

MAR 29 2013

CLERK OF THE SUPERIOR COURT  
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11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF ALAMEDA  
14 UNLIMITED CIVIL JURISDICTION  
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16 PETER ENGLANDER,

17 Plaintiff,

18 v.

19 KIRKLAND'S, INC.; and DOES 1-150,  
20 inclusive,

21 Defendants.

22 Case No. RG 13673606

23 **COMPLAINT FOR CIVIL PENALTIES  
24 AND INJUNCTIVE RELIEF**

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

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by Plaintiff PETER  
3 ENGLANDER in the public interest of the citizens of the State of California to enforce the  
4 People’s right to be informed of the presence of Tris(1,3-dichloro-2-propyl) phosphate  
5 (“TDCPP”), a toxic chemical found in padded upholstered furniture sold in California. TDCPP  
6 is a toxic chemical that is used to treat polyurethane foam, which is used as padding or  
7 cushioning in a variety of products.

8 2. By this Complaint, Plaintiff seeks to remedy Defendants’ continuing failures to  
9 warn California citizens about the risks of exposure to TDCPP present in and on the padded  
10 upholstered furniture manufactured, distributed, sold, and offered for sale or use to consumers  
11 throughout the State of California.

12 3. Detectable levels of TDCPP are commonly found in and on the padded  
13 upholstered furniture that Defendants manufacture, distribute, sell, and offer for sale to  
14 consumers, many of whom are infants and children, throughout the State of California.  
15 Individuals in California, including infants and children, are exposed to TDCPP when they  
16 inhale TDCPP released from padded upholstered furniture, and also when TDCPP from padded  
17 upholstered furniture accumulates in ambient particles that are subsequently touched by such  
18 individuals and brought into contact with the mouth.

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

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

1           6. Pursuant to Proposition 65, on October 28, 2011, California identified and listed  
2 TDCPP as a chemical known to cause cancer. TDCPP became subject to the “clear and  
3 reasonable warning” requirements of the Act one year later on October 28, 2012. (Cal. Code  
4 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).) TDCPP is  
5 hereinafter referred to as the “LISTED CHEMICAL.”

6           7. Defendants manufacture, distribute, import, sell, and/or offer for sale padded  
7 upholstered furniture, including chairs, containing TDCPP without a warning, including, but not  
8 limited to, the *Sand Parsons Chair, SKU # 15-106360*. All such padded upholstered furniture,  
9 including chairs, containing TDCPP, are hereinafter collectively referred to as “PRODUCTS.”

10           8. Although Defendants expose infants, children, and other people to TDCPP in the  
11 PRODUCTS, Defendants provide no warnings about the carcinogenic hazards associated with  
12 these TDCPP exposures. Defendants’ failures to warn consumers and other individuals in the  
13 State of California about their exposures to the LISTED CHEMICAL in conjunction with  
14 Defendants’ sales of the PRODUCTS, is a violation of Proposition 65, and subjects Defendants  
15 to enjoinder of such conduct as well as civil penalties for each violation. (Health & Safety  
16 Code § 25249.7(a) & (b)(1).)

17           9. As a result of Defendants’ violations of Proposition 65, Plaintiff seeks preliminary  
18 and permanent injunctive relief to compel Defendants to provide purchasers or users of the  
19 PRODUCTS with the required warning regarding the health hazards of the LISTED  
20 CHEMICAL. (Health & Safety Code § 25249.7(a).)

21           10. Pursuant to Health and Safety Code § 25249.7(b), Plaintiff also seeks civil  
22 penalties against Defendants for their violations of Proposition 65.

23   **PARTIES**

24           11. Plaintiff PETER ENGLANDER is a citizen of the State of California who is  
25 dedicated to protecting the health of California citizens through the elimination or reduction of  
26 toxic exposures from consumer products; and he brings this action in the public interest  
27 pursuant to Health and Safety Code § 25249.7(d).  
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1           12. Defendant KIRKLAND’S, INC. (“KIRKLAND’S”) is a person in the course of  
2 doing business within the meaning of Health and Safety Code § 25249.11.

3           13. KIRKLAND’S manufactures, imports, distributes, sells, and/or offers the  
4 PRODUCTS for sale or use in the State of California, or implies by its conduct that it  
5 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the  
6 State of California.

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

15           15. KIRKLAND’S and Defendants DOES 1-150 are hereinafter collectively referred  
16 to as “Defendants.”

17   **VENUE AND JURISDICTION**

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

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

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1 18. The California Superior Court has jurisdiction over Defendants based on  
2 Plaintiff's information and good faith belief that each Defendant is a person, firm, corporation  
3 or association that is a citizen of the State of California, has sufficient minimum contacts in the  
4 State of California, and/or otherwise purposefully avails itself of the California market.  
5 Defendants' purposeful availment of California as a marketplace for the PRODUCTS renders  
6 the exercise of personal jurisdiction by California courts over Defendants consistent with  
7 traditional notions of fair play and substantial justice.

8 **FIRST CAUSE OF ACTION**

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

10 19. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
11 Paragraphs 1 through 18, inclusive.

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

16 21. Proposition 65 states, "[n]o person in the course of doing business shall  
17 knowingly and intentionally expose any individual to a chemical known to the state to cause  
18 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
19 individual . . . ." (Health & Safety Code § 25249.6.)

20 22. On January 17, 2013, Plaintiff's sixty-day notice of violation, together with the  
21 requisite certificate of merit, was provided to KIRKLAND'S and certain public enforcement  
22 agencies stating that, as a result of Defendants' sales of the PRODUCTS containing the  
23 LISTED CHEMICAL, purchasers and users in the State of California were being exposed to the  
24 LISTED CHEMICAL resulting from their reasonably foreseeable use of the PRODUCTS,  
25 without the individual purchasers and users first having been provided with a "clear and  
26 reasonable warning" regarding such toxic exposures, as required by Proposition 65.

27 23. Defendants have engaged in the manufacture, importation, distribution, sale, and  
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1 offering of the PRODUCTS for sale or use in violation of Health and Safety Code § 25249.6,  
2 and Defendants' violations have continued to occur beyond their receipt of Plaintiff's sixty-day  
3 notice of violation. As such, Defendants' violations are ongoing and continuous in nature, and  
4 will continue to occur in the future.

5 24. After receiving Plaintiff's sixty-day notice of violation, the appropriate public  
6 enforcement agencies have failed to commence and diligently prosecute a cause of action  
7 against Defendants under Proposition 65.

8 25. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale  
9 or use in California by Defendants contain the LISTED CHEMICAL such that they require a  
10 "clear and reasonable" warning under Proposition 65.

11 26. Defendants knew or should have known that the PRODUCTS they manufacture,  
12 import, distribute, sell, and offer for sale or use in California contain the LISTED CHEMICAL.

13 27. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to  
14 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or  
15 inhalation during reasonably foreseeable uses of the PRODUCTS.

16 28. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and  
17 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are  
18 defined by Title 27 of the California Code of Regulations, § 25602(b).

19 29. Defendants had knowledge that the normal and reasonably foreseeable uses of the  
20 PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact, ingestion,  
21 and/or inhalation.

22 30. Defendants intended that such exposures to the LISTED CHEMICAL from the  
23 reasonably foreseeable uses of the PRODUCTS would occur by Defendants' deliberate, non-  
24 accidental participation in the manufacture, importation, distribution, sale, and offering of the  
25 PRODUCTS for sale or use to individuals in the State of California.

26 31. Defendants failed to provide a "clear and reasonable warning" to those consumers  
27 and other individuals in the State of California who were or who would become exposed to the  
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1 LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation during the  
2 reasonably foreseeable uses of the PRODUCTS.

3 32. Contrary to the express policy and statutory prohibition of Proposition 65 enacted  
4 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal  
5 contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of the  
6 PRODUCTS sold by Defendants without a “clear and reasonable warning,” have suffered, and  
7 continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at  
8 law.

9 33. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-  
10 described acts, Defendants are liable for a civil penalty of \$2,500 per day for each violation.

11 34. As a consequence of the above-described acts, Health and Safety Code  
12 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendants.

13 **PRAYER FOR RELIEF**

14 Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as  
15 follows:

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

18 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily  
19 and permanently enjoin Defendants from manufacturing, distributing, or offering the  
20 PRODUCTS for sale or use in California without first providing a “clear and reasonable  
21 warning” as defined by Title 27 of the California Code of Regulations, § 25601 *et seq.*, as to the  
22 harms associated with exposures the LISTED CHEMICAL;

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- 3. That the Court grant Plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: March 29, 2013

THE CHANLER GROUP

By:   
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Attorneys for Plaintiff  
PETER ENGLANDER