

1 Stephen S. Sayad, State Bar No. 104866
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 PETER ENGLANDER

ENDORSED
FILED
ALAMEDA COUNTY

MAY 07 2013.

CLERK OF THE SUPERIOR COURT

By

PILIPINO TUNGOHAN

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 KIRKLAND'S, INC.; and DOES 1-150,
20 inclusive,

21 Defendants.

Case No. RG-13-673606

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

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

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by Plaintiff PETER
3 ENGLANDER in the public interest of the citizens of the State of California to enforce the
4 People’s right to be informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate
5 (“TDCPP”) and Tris(2-chloroethyl) phosphate (“TCEP”), toxic chemicals found in padded
6 upholstered furniture sold in California. TDCPP and TCEP are toxic chemicals used to treat
7 polyurethane foam, which is used as padding or cushioning in a variety of products.

8 2. By this Complaint, Plaintiff seeks to remedy Defendants’ continuing failures to
9 warn California citizens about the risks of exposures to TDCPP and TCEP present in and on the
10 padded upholstered furniture manufactured, distributed, sold, and offered for sale or use to
11 consumers throughout the State of California.

12 3. Detectable levels of TDCPP and TCEP are commonly found in and on the padded
13 upholstered furniture that Defendants manufacture, distribute, sell, and offer for sale to
14 consumers, many of whom are infants and children, throughout the State of California.
15 Individuals in California, including infants and children, are exposed to TDCPP and/or TCEP
16 when they inhale TDCPP and TCEP released from padded upholstered furniture, and also when
17 TDCPP and/or TCEP from padded upholstered furniture accumulates in ambient particles that
18 are subsequently touched by such individuals and brought into contact with the mouth.

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

24 5. TDCPP and TCEP have been used in consumer products as additive flame
25 retardant since the 1960s. In the late 1970s, based on findings that exposure to TDCPP could
26 have mutagenic effects, the United States Consumer Product Safety Commission banned the use
27 of TDCPP in children’s pajamas.

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

5 7. Pursuant to Proposition 65, on April 1, 1992, California identified and listed
6 TCEP as a chemical known to cause cancer. TCEP became subject to the “clear and reasonable
7 warning” requirements of the Act one year later on April 1, 1993. (Cal. Code Regs., Tit. 27, §
8 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

9 8. TDCPP and TCEP are hereinafter collectively referred to as the “LISTED
10 CHEMICALS.”

11 9. Defendants manufacture, distribute, import, sell, and/or offer for sale padded
12 upholstered furniture, including chairs, containing the LISTED CHEMICALS without a
13 warning, including, but not limited to, the *Sand Parsons Chair, SKU # 15-106360*. All such
14 padded upholstered furniture, including chairs, containing TDCPP and/or TCEP, are hereinafter
15 collectively referred to as the “PRODUCTS.”

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

23 11. As a result of Defendants’ violations of Proposition 65, Plaintiff seeks preliminary
24 and permanent injunctive relief to compel Defendants to provide purchasers or users of the
25 PRODUCTS with the required warning regarding the health hazards of the LISTED
26 CHEMICALS. (Health & Safety Code § 25249.7(a).)

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

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

15 **FIRST CAUSE OF ACTION**

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

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

19 22. 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 23. 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 24. On January 17, 2013, Plaintiff's sixty-day notice of violation, together with the
2 requisite certificate of merit, was provided to KIRKLAND'S and certain public enforcement
3 agencies stating that, as a result of Defendants' sales of the PRODUCTS containing TDCPP,
4 purchasers and users in the State of California were being exposed to TDCPP resulting from
5 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
6 users first having been provided with a "clear and reasonable warning" regarding such toxic
7 exposures, as required by Proposition 65.

8 25. On February 25, 2013, Plaintiff's sixty-day notice of violation, together with the
9 requisite certificate of merit, was provided to KIRKLAND'S and certain public enforcement
10 agencies stating that, as a result of Defendants' sales of the PRODUCTS containing TCEP,
11 purchasers and users in the State of California were being exposed to TCEP resulting from their
12 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users
13 first having been provided with a "clear and reasonable warning" regarding such toxic
14 exposures, as required by Proposition 65.

15 26. Defendants have engaged in the manufacture, importation, distribution, sale, and
16 offering of the PRODUCTS for sale or use in violation of Health and Safety Code § 25249.6,
17 and Defendants' violations have continued to occur beyond their receipt of Plaintiff's sixty-day
18 notices of violation. As such, Defendants' violations are ongoing and continuous in nature, and
19 will continue to occur in the future.

20 27. After receiving Plaintiff's sixty-day notices of violation, and more than sixty days
21 having passed since receipt of each such notice, the appropriate public enforcement agencies
22 have failed to commence and diligently prosecute a cause of action against Defendants under
23 Proposition 65.

24 28. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
25 or use in California by Defendants contain the LISTED CHEMICALS such that they require a
26 "clear and reasonable" warning under Proposition 65.
27
28

1 29. Defendants knew or should have known that the PRODUCTS they manufacture,
2 import, distribute, sell, and offer for sale or use in California contain the LISTED
3 CHEMICALS.

4 30. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
5 to expose individuals to the LISTED CHEMICALS through dermal contact, ingestion, and/or
6 inhalation during reasonably foreseeable uses of the PRODUCTS.

7 31. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
8 continue to cause, consumer exposures to the LISTED CHEMICALS, as such exposures are
9 defined by Title 27 of the California Code of Regulations, § 25602(b).

10 32. Defendants had knowledge that the normal and reasonably foreseeable uses of the
11 PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact,
12 ingestion, and/or inhalation.

13 33. Defendants intended that such exposures to the LISTED CHEMICALS from the
14 reasonably foreseeable uses of the PRODUCTS would occur by Defendants' deliberate, non-
15 accidental participation in the manufacture, importation, distribution, sale, and offering of the
16 PRODUCTS for sale or use to individuals in the State of California.

17 34. Defendants failed to provide a "clear and reasonable warning" to those consumers
18 and other individuals in the State of California who were or who would become exposed to the
19 LISTED CHEMICALS through dermal contact, ingestion, and/or inhalation during the
20 reasonably foreseeable uses of the PRODUCTS.

21 35. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
22 directly by California voters, individuals exposed to the LISTED CHEMICALS through dermal
23 contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of the
24 PRODUCTS sold by Defendants without a "clear and reasonable warning," have suffered, and
25 continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at
26 law.

