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11
12

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF ALAMEDA
15

16 CENTER FOR ENVIRONMENTAL HEALTH,)
17 a non-profit corporation,)

18 Plaintiff,)

19 v.)

20 AMERIWOOD INDUSTRIES, INC.; DOREL)
ASIA INC.; DOREL INDUSTRIES INC.;)
21 DOREL JUVENILE GROUP, INC.; and DOES)
1 through 700, inclusive,)

22 Defendants.)
23

Case No. RG-13673582

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

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

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This First Amended Complaint seeks to remedy Defendants' continuing
6 failure to warn individuals in California that they are being exposed to several toxic chemicals –
7 tris(1,3-dichloro-2-propyl) phosphate ("TDCPP") and/or lead and lead compounds (collectively,
8 "Lead") – found in certain consumer products manufactured, distributed, and/or sold by
9 Defendants. TDCPP is a chemical known to the State of California to cause cancer. Lead is a
10 chemical known to the State of California to cause both cancer and birth defects or other
11 reproductive harm.

12 2. TDCPP is used to treat polyurethane foam, which is used as padding or
13 cushioning in a variety of products, including (i) foam-cushioned upholstered furniture, such as
14 chairs, ottomans, sofas, recliners, and futons ("Foam-Cushioned Furniture"); and (ii)
15 foam-cushioned pads for infants and children to lie on, such as infant walkers, car safety seats,
16 and pads and mats used for sleeping, resting, and/or changing diapers (collectively, "Reclining
17 Pads"). Individuals in California, including infants and children, are exposed to TDCPP when
18 they inhale TDCPP released from Foam-Cushioned Furniture and Reclining Pads, and also when
19 TDCPP from Foam-Cushioned Furniture and Reclining Pads accumulates in ambient particles
20 that are subsequently touched by such individuals and brought into contact with the mouth.

21 3. Lead is used as an additive in the production of faux leather products,
22 including faux leather furniture ("Faux Leather Furniture"). Individuals in California, including
23 infants, children, and pregnant women, are exposed to Lead after touching Faux Leather
24 Furniture, either by hand-to-mouth ingestion or by dermal absorption directly through the skin.
25 Foam-Cushioned Furniture, Reclining Pads, and Faux Leather Furniture are collectively referred
26 to herein as "Products."

27 4. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
28 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California

1 9. Defendant DOREL INDUSTRIES INC. is a person in the course of doing
2 business within the meaning of Health & Safety Code § 25249.11. Dorel Industries Inc.
3 manufactures, distributes, and/or sells Foam-Cushioned Furniture, Reclining Pads, and Faux
4 Leather Furniture for sale or use in California.

5 10. Defendant DOREL JUVENILE GROUP, INC. is a person in the course of
6 doing business within the meaning of Health & Safety Code § 25249.11. Dorel Juvenile Group,
7 Inc. manufactures, distributes, and/or sells Reclining Pads for sale or use in California.

8 11. DOES 1 through 100 are each a person in the course of doing business
9 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
10 distribute, and/or sell Foam-Cushioned Furniture for sale or use in California. Defendants
11 AMERIWOOD INDUSTRIES, INC.; DOREL ASIA INC.; DOREL INDUSTRIES INC.; and
12 DOES 1 through 100 are collectively referred to herein as “Foam-Cushioned Furniture
13 Defendants.”

14 12. DOES 101 through 200 are each a person in the course of doing business
15 within the meaning of Health & Safety Code § 25249.11. DOES 101 through 200 manufacture,
16 distribute, and/or sell Reclining Pads for sale or use in California. Defendants DOREL
17 INDUSTRIES INC.; DOREL JUVENILE GROUP, INC.; and DOES 101 through 200 are
18 collectively referred to herein as “Reclining Pads Defendants.”

19 13. DOES 201 through 300 are each a person in the course of doing business
20 within the meaning of Health & Safety Code § 25249.11. DOES 201 through 300 manufacture,
21 distribute, and/or sell Faux Leather Furniture for sale or use in California. Defendants DOREL
22 ASIA INC.; DOREL INDUSTRIES INC.; and DOES 201 through 300 are collectively referred
23 to herein as “Faux Leather Furniture Defendants.”

24 14. DOES 301 through 400 are each a person in the course of doing business
25 within the meaning of Health & Safety Code § 25249.11. DOES 301 through 400 manufacture,
26 distribute, and/or sell both Foam-Cushioned Furniture and Reclining Pads for sale or use in
27 California.

28 15. DOES 401 through 500 are each a person in the course of doing business

1 within the meaning of Health & Safety Code § 25249.11. DOES 401 through 500 manufacture,
2 distribute, and/or sell both Foam-Cushioned Furniture and Faux Leather Furniture for sale or use
3 in California.

4 16. DOES 501 through 600 are each a person in the course of doing business
5 within the meaning of Health & Safety Code § 25249.11. DOES 501 through 600 manufacture,
6 distribute, and/or sell both Reclining Pads and Faux Leather Furniture for sale or use in
7 California.

8 17. DOES 601 through 700 are each a person in the course of doing business
9 within the meaning of Health & Safety Code § 25249.11. DOES 601 through 700 manufacture,
10 distribute, and/or sell Foam-Cushioned Furniture, Reclining Pads, and Faux Leather Furniture for
11 sale or use in California.

12 18. The true names of DOES 1 through 700 are unknown to CEH at this time.
13 When their identities are ascertained, the Complaint shall be amended to reflect their true names.

14 19. The defendants identified in paragraphs 7 through 10 and DOES 1 through
15 700 are collectively referred to herein as "Defendants."

16 **JURISDICTION AND VENUE**

17 20. The Court has jurisdiction over this action pursuant to Health & Safety
18 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
19 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
20 to other trial courts.

21 21. This Court has jurisdiction over Defendants because each is a business
22 entity that does sufficient business, has sufficient minimum contacts in California or otherwise
23 intentionally avails itself of the California market through the sale, marketing, or use of Products
24 in California and/or by having such other contacts with California so as to render the exercise of
25 jurisdiction over it by the California courts consistent with traditional notions of fair play and
26 substantial justice.

27 22. Venue is proper in the Alameda Superior Court because one or more of the
28 violations arise in the County of Alameda.

1 **BACKGROUND FACTS**

2 23. The People of the State of California have declared by initiative under
3 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
4 defects, or other reproductive harm.” Proposition 65, § 1(b).

5 24. To effectuate this goal, Proposition 65 prohibits exposing people to
6 chemicals listed by the State of California as known to cause cancer, birth defects, or other
7 reproductive harm without a “clear and reasonable warning” unless the business responsible for
8 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
9 states, in pertinent part:

10 No person in the course of doing business shall knowingly and
11 intentionally expose any individual to a chemical known to the
12 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual ...

13 **TDCPP**

14 25. TDCPP has been used in consumer products as an additive flame retardant
15 since the 1960s. In the late 1970s, based on findings that exposure to TDCPP could have
16 potentially mutagenic effects, the U.S. Consumer Product Safety Commission banned the use of
17 TDCPP in children’s pajamas.

18 26. On May 29, 2009, the Proposition 65 Carcinogen Identification
19 Committee, a group of qualified experts who advise the State of California on Proposition 65
20 chemical listing determinations, announced that it was assigning priority to the preparation of
21 hazard identification materials for TDCPP, based on the chemical’s suspected carcinogenic
22 properties. 27 Cal. Code Regs. (“C.C.R.”) § 25102(c)(1). On February 11, 2011, the California
23 Environmental Protection Agency’s Office of Environmental Health Hazard Assessment
24 (“OEHHA”) announced that it was preparing hazard identification materials for TDCPP as a
25 precursor to formally identifying the chemical as carcinogenic. On July 8, 2011, OEHHA made
26 its hazard identification materials for TDCPP publicly available, and announced that the State of
27 California would be making a TDCPP listing determination by October 2011.

28 27. On October 28, 2011, the State of California officially listed TDCPP as a

1 chemical known to cause cancer. 27 C.C.R. § 27001(b). In making this listing determination,
2 OEHHA credited studies showing that exposure to TDCPP induces tumor formation in test
3 animals, and that TDCPP metabolizes into other chemicals found to have similar carcinogenic
4 properties in test subjects.

5 28. On October 28, 2012, one year after it was listed as a chemical known to
6 cause cancer, TDCPP became subject to the clear and reasonable warning requirement regarding
7 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).
8 The chief purpose of the one-year grace period between the listing date of a chemical under
9 Proposition 65 and the effective date of the warning requirement is to give potentially liable
10 parties sufficient time to come into complete compliance with this requirement, such that all
11 illegal exposures can be averted.

12 29. TDCPP is used in Foam-Cushioned Furniture and Reclining Pads
13 primarily as an additive flame retardant in the foam padding portion. However, the use of
14 chemical flame retardants, such as TDCPP, in foam provides no appreciably greater protection
15 from fires. Non-chemical methods, such as the use of fire barriers, are far more effective at
16 achieving fire safety benefits.

17 30. TDCPP in the foam portion of Foam-Cushioned Furniture and Reclining
18 Pads is known to migrate from such Products into indoor household environments. Defendants'
19 Foam-Cushioned Furniture and Reclining Pads contains sufficient quantities of TDCPP such that
20 individuals, including infants and children, are exposed to TDCPP through the average use of
21 such Products. The routes of exposure include inhalation, ingestion, and/or dermal absorption by
22 individuals. Inhalation occurs when TDCPP is released from Foam-Cushioned Furniture and
23 Reclining Pads into the ambient environment. Ingestion and dermal absorption occur when
24 TDCPP from Foam-Cushioned Furniture and Reclining Pads accumulates in ambient particles
25 (e.g., dust) that are subsequently touched by individuals and brought into contact with the mouth.

26 31. Infants and children are especially prone to ingesting ambient particles
27 containing TDCPP from Foam-Cushioned Furniture and Reclining Pads, given the greater
28 amount of time they spend crawling on floors and their greater tendency to put their hands in

1 their mouths. Studies show that concentrations of TDCPP in dust are higher in child care
2 facilities that use foam-cushioned napping pads than in facilities that do not. Once exposed to
3 TDCPP, infants and children may be more susceptible to its carcinogenic properties because they
4 are smaller than adults and because their bodies are still developing.

5 **LEAD**

6 32. On February 27, 1987, the State of California officially listed lead as a
7 chemical known to cause reproductive toxicity. Lead is specifically identified as a reproductive
8 toxicant under three subcategories: “developmental reproductive toxicity,” which means harm to
9 the developing fetus, “female reproductive toxicity,” which means harm to the female
10 reproductive system, and “male reproductive toxicity,” which means harm to the male
11 reproductive system. 27 C.C.R. § 27001(c). On February 27, 1988, one year after it was listed as
12 a chemical known to cause reproductive toxicity, lead became subject to the clear and reasonable
13 warning requirement regarding reproductive toxicants under Proposition 65. 27 C.C.R. §
14 27001(c); Health & Safety Code § 25249.10(b).

15 33. On October 1, 1992, the State of California officially listed lead and lead
16 compounds as chemicals known to cause cancer. On October 1, 1993, one year after they were
17 listed as chemicals known to cause cancer, lead and lead compounds became subject to the clear
18 and reasonable warning requirement regarding carcinogens under Proposition 65. 27 C.C.R. §
19 27001(c); Health & Safety Code § 25249.10(b).

20 34. Lead is often used as a stabilizing additive and/or as a coloring agent in
21 faux leather, including faux leather made from polyvinyl chloride (“PVC”), which is often used
22 in the production of faux leather such as vinyl or other imitation leather materials. Faux leather
23 is used in the covering of Faux Leather Furniture.

24 35. Defendants’ Faux Leather Furniture contains sufficient quantities of Lead
25 such that consumers, including children, who touch or handle these Products are exposed to Lead
26 through the average use of these Products. The routes of exposure for the violation include
27 ingestion via hand to mouth contact after consumers, including children, touch or handle the
28 Products and dermal absorption directly through the skin when consumers, including children,

1 touch or handle the Products.

2 36. Young children are especially susceptible to the toxic effects of Lead.
3 Children show a greater sensitivity to Lead's effects than do adults. Adverse health impacts from
4 Lead exposure generally occur in children at lower blood Lead levels than in adults. Children
5 absorb and retain more Lead in proportion to their weight than do adults. Young children also
6 show a greater prevalence of iron deficiency, a condition that can increase gastrointestinal
7 absorption of Lead. The body accumulates Lead over a lifetime and releases it slowly, so even
8 small doses received in childhood, over time, can cause adverse health impacts, including but not
9 limited to reproductive toxicity, later in life.

10 37. There is no safe level of exposure to Lead and even minute amounts of
11 Lead exposure have been shown to permanently reduce mental capacity. Studies have shown
12 that even the smallest detectable amount of blood Lead levels in children can mean the difference
13 between an A or B grade in school, that children exposed to sufficient levels of Lead as toddlers
14 have a sevenfold increase in the risk for developing a reading disability as adults, and that adult
15 IQ levels are inversely associated with blood Lead concentrations from childhood.

16 38. Lead in products used by pregnant women is also of particular concern in
17 light of evidence that even short term Lead exposures *in utero* can have long-term harmful
18 effects. In times of physiological stress, such as pregnancy, the body can mobilize accumulated
19 stores of Lead in tissue and bone, thereby increasing the level of Lead in the blood and increasing
20 the risk of harm to the fetus.

21 **PROPOSITION 65 NOTICE AND ENFORCEMENT**

22 39. Any person acting in the public interest has standing to enforce violations
23 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
24 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
25 action within such time. Health & Safety Code § 25249.7(d).

26 40. More than sixty days prior to naming each Defendant in this lawsuit, CEH
27 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
28 the District Attorneys of every county in California, the City Attorneys of every California city

1 with a population greater than 750,000, and to each of the named Defendants. In compliance
2 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
3 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
4 time period during which violations occurred; (4) specific descriptions of the violations,
5 including (a) the routes of exposure to TDCPP and/or Lead from Products, and (b) the specific
6 type of Products sold and used in violation of Proposition 65; and (5) the name of the specific
7 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

8 41. More than sixty days prior to naming each Defendant in this lawsuit,
9 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
10 Certificate of Merit for each Notice to the California Attorney General, to the District Attorneys
11 of every county in California, to the City Attorneys of every California city with a population
12 greater than 750,000, and to the named Defendants. In compliance with Health & Safety Code §
13 25249.7(d) and 11 C.C.R. § 3101, each of the Certificates certified that CEH's counsel: (1) has
14 consulted with one or more persons with relevant and appropriate experience or expertise who
15 reviewed facts, studies, or other data regarding the exposures to TDCPP and/or Lead alleged in
16 each of the Notices; and (2) based on the information obtained through such consultations,
17 believes that there is a reasonable and meritorious case for a citizen enforcement action based on
18 the facts alleged in each of the Notices. In compliance with Health & Safety Code § 25249.7(d)
19 and 11 C.C.R. § 3102, each of the Certificates served on the Attorney General included factual
20 information – provided on a confidential basis – sufficient to establish the basis for the
21 Certificate, including the identity of the person(s) consulted by CEH's counsel and the facts,
22 studies, or other data reviewed by such persons.

23 42. None of the public prosecutors with the authority to prosecute violations
24 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
25 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in the
26 Notices.

27 43. Defendants both know and intend that consumers in California, including
28 infants, children, and pregnant women, will use or touch Products, or will come into close

1 proximity to Products, thus exposing them to TDCPP and/or Lead.

2 44. Under Proposition 65, an exposure is “knowing” where the party
3 responsible for such exposure has:

4 knowledge of the fact that a[n] ... exposure to a chemical listed
5 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
6 No knowledge that the ... exposure is unlawful is required.

7 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
8 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
9 12201).

10 45. No clear and reasonable warning is provided with Products regarding the
11 carcinogenic or reproductive hazards of TDCPP or Lead.

12 46. Defendants have been informed of the TDCPP and/or Lead in their
13 Products by the 60-Day Notice of Violation and accompanying Certificate of Merit served on
14 them by CEH.

15 47. Defendants also have constructive knowledge that their Products contain
16 TDCPP and/or Lead due to the widespread media coverage concerning the problem of TDCPP
17 and Lead in consumer products in general and in furniture and children’s products in particular.
18 The problem of TDCPP in Foam-Cushioned Furniture and Reclining Pads has been the subject of
19 articles in national newspapers, industry trade papers, and scholarly journals, as well as numerous
20 Internet weblog postings. Likewise, the association between PVC, such as that found in Faux
21 Leather Furniture, and Lead exposure has been widely discussed in the media in recent years.

22 48. As companies that manufacture, import, distribute, and/or sell Products for
23 use in the California marketplace, Defendants know or should know that Foam-Cushioned
24 Furniture and Reclining Pads contain TDCPP and that Faux Leather Furniture contains Lead, and
25 that individuals who use these Products will be exposed to TDCPP and Lead. These TDCPP and
26 Lead exposures are a natural and foreseeable consequence of Defendants’ placing Products into
27 the stream of commerce.

28 49. Nevertheless, Defendants continue to expose consumers in California,

1 including infants, children, and pregnant women, to TDCPP and Lead without prior clear and
2 reasonable warnings regarding the carcinogenic or reproductive hazards of TDCPP and Lead.

3 50. CEH has engaged in good-faith efforts to resolve the claims alleged herein
4 prior to filing this Complaint.

5 51. Any person "violating or threatening to violate" Proposition 65 may be
6 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
7 violate" is defined to mean "to create a condition in which there is a substantial probability that a
8 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
9 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
10 Code § 25249.7(b).

11 **FIRST CAUSE OF ACTION**
12 **(Violations of Health & Safety Code § 25249.6)**
13 **(Against Foam-Cushioned Furniture Defendants Only)**

14 52. CEH realleges and incorporates by reference as if specifically set forth
15 herein Paragraphs 1 through 51, inclusive.

16 53. TDCPP is a chemical listed by the State of California as known to cause
17 cancer.

18 54. By placing their Foam-Cushioned Furniture into the stream of commerce,
19 Foam-Cushioned Furniture Defendants are each a person in the course of doing business within
20 the meaning of Health & Safety Code § 25249.11.

21 55. Foam-Cushioned Furniture Defendants know that average use of their
22 Foam-Cushioned Furniture will expose users of Foam-Cushioned Furniture to TDCPP.
23 Foam-Cushioned Furniture Defendants intend that their Foam-Cushioned Furniture be used in a
24 manner that results in users of their Foam-Cushioned Furniture, and others who come into close
25 proximity to this Foam-Cushioned Furniture, being exposed to TDCPP contained therein.

26 56. Foam-Cushioned Furniture Defendants have failed, and continue to fail, to
27 provide prior clear and reasonable warnings regarding the carcinogenicity of TDCPP to users of
28 their Foam-Cushioned Furniture and others who come into close proximity to this

1 Proposition 65 according to proof;

2 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
3 preliminarily and permanently enjoin Defendants from offering Products for sale in California
4 without providing prior clear and reasonable warnings, as CEH shall specify in further
5 application to the Court;

6 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
7 Defendants to take action to stop ongoing unwarned exposures to TDCPP and Lead resulting
8 from use of Products sold by Defendants, as CEH shall specify in further application to the
9 Court;

10 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
11 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

12 5. That the Court grant such other and further relief as may be just and
13 proper.

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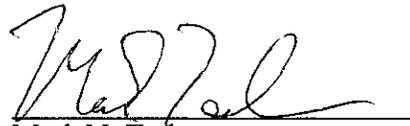
15 Dated: April 30, 2013

Respectfully submitted,

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LEXINGTON LAW GROUP

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Mark N. Todzo

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Attorneys for Plaintiff

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CENTER FOR ENVIRONMENTAL HEALTH

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