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FILED

SEP 22 2009

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: S. Bond, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 FOR THE COUNTY OF MARIN

10 UNLIMITED CIVIL JURISDICTION

11
12 ANTHONY E. HELD, Ph.D., P.E.,

13 Plaintiff,

14 v.

15 RUSS BERRIE AND COMPANY, INC.; and
DOES 1-150, inclusive,

16 Defendants.
17

Case No. CU

09 4 8 1 9

**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 ANTHONY E.
3 HELD, Ph.D., P.E., in the public interest of the citizens of the State of California, to enforce the
4 People's right to be informed of the presence of di(2-ethylhexyl)phthalate, a toxic chemical
5 found in vinyl bags that appeal to children sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failures to
7 warn California citizens about their exposure to di(2-ethylhexyl)phthalate present in and/or on
8 certain vinyl bags that appeal to children, plush toys with vinyl components, and vinyl keychains
9 that defendants manufacture, distribute, and/or offer for sale to consumers throughout the State
10 of California.

11 3. High levels of di(2-ethylhexyl)phthalate are commonly found in and/or on certain
12 vinyl bags that appeal to children, plush toys with vinyl components, and vinyl keychains that
13 defendants manufacture, distribute, and/or offer for sale to consumers throughout the State of
14 California.

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

20 5. On October 24, 2003, California identified and listed di(2-ethylhexyl)phthalate as
21 a chemical known to cause birth defects and other reproductive harm. Di(2-ethylhexyl)phthalate
22 became subject to the warning requirement one year later and was therefore subject to the "clear
23 and reasonable warning" requirements of Proposition 65, beginning on October 24, 2004.
24 (*27 CCR § 27001; Cal. Health & Safety Code § 25249.8.*)

25 6. Di(2-ethylhexyl)phthalate shall hereinafter be referred to as the "LISTED
26 CHEMICAL."

1 13. Defendant RUSS BERRIE manufactures, distributes, and/or offers the
2 PRODUCTS for sale or use in the State of California or implies by its conduct that it
3 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

4 14. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each
5 persons doing business within the meaning of California Health & Safety Code Section
6 25249.11.

7 15. MANUFACTURER DEFENDANTS engage in the process of research, testing,
8 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
9 engage in the process of research, testing, designing, assembling, fabricating and/or
10 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

11 16. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
12 doing business within the meaning of California Health & Safety Code Section 25249.11.

13 17. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
14 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in
15 the State of California.

16 18. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
17 business within the meaning of California Health & Safety Code Section 25249.11.

18 19. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the
19 State of California.

20 20. At this time, the true names of Defendants DOES 1-150, inclusive, are unknown
21 to plaintiff, who therefore sues said defendants by their fictitious name pursuant to Code of Civil
22 Procedure Section 474. Plaintiff is informed and believes, and on that basis alleges, that each of
23 the fictitiously named defendants is responsible for the acts and occurrences herein alleged.

24 When ascertained, their true names shall be reflected in an amended complaint.

25 21. RUSS BERRIE, MANUFACTURER DEFENDANTS, DISTRIBUTOR
26 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
27 to hereinafter as “DEFENDANTS.”

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2 **VENUE AND JURISDICTION**

3 22. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
4 Procedure Sections 394, 395, 395.5, because this Court is a court of competent jurisdiction,
5 because one or more instances of wrongful conduct occurred, and continues to occur, in the
6 County of Marin and/or because DEFENDANTS conducted, and continue to conduct, business
7 in this County with respect to the PRODUCTS.

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

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

18 **FIRST CAUSE OF ACTION**

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

20 25. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
21 Paragraphs 1 through 24, inclusive.

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

26 27. Proposition 65 states, “No person in the course of doing business shall knowingly
27 and intentionally expose any individual to a chemical known to the state to cause cancer or
28

1 reproductive toxicity without first giving clear and reasonable warning to such individual...”

2 (*Id.*)

3 28. On March 5, 2009, May 6, 2009, and June 30, 2009 sixty-day notices of violation,
4 together with the requisite certificate of merit, were provided to RUSS BERRIE and various
5 public enforcement agencies stating that as a result of DEFENDANTS’ sales of the
6 PRODUCTS, purchasers and users in the State of California were being exposed to the LISTED
7 CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without the
8 individual purchasers and users first having been provided with a “clear and reasonable warning”
9 regarding such toxic exposures (“60-Day Notice of Violation”).

10 29. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
11 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
12 and DEFENDANTS’ manufacture, distribution, and/or offering of the PRODUCTS for sale or
13 use in violation of California Health & Safety Code Section 25249.6 has continued to occur
14 beyond DEFENDANTS’ receipt of plaintiff’s 60-Day Notice of Violation. Plaintiff further
15 alleges and believes that such violations will continue to occur into the future.

16 30. After receipt of the claims asserted in the 60-Day Notice of Violation, the
17 appropriate public enforcement agencies have failed to commence and diligently prosecute a
18 cause of action against DEFENDANTS under Proposition 65.

19 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
20 California by DEFENDANTS contained the LISTED CHEMICAL above the allowable state
21 limits.

22 32. DEFENDANTS knew or should have known that the PRODUCTS manufactured,
23 distributed, and/or offered for sale or use by DEFENDANTS in California contained the
24 LISTED CHEMICAL.

25 33. The LISTED CHEMICAL was present in or on the PRODUCTS in such a way as
26 to expose individuals to the LISTED CHEMICAL through dermal contact and/or ingestion
27 during the reasonably foreseeable use of the PRODUCTS.

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1 34. The normal and reasonably foreseeable use of the PRODUCTS has caused and
2 continues to cause consumer exposures to the LISTED CHEMICAL, as such exposure is defined
3 by 27 CCR Section 25602(b).

4 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
5 the PRODUCTS would expose individuals to the LISTED CHEMICAL through dermal contact
6 and/or ingestion.

7 36. DEFENDANTS intended that such exposures to the LISTED CHEMICAL from
8 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-
9 accidental participation in the manufacture, distribution, and/or offer for sale or use of
10 PRODUCTS to individuals in the State of California.

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

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

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

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

26 41. Wherefore, plaintiff prays for judgment against DEFENDANTS as set forth
27 hereinafter.

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1 **PRAYER FOR RELIEF**

2 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

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

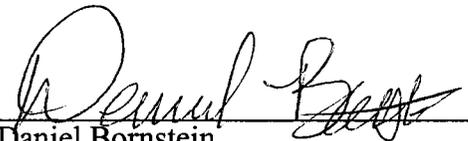
11 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

12 4. That the Court grant such other and further relief as may be just and proper.

13 Respectfully Submitted,

14 Dated: September 17, 2009

HIRST & CHANLER LLP

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16 By: 
17 Daniel Bornstein
18 Attorneys for Plaintiff
19 ANTHONY E. HELD, Ph.D., P.E.
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