

ENDORSED
FILED
ALAMEDA COUNTY

JUN - 4 2013

CLERK OF THE SUPERIOR COURT
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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

16 LAURENCE VINOUCUR,

17 Plaintiff,

18 v.

19 FRY'S ELECTRONICS, INC.; Z-LINE
20 DESIGNS, INC.; and DOES 1-150, inclusive,

21 Defendants.
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) Case No. RG13675337
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) **FIRST AMENDED COMPLAINT FOR**
) **CIVIL PENALTIES AND**
) **INJUNCTIVE RELIEF**

) (Health & Safety Code. § 25249.6, *et seq.*)
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1 **NATURE OF THE ACTION**

2 1. This *First Amended* Complaint is a representative action brought by plaintiff
3 LAURENCE VINO CUR (“Plaintiff”) in the public interest of the citizens of the State of
4 California to enforce the People’s right to be informed of the presence of Tris(1,3-dichloro-2-
5 propyl) phosphate (“TDCPP”) and Tris(2-chloroethyl) phosphate (“TCEP”), toxic chemicals
6 found in padded upholstered furniture sold in California. TDCPP and TCEP are toxic chemicals
7 that are used to treat polyurethane foam, which is used as padding or cushioning in a variety of
8 products.

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

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

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

26 5. TDCPP has been used in consumer products as an additive flame retardant since
27 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. On April 1, 1992, California identified and listed TCEP as a chemical known to
8 cause cancer. TCEP became subject to the warning requirement one year later and was,
9 therefore, subject to the "clear and reasonable warning" requirements of Proposition 65,
10 beginning April 1, 1993. (Cal. Code Regs., Tit. 27, § 27001(c); Health & Safety Code
11 §§ 25249.8 & 25249.10(b).)

12 8. Defendant Fry's Electronics, Inc. manufactures, causes to be manufactured,
13 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers
14 for sale in California padded upholstered office chairs containing TDCPP and TCEP.
15 Defendant Fry's Electronics, Inc. also manufactures, causes to be manufactured, distributes,
16 causes to be distributed, imports, causes to be imported, sells and/or otherwise offers for sale in
17 California the *Z-Line ZL3006 Mgr. Chair, Item No. ZL3006-01MCU, #846158003513*, with
18 foam padding containing TDCPP and TCEP.

19 9. Defendant Z-Line Designs, Inc. manufactures, causes to be manufactured,
20 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers
21 for sale in California padded upholstered furniture including office chairs containing TDCPP
22 and TCEP. Defendant Z-Line Designs, Inc. also manufactures, causes to be manufactured,
23 distributes, causes to be distributed, imports, causes to be imported, sells and/or otherwise offers
24 for sale in California the *Z-Line ZL3006 Mgr. Chair, Item No. ZL3006-01MCU,*
25 *#846158003513*, with foam padding containing TDCPP and TCEP.

26 10. All such padded upholstered furniture including office chairs, containing TDCPP
27 and TCEP, are hereinafter collectively referred to as "PRODUCTS."
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1 State of California, and/or otherwise purposefully avails itself of the California market.
2 DEFENDANTS' purposeful availment of California as a marketplace for the PRODUCTS
3 renders the exercise of personal jurisdiction by California courts over DEFENDANTS
4 consistent with traditional notions of fair play and substantial justice.

5 **FIRST CAUSE OF ACTION**

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

7 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
8 Paragraphs 1 through 23, inclusive.

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

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

17 27. On January 28, 2013, Plaintiff's sixty-day notice of violation, together with the
18 requisite certificate of merit, was provided to Z-LINE and certain public enforcement agencies
19 stating that, as a result of DEFENDANTS' sales of the PRODUCTS containing TDCPP,
20 purchasers and users in the State of California were being exposed to TDCPP resulting from
21 their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and
22 users first having been provided with a "clear and reasonable warning" regarding such toxic
23 exposures, as required by Proposition 65.

24 28. On February 25, 2013, Plaintiff's sixty-day notice of violation, together with the
25 requisite certificate of merit, was provided to FRY'S, Z-LINE and certain public enforcement
26 agencies stating that, as a result of DEFENDANTS' sales of the PRODUCTS containing
27 TDCPP, purchasers and users in the State of California were being exposed to TDCPP resulting
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1 from their reasonably foreseeable uses of the PRODUCTS, without the individual purchasers
2 and users first having been provided with a “clear and reasonable warning” regarding such toxic
3 exposures, as required by Proposition 65.

4 29. On March 13, 2013, Plaintiff’s sixty-day notice of violation, together with the
5 requisite certificate of merit, was provided to FRY’S, Z-LINE and certain public enforcement
6 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing TCEP,
7 purchasers and users in the State of California were being exposed to TCEP resulting from their
8 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users
9 first having been provided with a “clear and reasonable warning” regarding such toxic
10 exposures, as required by Proposition 65.

11 30. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
12 and offering of the PRODUCTS for sale or use in California in violation of Health and Safety
13 Code Section 25249.6, and DEFENDANTS’ violations have continued to occur beyond their
14 receipt of Plaintiff’s sixty-day notices of violation. As such, DEFENDANTS’ violations are
15 ongoing and continuous in nature, and will continue to occur in the future.

16 31. After receiving Plaintiff’s sixty-day notices of violation, the appropriate public
17 enforcement agencies have failed to commence and diligently prosecute a cause of action
18 against DEFENDANTS under Proposition 65.

19 32. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
20 or use in California by DEFENDANTS contain TDCPP and TCEP such that they require a
21 “clear and reasonable” warning under Proposition 65.

22 33. DEFENDANTS knew or should have known that the PRODUCTS they
23 manufacture, import, distribute, sell, and offer for sale or use in California contain TDCPP and
24 TCEP.

25 34. TDCPP and TCEP are present in or on the PRODUCTS in such a way as to
26 expose individuals to TDCPP and TCEP through dermal contact, ingestion, and/or inhalation
27 during reasonably foreseeable uses of the PRODUCTS.

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1 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
2 continue to cause, consumer products exposures and occupational exposures to TDCPP and
3 TCEP, as such exposures are defined by Title 27 of the California Code of Regulations, section
4 25602(b).

5 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
6 of the PRODUCTS expose individuals to TDCPP and TCEP through dermal contact, ingestion,
7 and/or inhalation.

8 37. DEFENDANTS intended that such exposures to TDCPP and TCEP from the
9 reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate,
10 non-accidental participation in the manufacture, importation, distribution, sale, and offering of
11 the PRODUCTS for sale or use to individuals in the State of California.

12 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
13 consumers and other individuals in the State of California who were or who would become
14 exposed to TDCPP and TCEP through dermal contact, ingestion, and/or inhalation during the
15 reasonably foreseeable uses of the PRODUCTS.

16 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
17 directly by California voters, individuals exposed to TDCPP and TCEP through dermal contact,
18 ingestion, and/or inhalation, resulting from the reasonably foreseeable uses of the PRODUCTS
19 sold by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue
20 to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

24 41. As a consequence of the above-described acts, Health and Safety Code
25 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
26 DEFENDANTS.
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PRAYER FOR RELIEF

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

1. That the Court, pursuant to Health and Safety Code Section 25249.7(b), assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
2. That the Court, pursuant to Health and Safety Code Section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a "clear and reasonable warning" as defined by Title 27 of the California Code of Regulations, Section 25601 *et seq.*, as to the harms associated with exposures to TDCPP and TCEP;
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 31, 2013

THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
LAURENCE VINO CUR