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ENDORSED
FILED
ALAMEDA COUNTY

SEP 02 2015

CLERK OF THE SUPERIOR COURT
By XIAN-XI BOWIE

6 Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL HEALTH
7
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

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

13 Plaintiff,)

14 v.)

15 ORBIT BABY, INC.; THE ERGO BABY)
16 CARRIER, INC.; and DOES 1 through 100,)
inclusive,)

17 Defendants.)
18

Case No. RG16889826

**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 as a flame retardant to treat polyurethane foam, which is used as padding or
9 cushioning in a variety of products. 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 car seats (the "Products"). Individuals in California, particularly infants and children,
12 are exposed to TDCPP when they inhale TDCPP released from Products, when TDCPP from
13 Products accumulates in ambient particles that are subsequently touched by such individuals and
14 brought into contact with the mouth, and when exposed foam is touched directly and brought into
15 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 containing significant
20 quantities of TDCPP into the California marketplace, thereby exposing consumers of their
21 Products, primarily infants and children, to TDCPP.

22 3. Despite the fact that Defendants expose infants, children, and other
23 individuals to TDCPP, Defendants provide no warnings whatsoever about the carcinogenic
24 hazards associated with these TDCPP exposures. Defendants' conduct thus violates the warning
25 provision of 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 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 12. 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 13. 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 14. 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
clear and reasonable warning to such individual ...

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

26 16. On May 29, 2009, the Proposition 65 Carcinogen Identification
27 Committee, a group of qualified experts who advise the State of California on Proposition 65
28 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 17. 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 18. 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 19. TDCPP is used in Products primarily as an additive flame retardant in the
21 cushioning foam portion. However, the use of chemical flame retardants, such as TDCPP, in
22 foam provides no appreciably greater protection from fires. Non-chemical methods, such as the
23 use of fire barriers, are far more effective at achieving fire safety benefits.

24 20. TDCPP in the foam portion of Products is known to migrate from such
25 Products into nearby environments. Defendants' Products contain sufficient quantities of
26 TDCPP such that individuals, particularly the infants and children who sit in the Products, are
27 exposed to TDCPP through the average use of the Products. The routes of exposure include
28 inhalation, ingestion, and/or dermal absorption by individuals. Inhalation occurs when TDCPP is

1 released from Products into the ambient environment. Ingestion and dermal absorption occur
2 when TDCPP from Products accumulates in ambient particles (*e.g.*, dust) that are subsequently
3 touched by individuals and brought into contact with the mouth, or when exposed foam is
4 touched directly and brought into contact with the mouth.

5 21. The Products are specifically designed for infants and children, and are
6 marketed to persons who care for infants and children, such as parents and other caregivers. The
7 Products are often used inside closed structures such as cars, which increases the likelihood of
8 inhalation exposures for anyone inside these structures. Infants and children spend a large
9 proportion of their time secured into, surrounded by, and in intimate contact with the Products,
10 which also increases their risk of TDCPP exposure from inhalation and dermal absorption.
11 Infants and children may also be especially prone to ingesting ambient particles containing
12 TDCPP from Products, given the greater amount of time they spend touching nearby objects and
13 their greater tendency to put their hands in their mouths. Once exposed to TDCPP, infants and
14 children may be more susceptible to its carcinogenic properties because they are smaller than
15 adults and because their bodies are still developing.

16 22. The Products are used on a consistent basis over a period of many years.
17 Given that California law requires the use of car seats until a child is eight years old, Defendants
18 know and intend that their Products will be used for such period of time. *See* Vehicle Code §
19 27360(a). Defendants also provide child height and weight ratings for their Products that are
20 expressed in ranges correlating to the anticipated usage of Products across as many as eight years.
21 Many Products are also used by multiple children, such as when an older child grows too big to
22 fit into a car seat and the same seat is then used by a younger child, which further extends the
23 service life of such Products.

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

28 24. More than sixty days prior to naming each Defendant in this lawsuit, CEH

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

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

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

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

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

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

9 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
10 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2, §
11 12601).

12 29. No clear and reasonable warning is provided with Products regarding the
13 carcinogenic hazards of TDCPP. To the contrary, Defendants have made affirmative
14 representations in their marketing and advertising materials that their Products contain no
15 TDCPP or any other chlorinated chemical flame retardants.

16 30. 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 31. 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 Products and polyurethane foam in particular. The problem of TDCPP
21 and other chlorinated chemical flame retardants in foam-containing consumer products, including
22 Products, has been the subject of articles in national newspapers, industry trade papers, and
23 scholarly journals, as well as numerous Internet weblog postings.

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

1 relevant to this Complaint violated Proposition 65 by knowingly and intentionally exposing
2 individuals to TDCPP without first giving clear and reasonable warnings to such individuals
3 regarding the carcinogenicity of TDCPP.

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

5 **PRAYER FOR RELIEF**

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

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

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

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

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

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

21
22 Dated: September 2, 2016

Respectfully submitted,

23 LEXINGTON LAW GROUP

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