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ENDORSED
FILED
ALAMEDA COUNTY

JUN 20 2013

CLERK OF THE SUPERIOR COURT
By Angela Yamsuan

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

15 PETER ENGLANDER,

16 Plaintiff,

17 v.

18 SHAFER COMMERCIAL SEATING INC.;
19 and DOES 1-150, inclusive,

20 Defendants.

21) Case No. 13-685119

22) **COMPLAINT FOR CIVIL PENALTIES**
23) **AND INJUNCTIVE RELIEF**

24) (Health & Safety Code. § 25249.6, *et seq.*)
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26)
27)
28)

VIA FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by Plaintiff PETER
3 ENGLANDER in the public interest of the citizens of the State of California to enforce the
4 People’s right to be informed of the presence of Tris(2-chloroethyl) phosphate (“TCEP”), a
5 toxic chemical found in padded upholstered furniture including chairs sold in California. TCEP
6 is a toxic chemical that is used to treat polyurethane foam, which is used as padding or
7 cushioning in a variety of products.

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

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

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

25 5. TCEP has been used in consumer products as an additive flame retardant since the
26 1960s. In the late 1970s, based on findings that exposure to TCEP could have mutagenic
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1 effects, the United States Consumer Product Safety Commission banned the use of TCEP in
2 children's pajamas.

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

7 7. Defendant Shafer Commercial Seating Inc. ("SHAFER") manufactures,
8 distributes, imports, sells and/or offers for sale in California padded upholstered furniture
9 including chairs containing TCEP without a warning, including, but not limited to, the *Shafer*
10 *Commercial Seating Chair, WC551UR*. All such padded upholstered furniture including chairs
11 containing TCEP are hereinafter collectively referred to as the "PRODUCTS."

12 8. Although Defendants expose infants, children, and other people to TCEP in the
13 PRODUCTS, Defendants provide no warnings about the carcinogenic hazards associated with
14 these TCEP exposures. Defendants' failures to warn consumers and other individuals in the
15 State of California not covered by California's Occupational Health Act, Labor Code § 6300 et
16 seq. about their exposures to TCEP in conjunction with Defendants' sales of the PRODUCTS,
17 is a violation of Proposition 65, and subjects Defendants to enjoinder of such conduct as well
18 as civil penalties for each violation. (Health & Safety Code § 25249.7(a) & (b)(1).)

19 9. As a result of Defendants' violations of Proposition 65, Plaintiff seeks preliminary
20 and permanent injunctive relief to compel Defendants to provide purchasers or users of the
21 PRODUCTS with the required warning regarding the health hazards of TCEP in the
22 PRODUCTS. (Health & Safety Code § 25249.7(a).)

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

25 PARTIES

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

3 12. SHAFER is a person in the course of doing business within the meaning of Health
4 and Safety Code Section 25249.11.

5 13. SHAFER manufactures, imports, distributes, sells, and/or offers the PRODUCTS
6 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
7 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

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

16 15. SHAFER and Defendants DOES 1-150 are collectively referred to herein as
17 "DEFENDANTS."

18 VENUE AND JURISDICTION

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

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

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

10 **FIRST CAUSE OF ACTION**

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

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

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

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

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

3 23. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
4 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code Section
5 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
6 Plaintiff’s sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing and
7 continuous in nature, and will continue to occur in the future.

8 24. After receiving Plaintiff’s sixty-day notice of violation, the appropriate public
9 enforcement agencies have failed to commence and diligently prosecute a cause of action
10 against DEFENDANTS under Proposition 65.

11 25. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
12 or use in California by DEFENDANTS contain TCEP such that they require a “clear and
13 reasonable” warning under Proposition 65.

14 26. DEFENDANTS knew or should have known that the PRODUCTS they
15 manufacture, import, distribute, sell, and offer for sale or use in the State of California contain
16 TCEP.

17 27. TCEP is present in or on the PRODUCTS in such a way as to expose individuals
18 to TCEP through dermal contact, ingestion, and/or inhalation during reasonably foreseeable
19 uses of the PRODUCTS.

20 28. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
21 continue to cause, consumer exposures and workplace exposures to TCEP, as such exposures
22 are defined by Title 27 of the California Code of Regulations, Section 25602(b).

23 29. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
24 of the PRODUCTS expose individuals to TCEP through dermal contact, ingestion, and/or
25 inhalation.

26 30. DEFENDANTS intended that such exposures to TCEP from the reasonably
27 foreseeable uses of the PRODUCTS would occur by DEFENDANTS’ deliberate, non-
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1 accidental participation in the manufacture, importation, distribution, sale, and offering of the
2 PRODUCTS for sale or use to individuals in the State of California.

3 31. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and other individuals in the State of California who were or who would become
5 exposed to TCEP through dermal contact, ingestion, and/or inhalation during the reasonably
6 foreseeable uses of the PRODUCTS.

7 32. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
8 directly by California voters, individuals exposed to TCEP through dermal contact, ingestion,
9 and/or inhalation resulting from the reasonably foreseeable uses of the PRODUCTS sold by
10 DEFENDANTS without a “clear and reasonable warning” have suffered, and continue to suffer,
11 irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

15 34. As a consequence of the above-described acts, Health and Safety Code
16 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
17 DEFENDANTS.

18 **PRAYER FOR RELIEF**

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

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

23 2. That the Court, pursuant to Health and Safety Code Section 25249.7(a),
24 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
25 offering the PRODUCTS for sale or use in the State of California without first providing a
26 “clear and reasonable warning” as defined by Title 27 of the California Code of Regulations,
27 Section 25601 *et seq.*, as to the harms associated with exposures TCEP;

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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: June 18 2013

THE CHANLER GROUP



By: _____
Stephen H. Cohen
Attorneys for Plaintiff
PETER ENGLANDER