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CENTER FOR ENVIRONMENTAL HEALTH

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ENDORSED
FILED
ALAMEDA COUNTY

DEC 18 2013

CLERK OF THE SUPERIOR COURT
By Angela Yanez

RG13 707315

CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation,)

Plaintiff,)

v.)

ACOUSTICAL SOLUTIONS, INC.;)
AMERICAN MICRO INDUSTRIES, INC.;)
19 PARTS EXPRESS INTERNATIONAL, INC.;)
TECNIFOAM, INC.; and DOES 1 through 100,)
20 inclusive,)

Defendants.)

Case No. _____

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health, in the public interest, based on
2 information and belief and investigation of counsel, except for information based on knowledge,
3 hereby makes the following allegations:

4 INTRODUCTION

5 1. This Complaint seeks to remedy Defendants' continuing failure to warn
6 individuals in California that they are being exposed to tris(1,3-dichloro-2-propyl) phosphate
7 ("TDCPP"), a chemical known to the State of California to cause cancer. TDCPP is a toxic
8 chemical that is used to treat polyurethane foam, which is used as padding or cushioning in a
9 variety of products. This Complaint addresses exposures that have occurred, and continue to
10 occur, through the manufacture, distribution, sale, and/or use of Defendants' acoustic and
11 soundproofing foam, such as polyurethane foam used for enhancing or blocking ambient sound
12 (the "Products"). Individuals in California are exposed to TDCPP when they inhale TDCPP
13 released from Products, when TDCPP from Products accumulates in ambient particles that are
14 subsequently touched by such individuals and brought into contact with the mouth, and when
15 exposed foam is touched directly and brought into contact with the mouth.

16 2. Under California's Proposition 65, Health & Safety Code § 25249.5, *et*
17 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
18 to chemicals known to the State to cause cancer without providing clear and reasonable warnings
19 to individuals prior to their exposure. Defendants introduce Products contaminated with
20 significant quantities of TDCPP into the California marketplace, exposing consumers of their
21 Products to TDCPP.

22 3. Despite the fact that Defendants expose individuals to TDCPP, Defendants
23 provide no warnings whatsoever about the carcinogenic hazards associated with these TDCPP
24 exposures. Defendants' conduct thus violates the warning provision of Proposition 65. Health &
25 Safety Code § 25249.6.

26 PARTIES

27 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
28 non-profit corporation dedicated to protecting the public from environmental health hazards and

1 toxic exposures. CEH is based in Oakland, California and is incorporated under the laws of the
2 State of California. CEH is a “person” within the meaning of Health & Safety Code §
3 25249.11(a) and brings this enforcement action in the public interest pursuant to Health & Safety
4 Code § 25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group
5 that has prosecuted a large number of Proposition 65 cases in the public interest. These cases
6 have resulted in significant public benefit, including the reformulation of thousands of products
7 to remove toxic chemicals to make them safer. CEH also provides information to Californians
8 about the health risks associated with exposure to hazardous substances, where manufacturers
9 and other responsible parties fail to do so.

10 5. Defendant ACOUSTICAL SOLUTIONS, INC. is a person in the course of
11 doing business within the meaning of Health & Safety Code § 25249.11. ACOUSTICAL
12 SOLUTIONS, INC. manufactures, distributes, and/or sells Products for sale or use in California.

13 6. Defendant AMERICAN MICRO INDUSTRIES, INC. is a person in the
14 course of doing business within the meaning of Health & Safety Code § 25249.11. AMERICAN
15 MICRO INDUSTRIES, INC. manufactures, distributes, and/or sells Products for sale or use in
16 California.

17 7. Defendant PARTS EXPRESS INTERNATIONAL, INC. is a person in the
18 course of doing business within the meaning of Health & Safety Code § 25249.11. PARTS
19 EXPRESS INTERNATIONAL, INC. manufactures, distributes, and/or sells Products for sale or
20 use in California.

21 8. Defendant TECNIFOAM, INC. is a person in the course of doing business
22 within the meaning of Health & Safety Code § 25249.11. TECNIFOAM, INC. manufactures,
23 distributes, and/or sells Products for sale or use in California.

24 9. DOES 1 through 100 are each a person in the course of doing business
25 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,
26 distribute, and/or sell Products for sale or use in California. Defendants ACOUSTICAL
27 SOLUTIONS, INC.; AMERICAN MICRO INDUSTRIES, INC.; PARTS EXPRESS
28 INTERNATIONAL, INC.; TECNIFOAM, INC.; and DOES 1 through 100 are collectively

1 No person in the course of doing business shall knowingly and
2 intentionally expose any individual to a chemical known to the
3 state to cause cancer or reproductive toxicity without first giving
4 clear and reasonable warning to such individual ...

5 17. TDCPP has been used in consumer products as an additive flame retardant
6 since the 1960s. In the late 1970s, based on findings that exposure to TDCPP could have
7 potentially mutagenic effects, the use of TDCPP as a flame retardant in children's pajamas was
8 discontinued. Around the same time, the U.S. Consumer Product Safety Commission banned the
9 use of a related chemical flame retardant – tris (2,3,-dibromopropyl) phosphate – in children's
10 clothing based on studies confirming its carcinogenic properties.

11 18. On May 29, 2009, the Proposition 65 Carcinogen Identification
12 Committee, a group of qualified experts who advise the State of California on Proposition 65
13 chemical listing determinations, announced that it was assigning priority to the preparation of
14 hazard identification materials for TDCPP based on the chemical's suspected carcinogenic
15 properties. 27 Cal. Code Regs. ("C.C.R.") § 25102(c)(1). On February 11, 2011, the California
16 Environmental Protection Agency's Office of Environmental Health Hazard Assessment
17 ("OEHHA") announced that it was preparing hazard identification materials for TDCPP as a
18 precursor to formally identifying the chemical as carcinogenic. On July 8, 2011, OEHHA made
19 its hazard identification materials for TDCPP publicly available, and announced that the State of
20 California would be making a TDCPP listing determination by October 2011.

21 19. On October 28, 2011, the State of California officially listed TDCPP as a
22 chemical known to cause cancer. 27 C.C.R. § 27001(b). In making this listing determination,
23 OEHHA credited studies showing that exposure to TDCPP induces tumor formation in test
24 animals, and that TDCPP metabolizes into other chemicals found to have similar carcinogenic
25 properties in test subjects.

26 20. On October 28, 2012, one year after it was listed as a chemical known to
27 cause cancer, TDCPP became subject to the clear and reasonable warning requirement regarding
28 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).
The chief purpose of the one-year grace period between the listing date of a chemical under

1 Proposition 65 and the effective date of the warning requirement is to give potentially liable
2 parties sufficient time to come into complete compliance with this requirement, such that all
3 illegal exposures can be averted.

4 21. TDCPP is used in Products primarily as an additive flame retardant in the
5 foam portion.

6 22. The Products are characteristically affixed to the walls and ceilings of
7 indoor environments, with no covering of any sort. TDCPP in the polyurethane foam portion of
8 foam-containing products is known to migrate from such products into these indoor
9 environments. Defendants' Products contain sufficient quantities of TDCPP such that
10 individuals are exposed to TDCPP during Product installation, and continue to be exposed to
11 TDCPP through the average use of Products. The routes of exposure include inhalation,
12 ingestion, and/or dermal absorption by individuals. Inhalation occurs when TDCPP is released
13 from the products into the ambient environment. Ingestion and dermal absorption occur when
14 TDCPP from the products accumulates in ambient particles (*e.g.*, dust) that are subsequently
15 touched by individuals and brought into contact with the mouth, or when exposed foam is
16 touched directly and brought into contact with the mouth.

17 23. Any person acting in the public interest has standing to enforce violations
18 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
19 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
20 action within such time. Health & Safety Code § 25249.7(d).

21 24. More than sixty days prior to naming each Defendant in this lawsuit, CEH
22 provided a 60-Day "Notice of Violation of Proposition 65" to the California Attorney General,
23 the District Attorneys of every county in California, the City Attorneys of every California city
24 with a population greater than 750,000, and to each of the named Defendants. In compliance
25 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
26 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
27 time period during which violations occurred; (4) specific descriptions of the violations,
28 including (a) the routes of exposure to TDCPP from Products, and (b) the specific type of

1 Products sold and used in violation of Proposition 65; and (5) the name of the specific
2 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

3 25. More than sixty days prior to naming each Defendant in this lawsuit,
4 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a
5 Certificate of Merit for each Notice to the California Attorney General, the District Attorneys of
6 every county in California, the City Attorneys of every California city with a population greater
7 than 750,000, and to the named Defendants. In compliance with Health & Safety Code §
8 25249.7(d) and 11 C.C.R. § 3101, each of the Certificates certified that CEH's counsel: (1) has
9 consulted with one or more persons with relevant and appropriate experience or expertise who
10 reviewed facts, studies, or other data regarding the exposures to TDCPP alleged in each of the
11 Notices; and (2) based on the information obtained through such consultations, believes that
12 there is a reasonable and meritorious case for a citizen enforcement action based on the facts
13 alleged in each of the Notices. In compliance with Health & Safety Code § 25249.7(d) and 11
14 C.C.R. § 3102, each of the Certificates served on the Attorney General included factual
15 information – provided on a confidential basis – sufficient to establish the basis for the
16 Certificate, including the identity of the person(s) consulted by CEH's counsel and the facts,
17 studies, or other data reviewed by such persons.

18 26. None of the public prosecutors with the authority to prosecute violations
19 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against
20 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in the
21 Notices.

22 27. Defendants both know and intend that consumers in California will use,
23 touch, and/or handle Products, or will come into close proximity to Products, thus exposing them
24 to TDCPP.

25 28. Under Proposition 65, an exposure is “knowing” where the party
26 responsible for such exposure has:

27 knowledge of the fact that a[n] ... exposure to a chemical listed
28 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.

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No knowledge that the ... exposure is unlawful is required.

27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, § 12201).

29. No clear and reasonable warning is provided with Products regarding the carcinogenic hazards of TDCPP.

30. Defendants have been informed of the TDCPP in their Products by the 60-Day Notice of Violation and accompanying Certificate of Merit served on them by CEH.

31. Defendants also have constructive knowledge that their Products contain TDCPP due to the widespread media coverage concerning the problem of TDCPP in consumer products in general and in polyurethane foam in particular. The problem of TDCPP in foam-containing consumer products has been the subject of articles in national newspapers, industry trade papers, and scholarly journals, as well as numerous Internet weblog postings.

32. As companies that manufacture, import, distribute, and/or sell Products for use in the California marketplace, Defendants know or should know that Products contain TDCPP and that individuals who use Products, or who otherwise come into close proximity to Products, will be exposed to TDCPP. These TDCPP exposures are a natural and foreseeable consequence of Defendants' placing Products into the stream of commerce.

33. Nevertheless, Defendants continue to expose consumers in California to TDCPP without prior clear and reasonable warnings regarding the carcinogenic hazards of TDCPP.

34. CEH has engaged in good-faith efforts to resolve the claims alleged herein prior to filing this Complaint.

35. Any person "violating or threatening to violate" Proposition 65 may be enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to violate" is defined to mean "to create a condition in which there is a substantial probability that a violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil

1 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
2 Code § 25249.7(b).

3 **FIRST CAUSE OF ACTION**
4 **(Violations of Health & Safety Code § 25249.6)**

5 36. CEH realleges and incorporates by reference as if specifically set forth
6 herein Paragraphs 1 through 35, inclusive.

7 37. TDCPP is a chemical listed by the State of California as known to cause
8 cancer.

9 38. By placing their Products into the stream of commerce, Defendants are
10 each a person in the course of doing business within the meaning of Health & Safety Code §
11 25249.11.

12 39. Defendants know that average installation and use of their Products will
13 expose users of Products to TDCPP. Defendants intend that their Products be used in a manner
14 that results in users of their Products, and others who come into close proximity to these
15 Products, being exposed to TDCPP contained therein.

16 40. Defendants have failed, and continue to fail, to provide prior clear and
17 reasonable warnings regarding the carcinogenicity of TDCPP to users of their Products and
18 others who come into close proximity to these Products.

19 41. By committing the acts alleged above, Defendants have at all times
20 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
21 individuals to TDCPP without first giving clear and reasonable warnings to such individuals
22 regarding the carcinogenicity of TDCPP.

23 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.
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1 **PRAYER FOR RELIEF**

2 Wherefore, CEH prays for judgment against Defendants as follows:

3 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
4 civil penalties against each Defendant in the amount of \$2,500 per day for each violation of
5 Proposition 65 alleged herein according to proof;

6 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
7 preliminarily and permanently enjoin Defendants from offering Products for sale in California
8 without providing prior clear and reasonable warnings, as CEH shall specify in further
9 application to the Court;

10 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
11 Defendants to take action to stop ongoing unwarned exposures to TDCPP resulting from use of
12 Products sold by Defendants, as CEH shall specify in further application to the Court;

13 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
14 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

15 5. That the Court grant such other and further relief as may be just and
16 proper.

17
18 Dated: December 18, 2013

Respectfully submitted,

19 LEXINGTON LAW GROUP

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21 Mark N. Todzo

22 Attorneys for Plaintiff

23 CENTER FOR ENVIRONMENTAL HEALTH