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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF ALAMEDA
16 UNLIMITED CIVIL JURISDICTION
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19 LAURENCE VINOUCUR, *et al.*,
20
21 Plaintiffs,
22
23 v.
24
25 ABAD FOAM, INC., *et al.*,
26
27 Defendants.
28

Case No. RG14710984

*Assigned for All Purposes to the Hon.
George C. Hernandez, Jr., Dept. 17*

**PLAINTIFFS' OPPOSITION TO
DEFENDANT ABAD FOAM, INC.'S
MOTION FOR CHANGE OF VENUE**

Date: June 3, 2014
Time: 2:30 P.M.
Dept.: 17

Trial Date: None Set

1 **I. INTRODUCTION**

2 Plaintiff Laurence Vinocur (“Vinocur”) respectfully submits this opposition to Defendant
3 Abad Foam, Inc.’s (“Abad”) Motion for Change of Venue, and Plaintiff Peter Englander hereby joins
4 Vinocur in opposing the motion.

5 Plaintiffs request that the Court deny Abad’s Motion for Change of Venue on the grounds
6 that: (1) it is untimely as it was filed 46 days after plaintiffs served the First Amended Complaint
7 (“FAC”) on Abad; (2) because venue is uncontested and proper as to the other defendants named in
8 the FAC, venue is also proper as to Abad; and (3) Abad fails to overcome the presumption that venue
9 in Alameda County is properly based on the allegations in the FAC that the violations of Proposition
10 65 (violations of statute giving rise to liability) have occurred and will continue to occur in Alameda.

11 **II. BACKGROUND**

12 In December 2012, plaintiffs and other clients of The Chanler Group (“TCG”)—the firm
13 representing plaintiffs—began issuing 60-Day Notices of Violation of Proposition 65 to entities
14 involved in the manufacture, distribution, and sale of products in California containing tris(1,3-
15 dichloro-2-propyl) phosphate (“TDCPP”) and other fire retardant chemicals without a health hazard
16 warning. All of the citizen enforcement actions brought by plaintiffs and other TCG clients to date,
17 for unwarned exposures to TDCPP in violation of Proposition 65, were filed in the Alameda County
18 Superior Court and assigned to this Department. (See the Declaration of Brian Johnson in Support of
19 Plaintiffs’ Opposition to Defendant Abad Foam, Inc.’s Motion for Change of Venue (“Johnson
20 Decl.”) ¶2.)

21 On June 14, 2013, Vinocur served Abad and various required public prosecutors with a 60-
22 day Notice of Violation of Proposition 65. (Johnson Decl. ¶3.)

23 On January 22, 2014, plaintiffs commenced the instant action, naming Abad as a defendant,
24 and alleging violations of Proposition 65 that are the subject of Vinocur’s notice. (*Id.*) The action
25 was designated complex and found related to the existing Proposition 65 Flame Retardant Actions by
26 the Court.

27 On March 4, 2014, plaintiffs filed a First Amended Complaint (“FAC”), the operative
28 pleading in this action. (Johnson Decl. ¶3.) The FAC contains the same allegations made in the

1 original complaint but names additional defendants. (*Id.*) On March 12, 2014, plaintiffs served the
2 FAC by mail on Abad. (Johnson Decl. ¶ 4, Exh. 1.) Forty-six days later, on April 18, 2014, without
3 answering, demurring, or moving to strike, Abad filed its motion to transfer venue. (Johnson Decl.
4 ¶5.)

5 In the FAC, plaintiffs allege that Abad’s violations of Proposition 65—*i.e.*, exposing
6 purchasers and users of products containing TDCPP-treated foam to the listed chemical without a
7 warning—occurred, and continue to occur, in Alameda County. (FAC, ¶27.) Abad has not denied
8 or refuted plaintiffs’ allegations that individuals in Alameda County have been exposed TDCPP from
9 foam padding manufactured by Abad that is contained in products sold and offered for sale in
10 Alameda County and throughout California.

11 **III. LEGAL ARGUMENT**

12 **A. Abad’s Motion for Change of Venue, Filed More than 35 Days After Service of the** 13 **Complaint is Untimely**

14 The deadline for filing a motion for change of venue is 30 days after service of the
15 complaint. The deadline governed by Code of Civil Procedure § 396b(a), which provides in
16 pertinent part:

17 [I]f an action or proceeding is commenced in a court having jurisdiction of the
18 subject matter thereof, other than the court designated as the proper court for the
19 trial thereof, under this title, the action may, notwithstanding, be tried in the court
20 where commenced, unless the defendant, at the time he or she answers, demurs, or
21 moves to strike, or, at his or her option, without answering, demurring, or moving to
22 strike and within the time otherwise allowed to respond to the complaint, files with
23 the clerk, a notice of motion for an order transferring the action or proceeding to the
24 proper court.

25 A defendant must file an answer, demurrer, or motion to strike within 30 days after service of the
26 complaint. CCP §§ 412.20(a)(3), 430.40, 435(b)(1). Thus because the motion for change of venue
27 must be filed within the time otherwise allowed to answer, demur, or move to strike, and such time
28 otherwise allowed is 30 days after service of the complaint, the deadline for filing a motion for
change of venue is 30 days after service of the complaint.

1 “Failure to move for change of venue on the ground of residence at the time of demurrer or
2 answer constitutes a Waiver of the right to have venue changed.” *Hennigan v. Boren* (1966) 243
3 Cal.App.2d 810, 816.

4 Here, plaintiffs served the FAC on Abad by mail at its California business address on March
5 12, 2014. Abad then had 30 days within which to file an answer, demurrer, or motion to strike, plus
6 an additional five days because the FAC was served by mail (CCP § 1013(a)), giving Abad until
7 April 16, 2014 to file a response to the FAC or move to change venue. Because Abad did not file its
8 motion to change venue until April 18, 2014, Abad’s motion is untimely and it has therefore waived
9 the right to challenge venue.

10 While Abad’s failure to timely file its motion to change venue is dispositive, in the event that
11 the Court is included to consider Abad’s arguments, plaintiffs present the following arguments in
12 opposition as an alternative basis for denying the motion.

13
14 **B. Venue is Also Proper as to Abad Because Venue is Undeniably Proper as to Other
Defendants in this Multi-Defendant Action**

15 At the outset, because venue is undeniably proper, and uncontested, as to the other defendants
16 in named in the FAC, even if Abad’s products were not sold in Alameda County—directly or
17 indirectly—the fact remains that because venue is proper for the other defendants in this action,
18 venue is proper for Abad in Alameda County. In multi-defendants cases such as this action, where
19 venue is proper as to one defendant, venue is proper as to all defendants *K.R.L. Partnership v. Sup.*
20 *Ct.* (2004) 120 Cal.App.4th 490, 505. In *K.R.L. Partnership*, the Court of Appeal held that a
21 defendant is not entitled to have an action transferred to the county of his residence unless none of the
22 other defendants are residents of the county in which the action was brought. The same reasoning
23 applies to Abad.

24 Where a plaintiff takes advantage of the liberal statutory joinder rules and joins various causes
25 of action against various defendants, so long as the plaintiff chooses a venue that is proper as to one
26 defendant, the entire case may be tried there, regardless of whether venue would be improper with
27 respect to other defendants if the causes of action against them were analyzed separately. *Id.* Thus, if
28 Alameda County is the proper venue as to just one defendant in this action, then venue is proper as to

1 Abad, and Abad cannot be permitted to transfer the action to its county of residence. *Id. see also,*
2 *Buran Equipment Co., Supra*, at 1666 (“[w]here an action is brought against both corporate and
3 individual defendants, venue is proper for the action as a whole if it is correct as to any defendant”).

4 Abad’s theory of venue—that it has never transacted business in Alameda County and is,
5 therefore, not subject to suit in Alameda County – would result in the filing of multiple lawsuits in
6 any action in which a plaintiff alleged Proposition 65 violations against corporate residents of
7 multiple counties. Undoubtedly, in any such action, a series of transfer motions would be filed and
8 decided before litigation even got underway. If Abad were correct, it could have this case transferred
9 down to Orange County, only to have the remaining defendants successfully transfer the case back to
10 Alameda where their liability arose. Of the eleven defendants named in the Complaint, four sold
11 through a single retailer with a brick-and-mortar outlet store located in Alameda County. (Johnson
12 Decl. ¶7.)

13 Venue is undeniably proper as to the four defendants whose furniture—or furniture
14 containing foam manufactured by Abad—was actually purchased by plaintiffs in Alameda County.
15 These companies include defendants Foam & Fibre Company Inc., Foamco Industries Corporation;
16 Talmolder, Inc.,¹ and Valle Foam Industries, Inc. These defendants’ products or products with
17 component parts manufactured by these defendants were purchased directly from Kantor’s Discount
18 Office Furniture and Equipment, Inc. located in Oakland California. (Johnson Decl. ¶7.) Moreover,
19 within this action, and across the pending and resolved related actions assigned to this Department,
20 there are related factual and legal issues and parties. For example, Abad’s customer, Virco Mfg.
21 Corporation, is subject to a judgment of this Court entered following its settlement with Vinocur in
22 the related action, *Vinocur et al. v. Cheyenne Industries, LLC, et al.*, Case No. RG13673710. Thus,
23 venue is undeniably proper as to Abad.

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27 _____
28 ¹ On May 2, 2014, Plaintiffs filed a request for dismissal as to defendant Talmolder, Inc. for reasons unrelated to this motion.

1
2 **C. Presumption that Venue is Proper and Defendant’s Burden to Overcome
Presumption**

3 Abad is a California corporation. Because Abad is a corporation, under CCP § 395.5, it may
4 be sued in the county where “the obligation or liability arises.” The paramount purpose of CCP
5 § 395.5 “is to permit a wider choice of venue against corporations or associations than would be
6 permitted in suits against individuals.” *Black Diamond Asphalt, Inc. v. Superior Ct.* (2003) 109
7 Cal.App.4th 166, 171.

8 Under *Black Diamond Asphalt*, where a complaint alleges breach of statutory duties, venue
9 is proper where the statutory obligation arises: “For purposes of laying venue, a liability ‘arises’
10 where the injury occurs. Injury means a wrongful invasion of legal rights.” *Id.* at 172 (citations and
11 internal quotations omitted.) A breach of a statutory obligation does not necessarily occur in the
12 same place where an underlying contract or transaction occurs: “obligations created by statute are
13 separate animals from those which emanate from contract.” *Id.* at 171.

14 Abad has moved to transfer venue to Orange County or Los Angeles County pursuant to
15 CCP § 397(a), which provides:

16 The court may, on motion, change the place of trial in the following cases:

17 (a) When the court designated in the complaint is not the proper court.

18 California courts have long held that the venue selected by the plaintiff is presumed to be proper.
19 *Fontaine v. Superior Ct.* (2009) 175 Cal.App.4th 830, 836. Here, Abad, as the moving party, must
20 overcome the presumption that plaintiffs have selected the proper venue: “(I)t is the moving
21 defendant's burden to demonstrate that the plaintiff's venue selection is not proper under any of the
22 statutory grounds.” *Id.* As California courts have long held:

23 It is not sufficient for a corporate defendant seeking a change of venue to show that
24 its principal place of business is located in the county to which it seeks to have the
25 action transferred. It is incumbent upon the moving party to show not only the
26 place of its residence or principal place of business, but also that the . . . the
27 obligation or liability did not arise and that the breach did not occur in the county
28 wherein the venue is originally placed by the filing of plaintiff's complaint. *Owens
v. Paraco, Inc.* (1958) 160 Cal.App.2d 824, 826 (internal quotations omitted).

1 As will be shown, Abad has failed to meet its burden since it has not shown that its duty to provide
2 Proposition 65 warnings regarding TDCPP in its products did not arise, and its violation of
3 Proposition 65 (breach of statutory obligation) did not occur in Alameda County.

4 **D. Abad Fails to Overcome the Strong Presumption that Venue In Alameda County is**
5 **Proper**

6 The FAC alleges that venue is proper in this county because Abad’s alleged violations have
7 occurred, and continue to occur, in Alameda County. (FAC, ¶27.) In its motion, Abad asserts only
8 that its principle place of business is not in Alameda County, and that it does not sell its products
9 directly to customers located in Alameda County. A corporate defendant has the burden of “negating
10 the propriety of venue as laid **on all possible alternative grounds.**” *Karson Industries, Inc. v.*
11 *Superior Ct.* (1969) 273 Cal.App.2d 7, 8-9 (emphasis in original). In other words, it is Abad’s
12 burden to affirmatively demonstrate that Alameda County is *not* the proper venue. *Id.*

13 Abad cannot overcome the strong presumption favoring plaintiffs’ choice of venue. In
14 addition to the burden of showing that statutory liability did not arise in the forum county, Abad must
15 also show that no grounds exist which would allow for venue to be proper in this county. Abad has
16 only shown that its principle place of business is elsewhere. It does not claim, and fails to offer any
17 evidence to support, that its Proposition 65 liability did not arise in Alameda County. The
18 declarations in support of Abad’s motion contain no averments, and it otherwise proffers no
19 evidence, that products made using Abad’s foam products that contain TDCPP were not offered for
20 sale or use in Alameda County without a warning, and thus Abad has no evidence to refute the
21 allegations of the FAC Abad violated Proposition 65 when sales of products, containing Abad foam
22 with TDCPP, occurred in Alameda County without a warning to purchasers and users of the products.

23 Abad’s motion is narrowly premised on the notion that venue can only be proper where its
24 principal place of business is located, or the place of business of one of its direct customers,
25 regardless of where its products are ultimately sold. (*See* Motion for Transfer, P. 4:10-17.) Abad’s
26 and the other defendants’ alleged liability under Proposition 65 arises in Alameda County because
27 their products are sold, purchased, and used by consumers and other individuals in Alameda County
28

1 through both brick-and-mortar retail stores, and online over the internet. (Johnson Decl. ¶6.) See,
2 e.g., *Mission Imports, Inc. v. Superior Ct.* (1982) 31 Cal.3d 921, 928-30.

3 Abad’s contention that it had absolutely no dealings with the County of Alameda appears to
4 be based on the averment in the Chavez declaration that Abad only shipped the product at issue to
5 Virco Mfg. Corporation at its location in Los Angeles County. However, Abad’s contention ignores
6 the fact that it placed its products into the stream of commerce in California and that it was
7 reasonably foreseeable that its foam, contained in Virco products, would be sold in Alameda County,
8 with a 2013 estimated population of over 1.5 million. (U.S. Census, State and County Quick Facts,
9 Alameda County, California, posted online at <http://quickfacts.census.gov/qfd/states/06/06001.html>.)

10 Under the “stream of commerce” theory of products liability, legal responsibility for damages
11 that result from a failure to warn of a product’s inherent dangers attaches to “entities in the chain of
12 distribution of the injury-causing manufactured product.” *Taylor v. Elliott Turbomachinery Co , Inc*,
13 (2009) 171 Cal.App.4th 564, 575.

14 When a supplier’s product is intended to be used with another product for the very activity
15 that creates a hazardous situation, that supplier may be held strictly liable for harm caused by another
16 manufacturer's product, because the supplier’s own product contributed substantially to the harm.
17 *Bettencourt v. Hennessy Industries, Inc* (2012) 205 Cal.App.4th 1103, 1122. For example, in *Arena*
18 *v. Owens-Corning* (1998) 63 Cal.App.4th 1178, 1187-88 , the Court of Appeal held that a company
19 that supplied raw asbestos to a manufacturer, for use in a finished product made by the manufacturer,
20 could be held strictly liable for harm caused by the product.

21 Here, analogizing the “stream of commerce” theory of products liability to Prop 65, Abad is
22 an entity in the chain of distribution of its foam products as contained in Virco products, the injury-
23 causing manufactured products. Because Abad’s foam containing TDCPP is intended to be a
24 component of Virco products intended for use by individuals in California, and no warning has been
25 provided by Abad—the very activity that creates a hazardous situation under Prop 65—Abad should
26 be held liable under Proposition 65 for harm caused by the Virco products containing Abad foam
27 treated with TDCPP. Under such circumstances, Abad’s failure to warn that its foam containing
28

1 TDCPP contained a known carcinogen contributed substantially, if not entirely, to the Proposition 65
2 violations alleged in the FAC.

3 The declarations in support of Abad’s motion are therefore insufficient to demonstrate that
4 Abad’s liability did not arise in Alameda County, as alleged in the FAC. Abad’s failure to rebut this
5 presumption is fatal to its motion. *See, e.g., Shores v. Chip Steak Co.* (1955) 310 Cal.App.2d 627,
6 629-30 (holding corporate defendants’ failure to meet burden of “proving their alleged wrongdoing
7 did not occur in [the county where plaintiffs brought the suit]” was fatal to motion for change of
8 venue). Because Abad has failed to meet its burden of showing that its statutory obligation to warn
9 under Proposition 65 did not arise in Alameda County, its motion should be denied.

10 **E. Abad’s and the Other Defendants’ Alleged Proposition 65 Liability Arises in**
11 **Alameda County**

12 As noted, CCP § 395.5 provides that a corporation may be sued in the county where the
13 obligation or liability arises. Abad’s and the other defendants potential liability for violations of
14 Proposition 65 stemming from their alleged failure to warn about exposures to TDCPP arises not at
15 the place the products are manufactured or the time they are shipped, but at the time of exposure.
16 Exposures have occurred and are occurring to individual consumers and other individuals in Alameda
17 County who purchase or use these defendants’ products. Thus, Abad cannot claim that because it has
18 not directly shipped any products to Alameda County, its liability cannot arise here. In fact, Abad
19 has failed to provide any evidence that exposures to TDCPP from the use of its foam padding
20 materials have not occurred in Alameda County.

21 Proposition 65 prohibits both actual and threatened violations of the act’s statutory warning
22 requirements. Health & Safety Code § 25249.7(a). Thus, Abad’s and the other defendants’ liability
23 in this Proposition 65 action arises in any county where there is an actual or threatened violation of
24 the act’s warning requirements. The statute defines “threaten to violate” as “to create a condition in
25 which there is a substantial probability that a violation will occur.” Health & Safety Code §
26 25249.11(e). In the present action, there are both actual and threatened violations of Proposition 65
27 occurring in Alameda County as a result of both Abad’s and the other defendants’ direct and indirect
28 sales of TDCPP-containing products in this county. Threatened violations exist by virtue of the fact

1 that any individual in Alameda County can purchase products such as Virco chairs—chairs that Abad
2 admits contain Abad-manufactured foam—over the internet for delivery to Alameda County.
3 (Declaration of Cesar Chavez in Support of Motion for Change of Venue (“Chavez Decl.”) ¶3;
4 Johnson Decl. ¶6.) Several of the defendants to this action manufacture and shape foam or sell
5 products that are available nationally as well as throughout California. Of the 11 defendants named
6 in the FAC, plaintiffs purchased four of their products at Kantor’s Discount Office Furniture and
7 Equipment, Inc., a brick-and-mortar retail location in Alameda County. (Johnson Decl. ¶7.)

8 In these complex, related actions, many defendants are also national retailers with a
9 significant California presence who conduct business through name-brand retail stores located in
10 Alameda County. *Id.* As recently as May 15, 2014, individuals carrying out plaintiffs’ investigation
11 into the sales of TDCPP-containing products manufactured by Abad, Virco, and other defendants
12 purchased two additional upholstered chairs with foam padding manufactured by Abad’s customer,
13 Virco Mfg. Corporation over the internet within Alameda County for delivery to Alameda County.
14 (Johnson Decl. ¶8.)

15 Other defendants, including Virco Mfg. Corporation, who uses Abad’s foam in its upholstered
16 furniture products and is subject to an existing judgment of this Court entered in a related action, sell
17 and offer their products for sale in Alameda County. Thus, venue is proper in Alameda County based
18 on both Abad’s and other defendants’ products actually being sold in Alameda County in violation of
19 Proposition 65, and because of the threatened violations of Proposition 65 that are inherent in these
20 defendants’ continued offering of Abad’s and other products for sale in Alameda County. *See, e.g.*
21 *Mission Imports, Inc., Supra, at 930* (denying corporation’s motion to change venue from San
22 Francisco where allegations in complaint and evidence established that plaintiff “*may* have suffered
23 injury (lost sales) in San Francisco” (emphasis added); *In United Pac. Ins. Co. v. Sup. Ct.* (1957) 254
24 Cal.App.2d 897, 899 (denying defendant’s motion to change venue from county where alleged
25 wrongful conduct took place); and *Chip Steak Co., Supra, at 629* (venue in defamation action proper
26 in county where allegedly libelous newspaper was circulated).

1 **F. If a Change of Venue is Granted, Plaintiffs Will Seek Coordination of the Actions by**
2 **Petition to the Chair of the Judicial Council**

3 Plaintiffs believe that, should the Court decide to grant the requested change of venue,
4 coordination of plaintiffs' action against Abad with the other complex, related actions is appropriate
5 under the circumstances. Unfortunately, seeking and obtaining coordination will further tax both
6 judicial and party resources, and result in needless delay. These facts notwithstanding, will be the
7 only course of action available to plaintiffs if Abad's motion is granted. Moreover, plaintiffs are
8 confident that coordination will be granted. CCP § 404.1 provides:

9 [C]oordination is appropriate if it will promote the ends of justice, taking into
10 account whether (a) the common question of fact or law predominates and is
11 significant to the litigation; (b) the convenience of the parties, witnesses, and
12 counsel; (c) the relative development of the actions and the work product of counsel;
13 (d) the efficient use of judicial resources; (e) the calendar of the courts; (f) the
14 disadvantage of duplicative and inconsistent rulings, orders, or judgments; (g) and
15 the likelihood of settlement without further litigation if coordination is denied.

16 It is plaintiffs' position that each of the above factors weigh in favor of coordination under the instant
17 facts. A petition for coordination is the only procedure that exists in the superior court for
18 consolidation of complex actions pending in more than one county. Because these actions are
19 complex, plaintiffs will submit their petition directly to the Chair of the Judicial Council. *See* CCP §
20 404. While plaintiffs feel that denying Abad's meritless motion would be the most efficient means,
21 they fully intend to avail themselves of the process provided by Section 404 should the Court grant
22 Abad's requested change of venue.

23 **IV. CONCLUSION**

24 Based on all of the foregoing reasons, plaintiffs respectfully request that the Court deny
25 Abad's motion, and require that Abad file and serve an answer to the FAC within fifteen days.

26 Date: May 20, 2014

27 Respectfully submitted,
28 THE CHANLER GROUP



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