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ENDORSED
FILED
ALAMEDA COUNTY

APR 23 2013

CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

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

14 LAURENCE VINOCUR,

15 Plaintiff,

16 v.

17 ESSENTIAL MEDICAL SUPPLY, INC.; and
18 DOES 1-150, inclusive,

19 Defendants.

20 Case No. _____

21 *AS* -13-676698

22 **COMPLAINT FOR CIVIL PENALTIES
23 AND INJUNCTIVE RELIEF**

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

25 BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by Plaintiff LAURENCE
3 VINOCUR in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of Tris(1,3-dichloro-2-propyl)phosphate (“TDCPP”), a toxic
5 chemical found in seat cushions sold in California. TDCPP is a toxic chemical that is used to treat
6 polyurethane foam, which is used as padding or cushioning in a variety of products.

7 2. By this Complaint, Plaintiff seeks to remedy Defendants’ continuing failures to warn
8 California citizens about the risks of exposures to TDCPP present in and on seat cushions
9 manufactured, distributed, sold, and offered for sale or use to consumers throughout the State of
10 California.

11 3. Detectable levels of TDCPP are commonly found in and on seat cushions that
12 Defendants manufacture, distribute, sell, and offer for sale to consumers throughout the State of
13 California. Individuals in California, including infants and children, are exposed to TDCPP when
14 they inhale TDCPP released from seat cushions, and also when TDCPP from seat cushions
15 accumulates in ambient particles that are subsequently touched by such individuals and brought into
16 contact with the mouth.

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

22 5. TDCPP has been used in consumer products as an additive flame retardant since the
23 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic effects,
24 the United States Consumer Product Safety Commission banned the use of TDCPP in children’s
25 pajamas.

26 6. Pursuant to Proposition 65, on October 28, 2011, California identified and listed
27 TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and reasonable
28 warning” requirements of the Act one year later on October 28, 2012. (Cal. Code Regs., Title 27,

1 § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).) TDCPP is hereinafter referred to as
2 the “LISTED CHEMICAL.”

3 7. Defendants manufacture, distribute, import, sell, and/or offer for sale seat cushions
4 containing TDCPP without a warning including, but not limited to, *Essential Gel Cushion* (#7
5 54756 13039 8). All such seat cushions containing TDCPP, are hereinafter collectively referred to
6 as the “PRODUCTS.”

7 8. Although Defendants expose infants, children, and other people to TDCPP in the
8 PRODUCTS, Defendants provide no warnings about the carcinogenic hazards associated with these
9 TDCPP exposures. Defendants’ failures to warn consumers and other individuals in the State of
10 California about their exposures to the LISTED CHEMICAL in conjunction with Defendants’ sales
11 of the PRODUCTS, is a violation of Proposition 65, and subjects Defendants to enjoinder of such
12 conduct as well as civil penalties for each violation. (Health & Safety Code § 25249.7(a) & (b)(1).)

13 9. As a result of Defendants’ violations of Proposition 65, Plaintiff seeks preliminary
14 and permanent injunctive relief to compel Defendants to provide purchasers and users of the
15 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.
16 (Health & Safety Code § 25249.7(a).)

17 10. Pursuant to Health and Safety Code § 25249.7(b), Plaintiff also seeks civil penalties
18 against Defendants for their violations of Proposition 65.

19 **PARTIES**

20 11. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is
21 dedicated to protecting the health of California citizens through the elimination or reduction of toxic
22 exposures from consumer products; and he brings this action in the public interest pursuant to
23 Health and Safety Code § 25249.7(d).

24 12. Defendant ESSENTIAL MEDICAL SUPPLY, INC. is a person in the course of doing
25 business within the meaning of Health and Safety Code § 25249.11.

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1 availment of California as a marketplace for the PRODUCTS renders the exercise of personal
2 jurisdiction by California courts over Defendants consistent with traditional notions of fair play and
3 substantial justice.

4 **FIRST CAUSE OF ACTION**

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

6 19. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
7 Paragraphs 1 through 18, inclusive.

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

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

15 22. On February 8, 2013, Plaintiff’s sixty-day notice of violation, together with the
16 requisite certificate of merit, was provided to ESSENTIAL MEDICAL SUPPLY, INC., and certain
17 public enforcement agencies stating that, as a result of Defendants’ sales of the PRODUCTS
18 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
19 exposed to the LISTED CHEMICAL resulting from their reasonably foreseeable uses of the
20 PRODUCTS, without the individual purchasers and users first having been provided with a “clear
21 and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

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

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1 24. After receiving Plaintiff's sixty-day notice of violation, the appropriate public
2 enforcement agencies have not commenced and are not diligently prosecuted a cause of action
3 against Defendants under Proposition 65.

4 25. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale or
5 use in California by Defendants contain the LISTED CHEMICAL such that they require a "clear
6 and reasonable" warning under Proposition 65.

7 26. Defendants knew or should have known that the PRODUCTS they manufacture,
8 import, distribute, sell, and offer for sale or use in California contain the LISTED CHEMICAL.

9 27. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
10 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
11 inhalation during reasonably foreseeable uses of the PRODUCTS.

12 28. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
13 continue to cause, consumer exposures to the LISTED CHEMICAL as such exposures are defined
14 by Title 27 of the California Code of Regulations, section 25602(b).

15 29. Defendants have had knowledge that the normal and reasonably foreseeable uses of
16 the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact, ingestion,
17 and/or inhalation.

18 30. Defendants intended that such exposures to the LISTED CHEMICAL from the
19 reasonably foreseeable uses of the PRODUCTS would occur by Defendants' deliberate, non-
20 accidental participation in the manufacture, importation, distribution, sale, and offering of the
21 PRODUCTS for sale or use to individuals in the State of California.

22 31. Defendants failed to provide a "clear and reasonable warning" to those consumers
23 and other individuals in the State of California who were or who would become exposed to the
24 LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation during the reasonably
25 foreseeable uses of the PRODUCTS.

26 32. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
27 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
28 contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of the

1 PRODUCTS sold by Defendants without a "clear and reasonable warning," have suffered, and
2 continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at
3 law.

4 33. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
5 described acts, Defendants are liable for a civil penalty of \$2,500 per day for each violation.

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

8 **PRAYER FOR RELIEF**

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

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

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

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

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

19 Dated: April 22, 2013

THE CHANLER GROUP

20
21 By: 

Laralei S. Paras
Attorneys for Plaintiff
LAURENCE VINOUCUR