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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 SKYLINE FURNITURE MFG., INC.; et
al.

15 Defendants.
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17
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Case No. RG 13-675155

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

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT COSTCO WHOLESALE
CORPORATION**

(Health & Safety Code § 25249.6 et seq.)

Complaint Filed: April 11, 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 (“Plaintiff”)
4 on the one hand and defendant Costco Wholesale Corporation as further identified in the Exhibit A
5 (“Settling Defendant”) on the other hand, with Plaintiff and the Settling Defendant collectively
6 referred to as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Settling Defendant**

12 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** Plaintiff alleges that the 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”) without the requisite Proposition 65 health hazard
19 warnings.

20 **1.4.2** Pursuant to Proposition 65, on October 28, 2011, California identified and
21 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
22 reasonable warning” requirements of Proposition 65 one year later on October 28, 2012. Cal. Code
23 Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8 and 25249.10(b). TDCPP is referred
24 to hereinafter as the “Listed Chemical.” Plaintiff alleges that the Listed Chemical escapes from
25 foam padding, leading to human exposures.

1 **1.5 Product Description**

2 The categories of products that are covered by this Consent Judgment as to the Settling
3 Defendant are the products manufactured by Whalen Furniture Manufacturing, Inc. (“Whalen”) that
4 are distributed to the Settling Defendant by Whalen and are identified on Exhibit A (hereinafter
5 “Products”). Polyurethane foam that is supplied, shaped or manufactured for use as a component of
6 another product, such as upholstered furniture, but which is not itself a finished product, is
7 specifically excluded from the definition of Products and shall not be identified by the Settling
8 Defendant on Exhibit A as a Product.

9 **1.6 Notices of Violation**

10 On January 30, 2013, Plaintiff served Settling Defendant and certain requisite public
11 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) that provided the recipients
12 with notice of alleged violations of Proposition 65 based on the alleged failure to warn customers,
13 consumers, and workers in California that the Products expose users to the Listed Chemical. On
14 September 26, 2013, Plaintiff served Settling Defendant and certain requisite public enforcement
15 agencies with a “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) that provided
16 the recipients with notice of alleged violations of Proposition 65 based on the alleged failure to
17 warn customers, consumers, and workers in California that the Products expose users to TDCPP
18 and di(2-ethylhexyl)phthalate (“DEHP”).¹ To the best of the Parties’ knowledge, no public
19 enforcer has commenced or is diligently prosecuting the allegations set forth in the Notices.

20 **1.7 Complaint**

21 On August 14, 2013, Plaintiff filed a Third Amended Complaint in the Superior Court in
22 and for the County of Alameda against the Settling Defendant, and Does 1 through 150, *Peter*
23 *Englander v. Skyline Furniture Mfg., Inc., et al.*, Case No. RG 13-675155, alleging violations of
24 Proposition 65, based in part on the alleged unwarned exposures to TDCPP contained in the
25 Products (“Complaint”).

26 _____
27 ¹ DEHP and other phthalates including butyl benzyl phthalate (“BBP”) and Di-n-butyl phthalate
28 (“DBP”) are listed under Proposition 65 as chemicals known to cause birth defects and other reproductive
harm. The Notice and Supplemental Notice shall collectively be referred to hereinafter as the “Notices.”

1 **1.8 No Admission**

2 The Settling Defendant denies the material factual and legal allegations contained in
3 Plaintiff's Notices and Complaint and maintains that all products that it has 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 the 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 the 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 the Settling Defendant's obligations, responsibilities, and
10 duties 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 Defendant as to the allegations contained in the Complaint, that venue
14 is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the
15 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 the 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: (a) containing more than 25 parts per million ("ppm") (the
24 equivalent of .0025%) of each of TDCPP or tris(2-chloroethyl) phosphate ("TCEP") in any
25 material, component, or constituent of a subject product, when analyzed by an accredited laboratory
26 pursuant to EPA testing methodologies 3545 and 8270C, or equivalent methodologies utilized by
27 federal or state agencies to determine the presence, and measure the quantity, of TDCPP and/or
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1 TCEP in a solid substance; and (b) containing more than 1,000 ppm each of DEHP, BBP, and/or
2 DBP in any material, component, or constituent of a subject product, when analyzed pursuant to
3 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
4 methodology utilized by federal or state government agencies for the purpose of determining
5 DEHP, BBP, or DBP content in a solid substance.

6 **2.3 Effective Date**

7 “Effective Date” shall mean the date that this Consent Judgment is approved by the Court,
8 including any tentative ruling that is unopposed.

9 **2.4 Private Label Covered Products**

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

13 **2.5 Reformulated Products**

14 “Reformulated Products” shall mean Products that contain no Detectable amount of TDCPP,
15 TCEP, DEHP, BBP or DBP.

16 **2.6 Reformulation Standard**

17 The “Reformulation Standard” shall mean containing no more than 25 ppm for each of
18 TDCPP and TCEP and containing no more than 1,000 ppm for each of DEHP, BBP and DBP.

19 **2.7 Retailer**

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

22 **3. INJUNCTIVE RELIEF: REFORMULATION**

23 **3.1 Reformulation Commitment**

24 Commencing on March 31, 2014, Settling Defendant shall not manufacture or import for
25 distribution or sale to California Customers, or cause to be manufactured or imported for
26 distribution or sale to California Customers, any Products that are not Reformulated Products.

1 **3.2 Vendor Notification/Certification**

2 On or before April 15, 2014, the Settling Defendant shall provide written notice to all of its
3 then-current vendors of the Products, instructing each such vendor to use reasonable efforts to
4 provide it with only Reformulated Products. In addressing the obligation set forth in the preceding
5 sentence, the Settling Defendant shall not employ statements that will encourage a vendor to delay
6 compliance with the Reformulation Standard. The Settling Defendant shall subsequently obtain
7 written certifications, no later than May 15, 2014, from the vendors of the Products, (and any newly
8 engaged vendors of the Products), that the Products manufactured by such vendors are in
9 compliance with the Reformulation Standard. Certifications shall be held by the Settling Defendant
10 for at least two years after their receipt and shall be made available to Plaintiff upon request.

11 **3.3 Current Inventory**

12 Any Products in, or manufactured and en route to, the Settling Defendant's inventory as of
13 or after December 31, 2013, that do not qualify as Reformulated Products and that the Settling
14 Defendant has reason to believe may be sold or distributed for sale in California, shall contain a
15 clear and reasonable warning as set forth in Section 3.4 below, unless Section 3.5 applies.²

16 **3.4 Product Warnings**

17 **3.4.1 Product Labeling**

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

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² This shall not apply to Products which are Private Label Covered Products in a Retailer Settling Defendant's inventory as of December 31, 2013.

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

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

4 and/or

5 **WARNING:** This product contains [DEHP, BBP,
6 and/or DBP], chemicals known to the
State of California to cause birth
7 defects and other reproductive harm.³

8 Attached as Exhibit B are template warnings developed by Plaintiff that are deemed to be clear and
9 reasonable for purposes of this Consent Judgment.⁴ Provided that the other requirements set forth
10 in this Section are addressed, including as to the required warning statement and method of
11 transmission as set forth above, Settling Defendant remains free not to utilize the template
12 warnings.

13 3.4.2 Internet Website Warning

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

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

20 ³ The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be used if
21 the Settling Defendant had begun to use it, prior to the Effective Date. If Settling Defendant seeks to use
22 alternative warning language, other than the language specified above or the safe harbor warning specified in
23 27 CCR § 25603.2, or seeks to use an alternate method of transmission of the warning, it must obtain the
24 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."

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

3 and/or

4 **WARNING:** This product contains [DEHP, BBP,
5 and/or DBP], chemicals known to the
 State of California to cause birth
 defects and other reproductive harm.⁵

6 **3.5 Alternatives to Interim Warnings**

7 The obligations of the Settling Defendant under Section 3.3 shall be relieved provided the
8 Settling Defendant certifies on or before May 31, 2014, that only Exemplar Products meeting the
9 Reformulation Standard will be offered for sale in California, or to California Customers for sale in
10 California, after May 15, 2014. The obligations of a Settling Defendant under Section 3.4 shall be
11 relieved provided the Settling Defendant certifies on or before May 31, 2014 that, after September
12 30, 2014, it will only distribute or cause to be distributed for sale in, or sell in, California, or to
13 California Customers for sale in California, Products (i.e., Products beyond the Exemplar Product)
14 meeting the Reformulation Standard. The certifications provided by this Section are material terms
15 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, the Settling Defendant
19 shall pay the civil penalties shown for it on Exhibit A in accordance with this Section.⁶
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 the remaining 25% of the penalty remitted to “The
23 Chanler Group in Trust for Englander.” Each penalty payment shall be made within two business
24 days of the date it is due and be delivered to the addresses listed in Section 4.5 below. The Settling
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26 ⁵ Footnote 4, *supra*, applies in this context as well.

27 ⁶ The penalty amount shown on Exhibit A includes an additional component to address the
28 resolution of the claims listed in the Supplemental Notice alleging violations of DEHP.

1 Defendant shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts
2 due and owing 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 Defendant
4 shall make an initial civil penalty payment in the amount identified on the Settling Defendant's
5 Exhibit A.

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

10 4.1.3 Third Civil Penalty

11 On or before November 30, 2014, the Settling Defendant shall make a third civil
12 penalty payment in the amount identified on the Settling Defendant's Exhibit A. The amount of the
13 third penalty may be reduced according to any penalty waiver the Settling Defendant is eligible for
14 under Sections 4.1.4(ii) and 4.1.4(iii), below.

15 4.1.4 Reductions to Civil Penalty Payment Amounts.

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

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

24 As shown on the Settling Defendant's Exhibit A, if so elected, the second civil penalty shall
25 be waived, to the extent that it has agreed that, as of May 15, 2014, and continuing into the future, it
26 shall only manufacture or import for distribution or sale to California Customers or cause to be
27 manufactured or imported for distribution or sale to California Customers, Reformulated Products.

1 An officer or other authorized representative of the Settling Defendant that has exercised this
2 election shall provide Plaintiff with a written certification confirming compliance with such
3 conditions, which certification must be received by Plaintiff' counsel on or before May 31, 2014.

4 **4.1.4(ii) Partial Penalty Waiver for Extended Reformulation.**

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

17 **4.1.4(iii) Partial Penalty Waiver for Termination of Distribution to**
18 **California of Unreformulated Inventory.**

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

24 **4.2 Representations**

25 The Settling Defendant represents that the sales data and other information concerning its
26 size, knowledge of the Listed Chemical, and prior reformulation and/or warning efforts, it provided
27 to Plaintiff was truthful to its knowledge and a material factor upon which Plaintiff has relied to
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1 determine the amount of civil penalties assessed pursuant to Health & Safety Code § 25249.7 in this
2 Consent Judgment. If, within nine months of the Effective Date, Plaintiff discovers and presents to
3 the Settling Defendant, evidence demonstrating that the preceding representation and warranty was
4 materially inaccurate, then the Settling Defendant shall have 30 days to meet and confer regarding
5 the Plaintiff's contention. Should this 30 day period pass without any such resolution between the
6 Plaintiff and the Settling Defendant, Plaintiff shall be entitled to file a formal legal claim including,
7 but not limited to, a claim for damages for breach of contract.

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

13 **4.3 Stipulated Penalties for Certain Violations of the Reformulation**
14 **Standard.**

15 If Plaintiff provides notice and appropriate supporting information to the Settling Defendant
16 that levels of the Listed Chemical in excess of the Reformulation Standard have been detected in
17 one or more Products labeled or otherwise marked in an identifiable manner as manufactured or
18 imported after a deadline for meeting the Reformulation Standard has arisen for a Settling
19 Defendant under Sections 3.1 or 3.6 above, the Settling Defendant may elect to pay a stipulated
20 penalty to relieve any further potential liability to Plaintiff under Proposition 65 or sanction under
21 this Consent Judgment as to Products sourced from the vendor in question.⁷ The stipulated penalty
22 shall be \$1,500 if the violation level is below 100 ppm and \$3,000 if the violation level is between
23 100 ppm and 249 ppm, this being applicable for any amount in excess of the Reformulation
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25 ⁷ This Section shall not be applicable where the vendor in question had previously been found by the
26 Settling Defendant to have provided unreliable certifications as to meeting the Reformulation Standard in its
27 Products on more than one occasion. Notwithstanding the foregoing, a stipulated penalty for a second
28 exceedance by a Settling Defendant's vendor at a level between 100 and 249 ppm shall not be available after
July 1, 2015.

1 Standards but under 250 ppm.⁸ Plaintiff shall further be entitled to reimbursement of his associated
2 expense in an amount not to exceed \$5,000 regardless of the stipulated penalty level. The Settling
3 Defendant under this Section must provide notice and appropriate supporting information relating
4 to the purchase (e.g. vendor name and contact information including representative, purchase order,
5 certification (if any) received from vendor for the exemplar or subcategory of products), test results,
6 and a letter from a company representative or counsel attesting to the information provided, to
7 Plaintiff within 30 calendar days of receiving test results from Plaintiff's counsel. Any violation
8 levels at or above 250 ppm shall be subject to the full remedies provided pursuant to this Consent
9 Judgment and at law.

10 4.4 Reimbursement of Fees and Costs

11 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to him, thereby leaving
13 this fee reimbursement issue to be resolved after the material terms of the agreement had been
14 settled. Shortly after the other settlement terms had been finalized, the Settling Defendant
15 expressed a desire to resolve the fee and cost issue. The Settling Defendant then agreed to pay
16 Plaintiff and his counsel under general contract principles and the private attorney general doctrine
17 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
18 mutual execution of this agreement, including the fees and costs incurred as a result of investigating
19 Settling Defendant and Whalen, bringing this matter to the Settling Defendant's attention,
20 negotiating a settlement in the public interest, including a release for Whalen, an upstream
21 manufacturer of the Products, and seeking court approval of the same. In addition, the negotiated
22 fee and cost figure expressly includes the anticipated significant amount of time plaintiff's counsel
23 will incur to monitor various provisions in this agreement over the next two years, with the
24 exception of additional fees that may be incurred pursuant to the Settling Defendant's election in
25 Section 11. The Settling Defendant more specifically agreed, upon the Court's approval and entry
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27 ⁸ Any stipulated penalty payments made pursuant to this Section should be allocated and remitted in
28 the same manner as set forth in Sections 4.1 and 4.5, respectively.

1 of this Consent Judgment, to pay Plaintiff's counsel the amount of fees and costs indicated on the
2 Settling Defendant's Exhibit A. The Settling Defendant further agreed to tender and shall tender its
3 full required payment under this Section to a trust account at The Chanler Group (made payable "In
4 Trust for The Chanler Group") within two business days of the Effective Date. Such funds shall be
5 released from the trust account upon the Court's approval and entry of this Consent Judgment.

6 **4.5 Payment Procedures**

7 **4.5.1 Issuance of Payments.**

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

10 The Chanler Group
11 Attn: Proposition 65 Controller
12 2560 Ninth Street
13 Parker Plaza, Suite 214
14 Berkeley, CA 94710

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

18 **For United States Postal Service Delivery:**

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 P.O. Box 4010
23 Sacramento, CA 95812-4010

24 **For Non-United States Postal Service Delivery:**

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 1001 I Street
Sacramento, CA 95814

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

4.5.3 Tax Documentation. The Settling Defendant shall issue a separate 1099 form
for each payment required by this Section to: (a) Peter Englander, whose address and tax

1 identification number shall be furnished upon request after this Consent Judgment has been fully
2 executed by the Parties; (b) OEHHA, who shall be identified as “California Office of
3 Environmental Health Hazard Assessment” (EIN: 68-0284486) in the 1099 form, to be delivered
4 directly to OEHHA, P.O. Box 4010, Sacramento, CA 95814; and (c) “The Chanler Group” (EIN:
5 94-3171522) to the address set forth in Section 4.5.1(a) above.

6 **5. CLAIMS COVERED AND RELEASED**

7 **5.1 Plaintiff’s Release of Proposition 65 Claims**

8 Plaintiff, acting on his behalf and in the public interest, releases the Settling Defendant, its
9 parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
10 employees, attorneys, and each entity to whom the Settling Defendant directly or indirectly
11 distributes or sells Products, including, but not limited, to downstream distributors, wholesalers,
12 customers, retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”),
13 from all claims for violations of Proposition 65 through the Effective Date based on unwarned
14 exposures to the Listed Chemical in the Products, as set forth in the Notice. Compliance with the
15 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
16 exposures to the Listed Chemical from the Products, as set forth in the Notice. The Parties further
17 understand and agree that this Section 5.1 release shall not extend upstream to any entities, other
18 than to Whalen, but only as to Products, or component parts thereof, manufactured by Whalen and
19 distributed to Settling Defendant through the Effective Date, and shall not extend to any distributors
20 or suppliers who sold the Products or any component parts thereof to the Settling Defendant, except
21 as to the aforementioned and entities that are within the Settling Defendant’s same corporate
22 family. Within ten days of the Court approving this Consent Judgment, Plaintiff shall dismiss
23 Whalen without prejudice.

24 **5.2 Plaintiff’s Individual Releases of Claims**

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

13 **5.3 Settling Defendant's Release of Plaintiff**

14 The Settling Defendant, on behalf of itself, its past and current agents, representatives,
15 attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff and his
16 attorneys and other representatives, for any and all actions taken or statements made (or those that
17 could have been taken or made) by Plaintiff and his attorneys and other representatives, whether in
18 the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this
19 matter with respect to the Products.

20 **6. COURT APPROVAL**

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

9 **7. GOVERNING LAW**

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

19 **8. NOTICES**

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

24 For Plaintiff: Proposition 65 Coordinator, The Chanler Group, 2560 Ninth Street,
25 Parker Plaza, Suite 214, Berkeley, CA 94710-2565

26 For Settling Defendant: At the address shown on Exhibit A.
27
28

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

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

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

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

8 Plaintiff and his attorneys agree to comply with the reporting form requirements referenced
9 in California Health & Safety Code section 25249.7(f).

10 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

11 11.1 Plaintiff and Settling Defendant 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 section 25249.7, a
14 noticed motion is required to obtain judicial approval of this Consent Judgment, which Plaintiff
15 shall draft and file. If any third party objection to the noticed motion is filed, Plaintiff and the
16 Settling Defendant shall work together to file a reply and appear at any hearing before the Court.
17 This 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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13. AUTHORIZATION

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

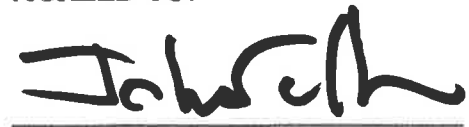
AGREED TO:



Plaintiff Peter Englander

Date: May 2, 2014

AGREED TO:



By:
Title:
For: Settling Defendant

Date: May __, 2014

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1 EXHIBIT A

2 I. Name of Settling Defendant: COSTCO WHOLESALE CORPORATION

3 II. Names of Releasees (optional/partial): WHALEN FURNITURE MANUFACTURING,
4 INC.

5 III. Types of Covered Products Applicable to Settling Defendant: Upholstered furniture
6 products manufactured by Whalen Furniture Manufacturing, Inc. that are distributed to the
7 Settling Defendant by Whalen Furniture Manufacturing, Inc.

8 IV. Settling Defendant's Required Settlement Payments

9 A. Penalties of \$53,000, as follows:

10 \$18,000 initial payment due on or before the Effective Date;

11 \$21,000 second payment due on or before June 15, 2014, which \$21,000 may
be waived pursuant to Section 4.1.4(i); and

12 \$14,000 third payment due on or before November 30, 2014, of which
13 \$8,000 may be waived pursuant to Section 4.1.4(ii) and \$6,000 may be
waived pursuant to Section 4.1.4(iii).

14 B. Payment to The Chanler Group for reimbursement of attorneys' fees and costs
15 totaling \$42,000 as follows:

16 Fees and Costs attributable to Costco Wholesale Corporation: \$42,000.

17 V. Person(s) to receive Notices pursuant to Section 8

18 Juliann Buron
19 Name

20 Corporate Counsel
21 Title

22 Costco Wholesale Corp.
23 Company/Firm Name

24 Address _____

25 999 Lake Drive

26 Issaquah, WA 98027

1 Renee D. Wasserman

2 Rogers Joseph O'Donnell

3 311 California Street

4 San Francisco, CA 94104

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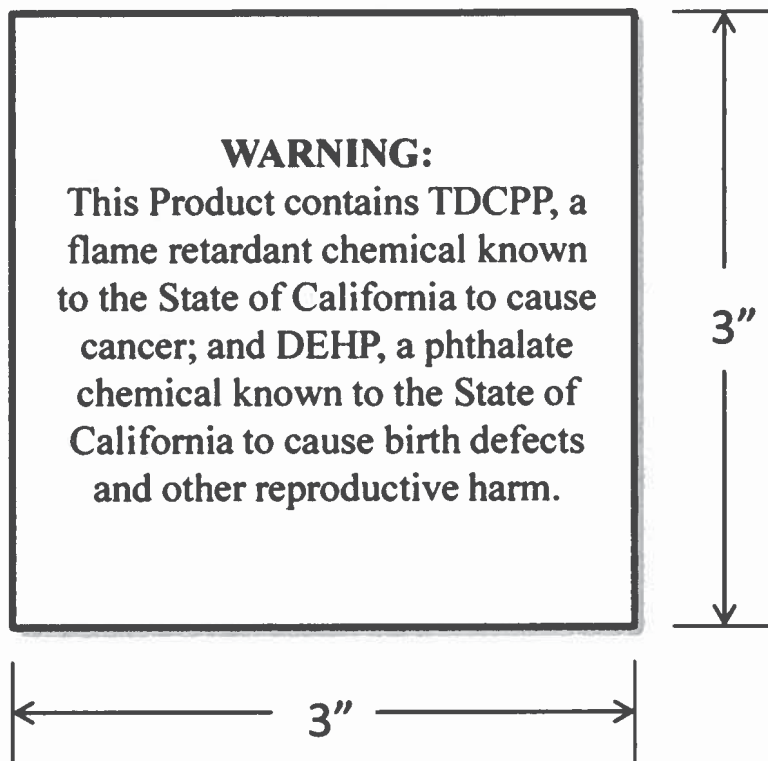
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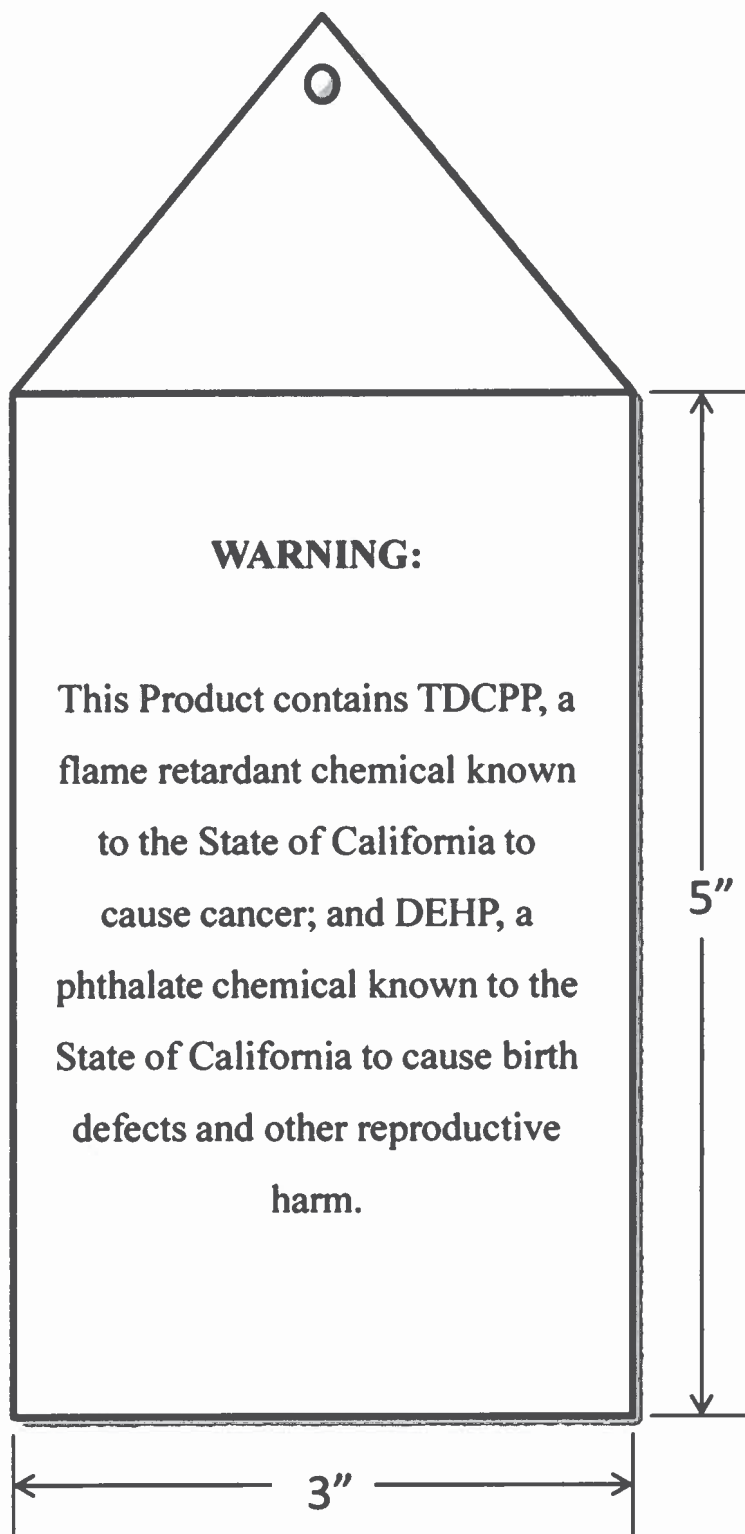
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EXHIBIT B
(ILLUSTRATIVE WARNINGS)

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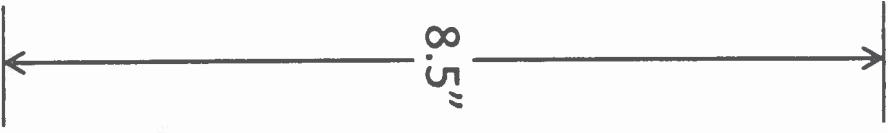
INSTRUCTIONS: Minimum 12 pt. font. "WARNING:" text must be bold.



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



INSTRUCTIONS:

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