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SAN FRANCISCO COUNTY
SUPERIOR COURT

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CASE MANAGEMENT CONFERENCE SET

5 Attorneys for Plaintiff
AS YOU SOW

AUG - 8 2008 - 9⁰⁰AM

DEPARTMENT 212

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

12 AS YOU SOW

13 Plaintiff,

14 v.

15 KAUFMAN, LEVINE AND PARTNERS
16 INC., and DOES 1 through 10, inclusive.

17 Defendants,

Case No. **080-08-473206**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

(Health and Safety Code § 25249 *et seq.*)

1 Plaintiff AS YOU SOW alleges as follows:

2 **INTRODUCTION**

3 1. This complaint seeks civil penalties and an injunction to remedy the
4 continuing failure of KAUFMAN, LEVINE AND PARTNERS INC., and DOES 1
5 through 10 (“Defendants”) to give clear and reasonable warnings to those residents of
6 California prior to exposing those residents to book bags (“book bags”) which contain
7 lead and lead compounds (“lead”) and Di(2-ethylhexyl) phthalate (“DEHP”). The
8 handling and use of these products causes these residents to be exposed to lead and
9 DEHP. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
10 Safety Code section 25249.6 *et seq.*, also known as “Proposition 65,” businesses must
11 provide persons with a clear and reasonable warning before exposing individuals to a
12 chemical known to the State of California to cause cancer or reproductive toxicity.
13 Plaintiff seeks injunctive relief and civil penalties to remedy these violations of
14 Proposition 65.

15 **PARTIES**

16 2. Plaintiff AS YOU SOW is a not for profit organization dedicated to
17 ensuring that corporations and other institutions act responsibly and in the long-term best
18 interests of the environment and the human condition. AS YOU SOW is based in San
19 Francisco, California and is incorporated under the laws of the State of California. AS
20 YOU SOW is a “person” pursuant to section 25249.11(a) of the Health and Safety Code.
21 AS YOU SOW brings this action in the interest of the general public pursuant to section
22 25249.7(d) of the Health and Safety Code.

23 3. Defendant KAUFMAN, LEVINE AND PARTNERS INC. is a business
24 entity with more than 10 employees that manufactures, distributes, markets and/or sells
25 book bags containing lead and DEHP in California, including in the City and County of
26 San Francisco.

27 4. The true names and capacities of the defendants sued as Does 1 through 10
28 are unknown to Plaintiff, who therefore sues them by fictitious names. Plaintiff will

1 amend this complaint to allege the true names and capacities of these defendants when
2 they have been determined. Each of the fictitiously named defendants is responsible for
3 the manufacture, distribution, marketing, or sale of book bags containing lead and DEHP
4 in California.

5 5. Wherever reference is made to "Defendants," such reference includes the
6 defendant named in paragraph 3 and Does 1 through 10.

7 JURISDICTION AND VENUE

8 6. This Court has jurisdiction pursuant to California Constitution Article VI,
9 section 10, because this case is not a cause given by statute to other trial courts.

10 7. This Court has jurisdiction over each Defendant named above, because each
11 is a business entity that does sufficient business, has sufficient minimum contacts in
12 California, or otherwise intentionally avails itself of the California market, though the
13 sale, marketing, and use of its products in California, to render the exercise of jurisdiction
14 over it by the California courts consistent with traditional notions of fair play and
15 substantial justice.

16 8. Venue is proper in this Court because Defendants' manufacturing,
17 distribution, marketing and/or sales of book bags containing lead and DEHP has occurred
18 in San Francisco County and/or to people who live in San Francisco County, which
19 causes people to be exposed to lead and DEHP while they are physically present in San
20 Francisco County.

21 9. On December 19, 2007 Plaintiff provided a Notice of Violation of
22 Proposition 65 to the California Attorney General, the District Attorney of each county in
23 California, the City Attorney of each California city with a population over 750,000
24 persons, and each named Defendant, pursuant to section 25249.7(d) of the Health and
25 Safety Code. Defendant received a notice of violation of Proposition 65 from As You
26 Sow on December 20, 2007.

27 10. Each Notice of Violation included a Certificate of Merit that Plaintiff's
28 attorneys had consulted with one or more persons with relevant and appropriate

1 experience or expertise who has reviewed facts, studies, or other data regarding exposure
2 to lead and DEHP from the book bags manufactured and/or sold by Defendants and that,
3 based on that information, such attorneys believe that there is a reasonable and
4 meritorious case for this private action. Each Notice of Violation also included a
5 Certificate of Service. The Notice of Violation mailed to each Defendant included a
6 document entitled "The Safe Drinking Water and Toxic Enforcement Act of 1986: a
7 Summary." In compliance with section 25249.7(d) and title 11, section 3102 of the
8 California Code of Regulations, the Attorney General was served with a Notice of
9 Violation and Certificate of Merit that included confidential factual information sufficient
10 to establish the basis of the Certificate of Merit, including the identify of individual(s)
11 with whom Plaintiff consulted and the facts, studies or other data that was reviewed by
12 such person(s).

13 11. None of the public prosecutors that received the Notice of Violation has
14 commenced and is diligently prosecuting an action against these named Defendants for
15 the violations alleged in this complaint, although the notice period established in section
16 25249.7(d) of the Health and Safety Code has elapsed since the Notice of Violation was
17 served by mail.

18 STATUTORY BACKGROUND

19 12. The Safe Drinking Water and Toxic Enforcement Act of 1986 is an
20 initiative statute passed as "Proposition 65" by a vote of the people in November 1986.

21 13. The warning requirement of Proposition 65 is contained in section 25249.6
22 of the Health and Safety Code, which provides:

23 No person in the course of doing business shall knowingly and intentionally
24 expose any individual to a chemical known to the state to cause cancer or
25 reproductive toxicity without first giving clear and reasonable warning to
such individual, except as provided in Section 25249.10.

26 14. An exposure to a chemical in a consumer product is one "which results
27 from a person's acquisition, purchase, storage, consumption, or other reasonably
28 foreseeable use of a consumer good, or any exposure which results from receiving a

1 consumer service.” Cal. Code Regs., tit. 22, § 12601(b).

2 15. Proposition 65 establishes a procedure by which the state of California is to
3 develop a list of chemicals “known to the State to cause cancer or reproductive toxicity.”
4 Health & Safety Code § 25249.8. No warning need be given concerning a listed chemical
5 until one year after the chemical first appears on this list.

6 16. Any person “violating or threatening to violate” Proposition 65 may be
7 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. To
8 “threaten to violate” is defined to mean “to create a condition in which there is a
9 substantial probability that a violation will occur.” *Id.* § 25249.11(e).

10 17. Violators of Proposition 65 are liable for civil penalties of up to \$2,500 per
11 day for each violation, recoverable in a civil action. *Id.* § 25249.7(b).

12 18. Private parties may bring suit to enforce Proposition 65 “in the public
13 interest,” but only if the private party first provides written notice of the violation to the
14 alleged violator, the Attorney General, every District Attorney in whose jurisdiction the
15 violation is alleged to have occurred, and every city attorney of a city having a population
16 in excess of 750,000 where a violation is alleged to have occurred. If no public
17 prosecutors commence enforcement within sixty days, then the private party may sue. *Id.*
18 § 25249.7(d).

19 FACTS

20 19. The State listed DEHP as a chemical causing cancer on January 1, 1988.
21 Cal. Code Regs., tit. 22, § 12000(b). DEHP was listed by the state as causing male
22 reproductive toxicity on October 24, 2003. Cal. Code Regs., tit. 22, § 12000(c).

23 20. The State listed lead as a chemical known to cause cancer on October 1,
24 1992. On February 27, 1987, the State of California officially listed lead as a chemical
25 known to cause reproductive toxicity.

26 21. Each Defendant manufactures, distributes, imports, markets, or sells book
27 bags made with components that contain lead and DEHP for sale or use in the State of
28 California, including book bags which are marketed and distributed to children as part of

1 the Take Home Book Program through the San Francisco Unified School District and in
2 other school districts.

3 22. Individuals who handle or use the book bags are exposed to lead and DEHP
4 through contact between the book bags and skin or by placing the book bags, or parts
5 thereof, in their mouths. Individuals who handle or use the book bags can and do ingest
6 some portion of the lead and DEHP, either by placing the book bag or parts of the book
7 bag in their mouth, through transfer of lead and DEHP from the skin to the mouth,
8 through transfer of lead and DEHP from the skin to objects that are put in the mouth,
9 including food, or through absorption of lead and DEHP directly through the skin. In
10 addition, individuals who use or handle the book bags are exposed to DEHP through
11 inhalation. Both adults and children handle or use these book bags and are exposed to
12 lead and DEHP that are released from the book bags in the course of their reasonable and
13 foreseeable use.

14 23. Each Defendant knew or reasonably should have known that the book bags
15 it manufactured, distributed, marketed or sold contained lead and DEHP. Each Defendant
16 has intended that individuals use and handle the book bags. Each Defendant has had
17 knowledge that individuals, including both adults and children, use and handle the book
18 bags it manufactured, distributed, marketed or sold. Each Defendant has knowingly and
19 intentionally exposed individuals to lead and DEHP through their deliberate act(s) of
20 manufacturing, distributing, marketing, and/or selling book bags made with materials
21 which contain lead and DEHP.

22 24. Each Defendant has failed to provide clear and reasonable warnings that the
23 use of the products in question results in exposure to a chemical known to the State of
24 California to cause cancer and reproductive toxicity, and no such warning was provided
25 to those individuals by any other person.

26 **FIRST CAUSE OF ACTION**
27 **(VIOLATION OF PROPOSITION 65)**

28 25. Plaintiff hereby realleges and incorporates the allegations set forth in

1 paragraphs 1 through 24, inclusive, as if set forth fully here.

2 26. By committing the acts alleged above, each Defendant has, within the
3 previous twelve months, in the course of doing business, knowingly and intentionally
4 exposed individuals to chemicals known by the State of California to cause cancer and
5 reproductive toxicity without first giving clear and reasonable warning to such
6 individuals, within the meaning of section 25249.6 of the Health and Safety Code.

7 27. Said violations render each Defendant liable to Plaintiff for civil penalties
8 not to exceed \$2,500 per day for each violation, as well as other remedies.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff prays for relief as follows:

11 1. Pursuant to the First Cause of Action, assess civil penalties against each
12 Defendant in the amount of \$2,500 per day for each violation of Proposition 65,
13 according to proof;

14 2. Pursuant to Health and Safety Code section 25249.7, enter such temporary
15 restraining orders, preliminary injunctions, permanent injunctions, or other orders
16 prohibiting Defendants from exposing persons within the State of California to lead and
17 DEHP caused by the use of these book bags without providing a clear and reasonable
18 warning, as Plaintiff shall specify in further application to the Court;

19 3. That, pursuant to section 1021.5 of the Code of Civil Procedure and any
20 other applicable provision of law, order Defendants to pay Plaintiff such attorney's fees
21 and costs Plaintiff incurred in bringing this enforcement action; and

22 4. Grant such other relief that the Court deems just and proper.

23
24 Dated: March 10, 2008

SHUTE, MIHALY & WEINBERGER LLP

25
26 By: 
27 _____
ELLISON FOLK

28 Attorneys for Plaintiff
AS YOU SOW