

ENDORSED
FILED
ALAMEDA COUNTY

MAY - 8 2013

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

1 Jonathan A. Bornstein, State Bar No. 235965
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

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

14 PETER ENGLANDER,

15 Plaintiff,

16 v.

17 SKYLINE FURNITURE MFG., INC.;
18 HOOKER FURNITURE CORPORATION;
19 WHELAN FURNITURE MANUFACTURING
20 INC.; COSTCO WHOLESALE
21 CORPORATION; and DOES 1-150, inclusive,

22 Defendants.

Case No. RG13675155

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

(Health & Safety Code § 25249.6 et seq.)

23
24
25
26
27
28
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”), and Tris(2-chloroethyl) phosphate (“TCEP”), toxic chemicals that are used to treat
6 polyurethane foam, which is used as padding or cushioning in a variety of products sold in the
7 State of California.

8 2. By this First Amended Complaint, Plaintiff seeks to remedy Defendants’
9 continuing failure to warn citizens, consumers, and other individuals throughout California
10 about the health hazard risks associated with exposures to TDCPP and/or TCEP present in and
11 on the products manufactured, distributed, sold, and offered for sale by Defendants.

12 3. Detectable levels of TDCPP and/or TCEP are commonly found in and on the
13 products Defendants manufacture, distribute, sell, and offer for sale or use without warning in
14 California. Citizens, consumers, and other individuals in California, including infants and
15 children, are exposed to TDCPP in the following ways: (i) by inhalation when they inhale
16 TDCPP present in ambient particles released from upholstered furniture and other products
17 containing TDCPP-treated foam; (ii) by dermal exposure when they touch TDCPP-treated foam
18 directly or contact ambient particles containing TDCPP that are released from upholstered
19 furniture and other products that use TDCPP-treated foam; and (iii) by route of ingestion as a
20 result of hand-to-mouth contact with TDCPP-treated foam or with ambient particles released
21 from upholstered furniture and other products that use TDCPP-treated foam.

22 4. The Safe Drinking Water and Toxic Enforcement Act of 1986 codified at Health
23 and Safety Code Section 25249.5 et seq. (“Proposition 65), states “[n]o person in the course of
24 doing business shall knowingly and intentionally expose any individual to a chemical known to
25 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
26 warning to such individual . . .”

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 exposures 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. On October 28, 2011, California identified and listed TDCPP, pursuant to
6 Proposition 65, 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. Pursuant to Proposition 65, on April 1, 1992, California identified and listed
10 TCEP as a chemical known to cause cancer. TCEP became subject to the “clear and reasonable
11 warning” requirements of the Act one year later on April 1, 1993. (Cal. Code Regs., Title 27, §
12 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

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

15 a. Defendant Skyline Furniture Mfg., Inc. manufactures, distributes, imports,
16 sells, and/or offers for sale without a warning in California padded upholstered furniture,
17 including chairs, containing TDCPP including, but not limited to, the *Medallion Accident*
18 *Chair by Skyline Furniture Mfg., Style #: 6705MDLSTN, DPCI-Item #: 249030147 (#4*
19 *92490 30147 5);*

20 b. Defendant Hooker Furniture Corporation manufactures, distributes,
21 imports, sells, and/or offers for sale without a warning in California padded upholstered
22 furniture, including ottomans, containing TDCPP and/or TCEP including, but not limited
23 to, the *Joli Nesting Ottomans, #641-36003, W-10810);*

24 c. Defendant Whelan Furniture Manufacturing Inc. manufactures,
25 distributes, imports, sells, and/or offers for sale without a warning in California padded
26 upholstered furniture, including stools, containing TDCPP including, but not limited to,
27
28

1 the *Bayside Furnishings Century Barstool, Itm./Art. 626832, Model #CTBST, (#7 64053*
2 *47312 8)*, sold by, inter alia, Costco Wholesale Corporation.

3 9. All such padded upholstered furniture including chairs, ottomans, and stools that
4 contain TDCPP described in Paragraphs 8(a) through (c) above, shall hereinafter be collectively
5 be referred to as "PRODUCTS." As to each specific defendant, however, PRODUCTS shall
6 refer only to those categories of products listed for the defendant in Paragraphs 8(a) through (c)
7 above.

8 10. Although Defendants expose infants, children, and other people to TDCPP and/or
9 TCEP in their PRODUCTS, Defendants provide no warnings about the carcinogenic or
10 teratogenic health hazards associated with exposures to these Proposition 65-listed chemicals.
11 Defendants' failure to warn consumers and other individuals in the State of California not
12 covered by California's Occupational Safety Health Act, Labor Code section 6300 et seq. about
13 their the health hazards associated with exposures to TDCPP and/or TCEP in conjunction with
14 Defendants' distribution, importation, manufacture, and/or sales of the PRODUCTS, are
15 violations of Proposition 65, and subject Defendants to enjoinder of such conduct as well as
16 civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

17 11. Pursuant to Health and Safety Code section 25249.7(a), Plaintiff seeks
18 preliminary and permanent injunctive relief to compel each of the Defendants to provide
19 purchasers or users of the PRODUCTS with the required health hazard warning regarding the
20 risks of exposures to TDCPP and/or TCEP in the PRODUCTS.

21 12. Pursuant to Health and Safety Code Section 25249.7(b), Plaintiff also seeks civil
22 penalties against each Defendant for its violations of Proposition 65.

23 **PARTIES**

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

28

1 users first having been provided with a “clear and reasonable warning” regarding the health
2 hazards of such toxic exposures, as required by Proposition 65.

3 25. On January 30, 2013, PETER ENGLANDER provided a sixty-day notice of
4 violation of Proposition 65, together with the requisite certificate of merit, to HOOKER and the
5 required public enforcement agencies, stating that as a result of HOOKER’s sales of the
6 PRODUCTS, purchasers and users in California were being exposed to TDCPP resulting from
7 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
8 users first having been provided with a “clear and reasonable warning” regarding the health
9 hazards of such toxic exposures, as required by Proposition 65.

10 26. On February 25, 2013, PETER ENGLANDER provided a sixty-day notice of
11 violation of Proposition 65, together with the requisite certificate of merit, to HOOKER and the
12 required public enforcement agencies, stating that as a result of HOOKER’s sales of the
13 PRODUCTS, purchasers and users in California were being exposed to TCEP resulting from
14 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
15 users first having been provided with a “clear and reasonable warning” regarding the health
16 hazards of such toxic exposures, as required by Proposition 65.

17 27. On January 30, 2013, PETER ENGLANDER provided a sixty-day notice of
18 violation of Proposition 65, together with the requisite certificate of merit, to WHELAN and
19 certain required public enforcement agencies, stating that as a result of WHELAN’s sales of the
20 PRODUCTS, purchasers and users in California were being exposed to TDCPP resulting from
21 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
22 users first having been provided with a “clear and reasonable warning” regarding the health
23 hazards of such toxic exposures, as required by Proposition 65.

24 28. On January 30, 2013, PETER ENGLANDER provided a sixty-day notice of
25 violation of Proposition 65, together with the requisite certificate of merit, to COSTCO and
26 certain required public enforcement agencies, stating that as a result of COSTCO’s sales of the
27 PRODUCTS, purchasers and users in California were being exposed to TDCPP resulting from
28

1 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
2 users first having been provided with a “clear and reasonable warning” regarding the health
3 hazards of such toxic exposures, as required by Proposition 65.

4 29. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
5 and offering of the PRODUCTS for sale or use in California in violation of Health and Safety
6 Code section 25249.6, and DEFENDANTS’ violations have continued to occur beyond their
7 receipt of Plaintiff’s sixty-day notices of violation. As such, DEFENDANTS’ violations are
8 ongoing and continuous in nature, such that they will continue to occur in the future.

9 30. After receiving Plaintiff’s sixty-day notices of violation, the appropriate public
10 enforcement agencies have failed to commence and diligently prosecute a cause of action against
11 DEFENDANTS under Proposition 65.

12 31. The PRODUCTS DEFENDANTS manufacture, import, distribute, sell and offer
13 for sale or use in California contain TDCPP such that they require a “clear and reasonable”
14 warning under Proposition 65.

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

17 33. TDCPP and/or TCEP is present in or on the PRODUCTS in such a way as to
18 expose individuals to TDCPP and/or TCEP through dermal contact, ingestion, and/or inhalation
19 during reasonably foreseeable uses of the PRODUCTS.

20 34. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
21 continue to cause, consumer products exposures and occupational exposures to TDCPP and/or
22 TCEP as such exposures are defined by California Code of Regulations title 27, section
23 25602(b).

24 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
25 of the PRODUCTS expose individuals to TDCPP and/or TCEP through dermal contact,
26 ingestion, and/or inhalation.

27
28

1 reasonable warning” as defined by California Code of Regulations tit. 27, section 25601, et seq.,
2 as to the harms associated with exposures to TDCPP;

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

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

5
6 Dated: May 8, 2013

Respectfully Submitted,
THE CHANLER GROUP

8
9 By: 
10 Jonathan A. Bornstein
11 Attorneys for Plaintiff
12 PETER ENGLANDER
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28