

1 Gregory M. Sheffer, State Bar No. 173124
2 THE CHANLER GROUP
3 38 Miller Avenue, #102
4 Mill Valley, CA 94941
5 Telephone: (415) 459-1411
6 Facsimile: (415) 459-1911

7 Attorneys for Plaintiff
8 RUSSELL BRIMER

CASE MANAGEMENT CONFERENCE SET

NOV 19 2010 9⁰⁰ AM

DEPARTMENT 212

Endorsed copy
FILED
San Francisco County Superior Court

JUN 18 2010

CLERK OF THE COURT
BY: P. NATT
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE CITY AND COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION

12 RUSSELL BRIMER,
13 Plaintiff,

14 v.

15 JACK SCHWARTZ SHOES, INC.; and DOES
16 1-600, inclusive,
17 Defendant.

Case No.

CGC-10-500815

**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 infant footwear sold in California.

5 2. By this Complaint, Plaintiff seeks to remedy Defendant's continuing failures to
6 warn California citizens about their exposure to lead present in or on certain infant footwear that
7 Defendant manufactures, distributes and/or offers for sale to consumers throughout the State of
8 California.

9 3. Elevated levels of lead are present and found in and on certain types of infant
10 footwear, such as Lugz Drifter Boots for Infants (#676730 10310 8), that Defendants
11 manufacture, distribute, and/or offer for sale to consumers and businesses 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, 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. Defendant Jack Schwartz Shoes, Inc. manufactures, distributes, and/or sells infant
25 footwear containing excessive levels of the Listed Chemical on external surfaces, including, but
26 not limited to Lugz Drifter Boots, for Infants, IDRIV-7651 (#676730 10310 8)

27 8. All such infant footwear as listed above in paragraph 7 shall hereinafter be
28 referred to as the "Products."

1 18. Distributor Defendants distribute, exchange, transfer, process and/or transport one
2 or more of the Products to individuals, businesses or retailers for sale or use in the State of
3 California.

4 19. Defendant DOES 401-600 ("Retailer Defendants") are each persons doing
5 business within the meaning of California Health & Safety Code § 25249.11.

6 20. Retailer Defendants offer the Products for sale primarily to individuals in the
7 State of California.

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

13 22. Defendant Jack Schwartz, Retailer Defendants, Distributor Defendants and
14 Manufacturer Defendants shall hereafter be collectively referred to as "Defendants"

15 **VENUE AND JURISDICTION**

16 23. Venue is proper in the San Francisco County Superior Court, pursuant to Code of
17 Civil Procedure §§ 394, 395, 395.5, because this Court is a court of competent jurisdiction,
18 because one or more instances of wrongful conduct occurred, and continues to occur, in the City
19 and County of San Francisco and/or because Defendant conducted, and continue to conduct,
20 business in this County with respect to the Products.

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

25 25. The California Superior Court has jurisdiction over Defendant based on Plaintiff's
26 information and good faith belief that each Defendant is a person, firm, corporation or
27 association that either are citizens of the State of California, have sufficient minimum contacts in
28 the State of California, or otherwise purposefully avail themselves of the California market.

1 Defendants' purposeful availment renders the exercise of personal jurisdiction by California
2 courts consistent with traditional notions of fair play and substantial justice.

3 **FIRST CAUSE OF ACTION**

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

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

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

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

15 29. On December 15, 2009, a sixty-day notice of violation, together with the requisite
16 certificate of merit, was provided to Jack Schwartz and various public enforcement agencies
17 stating that as a result of Jack Schwartz's sales of the products listed above in paragraph 7,
18 purchasers and users in the State of California were being exposed to the Listed Chemical
19 resulting from the reasonably foreseeable uses of the Products, without the individual purchasers
20 and users first having been provided with a “clear and reasonable warning” regarding such toxic
21 exposures; and

22 30. Defendants have engaged in the manufacture, distribution and/or offering of the
23 Products for sale or use in violation of California Health & Safety Code § 25249.6 and
24 Defendants' manufacture, distribution and/or offering of the Products for sale or use in violation
25 of California Health & Safety Code § 25249.6 has continued to occur beyond Defendants'
26 receipt of Plaintiff's sixty-day notice of violation. Plaintiff further alleges and believes that such
27 violations will continue to occur into the future.

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

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

6 33. Defendants knew or should have known that the Products manufactured,
7 distributed, and/or offered for sale or use by Defendants in California contained the Listed
8 Chemical.

9 34. The Listed Chemical was present in or on the Products in such a way as to expose
10 individuals to the Listed Chemical through dermal contact and/or ingestion during the reasonably
11 foreseeable use of the Products.

12 35. The normal and reasonably foreseeable use of the Products has caused and
13 continues to cause consumer exposures to the Listed Chemical, as such exposure is defined by
14 27 CCR § 25602(b).

15 36. Defendants had knowledge that the normal and reasonably foreseeable use of the
16 Products would expose individuals to the Listed Chemical through dermal contact and/or
17 ingestion.

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

22 38. Defendants failed to provide a "clear and reasonable warning" to those consumers
23 and/or other individuals in the State of California who were or who could become exposed to the
24 Listed Chemical through dermal contact and/or ingestion during the reasonably foreseeable use
25 of the Products.

26 39. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
27 directly by California voters, individuals exposed to the Listed Chemical through dermal contact
28 and/or ingestion resulting from the reasonably foreseeable use of the Products, sold by

1 Defendants without a "clear and reasonable warning," have suffered, and continue to suffer,
2 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.

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

6 41. As a consequence of the above-described acts, California Health & Safety Code
7 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against Defendant.

8 42. Wherefore, Plaintiff prays for judgment against Defendants, and each of them, as
9 set forth hereinafter.

10 **PRAYER FOR RELIEF**

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

12 1. That the Court assess civil penalties against Defendants, and each of them, in the
13 amount of \$2,500 per day for each violation alleged herein (H&S Code § 25249.7(b));

14 2. That the Court preliminarily and permanently enjoin Defendants, and each of
15 them, from manufacturing, distributing or offering the Products for sale or use in California,
16 without providing "clear and reasonable warnings" as defined by 27 CCR § 25601, as to the
17 harms associated with exposures to the Listed Chemical (H&S Code § 25249.7(a));


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

19 4. That the Court grants such other and further relief as may be just and proper.

20 Respectfully Submitted,

21 Dated: June 3, 2010

THE CHANLER GROUP

22
23 By: 
24 Gregory M. Sheffer
25 Attorneys for Plaintiff
26 RUSSELL BRIMER
27
28