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FILED
ALAMEDA COUNTY

AUG 12 2013

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

LAURENCE VINOUCUR,
Plaintiff,

v.

KEYSTONE FOAM CORPORATION; and
DOES 1-150, inclusive,
Defendants.

Case No. RG13691443

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.5 *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"), a toxic
5 chemical found in foam and foam-containing products, including seat cushions, bedding and
6 furniture, sold in the State of California. TDCPP is a toxic chemical that is used to treat
7 polyurethane foam used as padding or cushioning in a variety of consumer products.

8 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn
9 California citizens about the health hazards associated with exposures to TDCPP present in and on
10 foam and foam-containing products, including, without limitation, seat cushions, bedding, and
11 furniture, that are manufactured, shaped, brokered, distributed, sold, and offered for sale or use to
12 consumers throughout California.

13 3. Detectable levels of TDCPP are commonly found in and on foam and foam-
14 containing products that defendants manufacture, shape, broker, distribute, and offer for sale to
15 consumers throughout California. Workers, consumers and other individuals in California,
16 including infants and children, are exposed to TDCPP from defendants' foam and foam-containing
17 products through multiple routes of exposure, including: (i) by inhalation when TDCPP is released
18 from the foam and foam-containing products during use, or over time as a result of breakdown or
19 degradation of the products and foam containing TDCPP; (ii) by dermal exposure when individuals
20 touch or otherwise physically contact TDCPP in the foam and foam-containing products sold by
21 defendants, whether by contacting the foam or foam-containing products directly, or contacting
22 ambient particles released from such items; and/or (iii) by oral exposure resulting from hand-to-
23 mouth contact during and after use, or when TDCPP-containing ambient particles in the air contact
24 the individuals' mouths.

25 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
26 Health and Safety Code section 25249.5 *et seq.* ("Proposition 65"), "[n]o person in the course of
27 doing business shall knowingly and intentionally expose any individual to a chemical known to the
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1 state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to
2 such individual . . .” Health & Safety Code § 25249.6.

3 5. TDCPP has been used in foam and consumer products as an additive flame retardant
4 since the 1960s. In 1977, based on findings that TDCPP may cause mutagenic effects, the United
5 States Consumer Product Safety Commission banned the use of TDCPP in children’s pajamas.

6 6. On October 28, 2011, California listed TDCPP pursuant to Proposition 65 as a
7 chemical known to cause cancer. TDCPP became subject to the “clear and reasonable warning”
8 requirements of the act one year later on October 28, 2012. Cal. Code Regs. tit. 27, § 27001(b);
9 Health & Safety Code §§ 25249.8 & 25249.10(b).

10 7. Defendants manufacture, shape, broker, distribute, import, sell and/or offer for sale
11 without a warning in California, TDCPP-containing foam, and consumer products manufactured
12 with TDCPP-containing foam, including, without limitation, seat cushions, bedding, and furniture,
13 including, but not limited to, the *Deluxe Self-Adjustable Seat/Back Cushion with Memory Foam*
14 (*UPC No. 0 34238 91061 9*) identified as an exemplar of the type of products Defendants
15 manufacture and sell on Plaintiff’s 60-Notice of Violation of Proposition 65. All such TDCPP-
16 containing foam, and consumer products manufactured with TDCPP-containing foam are
17 collectively referred to hereinafter as “PRODUCTS.”

18 8. Although Defendants expose consumers, workers, infants, children, and other
19 individuals in California to TDCPP in the PRODUCTS, Defendants provide no warnings about the
20 carcinogenic hazards associated with exposures to this chemical. Defendants’ failure to warn
21 consumers, workers and other individuals in California not covered by California’s Occupational
22 Safety Health Act, Labor Code § 6300 *et seq.*, about the health hazards associated with exposures to
23 TDCPP in conjunction with defendants’ manufacture and sales of the PRODUCTS is a violation of
24 Proposition 65, and subjects defendants to enjoinder of such conduct as well as civil penalties for
25 each violation. Health & Safety Code § 25249.7(a) & (b)(1).

26 9. As a result of defendants’ violations of Proposition 65, plaintiff seeks preliminary and
27 permanent injunctive relief to compel defendants to provide purchasers and/or users of the
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1 PRODUCTS with the required warning regarding the health hazards of TDCPP. Health & Safety
2 Code § 25249.7(a).

3 10. 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 11. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is
7 dedicated to protecting the health of California consumers and other individuals in California
8 through the elimination or reduction of toxic exposures from consumer products, and he brings this
9 action in the public interest pursuant to Health and Safety Code section 25249.7(d).

10 12. Defendant Keystone Foam Corporation (“KEYSTONE”) is a person in the course of
11 doing business within the meaning of Health and Safety Code section 25249.11.

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

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

24 15. KEYSTONE and Defendants DOES 1-150 are collectively referred to hereinafter as
25 “DEFENDANTS.”

26 VENUE AND JURISDICTION

27 16. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
28 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,

1 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
2 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
3 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
4 PRODUCTS.

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

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

16 **FIRST CAUSE OF ACTION**

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

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

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

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

27 22. On May 3, 2013, plaintiff served a 60-Day Notice of Violation ("Notice"), together
28 with the requisite certificate of merit on KEYSTONE and certain public enforcement agencies

1 stating that, as a result of DEFENDANTS' sales of the PRODUCTS containing TDCPP, purchasers
2 and users in the State of California are being exposed to this Proposition 65-listed chemical from
3 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users first
4 having been provided with the "clear and reasonable warning" regarding required by Proposition
5 65.

6 23. DEFENDANTS have engaged in the manufacture, shaping, importation, brokering,
7 distribution, sale, and offering of the PRODUCTS for sale or use in violation of Health and Safety
8 Code section 25249.6, and DEFENDANTS' violations have continued to occur beyond their receipt
9 of plaintiff's Notice and Supplemental Notice. As such, DEFENDANTS' violations are ongoing
10 and continuous in nature, and will continue to occur in the future.

11 24. After receiving plaintiff's Notice, the appropriate public enforcement agencies have
12 failed to commence and diligently prosecute a cause of action against DEFENDANTS under
13 Proposition 65.

14 25. The PRODUCTS manufactured, imported, shaped, brokered, distributed, sold, and
15 offered for sale or use in California by DEFENDANTS cause exposures to TDCPP that are not
16 exempt from the "clear and reasonable" warning requirements of Proposition 65.

17 26. DEFENDANTS knew or should have known that the PRODUCTS they manufacture,
18 import, distribute, sell, and offer for sale or use in the State of California contain TDCPP.

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

22 28. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
23 continue to cause, workplace exposures and consumer exposures to TDCPP, as defined by Title 27
24 of the California Code of Regulations, section 25602(b).

25 29. DEFENDANTS know that the normal and reasonably foreseeable uses of the
26 PRODUCTS expose individuals to TDCPP through dermal contact, ingestion, and/or inhalation.

27 30. DEFENDANTS intended that such exposures to TDCPP from the normal and
28 reasonably foreseeable uses of the PRODUCTS would occur by DEFENDANTS' deliberate, non-

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, workers and other individuals in California who were or who would become exposed to
5 TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably foreseeable uses
6 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 TDCPP 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 for
14 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 civil
22 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), preliminarily
24 and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the
25 PRODUCTS for sale or use in the State of California without first providing a "clear and reasonable
26 warning" as defined by Title 27 of the California Code of Regulations, section 25601 *et seq.*, as to
27 the harms associated with exposures TDCPP;

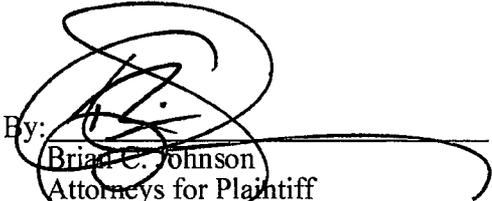
28 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

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4. That the Court grant such other and further relief as may be just and proper.

Dated: August 12, 2013

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By: 
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