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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

10
11 PETER ENGLANDER,)

12 Plaintiff,)

13 v.)

14 BEXCO ENTERPRISES, INC.; *et al.*,)

15 Defendants.)

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Case No. RG 13688520

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

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT THEODORE
ALEXANDER USA, INC.**

**(Health & Safety Code § 25249.6 *et seq.*
Complaint Filed: July 22, 2013)**

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Peter Englander (“Englander”) and
4 defendant Theodore Alexander USA, Inc. (“Theodore Alexander”) with Englander and Theodore
5 Alexander collectively referred 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
9 eliminating hazardous substances contained in consumer and commercial products.

10 **1.3 Theodore Alexander USA, Inc.**

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

14 **1.4 General Allegations**

15 1.4.1 Englander alleges that Theodore Alexander manufactured, imported, sold
16 and/or distributed for sale in California, products with foam cushioned components containing
17 tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) without the requisite Proposition 65 health
18 hazard 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.
22 Code Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). Englander
23 alleges that the TDCPP escapes from foam padding, leading to human exposures.

24 TDCPP shall hereinafter be referred to as the “Listed Chemical.”

25 **1.5 Product Description**

26 The categories of products that are covered by this Consent Judgment as to Theodore
27 Alexander are identified on Exhibit A (hereinafter “Products”). Polyurethane foam that is

1 supplied, shaped or manufactured for use as a component of a product, such as upholstered
2 furniture, is specifically excluded from the definition of Products and shall not be identified by
3 Theodore Alexander on Exhibit A as a Product.

4 **1.6 Notice of Violation**

5 On April 11, 2013, Englander served Theodore Alexander and certain requisite public
6 enforcement agencies with a "60-Day Notice of Violation" ("Notice") that provided the recipients
7 with notice of alleged violations of Proposition 65 based on the alleged failure to warn customers,
8 consumers, and workers in California that the Products expose users to TDCPP.

9 To the best of the Parties' knowledge, no public enforcer has commenced or is diligently
10 prosecuting the allegations set forth in the Notice.

11 **1.7 Complaint**

12 On July 22, 2013, Englander filed a Complaint in the Superior Court in and for the County
13 of Alameda against Theodore Alexander, among others, and Does 1 through 150, *Peter Englander*
14 *v. Bexco Enterprises, Inc., et al.*, Case No. RG 13688520, alleging violations of Proposition 65,
15 based in part on the alleged unwarned exposures to TDCPP contained in the Products
16 ("Complaint").

17 **1.8 No Admission**

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

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Theodore Alexander as to the allegations contained in the Complaints, that venue
4 is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the
5 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
6 Procedure § 664.6.

7 **2. DEFINITIONS**

8 **2.1 California Customers**

9 “California Customer” shall mean any customer that Theodore Alexander reasonably
10 understands is located in California, has a California warehouse or distribution center, maintains a
11 retail outlet in California, or has made internet sales into California on or after March 4, 2011.

12 **2.2 Detectable**

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

19 **2.3 Effective Date**

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

21 **2.4 Private Label Covered Products**

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

25 **2.5 Reformulated Products**

26 “Reformulated Products” shall mean Products that contain no Detectable amount of
27 TDCPP or TCEP.

1 **2.6 Reformulation Standard**

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

4 **2.7 Retailer**

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

7 **3. INJUNCTIVE RELIEF: REFORMULATION**

8 **3.1 Reformulation Commitment**

9 Commencing on March 31, 2014, Theodore Alexander shall not manufacture or import for
10 distribution or sale to California Customers, or cause to be manufactured or imported for
11 distribution or sale to California Customers, any Products that are not Reformulated Products.

12 **3.2 Vendor Notification/Certification**

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

23 **3.3 Products No Longer in Theodore Alexander’s Control**

24 No later than 45 days after the Effective Date, Theodore Alexander shall send a letter,
25 electronic or otherwise (“Notification Letter”) to: (1) each California Customer and/or Retailer
26 which it, after October 28, 2011, supplied the item for resale in California described as an
27 exemplar in the Notice received by Theodore Alexander from Englander (“Exemplar Product”);

1 and (2) any California Customer and/or Retailer that Theodore Alexander reasonably understands
2 or believes had any inventory for resale in California of Exemplar Product as of the relevant
3 Notice's dates. The Notification Letter shall advise the recipient that the Exemplar Product
4 "contains TDCPP, a chemical known to the State of California to cause cancer," and request that
5 the recipient either: (a) label the Exemplar Products remaining in inventory for sale in California,
6 or to California Customers, pursuant to Section 3.5; or (b) return, at Theodore Alexander's sole
7 expense, all units of the Exemplar Product held for sale in California, or to California Customers,
8 to Theodore Alexander or a party Theodore Alexander has otherwise designated. The Notification
9 Letter shall require a response from the recipient within 15 days confirming whether the Exemplar
10 Product will be labeled or returned. Theodore Alexander shall maintain records of all
11 correspondence or other communications generated pursuant to this Section for two years after the
12 Effective Date and shall promptly produce copies of such records upon Englander's written
13 request.

14 3.4 Current Inventory

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

19 3.5 Product Warnings

20 3.5.1 Product Labeling

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

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

1
2 **WARNING:** This product contains TDCPP, a
3 flame retardant chemical known to
4 the State of California to cause
5 cancer.¹

6 Attached as Exhibit B are template warnings developed by Englander that are deemed to be
7 clear and reasonable for purposes of this Consent Judgment.² Provided that the other requirements
8 set forth in this Section are addressed, including as to the required warning statement and method
9 of transmission as set forth above, Theodore Alexander remains free not to utilize the template
10 warnings.

11 **3.5.2 Internet Website Warning**

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

18 ¹ The regulatory safe harbor warning language specified in of 27 CCR § 25603.2 may also
19 be used if Theodore Alexander had begun to use it, prior to the Effective Date. If Theodore
20 Alexander seeks to use alternative warning language, other than the language specified above or
21 the safe harbor warning specified in 27 CCR § 25603.2, or seeks to use an alternate method of
22 transmission of the warning, it must obtain the Court's approval of its proposed alternative and
23 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."

24 ² The characteristics of the template warnings are as follows: (a) a yellow hang tag
25 measuring 3" x 5", with no less than 12 point font, with the warning language printed on each side
26 of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring
27 8.5" x. 11", with no less that 32 point font, with the warning language printed on each side, which
28 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
2 **WARNING:** This product contains TDCPP, a
3 flame retardant chemical known to
4 the State of California to cause
5 cancer.³

6 **3.6 Alternatives to Interim Warnings**

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

16 **4. MONETARY PAYMENTS**

17 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

18 In settlement of all the claims referred to in this Consent Judgment, Theodore
19 Alexander shall pay the civil penalties shown for it on Exhibit A in accordance with this Section.
20 Each penalty payment will be allocated in accordance with California Health & Safety Code
21 § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
22 Health Hazard Assessment (“OEHHA”), and 25% of the penalty remitted to “The Chanler Group
23 in Trust for Englander.” Each penalty payment shall be made within two business days of the date
24 it is due and be delivered to the addresses listed in Section 4.5 below. Theodore Alexander shall
25 be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing
26 under this Section that are not received within two business days of the due date.

27 ³ Footnote 1, *supra*, applies in this context as well.

1 4.1.1 Initial Civil Penalty. On or before the Effective Date, Theodore Alexander
2 shall make an initial civil penalty payment in the amount identified on Theodore Alexander's
3 Exhibit A.

4 4.1.2 Second Civil Penalty. On or before January 15, 2014, Theodore Alexander
5 shall make a second civil penalty payment in the amount identified on Theodore Alexander's
6 Exhibit A. The amount of the second penalty may be reduced according to any penalty waiver
7 Theodore Alexander is eligible for under Sections 4.1.4(i) and 4.1.4(iii), below.

8 4.1.3 Third Civil Penalty. On or before November 30, 2014, Theodore Alexander
9 shall make a third civil penalty payment in the amount identified on Theodore Alexander's Exhibit
10 A. The amount of the third penalty may be reduced according to any penalty waiver Theodore
11 Alexander is eligible for under Sections 4.1.4(ii) and 4.1.4(iv), below.

12 4.1.4 Reductions to Civil Penalty Payment Amounts. Theodore Alexander may
13 reduce the amount of the second and/or third civil penalty payments identified on Theodore
14 Alexander's Exhibit A by providing Englander with certification of certain efforts undertaken to
15 reformulate their Products or limit the ongoing sale of non-reformulated Products in California.
16 The options to provide a written certification in lieu of making a portion of Theodore Alexander's
17 civil penalty payment constitute material terms of this Consent Judgment, and with regard to such
18 terms, time is of the essence.

19 4.1.4(i) **Partial Penalty Waiver for Accelerated Reformulation of**
20 **Products Sold or Offered for Sale in California.**

21 As shown on Theodore Alexander's Exhibit A, a portion of the second civil penalty shall
22 be waived, to the extent that it has agreed that, as of November 1, 2013, and continuing into the
23 future, it shall only manufacture or import for distribution or sale to California Customers or cause
24 to be manufactured or imported for distribution or sale to California Customers, Reformulated
25 Products. An officer or other authorized representative of Theodore Alexander that has exercised
26 this election shall provide Englander with a written certification confirming compliance with such
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1 conditions, which certification must be received by Englander's counsel on or before December
2 15, 2013.

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

4 As shown on Theodore Alexander's Exhibit A, a portion of the third civil penalty shall be
5 waived, to the extent that it has agreed that, as of March 31, 2014, and continuing into the future, it
6 shall only manufacture or import for distribution or sale in California or cause to be manufactured
7 or imported for distribution or sale in California, Reformulated Products which also do not contain
8 tris(2,3-dibromopropyl)phosphate ("TDBPP") in a detectable amount of more than 25 parts per
9 million ("ppm") (the equivalent of .0025%) in any material, component, or constituent of a subject
10 product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing methodologies
11 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to determine the
12 presence, and measure the quantity, of TDBPP in a solid substance. An officer or other authorized
13 representative of Theodore Alexander that has exercised this election shall provide Englander with
14 a written certification confirming compliance with such conditions, which certification must be
15 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 Theodore Alexander's Exhibit A, a portion of the second civil penalty shall
19 be waived, if an officer or other authorized representative of Theodore Alexander provides
20 Englander with written certification, by December 15, 2013, confirming that each individual or
21 establishment in California to which it supplied the Exemplar Product after October 28, 2011, has
22 elected to return all remaining Exemplar Products held for sale in California.⁴

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26 ⁴ For purposes of this Section, the term Exemplar Products shall further include Products
27 for which Englander has, prior to August 31, 2013, provided Theodore Alexander with test results
28 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 4.3 **Stipulated Penalties for Certain Violations of the Reformulation**
2 **Standard.**

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

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24 ⁵ This Section shall not be applicable where the vendor in question had previously been
25 found by Theodore Alexander to have provided unreliable certifications as to meeting the
26 Reformulation Standard in its Products on more than one occasion. Notwithstanding the
27 foregoing, a stipulated penalty for a second exceedance by Theodore Alexander's vendor at a level
28 between 100 and 249 ppm shall not be available after July 1, 2015.

⁶ 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 **4.4 Reimbursement of Fees and Costs**

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

21 **4.5 Payment Procedures**

22 4.5.1 Issuance of Payments.

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

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 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
14 in Section 4.5.1(a) above, as proof of payment to OEHHA.

15 4.5.3 Tax Documentation. Theodore Alexander shall issue a separate 1099 form
16 for each payment required by this Section to: (a) Peter Englander, whose address and tax
17 identification number shall be furnished upon request after this Consent Judgment has been
18 fully executed by the Parties; (b) OEHHA, who shall be identified as "California Office of
19 Environmental Health Hazard Assessment" (EIN: 68-0284486) in the 1099 form, to be
20 delivered directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814; and (c) "The
21 Chanler Group" (EIN: 94-3171522) to the address 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 Theodore
25 Alexander, its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
26 agents employees, attorneys, and each entity to whom Theodore Alexander directly or indirectly
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1 distribute or sell Products, including, but not limited, to downstream distributors, wholesalers,
2 customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"),
3 from all claims for violations of Proposition 65 through the Effective Date based on unwarned
4 exposures to the Listed Chemical in the Products, as set forth in the Notice. Compliance with the
5 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
6 exposures to the Listed Chemical from the Products, as set forth in the Notice. The Parties further
7 understand and agree that this Section 5.1 release shall not extend upstream to any entities, other
8 than Theodore Alexander, that manufactured the Products or any component parts thereof, or any
9 distributors or suppliers who sold the Products or any component parts thereof to Theodore
10 Alexander, except that an entity upstream of Theodore Alexander that is a Retailer of a Private
11 Labeled Covered Product shall be released as to the Private Labeled Covered Products offered for
12 sale in California, or to California Customers, by the Retailer in question.

13 5.2 Englander's Individual Releases of Claims

14 Englander, in his individual capacity only and *not* in his representative capacity, provides a
15 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
16 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
17 liabilities, and demands of Englander of any nature, character, or kind, whether known or
18 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
19 TDCPP, TCEP, and/or TDBPP in the Products or Additional Products (as defined in Section 11.1
20 and delineated on Theodore Alexander's Exhibit A) manufactured, imported, distributed, or sold
21 by Theodore Alexander prior to the Effective Date.⁷ The Parties further understand and agree that
22 this Section 5.2 release shall not extend upstream to any entities that manufactured the Products or
23 Additional Products, or any component parts thereof, or any distributors or suppliers who sold the
24 Products Additional Products, or any component parts thereof to Theodore Alexander, except that
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26 ⁷ The injunctive relief requirements of Section 3 shall apply to Additional Products as
27 otherwise specified.

1 an entity upstream of Theodore Alexander that is a Retailer of a Private Labeled Covered (or
2 Additional) Product shall be released as to the Private Labeled Covered (or Additional) Products
3 offered for sale in California by the Retailer in question. Nothing in this Section affects
4 Englander's right to commence or prosecute an action under Proposition 65 against a Releasee that
5 does not involve Theodore Alexander's Products or Additional Products.

6 5.3 Theodore Alexander's Release of Englander

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

13 6. COURT APPROVAL

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

3 **7. GOVERNING LAW**

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

13 **8. NOTICES**

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

18 To Theodore Alexander:

19 At the address shown on Exhibit A

To Englander:

20 Proposition 65 Coordinator
21 The Chanler Group
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710-2565

25 Any Party, from time to time, may specify in writing to the other Party a change of address to
26 which all notices and other communications shall be sent.
27
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1 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

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

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

8 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

9 11.1 In addition to the Products, where Theodore Alexander has identified on Exhibit A
10 additional products that contain TDCPP and that are sold or offered for sale by it in California, or
11 to California Customers, (“Additional Products”), then by no later than October 15, 2013,
12 Theodore Alexander may provide Englander with additional information or representations
13 necessary to enable him to issue a 60-Day Notice of Violation and valid Certificate of Merit
14 therefore, pursuant to Health & Safety Code § 25249.7, that includes the Additional Products.
15 Polyurethane foam that is supplied, shaped or manufactured for use as a component of a product,
16 such as upholstered furniture, is specifically excluded from the definition of Additional Products
17 and shall not be identified by Theodore Alexander on Exhibit A as an Additional Product. Except
18 as agreed upon by Englander, Theodore Alexander shall not include a product, as an Additional
19 Product, that is the subject of an existing 60-day notice issued by Englander or any other private
20 enforcer at the time of execution. After receipt of the required information, Englander agrees to
21 issue a supplemental 60-day notice in compliance with all statutory and regulatory requirements
22 for the Additional Products. Englander will, and in no event later than October 1, 2014, prepare
23 and file an amendment to this Consent Judgment to incorporate the Additional Products within the
24 defined term “Products” and, serve a copy thereof and its supporting papers (including the basis
25 for supplemental stipulated penalties, if any) on the Office of the California Attorney General upon
26 the Court’s approval, and finding that the supplemental stipulated penalty amount, if any, is
27 reasonable, the Additional Products shall become subject to Section 5.1 in addition to Section 5.2.

1 Theodore Alexander shall, at the time it elects to utilize this Section and tenders the additional
2 information or representations regarding the Additional Products to Englander, tender to The
3 Chanler Group's trust account an amount not to exceed \$8,750 as stipulated penalties and
4 attorneys' fees and costs incurred by Englander in issuing the new notice and engaging in other
5 reasonably related activities, which may be released from the trust as awarded by the Court upon
6 Englander's application. Any fee award associated with the modification of the Consent Judgment
7 to include Additional Products shall not offset any associated supplemental penalty award, if any
8 (Any tendered funds remaining in the trust thereafter shall be refunded to Theodore Alexander
9 within 15 days). Such payment shall be made to "in trust for The Chanler Group" and delivered as
10 per Section 4.5.1(a) above.

11 11.2 Englander and Theodore Alexander agree to support the entry of this agreement as a
12 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.
13 The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed
14 motion is required to obtain judicial approval of this Consent Judgment, which Englander shall
15 draft and file. If any third party objection to the noticed motion is filed, Englander and Theodore
16 Alexander shall work together to file a reply and appear at any hearing before the Court. This
17 provision is a material component of the Consent Judgment and shall be treated as such in the
18 event of a breach.

19 **12. MODIFICATION**

20 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
21 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
22 of any party and entry of a modified Consent Judgment by the Court.
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1 **13. AUTHORIZATION**

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

5
6 **AGREED TO:**

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9 _____
10 **Plaintiff, Peter Englander**

11 **Date: October 14, 2013**

AGREED TO:

**Settling Defendant:
Theodore Alexander USA, Inc.**

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By: _____
Name:
It's:

Date: October __, 2013

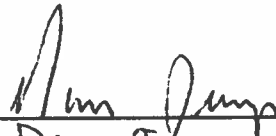
1 **13. AUTHORIZATION**

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

5
6 AGREED TO:

AGREED TO:
Settling Defendant:
Theodore Alexander USA, Inc.

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8
9 _____
10 Plaintiff, Peter Englander

By: 
Name: Doug Jermyn
It's: Vice President

11 Date: September __, 2013

Date: September 30, 2013

EXHIBIT A

I. Name of Settling Defendant: THEODORE ALEXANDER USA, INC.

II. Names of Releasees (optional/partial):

III. Types of Covered Products Applicable to Theodore Alexander:

Padded upholstered furniture including chairs containing TDCPP

IV. Types of Additional Products Theodore Alexander Elects to Address (if any):

V. Theodore Alexander's Required Settlement Payments

A. Penalties of \$86,000, as follows:

\$20,000 initial payment due on or before the Effective Date;

\$42,000 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 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 attributable to Theodore Alexander USA, Inc.: \$40,000.

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

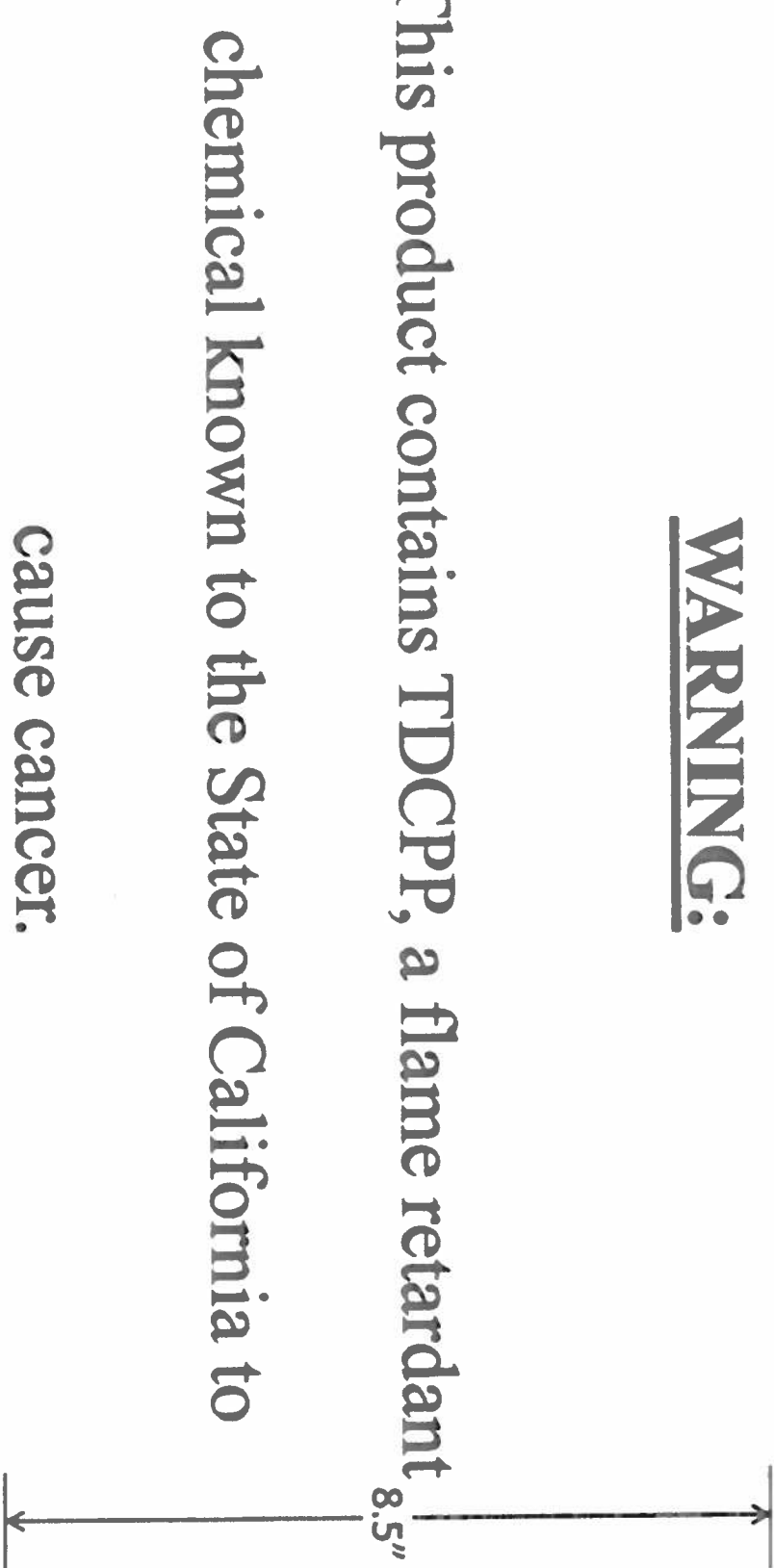
Los Angeles, CA 90071

EXHIBIT B
(ILLUSTRATIVE WARNINGS)

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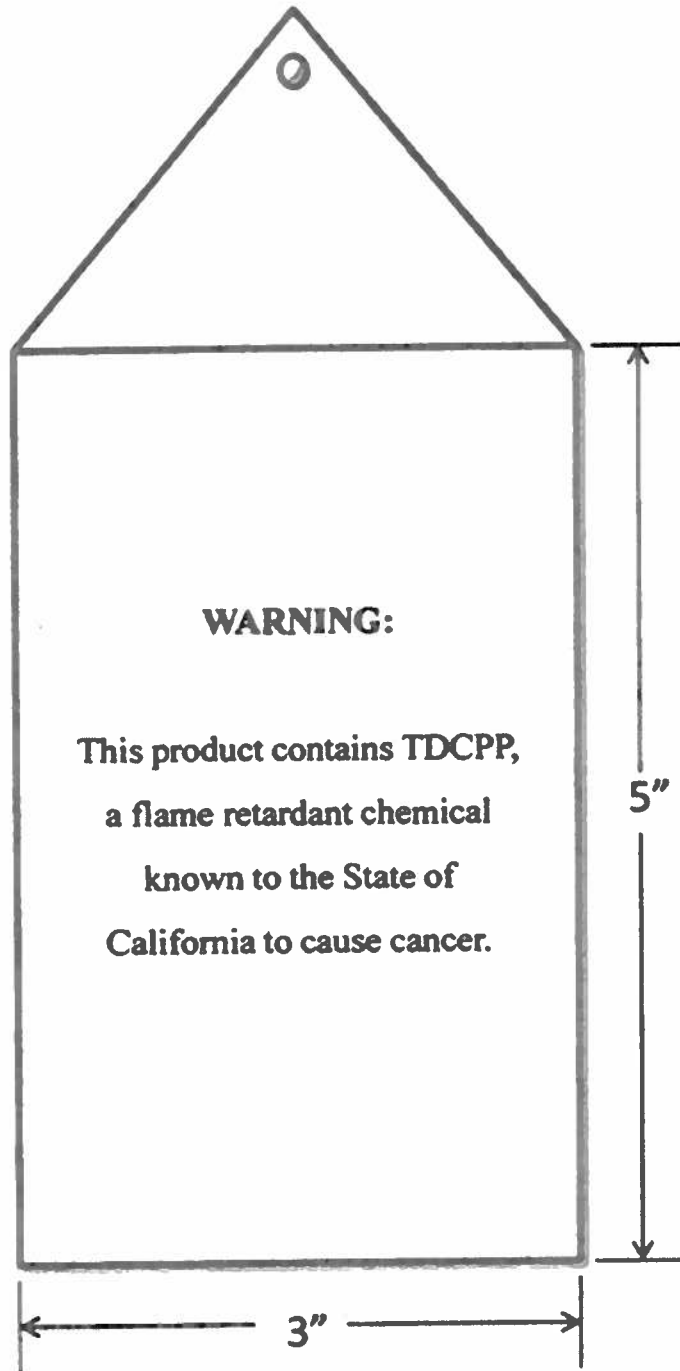
WARNING:

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

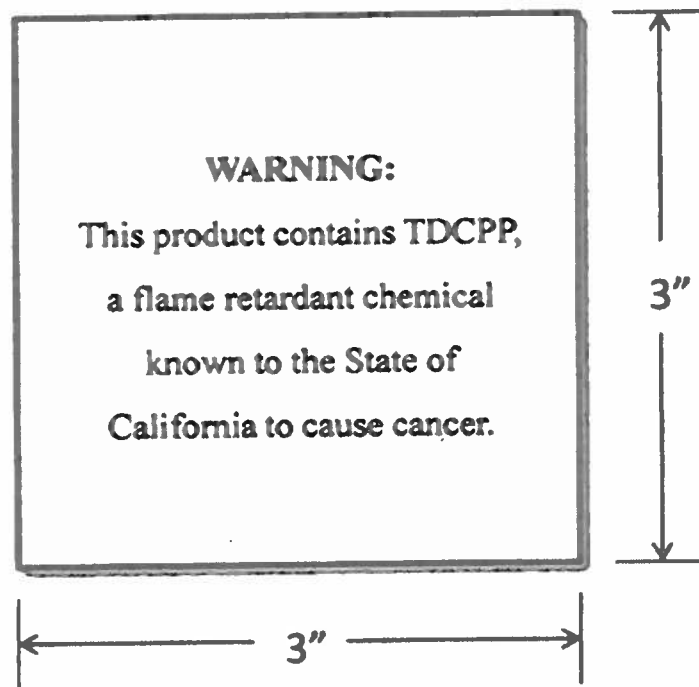


INSTRUCTIONS:

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



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



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