

ENDORSED
FILED
ALAMEDA COUNTY

FEB -3 2015

CLERK OF THE SUPERIOR COURT
BY Anita Dhir DEPUTY

1 Brian C. Johnson, State Bar No. 235965
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 LAURENCE VINOCUR

11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ALAMEDA
14 UNLIMITED CIVIL JURISDICTION
15

16 LAURENCE VINOCUR,

17 Plaintiff,

18 v.

19 WESTFIELD OUTDOOR, INC.; THE SPORTS
20 AUTHORITY, INC.; SEARS HOLDINGS
21 CORPORATION; KMART CORPORATION;
22 JARDEN CORPORATION; MARMOT
23 MOUNTAIN, LLC; DICK'S SPORTING
24 GOODS, INC. and DOES 1-150, inclusive,

25 Defendants.
26
27
28

Case No. RG15754189

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

NATURE OF THE ACTION

1
2 1. This First Amended Complaint is a representative action brought by plaintiff
3 LAURENCE VINOUCUR in the public interest of the citizens of the State of California to
4 enforce the People’s right to be informed about exposures to tris(1,3-dichloro-2-propyl)
5 phosphate (“TDCPP”), a toxic chemical that is found in and on the fabric of tents and shelters
6 sold in the State of California.

7 2. By this First Amended Complaint, plaintiff seeks to remedy defendants’
8 continuing failure to warn consumers and other individuals in California about the risks of
9 exposures to TDCPP present in and on certain tent and/or shelter fabrics manufactured,
10 distributed, sold, and/or offered for sale or use to consumers throughout the State of California.

11 3. Detectable levels of TDCPP are commonly found in and on certain tent and/or
12 shelter fabrics that defendants manufacture, import, distribute, sell, and/or offer for sale or use
13 to consumers throughout California. Individuals in California, including infants and children,
14 are exposed to TDCPP in the products through, inter alia, inhalation, dermal exposure, and/or
15 ingestion during use and after use.

16 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
17 codified at Health & Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the
18 course of doing business shall knowingly and intentionally expose any individual to a chemical
19 known to the State to cause cancer or reproductive toxicity without first giving clear and
20 reasonable warning to such individual...” Cal. Health & Safety Code § 25249.6.

21 5. TDCPP has been used in consumer products as an additive flame retardant since
22 the 1960s. In 1977, based on findings that exposures to TDCPP could have mutagenic effects,
23 the use of TDCPP was discontinued in children’s pajamas nationwide.

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

1 TDCCP is hereinafter referred to as the "LISTED CHEMICAL."

2 7. Defendants manufacture, import, distribute, sell, and/or offer for sale tents and
3 shelters that utilize fabric containing excessive levels of the LISTED CHEMICAL which cause
4 exposures that require a warning under Proposition 65. All such tent and/or shelter fabrics
5 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."

6 8. Defendants manufacture, import, sell and/or distribute for sale in California
7 PRODUCTS containing the LISTED CHEMICAL more specifically, as follows:

8 a. Defendants Westfield Outdoor, Inc. and The Sports Authority, Inc.,
9 manufacture distribute, import, sell, and/or offer for sale without a warning in
10 California, tent and/or shelter fabrics that contain TDCPP including, but not limited to,
11 the *Alpine Design Solitude Tent, SKU: 34405891, Style: TSA-8532, UPC #8 44093*
12 *01961 3*, as alleged in plaintiff's July 30, 2014 notice of violation of Proposition 65
13 served on Westfield Outdoor, Inc. and The Sports Authority, Inc.

14 b. Defendants Sears Holdings Corporation and Kmart Corporation
15 manufacture distribute, import, sell, and/or offer for sale without a warning in
16 California, tent and/or shelter fabrics that contain TDCPP including, but not limited to,
17 the *Northwest Territory Sierra Dome Tent, Style #KMT120907-3, KSN #0-05734934-*
18 *2/180057349342, UPC #8 18655 00644 1*, as alleged in plaintiff's October 24, 2014
19 notice of violation of Proposition 65 served on Sears Holdings Corporation and Kmart
20 Corporation.

21 c. Defendants Jarden Corporation, Marmot Mountain, LLC and Dick's
22 Sporting Goods, Inc. manufacture distribute, import, sell, and/or offer for sale without a
23 warning in California, tent and/or shelter fabrics that contain TDCPP including, but not
24 limited to, the *Marmot Aspen 2P Tent, #93600, UPC #7 85562 40560 9*, as alleged in
25 plaintiff's October 24, 2014 notice of violation of Proposition 65 served on Jarden
26 Corporation, Marmot Mountain, LLC and Dick's Sporting Goods, Inc.

1 9. Defendants' failure to warn consumers and other individuals in California of the
2 harms associated with exposures to the LISTED CHEMICAL in conjunction with defendants'
3 sales of the PRODUCTS containing the LISTED CHEMICAL constitute violations of
4 Proposition 65, and subject defendants to enjoinder of such conduct, as well as civil penalties
5 for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

6 10. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
7 permanent injunctive relief to compel defendants to provide purchasers or users of the
8 PRODUCTS with the required warning regarding the health hazards associated with exposures
9 to the LISTED CHEMICAL. Health & Safety Code § 25249.7(a).

10 11. Pursuant to Health & Safety Code § 25249.7(b), plaintiff also seeks civil penalties
11 against defendants, and each of them, for each violation of Proposition 65.

12 **PARTIES**

13 12. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is
14 dedicated to protecting the health of California citizens through the elimination or reduction of
15 toxic exposures from consumer products. He brings this action in the public interest pursuant
16 to California Health and Safety Code § 25249.7(d).

17 13. Defendant Westfield Outdoor, Inc. ("WESTFIELD") is a person in the course of
18 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

19 14. WESTFIELD manufactures, imports, distributes, sells, and/or offers the
20 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
21 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
22 State of California.

23 15. Defendant The Sports Authority, Inc. ("SPORTS AUTHORITY") is a person in
24 the course of doing business within the meaning of Health and Safety Code sections 25249.6
25 and 25249.11.

1 16. SPORTS AUTHORITY imports, distributes, sells, and/or offers the PRODUCTS
2 for sale or use in the State of California, or implies by its conduct that it imports, distributes,
3 sells, and/or offers the PRODUCTS for sale or use in the State of California.

4 17. Defendant Sears Holdings Corporation (“SEARS”) is a person in the course of
5 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

6 18. SEARS imports, distributes, sells, and/or offers the PRODUCTS for sale or use in
7 the State of California, or implies by its conduct that it imports, distributes, sells, and/or offers
8 the PRODUCTS for sale or use in the State of California.

9 19. Defendant Kmart Corporation (“KMART”) is a person in the course of doing
10 business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

11 20. KMART imports, distributes, sells, and/or offers the PRODUCTS for sale or use in
12 the State of California, or implies by its conduct that it imports, distributes, sells, and/or offers
13 the PRODUCTS for sale or use in the State of California.

14 21. Defendant Jarden Corporation (“JARDEN”) is a person in the course of doing
15 business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

16 22. JARDEN imports, distributes, sells, and/or offers the PRODUCTS for sale or use
17 in the State of California, or implies by its conduct that it imports, distributes, sells, and/or offers
18 the PRODUCTS for sale or use in the State of California.

19 23. Defendant Marmot Mountain, LLC (“MARMOT”) is a person in the course of
20 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

21 24. MARMOT imports, distributes, sells and/or offers the PRODUCTS for sale or use
22 in the State of California, or implies by its conduct that it imports, distributes, sells, and/or offers
23 the PRODUCTS for sale or use in the State of California.

24 25. Defendant Dick’s Sporting Goods, Inc. (“DICK’S”) is a person in the course of
25 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

1 26. DICK’S imports, distributes, sells and/or offers the PRODUCTS for sale or use in
2 the State of California, or implies by its conduct that it imports, distributes, sells and/or offers the
3 PRODUCTS for sale or use in the State of California.

4 27. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
5 person in the course of doing business within the meaning of California Health & Safety Code §
6 25249.11.

7 28. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
8 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
9 and/or manufacture one or more of the PRODUCTS offered for sale or use in California.

10 29. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
11 in the course of doing business within the meaning of California Health & Safety Code §
12 25249.11.

13 30. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and
14 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
15 in the State of California.

16 31. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in
17 the course of doing business within the meaning of California Health & Safety Code §
18 25249.11.

19 32. RETAILER DEFENDANTS offer one or more of the PRODUCTS for sale or use
20 to consumers and other individual in California.

21 33. At this time, the true names of defendants DOES 1 through 150, inclusive, are
22 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
23 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
24 each of the fictitiously named defendants is responsible for the acts and occurrences alleged.
25 When ascertained, their true names shall be reflected in an amendment to the complaint.

26 34. WESTFIELD, SPORTS AUTHORITY, SEARS, KMART, JARDEN,
27 MARMOT, DICK’S MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
28

1 and RETAILER DEFENDANTS shall hereinafter collectively be referred to as
2 “DEFENDANTS.”

3 **VENUE AND JURISDICTION**

4 35. Venue is proper in Alameda County, pursuant to the Code of Civil Procedure
5 sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction, because
6 plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
7 wrongful conduct occurred, and continue to occur, in this county, and/or because
8 DEFENDANTS conducted, and continue to conduct, business in Alameda County with respect
9 to the PRODUCTS.

10 36. The California Superior Court has jurisdiction over this action pursuant to
11 California Constitution Article VI, section 10, which grants the Superior Court “original
12 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
13 which this action is brought does not specify any other basis of subject matter jurisdiction.

14 37. The California Superior Court has jurisdiction over DEFENDANTS based on
15 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
16 association that is a citizen of the State of California, has sufficient minimum contacts in the
17 State of California, and/or otherwise purposefully avails itself of the California market.
18 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
19 California courts consistent with traditional notions of fair play and substantial justice.

20 **FIRST CAUSE OF ACTION**

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

22 38. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
23 Paragraphs 1 through 37 inclusive.

24 39. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
25 Enforcement Act of 1986, the people of California expressly declared their right “[t]o be
26 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
27 harm.” Cal. Health & Safety Code § 25249.6.

1 40. Proposition 65 states, “[n]o person in the course of doing business shall
2 knowingly and intentionally expose any individual to a chemical known to the state to cause
3 cancer or reproductive toxicity without first giving clear and reasonable warning to such
4 individual” *Id.*

5 41. On July 30, 2014, plaintiff served a sixty-day notice of violation, together with the
6 accompanying certificate of merit on WESTFIELD, SPORTS AUTHORITY, the California
7 Attorney General, and all other requisite public enforcement agencies stating that, as a result of
8 DEFENDANTS’ sales of the PRODUCTS containing the LISTED CHEMICAL, consumers,
9 and other individuals in the State of California are being exposed to the LISTED CHEMICAL
10 as a result of their reasonably foreseeable use of the PRODUCTS without first receiving a “clear
11 and reasonable warning” regarding the health hazards associated with such exposures as
12 required by Proposition 65.

13 42. On October 24, 2014, plaintiff also served a sixty-day notice of violation, together
14 with the accompanying certificate of merit on SEARS, KMART, the California Attorney
15 General, and all other requisite public enforcement agencies stating that, as a result of
16 DEFENDANTS’ sales of PRODUCTS containing the LISTED CHEMICAL, consumers and
17 other individuals in the State of California are being exposed to the LISTED CHEMICAL as a
18 result of their reasonably foreseeable use of the PRODUCTS without first receiving a “clear and
19 reasonable warning” regarding the health hazards associated with such exposures as required by
20 Proposition 65.

21 43. On October 24, 2014, plaintiff also served a sixty-day notice of violation, together
22 with the accompanying certificate of merit on JARDEN, MARMOT, DICK’S, the California
23 Attorney General, and all other requisite public enforcement agencies stating that, as a result of
24 DEFENDANTS’ sales of PRODUCTS containing the LISTED CHEMICAL, consumers and
25 other individuals in the State of California are being exposed to the LISTED CHEMICAL as a
26 result of their reasonably foreseeable use of the PRODUCTS without first receiving a “clear and
27
28

1 reasonable warning” regarding the health hazards associated with such exposures as required by
2 Proposition 65.

3 44. DEFENDANTS engage in the manufacture, importation, distribution, sale, and/or
4 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 notices of violation. As such, DEFENDANTS’ violations are ongoing and
7 continuous in nature, and, unless enjoined, will continue to occur in the future.

8 45. After receiving plaintiff’s sixty-day notices 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 46. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
12 or use in California by DEFENDANTS contain the LISTED CHEMICAL in such a way that the
13 reasonably foreseeable uses of these products result in exposures that require a “clear and
14 reasonable” warning under Proposition 65.

15 47. DEFENDANTS knew or should have known that the PRODUCTS they
16 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
17 CHEMICAL.

18 48. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
19 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
20 inhalation during reasonably foreseeable use.

21 49. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
22 continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
23 defined by title 27 of the California Code of Regulations, section 25602(b).

24 50. DEFENDANTS know that the normal and reasonably foreseeable use of the
25 PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact, ingestion,
26 and/or inhalation.

1 51. DEFENDANTS intend that such exposures to the LISTED CHEMICAL from the
2 reasonably foreseeable use of the PRODUCTS to occur by their deliberate, non-accidental
3 participation in the manufacture, distribution, sale, and/or offering of the PRODUCTS for sale
4 or use to individuals in the State of California.

5 52. DEFENDANTS failed to provide a “clear and reasonable warning” to those
6 consumers and other individuals in who have been, or will be, exposed to the LISTED
7 CHEMICAL.

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

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

17 55. As a consequence of the above-described acts, Health and Safety Code
18 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
19 DEFENDANTS.

20 **PRAYER FOR RELIEF**

21 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

25 2. That the Court, pursuant to California Health and Safety Code section 25249.7(a),
26 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
27 offering the PRODUCTS for sale or use in California without first providing a “clear and
28

1 reasonable warning” as defined by title 27 of the California Code of Regulations, section 25601
2 *et seq.*, as to the harms associated with exposures to the LISTED CHEMICAL;

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

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

5
6
7 Dated: February 2, 2015

THE CHANLER GROUP

8
9 A handwritten signature in black ink, appearing to read "Brian C. Johnson", is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

10 By: Brian C. Johnson
11 Attorneys for Plaintiff
12 LAURENCE VINO CUR
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28