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ENDORSED
FILED
ALAMEDA COUNTY

OCT 01 2012

CLERK OF THE SUPERIOR COURT
By Kmel Dhillon
Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14 RUSSELL BRIMER,
15 Plaintiff,
16 v.

17 SEARS, ROEBUCK AND CO.; SEARS
18 HOLDINGS CORPORATION; O'REILLY
19 AUTOMOTIVE, INC.; and DOES 1-150,
20 inclusive,
21 Defendants.

Case No. RG12 650009

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code. § 25249.6 *et seq.*)

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BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff RUSSELL BRIMER
3 in 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 and di(2-ethylhexyl)phthalate (“DEHP”), toxic chemicals found
5 in tools with grips sold in California and lead, a toxic chemical found in trolley jack handles.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn
7 California citizens about the risk of exposure to lead and DEHP present in and on the trolley jack
8 handles and tools with grips manufactured, distributed and/or offered for sale or use to consumers
9 throughout the State of California and to lead present in and on the trolley jack handles
10 manufactured, distributed and/or offered for sale or use to consumers throughout the State of
11 California.

12 3. High levels of lead and DEHP are commonly found in and on either the trolley jack
13 handles or tools with grips, or both, that defendants manufacture, distribute and/or offer for sale to
14 consumers throughout the State of California.

15 4. Under The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
16 California Health & Safety Code § 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course
17 of doing business shall knowingly and intentionally expose any individual to a chemical known to
18 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
19 to such individual ...” (Cal. Health & Safety Code § 25249.6.)

20 5. On February 27, 1987, the State of California identified and listed lead as a
21 chemical known to cause birth defects and other reproductive harm. Lead became subject to the
22 “clear and reasonable warning” requirements of Proposition 65 one year later on February 27,
23 1988. (Cal. Code Regs., tit. 27, § 27001(c); Cal. Health & Safety Code §§ 25249.8 &
24 25249.10(b).)

25 6. On October 24, 2003, California identified and listed DEHP pursuant to Proposition
26 65 as a chemical known to cause birth defects and other reproductive harm. DEHP became
27 subject to the “clear and reasonable warning” requirements of the Act one year later on October

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1 24, 2004. (Cal. Code Regs., tit. 27, § 27001(c); Cal. Health & Safety Code §§ 25249.8 &
2 25249.10(b).) Lead and DEHP are referred to hereinafter as the “LISTED CHEMICALS.”

3 7. Defendants manufacture, distribute, and/or sell trolley jack handles with grips that
4 contain excessive levels of lead, including, but not limited to, the *GM Performance Parts 2 Ton*
5 *Hydraulic Trolley Jack, GM7002 (#7 00305 67002 0)* and tools with grips that contain excessive
6 levels of lead and DEHP, including, but not limited to, the *UltraSteel 34 Piece ¼” Drive Ratchet,*
7 *Bit And Socket Set, TSO2265J (#0 47669 00265 3).* All such trolley jack handles with grips
8 containing lead, and tools with grips containing lead and DEHP are referred to collectively
9 hereinafter as “PRODUCTS.”

10 8. Defendants’ failure to warn consumers and/or other individuals in the State of
11 California about their exposure to the LISTED CHEMICALS in conjunction with defendants’
12 sale of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder of
13 such conduct as well as civil penalties for each violation. (Cal. Health & Safety Code
14 § 25249.7(a) & (b)(1).)

15 9. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
16 permanent injunctive relief to compel defendants to provide purchasers or users of the
17 PRODUCTS with the required warning regarding the health hazards of the LISTED
18 CHEMICALS. (Cal. Health & Safety Code § 25249.7(a).)

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

21 **PARTIES**

22 11. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated
23 to protecting the health of California citizens through the elimination or reduction of toxic
24 exposures from consumer products, and he brings this action in the public interest pursuant to
25 California Health & Safety Code § 25249.7(d).

26 12. Defendant SEARS, ROEBUCK AND CO. (“SEARS”) is a person in the course of
27 doing business within the meaning of California Health & Safety Code § 25249.11.

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

4 14. Defendant SEARS HOLDINGS CORPORATION (“SEARS HOLDINGS”) is a
5 person in the course of doing business within the meaning of California Health & Safety Code §
6 25249.11.

7 15. SEARS HOLDINGS manufactures, distributes and/or offers the PRODUCTS for
8 sale or use in the State of California, or implies by its conduct that it manufactures, distributes
9 and/or offers the PRODUCTS for sale or use in the State of California.

10 16. Defendant O’REILLY AUTOMOTIVE, INC. (“O’REILLY”) is a person in the
11 course of doing business within the meaning of California Health & Safety Code § 25249.11.

12 17. O’REILLY manufactures, distributes and/or offers the PRODUCTS for sale or use
13 in the State of California, or implies by its conduct that it manufactures, distributes and/or offers
14 the PRODUCTS for sale or use in the State of California.

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

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

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

24 21. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or
25 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in
26 the State of California.

27 22. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each persons in
28 the course of doing business within the meaning of California Health & Safety Code § 25249.11.

1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65 - Against All Defendants)**

3 29. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 28, inclusive.

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

9 31. Proposition 65 states, “[n]o person in the course of doing business shall knowingly
10 and intentionally expose any individual to a chemical known to the state to cause cancer or
11 reproductive toxicity without first giving clear and reasonable warning to such individual ...” (*Id.*)

12 32. On or about January 19, 2012, plaintiff’s Supplemental 60-Day Notice of Violation,
13 together with the requisite certificate of merit, was provided to SEARS, SEARS HOLDINGS,
14 O’REILLY and certain requisite public enforcement agencies stating that, as a result of the
15 DEFENDANTS’ sales of the PRODUCTS containing the LISTED CHEMICALS, purchasers and
16 users in the State of California were being exposed to the LISTED CHEMICALS resulting from
17 the reasonably foreseeable use of the PRODUCTS, without the individual purchasers and users
18 first having been provided with a “clear and reasonable warning” regarding such toxic exposures,
19 as required by Proposition 65.

20 33. DEFENDANTS have engaged in the manufacture, distribution and/or offering of
21 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6, and
22 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s
23 Supplemental 60-Day Notice of Violation. Plaintiff further alleges that DEFENDANTS’
24 violations are ongoing and continuous in nature and, as such, will continue to occur in the future.

25 34. After receiving the claims asserted in the Supplemental 60-Day Notice of Violation,
26 the appropriate public enforcement agencies have failed to commence and diligently prosecute a
27 cause of action against DEFENDANTS under Proposition 65.

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1 35. The PRODUCTS manufactured, distributed and/or offered for sale or use in
2 California by DEFENDANTS contain the LISTED CHEMICALS in amounts above the
3 allowable state limits such that they require a “clear and reasonable” Proposition 65 warning.

4 36. DEFENDANTS knew or should have known that the PRODUCTS they
5 manufactured, distributed and/or offered for sale or use in California contain the LISTED
6 CHEMICALS.

7 37. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
8 to expose individuals through dermal contact and/or ingestion during reasonably foreseeable use.

9 38. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
10 continues to cause, consumer exposures to the LISTED CHEMICALS, as such exposures are
11 defined by Cal. Code Regs., tit. 27, § 25602(b).

12 39. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
13 the PRODUCTS exposes individuals to the LISTED CHEMICALS through dermal contact and/or
14 ingestion.

15 40. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from
16 the reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental
17 participation in the manufacture, distribution and/or offering of the PRODUCTS for sale or use to
18 individuals in the State of California.

19 41. DEFENDANTS failed to provide a “clear and reasonable warning” to those
20 consumers and/or other individuals in the State of California who were or who could become
21 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the
22 reasonably foreseeable use of the PRODUCTS.

23 42. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
24 directly by California voters, individuals exposed to the LISTED CHEMICALS through dermal
25 contact 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 they have no plain, speedy or adequate remedy at law.

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