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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION
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15 LALEH MARTIN,

16 Plaintiff,

17 v.

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19 EXXEL OUTDOORS, INC.; TOYS "R" US,
INC.; and DOES 1-150, inclusive,

20 Defendants.
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ENDORSED
FILED
ALAMEDA COUNTY

SEP 03 2014

CLERK OF THE SUPERIOR COURT
By Louis Staley, Jr.

Case No. _____

RG14789137

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code section 25249.6 *et seq.*)

1 NATURE OF THE ACTION

2 1. California's Safe Drinking Water and Toxic Enforcement Act ("Proposition 65" or
3 "the Act"), Health & Safety Code § 25249.5, *et seq.*, prohibits any person in the course of doing
4 business from knowingly and intentionally exposing any individual to a chemical known to the
5 State of California to cause cancer, without first giving clear and reasonable warning of such
6 exposure. Health & Safety Code §25249.6. This prohibition applies with equal force against
7 business entities that manufacture, distribute, or sell consumer products, where the reasonable
8 intended use of such products would result in an exposure to a known carcinogen.

9 2. This is a representative action in the public interest of the citizens of the State of
10 California to protect children and other humans from highly toxic flame retardants that are
11 intentionally added to children's play tents.

12 3. Flame retardants, including tris(1,3-dichloro-2-propyl) phosphate ("TDCPP"), are
13 widely used in consumer goods. TDCPP is a genotoxin that is used as a flame retardant and
14 plasticizer. TDCPP has been used in consumer products as an additive flame retardant since the
15 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic
16 effects, the United States Consumer Product Safety Commission banned the use of TDCPP in
17 children's pajamas.

18 4. Humans are exposed to TDCPP though a variety of means, including direct
19 dermal contact with products and indirect hand-to-mouth activity. These exposures to hazardous
20 TCCPP residue result from the reasonably foreseeable use of commercially marketed children's
21 tents containing TDCPP. The citizens of California have the right to be informed of the
22 presence of TDCPP found in or on children's play tents manufactured, distributed, and sold or
23 otherwise offered for use in California by Defendants ("PRODUCTS").

24 5. Each Defendant has failed to provide a clear and reasonable warning that the use
25 of the flame retardant-containing play tents that they have manufactured, distributed, or sold
26 will result in exposure to TDCPP, a chemical known to the State of California to cause cancer.
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1 herein. Plaintiff will amend this Complaint and include these Doe Defendants' true names and
2 capacities when they are ascertained.

3 11. EXXEL, TOYS "R" US, and Defendants DOES 1-150 are collectively referred to
4 herein as "Defendants."

5 **VENUE AND JURISDICTION**

6 12. The Court has jurisdiction over this action pursuant to Health and Safety Code
7 section 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
8 to California Constitution, article VI, section 10, because this case does not present a cause
9 given by statute to other trial courts.

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

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

22 **NOTICE REQUIREMENTS**

23 15. On May 22, 2014, Plaintiff's sixty-day notice of violation ("NOTICE") was
24 provided to EXXEL, TOYS "R" US, and to each of those public enforcement agencies to which
25 Proposition 65 requires notice be given stating that, as a result of EXXEL's and TOYS "R"
26 US's sales of the PRODUCTS, purchasers and users in the State of California were being
27 exposed to TDCPP resulting from their reasonably foreseeable use of these PRODUCTS,
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1 without the individual purchasers and users first having been provided with a “clear and
2 reasonable warning” regarding such toxic exposures, as required by Proposition 65.

3 16. The NOTICE included, *inter alia*, the following information: the name, address,
4 and telephone number of the noticing individual; the name of the alleged violator; the statute
5 violated; the approximate time period during which violations occurred; and descriptions of the
6 violations, including the chemical involved, the routes of toxic exposure, and the specific
7 products and type of products causing the violations. The named Defendants and the California
8 Attorney General were provided copies of the 60-Day Notice by mail. Additionally, the named
9 Defendants were each provided with a copy of a document entitled “The Safe Drinking Water
10 and Toxic Enforcement Act of 1986 (Proposition 65): A Summary,” which is also known as
11 Appendix A to title 27 of California Code of Regulations (“CCR”) section 25903.

12 17. Each NOTICE included a certificate of merit executed by Plaintiff’s attorney
13 stating that the person executing the certificate had consulted with one or more persons with
14 relevant and appropriate experience or expertise who has reviewed the facts, studies or other
15 data regarding exposure to the listed chemical that is the subject of the notice, and that, based on
16 that information, the person executing the certificate believes there is a reasonable and
17 meritorious case for this private action. Factual information sufficient to establish the basis of
18 the certificate of merit was attached to the certificate of merit served on the California Attorney
19 General.

20 18. No public prosecutors has commenced and is diligently prosecuting an action
21 against the violations at issue herein, although the notice period provided in Health & Safety
22 Code section 25249.7 has elapsed.

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1 27 CCR § 25102(n). This knowledge may be actual or constructive. *See, e.g.*, Final Statement of
2 Reasons Revised (November 4, 1988) for former 22 CCR § 12201.

3 25. Violators of Proposition 65 are liable for civil penalties of up to \$2,500.00 per
4 day per violation, recoverable in a civil action. Healthy & Safety Code § 25249.7(b).

5 26. Private parties are entitled to bring an action in the public interest to enforce the
6 Act under Health and Safety Code section 25249.7, subdivision (d).

7 **FACTS**

8 26. The PRODUCTS are used by consumers and contain the toxic flame retardant
9 TDCPP.

10 27. Defendants and each of them manufacture, distribute, and/or sale or offer the
11 PRODUCTS for sale or promotional purposes in California.

12 28. Over time TDCPP escapes from the PRODUCTS and causes exposures when it is
13 directly inhaled and absorbed through skin; as it volatilizes and is inhaled and absorbed; and
14 when it is ingested as household dust where it accumulates. Ingestion through hand-to-mouth
15 behavior is of particular concern for children, to whom the PRODUCTS are marketed.

16 29. DEFENDANTS, in the course of doing business, know and intend that
17 individuals will purchase and use their PRODUCTS, thus exposing them to TDCPP.

18 30. DEFENDANTS have failed to provide a clear and reasonable warning as required
19 by Health and Safety Code section 25249.6 and section 25249.11, subdivision (f) to users of
20 their PRODUCTS. As a direct result of Defendants' acts and omissions, the general public in
21 California is being regularly, unlawfully, and involuntarily exposed to TDCPP, a known
22 carcinogen.

23 31. The PRODUCTS continue to be manufactured, distributed, and offered for sale or
24 promotional purposes in California without a clear and reasonable warning.

1 **FIRST CAUSE OF ACTION**

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

3 32. Plaintiff realleges and incorporates each and every allegation contained in the
4 preceding paragraphs as though fully set forth herein.

5 33. TDCPP is present in or on the DEFENDANTS' PRODUCTS in such a way as to
6 expose individuals in California to TDCPP, as such exposures are defined by California Code of
7 Regulations title 27, section 25602, subdivision (b).

8 34. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
9 or use in California require a "clear and reasonable" warning under Proposition 65.

10 35. Defendants knew or should have known that the children's play tents they
11 manufacture, import, distribute, sell, and offer for sale or use in California contain TDCPP.

12 36. Defendants intended that such exposures to TDCPP from the reasonably
13 foreseeable uses of the children's play tents would occur by Defendants' deliberate, non-
14 accidental participation in the manufacture, importation, distribution, sale, and offering of the
15 children's play tents for sale or use to individuals in the State of California.

16 37. Defendants failed to provide a "clear and reasonable warning" to those consumers
17 and other individuals in the State of California who were or who would become exposed to
18 TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably foreseeable
19 uses of the children's play tents.

20 38. DEFENDANTS' violations have continued to occur beyond their receipt of
21 Plaintiff's sixty-day notice of violation. As such, DEFENDANTS' violations are ongoing and
22 continuous in nature, and will continue to occur in the future.

23 39. Pursuant to Health and Safety Code section 25249.7, subdivision (b), as a
24 consequence of the above-described acts, Defendants are liable for a maximum civil penalty of
25 \$2,500 per day for each violation.

