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12 ENDORSED  
13 FILED  
14 ALAMEDA COUNTY  
15 MAY 13 2013

16 CLERK OF THE SUPERIOR COURT  
17 by MICHELLE BANKS Deputy

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
19 COUNTY OF ALAMEDA  
20 UNLIMITED CIVIL JURISDICTION

21 LAURENCE VINOCUR,

22 Plaintiff,

23 v.

24 FIRST ACT INC.; TOYS "R" US, INC.; and  
25 DOES 1-150, inclusive,

26 Defendants.

27 Case No. <sup>HS</sup> 13679189

28 **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 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”) and  
5 Tris(2-chloroethyl) phosphate (“TCEP”) (hereinafter referred to collectively as the “LISTED  
6 CHEMICALS”), toxic chemicals found in padded upholstered drum seats sold in the State of  
7 California. The LISTED CHEMICALS are toxic chemicals that are used to treat polyurethane  
8 foam, which is used as padding or cushioning in a variety of products.

9 2. By this Complaint, Plaintiff seeks to remedy Defendants’ continuing failures to  
10 warn California citizens about the risks of exposures to the LISTED CHEMICALS present in  
11 and on padded upholstered drum seats manufactured, distributed, sold, and offered for sale or  
12 use to consumers throughout the State of California.

13 3. Detectable levels of the LISTED CHEMICALS are commonly found in and on  
14 padded upholstered drum seats that Defendants manufacture, distribute, sell, and offer for sale  
15 to consumers throughout the State of California. Individuals in California, including infants and  
16 children, are exposed to the LISTED CHEMICALS in the products through various routes of  
17 exposure: (i) through inhalation when the LISTED CHEMICALS are released from padded  
18 upholstered drum seats; (ii) through dermal exposure when the LISTED CHEMICALS from  
19 padded upholstered drum seats accumulates in ambient particles that are subsequently touched  
20 by such individuals; and (iii) through ingestion when such particles are brought into contact  
21 with the mouth.

22 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at  
23 Health and Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course  
24 of doing business shall knowingly and intentionally expose any individual to a chemical known  
25 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable  
26 warning to such individual . . .” (Health & Safety Code § 25249.6.)  
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1           5.     The LISTED CHEMICALS have been used in consumer products as an additive  
2 flame retardant since the 1960s. In the late 1970s, based on findings that exposure to TDCPP  
3 could have mutagenic effects, the United States Consumer Product Safety Commission banned  
4 the use of TDCPP in children’s pajamas.

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

8           7.     Pursuant to Proposition 65, on April 1, 1992, California identified and listed  
9 TCEP as a chemical known to cause cancer. TCEP became subject to the “clear and reasonable  
10 warning” requirements of the Act one year later on April 1, 1993. (Cal. Code Regs., Title 27, §  
11 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).)

12           8.     Defendants First Act Inc. (“FIRST ACT”) and Toys “R” Us, Inc. (“TOYS “R”  
13 US”) manufacture, distribute, import, sell and/or offer for sale in California padded upholstered  
14 drum seats containing the LISTED CHEMICALS without a warning including, but not limited  
15 to, the *First Act Discovery Select Edition Drum Seat, Model No. FD210 (#6 07266 60010 6)*.  
16 All such padded upholstered drum seats containing TDCPP and/or TCEP, are hereinafter  
17 collectively referred to as the “PRODUCTS.”

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

25           10.    As a result of Defendants’ violations of Proposition 65, Plaintiff seeks preliminary  
26 and permanent injunctive relief to compel Defendants to provide purchasers or users of the  
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1 PRODUCTS with the required warning regarding the health hazards of the LISTED  
2 CHEMICALS. (Health & Safety Code § 25249.7(a).)

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

5 **PARTIES**

6 12. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is  
7 dedicated to protecting the health of California citizens through the elimination or reduction of  
8 toxic exposures from consumer products and he brings this action in the public interest pursuant  
9 to Health and Safety Code Section 25249.7(d).

10 13. FIRST ACT is a person in the course of doing business within the meaning of  
11 Health and Safety Code Section 25249.11.

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

16 15. TOYS "R" US is a person in the course of doing business within the meaning of  
17 Health and Safety Code Section 25249.11.

18 16. TOYS "R" US manufactures, imports, distributes, sells, and/or offers the  
19 PRODUCTS for sale or use in the State of California, or implies by its conduct that it  
20 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the  
21 State of California.

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

3 18. FIRST ACT, TOYS “R” US, and Defendants DOES 1-150 are collectively  
4 referred to herein as “DEFENDANTS.”

5 **VENUE AND JURISDICTION**

6 19. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil  
7 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,  
8 because Plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of  
9 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because  
10 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the  
11 PRODUCTS.

12 20. The California Superior Court has jurisdiction over this action pursuant to  
13 California Constitution Article VI, Section 10, which grants the Superior Court “original  
14 jurisdiction in all causes except those given by statute to other trial courts.” The statute under  
15 which this action is brought does not specify any other basis of subject matter jurisdiction.

16 21. The California Superior Court has jurisdiction over DEFENDANTS based on  
17 Plaintiff’s information and good faith belief that each Defendant is a person, firm, corporation  
18 or association that is a citizen of the State of California, has sufficient minimum contacts in the  
19 State of California, and/or otherwise purposefully avails itself of the California market.  
20 DEFENDANTS’ purposeful availment of California as a marketplace for the PRODUCTS  
21 renders the exercise of personal jurisdiction by California courts over DEFENDANTS  
22 consistent with traditional notions of fair play and substantial justice.

23 **FIRST CAUSE OF ACTION**

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

25 22. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
26 Paragraphs 1 through 21, inclusive.

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

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

9           25. On February 15, 2013, Plaintiff’s sixty-day notice of violation, together with the  
10 requisite certificate of merit, was provided to FIRST ACT, TOYS “R” US, and certain public  
11 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS  
12 containing TDCPP, purchasers and users in the State of California were being exposed to  
13 TDCPP resulting from their reasonably foreseeable uses of the PRODUCTS, without the  
14 individual purchasers and users first having been provided with a “clear and reasonable  
15 warning” regarding such toxic exposures, as required by Proposition 65.

16           26. On February 26, 2013, Plaintiff’s sixty-day notice of violation, together with the  
17 requisite certificate of merit, was provided to FIRST ACT, TOYS “R” US, and certain public  
18 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS  
19 containing TCEP, purchasers and users in the State of California were being exposed to TCEP  
20 resulting from their reasonably foreseeable uses of the PRODUCTS, without the individual  
21 purchasers and users first having been provided with a “clear and reasonable warning”  
22 regarding such toxic exposures, as required by Proposition 65.

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

1           28. After receiving Plaintiff's sixty-day notices of violation, the appropriate public  
2 enforcement agencies have failed to commence and diligently prosecute a cause of action  
3 against DEFENDANTS under Proposition 65.

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

7           30. DEFENDANTS knew or should have known that the PRODUCTS they  
8 manufacture, import, distribute, sell, and offer for sale or use in the State of California contain  
9 the LISTED CHEMICALS.

10          31. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as  
11 to expose individuals to the LISTED CHEMICALS through dermal contact, ingestion, and/or  
12 inhalation during reasonably foreseeable uses of the PRODUCTS.

13          32. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and  
14 continue to cause, consumer exposures and workplace exposures to the LISTED CHEMICALS,  
15 as such exposures are defined by Title 27 of the California Code of Regulations, Section  
16 25602(b).

17          33. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses  
18 of the PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact,  
19 ingestion, and/or inhalation.

20          34. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from  
21 the reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS'  
22 deliberate, non-accidental participation in the manufacture, importation, distribution, sale, and  
23 offering of the PRODUCTS for sale or use to individuals in the State of California.

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

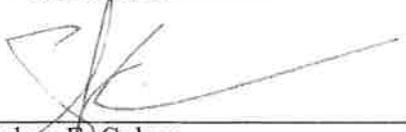


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- 3. That the Court grant Plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: May 8, 2013

THE CHANLER GROUP

By:   
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Attorneys for Plaintiff  
LAURENCE VINOUCUR