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ENDORSED
FILED
ALAMEDA COUNTY

MAY 03 2013

CLERK OF THE SUPERIOR COURT
By Kmel Dhillon Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 PETER ENGLANDER,

15 Plaintiff,

16 v.

17 BENTWOOD FURNITURE, INC.; ROGUE
18 VALLEY FURNITURE, INC.; and DOES 1-
19 150, inclusive,

20 Defendants.

) Case No. RG13 678152

) **COMPLAINT FOR CIVIL PENALTIES
) AND INJUNCTIVE RELIEF**

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

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BY FAX

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”), a toxic chemical found in padded upholstered furniture sold in California. TDCPP
6 is a toxic chemical that is used to treat polyurethane foam, which is used as padding or
7 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 present in and on padded
10 upholstered furniture manufactured, distributed, sold, and offered for sale or use to consumers
11 throughout the State of California.

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

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

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

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

9 7. Defendants Bentwood Furniture, Inc. and Rogue Valley Furniture, Inc.
10 manufacture, distribute, import, sell and/or offer for sale in California padded upholstered
11 furniture containing TDCPP including, but not limited to, chairs such as the *Metal Back Side*
12 *Chair, CCM210-CS*. All such padded upholstered furniture, including chairs, containing
13 TDCPP, are hereinafter collectively referred to as "PRODUCTS."

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

21 9. As a result of Defendants' violations of Proposition 65, plaintiff seeks preliminary
22 and permanent injunctive relief to compel Defendants to provide purchasers or users of the
23 PRODUCTS with the required warning regarding the health hazards of TDCPP in the
24 PRODUCTS. (Health & Safety Code § 25249.7(a).)

25 10. Pursuant to Health and Safety Code Section 25249.7(b), plaintiff also seeks civil
26 penalties against Defendants for their violations of Proposition 65.

PARTIES

11. Plaintiff PETER ENGLANDER is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products and he brings this action in the public interest pursuant to Health and Safety Code Section 25249.7(d).

12. Defendant Bentwood Furniture, Inc. (“BENTWOOD”) is a person in the course of doing business within the meaning of Health and Safety Code Section 25249.11.

13. BENTWOOD manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

14. Defendant Rogue Valley Furniture, Inc. (“ROGUE”) is a person in the course of doing business within the meaning of Health and Safety Code Section 25249.11.

15. ROGUE manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

16. Defendants DOES 1-150 are each persons in the course of doing business within the meaning of Health and Safety Code Section 25249.11(b), that manufacture, distribute, sell, and/or offer the PRODUCTS for sale in the State of California. At this time, the true names and capacities of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure Section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences alleged herein. When ascertained, their true names and capacities shall be reflected in an amended complaint.

17. BENTWOOD, ROGUE and Defendants DOES 1-150 are collectively referred to herein as “DEFENDANTS.”

1 **VENUE AND JURISDICTION**

2 18. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
3 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
5 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
6 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
7 PRODUCTS.

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

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

19 **FIRST CAUSE OF ACTION**

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

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

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

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

5 24. On January 30, 2013, plaintiff’s sixty-day notice of violation, together with the
6 requisite certificate of merit, was provided to BENTWOOD, ROGUE and certain public
7 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
8 containing TDCPP, purchasers and users in the State of California were being exposed to
9 TDCPP resulting from their reasonably foreseeable uses of the PRODUCTS, without the
10 individual purchasers and users first having been provided with a “clear and reasonable
11 warning” regarding such toxic exposures, as required by Proposition 65.

12 25. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
13 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code Section
14 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
15 plaintiff’s sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing and
16 continuous in nature, and will continue to occur in the future.

17 26. After receiving plaintiff’s sixty-day notices of violation, the appropriate public
18 enforcement agencies have failed to commence and diligently prosecute a cause of action
19 against DEFENDANTS under Proposition 65.

20 27. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
21 or use in California by DEFENDANTS contain TDCPP such that they require a “clear and
22 reasonable” warning under Proposition 65.

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

25 29. TDCPP is present in or on the PRODUCTS in such a way as to expose
26 individuals to TDCPP through dermal contact, ingestion, and/or inhalation during reasonably
27 foreseeable uses of the PRODUCTS.

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1 30. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
2 continue to cause, consumer exposures and workplace exposures to TDCPP, as such exposures
3 are defined by Title 27 of the California Code of Regulations, Section 25602(b).

4 31. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
5 of the PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or
6 inhalation.

7 32. DEFENDANTS intended that such exposures to TDCPP from the reasonably
8 foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate, non-
9 accidental participation in the manufacture, importation, distribution, sale, and offering of the
10 PRODUCTS for sale or use to individuals in the State of California.

11 33. DEFENDANTS failed to provide a "clear and reasonable warning" to those
12 consumers and other individuals in the State of California who were or who would become
13 exposed to TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably
14 foreseeable uses of the PRODUCTS.

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

20 35. Pursuant to Health and Safety Code Section 25249.7(b), as a consequence of the
21 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
22 for each violation.

23 36. As a consequence of the above-described acts, Health and Safety Code
24 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
25 DEFENDANTS.

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PRAYER FOR RELIEF

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

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

2. That the Court, pursuant to Health and Safety Code Section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a "clear and reasonable warning" as defined by Title 27 of the California Code of Regulations, Section 25601 *et seq.*, as to the harms associated with exposures to TDCPP;

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

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

Dated: May 3, 2013

THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
PETER ENGLANDER