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8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 [Unlimited Jurisdiction]
11

12 STEVEN SCHWARTZBERG,

13 Plaintiff,

14 vs.

15 WAL-MART STORES, INC., a Delaware
corporation, and DOES 1 to 200,
16 inclusive,

17 Defendants.

Case No.

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND CIVIL
PENALTIES**

[Health & Safety Code §§25249.6
et seq.]

18 **INTRODUCTION**
19

20 1. Plaintiff STEVEN SCHWARTZBERG brings this action as a private attorney
21 general on behalf of the children and the People of the State of California and in the public
22 interest pursuant to Health and Safety Code Section 25249.7(d). Based on the Safe
23 Drinking Water and Toxic Enforcement Act of 1986 (Health and Safety Code §25249.5 et
24 seq.) also known as Proposition 65, this complaint seeks injunctive and declaratory relief
25 and civil penalties arising from Defendant WAL-MART STORES, INC.'s ("Wal-Mart")
26 failure to warn children and adults in Alameda County, and other areas in the State of
27 California, that they have been, and continue to be, exposed to lead, a chemical known to
28

1 the State of California to cause cancer, contained in a toy manufactured, distributed and
2 sold by Wal-Mart. Under Proposition 65, businesses with 10 or more employees must
3 provide persons with a “clear and reasonable warning” prior to exposing them to
4 chemicals listed by the State to cause cancer, in excess of the “no significant risk” level for
5 that chemical.
6

7 THE PARTIES

8 2. Plaintiff, STEVEN SCHWARTZBERG, is a resident of Alameda County who
9 is concerned about exposure of lead to children.

10 3. Defendant WAL-MART STORES, INC. (“Wal-Mart”) is a corporation
11 organized and existing under the laws of the State of Delaware, duly authorized and
12 qualified and doing business in the State of California, and in doing the acts complained of
13 herein was acting in said capacity.
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15 4. Plaintiff does not know the true names and capacities, whether individual,
16 corporate, associate, public, private or otherwise, of Defendants sued herein as DOES 1
17 through 200, inclusive, and therefore sues said Defendants by such fictitious names.
18 Plaintiff will seek leave to amend this complaint to allege the true names and capacities
19 when ascertained. Plaintiff is informed and believes and thereupon alleges that each of
20 said fictitiously named Defendants is responsible in some manner for the occurrences
21 herein alleged, and for causing the harms alleged by plaintiff in this complaint
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23 JURISDICTION AND VENUE

24 5. This court has jurisdiction pursuant to California Constitution Article VI,
25 Section 10.

26 6. Plaintiff has performed any and all conditions precedent to the filing of a
27 legal action pursuant to Proposition 65, by mailing a Notice of Violation dated April 19,
28

1 2005, to the Attorney General of the State of California, the Alameda County District
2 Attorney, and Defendant Wal-Mart. A true and correct copy of this notice is attached
3 hereto and incorporated herein as **EXHIBIT A**. More than 60 days have passed since
4 Plaintiff mailed this notice, and no public enforcement entity has filed a complaint in this
5 case.
6

7 7. This court is the proper venue for the action because the cause of action
8 arose in Alameda County. Furthermore, this court is the proper venue under Code of Civil
9 Procedure Section 395.5, and Health and Safety Code §25249.7

10 **STATUTORY BACKGROUND**

11 8. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an initiative
12 statute passed as “Proposition 65” by a vote of the people of the State of California in
13 November 1986.
14

15 9. The warning requirement of Proposition 65 is contained in Health and Safety
16 Code §25249.6 which provides: “No person in the course of doing business shall
17 knowingly and intentionally expose any individual to a chemical known to the State of
18 California to cause cancer or reproductive toxicity without first giving clear and reasonable
19 warning to such individual, except as provided in Health and Safety Code §25249.10.”
20

21 10. Implementing regulations for Proposition 65 provide that warnings are
22 required for consumer products. As defined in 22 CCR §12601(b), consumer products
23 exposure “is an exposure which results from a person’s acquisition, purchase, storage,
24 consumption, or other reasonably foreseeable use of a consumer good, or any exposure
25 that results from receiving a consumer service.”
26

27 11. Warnings for consumer products exposures must be provided in the manner
28 specified in 22 CCR §12601(b).

1 12. Proposition 65 establishes a procedure by which the state is to develop a list
2 of chemicals “known to the State to cause cancer or reproductive toxicity.” Lead was
3 listed as a carcinogen by the State of California on October 1, 1992, and as a source of
4 developmental toxicity on February 27, 1987. Defendant Wal-Mart had a duty to provide
5 clear and reasonable warning to those persons exposed to lead at significant risk levels
6 twelve months after the chemical was published on the state list.
7

8 13. Even minimal exposure to lead can cause cancer, reproductive toxicity, and
9 other significant adverse health effects, especially in children under age seven, including
10 traumatic injury to the brain and nervous system, reduced capacity to learn, lowered IQ,
11 impaired memory, lessened concentration, diminished fine motor skills, hearing loss,
12 internal organ damage, anemia, psychological problems, and emotional deficits.
13

14 14. The California Legislature found and declared in Health & Safety Code
15 Section 124125, that “childhood lead exposure represents the most significant childhood
16 environmental health problem in the state today.” The State of California further found
17 and declared in Health & Safety Code Section 124125 that “it is well known that the
18 environment is widely contaminated with lead; that excessive lead exposure causes acute
19 and chronic damage to a child’s renal system, red blood cells, and developing brain and
20 nervous system.”
21

22 15. Proposition 65 may be enforced by any person in the public interest who first
23 provides notice 60 days before filing suit, to the violator and designated law enforcement
24 officials. The failure of law enforcement officials to file a timely complaint enables a citizen
25 suit to be filed pursuant to Health and Safety Code Section 25249.7(c) (d).
26

27 16. Proposition 65 provides for injunctive relief and a civil fine of up to \$2,500
28 per day for each violation under Health and Safety Code Section 25249.7(a)(b). Each

1 individual exposure without warning is a separate violation.

2 **FACTUAL ALLEGATIONS**

3 17. In or about June 2003, and continuing through March 2005, Wal-Mart
4 caused to be manufactured, distributed, and sold at wholesale and retail outlets in
5 Alameda County and other areas of the State of California a toy intended to be bought for
6 and used by young children. The toy was a Nu-Tronix Karaoke Cassette Player/Recorder
7 (“the Nu-Tronix Karaoke toy”).
8

9 18. The Nu-Tronix Karaoke toy manufactured, distributed, and sold by
10 Defendant Wal-Mart contained and contains excessive levels of lead paint on a series of
11 buttons that control the toy’s functions. Children using the Nu-Tronix Karaoke toy as
12 intended necessarily push the buttons with their fingers, exposing them to unsafe levels of
13 lead. It is reasonably foreseeable and in fact common knowledge, that young children
14 frequently place their fingers in their mouths without first washing their hands. Thus,
15 children using the Nu-Tronix Karaoke toy as it is intended to be used would necessarily
16 and foreseeably be exposed to excessive lead through ingestion in this manner.
17

18 19. Despite the widespread availability and feasibility of lead-free paints for
19 children’s toys, Wal-Mart failed to eliminate lead in the paint used on the Nu-Tronix
20 Karaoke toy by substituting lead-free paint.
21

22 20. Although Wal-Mart participated in a recall of the the Nu-Tronix Karaoke toy
23 in April 2005, Plaintiff is informed and believes that hundreds or thousands of units of the
24 Nu-Tronix Karaoke toy remain in use in California.

25 21. The implementing regulations for Proposition 65 require, at 22 CCR Section
26 12705, that a warning is required if an individual will be threatened with exposure, or
27 exposed, to more than 15 micrograms per day of lead over a stated period of time.
28

1 24. The Nu-Tronix Karaoke toy manufactured, distributed, and sold by
2 Defendant Wal-Mart contained more than enough lead to require a Proposition 65
3 warning.

4 24. Defendant Wal-Mart has not provided clear and reasonable warnings to
5 consumers of the lead contained in the Nu-Tronix Karaoke toy as required by Prop. 65.
6

7 24. As a direct and proximate result of Defendant Wal-Mart's failure to provide
8 adequate warning of the lead hazard posed by the Nu-Tronix Karaoke toy, numerous
9 children in California have been exposed, and will continue to be exposed, to levels of
10 lead above the warning threshold imposed by Proposition 65 and its implementing
11 regulations.

12 25. Defendant Wal-Mart has knowingly and intentionally exposed children using
13 the Nu-Tronix Karaoke to excessive lead without providing a clear and reasonable
14 warning as required by Proposition 65.
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16 25. Defendant Wal-Mart has at all times relevant hereto been aware that
17 manufacturing operations in China, where it caused the Nu-Tronix Karaoke toy to be
18 manufactured, frequently use lead in the manufacturing process.

19 25. Defendant Wal-Mart at all relevant times had actual knowledge that the Nu-
20 tronix Karaoke toy contained lead, that children would be exposed to lead using the Nu-
21 tronix Karaoke toy, and that lead-free paints were feasible and available for use on the
22 Nu-Tronix Karaoke toy in place of the lead paint that was used.
23

24 **FIRST CAUSE OF ACTION**

25 **(Violation of Section 25249.6 of the Health and Safety Code; Failure to Provide Clear**
26 **and Reasonable Warning Under Proposition 65 – All Defendants)**

27 25. Plaintiff incorporates herein each of the allegations set forth in paragraphs 1
28

1 through 25 above.

2 27. Defendant Wal-Mart operates a business which employs 10 or more
3 persons.

4 28. By the acts and omissions alleged above, Defendant Wal-Mart has, in the
5 course of doing business, knowingly and intentionally, exposed children to a chemical
6 known to the State of California to cause cancer and reproductive toxicity, without first
7 giving clear and reasonable warning to such individuals within the meaning of Health and
8 Safety Code §25249.6.

9
10 29. As a result of its violations of Proposition 65, as alleged herein, Defendant
11 Wal-Mart is liable for civil fines up to \$2,500 per day, for each violation. Plaintiff alleges
12 that a separate violation occurred on each day within the applicable statute of limitations
13 on which the Nu-Tronix Karaoke toy was offered for sale in the State of California at a
14 given location.

15
16 30. Defendant Wal-Mart's failure to warn the people of the State of California of
17 the lead hazard posed by the Nu-Tronix Karaoke toy has resulted in a large number of
18 those toys remaining in use to this date. The ongoing use of Nu-Tronix Karaoke toys in
19 this State will irreparably harm children and the public interest on whose behalf Plaintiff
20 brings this action, for which there is not adequate remedy at law.

21
22 **JURY DEMAND**

23 30. Plaintiff demands a jury trial.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff prays for relief against Defendants as follows:

26 1. For civil penalties of \$2,500 per day for each and every violation according
27 to proof;

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- 2. For such temporary restraining orders, preliminary and permanent injunctive orders, or other orders, prohibiting Wal-Mart from exposing children and adults to lead without providing clear and reasonable warnings, pursuant to Health and Safety Code Section 25249.7(a);
- 3. For an order requiring Defendants to provide actual Proposition 65 warnings to all persons who purchased the Nu-Tronix Karaoke toy in the State of California;
- 4. For reasonable attorneys fees pursuant to Section 1021.5 of the Code of Civil Procedure or the substantial benefit theory;
- 5. For costs of suit herein; and
- 6. For such other and further relief as the court may deem proper.

Dated: July 11, 2005

LAW OFFICE OF GREGORY P. BROCK

By: _____
GREGORY P. BROCK
Attorney for Plaintiff
STEVEN SCHWARTZBERG