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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

14 LAURENCE VINOCUR, ) Case No. HG13679189  
15 )  
16 Plaintiff, )  
17 )  
18 v. ) Assigned for All Purposes to  
19 ) Judge George C. Hernandez, Jr.,  
20 ) Department 17  
21 FIRST ACT INC.; et al. )  
22 )  
23 )  
24 )  
25 )  
26 ) **[PROPOSED] CONSENT JUDGMENT AS**  
27 ) **TO FIRST ACT INC.**  
28 )  
29 ) **(Health & Safety Code § 25249.6 et seq.)**  
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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Laurence Vinocur  
4 (“Vinocur”) and First Act Inc. (“First Act”), with Vinocur and First Act collectively referred to as  
5 the “Parties.”

6 **1.2 Laurence Vinocur**

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

10 **1.3 First Act Inc.**

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

14 **1.4 General Allegations**

15 1.4.1 Vinocur alleges that First Act manufactured, imported, sold and/or  
16 distributed for sale in California products with foam cushioned components containing tris(1,3-  
17 dichloro-2-propyl) phosphate (“TDCPP”) and tris(2-chloroethyl) phosphate (“TCEP”) without the  
18 requisite Proposition 65 health hazard warnings. Vinocur alleges that TDCPP and TCEP escape  
19 from foam padding, leading to human exposures.

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 Proposition 65 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).

28

1 TDCPP and TCEP shall hereinafter be collectively referred to as the “Listed Chemicals.”

2 **1.5 Product Description**

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

8 **1.6 Notices of Violation**

9 On or about February 15, 2013, Vinocur issued to First Act and certain requisite public  
10 enforcement agencies a “60-Day Notice of Violation” (“TDCPP Notice”) that provided the  
11 recipients with notice of alleged violations of Proposition 65 based on the alleged failure to warn  
12 customers, consumers, and workers in California that the Products expose users to TDCPP.

13 On or about February 26, 2013, Vinocur issued to First Act and certain requisite public  
14 enforcement agencies a “60-Day Notice of Violation” (“TCEP Notice”) that provided the recipients  
15 with notice of alleged violations of Proposition 65 based on the alleged failure to warn customers,  
16 consumers and workers in California that the Products expose users to TCEP.

17 The TDCPP Notice and TCEP Notice shall hereinafter collectively be referred to as the  
18 “Notices.” To the best of the Parties’ knowledge, no public enforcer has commenced or is  
19 diligently prosecuting the allegations set forth in the Notices.

20 **1.7 Complaint**

21 On May 13, 2013, Vinocur filed a Complaint in the Superior Court in and for the County of  
22 Alameda against First Act, other defendants and Does 1 through 150, *Laurence Vinocur v. First Act*  
23 *Inc., et al.*, Case No. HG13679189 (“Complaint”), alleging violations of Proposition 65, based in  
24 part on the alleged unwarned exposures to the Listed Chemicals contained in the Products.

25 **1.8 No Admission**

26 First Act denies the material factual and legal allegations contained in Vinocur’s Notices  
27 and Complaint and maintains that all products that it has manufactured, imported, distributed,  
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1 and/or sold in California, including the Products, have been and are in compliance with all laws.  
2 Nothing in this Consent Judgment shall be construed as an admission by First Act of any fact,  
3 finding, conclusion, issue of law, or violation of law, nor shall compliance with this Consent  
4 Judgment constitute or be construed as an admission by First Act of any fact, finding, conclusion,  
5 issue of law, or violation of law. However, this section shall not diminish or otherwise affect First  
6 Act's obligations, responsibilities, and duties under this Consent Judgment.

7 **1.9 Consent to Jurisdiction**

8 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
9 jurisdiction over First Act as to the allegations contained in the Notices and Complaint, that venue  
10 is proper in the County of Alameda, and that this Court has jurisdiction to enter and enforce the  
11 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil  
12 Procedure § 664.6.

13 **2. DEFINITIONS**

14 **2.1 California Customers**

15 "California Customer" shall mean any customer that First Act reasonably understands is  
16 located in California, has a California warehouse or distribution center, maintains a retail outlet in  
17 California, or has made internet sales into California on or after January 1, 2011.

18 **2.2 Detectable**

19 "Detectable" shall mean containing more than 25 parts per million ("ppm") (the equivalent  
20 of .0025%) of any one chemical in any material, component, or constituent of a  
21 subject product, when analyzed by a NVLAP accredited laboratory pursuant to EPA testing  
22 methodologies 3545 and 8270C, or equivalent methodologies utilized by federal or state agencies to  
23 determine the presence, and measure the quantity, of TDCPP and/or TCEP, in a solid substance.

24 **2.3 Effective Date**

25 "Effective Date" shall mean October 15, 2013.  
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27  
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1           **2.4 Private Label Covered Products**

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

5           **2.5 Reformulated Products**

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

8           **2.6 Reformulation Standard**

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

11           **2.7 Retailer**

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

14 **3. INJUNCTIVE RELIEF: REFORMULATION**

15           **3.1 Reformulation Commitment**

16           Commencing on March 31, 2014, First Act shall not manufacture or import for distribution  
17 or sale to California Customers, or cause to be manufactured or imported for distribution or sale to  
18 California Customers, any Products that are not Reformulated Products.

19           **3.2 Vendor Notification/Certification**

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

3 **3.3 Products No Longer in First Act's Control**

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

20 **3.4 Current Inventory**

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

1           3.5     **Product Warnings**

2                   3.5.1   **Product Labeling**

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

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

10                               **WARNING:** This product contains TDCPP and  
11    TCEP, flame retardant chemicals  
12    known to the State of California to  
  cause cancer.<sup>1</sup>

13           Attached as Exhibit B are template warnings developed by Vinocur that are deemed to be  
14 clear and reasonable for purposes of this Consent Judgment.<sup>2</sup> Provided that the other requirements  
15 set forth in this Section are addressed, including as to the required warning statement and method of  
16 transmissions as set forth above, First Act remains free not to utilize the template warnings.

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19                               <sup>1</sup> The regulatory safe harbor warning language specified in 27 CCR § 25603.2 may also be  
20 used if First Act had begun to use it, prior to the Effective Date. If First Act seeks to use alternative  
21 warning language, other than the language specified above or the safe harbor warning specified in  
22 27 CCR § 25603.2, or seeks to use an alternate method of transmission of the warning, First Act  
23 must obtain the Court’s approval of its proposed alternative and provide all Parties and the Office of  
24 the Attorney General with timely notice and the opportunity to comment of 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                               <sup>2</sup> The characteristics of the template warnings are as follows: (a) a yellow hang tag  
26 measuring 3” x 5”, with no less than 12 point font, with the warning language printed on each side  
27 of the hang tag, which shall be affixed directly to the Product; (b) a yellow warning sign measuring  
28 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                   **3.5.2 Internet Website Warning**

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

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

8                                   **WARNING:** This product contains TDCPP and  
9   TCEP, flame retardant chemicals  
10   known to the State of California to  
  cause cancer.<sup>3</sup>

11                   **3.6 Alternatives to Interim Warnings**

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

20                   **4. MONETARY PAYMENTS**

21                   **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

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

28                   <sup>3</sup> Footnote 1, *supra*, applies in this context as well.



1 be delivered to the addresses listed in Section 4.5 below. First Act shall be liable for payment of  
2 interest, at a rate of 10% simple interest, for all amounts due and owing under this Section that are  
3 not received within two business days of the due date.

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

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

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

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

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

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

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

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

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27 <sup>4</sup> For purposes of this Section, the term Exemplar Products shall further include Products for  
28 which Vinocur has, prior to August 31, 2013, provided First Act 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.

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

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

**4.2 Representations**

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

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

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

If Vinocur provides notice and appropriate supporting information to First Act that levels of the Listed Chemicals in excess of the Reformulation Standard have been detected in one or more Products labeled or otherwise marked in an identifiable manner as manufactured or imported after a deadline for meeting the Reformulation Standard has arisen for First Act under Sections 3.1 or 3.6

1 above, First Act may elect to pay a stipulated penalty to relieve any further potential liability under  
2 Proposition 65 or sanction under this Consent Judgment as to Products sourced from the vendor in  
3 question.<sup>5</sup> The stipulated penalty shall be \$1,500 if the violation level is below 100 ppm and \$3,000  
4 if the violation level is between 100 ppm and 249 ppm, this being applicable for any amount in  
5 excess of the Reformulation Standards but under 250 ppm.<sup>6</sup> Vinocur shall further be entitled to  
6 reimbursement of his associated expense in an amount not to exceed \$5,000 regardless of the  
7 stipulated penalty level. First Act under this Section must provide notice and appropriate  
8 supporting information relating to the purchase (e.g. vendor name and contact information  
9 including representative, purchase order, certification (if any) received from vendor for the  
10 exemplar or subcategory of products), test results, and a letter from a company representative or  
11 counsel attesting to the information provided, to Vinocur within 30 calendar days of receiving test  
12 results from Vinocur's counsel. Any violation levels at or above 250 ppm shall be subject to the  
13 full remedies provided pursuant to this Consent Judgment and at law.

#### 14 4.4 Reimbursement of Fees and Costs

15 The Parties acknowledge that Vinocur and his counsel offered to resolve this dispute  
16 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving  
17 this fee reimbursement issue to be resolved after the material terms of the agreement had been  
18 settled. Shortly after the other settlement terms had been finalized, First Act expressed a desire to  
19 resolve the fee and cost issue. First Act then agreed to pay Vinocur and his counsel under general  
20 contract principles and the private attorney general doctrine codified at California Code of Civil  
21 Procedure section 1021.5 for all work performed through the mutual execution of this agreement,  
22 including the fees and costs incurred as a result of investigating, bringing this matter to First Act's  
23 attention, negotiating a settlement in the public interest, and seeking court approval of the same. I  
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25 <sup>5</sup> This Section shall not be applicable where the vendor in question had previously been  
26 found by First Act to have provided unreliable certifications as to meeting the Reformulation  
27 Standard in its Products on more than one occasion. Notwithstanding the foregoing, a stipulated  
28 penalty for a second exceedance by First Act's vendor at a level between 100 and 249 ppm shall not  
be available after July 1, 2015.

<sup>6</sup> 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 addition, the negotiated fee and cost figure expressly includes the anticipated significant amount of  
2 time plaintiff's counsel will incur to monitor various provisions in this agreement over the next two  
3 years, with the exception of additional fees that may be incurred pursuant to First Act's election in  
4 Section 11. First Act more specifically agreed, upon the Court's approval and entry of this Consent  
5 Judgment, to pay Vinocur's counsel the amount of fees and costs indicated on Exhibit A. First Act  
6 further agreed to tender and shall tender its full required payment under this Section to a trust  
7 account at The Chanler Group (made payable "In Trust for The Chanler Group") within two  
8 business days of the Effective Date. Such funds shall be released from the trust account upon the  
9 Court's approval and entry of this Consent Judgment.

10 **4.5 Payment Procedures**

11 4.5.1 Issuance of Payments.

12 (a) All payments owed to Vinocur and his counsel, pursuant to Sections  
13 4.1, 4.3, and 4.4 shall be delivered to the following payment address:

14 The Chanler Group  
15 Attn: Proposition 65 Controller  
16 2560 Ninth Street  
17 Parker Plaza, Suite 214  
18 Berkeley, CA 94710

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

22 For United States Postal Service Delivery:

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

28 For Non-United States Postal Service Delivery:

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

1                   4.5.2 Proof of Payment to OEHHA. A copy of each check payable to OEHHA  
2 shall be mailed, simultaneous with payment, to The Chanler Group at the address set forth in  
3 Section 4.5.1(a) above, as proof of payment to OEHHA.

4                   4.5.3 Tax Documentation. First Act shall issue a separate 1099 form for each  
5 payment required by this Section to: (a) Laurence Vinocur, whose address and tax identification  
6 number shall be furnished upon request after this Consent Judgment has been fully executed by the  
7 Parties; (b) OEHHA, who shall be identified as “California Office of Environmental Health Hazard  
8 Assessment” (EIN: 68-0284486) in the 1099 form, to be delivered directly to OEHHA, P.O. Box  
9 4010, Sacramento, CA 95814; and (c) “The Chanler Group” (EIN: 94-3171522) to the address set  
10 forth in Section 4.5.1(a) above.

11 **5.       CLAIMS COVERED AND RELEASED**

12               **5.1       Vinocur’s Release of Proposition 65 Claims**

13               Vinocur, acting on his own behalf and in the public interest, releases First Act, its parents,  
14 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,  
15 attorneys, and each entity to whom First Act directly or indirectly distributes or sell Products,  
16 including, but not limited, to Toys “R” Us, Inc., downstream distributors, wholesalers, customers,  
17 retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), from all  
18 claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to  
19 the Listed Chemicals in the Products, as set forth in the Notices. Compliance with the terms of this  
20 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to the  
21 Listed Chemicals from the Products, as set forth in the Notices. The Parties further understand and  
22 agree that this Section 5.1 release shall not extend upstream to any entities, other than First Act, that  
23 manufactured the Products or any component parts thereof, or any distributors or suppliers who  
24 sold the Products or any component parts thereof to First Act, except any entities upstream of First  
25 Act that is a Retailer of a Private Labeled Covered Product shall be released as to the Private  
26 Labeled Covered Products offered for sale in California, or to California Customers, by the Retailer  
27 in question.

1           **5.2     Vinocur’s Individual Releases of Claims**

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

17           **5.3     First Act’s Release of Vinocur**

18           First Act, on behalf of itself, its past and current agents, representatives, attorneys,  
19 successors, and assignees, hereby waives any and all claims against Vinocur and his attorneys and  
20 other representatives, for any and all actions taken or statements made (or those that could have  
21 been taken or made) by Vinocur and his attorneys and other representatives, whether in the course  
22 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with  
23 respect to the Products or Additional Products.

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27           <sup>7</sup> The injunctive relief requirements of Section 3 shall apply to Additional Products as  
28 otherwise specified.

1 **6. COURT APPROVAL**

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

17 **7. GOVERNING LAW**

18 The terms of this Consent Judgment shall be governed by the laws of the State of California.  
19 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by  
20 reason of law generally, or if any of the provisions of this Consent Judgment are rendered  
21 inapplicable or are no longer required as a result of any such repeal or preemption, or rendered  
22 inapplicable by reason of law generally as to the Products, then First Act may provide written  
23 notice to Vinocur of any asserted change in the law, and shall have no further obligations pursuant  
24 to this Consent Judgment with respect to, and to the extent that, the Products are so affected.  
25 Nothing in this Consent Judgment shall be interpreted to relieve First Act from any obligation to  
26 comply with any pertinent state or federal law or regulation.

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1 **8. NOTICES**

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

6 To First Act:	To Vinocur:
7 At the address shown on Exhibit A	Proposition 65 Coordinator
8	The Chanler Group
9	2560 Ninth Street
10	Parker Plaza, Suite 214
	Berkeley, CA 94710-2565

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

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

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

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

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

20 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

21 11.1 In addition to the Products, where First Act has identified on Exhibit A additional  
22 products that contain Listed Chemicals and that are sold or offered for sale by it in California, or to  
23 California Customers (“Additional Products”), then by no later than October 15, 2013, First Act  
24 may provide Vinocur with additional information or representations necessary to enable them to  
25 issue a 60-Day Notice of Violation and valid Certificate of Merit therefore, pursuant to Health &  
26 Safety Code section 25249.7, that includes the Additional Products. Polyurethane foam that is  
27 supplied, shaped or manufactured for use as a component of a product, such as upholstered  
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1 furniture, is specifically excluded from the definition of Additional Products and shall not be  
2 identified by First Act on Exhibit A as an Additional Product. Except as agreed upon by Vinocur,  
3 First Act shall not include a product, as an Additional Product, that is the subject of an existing 60-  
4 day notice issued by Vinocur or any other private enforcer at the time of execution. After receipt of  
5 the required information, Vinocur agrees to issue a supplemental 60-day notice in compliance with  
6 all statutory and regulatory requirements for the Additional Products. Vinocur will, and in no event  
7 later than October 1, 2014, prepare and file an amendment to this Consent Judgment to incorporate  
8 the Additional Products within the defined term “Products” and serve a copy thereof and its  
9 supporting papers (including the basis for supplemental stipulated penalties, if any) on the Office of  
10 the California Attorney General; upon the Court’s approval and finding that the supplemental  
11 stipulated penalty amount, if any, is reasonable, the Additional Products shall become subject to  
12 Section 5.1 in addition to Section 5.2. First Act shall, at the time it elects to utilize this Section  
13 and tenders the additional information or representations regarding the Additional Products to  
14 Vinocur, tender to The Chanler Group’s trust account an amount not to exceed \$8,750 as stipulated  
15 penalties and attorneys’ fees and costs incurred by Vinocur in issuing the new notice and engaging  
16 in other reasonably related activities, which may be released from the trust as awarded by the Court  
17 upon Vinocur’s application. Any fee award associated with the modification of the Consent  
18 Judgment to include Additional Products shall not offset any associated supplemental penalty  
19 award, if any. (Any tendered funds remaining in the trust thereafter shall be refunded to First Act  
20 within 15 days). Such payment shall be made to “in trust for The Chanler Group” and delivered as  
21 per Section 4.5.1(a) above.

22           11.2 Vinocur and First Act agree to support the entry of this agreement as a Consent  
23 Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The  
24 Parties acknowledge that, pursuant to California Health & Safety Code section 25249.7, a noticed  
25 motion is required to obtain judicial approval of this Consent Judgment, which Vinocur shall draft  
26 and file. If any third party objection to the noticed motion is filed, Vinocur and First Act shall work  
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1 together to file a reply and appear at any hearing before the Court. This provision is a material  
2 component of the Consent Judgment and shall be treated as such in the 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 AGREED TO:

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13 \_\_\_\_\_  
14 Plaintiff Laurence Vinocur

AGREED TO:

\_\_\_\_\_   
Defendant: First Act Inc.

15 Date: October 3, 2013

Date: October \_\_, 2013

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1 together to file a reply and appear at any hearing before the Court. This provision is a material  
2 component of the Consent Judgment and shall be treated as such in the 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.

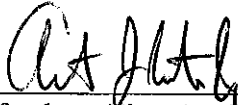
7 **13. AUTHORIZATION**

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 AGREED TO:

AGREED TO:

12  
13 \_\_\_\_\_  
14 Plaintiff Laurence Vinocur

  
15 \_\_\_\_\_  
16 Defendant: First Act Inc.

15 Date: September \_\_, 2013

15 Date: ~~September \_\_, 2013~~  
16 *October 3, 2013*

EXHIBIT A

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I. Name of Settling Defendant (Mandatory)

First Act, Inc.

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

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

- Foam-cushioned pads for children and infants to lie on, such as rest mats
- Upholstered furniture
- Foam-filled mattresses, mattress toppers, pillows, cushions, travel beds
- Car seats, strollers
- Other (specify): Padded Upholstered Drum Seats containing TDCPP and TCEP

IV. Types of Additional Products First Act Inc. Elects to Address (if any):

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V. First Act Inc.'s Required Settlement Payments

- A. Civil Penalties for First Act Inc.: \$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).

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

A. Fees and Costs for First Act Inc.: \$48,000.

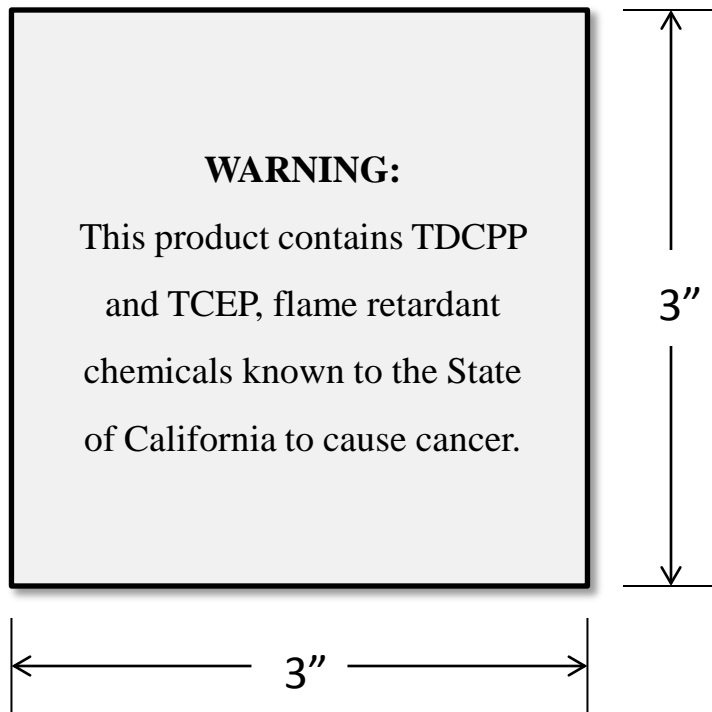
VII. Person(s) to receive Notices pursuant to Section 8

Alex Behrakis  
IP Counsel  
First Act, Inc.  
745 Boylston Street  
Boston, MA 02116

Bruce Nye  
Adams Nye Becht LLP  
222 Kearny Street, 7<sup>th</sup> Floor  
San Francisco, CA 94108-4521

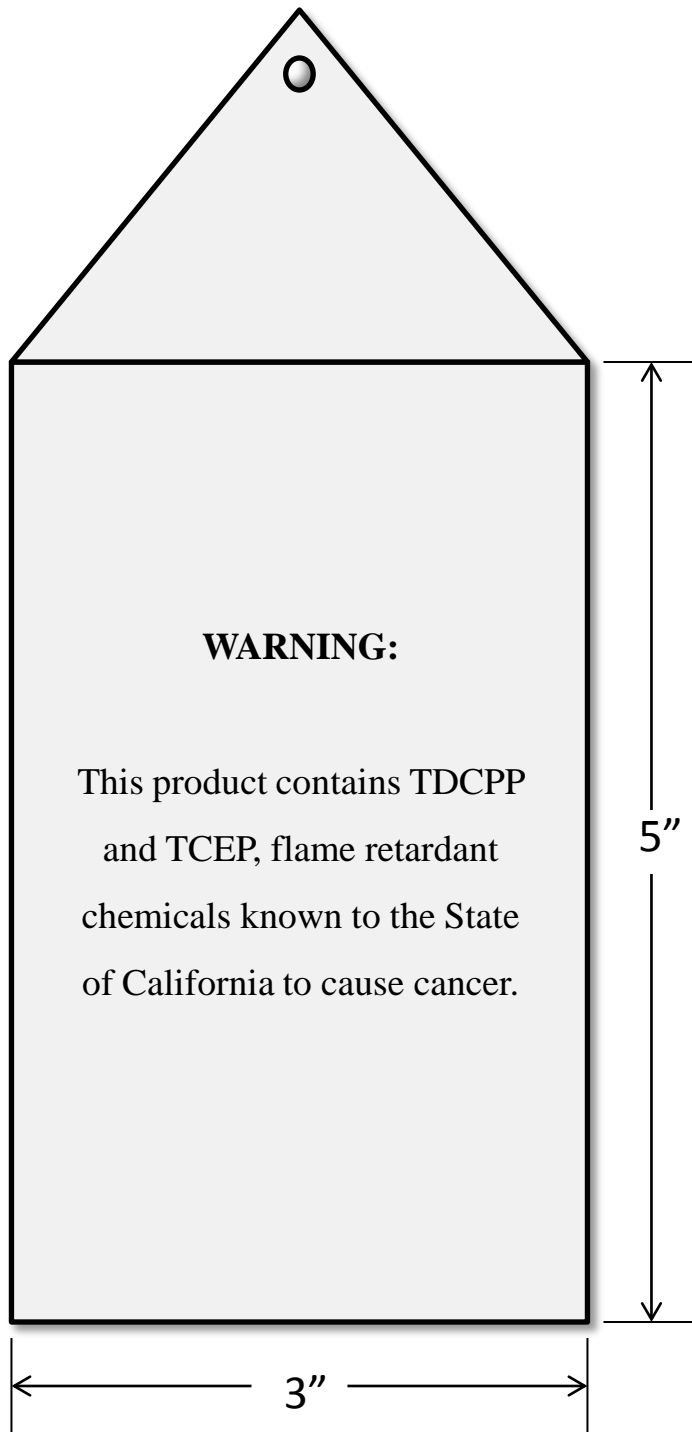
EXHIBIT B  
(ILLUSTRATIVE WARNINGS)

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



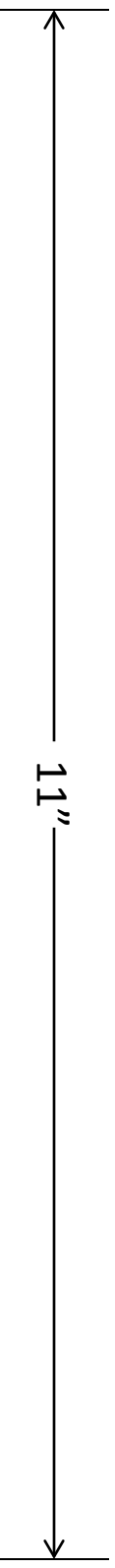


**INSTRUCTIONS:** Print warning on each side of hang tag.  
Minimum 12 pt. font. “WARNING:” text must be bold.

**WARNING:**

This product contains TDCPP 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.