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RUSSELL BRIMER

**ENDORSED
FILED**
San Francisco County Superior Court

FEB 10 2012

CLERK OF THE COURT

By: RONNIE OTERO
Deputy Clerk

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

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 AMAZON.COM, INC.; HANCOCK
16 FABRICS, INC.; KMART CORPORATION;
PROVO CRAFT & NOVELTY, INC.;
17 SCRAPBOOK ISLAND; SEARS HOLDING
CORPORATION; WAL-MART STORES,
18 INC.; and DOES 1 through 150, inclusive,

19 Defendants.

Case No. CGC-11-516509

**FIRST AMENDED 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
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 lead and di(2-ethylhexyl)phthalate (“DEHP”), toxic
5 chemicals found in certain storage binders, binder inserts/pages, storage binders with storage
6 pages, shoulder bags, and tote bags with keychains sold in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failures to
8 warn California citizens about their exposures to lead and DEHP present in certain storage
9 binders, binder inserts/pages, storage binders with storage pages, shoulder bags, and tote bags
10 with keychains that defendants import, manufacture, distribute, and/or offer for sale to
11 consumers throughout the state of California.

12 3. High levels of lead and/or DEHP are commonly found in storage binders, binder
13 inserts/pages, storage binders with storage pages, shoulder bags, and tote bags with keychains
14 that defendants manufacture, distribute, and/or offer for sale to consumers throughout the State
15 of California.

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

21 5. On February 27, 1987, California identified and listed lead as a chemical known
22 to cause birth defects and other reproductive harm. Lead 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 February 27, 1988. (*27 CCR Section 27001(c);*
25 *Cal. Health & Safety Code Sections 25249.8 & 25249.10(b).*)

26 6. On October 24, 2003, California identified and listed DEHP as a chemical known
27 to cause birth defects and other reproductive harm. DEHP became subject to the “clear and
28

1 reasonable warning” requirements of Proposition 65 one year later on October 24, 2004. (27
2 *CCR Section 27001(c); Cal. Health & Safety Code Sections 25249.8 & 25249.10(b).*)

3 7. Defendants import, manufacture, distribute, and/or sell certain storage binders,
4 binder inserts/pages, storage binders with storage pages, shoulder bags, and tote bags with
5 keychains containing excessive levels of DEHP and/or lead, as follows:

6 a. Defendant PROVO CRAFT & NOVELTY INC. manufactures,
7 imports, distributes, and/or sells: (i) “*Cuttlebug Storage Binders, #37-1575*
8 *(#0 93573 41575 3)*” containing DEHP; (ii) “*Cricut Shoulder Bags, #29-0692*
9 *(#0 93573 10692 7)*” contained lead; (iii) “*Cuttlebug A2 Binder Inserts, #37-1576*
10 *(#0 93573 41576 0)*” containing DEHP; (iv) *Cuttlebug 2 x 2 Binder Inserts, #37-*
11 *1577 (#0 93573 41577 7)*” containing DEHP; and (v) “*Cuttlebug Totes, #2000970*
12 *(#0 93573 58871 6)*” with keychains containing DEHP;

13 b. Defendant SCRAPBOOK ISLAND manufactures, imports,
14 distributes, and/or sells “*Cuttlebug Storage Binders, #37-1575 (#0 93573 41575*
15 *3)*” containing lead and DEHP;

16 c. Defendant HANCOCK FABRICS, INC. manufactures, imports,
17 distributes, and/or sells “*Cuttlebug A2 Binder Inserts, #37-1576 (#0 93573 41576*
18 *0)*” containing DEHP;

19 d. Defendant KMART CORPORATION manufactures, imports,
20 distributes, and/or sells “*Cuttlebug Storage Binders, #37-1575 (#0 93573 41575*
21 *3)*” containing lead and DEHP;

22 e. Defendant SEARS HOLDINGS CORPORATION manufactures,
23 imports, distributes, and/or sells “*Cuttlebug Storage Binders, #37-1575 (#0 93573*
24 *41575 3)*” containing lead and DEHP;

25 f. Defendant AMAZON.COM, INC. manufactures, imports,
26 distributes, and/or sells: (i) “*Cuttlebug Storage Binders, #37-1575 (#0 93573*
27 *41575 3)*” containing lead and DEHP; and (ii) *Cuttlebug 2 x 2 Binder Inserts,*
28 *#37-1577 (#0 93573 41577 7)*” containing DEHP; and

1 g. Defendant WAL-MART STORES, INC. manufactures, imports,
2 distributes, and/or sells “Cricut Shoulder Bags, #29-0692 (#0 93573 10692 7)”
3 containing lead.

4 8. The aforementioned “Cuttlebug Storage Binders, #37-1575 (#0 93573 41575 3)”
5 containing lead and DEHP; “Cricut Shoulder Bags, #29-0692 (#0 93573 10692 7)” containing
6 lead; “Cuttlebug A2 Binder Inserts, #37-1576 (#0 93573 41576 0)” containing DEHP;
7 “Cuttlebug 2 x 2 Binder Inserts, #37-1577 (#0 93573 41577 7)” containing DEHP; and
8 “Cuttlebug Totes, #2000970 (#0 93573 58871 6)” with keychain containing DEHP, shall
9 hereinafter be referred to as the “PRODUCTS.” As to each specific defendant, however,
10 PRODUCTS shall refer only to those specific products and chemicals listed for each specific
11 defendant in paragraphs 7(a) through (g) above.

12 9. Lead and DEHP shall collectively hereinafter be referred to as the “LISTED
13 CHEMICALS.” As to each specific defendant, however, LISTED CHEMICALS shall refer
14 only to the specific chemical(s) listed for each specific defendant in paragraphs 7(a) through (g)
15 above.

16 10. Defendants’ failures to warn consumers and/or other individuals in the state of
17 California about their exposures to the LISTED CHEMICALS in conjunction with defendants’
18 sales of the PRODUCTS is a violation of Proposition 65 and subjects defendants to enjoinder
19 of such conduct as well as civil penalties for each such violation.

20 11. As a result of defendants’ violations of Proposition 65, plaintiff seeks preliminary
21 injunctive and permanent injunctive relief to compel defendants to provide purchasers or users
22 of the PRODUCTS with the required warnings regarding the health hazards of the LISTED
23 CHEMICALS in the PRODUCTS. (*Cal. Health & Safety Code § 25249.7(a).*)

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

26 **PARTIES**

27 13. Plaintiff RUSSELL BRIMER, is a citizen of the state of California who is
28 dedicated to protecting the health of California citizens through the elimination or reduction of

1 toxic exposures from consumer products, and brings this action in the public interest pursuant to
2 California Health & Safety Code § 25249.7.

3 14. Defendant AMAZON.COM, INC. (“AMAZON”) is a person doing business
4 within the meaning of California Health & Safety Code § 25249.11.

5 15. Defendant AMAZON imports, manufactures, distributes, and/or offers the
6 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
7 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
8 California.

9 16. Defendant HANCOCK FABRICS, INC. (“HANDCOCK”) is a person doing
10 business within the meaning of California Health & Safety Code § 25249.11.

11 17. Defendant HANCOCK imports, manufactures, distributes, and/or offers the
12 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
13 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
14 California.

15 18. Defendant KMART CORPORATION (“KMART”) is a person doing business
16 within the meaning of California Health & Safety Code § 25249.11.

17 19. Defendant KMART imports, manufactures, distributes, and/or offers the
18 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
19 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
20 California.

21 20. Defendant PROVO CRAFT & NOVELTY, INC. (“PROVO CRAFT”) is a person
22 doing business within the meaning of California Health & Safety Code § 25249.11.

23 21. Defendant PROVO CRAFT imports, manufactures, distributes, and/or offers the
24 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
25 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
26 California.

27 22. Defendant SCRAPBOOK ISLAND (“SCRAPBOOK”) is a person doing business
28 within the meaning of California Health & Safety Code § 25249.11.

1 23. Defendant SCRAPBOOK imports, manufactures, distributes, and/or offers the
2 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
3 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
4 California.

5 24. Defendant SEARS HOLDING CORPORATION (“SEARS”) is a person doing
6 business within the meaning of California Health & Safety Code § 25249.11.

7 25. Defendant SEARS imports, manufactures, distributes, and/or offers the
8 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
9 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
10 California.

11 26. Defendant WAL-MART STORES, INC. (“WAL-MART”) is a person doing
12 business within the meaning of California Health & Safety Code § 25249.11.

13 27. Defendant WAL-MART imports, manufactures, distributes, and/or offers the
14 PRODUCTS for sale or use in the state of California or implies by its conduct that it imports,
15 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of
16 California.

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

19 29. MANUFACTURER DEFENDANTS engage in the process of researching,
20 testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that
21 they engage in the process of researching, testing, designing, assembling, fabricating and/or
22 manufacturing, one or more of the PRODUCTS for sale or use in the state of California.

23 30. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
24 doing business within the meaning of California Health & Safety Code § 25249.11.

25 31. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process and/or
26 transport the PRODUCTS to individuals, businesses or retailers for sale or use in the state of
27 California.

28

1 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
2 California 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 39. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
6 Paragraphs 1 through 38, inclusive.

7 40. 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 that they must be informed "about exposures to chemicals that cause cancer, birth defects and
10 other reproductive harm." (*Cal. Health & Safety Code § 25249.6.*)

11 41. 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 42. On or about October 29, 2010, Brimer issued a sixty-day notice of violation,
16 together with the requisite Certificate of Merit, to PROVO CRAFT and various public
17 enforcement agencies stating that as a result of the DEFENDANTS' sales of certain storage
18 binders, purchasers and users in the state of California were being exposed lead resulting from
19 the reasonably foreseeable uses of the storage binders, without the individual purchasers and
20 users first having been provided with a "clear and reasonable warning" regarding such toxic
21 exposures. The allegations with respect to this notice are set forth in *Brimer v. Provo Craft, et*
22 *al. (San Francisco Superior Court Case No. CGC-11-508609).*

23 43. On or about September 1, 2011, Brimer issued a supplemental sixty-day notice of
24 violation, together with the requisite Certificate of Merit, to PROVO CRAFT and various public
25 enforcement agencies stating that as a result of the DEFENDANTS' sales of certain storage
26 binders, purchasers and users in the state of California were being exposed to lead and DEHP
27 resulting from the reasonably foreseeable uses of the storage binders, without the individual
28

1 purchasers and users first having been provided with a “clear and reasonable warning”
2 regarding such toxic exposures.

3 44. On or about November 17, 2011, Brimer issued a second supplemental sixty-day
4 notice of violation, together with the requisite Certificate of Merit, to AMAZON, HANCOCK,
5 KMART, PROVO CRAFT, SCRAPBOOK, SEARS, WAL-MART, and various public
6 enforcement agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS ,
7 purchasers and users in the state of California were being exposed to one or more of the
8 LISTED CHEMICALS resulting from the reasonably foreseeable uses of the PRODUCTS ,
9 without the individual purchasers and users first having been provided with a “clear and
10 reasonable warning” regarding such toxic exposures.

11 45. DEFENDANTS have engaged in the importation, manufacture, distribution,
12 and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety
13 Code § 25249.6, and DEFENDANTS’ importation, manufacture, distribution, and/or offering of
14 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 has
15 continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day notices of violation.
16 Plaintiff further alleges and believes that such violations will continue to occur into the future.

17 46. After receipt of the claims asserted in the sixty-day notices of violation, the
18 appropriate public enforcement agencies have failed to commence and diligently prosecute a
19 cause of action against DEFENDANTS under Proposition 65.

20 47. The PRODUCTS imported, manufactured, distributed, and/or offered for sale or
21 use in California by DEFENDANTS contained one or more of the LISTED CHEMICALS
22 above the allowable State limit.

23 48. DEFENDANTS knew or should have known that the PRODUCTS imported,
24 manufactured, distributed, and/or offered for sale or use by DEFENDANTS in California
25 contained one or more of the LISTED CHEMICALS.

26 49. The LISTED CHEMICALS were present in or on the PRODUCTS in such a way
27 as to expose individuals to one or more of the LISTED CHEMICALS through dermal contact
28 and/or ingestion during the reasonably foreseeable use of the PRODUCTS.

1 50. The normal and reasonably foreseeable use of the PRODUCTS has caused and
2 continues to cause consumer exposures to one or more of the LISTED CHEMICALS, as such
3 exposure is defined by 27 CCR § 25602(b).

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

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

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

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

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

24 56. As a consequence of the above-described acts, California Health & Safety Code
25 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
26 DEFENDANTS.
27
28

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 § 25249.7(b), assess
4 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 § 25249.7(a),
7 preliminarily and permanently enjoin DEFENDANTS from importing, manufacturing,
8 distributing, and/or offering the PRODUCTS for sale or use in California, without providing
9 "clear and reasonable warnings" as defined by 27 CCR § 25601, as to the harms associated with
10 exposures 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
14
15 Dated: 2/10/12

Respectfully submitted,

THE CHANLER GROUP

17
18 By: 
19 Josh Voorhees
20 Attorneys for Plaintiff
21 RUSSELL BRIMER