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ENDORSED
FILED
Superior Court of California
County of San Francisco
DEC 22 2009
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By: MICHAEL SWEENEY
Deputy Clerk

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

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12 CENTER FOR ENVIRONMENTAL HEALTH,)
a non-profit corporation)
13 Plaintiff,)

14 v.)

15 BASIC INTERNATIONAL, INC. DBA BASIC)
16 MEDICAL INDUSTRIES, INC.; DASH)
MEDICAL GLOVES, INC.; AMMEX)
17 CORPORATION; BIG TIME PRODUCTS,)
18 LLC; BOSS MANUFACTURING COMPANY;)
GOLDMAX INDUSTRIES, INC.; PRO-STAT,)
19 INC.; RITE AID CORPORATION; and)
Defendant DOES 1 through 200, inclusive,)

20 Defendants.)
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Case No. CGC-09-494337

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

Health & Safety Code § 25249.6, *et seq.*

(Other)

1 Plaintiff Center for Environmental Health ("Plaintiff"), in the public interest, and
2 based on information and belief and investigation of counsel, except for information based on
3 personal knowledge, hereby makes the following allegations:

4 **INTRODUCTION**

5 1. This First Amended Complaint seeks to remedy Defendants' continuing
6 failure to warn individuals in California that they are being exposed to Di(2-ethylhexyl) phthalate
7 ("DEHP"), a chemical known to the State of California to cause cancer and birth defects or other
8 reproductive harm. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and consumer use of Defendants' vinyl gloves containing DEHP
10 (the "Products"). Consumers are exposed to DEHP when they use or otherwise handle the
11 Products.

12 2. Under California's Proposition 65, Health and Safety Code § 25249.5, *et*
13 *seq.*, it is unlawful for businesses to knowingly and intentionally expose individuals in California
14 to chemicals known to the State to cause cancer and/or birth defects or other reproductive harm
15 without providing clear and reasonable warnings to individuals prior to their exposure. Despite
16 the fact that Defendants' Products expose consumers to DEHP, Defendants provide no warnings
17 whatsoever about the reproductive hazards associated with DEHP exposure. Defendants'
18 conduct thus violates the warning provision of Proposition 65. Health & Safety Code § 25249.6.

19 **PARTIES**

20 3. Plaintiff is a non-profit corporation dedicated to protecting the public from
21 environmental health hazards and toxic exposures. Plaintiff is based in Oakland, California, and
22 incorporated under the laws of the State of California. Plaintiff is a "person" within the meaning
23 of Health & Safety Code § 25249.11(a) and brings this enforcement action in the public interest
24 pursuant to Health & Safety Code § 25249.7(d). Plaintiff is a nationally recognized non-profit
25 environmental advocacy group that has prosecuted a large number of Proposition 65 cases in the
26 public interest. These cases have resulted in significant public benefit, including reformulation
27 of thousands of products to remove toxic chemicals and to make them safer. Plaintiff also
28 provides information to Californians about the health risks associated with exposure to hazardous

1 substances, where manufacturers and other responsible parties fail to do so.

2 4. Defendant AMMEX CORPORATION (“Ammex”) is a “person in the
3 course of doing business” within the meaning of Health & Safety Code § 25249.11(b). Ammex
4 manufactures, distributes and/or sells the Products for sale and use in California.

5 5. Defendant BASIC INTERNATIONAL, INC. DBA BASIC MEDICAL
6 INDUSTRIES, INC. (“Basic Medical”) is a “person in the course of doing business” within the
7 meaning of Health & Safety Code § 25249.11(b). Basic Medical manufactures, distributes
8 and/or sells the Products for sale and use in California.

9 6. Defendant BIG TIME PRODUCTS, LLC (“Big Time”) is a “person in the
10 course of doing business” within the meaning of Health & Safety Code § 25249.11(b). Big Time
11 manufactures, distributes and/or sells the Products for sale and use in California.

12 7. Defendant BOSS MANUFACTURING COMPANY (“Boss”) is a “person
13 in the course of doing business” within the meaning of Health & Safety Code § 25249.11(b).
14 Boss manufactures, distributes and/or sells the Products for sale and use in California.

15 8. Defendant DASH MEDICAL GLOVES, INC. (“DASH”) is a “person in
16 the course of doing business” within the meaning of Health & Safety Code § 25249.11(b).
17 DASH manufactures, distributes and/or sells the Products for sale and use in California.

18 9. Defendant GOLDMAX INDUSTRIES, INC. (“Goldmax”) is a “person in
19 the course of doing business” within the meaning of Health & Safety Code § 25249.11(b).
20 Goldmax manufactures, distributes and/or sells the Products for sale and use in California.

21 10. Defendant PRO-STAT, INC. (“Pro-Stat”) is a “person in the course of
22 doing business” within the meaning of Health & Safety Code § 25249.11(b). Pro-Stat
23 manufactures, distributes and/or sells the Products for sale and use in California.

24 11. Defendant RITE AID CORPORATION (“Rite Aid”) is a “person in the
25 course of doing business” within the meaning of Health & Safety Code § 25249.11(b). Rite Aid
26 manufactures, distributes and/or sells the Products for sale and use in California.

27 12. DOES 1 through 200 are each a person in the course of doing business
28 within the meaning of Health & Safety Code § 25249.11. Defendant DOES 1 through 200 each

1 manufacture, distribute and/or sell the Products for sale or use in California.

2 13. DOES 1 through 200 are each identified herein by fictitious names. The
3 true names of DOES 1 through 200 are unknown to Plaintiff at this time. When the identities of
4 DOES 1 through 200 are ascertained, the complaint shall be amended to reflect their true names.

5 14. The defendants identified in paragraphs 4 through 11 and DOES 1 through
6 200 are collectively referred to herein as "Defendants."

7 **JURISDICTION AND VENUE**

8 15. The Court has jurisdiction over this action pursuant to Health & Safety
9 Code § 25249.7, which allows enforcement in any court of competent jurisdiction, and pursuant
10 to California Constitution Article VI, Section 10, because this case is a cause not given by statute
11 to other trial courts.

12 16. This Court has jurisdiction over the Defendants because each is a business
13 entity that does sufficient business, has sufficient minimum contacts or otherwise intentionally
14 avails itself of the California market through the sale, marketing or use of the Products in
15 California and/or by having such other contacts with California so as to render the exercise of
16 jurisdiction over it by the California courts consistent with traditional notions of fair play and
17 substantial justice.

18 17. Venue is proper in the San Francisco Superior Court because one or more
19 of the violations arise in the County of San Francisco.

20 **BACKGROUND FACTS**

21 18. The People of the State of California have declared by initiative under
22 Proposition 65 their right "[t]o be informed about exposures to chemicals that cause cancer, birth
23 defects, or other reproductive harm." Proposition 65, § 1(b).

24 19. To effectuate this goal, Proposition 65 prohibits exposing people to
25 chemicals listed by the State of California as known to cause cancer and/or birth defects or other
26 reproductive harm above certain levels without a "clear and reasonable warning" unless the
27 business responsible for the exposure can prove that it fits within a statutory exemption. Health
28 & Safety Code § 25249.6 states, in pertinent part:

1 No person in the course of doing business shall knowingly and
2 intentionally expose any individual to a chemical known to the
3 state to cause cancer or reproductive toxicity without first giving
4 clear and reasonable warning to such individual. . .

5 20. On January 1, 1988, the State of California officially listed DEHP as a
6 chemical known to cause cancer. On January 1, 1989, one year after it was listed as a chemical
7 known to cause cancer, DEHP became subject to the clear and reasonable warning requirement
8 regarding cancer hazards under Proposition 65. 27 California Code of Regulations (“C.C.R.”)
9 § 27001(c); Health & Safety Code § 25249.10(b).

10 21. On October 24, 2003, the State of California officially listed DEHP as a
11 chemical known to cause reproductive toxicity. DEHP is specifically identified as a reproductive
12 toxicant under two subcategories: (1) “developmental reproductive toxicity,” which means that it
13 tends to harm the developing fetus and (2) “male reproductive toxicity,” which means that it
14 tends to harm the male reproductive system. 27 C.C.R. § 27001(c). On October 24, 2004, one
15 year after it was listed as a chemical known to cause reproductive toxicity, DEHP became subject
16 to the clear and reasonable warning requirement regarding reproductive toxins under Proposition
17 65. 27 C.C.R. § 27001(c); Health & Safety Code § 25249.10(b).

18 22. Defendants’ Products contain sufficient quantities of DEHP such that
19 individuals who handle the Products are exposed to DEHP through the average use of the
20 Products. The route of exposure for the violations is dermal absorption through the skin when
21 consumers touch, use, handle, put on, wear and/or take off the Products; direct ingestion when
22 consumers place their hands in their mouths while wearing the Products or otherwise place the
23 Products in their mouths; and ingestion via hand-to-mouth contact after they touch, use, handle,
24 put on, wear and/or take off the Products or touch other objects that they then put in their mouths.

25 23. No clear and reasonable warning is provided with the Products regarding
26 the carcinogenic or reproductive hazards of DEHP.

27 24. Any person acting in the public interest has standing to enforce violations
28 of Proposition 65 provided that such person has supplied the requisite public enforcers with a
valid 60-Day Notice of Violation and such public enforcers are not diligently prosecuting the

1 action within such time. Health & Safety Code § 25249.7(d).

2 25. More than sixty days before naming each Defendant in this Complaint,
3 Plaintiff provided a 60-Day Notice of Violation of Proposition 65 to the California Attorney
4 General, the District Attorneys of every county in California, the City Attorneys of every
5 California city with a population greater than 750,000 and to the Defendant named. In
6 compliance with Health & Safety Code § 25249.7(d) and 27 C.C.R. § 25903(b), each of the
7 Notices included the following information: (1) the name and address of the violators; (2) the
8 statute violated; (3) the time period during which violations occurred; (4) specific descriptions of
9 the violations, including (a) the routes of exposure to DEHP from the Products, and (b) the
10 specific type of Products sold and used in violation of Proposition 65; and (5) the name of the
11 specific Proposition 65-listed chemical (DEHP) that is the subject of the violations described in
12 each of the Notices.

13 26. Plaintiff also sent a Certificate of Merit for each Notice of Violation to the
14 California Attorney General, the District Attorneys of every county in California, the City
15 Attorneys of every California city with a population greater than 750,000, and the Defendants
16 named in the Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R.
17 § 3101, each Certificate of Merit certified that Plaintiff's counsel: (1) has consulted with one or
18 more persons with relevant and appropriate experience or expertise who reviewed facts, studies
19 or other data regarding the exposures to DEHP alleged in the Notice; and (2) based on the
20 information obtained through such consultations, believes that there is a reasonable and
21 meritorious case for a citizen enforcement action based on the facts alleged in the attached
22 Notice. In compliance with Health & Safety Code § 25249.7(d) and 11 C.C.R. § 3102, the
23 Certificate served on the Attorney General included factual information – provided on a
24 confidential basis – sufficient to establish the basis for the Certificates, including the identity of
25 the person(s) consulted by Plaintiff's counsel and the facts, studies or other data reviewed by
26 such persons.

27 27. Under Proposition 65, an exposure is “knowing” where the party
28 responsible for such exposure has:

1 knowledge of the fact that a[n] . . . exposure to a chemical listed
2 pursuant to [Health and Safety Code § 25249.8(a)] is occurring.
3 No knowledge that the . . . exposure is unlawful is required.

4 27 C.C.R. § 25102(n). This knowledge may be either actual or constructive. *See, e.g.*, Final
5 Statement of Reasons Revised (November 4, 1988) (pursuant to former 22 C.C.R. Division 2,
6 § 12201).

7 28. Defendants both know and intend that the Products contain DEHP. The
8 Products typically contain DEHP to provide the Products with flexibility. DEHP is an intended
9 ingredient that makes up a substantial percentage of the Products.

10 29. Defendants both know and intend that individuals will handle, wear, and
11 otherwise use the Products, thus exposing them to DEHP.

12 30. Defendants have been informed of the DEHP in their Products by the 60-
13 Day Notice of Violation served on them by Plaintiff.

14 31. Nevertheless, Defendants have exposed consumers and continue to expose
15 consumers to DEHP without providing clear and reasonable warnings regarding the cancer
16 and/or reproductive hazards of DEHP.

17 32. None of the public prosecutors with the authority to prosecute violations
18 of Proposition 65 has commenced and/or is diligently prosecuting a cause of action against the
19 Defendants under Health & Safety Code § 25249.5, *et seq.*, based on the claim asserted in the
20 Notice.

21 33. Plaintiff has engaged in good-faith efforts to resolve the claims alleged
22 herein prior to filing this complaint.

23 34. Any person “violating or threatening to violate” Proposition 65 may be
24 enjoined in any court of competent jurisdiction. Health & Safety Code § 25249.7. “Threaten to
25 violate” is defined to mean “to create a condition in which there is a substantial probability that a
26 violation will occur.” Health & Safety Code § 25249.11(e). Proposition 65 provides for civil
27 penalties up to \$2,500 per day for each violation of Proposition 65.
28

1 **FIRST CAUSE OF ACTION**

2 **(Violations of the Health & Safety Code § 25249.6)**

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

5 36. By placing the Products into the stream of commerce, Defendants are
6 persons in the course of doing business within the meaning of Health & Safety Code § 25249.11.

7 37. Defendants know that average use of the Products will expose users of the
8 Products to DEHP. Defendants intend that the Products be used in a manner that results in users
9 of the Products being exposed to DEHP contained in the Products.

10 38. Defendants have failed, and continue to fail, to provide clear and
11 reasonable warnings regarding the carcinogenicity and/or reproductive toxicity of the DEHP
12 contained in their Products.

13 39. DEHP is a chemical listed by the State of California as known to cause
14 cancer and birth defects and other reproductive harm.

15 40. By committing the acts alleged above, the Defendants have at all times
16 relevant to this complaint violated Proposition 65 by knowingly and intentionally exposing
17 individuals to DEHP without first giving clear and reasonable warnings to such individuals
18 regarding the carcinogenicity and/or reproductive toxicity of DEHP.

19 Wherefore, Plaintiff prays judgment against the Defendants, as set forth hereafter.

20 **PRAYER FOR RELIEF**

21 Wherefore, Plaintiff prays for judgment against Defendants as follows:

22 1. That the Court, pursuant to Health & Safety Code § 25249.7(b), assess
23 civil penalties against each of the Defendants in the amount of \$2,500 per day for each violation
24 of Proposition 65 according to proof;

25 2. That the Court, pursuant to Health & Safety Code § 25249.7(a),
26 preliminarily and permanently enjoin Defendants from offering the Products for sale in
27 California without providing clear and reasonable warnings, as Plaintiff shall specify in further
28 application to the Court;

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3. That the Court, pursuant to Health & Safety Code § 25249.7(a), order Defendants to take action to stop ongoing unwarned exposures to DEHP resulting from use of Products sold by Defendants, as Plaintiff shall specify in further application to the Court;

4. That the Court, pursuant to Code of Civil Procedure § 1021.5 and/or any other applicable theory, grant Plaintiff its reasonable attorneys' fees and costs of suit; and

5. That the Court utilize its inherent equitable power to grant such other and further relief as may be just and proper.

Dated: December 21, 2009

Respectfully submitted,
LEXINGTON LAW GROUP



Mark N. Todzo
Attorneys for Plaintiff
CENTER FOR ENVIRONMENTAL
HEALTH