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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

ALAMEDA COUNTY

UNLIMITED CIVIL JURISDICTION

PETER ENGLANDER,

Plaintiff,

v.

SKYLINE FURNITURE MFG., INC.;
HOOKER FURNITURE CORPORATION;
WHELAN FURNITURE MANUFACTURING
INC.; COSTCO WHOLESALE
CORPORATION; TARGET CORPORATION;
and DOES 1-150, inclusive,

Defendants.

Case No. RG13675155

**SECOND 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 Englander in
3 the public interest of the citizens of the State of California to enforce the People’s right to be
4 informed of the presence of tris(1,3-dichloro-2-propyl) phosphate (“TDCPP”), and Tris(2-
5 chloroethyl) phosphate (“TCEP”), toxic flame retardant chemicals found in polyurethane foam
6 used as padding or cushioning in a variety of products sold in the State of California.

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

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

23 4. The Safe Drinking Water and Toxic Enforcement Act of 1986 codified at Health
24 and Safety Code Section 25249.5 *et seq.* (“Proposition 65”), states “[n]o person in the course of
25 doing business shall knowingly and intentionally expose any individual to a chemical known to
26 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
27 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 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. 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 Proposition 65 one year later on April 1, 1993. 27 Cal. Code
8 Regs. § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

9 7. Pursuant to Proposition 65, on October 28, 2011, California identified and listed
10 TDCPP as a chemical known to cause cancer. TDCPP became subject to the "clear and
11 reasonable warning" requirements of Proposition 65 one year later on October 28, 2012.
12 27 Cal. Code Regs. § 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 (such as 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)*. Defendant Skyline Furniture Mfg., Inc.'s chairs are sold by Target
20 Corporation, among other retailers;

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

25 c. Defendant Whelan Furniture Manufacturing Inc. manufactures,
26 distributes, imports, sells, and/or offers for sale without a warning in California padded
27 upholstered furniture (such as stools) containing TDCPP including, but not limited to, the
28 *Bayside Furnishings Century Barstool, Itm./Art. 626832, Model #CTBST, (#7 64053*

1 47312 8). Defendant Whelan Furniture Manufacturing Inc.'s stools are sold by Costco
2 Wholesale Corporation, among other retailers.

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

8 10. Although defendants expose infants, children, and other people to TDCPP and/or
9 TCEP in their PRODUCTS, defendants have provided, and continue to provide, no warnings
10 about the carcinogenic or teratogenic health hazards associated with exposures to these
11 Proposition 65-listed chemicals. Defendants' failure to warn consumers and other individuals in
12 the State of California not covered by California's Occupational Safety Health Act, Labor Code
13 section 6300 *et seq.* about their the health hazards associated with exposures to TDCPP and/or
14 TCEP in conjunction with Defendants' distribution, importation, manufacture, and/or sales of the
15 PRODUCTS, are violations of Proposition 65, and subject defendants to enjoinder of such
16 conduct as well as 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 dedicated to
25 protecting the health of California citizens through the elimination or reduction of toxic
26 exposures from consumer products; and he brings this action in the public interest pursuant to
27 Health and Safety Code section 25249.7(d).

1 b. On Hooker, stating that as a result of Hooker’s sales of the PRODUCTS,
2 purchasers and users in California were being exposed to TDCPP resulting from their
3 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
4 users first having been provided with a “clear and reasonable warning” regarding the
5 health hazards of such toxic exposures, as required by Proposition 65;

6 c. On Whelan, stating that as a result of Whelan’s sales of the PRODUCTS,
7 purchasers and users in California were being exposed to TDCPP resulting from their
8 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
9 users first having been provided with a “clear and reasonable warning” regarding the
10 health hazards of such toxic exposures, as required by Proposition 65;

11 d. On Costco, stating that as a result of Costco’s sales of the PRODUCTS,
12 purchasers and users in California were being exposed to TDCPP resulting from their
13 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
14 users first having been provided with a “clear and reasonable warning” regarding the
15 health hazards of such toxic exposures, as required by Proposition 65;

16 25. On February 25, 2013, plaintiff served another sixty-day notice of violation of
17 Proposition 65, together with the requisite certificate of merit, on Hooker and the required public
18 prosecutors, stating that as a result of Hooker’s sales of the PRODUCTS, purchasers and users in
19 California were being exposed to TCEP resulting from their reasonably foreseeable uses of the
20 PRODUCTS, without the individual purchasers and users first having been provided with a
21 “clear and reasonable warning” regarding the health hazards of such toxic exposures, as required
22 by Proposition 65.

23 26. On March 20, 2013, plaintiff served a sixty-day notice of violation of Proposition
24 65, together with the requisite certificate of merit, on Target and the required public prosecutors,
25 stating that as a result of Target’s sales of the PRODUCTS, purchasers and users in California
26 were being exposed to TDCPP resulting from their reasonably foreseeable uses of the
27 PRODUCTS, without the individual purchasers and users first having been provided with a
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1 “clear and reasonable warning” regarding the health hazards of such toxic exposures, as required
2 by Proposition 65.

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

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

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

14 30. Defendants knew or should have known that the PRODUCTS they manufacture,
15 import, distribute, sell, and offer for sale or use in California contain TDCPP and/or TCEP.

16 31. The chemicals TDCPP and/or TCEP are present in or on the PRODUCTS in such
17 a way as to expose individuals to TDCPP and/or TCEP through dermal contact, ingestion, and/or
18 inhalation during reasonably foreseeable uses of the PRODUCTS.

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

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

26 34. Defendants intended that such exposures to TDCPP and/or TCEP from the reasonably
27 foreseeable uses of the PRODUCTS would occur by defendants’ deliberate, non-accidental
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1 participation in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for
2 sale or use to individuals in the State of California.

3 35. Defendants failed to provide a “clear and reasonable warning” to those consumers
4 and other individuals in the State of California who were or who would become exposed to
5 TDCPP and/or TCEP through dermal contact, ingestion, and/or inhalation during the reasonably
6 foreseeable uses of the PRODUCTS.

7 36. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
8 directly by California voters, individuals exposed to TDCPP and/or TCEP through dermal
9 contact, ingestion, and/or inhalation, resulting from the reasonably foreseeable uses of the
10 PRODUCTS sold by defendants without a “clear and reasonable warning,” have suffered, and
11 continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at
12 law.

13 37. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
14 above-described acts, defendants are liable for a maximum civil penalty of \$2,500 per day for
15 each violation.

16 38. As a consequence of the above-described acts, Health and Safety Code
17 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
18 DEFENDANTS.

19 **PRAYER FOR RELIEF**

20 Wherefore, plaintiff prays for judgment against each of the defendants as follows:

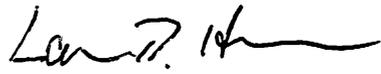
- 21 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
22 civil penalties against defendants in the amount of \$2,500 per day for each violation;
- 23 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
24 preliminarily and permanently enjoin defendants from manufacturing, distributing, or offering
25 the PRODUCTS for sale or use in California without first providing a “clear and reasonable
26 warning” as defined by California Code of Regulations tit. 27, section 25601, et seq., as to the
27 harms associated with exposures to TDCPP and/or TCEP;

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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grants such other and further relief as may be just and proper.

Dated: July 10, 2013

Respectfully Submitted,
THE CHANLER GROUP

By: 

Laurence D. Haveson
Attorneys for Plaintiff
PETER ENGLANDER