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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA
21 COUNTY OF ALAMEDA
22 UNLIMITED CIVIL JURISDICTION

BY FAX

23 LAURENCE VINOCUR and PETER
24 ENGLANDER

25 Plaintiffs,

26 v.

27 CHEYENNE INDUSTRIES, LLC;
28 FURNITURE BRANDS
INTERNATIONAL, INC.; GLOBAL
INDUSTRIES, INC.; HELEN OF TROY
TEXAS CORPORATION; HELEN OF
TROY L.P.; RITE AID CORPORATION;
STEIN WORLD OPERATING
COMPANY; SUMMER INFANT (USA),
INC.; THOMASVILLE FURNITURE
INDUSTRIES, INC.; THE UTTERMOST
CO.; LEXINGTON FURNITURE
INDUSTRIES, INC.; RESTORATION
HARDWARE, INC.; VIRCO MFG.
CORPORATION; and DOES 4 -150,
inclusive,

Defendants.

Case No. RG 13-673710
ASSIGNED FOR ALL PURPOSES TO:
JUDGE RONNI MACLAREN
DEPARTMENT 25

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

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

Complaint Filed: April 2, 2013

1 Plaintiffs hereby amend this Complaint to substitute Lexington Furniture Industries, Inc.,
2 Restoration Hardware, Inc. and Virco Mfg. Corporation for DOE Defendants 1 through 3 of the
3 original Complaint filed on April 2, 2013.

4 NATURE OF THE ACTION

5 1. This Complaint is a representative action brought by plaintiffs LAURENCE
6 VINOCUR and PETER ENGLANDER (collectively referred to herein as "PLAINTIFFS") in
7 the public interest of the citizens of the State of California to enforce the People's right to be
8 informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate ("TDCPP"), a toxic chemical
9 found in padded upholstered furniture, cushion massagers, and infant travel beds with padding
10 sold in California. TDCPP is a toxic chemical that is used to treat polyurethane foam, which is
11 used as padding or cushioning in a variety of products.

12 2. By this Complaint, PLAINTIFFS seek to remedy Defendants' continuing failures
13 to warn California citizens about the risk of exposure to TDCPP present in and on the padded
14 upholstered furniture, cushion massagers, and infant travel beds with padding manufactured,
15 distributed, and offered for sale or use to consumers throughout the State of California.

16 3. Detectable levels of TDCPP are commonly found in and on the padded
17 upholstered furniture, cushion massagers, and infant travel beds with padding that Defendants
18 manufacture, distribute, and offer for sale to consumers throughout the State of California.
19 Individuals in California, including infants and children, are exposed to TDCPP in the products
20 through various routes of exposure: (i) through inhalation when TDCPP is released from padded
21 upholstered furniture, cushion massagers, and infant travel beds with padding; (ii) through
22 dermal exposure when TDCPP from padded upholstered furniture, cushion massagers, and
23 infant travel beds with padding accumulates in ambient particles that are subsequently touched
24 by such individuals; and (iii) through ingestion when such particles are brought into contact
25 with the mouth.

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

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

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

12 7. Defendants manufacture, distribute, import, sell, and/or offer for sale in California
13 products containing TDCPP as follows:

14 a. Defendant CHEYENNE INDUSTRIES, LLC manufactures, distributes,
15 imports, sells and/or offer for sale in California padded upholstered furniture containing
16 TDCPP without a warning including, but not limited to, ottomans such as *Target Home*
17 *29-Inch Bar-Height Stool, Item 0143, #249 01 0143, ID102424-0046 (#0 50276 98698*
18 *0)*;

19 b. Defendant GLOBAL INDUSTRIES, INC. manufactures, distributes,
20 imports, sells and/or offer for sale in California padded upholstered furniture containing
21 TDCPP without a warning including, but not limited to, office/stacking chairs such as
22 *Sonic Armless Stacking Chair, SKU 6509-1*;

23 c. Defendants HELEN OF TROY TEXAS CORPORATION, HELEN OF
24 TROY L.P., and RITE AID CORPORATION manufacture, distribute, import, sell and/or
25 offer for sale in California cushion massagers containing TDCPP without a warning
26 including, but not limited to, *Dr. Scholl’s Soothing 5-Motor Full Cushion Massager,*
27 *Model DR8573 (#6 30623 08573 5)*;

1 d. Defendant STEIN WORLD OPERATING COMPANY manufactures,
2 distributes, imports, sells and/or offer for sale in California padded upholstered furniture
3 containing TDCPP without a warning including, but not limited to, benches such as *Stein*
4 *World Bench With Handles, Item# 57216*;

5 e. Defendants SUMMER INFANT (USA), INC. manufactures, distributes,
6 imports, sells and/or offer for sale in California infant travel beds with padding
7 containing TDCPP without a warning including, but not limited to, *Summer Infant Travel*
8 *Bed On-The-Go Bed by Kiddopotamus, #70790 (#0 12914 70790 6)*;

9 f. Defendants THE UTTERMOST CO., FURNITURE BRANDS
10 INTERNATIONAL, INC., and THOMASVILLE FURNITURE INDUSTRIES, INC.
11 manufacture, distribute, import, sell and/or offer for sale in California padded upholstered
12 furniture containing TDCPP without a warning including, but not limited to,
13 ottomans/benches such as *Karline, Small Bench, Item #23052*.

14 g. Defendant LEXINGTON FURNITURE INDUSTRIES, INC.
15 manufactures, distributes, imports, sells and/or offer for sale in California padded
16 upholstered ottomans containing TDCPP without a warning including, but not limited to,
17 ottomans such as *Bennett Ottoman, #7330-44*.

18 h. Defendant RESTORATION HARDWARE, INC. manufactures,
19 distributes, imports, sells and/or offer for sale in California padded upholstered furniture
20 containing TDCPP without a warning including, but not limited to, stools such as
21 *Neoclassical Rondelle Tufted Stool, SKU #57390508BRLP (#4 57395 09000 8)*.

22 i. Defendant VIRCO MFG. CORPORATION manufactures, distributes,
23 imports, sells and/or offer for sale in California padded upholstered furniture containing
24 TDCPP without a warning including, but not limited to, stack chairs such as *Virco Stack*
25 *Chair, #8915, M-8915, CB/OLY/DST, #89155E51G3 (#4 62314 55998 6)*.

26 8. All padded upholstered furniture containing TDCPP, as listed in paragraphs 7(a)
27 through 7(i) above, shall hereinafter be referred to as the "PRODUCTS." As to each specific
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1 defendant, however, PRODUCTS shall refer only to those specific products listed for each
2 specific defendant in paragraphs 7(a) through 7(i) above.

3 9. Although Defendants expose infants, children, and other people to TDCPP in the
4 PRODUCTS, Defendants provide no warnings about the carcinogenic hazards associated with
5 TDCPP exposures. Defendants' failures to warn consumers and other individuals in the State of
6 California not covered by California's Occupational Health Act, Labor Code section 6300 et
7 seq. about their exposures to TDCPP in conjunction with Defendants' sales of the PRODUCTS,
8 is a violation of Proposition 65, and subjects Defendants to enjoinder of such conduct as well
9 as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

10 10. As a result of Defendants' violations of Proposition 65, PLAINTIFFS seek
11 preliminary and permanent injunctive relief to compel Defendants to provide purchasers or
12 users of the PRODUCTS with the required warning regarding the health hazards of TDCPP in
13 the PRODUCTS. Health & Safety Code § 25249.7(a).

14 11. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFFS also seek
15 civil penalties against Defendants for their violations of Proposition 65.

16 **PARTIES**

17 12. Plaintiffs LAURENCE VINOCUR ("VINOCUR") and PETER ENGLANDER
18 ("ENGLANDER") are citizens of the State of California who are dedicated to protecting the
19 health of California citizens through the elimination or reduction of toxic exposures from
20 consumer products; and they bring this action in the public interest pursuant to Health and
21 Safety Code section 25249.7(d).

22 13. Defendants CHEYENNE INDUSTRIES, LLC ("CHEYENNE"), FURNITURE
23 BRANDS INTERNATIONAL, INC. ("FURNITURE BRANDS"), GLOBAL INDUSTRIES,
24 INC. ("GLOBAL"), HELEN OF TROY TEXAS CORPORATION ("HELEN TEXAS"),
25 HELEN OF TROY L.P. ("HELEN"), RITE AID CORPORATION ("RITE AID"), STEIN
26 WORLD OPERATING COMPANY ("STEIN WORLD"), SUMMER INFANT (USA), INC.
27 ("SUMMER INFANT"), THOMASVILLE FURNITURE INDUSTRIES, INC.

1 (“THOMASVILLE”), THE UTTERMOST CO. (“UTTERMOST”), LEXINGTON
2 FURNITURE INDUSTRIES, INC. (“LEXINGTON”), RESTORATION HARDWARE, INC.
3 (“RESTORATION HARDWARE”), and VIRCO MFG. CORPORATION (“VIRCO”), are each
4 a person in the course of doing business within the meaning of Health and Safety Code sections
5 25249.6 and 25249.11.

6 14. CHEYENNE, FURNITURE BRANDS, GLOBAL, HELEN TEXAS, HELEN,
7 RIGHT AID, STEIN WORLD, SUMMER INFANT, THOMASVILLE, UTTERMOST,
8 LEXINGTON, RESTORATION HARDWARE, and VIRCO each manufactures, imports,
9 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California, or
10 implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the
11 PRODUCTS for sale or use in the State of California.

12 15. Defendants DOES 4 -150 are each persons in the course of doing business within
13 the meaning of Health and Safety Code section 25249.11(b), which manufacture, distribute, sell,
14 and/or offer the PRODUCTS for sale in the State of California. At this time, the true names and
15 capacities of defendants DOES 4 through 150, inclusive, are unknown to PLAINTIFFS, who,
16 therefore, sue said defendants by their fictitious names pursuant to Code of Civil Procedure
17 section 474. PLAINTIFFS are informed and believe, and on that basis allege, that each of the
18 fictitiously named defendants is responsible for the acts and occurrences alleged herein. When
19 ascertained, their true names and capacities shall be reflected in an amended complaint.

20 16. CHEYENNE, FURNITURE BRANDS, GLOBAL, HELEN TEXAS, HELEN,
21 RIGHT AID, STEIN WORLD, SUMMER INFANT, THOMASVILLE, UTTERMOST,
22 LEXINGTON, RESTORATION HARDWARE, VIRCO and Defendants DOES 4 -150 are
23 collectively referred to herein as “DEFENDANTS.”

24 **VENUE AND JURISDICTION**

25 17. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
26 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
27 because Plaintiffs seek civil penalties against DEFENDANTS, because one or more instances of
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1 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
2 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
3 PRODUCTS.

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

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

15 **FIRST CAUSE OF ACTION**

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

17 20. PLAINTIFFS reallege and incorporate by reference, as if fully set forth herein,
18 Paragraphs 1 through 19, inclusive.

19 21. 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
21 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
22 harm.”

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

1 23. On January 8, 2013, VINO CUR’s sixty-day notice of violation, together with the
2 requisite certificate of merit, was provided to SUMMER INFANT and certain public
3 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
4 containing TDCPP, purchasers and users in the State of California were being exposed to
5 TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without the
6 individual purchasers and users first having been provided with a “clear and reasonable
7 warning” regarding such toxic exposures, as required by Proposition 65.

8 24. On January 8, 2013, ENGLANDER’s sixty-day notice of violation, together with
9 the requisite certificate of merit, was provided to CHEYENNE, FURNITURE BRANDS,
10 HELEN TEXAS, HELEN, RITE AID, THOMASVILLE, UTTERMOST, and certain public
11 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
12 containing TDCPP, purchasers and users in the State of California were being exposed to
13 TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without the
14 individual purchasers and users first having been provided with a “clear and reasonable
15 warning” regarding such toxic exposures, as required by Proposition 65.

16 25. On January 10, 2013, VINO CUR’s sixty-day notice of violation, together with the
17 requisite certificate of merit, was provided to GLOBAL and certain public enforcement
18 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing
19 TDCPP, purchasers and users in the State of California were being exposed to TDCPP resulting
20 from their reasonably foreseeable use of the PRODUCTS, without the individual purchasers and
21 users first having been provided with a “clear and reasonable warning” regarding such toxic
22 exposures, as required by Proposition 65.

23 26. On January 10, 2013, ENGLANDER’s sixty-day notice of violation, together
24 with the requisite certificate of merit, was provided to STEIN WORLD and certain public
25 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
26 containing TDCPP, purchasers and users in the State of California were being exposed to
27 TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without the
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1 individual purchasers and users first having been provided with a “clear and reasonable
2 warning” regarding such toxic exposures, as required by Proposition 65.

3 27. On January 28, 2013, ENGLANDER’s sixty-day notice of violation, together
4 with the requisite certificate of merit, was provided to RESTORATION HARDWARE and
5 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
6 PRODUCTS containing TDCPP, purchasers and users in the State of California were being
7 exposed to TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without
8 the individual purchasers and users first having been provided with a “clear and reasonable
9 warning” regarding such toxic exposures, as required by Proposition 65.

10 28. On January 28, 2013, ENGLANDER’s sixty-day notice of violation, together
11 with the requisite certificate of merit, was provided to LEXINGTON and certain public
12 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
13 containing TDCPP, purchasers and users in the State of California were being exposed to
14 TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without the
15 individual purchasers and users first having been provided with a “clear and reasonable
16 warning” regarding such toxic exposures, as required by Proposition 65.

17 29. On February 5, 2013, VINOCUR’s sixty-day notice of violation, together with the
18 requisite certificate of merit, was provided to VIRCO and certain public enforcement agencies
19 stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing TDCPP,
20 purchasers and users in the State of California were being exposed to TDCPP resulting from
21 their reasonably foreseeable use of the PRODUCTS, without the individual purchasers and
22 users first having been provided with a “clear and reasonable warning” regarding such toxic
23 exposures, as required by Proposition 65.

24 30. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
25 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
26 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
27 plaintiff’s sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing and
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1 continuous in nature, and will continue to occur in the future.

2 31. After receiving PLAINTIFFS' sixty-day notice of violation, the appropriate
3 public enforcement agencies have failed to commence and diligently prosecute a cause of action
4 against DEFENDANTS under Proposition 65.

5 32. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
6 or use in California by DEFENDANTS contain TDCPP such that they require a "clear and
7 reasonable" warning under Proposition 65.

8 33. DEFENDANTS knew or should have known that the PRODUCTS they
9 manufacture, import, distribute, sell, and offer for sale or use in California contain TDCPP.

10 34. TDCPP is present in or on the PRODUCTS in such a way as to expose
11 individuals to TDCPP through dermal contact, ingestion, and/or inhalation during reasonably
12 foreseeable use of the PRODUCTS.

13 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
14 continue to cause, consumer exposures to TDCPP, as such exposures are defined by the
15 California Code of Regulations title 27, section 25602(b).

16 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
17 of the PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or
18 inhalation.

19 37. DEFENDANTS intended that such exposures to TDCPP from the reasonably
20 foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate, non-
21 accidental participation in the manufacture, importation, distribution, sale, and offering of the
22 PRODUCTS for sale or use to individuals in the State of California.

23 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
24 consumers and other individuals in the State of California who were or who would become
25 exposed to TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably
26 foreseeable uses of the PRODUCTS.

27 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
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1 directly by California voters, individuals exposed to TDCPP through dermal contact, ingestion,
2 and/or inhalation resulting from the reasonably foreseeable uses of the PRODUCTS sold by
3 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
4 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

8 41. As a consequence of the above-described acts, Health and Safety Code
9 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
10 DEFENDANTS.

11 **PRAYER FOR RELIEF**

12 Wherefore, plaintiffs pray for judgment against DEFENDANTS, and each of them, as
13 follows:

14 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
15 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

16 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
17 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
18 offering the PRODUCTS for sale or use in California without first providing a “clear and
19 reasonable warning” as defined by the California Code of Regulations title 27, section 25601 *et*
20 *seq.*, as to the harms associated with exposures the LISTED CHEMICALS;

21 3. That the Court grant PLAINTIFFS their reasonable attorneys’ fees and costs of
22 suit; and

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

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3 Dated: April 18, 2013

Respectfully submitted,

MOSCONE EMBLIDGE SATER & OTIS

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6 By: 

Rachel Sater
Attorneys for Plaintiffs
LAURENCE VINOCUR
PETER ENGLANDER

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