

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 as a flame retardant to treat fabrics used in a variety of products, including
9 tents. This Complaint addresses exposures that have occurred, and continue to occur, through
10 the manufacture, distribution, sale, and/or use of Defendants' children's play tents (the
11 "Products"). Individuals in California, including children, are exposed to TDCPP when they
12 inhale TDCPP released from Products, when TDCPP from Products accumulates in ambient
13 particles that are subsequently touched by such individuals and brought into contact with the
14 mouth, and when fabric is touched directly and brought into contact with the mouth.

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

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

25 PARTIES

26 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH") is a
27 non-profit corporation dedicated to protecting the public from environmental health hazards and
28 toxic exposures. CEH is based in Oakland, California and is incorporated under the laws of the

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

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

12 6. Defendant BATTAT INCORPORATED is a person in the course of doing
13 business within the meaning of Health & Safety Code § 25249.11. BATTAT INCORPORATED
14 manufactures, distributes, and/or sells Products for sale or use in California.

15 7. Defendant MAISON JOSEPH BATTAT LTD. is a person in the course of
16 doing business within the meaning of Health & Safety Code § 25249.11. MAISON JOSEPH
17 BATTAT LTD. manufactures, distributes, and/or sells Products for sale or use in California.

18 8. Defendant TARGET CORPORATION is a person in the course of doing
19 business within the meaning of Health & Safety Code § 25249.11. TARGET CORPORATION
20 manufactures, distributes, and/or sells Products for sale or use in California.

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

24 10. Defendant KMART CORPORATION is a person in the course of doing
25 business within the meaning of Health & Safety Code § 25249.11. KMART CORPORATION
26 manufactures, distributes, and/or sells Products for sale or use in California.

27 11. DOES 1 through 100 are each a person in the course of doing business
28 within the meaning of Health & Safety Code § 25249.11. DOES 1 through 100 manufacture,

1 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
2 states, in pertinent part:

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

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

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

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

28 22. On October 28, 2012, one year after it was listed as a chemical known to
cause cancer, TDCPP became subject to the clear and reasonable warning requirement regarding

1 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).
2 The chief purpose of the one-year grace period between the listing date of a chemical under
3 Proposition 65 and the effective date of the warning requirement is to give potentially liable
4 parties sufficient time to come into complete compliance with this requirement, such that all
5 illegal exposures can be averted.

6 23. TDCPP is used in Products primarily as an additive flame retardant in the
7 fabric used to make the Products. TDCPP in the fabric of the Products is known to migrate from
8 such Products into nearby environments.

9 24. Defendants' Products contain sufficient quantities of TDCPP such that
10 individuals, including children, are exposed to TDCPP through the average use of Products. The
11 routes of exposure include inhalation, ingestion, and/or dermal absorption by individuals.
12 Inhalation occurs when TDCPP is released from the products into the ambient environment.

13 Ingestion and dermal absorption occur when TDCPP from the products accumulates in ambient
14 particles (*e.g.*, dust) that are subsequently touched by individuals and brought into contact with
15 the mouth, or when exposed fabric is touched directly and brought into contact with the mouth.

16 25. The Products are specifically designed for children, and are marketed to
17 persons who care for children, such as parents, teachers, and child care professionals. The
18 Products are enclosed structures, which increases the likelihood of inhalation exposures for
19 anyone playing inside the Products. Children spend a large proportion of their time inside and in
20 intimate contact with such Products, which may increase their risk of TDCPP exposure from
21 inhalation and dermal absorption. Children may also be especially prone to ingesting ambient
22 particles containing TDCPP from Products, given the greater amount of time they spend crawling
23 on floors and their greater tendency to put their hands in their mouths. Once exposed to TDCPP,
24 infants and children may be more susceptible to its carcinogenic properties because they are
25 smaller than adults and because their bodies are still developing.

26 26. Any person acting in the public interest has standing to enforce violations
27 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
28 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the

1 action within such time. Health & Safety Code § 25249.7(d).

2 27. More than sixty days prior to naming each Defendant in this lawsuit, CEH
3 provided a 60-Day “Notice of Violation of Proposition 65” to the California Attorney General,
4 the District Attorneys of every county in California, the City Attorneys of every California city
5 with a population greater than 750,000, and to each of the named Defendants. In compliance
6 with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each Notice included the
7 following information: (1) the name and address of each violator; (2) the statute violated; (3) the
8 time period during which violations occurred; (4) specific descriptions of the violations,
9 including (a) the routes of exposure to TDCPP from Products, and (b) the specific type of
10 Products sold and used in violation of Proposition 65; and (5) the name of the specific
11 Proposition 65-listed chemical that is the subject of the violations described in each Notice.

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

27 29. None of the public prosecutors with the authority to prosecute violations
28 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against

1 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claims asserted in the
2 Notices.

3 30. Defendants both know and intend that consumers in California, including
4 children, will use, touch, and/or handle Products, or will come into close proximity to Products,
5 thus exposing them to TDCPP.

6 31. Under Proposition 65, an exposure is “knowing” where the party
7 responsible for such exposure has:

8 knowledge of the fact that a[n] ... exposure to a chemical listed
9 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
10 No knowledge that the ... exposure is unlawful is required.

11 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
12 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
13 12201).

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

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

18 34. Defendants also have constructive knowledge that their Products contain
19 TDCPP due to the widespread media coverage concerning the problem of TDCPP in consumer
20 products in general and in fabric in particular. The problem of TDCPP in consumer products has
21 been the subject of articles in national newspapers, industry trade papers, and scholarly journals,
22 as well as numerous Internet weblog postings.

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

28 36. Nevertheless, Defendants continue to expose consumers in California,

1 including children, to TDCPP without prior clear and reasonable warnings regarding the
2 carcinogenic hazards of TDCPP.

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

5 38. Any person “violating or threatening to violate” Proposition 65 may be
6 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
7 violate” is defined to mean “to create a condition in which there is a substantial probability that a
8 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
9 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
10 Code § 25249.7(b).

11 **FIRST CAUSE OF ACTION**
12 **(Violations of Health & Safety Code § 25249.6)**

13 39. CEH realleges and incorporates by reference as if specifically set forth
14 herein Paragraphs 1 through 38, inclusive.

15 40. TDCPP is a chemical listed by the State of California as known to cause
16 cancer.

17 41. By placing their Products into the stream of commerce, Defendants are
18 each a person in the course of doing business within the meaning of Health & Safety Code §
19 25249.11.

20 42. Defendants know that average installation and use of their Products will
21 expose users of Products to TDCPP. Defendants intend that their Products be used in a manner
22 that results in users of their Products, and others who come into close proximity to these
23 Products, being exposed to TDCPP contained therein.

24 43. Defendants have failed, and continue to fail, to provide prior clear and
25 reasonable warnings regarding the carcinogenicity of TDCPP to users of their Products and
26 others who come into close proximity to these Products.

27 44. By committing the acts alleged above, Defendants have at all times
28 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing

1 individuals to TDCPP without first giving clear and reasonable warnings to such individuals
2 regarding the carcinogenicity of TDCPP.

3 Wherefore, CEH prays for judgment against Defendants, as set forth hereafter.

4 **PRAYER FOR RELIEF**

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

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

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

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

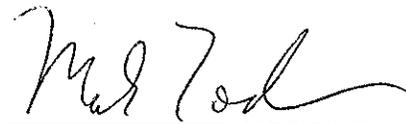
16 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
17 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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21 Dated: April 7, 2015

Respectfully submitted,

22 LEXINGTON LAW GROUP

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24 _____
25 Mark N. Todzo
26 Attorneys for Plaintiff
27 CENTER FOR ENVIRONMENTAL HEALTH
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