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ENDORSED
FILED
Superior Court of California
County of San Francisco

JAN 22 2010

GORDON PARK-LI, Clerk
BY: MARIA SANCHEZ
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

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

Plaintiff,)

v.)

ATICO INTERNATIONAL USA, INC.; and)
Defendant DOES 1 through 200, inclusive,)

Defendants.)

Case No. CGC-09-493291

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

Health & Safety Code § 25249.5, *et seq.*
(Other)

1 Plaintiff Center for Environmental Health (“Plaintiff”), in the public interest, and
2 based on information and belief and investigation of counsel, except for information based on
3 personal knowledge, 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 Di(2-ethylhexyl) Phthalate (“DEHP”), a
7 chemical known to the State of California to cause cancer and birth defects or other reproductive
8 harm. Such exposures have occurred, and continue to occur, through the manufacture,
9 distribution, sale and consumer use of Defendants’ vinyl lounge chairs such as: (a) the Folding
10 Tube Lounge Chair, Item No. 9000858-MMIX, SKU No. 8-84118-02498-7; and (b) the Multi
11 Position Lounge Chair, Item No. 517335, SKU No. 0-49022-44526-0 (the “Products”).
12 Consumers are exposed to DEHP when they touch, use or otherwise handle the Products.

13 2. Under California’s Proposition 65, Health and Safety Code § 25249.5, *et*
14 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
15 to chemicals known to the State to cause cancer and/or birth defects or other reproductive harm
16 without providing clear and reasonable warnings to individuals prior to their exposure.
17 Defendants introduce Products contaminated with significant quantities of DEHP into the
18 California marketplace, exposing users of their Products, many of whom are children, to DEHP.

19 3. Despite the fact that defendants’ Products expose consumers to DEHP,
20 defendants provide no warnings whatsoever about the carcinogenic and/or reproductive hazards
21 associated with DEHP exposure. Defendants’ conduct thus violates the warning provision of
22 Proposition 65. Health & Safety Code § 25249.6.

23 **PARTIES**

24 4. Plaintiff CENTER FOR ENVIRONMENTAL HEALTH is a non-profit
25 corporation dedicated to protecting the public from environmental health hazards and toxic
26 exposures. Plaintiff is based in Oakland, California, and incorporated under the laws of the State
27 of California. Plaintiff is a “person” within the meaning of Health & Safety Code § 25249.11(a)
28 and brings this enforcement action in the public interest pursuant to Health & Safety Code §

1 11. Venue is proper in the San Francisco Superior Court because one or more
2 of the violations arise in the County of San Francisco.

3 **BACKGROUND FACTS**

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

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

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

15 14. On January 1, 1988, the State of California officially listed DEHP as a
16 chemical known to cause cancer. On January 1, 1989, one year after it was listed as a chemical
17 known to cause cancer, DEHP became subject to the clear and reasonable warning requirement
18 regarding cancer hazards under Proposition 65. 27 California Code of Regulations (“C.C.R.”)
19 § 27001(c); Health & Safety Code § 25249.10(b).

20 15. On October 24, 2003, the State of California officially listed DEHP as a
21 chemical known to cause reproductive toxicity. DEHP is specifically identified as a reproductive
22 toxicant under two subcategories: (1) “developmental reproductive toxicity,” which means that it
23 tends to harm the developing fetus and (2) “male reproductive toxicity,” which means that it
24 tends to harm the male reproductive system. 27 C.C.R. § 27001(c). On October 24, 2004, one
25 year after it was listed as a chemical known to cause reproductive toxicity, DEHP became subject
26 to the clear and reasonable warning requirement regarding reproductive toxins under Proposition
27 65. 27 C.C.R. § 27001(c); Health & Safety Code § 25249.10(b).

28 16. Defendants’ Products contain sufficient quantities of DEHP such that

1 individuals who touch, use, or otherwise handle the Products are exposed to DEHP through the
2 average use of the Products. The routes of exposure for the violations include dermal absorption
3 directly through the skin when consumers, including children, touch, use, or handle the Products
4 and ingestion via hand-to-mouth contact after consumers, including children, touch, use, or
5 handle the Products.

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

10 18. More than sixty days before naming each Defendant in this Complaint,
11 Plaintiff provided a 60-Day Notice of Violation of Proposition 65 to the California Attorney
12 General, the District Attorneys of every county in California, the City Attorneys of every
13 California city with a population greater than 750,000 and to the Defendants named in the
14 Notice. In compliance with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each
15 of the Notices included the following information: (1) the name and address of the violators; (2)
16 the statute violated; (3) the time period during which violations occurred; (4) specific
17 descriptions of the violations, including (a) the routes of exposure to DEHP from the Products,
18 and (b) the specific type of Products sold and used in violation of Proposition 65; and (5) the
19 name of the specific Proposition 65-listed chemical (DEHP) that is the subject of the violations
20 described in each of the Notices.

21 19. Plaintiff also sent a Certificate of Merit for each Notice of Violation to the
22 California Attorney General, the District Attorneys of every county in California, the City
23 Attorneys of every California city with a population greater than 750,000, and the Defendants
24 named in the Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R.
25 § 3101, each Certificate of Merit certified that Plaintiff's counsel: (1) has consulted with one or
26 more persons with relevant and appropriate experience or expertise who reviewed facts, studies
27 or other data regarding the exposures to DEHP alleged in the Notice; and (2) based on the
28 information obtained through such consultations, believes that there is a reasonable and

1 meritorious case for a citizen enforcement action based on the facts alleged in the attached
2 Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, the
3 Certificate served on the Attorney General included factual information – provided on a
4 confidential basis – sufficient to establish the basis for the Certificates, including the identity of
5 the person(s) consulted by Plaintiff’s counsel and the facts, studies or other data reviewed by
6 such persons.

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

9 knowledge of the fact that a discharge of, release of, or exposure to
10 a chemical listed pursuant to Health and Safety Code § 25249.8(a)
11 of the Act is occurring. No knowledge that the discharge, release
 or exposure is unlawful is required.

12 27 C.C.R. § 25102(n).

13 21. Defendants both know and intend that the Products contain DEHP.

14 22. Defendants both know and intend that individuals will touch, use, and
15 otherwise handle the Products, thus exposing them to DEHP.

16 23. Defendants have also been informed of the DEHP in their Products by the
17 60-Day Notice of Violation served on them by Plaintiff.

18 24. Nevertheless, Defendants continue to expose consumers, including
19 children, to DEHP without prior clear and reasonable warnings regarding the carcinogenic or
20 reproductive hazards of DEHP.

21 25. None of the public prosecutors with the authority to prosecute violations
22 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against the
23 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claim asserted in the
24 Notice.

25 26. Any person “violating or threatening to violate” Proposition 65 may be
26 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
27 violate” is defined to mean “to create a condition in which there is a substantial probability that a
28 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil

1 preliminarily and permanently enjoin Defendants from offering the Products for sale in
2 California without providing clear and reasonable warnings, as Plaintiff shall specify in further
3 application to the Court;

4 3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order
5 Defendants to take action to stop ongoing unwarned exposures to DEHP resulting from use of
6 Products sold by Defendants, as Plaintiff shall specify in further application to the Court;

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

9 5. That the Court utilize its inherent equitable power to grant such other and
10 further relief as may be just and proper.

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12 Dated: January 22, 2010

Respectfully submitted,

LEXINGTON LAW GROUP

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17 _____
18 Howard Hirsch
19 Attorneys for Plaintiff
20 CENTER FOR ENVIRONMENTAL
21 HEALTH

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