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KIM TURNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: K. Main, Deputy

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION

11 RUSSELL BRIMER,
12
13 Plaintiff,

14 v.

15 ATICO INTERNATIONAL USA, INC.;
16 WALGREEN CO.; and DOES 1-150,
inclusive,

17 Defendants.

Case No. _____

093189

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

1
2 1. This Complaint is a representative action brought by plaintiff RUSSELL
3 BRIMER, in the public interest of the citizens of the State of California, to enforce the People's
4 right to be informed of the presence of lead, a toxic chemical found in vinyl-coated measuring
5 tapes 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
8 measuring tapes that defendants manufacture, distribute and/or offer for sale to consumers
9 throughout the State of California.

10 3. High levels of lead are commonly found in and on vinyl-coated measuring tapes
11 that defendants manufacture, distribute and/or offer for sale to consumers throughout the State of
12 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, California identified and listed lead as a chemical known
19 to cause birth defects and other reproductive harm. Lead became subject to the warning
20 requirement one year later and was therefore subject to the "clear and reasonable warning"
21 requirements of Proposition 65, beginning on February 27, 1988. (*27 CCR § 27001 (c); Cal.*
22 *Health & Safety Code § 25249.8.*) Lead shall be referred to hereinafter as the "LISTED
23 CHEMICAL."

24 6. Defendants manufacture, distribute, and/or sell vinyl-coated measuring tapes
25 containing excessive levels of the LISTED CHEMICAL including, but not limited to, the *Living*
26 *Solutions Sewing Kit, Item 846278 (#0 49022 02667 4)*. All such vinyl-coated measuring tapes
27 containing the LISTED CHEMICAL shall hereinafter be referred to as the "PRODUCTS."
28

7. Defendants' failures to warn consumers and/or other individuals in the State of California about their exposure to the LISTED CHEMICAL in conjunction with defendants' sale of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder of such conduct as well as civil penalties for each such violation.

8. For defendants' violations of Proposition 65, plaintiff seeks preliminary injunctive and permanent injunctive relief to compel defendants to provide purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

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

PARTIES

10. Plaintiff RUSSELL BRIMER, is a citizen of the County of Alameda in the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products, and brings this action in the public interest pursuant to California Health & Safety Code § 25249.7.

11. Defendant ATICO INTERNATIONAL USA, INC. (“ATICO”) is a person doing business within the meaning of California Health & Safety Code § 25249.11.

12. Defendant ATICO manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

13. Defendant WALGREEN CO. ("WALGREEN") is a person doing business within the meaning of California Health & Safety Code § 25249.11.

14. Defendant WALGREEN manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons doing business within the meaning of California Health & Safety Code § 25249.11.

1 16. MANUFACTURER DEFENDANTS engage in the process of research, testing,
2 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
3 engage in the process of research, testing, designing, assembling, fabricating and/or
4 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

5 17. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
6 doing business within the meaning of California Health & Safety Code § 25249.11.

7 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
8 transport one or more of the PRODUCTS to individuals, businesses or retailers for sale or use in
9 the State of California.

10 19. Defendants DOES 101-150 (RETAIL DEFENDANTS) are each persons doing
11 business within the meaning of California Health & Safety Code § 25249.11.

12 20. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
13 State of California.

14 21. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
15 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
16 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis alleges, that
17 each of the fictitiously named defendants is responsible for the acts and occurrences herein
18 alleged. When ascertained, their true names shall be reflected in an amended complaint.

19 22. ATICO, WALGREEN, MANUFACTURER DEFENDANTS, DISTRIBUTOR
20 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
21 to hereinafter as "DEFENDANTS."

22 **VENUE AND JURISDICTION**

23 23. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
24 Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction, because
25 one or more instances of wrongful conduct occurred, and continues to occur, in the County of
26 Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this
27 County with respect to the PRODUCTS.

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

5 25. The California Superior Court has jurisdiction over DEFENDANTS based on
6 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
7 association that either are citizens of the State of California, have sufficient minimum contacts in
8 the State of California, or otherwise purposefully avail themselves of the California market.
9 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
10 courts consistent with traditional notions of fair play and substantial justice.

11 **FIRST CAUSE OF ACTION**

12 **(Violation of Proposition 65 - Against All Defendants)**

13 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
14 Paragraphs 1 through 25, inclusive.

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

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

23 29. On February 24, 2009, a sixty-day notice of violation, together with the requisite
24 certificate of merit, was provided to ATICO, WALGREEN and various public enforcement
25 agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS, purchasers and
26 users in the State of California were being exposed to lead resulting from the reasonably
27 foreseeable uses of the PRODUCTS, without the individual purchasers and users first having
28 been provided with a “clear and reasonable warning” regarding such toxic exposures.

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

7 31. 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 32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
11 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
12 limits.

13 33. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
14 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
15 LISTED CHEMICAL.

16 34. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
17 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
18 during the reasonably foreseeable use of the PRODUCTS.

19 35. The normal and reasonably foreseeable use of the PRODUCTS has caused and
20 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
21 by 27 CCR § 25602(b).

22 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
23 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
24 and/or ingestion.

25 37. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
26 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
27 accidental participation in the manufacture, distribution and/or offer for sale or use of
28 PRODUCTS to individuals in the State of California.

38. DEFENDANTS failed to provide a “clear and reasonable warning” to those consumers and/or other individuals in the State of California who were or who could become exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS, sold by DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to suffer, irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

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

42. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth hereinafter.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

2. That the Court, pursuant to California Health & Safety Code § 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing or offering the PRODUCTS for sale or use in California, without providing “clear and reasonable warnings” as defined by 27 CCR § 25601, as to the harms associated with exposures the LISTED CHEMICAL;

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

3 Respectfully Submitted,

4 Dated: June 24, 2009

HIRST & CHANLER LLP

5 *Cliff Chanler*
6 By: _____
7 Clifford A. Chanler
8 Attorneys for Plaintiff
9 RUSSELL BRIMER