

ENDORSED
FILED
ALAMEDA COUNTY

MAR 26 2013

CLERK OF THE SUPERIOR COURT
BY Esther Coleman DEPUTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

MEDLINE INDUSTRIES, INC.,
WALGREEN CO., and DOES 1-150,
inclusive,

Defendants.

Case No. RG13673031

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

1 **NATURE OF THE ACTION**

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

8 2. By this Complaint, plaintiff seeks to remedy Defendants’ continuing failures to
9 warn California citizens about the risks of exposures to TDCPP present in and on the padded
10 upholstered furniture manufactured, distributed, 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 back cushions that
13 Defendants manufacture, distribute, sell, and offer for sale to consumers, many of whom are
14 infants and children, throughout the State of California. Individuals in California, including
15 infants and children, are exposed to TDCPP when they inhale TDCPP released from back
16 cushions, and also when TDCPP from back cushions accumulates in ambient particles that are
17 subsequently touched by such individuals and brought into contact with the mouth.

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

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

1 Defendants conducted, and continue to conduct, business in this County with respect to the
2 PRODUCTS.

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

7 20. The California Superior Court has jurisdiction over Defendants based on
8 plaintiff’s information and good faith belief that each Defendant is a person, firm, corporation or
9 association that is a citizen of the State of California, has sufficient minimum contacts in the
10 State of California, and/or otherwise purposefully avails itself of the California market.
11 Defendants’ purposeful availment of California as a marketplace for the PRODUCTS renders
12 the exercise of personal jurisdiction by California courts over Defendants consistent with
13 traditional notions of fair play and substantial justice.

14 **FIRST CAUSE OF ACTION**

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

16 21. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
17 Paragraphs 1 through 20, inclusive.

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

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

26 24. On January 8, 2013, plaintiff’s sixty-day notice of violation, together with the
27 requisite certificate of merit, was provided to MEDLINE and WALGREEN and certain public
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1 enforcement agencies stating that, as a result of Defendants' sales of the PRODUCTS
2 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
3 exposed to the LISTED CHEMICAL resulting from their reasonably foreseeable use of the
4 PRODUCTS, without the individual purchasers and users first having been provided with a
5 "clear and reasonable warning" regarding such toxic exposures, as required by Proposition 65.

6 25. Defendants have engaged in the manufacture, importation, distribution, sale, and
7 offering of the PRODUCTS for sale or use in violation of Health and Safety Code § 25249.6,
8 and Defendants' violations have continued to occur beyond their receipt of plaintiff's sixty-day
9 notice of violation. As such, Defendants' violations are ongoing and continuous in nature, and
10 will continue to occur in the future.

11 26. After receiving plaintiff's sixty-day notice of violation, the appropriate public
12 enforcement agencies have failed to commence and diligently prosecute a cause of action
13 against Defendants under Proposition 65.

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

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

19 29. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
20 expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
21 inhalation during reasonably foreseeable uses of the PRODUCTS.

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

25 31. Defendants had knowledge that the normal and reasonably foreseeable uses of the
26 PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact, ingestion,
27 and/or inhalation.

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1 32. Defendants intended that such exposures to the LISTED CHEMICAL from the
2 reasonably foreseeable uses of the PRODUCTS would occur by Defendants' deliberate, non-
3 accidental participation in the manufacture, importation, distribution, sale, and offering of the
4 PRODUCTS for sale or use to individuals in the State of California.

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

9 34. Defendants' failures to warn consumers and/or other individuals in the State of
10 California not covered by California's Occupational Safety Health Act, Labor Code § 6300 *et*
11 *seq.*, about their exposure to LISTED CHEMICAL in conjunction with Defendants'
12 distribution, importation, manufacturing, and/or sale of the PRODUCTS is a violation of
13 Proposition 65 and subjects Defendants to enjoinder of such conduct as well as civil penalties
14 for each such violation.

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

18 36. As a consequence of the above-described acts, Health and Safety Code
19 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendants.

20 **PRAYER FOR RELIEF**

21 Wherefore, plaintiff prays for judgment against Defendants, and each of them, as
22 follows:

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

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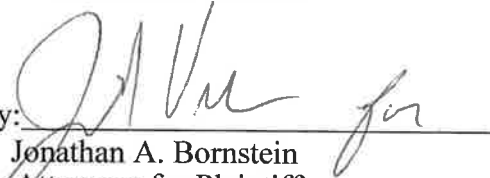
1 warning” as defined by Title 27 of the California Code of Regulations, § 25601 *et seq.*, as to the
2 harms associated with exposures the LISTED CHEMICAL;

3 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

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

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6 Dated: March 26, 2013

THE CHANLER GROUP

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8 By:  for
9 Jonathan A. Bornstein
10 Attorneys for Plaintiff
11 JOHN MOORE
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