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19 SUPERIOR COURT OF THE STATE OF CALIFORNIA

20 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

21 LAURENCE VINOCUR,

22 Plaintiff,

23 v.

24 DITTO SALES, INC.; and DOES 1 -150,
25 inclusive,

26 Defendants.

27 Case No. _____

28 **RG13678419**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff LAURENCE VINOCUR ("PLAINTIFF") in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate ("TDCPP"), a toxic chemical found in padded upholstered furniture and companion chairs sold in California. TDCPP is a toxic chemical that is used to treat polyurethane foam, which is used as padding or cushioning in a variety of products.

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

1

Case No.: _____

ENDORSED
FILED
ALAMEDA COUNTY

MAY - 6 2013
MAY - 6 2013

CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy

1 2. By this Complaint, PLAINTIFF seeks to remedy Defendant’s continuing failures
2 to warn California citizens about the risk of exposure to TDCPP present in and on the padded
3 upholstered furniture and companion chairs manufactured, distributed, and offered for sale or
4 use to consumers throughout the State of California.

5 3. Detectable levels of TDCPP are commonly found in and on the padded
6 upholstered furniture that Defendant manufactures, distributes, and offers for sale to consumers
7 throughout the State of California. Individuals in California, including infants and children,
8 are exposed to TDCPP in the products through various routes of exposure: (i) through
9 inhalation when TDCPP is released from padded upholstered furniture; (ii) through dermal
10 exposure when TDCPP from padded upholstered furniture accumulates in ambient particles
11 that are subsequently touched by such individuals; and (iii) through ingestion when such
12 particles are brought into contact with the mouth.

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

18 5. TDCPP has been used in consumer products as an additive flame retardant since
19 the 1960s. In the late 1970s, based on findings that exposure to TDCPP could have mutagenic
20 effects, the United States Consumer Product Safety Commission banned the use of TDCPP in
21 children’s pajamas.

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

26 7. Defendant manufactures, distributes, imports, sells, and/or offers for sale in
27 California products containing TDCPP as follows:
28

1 a. Defendant DITTO SALES, INC. manufactures, distributes, imports, sells
2 and/or offers for sale in California padded upholstered furniture containing TDCPP
3 without a warning including, but not limited to, chairs such as *Companion Chair, P/N*
4 *S00417*.

5 8. All padded upholstered furniture containing TDCPP, as listed in paragraphs 7(a)
6 above, shall hereinafter be referred to as the "PRODUCT."

7 9. Although Defendant exposes infants, children, and other people to TDCPP in the
8 PRODUCT, Defendant provides no warnings about the carcinogenic hazards associated with
9 TDCPP exposures. Defendant's failure to warn consumers and other individuals in the State of
10 California not covered by California's Occupational Health Act, Labor Code section 6300 et
11 seq. about their exposures to TDCPP in conjunction with Defendant's sales of the PRODUCT,
12 is a violation of Proposition 65, and subjects Defendant to enjoinder of such conduct as well
13 as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

14 10. As a result of Defendant's violation of Proposition 65, PLAINTIFF seeks
15 preliminary and permanent injunctive relief to compel Defendant to provide purchasers or
16 users of the PRODUCT with the required warning regarding the health hazards of TDCPP in
17 the PRODUCT. Health & Safety Code § 25249.7(a).

18 11. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFF also seeks
19 civil penalties against Defendant for its violation of Proposition 65.

20 **PARTIES**

21 12. PLAINTIFF LAURENCE VINOCUR ("VINOCUR" or "PLAINTIFF") is a
22 citizen of the State of California who is dedicated to protecting the health of California citizens
23 through the elimination or reduction of toxic exposures from consumer products; and he brings
24 this action in the public interest pursuant to Health and Safety Code section 25249.7(d).

25 13. Defendant DITTO SALES, INC. ("DITTO SALES") is a person in the course of
26 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

27 14. DITTO SALES manufactures, imports, distributes, sells, and/or offers the
28 PRODUCT for sale or use in the State of California, or implies by its conduct that it

1 manufactures, imports, distributes, sells, and/or offers the PRODUCT for sale or use in the State
2 of California.

3 15. Defendants DOES 1-150 are each persons in the course of doing business within
4 the meaning of Health and Safety Code section 25249.11(b), which manufacture, distribute,
5 sell, and/or offer the PRODUCT for sale in the State of California. At this time, the true names
6 and capacities of defendants DOES 1 through 150, inclusive, are unknown to PLAINTIFF,
7 who, therefore, sues said defendants by their fictitious names pursuant to Code of Civil
8 Procedure section 474. PLAINTIFF is informed and believes, and on that basis alleges, that
9 each of the fictitiously named defendants is responsible for the acts and occurrences alleged
10 herein. When ascertained, their true names and capacities shall be reflected in an amended
11 complaint.

12 16. DITTO SALES, and Defendants DOES 1-150 are collectively referred to herein
13 as “DEFENDANTS.”

14 VENUE AND JURISDICTION

15 17. Venue is proper in the Alameda County Superior Court, pursuant to Code of
16 Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent
17 jurisdiction, because PLAINTIFF seeks civil penalties against DEFENDANTS, because one or
18 more instances of wrongful conduct occurred, and continue to occur, in Alameda County,
19 and/or because DEFENDANTS conducted, and continue to conduct, business in this county
20 with respect to the PRODUCT.

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

25 19. The California Superior Court has jurisdiction over DEFENDANTS based on
26 PLAINTIFF’s information and good faith belief that each DEFENDANT is a person, firm,
27 corporation, or association that is a citizen of the State of California, has sufficient minimum
28 contacts in the State of California, and/or otherwise purposefully avails itself of the California

1 market. DEFENDANTS' purposeful availment of California as a marketplace for the
2 PRODUCT renders the exercise of personal jurisdiction by California courts over
3 DEFENDANTS consistent with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

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

6 20. PLAINTIFF realleges and incorporates by reference, as if fully set forth herein,
7 Paragraphs 1 through 19, inclusive.

8 21. In enacting Proposition 65, in the preamble to the Safe Drinking Water and
9 Toxic Enforcement Act of 1986, the People of California expressly declared their right "[t]o be
10 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
11 harm."

12 22. Proposition 65 states, "[n]o person in the course of doing business shall
13 knowingly and intentionally expose any individual to a chemical known to the state to cause
14 cancer or reproductive toxicity without first giving clear and reasonable warning to such
15 individual" Health & Safety Code § 25249.6.

16 23. On February 15, 2013, VINOCUR's sixty-day notice of violation, together with
17 the requisite certificate of merit, was provided to DITTO SALES and certain public
18 enforcement agencies stating that, as a result of DEFENDANTS' sales of the PRODUCT
19 containing TDCPP, purchasers and users in the State of California were being exposed to
20 TDCPP resulting from their reasonably foreseeable use of the PRODUCTS, without the
21 individual purchasers and users first having been provided with a "clear and reasonable
22 warning" regarding such toxic exposures, as required by Proposition 65.

23 24. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
24 and offering of the PRODUCT for sale or use in violation of Health and Safety Code section
25 25249.6, and DEFENDANTS' violations have continued to occur beyond their receipt of
26 plaintiff's sixty-day notice of violation. As such, DEFENDANTS' violations are ongoing and
27 continuous in nature, and will continue to occur in the future.

28 25. After receiving PLAINTIFF's sixty-day notice of violation, the appropriate

1 public enforcement agencies have failed to commence and diligently prosecute a cause of
2 action against DEFENDANTS under Proposition 65.

3 26. The PRODUCT manufactured, imported, distributed, sold, and offered for sale
4 or use in California by DEFENDANTS contain TDCPP such that they require a “clear and
5 reasonable” warning under Proposition 65.

6 27. DEFENDANTS knew or should have known that the PRODUCT they
7 manufacture, import, distribute, sell, and offer for sale or use in California contain TDCPP.

8 28. TDCPP is present in or on the PRODUCT in such a way as to expose individuals
9 to TDCPP through dermal contact, ingestion, and/or inhalation during reasonably foreseeable
10 use of the PRODUCT.

11 29. The normal and reasonably foreseeable uses of the PRODUCT have caused, and
12 continue to cause, consumer exposures to TDCPP, as such exposures are defined by the
13 California Code of Regulations title 27, section 25602(b).

14 30. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
15 of the PRODUCT expose individuals to TDCPP through dermal contact, ingestion, and/or
16 inhalation.

17 31. DEFENDANTS intended that such exposures to TDCPP from the reasonably
18 foreseeable uses of the PRODUCT would occur by DEFENDANTS’ deliberate, non-accidental
19 participation in the manufacture, importation, distribution, sale, and offering of the PRODUCT
20 for sale or use to individuals in the State of California.

21 32. DEFENDANTS failed to provide a “clear and reasonable warning” to those
22 consumers and other individuals in the State of California who were or who would become
23 exposed to TDCPP through dermal contact, ingestion, and/or inhalation during the reasonably
24 foreseeable uses of the PRODUCT.

25 33. Contrary to the express policy and statutory prohibition of Proposition 65
26 enacted directly by California voters, individuals exposed to TDCPP through dermal contact,
27 ingestion, and/or inhalation resulting from the reasonably foreseeable uses of the PRODUCT
28 sold by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue

1 to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

5 35. As a consequence of the above-described acts, Health and Safety Code
6 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
7 DEFENDANTS.

8 **PRAYER FOR RELIEF**

9 Wherefore, PLAINTIFF prays for judgment against DEFENDANTS, and each of them,
10 as follows:

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

13 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
14 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
15 offering the PRODUCT for sale or use in California without first providing a “clear and
16 reasonable warning” as defined by the California Code of Regulations title 27, section 25601 *et*
17 *seq.*, as to the harms associated with exposures to the LISTED CHEMICALS;

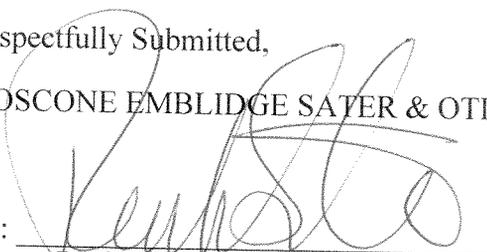
18 3. That the Court grants PLAINTIFF his reasonable attorneys’ fees and costs of
19 suit; and

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

21
22 Dated: May 6, 2013

23 Respectfully Submitted,

24 MOSCONE EMBLIDGE SATER & OTIS LLP

25
26 By: 

Rachel J. Sater

27 Attorneys for Plaintiff
28 LAURENCE VINOCUR