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ENDORSED
FILED
San Francisco County Superior Court

SEP 5 2007

GORDON PARK-Li Clerk
~~CASE MANAGEMENT SUPERVISOR~~
Deputy Clerk

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DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BY FAX

11
12 CENTER FOR ENVIRONMENTAL HEALTH,)

13 Plaintiff,

14 v.

15
16 EBERHARD FABER GMBH; AMERICAN
ART CLAY CO., INC.; and Defendant DOES 1)
17 through 200, inclusive,

18 Defendants.
19

Case No. 0807-466897

COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES

Health & Safety Code §25249.6 et seq.;

(Other)

1 Plaintiff Center for Environmental Health (“Plaintiff”), in the public interest, and
2 based on information and belief and investigation of counsel, except for information based on
3 personal knowledge, hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This complaint seeks to remedy Defendants’ continuing failure to warn
6 individuals in California that they are being exposed to Di-n-Hexyl Phthalate (“DnHP”), a
7 chemical known to the State of California to cause birth defects or other reproductive harm.
8 Such exposures have occurred, and continue to occur, through the manufacture, distribution, sale
9 and consumer use of Defendants’ modeling clay containing DnHP (the “Products”). Consumers
10 are exposed to DnHP when they use or otherwise handle the Products.

11 2. Under California’s Proposition 65, Health and Safety Code §25249.5 *et*
12 *seq.*,¹ it is unlawful for businesses to knowingly and intentionally expose individuals in
13 California to chemicals known to the State to cause birth defects or other reproductive harm
14 without providing clear and reasonable warnings to individuals prior to their exposure. Despite
15 the fact that Defendants’ Products expose consumers to DnHP, Defendants provide no warnings
16 whatsoever about the reproductive hazards associated with DnHP exposure. Defendants’
17 conduct thus violates the warning provision of Proposition 65. Health & Safety Code §25249.6.

18 **PARTIES**

19 3. Plaintiff Center for Environmental Health (“CEH”) is a non-profit
20 corporation dedicated to protecting the public from environmental health hazards and toxic
21 exposures. CEH is based in Oakland, California and incorporated under the laws of the State of
22 California. CEH is a “person” within the meaning of Health & Safety Code §25249.11(a) and
23 brings this enforcement action in the public interest pursuant to Health & Safety Code
24 §25249.7(d). CEH is a nationally recognized non-profit environmental advocacy group that has
25 prosecuted a large number of Proposition 65 cases in the public interest. These cases have
26 resulted in significant public benefit, including reformulation of toxic products to make them
27 safer and the provision of clear and reasonable warnings on hundreds of products sold
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¹ All statutory references herein are to California statutes, unless otherwise noted.

1 throughout California.

2 4. Defendant Eberhard Faber GmbH (“Eberhard Faber”) is a “person in the
3 course of doing business” within the meaning of Health & Safety Code §25249.11(b). Eberhard
4 Faber manufactures, distributes and/or sells the Products for sale and use in California.

5 5. Defendant American Art Clay Co., Inc. (“American Art Clay”) is a
6 “person in the course of doing business” within the meaning of Health & Safety Code
7 §25249.11(b). American Art Clay distributes and/or sells the Products for sale and use in
8 California.

9 6. DOES 1 through 200 are each a person in the course of doing business
10 within the meaning of Health & Safety Code §25249.11. Defendant DOES 1 through 200 each
11 manufacture, distribute and/or sell the Products for sale or use in California.

12 7. DOES 1 through 200 are each identified herein by fictitious names. The
13 true names of DOES 1 through 200 are unknown to Plaintiff at this time. When the identities of
14 DOES 1 through 200 are ascertained, the complaint shall be amended to reflect their true names.

15 8. Eberhard Faber, American Art Clay and DOES 1 through 200 are
16 collectively referred to herein as “Defendants.”

17 **JURISDICTION AND VENUE**

18 9. The Court has jurisdiction over this action pursuant to Health & Safety
19 Code §25249.7, which allows enforcement in any court of competent jurisdiction. The
20 California Superior Court has jurisdiction over this action pursuant to California Constitution
21 Article VI, Section 10, which grants the Superior Court “original jurisdiction in all cases except
22 those given by statute to other trial courts.” The statutes under which this action is brought do
23 not grant jurisdiction to any other trial court.

24 10. This Court has jurisdiction over the Defendants because each is a business
25 entity that does sufficient business, has sufficient minimum contacts or otherwise intentionally
26 avails itself of the California market through the sale, marketing or use of the Products in
27 California and/or by having such other contacts with California so as to render the exercise of
28 jurisdiction over it by the California courts consistent with traditional notions of fair play and

1 substantial justice.

2 11. Venue is proper in the San Francisco Superior Court because one or more
3 of the violations arise in the County of San Francisco.

4 **BACKGROUND FACTS**

5 12. The People of the State of California have declared by initiative under
6 Proposition 65 their right “[t]o be informed about exposures to chemicals that cause cancer, birth
7 defects, or other reproductive harm.” Proposition 65, §1(b).

8 13. To effectuate this goal, Proposition 65 requires that individuals be
9 provided with a “clear and reasonable warning” before being exposed to chemicals listed by the
10 State of California as known to cause birth defects or other reproductive harm unless the
11 business responsible for the exposure can prove that it fits within a statutory exemption. Health
12 & Safety Code §25249.6 states, in pertinent part:

13 No person in the course of doing business shall knowingly and
14 intentionally expose any individual to a chemical known to the
15 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual. . . .

16 14. On December 2, 2005, the State of California officially listed DnHP as
17 chemical known to cause reproductive toxicity. DnHP is specifically identified as a reproductive
18 toxicant under two subcategories: (1) “female reproductive toxicity,” which means that it tends
19 to harm the female reproductive system; and (2) “male reproductive toxicity,” which means that
20 it tends to harm the male reproductive system. 22 California Code of Regulations (“CCR”)
21 §12000(c). On December 2, 2006, one year after it was listed as a chemical known to cause
22 reproductive toxicity, DnHP became subject to the clear and reasonable warning requirement
23 regarding reproductive toxins under Proposition 65. 22 CCR §12000(c); Health & Safety Code
24 §25249.10(b).

25 15. Defendants’ Products, which are intended for use by children, contain
26 sufficient quantities of DnHP such that individuals who handle the Products are exposed to
27 DnHP through the average use of the Products. For example, ordinary consumers inhale DnHP
28 from fumes generated when the Products are baked or after baking during normal use. In

1 addition, ordinary consumers are exposed to DnHP through direct ingestion when consumers
2 place the Products in their mouths or via hand to mouth contact after consumers touch or handle
3 the Products. Ordinary consumers are also exposed to DnHP through dermal absorption directly
4 through the skin when consumers touch or handle the Products during normal use.

5 16. Defendants both know and intend that the Products contain DnHP. The
6 Products typically use DnHP as a plasticizing agent in the modeling clay.

7 17. Defendants both know and intend that individuals will handle, ingest, and
8 otherwise use the Products, thus exposing them to DnHP.

9 18. Nevertheless, Defendants have, since December 2, 2006, and continuing
10 to the present, exposed consumers to DnHP without providing clear and reasonable warnings
11 regarding the reproductive hazards of DnHP.

12 19. Any person acting in the public interest has standing to enforce violations
13 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
14 valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the
15 action within such time. Health & Safety Code §25249.7(d).

16 20. More than sixty days before naming each Defendant in this suit, Plaintiff
17 provided a 60-Day Notice of Violation of Proposition 65 to the California Attorney General, the
18 District Attorneys of every county in California, the City Attorneys of every California city with
19 a population greater than 750,000, and to Eberhard Faber and American Art Clay. Each of the
20 Notices contained the information required by Health & Safety Code §25249.7(d) and 22 CCR
21 §12903(b).

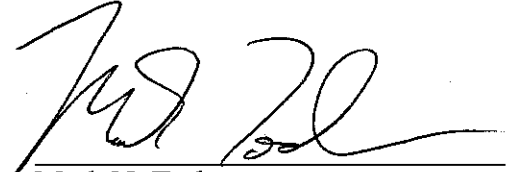
22 21. Plaintiff also sent a Certificate of Merit for each Notice of Violation to
23 the California Attorney General, the District Attorneys of every county in California, the City
24 Attorneys of every California city with a population greater than 750,000, and to Eberhard Faber
25 and American Art Clay. In compliance with Health & Safety Code §25249.7(d) and 11 CCR
26 §3101, each Certificate of Merit certified that Plaintiff's counsel: (1) has consulted with one or
27 more persons with relevant and appropriate experience or expertise who reviewed facts, studies
28 or other data regarding the exposures to DnHP alleged in the Notice; and (2) based on the

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5. That the Court utilize its inherent equitable power to grant such other and further relief as may be just and proper.

Dated: September 5, 2007

Respectfully submitted,
LEXINGTON LAW GROUP, LLP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL
HEALTH