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FILED
Superior Court of California
County of San Francisco

MAR - 5 2009

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CASE MANAGEMENT CONFERENCE SET

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DEPARTMENT 212

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED CIVIL JURISDICTION

CGC-09-485784

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Cal. Health & Safety Code § 25249.6 et seq.)

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11 Russell Brimer,

12 Plaintiff,

13 v.

14 ACCO BRANDS CORPORATION; A & W
15 PRODUCTS CO., INC.; KOLE IMPORTS;
16 NATIONWIDE TRADING CORP.; TOPCO
ASSOCIATES, INC. (COOPERATIVE);
17 TOPCO ASSOCIATES, LLC; KINGSTON
MARKETING, CO; and DOES 1-600,
18 inclusive,

19 Defendants.

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff Russell Brimer, 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 lead, a toxic chemical found in vinyl-coated paper fasteners,
5 vinyl-coated measuring tapes and vinyl-coated craft wire sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
7 warn California citizens about their exposure to lead present in or on certain vinyl-coated paper
8 fasteners, vinyl-coated measuring tapes and vinyl-coated craft wire that defendants manufacture,
9 distribute and/or offer for sale to consumers throughout the State of California.

10 3. Elevated levels of lead are commonly found in and on vinyl-coated paper
11 fasteners, vinyl-coated measuring tapes and vinyl-coated craft wire that defendants manufacture,
12 distribute, and/or offer for sale to consumers and businesses throughout the State of California.

13 4. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health & Safety Code § 25249.6 *et seq.* (Proposition 65), “No person in the course of
15 doing business shall knowingly and intentionally expose any individual to a chemical known to
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

18 5. On February 27, 1987, the State listed lead as a chemical known to cause birth
19 defects and other reproductive harm. Lead became subject to the warning requirement one year
20 later and was therefore subject to the “clear and reasonable warning” requirements of Proposition
21 65, beginning on February 27, 1988. (*27 CCR § 27001(c); Cal. Health & Safety Code*
22 *§ 25249.8.*)

23 6. Lead shall hereinafter be referred to as the “Listed Chemical.”

24 7. Defendants manufacture, distribute, and/or sell vinyl-coated paper fasteners,
25 vinyl-coated measuring tapes, and vinyl-coated craft wire containing excessive levels of the
26 Listed Chemical as follows:

1 a. Defendant Acco Brands Corporation manufactures, distributes, and/or
2 sells vinyl-coated paper fasteners including, but not limited to, the *Vinyl-coated Jumbo*
3 *Clips #72523 (#0 5050 72523 6)*;

4 b. Defendant A & W Products Co., Inc. manufactures, distributes, and/or
5 sells vinyl-coated paper fasteners including, but not limited to, the *A&W The Boxables*
6 *Paper Clips, Item No. 12104 (#0 79184 12104 7)*;

7 c. Defendant Kole Imports manufactures, distributes, and/or sells: (i) vinyl-
8 coated paper fasteners, including, but not limited to, *Sterling Stationary Jumbo Colored*
9 *Paper Clips, #OS074 (#7 31015 02661 6)*; (ii) vinyl-coated measuring tapes including,
10 but not limited to, the *Sterling High Quality 4 Piece Tailor Set, #HS092 (#7 31015 03019*
11 *4)*; and (iii) vinyl-coated craft wire including, but not limited to, the *Krafters Korner 5pc*
12 *Craft Wire, #CC092 (#7 31015 06589 9)*;

13 d. Defendant Nationwide Trading Corp. manufactures, distributes, and/or
14 sells vinyl-coated paper fasteners including, but not limited to, the *150PC Color Paper*
15 *Clips #NST244 (#7 04936 20244 5)*; and

16 e. Defendants Topco Associates, Inc. (Cooperative), Topco Associates, LLC
17 And Kingston Marketing, Co. manufacture, distribute, and/or sell vinyl-coated paper
18 fasteners including, but not limited to, the *Academix 45 Giant Vinyl-coated Clips (#0*
19 *11225 03677 4)*.

20 8. All such vinyl-coated paper fasteners, vinyl-coated measuring tapes, and vinyl-
21 coated craft wire containing the Listed Chemical, as listed above in paragraph 7, shall hereinafter
22 be referred to as the "Products."

23 9. Defendants' failures to warn consumers and/or other individuals in the State of
24 California about their exposure to the Listed Chemical in conjunction with defendants' sale of
25 the Products is a violation of Proposition 65 and subjects defendants to enjoinder of such
26 conduct as well as civil penalties for each such violation.

27 10. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive
28 and permanent injunctive relief to compel defendants to provide purchasers or users of the

1 Products with the required warning regarding the health hazards of the Listed Chemical. (*Cal.*
2 *Health & Safety Code § 25249.7(a).*)

3 11. Plaintiff also seeks civil penalties against defendants for their violations of
4 Proposition 65, as provided for by California Health & Safety Code § 25249.7(b).

5 **PARTIES**

6 12. Plaintiff Russell Brimer, is a citizen of the State of California who is dedicated to
7 protecting the health of California citizens through the elimination or reduction of toxic
8 exposures from commercial products, and brings this action in the public interest pursuant to
9 California Health & Safety Code § 25249.7.

10 13. Defendant ACCO Brands Corporation (“ACCO Brands”) is a person doing
11 business within the meaning of California Health & Safety Code § 25249.11.

12 14. Defendant A & W Products Co., Inc. (“A & W”) is a person doing business
13 within the meaning of California Health & Safety Code § 25249.11.

14 15. Defendant Kole Imports (“Kole”) is a person doing business within the meaning
15 of California Health & Safety Code § 25249.11.

16 16. Defendant Nationwide Trading Corp. (“Nationwide”) is a person doing business
17 within the meaning of California Health & Safety Code § 25249.11.

18 17. Defendant Topco Associates, Inc. (Cooperative) (“Topco Cooperative”) is a
19 person doing business within the meaning of California Health & Safety Code § 25249.11.

20 18. Defendant Topco Associates, LLC (“Topco Associates”) is a person doing
21 business within the meaning of California Health & Safety Code § 25249.11.

22 19. Defendant Kingston Marketing, Co. (“Kingston”) is a person doing business
23 within the meaning of California Health & Safety Code § 25249.11.

24 20. Defendants ACCO Brands, A & W, Kole, Nationwide, Topco Cooperative, Topco
25 Associates, and Kingston, and each of them, manufacture, distribute, and/or offer the Products
26 for sale or use in the State of California or imply by their conduct that they manufacture,
27 distribute and/or offer the Products for sale or use in the State of California.

1 21. Defendants DOES 1-200 (“Manufacturer Defendants”) are each persons doing
2 business within the meaning of California Health & Safety Code § 25249.11.

3 22. Manufacturer Defendants engage in the process of research, testing, designing,
4 assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the
5 process of research, testing, designing, assembling, fabricating and/or manufacturing, one or
6 more of the Products for sale or use in the State of California.

7 23. Defendants DOES 201-400 (“Distributor Defendants”) are each persons doing
8 business within the meaning of California Health & Safety Code § 25249.11.

9 24. Distributor Defendants distribute, exchange, transfer, process and/or transport one
10 or more of the Products to individuals, businesses or retailers for sale or use in the State of
11 California.

12 25. Defendants DOES 401-600 (“Retailer Defendants”) are each persons doing
13 business within the meaning of California Health & Safety Code § 25249.11.

14 26. Retailer Defendants offer the Products for sale primarily to individuals in the
15 State of California.

16 27. At this time, the true names of Defendants DOES 1 through 600, inclusive, are
17 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
18 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
19 each of the fictitiously named defendants is responsible for the acts and occurrences herein
20 alleged. When ascertained, their true names shall be reflected in an amended complaint.

21 28. ACCO Brands, A & W, Kole, Nationwide, Topco Cooperative, Topco Associates,
22 Kingston, Manufacturer Defendants, Distributor Defendants, and Retailer Defendants shall,
23 where appropriate, collectively be referred to hereinafter as “Defendants.”

24 **VENUE AND JURISDICTION**

25 29. Venue is proper in the San Francisco County Superior Court, pursuant to Code of
26 Civil Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction,
27 because one or more instances of wrongful conduct occurred, and continues to occur, in the City
28

1 and County of San Francisco and/or because Defendants conducted, and continue to conduct,
2 business in this County with respect to the Products.

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

7 31. 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 either are citizens of the State of California, have sufficient minimum contacts in
10 the State of California, or otherwise purposefully avail themselves of the California market.
11 Defendants’ purposeful availment renders the exercise of personal jurisdiction by California
12 courts consistent with traditional notions of fair play and substantial justice.

13 **FIRST CAUSE OF ACTION**

14 **(Violation of Proposition 65 – Against All Defendants)**

15 32. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
16 Paragraphs 1 through 31, inclusive.

17 33. The citizens of the State of California have expressly stated in the Safe Drinking
18 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.5, *et seq.*
19 (Proposition 65) that they must be informed “about exposures to chemicals that cause cancer,
20 birth defects and other reproductive harm.” (*Cal. Health & Safety Code § 25249.6.*)

21 34. Proposition 65 states, “No person in the course of doing business shall knowingly
22 and intentionally expose any individual to a chemical known to the state to cause cancer or
23 reproductive toxicity without first giving clear and reasonable warning to such individual....”
24 (*Id.*)

25 35. On November 28, 2008, a sixty-day notice of violation, together with the requisite
26 certificate of merit, was provided to:

- 27 a. A & W and various public enforcement agencies stating that as a result of
28 A & W’s sales of the products listed above in paragraph 7(b), purchasers and users in the

1 State of California were being exposed to the Listed Chemical resulting from the
2 reasonably foreseeable uses of the Products, without the individual purchasers and users
3 first having been provided with a “clear and reasonable warning” regarding such toxic
4 exposures; and

5 b. Kole and various public enforcement agencies stating that as a result of
6 Kole’s sales of the products listed above in paragraph 7(c), purchasers and users in the
7 State of California were being exposed to the Listed Chemical resulting from the
8 reasonably foreseeable uses of the Products, without the individual purchasers and users
9 first having been provided with a “clear and reasonable warning” regarding such toxic
10 exposures.

11 36. On December 23, 2008, a sixty-day notice of violation, together with the requisite
12 certificate of merit, was provided to:

13 a. ACCO Brands and various public enforcement agencies stating that as a
14 result of ACCO Brands’ sales of the products listed above in paragraph 7(a), purchasers
15 and users in the State of California were being exposed to the Listed Chemical resulting
16 from the reasonably foreseeable uses of the Products, without the individual purchasers
17 and users first having been provided with a “clear and reasonable warning” regarding
18 such toxic exposures;

19 b. Nationwide and various public enforcement agencies stating that as a
20 result of Nationwide’s sales of the products listed above in paragraph 7(d), purchasers
21 and users in the State of California were being exposed to the Listed Chemical resulting
22 from the reasonably foreseeable uses of the Products, without the individual purchasers
23 and users first having been provided with a “clear and reasonable warning” regarding
24 such toxic exposures; and

25 c. Topco Cooperative, Topco Associates, Kingston, and various public
26 enforcement agencies stating that as a result of Topco Cooperative’s, Topco Associates’s,
27 and Kingston’s sales of the products listed above in paragraph 7(e), purchasers and users
28 in the State of California were being exposed to the Listed Chemical resulting from the

1 reasonably foreseeable uses of the Products, without the individual purchasers and users
2 first having been provided with a “clear and reasonable warning” regarding such toxic
3 exposures.

4 37. Defendants have engaged in the manufacture, distribution and/or offering of the
5 Products for sale or use in violation of California Health & Safety Code § 25249.6 and
6 Defendants’ manufacture, distribution and/or offering of the Products for sale or use in violation
7 of California Health & Safety Code § 25249.6 has continued to occur beyond Defendants’
8 receipt of plaintiff’s sixty-day notice of violation. Plaintiff further alleges and believes that such
9 violations will continue to occur into the future.

10 38. After receipt of the claims asserted in the sixty-day notices of violation, the
11 appropriate public enforcement agencies have failed to commence and diligently prosecute a
12 cause of action against Defendants under Proposition 65.

13 39. The Products manufactured, distributed, and/or offered for sale or use in
14 California by Defendants contained the Listed Chemical above the allowable state limits.

15 40. Defendants knew or should have known that the Products manufactured,
16 distributed, and/or offered for sale or use by Defendants in California contained the Listed
17 Chemical.

18 41. The Listed Chemical was present in or on the Products in such a way as to expose
19 individuals to the Listed Chemical through dermal contact and/or ingestion during the reasonably
20 foreseeable use of the Products.

21 42. The normal and reasonably foreseeable use of the Products has caused and
22 continues to cause consumer exposures to the Listed Chemical, as such exposure is defined by 27
23 CCR § 25602(b).

24 43. Defendants had knowledge that the normal and reasonably foreseeable use of the
25 Products would expose individuals to the Listed Chemical through dermal contact and/or
26 ingestion.

27 44. Defendants, and each of them, intended that such exposures to the Listed
28 Chemical from the reasonably foreseeable use of the Products would occur by their deliberate,

1 non-accidental participation in the manufacture, distribution and/or offer for sale or use of
2 Products to individuals in the State of California.

3 45. Defendants failed to provide a “clear and reasonable warning” to those consumers
4 and/or other individuals in the State of California who were or who could become exposed to the
5 Listed Chemical through dermal contact and/or ingestion during the reasonably foreseeable use
6 of the Products.

7 46. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
8 directly by California voters, individuals exposed to the Listed Chemical through dermal contact
9 and/or ingestion resulting from the reasonably foreseeable use of the Products, sold by
10 Defendants without a “clear and reasonable warning,” have suffered, and continue to suffer,
11 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

12 47. As a consequence of the above-described acts, Defendants, and each of them, are
13 liable for a maximum civil penalty of \$2,500 per day for each violation pursuant to California
14 Health & Safety Code § 25249.7(b).

15 48. As a consequence of the above-described acts, California Health & Safety Code
16 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendants.

17 49. Wherefore, plaintiff prays for judgment against Defendants, and each of them, as
18 set forth hereinafter.

19 **PRAYER FOR RELIEF**

20 Wherefore, plaintiff prays for judgment against Defendants as follows:

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

24 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
25 preliminarily and permanently enjoin Defendants, and each of them, from manufacturing,
26 distributing or offering the Products for sale or use in California, without providing “clear and
27 reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures
28 to the Listed Chemical;

- 1 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
2 4. That the Court grants such other and further relief as may be just and proper.

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5 Dated: March 5, 2009

Respectfully Submitted,

HIRST & CHANLER LLP

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7 By: 
8 Clifford A Chanler
9 Attorneys for Plaintiff
10 Russell Brimer