

APR 23 2013

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

15 PETER ENGLANDER,

16 Plaintiff,

17 v.

18 CM INTERNATIONAL, INC.; CMC
19 WORLDWIDE, INC.; BERKSHIRE
20 HATHAWAY, INC.; R.C. WILLEY HOME
21 FURNISHINGS; RATTAN SPECIALTIES,
22 INC.; and DOES 1-150, inclusive,

23 Defendants.

24 Case No. 13 676712

25 **COMPLAINT FOR CIVIL PENALTIES
26 AND INJUNCTIVE RELIEF**

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

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”), a toxic chemical found in padded upholstered furniture sold in the State of
6 California. TDCPP is a toxic chemical that is used to treat polyurethane foam, which is used as
7 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 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.)

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

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

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

9 a. Defendants CM International, Inc. ("CM INTERNATIONAL"), CMC
10 Worldwide, Inc. ("CMC WORLDWIDE"), Berkshire Hathaway, Inc. ("BERKSHIRE"),
11 and R.C. Willey Home Furnishings ("R.C. WILEY") manufacture, distribute, import, sell
12 and/or offer for sale in California padded upholstered stools containing TDCPP without a
13 warning including, but not limited to, the 30" *Barstool, #2944C-ESP*;

14 b. Defendant Rattan Specialties, Inc. ("RATTAN") manufactures,
15 distributes, imports, sells and/or offers for sale in California padded upholstered furniture
16 including stools containing TDCPP without a warning including, but not limited to, the
17 *Barstool, #1010*.

18 8. All padded upholstered furniture containing TDCPP, as listed in paragraphs 7(a)
19 through (b) above, shall hereinafter be referred to as the "PRODUCTS." As to each specific
20 Defendant, however, PRODUCTS shall refer only to those specific products listed for each
21 specific Defendant in paragraphs 7(a) through (b) above.

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

3 10. As a result of Defendants' violations of Proposition 65, Plaintiff seeks preliminary
4 and permanent injunctive relief to compel Defendants to provide purchasers or users of the
5 PRODUCTS with the required warning regarding the health hazards of TDCPP in the
6 PRODUCTS. (Health & Safety Code § 25249.7(a).)

7 11. Pursuant to Health and Safety Code Section 25249.7(b), Plaintiff also seeks civil
8 penalties against Defendants for their violations of Proposition 65.

9 **PARTIES**

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

14 13. CM INTERNATIONAL is a person in the course of doing business within the
15 meaning of Health and Safety Code Section 25249.11.

16 14. CM INTERNATIONAL manufactures, imports, distributes, sells, and/or offers the
17 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
18 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
19 State of California.

20 15. CMC WORLDWIDE is a person in the course of doing business within the
21 meaning of Health and Safety Code Section 25249.11.

22 16. CMC WORLDWIDE manufactures, imports, distributes, sells, and/or offers the
23 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
24 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
25 State of California.

26 17. BERKSHIRE is a person in the course of doing business within the meaning of
27 Health and Safety Code Section 25249.11.

1 18. BERKSHIRE manufactures, imports, distributes, sells, and/or offers the
2 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
3 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
4 State of California.

5 19. R.C. WILLEY is a person in the course of doing business within the meaning of
6 Health and Safety Code Section 25249.11.

7 20. R.C. WILLEY manufactures, imports, distributes, sells, and/or offers the
8 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
9 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
10 State of California.

11 21. RATTAN is a person in the course of doing business within the meaning of
12 Health and Safety Code Section 25249.11.

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

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

24 24. CM INTERNATIONAL, CMC WORLDWIDE, BERKSHIRE, R.C. WILLEY,
25 RATTAN and Defendants DOES 1-150 are collectively referred to herein as "DEFENDANTS."
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1 **VENUE AND JURISDICTION**

2 25. 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 26. 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 27. 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
14 or 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 28. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
22 Paragraphs 1 through 27, inclusive.

23 29. 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 30. 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 31. On February 8, 2013, Plaintiff’s sixty-day notice of violation, together with the
6 requisite certificate of merit, was provided to CM INTERNATIONAL, CMC WORLDWIDE,
7 BERKSHIRE, R.C. WILLEY and certain public enforcement agencies stating that, as a result of
8 CM INTERNATIONAL, CMC WORLDWIDE, BERKSHIRE and R.C. WILLEY’S sales of
9 the PRODUCTS containing TDCPP, purchasers and users in the State of California were being
10 exposed to TDCPP 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 32. On February 15, 2013, Plaintiff’s sixty-day notice of violation, together with the
14 requisite certificate of merit, was provided to RATTAN and certain public enforcement
15 agencies stating that, as a result of RATTAN’S sales of the PRODUCTS containing TDCPP,
16 purchasers and users in the State of California were being exposed to TDCPP resulting from
17 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
18 users first having been provided with a “clear and reasonable warning” regarding such toxic
19 exposures, as required by Proposition 65.

20 33. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
21 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code Section
22 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
23 Plaintiff’s sixty-day notices of violation. As such, DEFENDANTS’ violations are ongoing and
24 continuous in nature, and will continue to occur in the future.

25 34. After receiving Plaintiff’s sixty-day notices of violation, the appropriate public
26 enforcement agencies have failed to commence and diligently prosecute a cause of action
27 against DEFENDANTS under Proposition 65.
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1 35. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
2 or use in the State of California by DEFENDANTS contain TDCPP such that they require a
3 “clear and reasonable” warning under Proposition 65.

4 36. DEFENDANTS knew or should have known that the PRODUCTS they
5 manufacture, import, distribute, sell, and offer for sale or use in the State of California contain
6 TDCPP.

7 37. TDCPP is present in or on the PRODUCTS in such a way as to expose
8 individuals to TDCPP through dermal contact, ingestion, and/or inhalation during reasonably
9 foreseeable uses of the PRODUCTS.

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

13 39. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
14 of the PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or
15 inhalation.

16 40. DEFENDANTS intended that such exposures to TDCPP from the reasonably
17 foreseeable uses of the PRODUCTS would occur by DEFENDANTS’ deliberate, non-
18 accidental participation in the manufacture, importation, distribution, sale, and offering of the
19 PRODUCTS for sale or use to individuals in the State of California.

20 41. DEFENDANTS failed to provide a “clear and reasonable warning” to those
21 consumers and other individuals in the State of California who were or who would become
22 exposed to TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably
23 foreseeable uses of the PRODUCTS.

24 42. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
25 directly by California voters, individuals exposed to TDCPP through dermal contact, ingestion,
26 and/or inhalation resulting from the reasonably foreseeable uses of the PRODUCTS sold by
27 DEFENDANTS without a “clear and reasonable warning” have suffered, and continue to suffer,
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1 irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

5 44. As a consequence of the above-described acts, Health and Safety Code
6 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
7 DEFENDANTS.

8 **PRAYER FOR RELIEF**

9 Wherefore, Plaintiff prays for judgment against DEFENDANTS, and each of them, as
10 follows:

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

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

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

19 4. That the Court grant such other and further relief as may be just and proper.
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21 Dated: April 22, 2013

THE CHANLER GROUP

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23 By: _____

Stephen E. Cohen
Attorneys for Plaintiff
PETER ENGLANDER