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FILED

MAY 05 2011

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: D. Taylor, Deputy

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

12 RUSSELL BRIMER,

13 Plaintiff

14 v.

15 SA&E INTERNATIONAL BAGS &
16 ACCESSORIES, LLC., TUESDAY
17 MORNING CORPORATION,
18 BURLINGTON COAT FACTORY
19 WAREHOUSE CORPORATION
and DOES 1-600,

20 Defendants

Case No. CIV 1006338

**FIRST AMENDED 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 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 certain Tote bags sold in California.

5 2. By this Complaint, Plaintiff seeks to remedy Defendants’ continuing failures to
6 warn California citizens about their exposure to Lead and Di(2-ethylhexyl)phthalate (“DEHP”)
7 present in and on certain tote bags.

8 3. Elevated levels of Lead and DEHP have been identified in and on such tote bags
9 that Defendants manufacture, distribute, and/or offer for sale to consumers and businesses
10 throughout the State of California.

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

16 5. On February 27, 1987, the State listed Lead as a chemical known to cause birth
17 defects and other reproductive harm. Lead became subject to the warning requirement one year
18 later and was therefore subject to the “clear and reasonable warning” requirements of Proposition
19 65, beginning on February 27, 1988. (*27 CCR § 27001(c); Cal. Health & Safety Code*
20 *§ 25249.8.*)

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

26 7. Lead and DEHP shall hereinafter be collectively referred to as the “Listed
27 Chemicals.”

28 8. Defendant SA&E International Bags & Accessories, LLC, Tuesday Morning

1 Corporation and Burlington Coat Factory Warehouse Corporation manufacture, distribute, and/or
2 sell tote bags containing excessive levels of the Listed Chemicals, including, but not limited to
3 Work Essentials style #TH2189 (#7 68410 21890 2), American Classic Tote Bag style #TH2436
4 (#7 68410 24360 7) and 15” Carry-On Bag style #TL3339 (#7 68410 33391 9).

5 9. All such organizer bags as listed above in paragraph 8 shall hereinafter be referred
6 to as the “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
12 injunctive and permanent injunctive relief to compel Defendants to provide purchasers or users
13 of the Products with the required warning regarding the health hazards of the Listed Chemicals.
14 (*Cal. 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 SA&E International Bags & Accessories, LLC (“SA&E”), is a person
23 doing business within the meaning of California Health & Safety Code § 25249.11.

24 15. Defendant SA&E manufactures, distributes, and/or offers the Products for sale or
25 use in the State of California or implies by their conduct that they manufacture, distribute and/or
26 offer the Products for sale or use in the State of California.

27 16. Defendant Tuesday Morning Corporation (“Tuesday Morning”) is a person doing
28 business within the meaning of California Health & Safety Code § 25249.11.

1 17. Defendant Tuesday morning distributes, and/or offers the Products for sale or use
2 in the State of California or implies by their conduct that they distribute and/or offer the Products
3 for sale or use in the State of California.

4 18. Defendant Burlington Coat Factory Warehouse Corporation (“Burlington Coat”)
5 is a person doing business within the meaning of California Health & Safety Code § 25249.11.

6 19. Defendant Burlington Coat distributes, and/or offers the Products for sale or use
7 in the State of California or implies by their conduct that they distribute and/or offer the Products
8 for sale or use in the State of California.

9 20. Defendant DOES 1-200 (“Manufacturer Defendants”) are each persons doing
10 business within the meaning of California Health & Safety Code § 25249.11.

11 21. Manufacturer Defendants engage in the process of research, testing, designing,
12 assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the
13 process of research, testing, designing, assembling, fabricating and/or manufacturing, one or
14 more of the Products for sale or use in the State of California.

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

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

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

22 25. Retailer Defendants offer the Products for sale primarily to individuals in the
23 State of California.

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

1 33. Proposition 65 states, “No person in the course of doing business shall knowingly
2 and intentionally expose any individual to a chemical known to the state to cause cancer or
3 reproductive toxicity without first giving clear and reasonable warning to such individual....”

4 (*Id.*)

5 34. On February 12, 2010, a sixty-day notice of violation, together with the requisite
6 certificate of merit, was provided to SA&E and various public enforcement agencies stating that
7 as a result of SA&E’s manufacture and sale of the Work Essentials type product listed above in
8 paragraph 8, purchasers and users in the State of California were being exposed to the Lead
9 resulting from the reasonably foreseeable uses of the Products, without the individual purchasers
10 and users first having been provided with a “clear and reasonable warning” regarding such toxic
11 exposures

12 35. On February 24, 2011, a sixty-day notice of violation, together with the requisite
13 certificate of merit, was provided to SA&E, Tuesday Morning, Burlington Coat and various
14 public enforcement agencies stating that as a result of SA&E’s, Tuesday Morning’s and
15 Burlington Coat’s manufacture and sale of the Products listed above in paragraph 8, purchasers
16 and users in the State of California were being exposed to the Listed Chemicals resulting from
17 the 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 36. Defendants have engaged in the manufacture, distribution and/or offering of the
20 Products for sale or use in violation of California Health & Safety Code § 25249.6 and plaintiff
21 is informed and believes that Defendants’ manufacture, distribution and/or offering of the
22 Products for sale or use in violation of California Health & Safety Code § 25249.6 has continued
23 to occur beyond Defendants’ receipt of Plaintiff’s sixty-day notices of violation. Plaintiff further
24 alleges and believes that such violations will continue to occur into the future.

25 37. After receipt of the claims asserted in the sixty-day notices of violation, the
26 appropriate public enforcement agencies have failed to commence and diligently prosecute any
27 cause of action against Defendants under Proposition 65.

28

1 38. The Products manufactured, distributed, and/or offered for sale or use in
2 California by Defendants contained the Listed Chemicals.

3 39. Defendants knew or should have known that the Products manufactured,
4 distributed, and/or offered for sale or use by Defendant in California contained the Listed
5 Chemicals.

6 40. The Listed Chemicals were present in or on the Products in such a way as to
7 expose individuals to the Listed Chemicals through dermal contact and/or ingestion during the
8 reasonably foreseeable use of the Products.

9 41. The normal and reasonably foreseeable use of the Products has caused and
10 continues to cause consumer exposures to the Listed Chemicals, as such exposure is defined by
11 27 CCR § 25602(b).

12 42. Defendants had knowledge that the normal and reasonably foreseeable use of the
13 Products would expose individuals to the Listed Chemicals through dermal contact and/or
14 ingestion.

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

19 44. Defendants failed to provide a “clear and reasonable warning” to those consumers
20 and/or other individuals in the State of California who were or who could become exposed to the
21 Listed Chemicals through dermal contact and/or ingestion during the reasonably foreseeable use
22 of the Products.

23 45. Contrary to the express policy and statutory prohibition of Proposition 65, enacted
24 directly by California voters, individuals exposed to the Listed Chemical through dermal contact
25 and/or ingestion resulting from the reasonably foreseeable use of the Products, sold by
26 Defendants without a “clear and reasonable warning,” have suffered, and continue to suffer,
27 irreparable harm, for which harm they have no plain, speedy or adequate remedy at law.
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