

MAY - 8 2013

CLERK OF THE SUPERIOR COURT
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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 UNLIMITED CIVIL JURISDICTION

15 LAURENCE VINOCUR,

16 Plaintiff,

17 v.

18 TOMY INTERNATIONAL, INC.;
19 BURLINGTON COAT FACTORY
20 WAREHOUSE CORPORATION; and
21 DOES 1-150, inclusive,

22 Defendants.

23 Case No. RG 13678793

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

26 (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 sleepers with padding sold in the State of California.
7 The LISTED CHEMICALS are toxic chemicals that are used to treat polyurethane foam, which
8 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 sleepers with padding manufactured, distributed, sold, and offered for sale or use to
12 consumers throughout the State of California.

13 3. Detectable levels of the LISTED CHEMICALS are commonly found in and on
14 sleepers with padding that Defendants manufacture, distribute, sell, and offer for sale to
15 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 sleepers
18 with padding; (ii) through dermal exposure when the LISTED CHEMICALS from sleepers with
19 padding accumulates in ambient particles that are subsequently touched by such individuals;
20 and (iii) through ingestion 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"), "[n]o person in the course
23 of doing business shall knowingly and intentionally expose any individual to a chemical known
24 to the state to cause cancer or reproductive toxicity without first giving clear and reasonable
25 warning to such individual . . ." (Health & Safety Code § 25249.6.)

26 5. The LISTED CHEMICALS have been used in consumer products as additive
27 flame retardants since the 1960s. In the late 1970s, based on findings that exposure to TDCPP
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1 could have mutagenic effects, the United States Consumer Product Safety Commission banned
2 the use of TDCPP in 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.

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

10 8. Defendants Tomy International, Inc. ("TOMY INTERNATIONAL") and
11 Burlington Coat Factory Warehouse Corporation ("BURLINGTON") manufacture, distribute,
12 import, sell and/or offer for sale in California sleepers with padding containing the LISTED
13 CHEMICALS without a warning including, but not limited to, the *The First Years Close &*
14 *Secure Sleeper, Y3171 (#0 71463 03171 9)*. All such sleepers with padding containing TDCPP
15 and/or TCEP, are hereinafter collectively referred to as the "PRODUCTS."

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

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

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

PARTIES

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

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

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

15. BURLINGTON is a person in the course of doing business within the meaning of Health and Safety Code Section 25249.11.

16. BURLINGTON manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

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

1 18. TOMY INTERNATIONAL, BURLINGTON, and Defendants DOES 1-150 are
2 collectively referred to herein as “DEFENDANTS.”

3 **VENUE AND JURISDICTION**

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

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

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

21 **FIRST CAUSE OF ACTION**

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

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

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

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

7 25. On February 26, 2013, Plaintiff’s sixty-day notice of violation, together with the
8 requisite certificate of merit, was provided to TOMY INTERNATIONAL, BURLINGTON, and
9 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
10 PRODUCTS containing TDCPP, purchasers and users in the State of California were being
11 exposed to TDCPP resulting from their reasonably foreseeable uses of the PRODUCTS, without
12 the individual purchasers and users first having been provided with a “clear and reasonable
13 warning” regarding such toxic exposures, as required by Proposition 65.

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

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

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

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

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

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

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

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

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

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

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

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

8 38. As a consequence of the above-described acts, Health and Safety Code
9 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
10 DEFENDANTS.

11 **PRAYER FOR RELIEF**

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

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

16 2. That the Court, pursuant to Health and Safety Code Section 25249.7(a),
17 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
18 offering the PRODUCTS for sale or use in the State of California without first providing a
19 “clear and reasonable warning” as defined by Title 27 of the California Code of Regulations,
20 Section 25601 *et seq.*, as to the harms associated with exposures to the LISTED CHEMICALS;
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- 1 3. That the Court grant Plaintiff his reasonable attorneys' fees and costs of suit; and
2 4. That the Court grant such other and further relief as may be just and proper.
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4 Dated: May 7, 2013

THE CHANLER GROUP

6 By: _____

7 Stephen E. Cohen
8 Attorneys for Plaintiff
9 LAURENCE VINOCUR
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