

1 Gregory M. Sheffer, State Bar No. 173124
THE CHANLER GROUP
2 81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941
3 Telephone: 415.388.0911
Facsimile: 415.388.9911

4 Attorneys for Plaintiff
5 PETER ENGLANDER

FILED BY FAX
ALAMEDA COUNTY
April 10, 2013
CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:
RG13673678

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

11 PETER ENGLANDER,

12 Plaintiff,

13 vs.

14 ACME FURNITURE INDUSTRY, INC.,
15 BASSETT FURNITURE INDUSTRIES,
INCORPORATED, BEST CHAIRS
16 INCORPORATED, BUTLER SPECIALTY
COMPANY, COA, INC., FOREMOST
17 GROUPS, INC., IDEA NUOVA INC.,
MINSON CORPORATION, NAJARIAN
18 FURNITURE COMPANY, INC., P'KOLINO,
LLC, THE TJX COMPANIES, INC. and DOES
1-150,

19 Defendants.

Case No. RG13676378

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

NATURE OF THE ACTION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. This Complaint is a representative action brought by plaintiff PETER ENGLANDER, in the public interest of the citizens of the State of California, to enforce the People’s right to be informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”) found in and on certain furniture products manufactured, distributed and/or otherwise sold by Defendants in California.

2. By this Complaint, Plaintiffs seek to remedy Defendants’ continuing failures to warn California citizens about the risks of exposures to TDCPP present in and on the products manufactured, distributed, sold, and offered for sale or use to consumers throughout the State of California.

3. TDCPP is a toxic chemical that is used to treat the polyurethane foam used as padding or cushioning in a variety of Defendants’ furniture products. Detectable levels of TDCPP have been found and are commonly found in and on the products that Defendants manufacture, distribute, sell, and offer for sale to California consumers, many of whom are infants and children. Individuals in California, including infants and children, are exposed to TDCPP in the products through inhalation, dermal absorption and ingestion. California consumers of Defendants’ products inhale airborne TDCPP released from padded upholstered furniture and ingest TDCPP from touching dust or other surfaces to which the chemical released from padded upholstered furniture has adhered or adsorbed and then transferring such dust, either directly or indirectly, to their mouths. California consumers of Defendants’ products also absorb TDCPP that comes into contact with exposed skin surfaces.

4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. . . .” (*Cal. Health & Safety Code* § 25249.6.)

5. TDCPP has been used in consumer products as an additive flame retardant since the 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic

1 effects, the United States Consumer Product Safety Commission banned the use of TDCPP in
2 children’s pajamas. Pursuant to Proposition 65, on October 28, 2011, California identified and
3 listed TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
4 reasonable warning” requirements of the Act one year later on October 28, 2012. (Cal. Code
5 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

6 6. Defendants cause products containing TDCPP to be sold in California as follows:

7 a. Defendant Acme Furniture Industry, Inc. manufactures, causes to be
8 manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
9 and/or otherwise offers for sale in California padded, upholstered furniture, including
10 ottomans, with foam padding containing TDCPP. Defendant Acme Furniture Industry, Inc.
11 also manufactures, causes to be manufactured, distributes, causes to be distributed, imports,
12 causes to be imported, sells and/or otherwise offers for sale in California the LLAN Orange
13 Finish Youth Ottoman, Item No. 96119, with foam padding containing TDCPP.

14 b. Defendant Bassett Furniture Industries, Incorporated manufactures, causes to
15 be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
16 and/or otherwise offers for sale in California padded, upholstered ottomans with foam
17 padding containing TDCPP. Defendant Bassett Furniture Industries, Incorporated also
18 manufactures, causes to be manufactured, distributes, causes to be distributed, imports,
19 causes to be imported, sells and/or otherwise offers for sale in California the Bassett Baby
20 Premier Ottoman, Item #1062-01, with foam padding containing TDCPP.

21 c. Defendant Best Chairs Incorporated manufactures, causes to be
22 manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
23 and/or otherwise offers for sale in California padded, upholstered furniture, including
24 ottomans, with foam padding containing TDCPP. Defendant Best Chairs Incorporated also
25 manufactures, causes to be manufactured, distributes, causes to be distributed, imports,
26 causes to be imported, sells and/or otherwise offers for sale in California the Storytime
27 Series Ottoman, Item #0036, with foam padding containing TDCPP.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

d. Defendant Butler Specialty Company manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California padded, upholstered furniture, including ottomans, with foam padding containing TDCPP. Defendant Butler Specialty Company also manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California the Bunching Cocktail Ottoman, Item #240683, with foam padding containing TDCPP.

e. Defendant COA, Inc. manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California padded, upholstered furniture, including stools, with foam padding containing TDCPP. Defendant COA, Inc. also manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California the Coaster Fine Furniture Bar Stool, Item #122010, with foam padding containing TDCPP.

f. Defendant Foremost Groups, Inc. manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California padded, upholstered furniture, including ottomans, with foam padding containing TDCPP. Defendant Foremost Groups, Inc. also manufactures, causes to be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in California the Room Essentials Storage Ottoman, Item #0321, with foam padding containing TDCPP.

g. Defendants Idea Nuova Inc. and The TJX Companies, Inc. manufacture, cause to be manufactured, distribute, cause to be distributed, import, cause to be imported, sell and/or otherwise offer for sale in California padded, upholstered furniture, including ottomans, with foam padding containing TDCPP. Defendants Idea Nuova Inc. and The TJX Companies, Inc. manufacture, cause to be manufactured, distribute, cause to be distributed, import, cause to be imported, sell and/or otherwise offer for sale in California the Storehouse Eyelet Ottoman (05121474769) with foam padding containing TDCPP.

1 h. Defendant Minson Corporation manufactures, causes to be manufactured,
2 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise
3 offers for sale in California padded, upholstered furniture, including chairs, with foam
4 padding containing TDCPP. Defendant Minson Corporation also manufactures, causes to
5 be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
6 and/or otherwise offers for sale in California the Pastel Furniture Classics Chair (MR110),
7 with foam padding containing TDCPP.

8 i. Defendant Najarian Furniture Company, Inc. manufactures, causes to be
9 manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
10 and/or otherwise offers for sale in California padded, upholstered furniture, including
11 chairs, with foam padding containing TDCPP. Defendant Najarian Furniture Company, Inc.
12 also manufactures, causes to be manufactured, distributes, causes to be distributed, imports,
13 causes to be imported, sells and/or otherwise offers for sale in California the Malibu 2 Arm
14 Chairs + Table set, with foam padding containing TDCPP.

15 j. Defendant P'Kolino, LLC manufactures, causes to be manufactured,
16 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise
17 offers for sale in California padded, upholstered furniture, including children's chairs, with
18 foam padding containing TDCPP. Defendant P'Kolino, LLC also manufactures, causes to be
19 manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
20 and/or otherwise offers for sale in California the P'Kolino Little Reader Chair, Item
21 PKFFNLRBR, with foam padding containing TDCPP.

22 7. All such padded, upholstered furniture, including ottomans, stool and chairs, made
23 with foam padding or cushion materials containing TDCPP and identified in paragraphs 6(a)
24 through 6(g) above, shall hereinafter be referred to as "PRODUCTS." However, as to each
25 defendant, PRODUCTS shall only mean or reference only those specific products or types of
26 products listed for each specific defendant in paragraphs 6(a) through 6(g).

27 8. Although Defendants expose infants, children, and other California consumers to
28 TDCPP through the reasonably foreseeable use of the PRODUCTS, Defendants provide no

1 warnings about the carcinogenic hazards associated with these TDCPP exposures. Defendants'
2 failure to warn consumers and/or other individuals in the State of California about their
3 exposures to TDCPP in conjunction with defendants' sale of the PRODUCTS is a violation of
4 Proposition 65.

5 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
6 permanent injunctive relief to compel defendants to provide purchasers or users of any and all of
7 the PRODUCTS with the required warning regarding the health hazards of TDCPP in the
8 PRODUCTS. (*Cal. Health & Safety Code § 25249.7(a).*)

9 10. Plaintiff also seeks civil penalties against defendants for their violations of
10 Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

11 **PARTIES**

12 11. Plaintiff PETER ENGLANDER is a citizen of the State of California who is
13 experienced in protecting the health of California citizens through the elimination or reduction of
14 toxic exposures from consumer products, and brings this action in the public interest pursuant to
15 California Health & Safety Code Section 25249.7.

16 12. Each defendant Acme Furniture Industry, Inc. ("ACME"), Bassett Furniture
17 Industries, Incorporated ("BASSETT"), Best Chairs Incorporated ("BEST CHAIRS"), Butler
18 Specialty Company ("BUTLER"), CAO, Inc. ("COA"), Foremost Groups, Inc. ("FOREMOST"), Idea
19 Nuova Inc. ("NUOVA"), Minson Corporation ("MINSON"), Najarian Furniture Company, Inc.
20 ("NAJARIAN"), P'Kolino, LLC ("P'KOLINO") and The TJX Companies, Inc. ("TJX") is a person
21 doing business within the meaning of California Health & Safety Code Section 25249.11.

22 13. Each defendant ACME, BASSETT, BEST CHAIRS, BUTLER, COA, FOREMOST,
23 NUOVA, MINSON, NAJARIAN, P'KOLINO and TJX manufactures, causes to be manufactured,
24 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers
25 for sale or use in California the PRODUCTS or implies by its conduct that it does so.

26 14. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
27 doing business within the meaning of California Health & Safety Code Section 25249.11.
28 MANUFACTURER DEFENDANTS engage in the process of research, testing, designing,

1 assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the
2 process of research, testing, designing, assembling, fabricating, and/or manufacturing, one or
3 more of the PRODUCTS for sale or use in the State of California.

4 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons doing
5 business within the meaning of California Health & Safety Code Section 25249.11. DISTRIBUTOR
6 DEFENDANTS distribute, exchange, transfer, process and/or transport one or more of the
7 PRODUCTS to individuals, businesses or retailers for sale or use in the State of California.

8 16. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
9 business within the meaning of California Health & Safety Code Section 25249.11. RETAIL
10 DEFENDANTS offer the PRODUCTS for sale to individuals in the State of California.

11 17. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
12 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
13 Code of Civil Procedure Section 474. Plaintiff is informed and believes, and on that basis alleges,
14 that each of the fictitiously named defendants is responsible for the acts and occurrences herein
15 alleged. When ascertained, their true names shall be reflected in an amended complaint.

16 18. ACME, BASSETT, BEST CHAIRS, BUTLER, COA, FOREMOST, NUOVA, MINSON,
17 NAJARIAN, P’KOLINO, TJX, MANUFACTURER DEFENDANTS, DISTRIBUTOR
18 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred to
19 hereinafter as “DEFENDANTS”.

20 **VENUE AND JURISDICTION**

21 19. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
22 Procedure Sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
23 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
24 wrongful conduct occurred, and continues to occur, in this County and/or because
25 DEFENDANTS conducted, and continue to conduct, business in this County with respect to the
26 PRODUCTS.

27 20. The California Superior Court has jurisdiction over this action pursuant to California
28 Constitution Article VI, Section 10, which grants the Superior Court “original jurisdiction in all

1 causes except those given by statute to other trial courts.” The statute under which this action is
2 brought does not specify any other basis of subject matter jurisdiction.

3 21. The California Superior Court has jurisdiction over DEFENDANTS based on
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
5 association that either is a citizen of the State of California and has sufficient minimum contacts in
6 the State of California, or otherwise purposefully avails them self of the California market.
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
8 courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

10 **(Violation of Proposition 65 - Against All Defendants)**

11 22. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 21, inclusive.

13 23. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
14 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be informed
15 about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.”

16 24. Proposition 65 states, “[n]o person in the course of doing business shall knowingly
17 and intentionally expose any individual to a chemical known to the state to cause cancer or
18 reproductive toxicity without first giving clear and reasonable warning to such individual”
19 (Health & Safety Code § 25249.6.)

20 25. On January 4, 2013, ENGLANDER served a sixty-day notice of violation (“60-Day
21 Notice”), supported by the requisite Certificate of Merit, upon COA, FOREMOST, P’KOLINO and
22 various public enforcement agencies stating that as a result of the such defendants’ sales of the
23 PRODUCTS, purchasers and users in the State of California are being exposed to TDCPP resulting
24 from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
25 users first having been provided with a “clear and reasonable warning” regarding such toxic
26 exposures.

27 26. On January 10, 2013, ENGLANDER served a 60-Day Notice, supported by the
28 requisite Certificate of Merit, upon BASSETT, BUTLER, NUOVA, NAJARIAN, TJX and various

1 public enforcement agencies stating that as a result of the such defendants' sales of the
2 PRODUCTS, purchasers and users in the State of California are being exposed to TDCPP resulting
3 from the reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
4 users first having been provided with a "clear and reasonable warning" regarding such toxic
5 exposures.

6 27. On January 24, 2013, ENGLANDER served a 60-Day Notice, supported by the
7 requisite Certificate of Merit, upon BEST CHAIRS, MINSON and various public enforcement
8 agencies stating that as a result of the such defendants' sales of the PRODUCTS, purchasers and
9 users in the State of California are being exposed to TDCPP resulting from the reasonably
10 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been
11 provided with a "clear and reasonable warning" regarding such toxic exposures.

12 28. On January 30, 2013, ENGLANDER served a 60-Day Notice, supported by the
13 requisite Certificate of Merit, upon ACME and various public enforcement agencies stating that as
14 a result of the such defendants' sales of the PRODUCTS, purchasers and users in the State of
15 California are being exposed to TDCPP resulting from the reasonably foreseeable uses of the
16 PRODUCTS, without the individual purchasers and users first having been provided with a "clear
17 and reasonable warning" regarding such toxic exposures.

18 29. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
19 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and
20 plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or offering
21 of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
22 has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice. Plaintiff
23 further alleges and believes that such violations are reasonably likely to occur into the future
24 absent express injunctive relief.

25 30. After receipt of the claims asserted in the 60-Day Notice, the appropriate public
26 enforcement agencies have failed to commence and diligently prosecute a cause of action against
27 DEFENDANTS under Proposition 65.

28

1 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
2 California by DEFENDANTS contain TDCPP.

3 32. DEFENDANTS knew or should have known that the PRODUCTS contain TDCPP.

4 33. TDCPP is present in or on each of the PRODUCTS in such a way as to expose (as
5 such exposure is defined by 27 CCR Section 25602(b)) individuals to TDCPP through dermal
6 contact, inhalation and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

7 34. DEFENDANTS knew or should have known that the reasonably foreseeable use of
8 the PRODUCTS exposes individuals to TDCPP through dermal contact, inhalation and/or
9 ingestion.

10 35. DEFENDANTS' participation in the manufacture, distribution and/or offer for sale
11 or use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.

12 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
13 consumers and/or other individuals in the State of California who were or who could become
14 exposed to TDCPP during the reasonably foreseeable use of the PRODUCTS.

15 37. Contrary to the express policy and statutory prohibition of Proposition 65,
16 individuals exposed to the TDCPP through dermal contact, inhalation and/or ingestion resulting
17 from the reasonably foreseeable use of the PRODUCTS, sold by DEFENDANTS without a "clear
18 and reasonable warning", have suffered, and continue to suffer, irreparable harm, for which harm
19 they have no other plain, speedy or adequate remedy at law.

20 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
21 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to
22 California Health & Safety Code Section 25249.7(b).

23 39. As a consequence of the above-described acts, California Health & Safety Code
24 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
25 DEFENDANTS.

26 **PRAYER FOR RELIEF**

27 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
28 follows:

1 1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),
2 assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
3 alleged herein;

4 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
5 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
6 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
7 warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to the
8 TDCPP;

9 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

10 4. That the Court grant such other and further relief as may be just and proper.

11 Dated: April 10, 2013

Respectfully submitted,

12 THE CHANLER GROUP

13
14 By: 

15 Gregory M. Sheffer
16 Attorneys for Plaintiff
17 PETER ENGLANDER
18
19
20
21
22
23
24
25
26
27
28