

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 - 2 2013

CLERK OF THE SUPERIOR COURT
By MARGARET J. DOWNI
Deputy

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
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16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 ACME FURNITURE INDUSTRY, INC.;
20 and DOES 1-150, inclusive,

21 Defendants.
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Case No. RG-13-675167

**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 that are used to
7 treat 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 throughout the State of California. Individuals in California, including infants and
15 children, are exposed to TDCPP and TCEP when they inhale TDCPP and TCEP released from
16 padded upholstered furniture, and also when TDCPP and TCEP from padded upholstered
17 furniture accumulates in ambient particles that are subsequently touched by such individuals
18 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 retardants 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.

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

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

10 9. Defendants manufacture, distribute, import, sell, and/or offer for sale padded
11 upholstered furniture, including ottomans, containing the LISTED CHEMICALS without a
12 warning, including, but not limited to, the *LLAN Orange Finish Youth Ottoman, Item No. 96119*
13 *(#6 55258 81998 2)*. All such padded upholstered furniture, including ottomans, containing
14 TDCPP and/or TCEP, are hereinafter collectively referred to as the “PRODUCTS.”

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

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

26 12. Pursuant to Health and Safety Code § 25249.7(b), Plaintiff also seeks civil
27 penalties against Defendants for their violations of Proposition 65.
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1 **PARTIES**

2 13. Plaintiff PETER ENGLANDER 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
4 toxic exposures from consumer products; and he brings this action in the public interest
5 pursuant to Health and Safety Code § 25249.7(d).

6 14. Defendant ACME FURNITURE INDUSTRY, INC. is a person in the course of
7 doing business within the meaning of Health and Safety Code § 25249.11.

8 15. Defendant ACME FURNITURE INDUSTRY, INC. 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 16. Defendants DOES 1-150 are each persons in the course of doing business within
13 the meaning of Health and Safety Code § 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 1-150, inclusive, are unknown to Plaintiff, who, therefore, sues
16 said defendants by their fictitious names pursuant to Code of Civil Procedure § 474. Plaintiff is
17 informed and believes, and on that basis alleges, that each of the fictitiously named defendants
18 is responsible for the acts and occurrences alleged herein. When ascertained, their true names
19 and capacities shall be reflected in an amended complaint.

20 17. Defendant ACME FURNITURE INDUSTRY, INC., and Defendants DOES 1-
21 150 are collectively referred to herein as “Defendants.”

22 **VENUE AND JURISDICTION**

23 18. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
24 Procedure §§ 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
25 because Plaintiff seeks civil penalties against Defendants, because one or more instances of
26 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
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1 Defendants conducted, and continue to conduct, business in this county with respect to the
2 PRODUCTS.

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

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

14 **FIRST CAUSE OF ACTION**

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

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

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

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

26 24. On January 30, 2013, Plaintiff’s sixty-day notice of violation, together with the
27 requisite certificate of merit, was provided to ACME FURNITURE INDUSTRY, INC., and
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1 certain public enforcement agencies stating that, as a result of Defendants' sales of the
2 PRODUCTS containing TDCPP, purchasers and users in the State of California were being
3 exposed to TDCPP resulting from their reasonably foreseeable uses of the PRODUCTS, without
4 the individual purchasers and users first having been provided with a "clear and reasonable
5 warning" regarding such toxic exposures, as required by Proposition 65.

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

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

18 27. After receiving Plaintiff's sixty-day notices of violation, the appropriate public
19 enforcement agencies have failed to commence and diligently prosecute a cause of action
20 against Defendants under Proposition 65.

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

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

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

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

7 32. Defendants have had knowledge that the normal and reasonably foreseeable uses
8 of the PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact,
9 ingestion, and/or inhalation.

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

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

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

24 36. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
25 described acts, Defendants are liable for a civil penalty of \$2,500 per day for each violation.

26 37. As a consequence of the above-described acts, Health and Safety Code
27 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendants.
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1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as
3 follows:

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

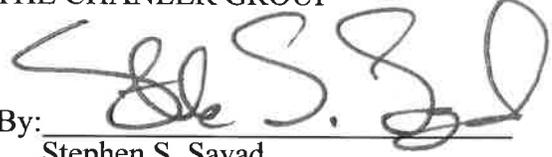
6 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily
7 and permanently enjoin Defendants from manufacturing, distributing, selling, or offering the
8 PRODUCTS for sale or use in California without first providing a “clear and reasonable
9 warning” as defined by Title 27 of the California Code of Regulations, § 25601 *et seq.*, as to the
10 harms associated with exposures to the LISTED CHEMICALS;

11 3. That the Court grant Plaintiff his reasonable attorneys’ fees and costs of suit; and

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

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14 Dated: May 2, 2013

THE CHANLER GROUP

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16 By: _____

17 Stephen S. Sayad
18 Attorneys for Plaintiff
19 PETER ENGLANDER
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