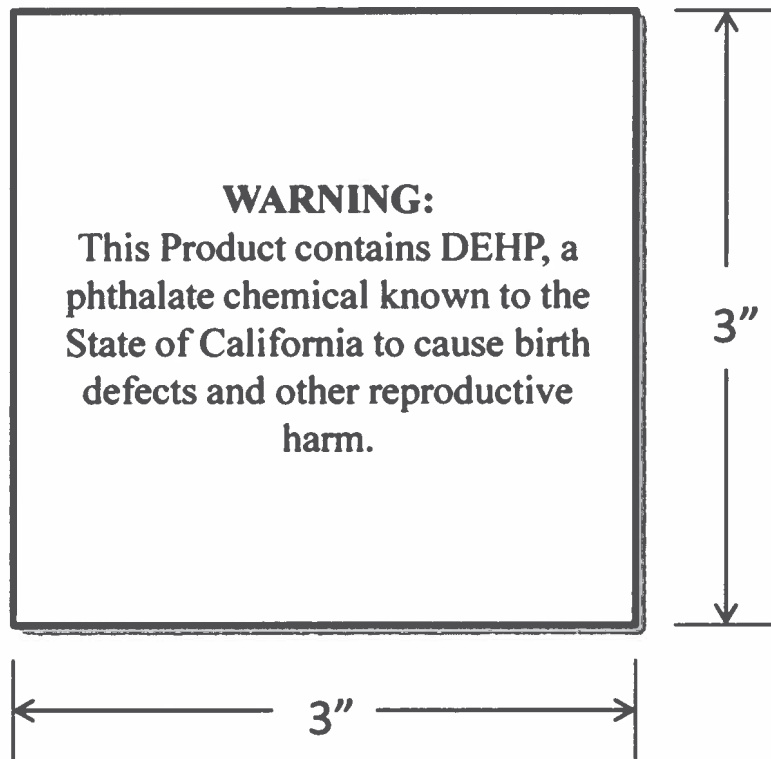
WARNING:

This product contains TDCPP and TCPEP, flame
8.5"

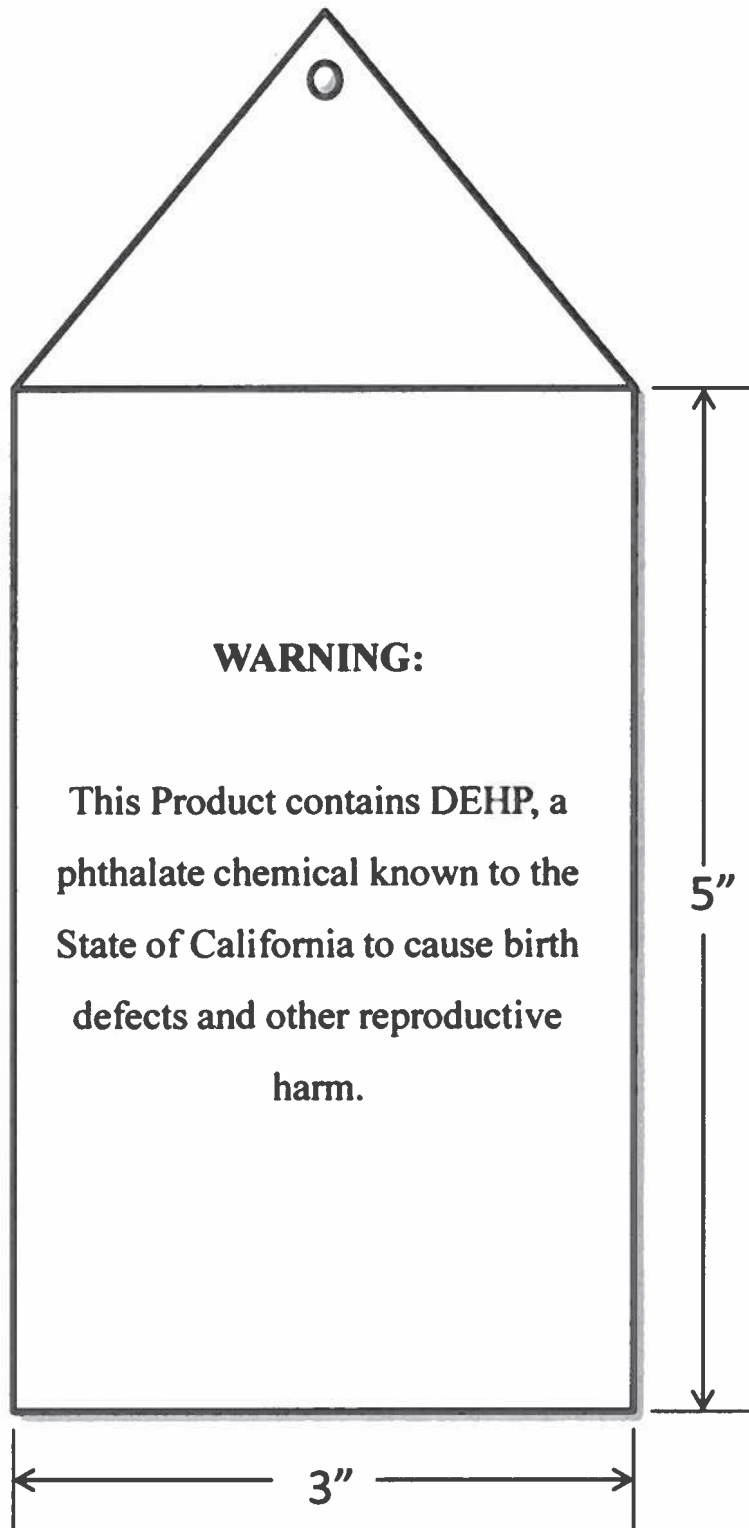
retardant chemicals known to the State of
California to cause cancer.



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



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 DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

8.5"

11"

INSTRUCTIONS:

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