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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;
WHALEN FURNITURE MANUFACTURING
INC.; COSTCO WHOLESALE
CORPORATION; TARGET CORPORATION;
and DOES 1-150, inclusive,
Defendants.

Case No. RG13675155

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

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



FILED
ALAMEDA COUNTY
AUG 14 2013
CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

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NATURE OF THE ACTION

1. This Complaint is a representative action brought by Plaintiff Peter Englander in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of tris(1,3-dichloro-2-propyl) phosphate ("TDCPP"), and Tris(2-chloroethyl) phosphate ("TCEP"), toxic flame retardant chemicals found in polyurethane foam used as padding or cushioning in a variety of products sold in the State of California.

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

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

4. The Safe Drinking Water and Toxic Enforcement Act of 1986 codified at Health and Safety Code Section 25249.5 *et seq.* ("Proposition 65"), states "[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable 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, the
27 *Bayside Furnishings Century Barstool, Itm./Art. 626832, Model #CTBST, (#7 64053*
28 *47312 8)*, containing TDCPP, sold by, inter alia, Costco Wholesale Corporation.

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

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

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

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

21 **PARTIES**

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

26 14. Defendants Skyline Furniture Mfg., Inc. (“Skyline”), Hooker Furniture
27 Corporation (“Hooker”), Whalen Furniture Manufacturing Inc. (“Whalen”), Costco Wholesale
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1 Corporation ("Costco"), and Target Corporation ("Target") are each a person in the course of
2 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

3 15. Skyline, Hooker, Whalen, Costco, and Target each manufacture, import, distribute,
4 sell, and/or offer the PRODUCTS for sale or use in the State of California, or implies by its
5 conduct that it manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or
6 use in the State of California.

7 16. Defendants DOES 1-150 are each a person in the course of doing business within
8 the meaning of Health and Safety Code sections 25249.6 and 25249.11. DOES 1 – 150 import,
9 manufacture, distribute, sell, and/or offer the PRODUCTS for sale or use in the State of
10 California. At this time, the true names and capacities of defendants DOES 1 – 150, inclusive,
11 are unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant
12 to Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
13 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
14 alleged herein. When ascertained, the true name and capacity of each such defendant shall be
15 reflected in an amended complaint.

16 17. Skyline, Hooker, Whalen, Costco, Target, and Defendants DOES 1-150 are
17 collectively referred to hereinafter as "defendants."

18 VENUE AND JURISDICTION

19 18. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
20 Procedure sections 393, 395, and 395.5 because this Court is a court of competent jurisdiction,
21 plaintiff seeks civil penalties against defendants, because one or more instances of wrongful
22 conduct occurred, and continue to occur, in Alameda County, and/or because defendants
23 conducted, and continue to conduct, business in this county with respect to the PRODUCTS.

24 19. The California Superior Court has jurisdiction over this action pursuant to
25 California Constitution Article VI, section 10, which grants the Superior Court "original
26 jurisdiction in all causes except those given by statute to other trial courts." The statute under
27 which this action is brought does not specify any other basis of subject matter jurisdiction.

28 20. The California Superior Court has jurisdiction over defendants based on

1 plaintiff's information and good faith belief that each defendant is a person, firm, corporation, or
2 association that is a citizen of the State of California, has sufficient minimum contacts in the
3 State of California, and/or otherwise purposefully avails itself of the California market.
4 Defendants' purposeful availing renders the exercise of personal jurisdiction by California courts
5 consistent with traditional notions of fair play and substantial justice.

6 **FIRST CAUSE OF ACTION**

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

8 21. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
9 Paragraphs 1 through 20, inclusive.

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

14 23. Health and Safety Code section 25249.6 states, "[n]o person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual . . ."

18 24. On January 30, 2013, plaintiff served sixty-day notices of violation of Proposition
19 65, together with the requisite certificates of merit, on the California Attorney General and
20 certain required public prosecutors and on the following defendants, alleging the following:

21 a. On Skyline, stating that as a result of Skyline's sales of the PRODUCTS,
22 purchasers and users in California were being exposed to TDCPP resulting from their
23 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
24 users first having been provided with a "clear and reasonable warning" regarding the
25 health hazards of such toxic exposures, as required by Proposition 65;

26 b. On Hooker, stating that as a result of Hooker's sales of the PRODUCTS,
27 purchasers and users in California were being exposed to TDCPP resulting from their
28 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and

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

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

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

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

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

27 27. Defendants have engaged in the manufacture, importation, distribution, sale, and
28 offering of the PRODUCTS for sale or use in California in violation of Health and Safety Code

1 section 25249.6, and defendants' violations have continued to occur beyond their receipt of
2 plaintiff's sixty-day notices of violation. As such, defendants' violations are ongoing and
3 continuous in nature, such that they will continue to occur in the future.

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

7 29. The PRODUCTS that defendants manufacture, import, distribute, sell and offer
8 for sale or use in California contain TDCPP and/or TCEP such that they require a "clear and
9 reasonable" warning under Proposition 65.

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

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

15 32. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
16 continue to cause, consumer products exposures and occupational exposures to TDCPP and/or
17 TCEP as such exposures are defined by California Code of Regulations title 27, section
18 25602(b).

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

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

26 35. Defendants failed to provide a "clear and reasonable warning" to those consumers
27 and other individuals in the State of California who were or who would become exposed to
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1 TDCPP and/or TCEP through dermal contact, ingestion, and/or inhalation during the reasonably
2 foreseeable uses of the PRODUCTS.

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

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

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

15 **PRAYER FOR RELIEF**

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

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

19 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
20 preliminarily and permanently enjoin defendants from manufacturing, distributing, or offering
21 the PRODUCTS for sale or use in California without first providing a "clear and reasonable
22 warning" as defined by California Code of Regulations tit. 27, section 25601, et seq., as to the
23 harms associated with exposures to TDCPP and/or TCEP;

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

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

Dated: August 13, 2013

THE CHANLER GROUP

By: Lawrence D. Haveson
Laurence D. Haveson
Attorneys for Plaintiff
PETER ENGLANDER