

1 Laralei Paras, State Bar No. 203319  
2 Josh Voorhees, State Bar No. 241436  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 RUSSELL BRIMER

ENDORSED  
FILED  
ALAMEDA COUNTY

JUL 01 2013

CLERK OF THE SUPERIOR COURT  
By S. YAMU  
Deputy

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

14 RUSSELL BRIMER,

15 Plaintiff,

16 v.

17 HOBBY LOBBY STORES, INC.; and DOES 1-  
18 150, inclusive,

19 Defendants.

Case No. AG 13685838

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 et seq.)

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BY FAX

1 **NATURE OF THE ACTION**

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

8 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn  
9 citizens, consumers, and other individuals throughout California about the health hazards associated  
10 with exposures to TDCPP present in and on the products manufactured, distributed, sold by  
11 defendants.

12 3. Detectable levels of TDCPP are commonly found in and on the products defendants  
13 manufacture, distribute, sell, and offer for sale or use without warning in California. Citizens,  
14 consumers, and other individuals in California, including infants and children, are exposed to  
15 TDCPP in the following ways: (i) by inhalation when they inhale TDCPP present in ambient  
16 particles released from upholstered furniture and other products containing TDCPP-treated foam; (ii)  
17 by dermal exposure when they touch TDCPP-treated foam directly or contact ambient particles  
18 containing TDCPP that are released from upholstered furniture and other products that use TDCPP-  
19 treated foam; and (iii) by route of ingestion as a result of hand-to-mouth contact with TDCPP-treated  
20 foam or with ambient particles released from upholstered furniture and other products that use  
21 TDCPP-treated foam.

22 4. The Safe Drinking Water and Toxic Enforcement Act of 1986 codified at Health and  
23 Safety Code § 25249.5 et seq. (“Proposition 65”) states “[n]o person in the course of doing business  
24 shall knowingly and intentionally expose any individual to a chemical known to the state to cause  
25 cancer or reproductive toxicity without first giving clear and reasonable warning to such individual .  
26 . . .”

27 5. TDCPP has been used in consumer products as an additive flame retardant since the  
28 1960s. In the late 1970s, based on findings that exposures to TDCPP could have mutagenic effects,

1 the United States Consumer Product Safety Commission banned the use of TDCPP in children's  
2 pajamas.

3 6. On October 28, 2011, California identified and listed TDCPP, pursuant to Proposition  
4 65, as a chemical known to cause cancer. TDCPP became subject to the "clear and reasonable  
5 warning" requirements of the Act one year later on October 28, 2012. Cal. Code Regs. tit. 27,  
6 § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

7 7. Defendants manufacture, cause to be manufactured, distribute, cause to be distributed,  
8 import, cause to be imported, sell and/or otherwise offer for sale upholstered ottomans with foam  
9 padding containing TDCPP. One example of the upholstered ottomans with TDCPP-treated foam  
10 that are manufactured, imported, distributed and/or sold by defendants is the *Hobby Lobby Ottoman*,  
11 *Item # 5209861*. All such upholstered ottomans made with foam padding containing TDCPP shall  
12 hereinafter be referred to as the "PRODUCTS."

13 8. Although defendants expose infants, children, and other people to TDCPP in their  
14 PRODUCTS, defendants provide no warnings about the carcinogenic or teratogenic health hazards  
15 associated with exposures to this Proposition 65-listed chemical. Defendants' failure to warn  
16 consumers and other individuals in the State of California not covered by California's Occupational  
17 Safety Health Act, Labor Code § 6300 et seq. about the health hazards associated with exposures to  
18 TDCPP in conjunction with defendants' distribution, importation, manufacture and/or sales of the  
19 PRODUCTS are violations of Proposition 65, and subject defendants to enjoinder of such conduct  
20 as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

21 9. Pursuant to Health and Safety Code § 25249.7(a), plaintiff seeks preliminary and  
22 permanent injunctive relief to compel defendants to provide purchasers or users of the PRODUCTS  
23 with the required health hazard warning regarding the risks of exposures TDCPP in the  
24 PRODUCTS.

25 10. Pursuant to Health and Safety Code § 25249.7(b), plaintiff also seeks civil penalties  
26 against each Defendant for its violations of Proposition 65.

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1 **PARTIES**

2 11. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated to  
3 protecting the health of California citizens through the elimination or reduction of toxic exposures  
4 from consumer products; and he brings this action in the public interest pursuant to Health and  
5 Safety Code § 25249.7(d).

6 12. Defendant HOBBY LOBBY STORES, INC. (“HLSI”) is a person in the course of  
7 doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

8 13. HLSI manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale  
9 or use in the State of California, or implies by its conduct that it manufactures, imports, distributes,  
10 sells, and/or offers the PRODUCTS for sale or use in the State of California.

11 14. Defendants DOES 1-150 are each a person in the course of doing business within the  
12 meaning of Health and Safety Code §§ 25249.6 and 25249.11. DOES 1-150 import, manufacture,  
13 distribute, sell, and/or offer the PRODUCTS for sale or use in the State of California. At this time,  
14 the true names and capacities of defendants DOES 1-150, inclusive, are unknown to plaintiff, who,  
15 therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure § 474.  
16 Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named  
17 defendants is responsible for the acts and occurrences alleged herein. When ascertained, the true  
18 name and capacity of each such defendant shall be reflected in an amended complaint.

19 15. HLSI and defendants DOES 1-150 are collectively referred to hereinafter as  
20 “Defendants.”

21 **VENUE AND JURISDICTION**

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

27 17. The California Superior Court has jurisdiction over this action pursuant to California  
28 Constitution Article VI, section 10, which grants the Superior Court “original jurisdiction in all

1 causes except those given by statute to other trial courts.” The statute under which this action is  
2 brought does not specify any other basis of subject matter jurisdiction.

3 18. The California Superior Court has jurisdiction over Defendants based on plaintiff’s  
4 information and good faith belief that each Defendant is a person, firm, corporation, or association  
5 that is a citizen of the State of California, has sufficient minimum contacts in the State of California,  
6 and/or otherwise purposefully avails itself of the California market. Defendants’ purposeful  
7 availment renders the exercise of personal jurisdiction by California courts consistent with  
8 traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**

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

11 19. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs  
12 1 through 18, inclusive.

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

16 21. Health and Safety Code § 25249.6 states, “[n]o person in the course of doing business  
17 shall knowingly and intentionally expose any individual to a chemical known to the state to cause  
18 cancer or reproductive toxicity without first giving clear and reasonable warning to such individual .  
19 ..”

20 22. On March 18, 2013, plaintiff provided a sixty-day notice of violation of Proposition  
21 65, together with the requisite certificate of merit, to HLSI and the required public enforcement  
22 agencies, stating that as a result of Defendants’ sales of the PRODUCTS, purchasers and users in  
23 California were being exposed to TDCPP resulting from their reasonably foreseeable uses of the  
24 PRODUCTS, without the individual purchasers and users first having been provided with a “clear  
25 and reasonable warning” regarding the health hazards of such toxic exposures, as required by  
26 Proposition 65.

27 23. Defendants have engaged in the manufacture, importation, distribution, sale, and  
28 offering of the PRODUCTS for sale or use in California in violation of Health and Safety Code

1 § 25249.6, and Defendants' violations have continued to occur beyond their receipt of plaintiff's  
2 sixty-day notice of violation. As such, Defendants' violations are ongoing and continuous in nature,  
3 such that they will continue to occur in the future.

4 24. After receiving plaintiff's sixty-day notice of violation dated March 18, 2013, the  
5 appropriate public enforcement agencies have not commenced and are not diligently prosecuting a  
6 cause of action against Defendants under Proposition 65.

7 25. The PRODUCTS Defendants manufacture, import, distribute, sell and offer for sale or  
8 use in California contain TDCPP such that they require a "clear and reasonable" warning under  
9 Proposition 65.

10 26. Defendants knew or should have known that the PRODUCTS they manufacture,  
11 import, distribute, sell, and offer for sale or use in California contain TDCPP.

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

15 28. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and  
16 continue to cause, consumer products exposures and occupational exposures to TDCPP, as such  
17 exposures are defined by California Code of Regulations title 27, § 25602(b).

18 29. Defendants had knowledge that the normal and reasonably foreseeable uses of the  
19 PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or inhalation.

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

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

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