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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 FOR THE CITY AND COUNTY OF SAN FRANCISCO
14 UNLIMITED CIVIL JURISDICTION
15

16 RUSSELL BRIMER,

17 Plaintiff,

18 v.

19 ACCO BRANDS CORPORATION;
20 99 CENTS ONLY STORES; FRY'S
21 ELECTRONICS, INC.; KMART
22 CORPORATION; LUCKY
23 SUPERMARKETS; SAVE MART
24 SUPERMARKETS; MICHAELS STORES,
25 INC.; ORCHARD SUPPLY HARDWARE
26 STORES CORPORATION; and DOES 1-600,
27 inclusive,

28 Defendants.

Case No. CGC-09-485784

**THIRD AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

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, sold in
5 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 that defendants manufacture, distribute and/or offer for sale to consumers throughout
9 the State of California.

10 3. Elevated levels of lead are commonly found in and on vinyl-coated paper
11 fasteners that defendants manufacture, distribute, and/or offer for sale to consumers and
12 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 ACCO Brands Corporation and Kmart Corporation manufacture,
25 distribute, and/or sell vinyl-coated paper fasteners containing excessive levels of the Listed
26 Chemical as follows:

1 a. Defendant ACCO Brands Corporation manufactures, distributes, and/or
2 sells colored, vinyl-coated paper fasteners including, but not limited to, *Vinyl Coated*
3 *Jumbo Clips #72523 (#0 50505 72523 6)*; and

4 b. Defendant Kmart Corporation manufactures, distributes, and/or sells
5 colored, vinyl-coated paper fasteners including, but not limited to, *Office Select Vinyl*
6 *Coated Paper Clips, #0-690883-111 (#0 72000 84994 1)*;

7 8. Defendants 99 Cents Only Stores, Fry's Electronics, Inc., Lucky Supermarkets
8 and Save Mart Supermarkets, Michaels Stores, Inc., and Orchard Supply Hardware Stores
9 Corporation manufacture, distribute, and/or sell vinyl-coated paper fasteners¹ containing
10 excessive levels of the Listed Chemical as follows:

11 a. Defendant 99 Cents Only Stores manufactures, distributes, and/or sells
12 colored, vinyl-coated paper fasteners including, but not limited to, *Vinyl Coated Jumbo*
13 *Clips, #72523 (#0 50505 72523 6)*;

14 b. Defendant Fry's Electronics, Inc. manufactures, distributes, and/or sells
15 colored, vinyl-coated paper fasteners including, but not limited to, (i) *Work Essentials by*
16 *Swingline Jumbo Vinyl Paper Clips, #71748 (#0 74711 71748 9)*, and (ii) *Work*
17 *Essentials by Swingline Standard Vinyl Paper Clips, #71749 (#0 74711 71749 6)*;

18 c. Defendants Lucky Supermarkets and Save Mart Supermarkets
19 manufacture, distribute, and/or sell colored, vinyl-coated paper fasteners including, but
20 not limited to, (i) *Work Essentials by Swingline Jumbo Vinyl Paper Clips, #71748 (#0*
21 *74711 71748 9)*, and (ii) *Work Essentials by Swingline Standard Vinyl Paper Clips,*
22 *#71749 (#0 74711 71749 6)*;

23 d. Defendant Michaels Stores, Inc. manufactures, distributes, and/or sells
24 colored, vinyl-coated paper fasteners including, but not limited to, *Work Essentials by*
25 *Swingline Jumbo Vinyl Paper Clips, #71748 (#0 74711 71748 9)*; and

26 ¹ The allegations in this *Third Amended* Complaint regarding defendants 99 Cents Only Stores,
27 Fry's Electronics, Inc., Kmart Corporation, Lucky Supermarkets, Save Mart Supermarkets,
28 Michaels Stores, Inc., and Orchard Supply Hardware Stores Corporation do not include the
distribution or sale of vinyl-coated paper fasteners manufactured, distributed, and/or sold by A &
W Products Co., Inc., Officemate International Corporation, and Topco Associates, LLC.

1 e. Defendant Orchard Supply Hardware Stores Corporation manufactures,
2 distributes, and/or sells colored, vinyl-coated paper fasteners including, but not limited to,
3 *Work Essentials by Swingline Jumbo Vinyl Paper Clips, #71748 (#0 74711 71748 9)*;

4 9. All such vinyl-coated paper fasteners containing the Listed Chemical, as listed
5 above in paragraphs 7(a) and 7(b), and 8(a) through 8(e), shall hereinafter be referred to as the
6 “Products.”

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

11 11. For defendants’ violations of Proposition 65, plaintiff seeks preliminary injunctive
12 and permanent injunctive relief to compel defendants to provide purchasers or users of the
13 Products with the required warning regarding the health hazards of the Listed Chemical. (*Cal.*
14 *Health & Safety Code § 25249.7(a).*)

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

17 **PARTIES**

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

22 14. Defendant 99 Cents Only Stores (“99 Cents”) is a person doing business within
23 the meaning of California Health & Safety Code § 25249.11.

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

26 16. Defendant Fry’s Electronics, Inc. (“Fry’s”) is a person doing business within the
27 meaning of California Health & Safety Code § 25249.11.

1 17. Defendant Kmart Corporation (“Kmart”) is a person doing business within the
2 meaning of California Health & Safety Code § 25249.11.

3 18. Defendant Lucky Supermarkets (“Lucky”) is a person doing business within the
4 meaning of California Health & Safety Code § 25249.11.

5 19. Defendant Michaels Stores, Inc. (“Michaels”) is a person doing business within
6 the meaning of California Health & Safety Code § 25249.11.

7 20. Defendant Orchard Supply Hardware Stores Corporation (“OSH”) is a person
8 doing business within the meaning of California Health & Safety Code § 25249.11.

9 21. Defendant Save Mart Supermarkets (“Save Mart”) is a person doing business
10 within the meaning of California Health & Safety Code § 25249.11.

11 22. Defendants 99 Cents, ACCO, Fry’s, Kmart, Lucky, Michaels, OSH, Save Mart,
12 and each of them, manufacture, distribute, and/or offer the Products for sale or use in the State of
13 California or imply by their conduct that they manufacture, distribute and/or offer the Products
14 for sale or use in the State of California.

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

17 24. Manufacturer Defendants engage in the process of research, testing, designing,
18 assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the
19 process of research, testing, designing, assembling, fabricating and/or manufacturing, one or
20 more of the Products for sale or use in the State of California.

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

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

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

1 **FIRST CAUSE OF ACTION**

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

3 34. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 33, inclusive.

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

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

13 37. On December 23, 2008, a sixty-day notice of violation, together with the requisite
14 certificate of merit, was provided to ACCO and various public enforcement agencies stating that
15 as a result of ACCO’s sales of the products listed above in paragraph 7(a), purchasers and users
16 in the State of California were being exposed to the Listed Chemical resulting from the
17 reasonably foreseeable uses of the Products, without the individual purchasers and users first
18 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

19 38. On March 5, 2009, a sixty-day notice of violation, together with the requisite
20 certificate of merit, was provided to Kmart, and various public enforcement agencies stating that
21 as a result of Kmart’s sales of the products listed above in paragraph 7(b), purchasers and users
22 in the State of California were being exposed to the Listed Chemical resulting from the
23 reasonably foreseeable uses of the Products, without the individual purchasers and users first
24 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

25 39. On April 30, 2009, a sixty-day notice of violation, together with the requisite
26 certificate of merit, was provided to:

27 a. 99 Cents and various public enforcement agencies stating that as a result
28 of 99 Cents’ sales of the products listed above in paragraph 8(a), purchasers and users in

1 the 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.

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

11 c. Michaels and various public enforcement agencies stating that as a result
12 of Michaels sales of the products listed above in paragraph 8(d), purchasers and users in
13 the State of California were being exposed to the Listed Chemical resulting from the
14 reasonably foreseeable uses of the Products, without the individual purchasers and users
15 first having been provided with a “clear and reasonable warning” regarding such toxic
16 exposures.

17 d. OSH and various public enforcement agencies stating that as a result of
18 OSH’s sales of the products listed above in paragraph 8(e), purchasers and users in the
19 State of California were being exposed to the Listed Chemical resulting from the
20 reasonably foreseeable uses of the Products, without the individual purchasers and users
21 first having been provided with a “clear and reasonable warning” regarding such toxic
22 exposures.

23 40. On July 23, 2010, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to Fry’s, and various public enforcement agencies stating that
25 as a result of Fry’s sales of the products listed above in paragraph 8(b), purchasers and users in
26 the State of California were being exposed to the Listed Chemical resulting from the reasonably
27 foreseeable uses of the Products, without the individual purchasers and users first having been
28 provided with a “clear and reasonable warning” regarding such toxic exposures

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

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

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

12 44. Defendants knew or should have known that the Products manufactured,
13 distributed, and/or offered for sale or use by Defendants in California contained the Listed
14 Chemical.

15 45. The Listed Chemical was present in or on the Products in such a way as to expose
16 individuals to the Listed Chemical through dermal contact and/or ingestion during the reasonably
17 foreseeable use of the Products.

18 46. The normal and reasonably foreseeable use of the Products has caused and
19 continues to cause consumer exposures to the Listed Chemical, as such exposure is defined by
20 27 CCR § 25602(b).

21 47. Defendants had knowledge that the normal and reasonably foreseeable use of the
22 Products would expose individuals to the Listed Chemical through dermal contact and/or
23 ingestion.

24 48. Defendants, and each of them, intended that such exposures to the Listed
25 Chemical from the reasonably foreseeable use of the Products would occur by their deliberate,
26 non-accidental participation in the manufacture, distribution and/or offer for sale or use of
27 Products to individuals in the State of California.

