

ENDORSED
FILED
ALAMEDA COUNTY

2013 MAY 16 PM 1:50

CLERK OF THE SUPERIOR COURT
M. SALCIDO, DEPUTY

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

Clifford A. Chanler, State Bar No. 135534
Laralei S. Paras, State Bar No. 203319
Josh Voorhees, State Bar No. 241436
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118

Attorneys for Plaintiff
LAURENCE VINOCUR

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RG13679859

LAURENCE VINOCUR,
Plaintiff,
v.
MASTER MFG. COMPANY, INC.;
OFFICEMAX INCORPORATED; and DOES
1-150, inclusive,
Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code. § 25249.6, *et seq.*)

BY FAX

NATURE OF THE ACTION

1
2 1. This Complaint is a representative action brought by plaintiff LAURENCE
3 VINOCUR in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), a toxic
5 chemical found in foam used in seat cushions, bedding and furniture sold in the State of California.
6 TDCPP is a toxic chemical that is used to treat polyurethane foam, which is used as padding or
7 cushioning in a variety of products.

8 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to warn
9 California citizens about the risks of exposures to TDCPP present in and on separately sold seat
10 cushions manufactured, distributed, sold, and offered for sale or use to consumers throughout the
11 State of California.

12 3. Detectable levels of TDCPP are commonly found in and on separately sold seat
13 cushions that defendants manufacture, distribute, and offer for sale to consumers throughout the
14 State of California. Individuals in California, including infants and children, are exposed to TDCPP
15 in the products through various routes of exposure: (i) through inhalation when TDCPP is released
16 from the foam component of the separately sold seat cushions; (ii) through dermal exposure when
17 TDCPP in the foam component of the separately sold seat cushions accumulates in ambient
18 particles that are subsequently touched by such individuals; and (iii) through ingestion when such
19 particles are brought into contact with the mouth.

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

25 ///

26 ///

27 ///

28 ///

1 5. TDCPP has been used in consumer products as an additive flame retardant since the
2 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic effects,
3 the United States Consumer Product Safety Commission banned the use of TDCPP in children's
4 pajamas.

5 6. Pursuant to Proposition 65, on October 28, 2011, California identified and listed
6 TDCPP as a chemical known to cause cancer. TDCPP became subject to the "clear and reasonable
7 warning" requirements of the Act one year later on October 28, 2012. (Cal. Code Regs. tit. 27, §
8 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

9 7. Defendants manufacture, distribute, import, sell and/or offer for sale in the State of
10 California separately sold seat cushions that contain TDCPP without a warning including, but not
11 limited to, the *Deluxe Self-Adjustable Seat/Back Cushion with Memory Foam (#0 34238 91061 9)*.
12 All separately sold seat cushions containing TDCPP are hereinafter collectively referred to as the
13 "PRODUCTS."

14 8. Although defendants expose infants, children, and other people to TDCPP in the
15 PRODUCTS, defendants provide no warnings about the carcinogenic hazards associated with these
16 exposures. Defendants' failures to warn consumers and other individuals in the State of California
17 about their exposures to TDCPP in conjunction with defendants' sales of the PRODUCTS is a
18 violation of Proposition 65, and subjects defendants to enjoinder of such conduct as well as civil
19 penalties for each violation. (Health & Safety Code § 25249.7(a) & (b)(1).)

20 9. As a result of defendants' violations of Proposition 65, plaintiff seeks preliminary and
21 permanent injunctive relief to compel defendants to provide purchasers or users of the PRODUCTS
22 with the required warning regarding the health hazards of TDCPP. (Health & Safety Code §
23 25249.7(a).)

24 10. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
25 penalties against defendants for their violations of Proposition 65.

26 ///

27 ///

28 ///

PARTIES

1
2 11. Plaintiff LAURENCE VINO CUR is a citizen of the State of California who is
3 dedicated to protecting the health of California citizens through the elimination or reduction of toxic
4 exposures from consumer products and he brings this action in the public interest pursuant to
5 Health and Safety Code section 25249.7(d).

6 12. Defendant Master Mfg. Company, Inc. (“MASTER”) is a person in the course of
7 doing business within the meaning of Health and Safety Code section 25249.11.

8 13. MASTER manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
9 sale or use in the State of California, or implies by its conduct that it manufactures, imports,
10 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

11 14. Defendant Officemax Incorporated (“OFFICEMAX”) is a person in the course of
12 doing business within the meaning of Health and Safety Code section 25249.11.

13 15. OFFICEMAX manufactures, imports, distributes, sells, and/or offers the PRODUCTS
14 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
15 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

16 16. Defendant DOES 1-150 are each persons in the course of doing business within the
17 meaning of Health and Safety Code Section 25249.11(b), that manufacture, distribute, sell, and/or
18 offer the PRODUCTS for sale in the State of California. At this time, the true names and capacities
19 of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said
20 defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff is
21 informed and believes, and on that basis alleges, that each of the fictitiously named defendants is
22 responsible for the acts and occurrences alleged herein. When ascertained, their true names and
23 capacities shall be reflected in an amended complaint.

24 17. MASTER, OFFICEMAX, and Defendants DOES 1-150 are collectively referred to
25 herein as “DEFENDANTS.”

26 ///

27 ///

28 ///

1 VENUE AND JURISDICTION

2 18. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
3 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
5 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
6 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
7 PRODUCTS.

8 19. The California Superior Court has jurisdiction over this action pursuant to California
9 Constitution Article VI, Section 10, which grants the Superior Court “original jurisdiction in all
10 causes except those given by statute to other trial courts.” The statute under which this action is
11 brought does not specify any other basis of subject matter jurisdiction.

12 20. The California Superior Court has jurisdiction over DEFENDANTS based on
13 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
14 association that is a citizen of the State of California, has sufficient minimum contacts in the State
15 of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS’
16 purposeful availment of California as a marketplace for the PRODUCTS renders the exercise of
17 personal jurisdiction by California courts over DEFENDANTS consistent with traditional notions
18 of fair play and substantial justice.

19 FIRST CAUSE OF ACTION

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

21 21. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
22 Paragraphs 1 through 20, inclusive.

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

26 ///

27 ///

28 ///

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

5 24. On December 28, 2012, plaintiff’s 60-Day Notice of Violation (the “Notice”),
6 together with the requisite certificate of merit, was provided to MASTER, OFFICEMAX and
7 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
8 PRODUCTS containing TDCPP, purchasers and users in the State of California were being
9 exposed to TDCPP resulting from their reasonably foreseeable uses of the PRODUCTS, without the
10 individual purchasers and users first having been provided with a “clear and reasonable warning”
11 regarding such toxic exposures, as required by Proposition 65.

12 25. DEFENDANTS have engaged in the manufacture, importation, distribution, sale, and
13 offering of the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6,
14 and DEFENDANTS’ violations have continued to occur beyond their receipt of plaintiff’s Notice.
15 As such, DEFENDANTS’ violations are ongoing and continuous in nature, and will continue to
16 occur in the future.

17 26. After receiving plaintiff’s Notice, the appropriate public enforcement agencies have
18 failed to commence and diligently prosecute a cause of action against DEFENDANTS under
19 Proposition 65.

20 27. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale or
21 use in the State of California by DEFENDANTS contain TDCPP such that they require a “clear and
22 reasonable” warning under Proposition 65.

23 28. DEFENDANTS knew or should have known that the PRODUCTS they manufacture,
24 import, distribute, sell, and offer for sale or use in the State of California contain TDCPP.

25 29. TDCPP is present in or on the PRODUCTS in such a way as to expose individuals to
26 TDCPP through dermal contact, ingestion, and/or inhalation during reasonably foreseeable uses of
27 the PRODUCTS.

28 ///

1 30. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
2 continue to cause, consumer exposures and workplace exposures to TDCPP, as such exposures are
3 defined by Title 27 of the California Code of Regulations, section 25602(b).

4 31. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses of
5 the PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or inhalation.

6 32. DEFENDANTS intended that such exposures to TDCPP from the reasonably
7 foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate, non-accidental
8 participation in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for
9 sale or use to individuals in the State of California.

10 33. DEFENDANTS failed to provide a "clear and reasonable warning" to those
11 consumers and other individuals in the State of California who were or who would become exposed
12 to TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably foreseeable
13 uses of the PRODUCTS.

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

19 35. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
20 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for
21 each violation.

22 36. As a consequence of the above-described acts, Health and Safety Code
23 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
24 DEFENDANTS.

25 ///
26 ///
27 ///
28 ///

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

PRAYER FOR RELIEF

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

1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in the State of California without first providing a “clear and reasonable warning” as defined by Title 27 of the California Code of Regulations, section 25601 *et seq.*, as to the harms associated with exposures TDCPP;
3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
4. That the Court grant such other and further relief as may be just and proper.

Dated: May 16, 2013

THE CHANLER GROUP

By: 
Laralee S. Paras
Attorneys for Plaintiff
LAURENCE VINOCUR