

**ENDORSED
FILED
ALAMEDA COUNTY**

OCT 18 2013

**CLERK OF THE SUPERIOR COURT
By CHERYL CLARK Deputy**

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 LAURENCE VINOCUR

6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF ALAMEDA
9 UNLIMITED CIVIL JURISDICTION

10
11 LAURENCE VINOCUR,

12 Plaintiff,

13 vs.

14 ACE BAYOU CORP., MARCO GROUP, INC.,
MECO CORPORATION, MICHAELS
15 STORES, INC., OFFICE DEPOT, INC., THE
FAIRFIELD PROCESSING CORPORATION,
16 UNAKA COMPANY, INCORPORATED and
DOES 1-150,

17 Defendants.

Case No. RG13673697

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

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

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

1 NATURE OF THE ACTION

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”) and di(2-
5 ethylhexyl)phthalate (“DEHP”) found in and on certain furniture products manufactured,
6 distributed and/or otherwise sold by Defendants in California.

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

11 3. TDCPP is a toxic chemical that is used to treat the polyurethane foam used as
12 padding or cushioning in a variety of Defendants’ furniture products. DEHP is a toxic chemical
13 often used as an agent in plastic, vinyl and PVC to make the material pliable. Detectable levels of
14 TDCPP and DEHP have been found and are commonly found in and on the products that
15 Defendants manufacture, distribute, sell, and offer for sale to California consumers, many of
16 whom are infants and children. Individuals in California, including infants and children, are
17 exposed to TDCPP in the products through inhalation, dermal absorption and ingestion.
18 California consumers of Defendants’ products inhale airborne TDCPP released from padded
19 upholstered furniture and ingest TDCPP from touching dust or other surfaces to which the
20 chemical released from padded upholstered furniture has adhered or adsorbed and then
21 transferring such dust, either directly or indirectly, to their mouths. California consumers of
22 Defendants’ products also absorb TDCPP that comes into contact with exposed skin surfaces.
23 Individuals in California, including infants and children, are exposed to DEHP in the products
24 through dermal absorption and ingestion. California consumers of Defendants’ products absorb
25 and/or ingest DEHP from touching the surface of DEHP-containing materials and then
26 transferring such dislodged DEHP, either directly or indirectly, to their mouths.

27 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
28 California Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the

1 course of doing business shall knowingly and intentionally expose any individual to a chemical
2 known to the state to cause cancer or reproductive toxicity without first giving clear and
3 reasonable warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

4 5. Pursuant to Proposition 65, on October 28, 2011, California identified and listed
5 TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and
6 reasonable warning” requirements of the Act one year later on October 28, 2012. (*Cal. Code*
7 *Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).*) Pursuant to
8 Proposition 65, on October 24, 2003, the State listed Di(2-ethylhexyl)phthalate as a chemical
9 known to cause birth defects and other reproductive harm. DEHP became subject to the
10 warning requirement one year later and was therefore subject to the “clear and reasonable
11 warning” requirements of Proposition 65, beginning on October 24, 2004. (*Cal. Code Regs., Tit.*
12 *27, § 27001(c); Health & Safety Code §§ 25249.8 and 25249.10(b).*)

13 6. Defendants cause products containing TDCPP and DEHP to be sold in California as
14 follows:

15 a. Defendant Ace Bayou Corp. 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 gaming chairs, with
18 foam padding containing TDCPP. Defendant Ace Bayou Corp. also manufactures, causes to
19 be manufactured, distributes, causes to be distributed, imports, causes to be imported, sells
20 and/or otherwise offers for sale in California the Original Xrock CO. Extreme 2.0 Sound
21 Gaming Chair, Style #5147401, with foam padding containing TDCPP.

22 b. Defendants Marco Group, Inc. and Office Depot, Inc. each manufactures,
23 causes to be manufactured, distributes, causes to be distributed, imports, causes to be
24 imported, sells and/or otherwise offers for sale in California padded, upholstered furniture,
25 including office/stacking chairs, with foam padding containing TDCPP. Defendants Marco
26 Group, Inc. and Office Depot, Inc. each also manufactures, causes to be manufactured,
27 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise
28

1 offers for sale in California the Office-Stor Plus Commercial Stacking Chair, Item 543-564, ,
2 with foam padding containing TDCPP.

3 c. Defendant Office Depot, Inc. manufactures, causes to be manufactured,
4 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise
5 offers for sale in California padded, upholstered furniture, including office/ task chairs, with
6 foam padding containing TDCPP. Defendant Office Depot, Inc. also manufactures, causes
7 to be manufactured, distributes, causes to be distributed, imports, causes to be imported,
8 sells and/or otherwise offers for sale in California the Alvy Task Chair, Item #715-010, with
9 foam padding containing TDCPP.

10 d. Defendants The Fairfield Processing Corporation and Michaels Stores, Inc.
11 each manufactures, causes to be manufactured, distributes, causes to be distributed,
12 imports, causes to be imported, sells and/or otherwise offers for sale in California foam
13 containing TDCPP. Defendants The Fairfield Processing Corporation and Michaels Stores,
14 Inc. each also manufactures, causes to be manufactured, distributes, causes to be distributed,
15 imports, causes to be imported, sells and/or otherwise offers for sale in California the Poly-
16 Fil Tru-Foam Bio-Based Foam Roll, Item TF24721 containing TDCPP.

17 e. Defendants Unaka Company, Incorporated, Meco Corporation and Office
18 Depot, Inc. each manufactures, causes to be manufactured, distributes, causes to be
19 distributed, imports, causes to be imported, sells and/or otherwise offers for sale in
20 California chairs with padded seats and foam padding containing TDCPP. Defendants
21 Unaka Company, Incorporated and Meco Corporation each 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 chairs with vinyl/PVC upholstery or fabric
24 covering containing DEHP. Defendants Unaka Company, Incorporated, Meco Corporation
25 and Office Depot, Inc. each also manufactures, causes to be manufactured, distributes,
26 causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for
27 sale in California the Sudden Comfort by Meco chair, WS01C4S021, with foam padding
28 containing TDCPP and vinyl/PVC upholstery or fabric covering containing DEHP..

1 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
2 wrongful conduct occurred, and continues to occur, in this County and/or because
3 DEFENDANTS conducted, and continue to conduct, business in this County with respect to the
4 PRODUCTS.

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

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

15 **FIRST CAUSE OF ACTION**

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

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

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

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

26 25. On December 28, 2012, VINO CUR served a sixty-day notice of violation (“60-Day
27 Notice”), supported by the requisite Certificate of Merit, upon ACE and various public
28 enforcement agencies stating that as a result of the such defendants’ sales of the PRODUCTS,

1 purchasers and users in the State of California are being exposed to TDCPP resulting from the
2 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
3 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

4 26. On January 2, 2013, VINOCUR served a 60-Day Notice, supported by the requisite
5 Certificate of Merit, upon MARCO, OFFICE DEPOT and various public enforcement agencies
6 stating that as a result of the such defendants’ sales of the PRODUCTS, purchasers and users in the
7 State of California are being exposed to TDCPP resulting from the reasonably foreseeable uses of
8 the PRODUCTS, without the individual purchasers and users first having been provided with a
9 “clear and reasonable warning” regarding such toxic exposures.

10 27. On January 8, 2013, VINOCUR served a 60-Day Notice, supported by the requisite
11 Certificate of Merit, upon UNAKA, MECO, OFFICE DEPOT and various public enforcement
12 agencies stating that as a result of the such defendants’ sales of the PRODUCTS, purchasers and
13 users in the State of California are being exposed to TDCPP resulting from the reasonably
14 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been
15 provided with a “clear and reasonable warning” regarding such toxic exposures.

16 28. On January 30, 2013, VINOCUR served a 60-Day Notice, supported by the requisite
17 Certificate of Merit, upon FAIRFIELD, MICHAELS and various public enforcement agencies
18 stating that as a result of the such defendants’ sales of the PRODUCTS, purchasers and users in the
19 State of California are being exposed to TDCPP resulting from the reasonably foreseeable uses of
20 the PRODUCTS, without the individual purchasers and users first having been provided with a
21 “clear and reasonable warning” regarding such toxic exposures.

22 29. On March 20, 2013, VINOCUR served a compliant Supplemental 60-Day Notice,
23 supported by the requisite Certificate of Merit, upon ACE and various public enforcement
24 agencies stating that as a result of the such defendants’ sales of the PRODUCTS, purchasers and
25 users in the State of California are being exposed to TDCPP resulting from the reasonably
26 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having been
27 provided with a “clear and reasonable warning” regarding such toxic exposures.

28

1 30. On April 11, 2013, VINO CUR served a compliant Supplemental 60-Day Notice,
2 supported by the requisite Certificate of Merit, upon MECO and UNAKA and various public
3 enforcement agencies stating that as a result of the such defendants' sales of the PRODUCTS,
4 purchasers and users in the State of California are being exposed to DEHP resulting from the
5 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
6 having been provided with a "clear and reasonable warning" regarding such toxic exposures.

7
8 31. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
9 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and
10 plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or offering
11 of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
12 has continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notices and
13 Supplemental 60-Day Notices. Plaintiff further alleges and believes that such violations are
14 reasonably likely to occur into the future absent express injunctive relief.

15 32. After receipt of the claims asserted in the 60-Day Notices and Supplemental 60-Day
16 Notices, the appropriate public enforcement agencies have failed to commence and diligently
17 prosecute a cause of action against DEFENDANTS under Proposition 65.

18 33. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
19 California by DEFENDANTS contain TDCPP and DEHP.

20 34. DEFENDANTS knew or should have known that the PRODUCTS contain TDCPP
21 and DEHP.

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

26 36. DEFENDANTS knew or should have known that the reasonably foreseeable use of
27 the PRODUCTS exposes individuals to TDCPP and DEHP through dermal contact, inhalation
28 and/or ingestion.

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

3 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
4 consumers and/or other individuals in the State of California who were or who could become
5 exposed to TDCPP and DEHP during the reasonably foreseeable use of the PRODUCTS.

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

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

14 41. As a consequence of the above-described acts, California Health & Safety Code
15 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
16 DEFENDANTS.

17 **PRAYER FOR RELIEF**

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

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

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

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

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

2 Dated: October 16, 2013

Respectfully submitted,

3 THE CHANLER GROUP

4
5 By: 
6 Gregory M. Sheffer
7 Attorneys for Plaintiff
8 LAURENCE VINOUCUR

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