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ENDORSED
FILED
ALAMEDA COUNTY

AUG 01 2013

CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION

12 PETER ENGLANDER,

13 Plaintiff,

14 v.

15
16 IDEAVILLAGE PRODUCTS CORP; CVS
17 CAREMARK CORPORATION; CVS
18 PHARMACY, INC.; and DOES 2-150,
19 inclusive,

20 Defendants.

Case No. RG13676717

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

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

NATURE OF THE ACTION

1
2 1. This First Amended Complaint is a representative action brought by plaintiff
3 PETER ENGLANDER in the public interest of the citizens of the State of California to enforce
4 the 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 found in massaging
6 pillows sold in California. TDCPP and TCEP are toxic chemicals used to treat polyurethane
7 foam, which is used as padding or cushioning in a variety of products.

8 2. By this First Amended Complaint, plaintiff seeks to remedy Defendants’
9 continuing failures to warn California citizens about the risks of exposures to TDCPP and TCEP
10 present in and on the massaging pillows manufactured, distributed, and offered for sale or use to
11 consumers throughout the State of California.

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

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

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

1 6. On April 1, 1992, California identified and listed TCEP pursuant to Proposition
2 65 as a chemical known to cause cancer. TCEP became subject to the warning requirement one
3 year later and was, therefore, subject to the “clear and reasonable warning” requirements of
4 Proposition 65 beginning April 1, 1993. (Cal. Code Regs., Tit. 27, § 27001(c); Health & Safety
5 Code §§ 25249.8 & 25249.10(b).)

6 7. On October 28, 2011, California identified and listed TDCPP pursuant to
7 Proposition 65 as a chemical known to cause cancer. TDCPP became subject to the warning
8 requirements one year later and was, therefore, subject to the “clear and reasonable warning”
9 requirements of the Proposition 65 beginning October 28, 2012. (Cal. Code Regs., Tit. 27, §
10 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

11 8. TDCPP and TCEP are hereinafter collectively referred to as the “LISTED
12 CHEMICALS.”

13 9. Defendants Ideavillage Products Corp. (“IDEAVILLAGE”), CVS Caremark
14 Corporation (“CVS CAREMARK”) and CVS Pharmacy Inc. (“CVS PHARMACY”)
15 manufacture, distribute, import, sell and/or offer for sale in California massaging pillows
16 containing the LISTED CHEMICALS without a warning including, but not limited to, the
17 *Miyashi Massaging Pillow, IV_MIY_PG_R4_060811-J (#7 54502 02300 4)*.

18 10. All massaging pillows containing the LISTED CHEMICALS, as listed in
19 paragraph 9 above, shall hereinafter be referred to as the “PRODUCTS.”

20 11. Although Defendants expose infants, children, and other people to the LISTED
21 CHEMICALS in the PRODUCTS, Defendants provide no warnings about the carcinogenic
22 hazards associated with exposures to the LISTED CHEMICALS. Defendants’ failures to warn
23 consumers and other individuals in the State of California about their exposures to the LISTED
24 CHEMICALS in conjunction with Defendants’ sales of the PRODUCTS, is a violation of
25 Proposition 65, and subjects Defendants to enjoinder of such conduct as well as civil penalties
26 for each violation. (Health & Safety Code § 25249.7(a) & (b)(1).)

1 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
2 State of California.

3 21. Defendants DOES 2-150 are each persons in the course of doing business within
4 the meaning of Health and Safety Code § 25249.11(b), which manufacture, distribute, sell,
5 and/or offer the PRODUCTS for sale in the State of California. At this time, the true names and
6 capacities of defendants DOES 2 through 150, inclusive, are unknown to plaintiff, who,
7 therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure §
8 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously
9 named defendants is responsible for the acts and occurrences alleged herein. When ascertained,
10 their true names and capacities shall be reflected in an amended complaint.

11 22. IDEAVILLAGE, CVS CAREMARK, CVS PHARMACY and Defendants DOES
12 2-150 are hereinafter collectively referred to as "Defendants."

13 VENUE AND JURISDICTION

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

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

24 25. The California Superior Court has jurisdiction over Defendants based on
25 plaintiff's information and good faith belief that each Defendant is a person, firm, corporation or
26 association that is a citizen of the State of California, has sufficient minimum contacts in the
27 State of California, and/or otherwise purposefully avails itself of the California market.

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

4 **FIRST CAUSE OF ACTION**

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

6 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
7 Paragraphs 1 through 25, inclusive.

8 27. 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
10 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
11 harm.”

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

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

23 30. On March 13, 2013, plaintiff’s sixty-day notice of violation, together with the
24 requisite certificate of merit, was provided to IDEAVILLAGE, CVS CAREMARK and certain
25 public enforcement agencies stating that, as a result of IDEAVILLAGE and CVS
26 CAREMARK’s sales of the PRODUCTS containing TCEP, purchasers and users in the State of
27 California were being exposed to TCEP resulting from their reasonably foreseeable uses of the
28

1 PRODUCTS, without the individual purchasers and users first having been provided with a
2 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

3 31. On May 17, 2013, plaintiff’s sixty-day notice of violation, together with the
4 requisite certificate of merit, was provided to IDEAVILLAGE, CVS CAREMARK, CVS
5 PHARMACY and certain public enforcement agencies stating that, as a result of Defendants’
6 sales of the PRODUCTS containing TDCPP, purchasers and users in the State of California
7 were being exposed to TDCPP resulting from their reasonably foreseeable uses of the
8 PRODUCTS, without the individual purchasers and users first having been provided with a
9 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

10 32. On May 17, 2013, plaintiff’s sixty-day notice of violation, together with the
11 requisite certificate of merit, was provided to IDEAVILLAGE, CVS CAREMARK, CVS
12 PHARMACY and certain public enforcement agencies stating that, as a result of Defendants’
13 sales of the PRODUCTS containing TCEP, purchasers and users in the State of California were
14 being exposed to TCEP resulting from their reasonably foreseeable uses of the PRODUCTS,
15 without the individual purchasers and users first having been provided with a “clear and
16 reasonable warning” regarding such toxic exposures, as required by Proposition 65

17 33. Defendants have engaged in the manufacture, importation, distribution, sale, and
18 offering of the PRODUCTS for sale or use in violation of Health and Safety Code § 25249.6,
19 and Defendants’ violations have continued to occur beyond sixty days of their receipt of
20 plaintiff’s sixty-day notices of violation. As such, Defendants’ violations are ongoing and
21 continuous in nature, and will continue to occur in the future.

22 34. After receiving plaintiff’s sixty-day notices of violation, and more than sixty days
23 having passed since receipt of each such notice, the appropriate public enforcement agencies
24 have failed to commence and diligently prosecute a cause of action against Defendants under
25 Proposition 65.

1 35. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
2 or use in California by Defendants contain the LISTED CHEMICALS 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 manufacture,
5 import, distribute, sell, and offer for sale or use in California contain the LISTED
6 CHEMICALS.

7 37. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
8 to expose individuals to the LISTED CHEMICALS through dermal contact, ingestion, and/or
9 inhalation during reasonably 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 to the LISTED CHEMICALS, as such exposures are
12 defined by Title 27 of the California Code of Regulations, § 25602(b).

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

16 40. Defendants intended that such exposures to the LISTED CHEMICALS from the
17 reasonably 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 consumers
21 and other individuals in the State of California who were or who would become exposed to the
22 LISTED CHEMICALS through dermal contact, ingestion, and/or inhalation during the
23 reasonably foreseeable uses of the PRODUCTS.

24 42. Defendants’ failures to warn consumers and/or other individuals in the State of
25 California not covered by California’s Occupational Safety Health Act, Labor Code § 6300 *et*
26 *seq.*, about their exposures to LISTED CHEMICALS in conjunction with Defendants’
27 distribution, importation, manufacturing, and/or sale of the PRODUCTS, is a violation of
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1 Proposition 65 and subjects Defendants to enjoinder of such conduct as well as civil penalties
2 for each such violation.

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

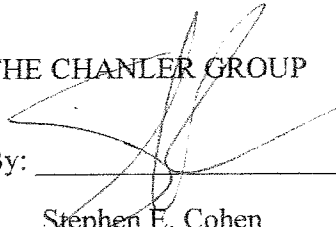
6 44. As a consequence of the above-described acts, Health and Safety Code
7 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendants.

8 **PRAYER FOR RELIEF**

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

- 11 1. That the Court, pursuant to Health and Safety Code § 25249.7(b), assess civil
12 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 § 25249.7(a), preliminarily
14 and permanently enjoin Defendants from manufacturing, distributing, selling, or offering the
15 PRODUCTS for sale or use in California without first providing a “clear and reasonable
16 warning” as defined by Title 27 of the California Code of Regulations, § 25601 *et seq.*, as to the
17 harms associated with exposures the LISTED CHEMICALS;
- 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: July 31, 2013

22 THE CHANLER GROUP
23 By: 
24 Stephen E. Cohen
25 Attorneys for Plaintiff
26 PETER ENGLANDER
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