

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 play tents and similar structures. This Complaint addresses exposures that have occurred, and
10 continue to occur, through the manufacture, distribution, sale, and/or use of Defendants'
11 children's play tents ("Play Tents") and children's play tunnels ("Play Tunnels") (collectively,
12 the "Products"). Individuals in California, including children, are exposed to TDCPP when they
13 inhale TDCPP released from Products, when TDCPP from Products accumulates in ambient
14 particles that are subsequently touched by such individuals and brought into contact with the
15 mouth, and when fabric 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, primarily children, to TDCPP.

22 3. Despite the fact that Defendants expose individuals to TDCPP,
23 Defendants provide no warnings whatsoever about the carcinogenic hazards associated with
24 these TDCPP exposures. Defendants' conduct thus violates the warning provision of
25 Proposition 65. Health & 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 PACIFIC PLAY TENTS, INC. is a person in the course of
11 doing business within the meaning of Health & Safety Code § 25249.11. PACIFIC PLAY
12 TENTS, INC. manufactures, distributes, and/or sells Play Tents and Play Tunnels for sale or use
13 in California.

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

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

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

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

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

1 entity that does sufficient business, has sufficient minimum contacts in California, or otherwise
2 intentionally avails itself of the California market through the sale, marketing, or use of Products
3 in California and/or by having such other contacts with California so as to render the exercise of
4 jurisdiction over it by the California courts consistent with traditional notions of fair play and
5 substantial justice.

6 19. Venue is proper in the Alameda Superior Court because one or more of the
7 violations arise in the County of Alameda.

8 BACKGROUND FACTS

9 20. The People of the State of California have declared by initiative under
10 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
11 defects, or other reproductive harm.” Proposition 65, § 1(b).

12 21. To effectuate this goal, Proposition 65 prohibits exposing people to
13 chemicals listed by the State of California as known to cause cancer, birth defects, or other
14 reproductive harm without a “clear and reasonable warning” unless the business responsible for
15 the exposure can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6
16 states, in pertinent part:

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

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

27 23. On May 29, 2009, the Proposition 65 Carcinogen Identification
28 Committee, a group of qualified experts who advise the State of California on Proposition 65
chemical listing determinations, announced that it was assigning priority to the preparation of

1 hazard identification materials for TDCPP based on the chemical's suspected carcinogenic
2 properties. 27 Cal. Code Regs. ("C.C.R.") § 25102(c)(1). On February 11, 2011, the California
3 Environmental Protection Agency's Office of Environmental Health Hazard Assessment
4 ("OEHHA") announced that it was preparing hazard identification materials for TDCPP as a
5 precursor to formally identifying the chemical as carcinogenic. On July 8, 2011, OEHHA made
6 its hazard identification materials for TDCPP publicly available, and announced that the State of
7 California would be making a TDCPP listing determination by October 2011.

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

13 25. On October 28, 2012, one year after it was listed as a chemical known to
14 cause cancer, TDCPP became subject to the clear and reasonable warning requirement regarding
15 carcinogens under Proposition 65. 27 C.C.R. § 27001(b); Health & Safety Code § 25249.10(b).
16 The chief purpose of the one-year grace period between the listing date of a chemical under
17 Proposition 65 and the effective date of the warning requirement is to give potentially liable
18 parties sufficient time to come into complete compliance with this requirement, such that all
19 illegal exposures can be averted.

20 26. TDCPP is used in Products primarily as an additive flame retardant in the
21 fabric used to make the Products. TDCPP in the fabric of the Products is known to migrate from
22 such Products into nearby environments.

23 27. Defendants' Products contain sufficient quantities of TDCPP such that
24 individuals, including children, are exposed to TDCPP through the average use of Products. The
25 routes of exposure include inhalation, ingestion, and/or dermal absorption by individuals.
26 Inhalation occurs when TDCPP is released from the Products into the ambient environment.
27 Ingestion and dermal absorption occur when TDCPP from the Products accumulates in ambient
28 particles (*e.g.*, dust) that are subsequently touched by individuals and brought into contact with

1 the mouth, or when exposed fabric is touched directly and brought into contact with the mouth.

2 28. The Products are specifically designed for children, and are marketed to
3 persons who care for children, such as parents, teachers, and child care professionals. The
4 Products are wholly or partially enclosed structures, which increases the likelihood of inhalation
5 exposures for anyone playing inside the Products. Children spend a large proportion of their
6 time inside and in intimate contact with such Products, which may increase their risk of TDCPP
7 exposure from inhalation and dermal absorption. Children may also be especially prone to
8 ingesting ambient particles containing TDCPP from Products or ingesting TDCPP from touching
9 Products, given the greater amount of time they spend crawling on floors and their greater
10 tendency to put their hands in their mouths. Once exposed to TDCPP, infants and children may
11 be more susceptible to its carcinogenic properties because they are smaller than adults and
12 because their bodies are still developing.

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

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

27 31. More than sixty days prior to naming each Defendant in this lawsuit,
28 concurrent with sending the Notices described in the preceding paragraph, CEH also sent a

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

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

18 33. Defendants both know and intend that consumers in California, including
19 children, will use, touch, and/or handle Products, or will come into close proximity to Products,
20 thus exposing them to TDCPP.

21 34. Under Proposition 65, an exposure is “knowing” where the party
22 responsible for such exposure has:

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

26 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
27 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
28 12201).

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

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

5 37. Defendants also have constructive knowledge that their Products contain
6 TDCPP due to the widespread media coverage concerning the problem of TDCPP in consumer
7 products in general and in fabric in particular. The problem of TDCPP in consumer products has
8 been the subject of articles in national newspapers, industry trade papers, and scholarly journals,
9 as well as numerous Internet weblog postings.

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

15 39. Nevertheless, Defendants continue to expose consumers in California,
16 including children, to TDCPP without prior clear and reasonable warnings regarding the
17 carcinogenic hazards of TDCPP.

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

20 41. Any person "violating or threatening to violate" Proposition 65 may be
21 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. "Threaten to
22 violate" is defined to mean "to create a condition in which there is a substantial probability that a
23 violation will occur." Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
24 penalties not to exceed \$2,500 per day for each violation of Proposition 65. Health & Safety
25 Code § 25249.7(b).

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1 Products sold by Defendants, as CEH shall specify in further application to the Court;

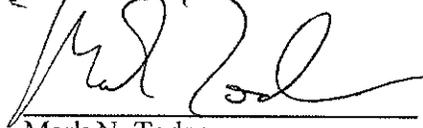
2 4. That the Court, pursuant to Code of Civil Procedure § 1021.5 or any other
3 applicable theory, grant CEH its reasonable attorneys' fees and costs of suit; and

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

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7 Dated: July 7, 2015

Respectfully submitted,

8 LEXINGTON LAW GROUP

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11 Mark N. Todzo
12 Attorneys for Plaintiff
13 CENTER FOR ENVIRONMENTAL HEALTH
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