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ENDORSED  
FILED  
ALAMEDA COUNTY  
  
DEC 11 2012  
  
CLERK OF THE SUPERIOR COURT  
By MARGARET J. DOWNIE  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA  
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

ZEBRA PEN CORP.; and DOES 1-150,  
inclusive,

Defendants.

Case No. RG12659297

**COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF**

(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  
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 di(2-ethylhexyl)phthalate (“DEHP”), a toxic chemical found in pencils  
5 with erasers sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to warn  
7 California citizens about the risk of exposure to DEHP present in and on the pencils with erasers  
8 manufactured, distributed, and offered for sale or use to consumers throughout the State of  
9 California.

10 3. Detectable levels of DEHP are commonly found in and on the pencils with erasers  
11 that defendants manufacture, distribute, and offer for sale to consumers throughout the State of  
12 California.

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

18 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed  
19 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became  
20 subject to the “clear and reasonable warning” requirements of the act one year later on October 24,  
21 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).  
22 DEHP is referred to hereinafter as the “LISTED CHEMICAL.”

23 6. Defendants manufacture, distribute, import, sell, and/or offer for sale pencils with  
24 erasers containing DEHP without a warning, including, but not limited to, the *Zebra Cadoozles*  
25 *Mechanical Pencil* (#0 45888 51211 5). All such pencils with erasers containing DEHP are  
26 referred to collectively hereinafter as “PRODUCTS.”

27 7. Defendants’ failure to warn consumers and other individuals in the State of  
28 California about their exposure to the LISTED CHEMICAL in conjunction with defendants’ sales

1 of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder of such  
2 conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

3 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and  
4 permanent injunctive relief to compel defendants to provide purchasers or users of the  
5 PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL.  
6 Health & Safety Code § 25249.7(a).

7 9. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil  
8 penalties against defendants for their violations of Proposition 65.

9 **PARTIES**

10 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is dedicated  
11 to protecting the health of California citizens through the elimination or reduction of toxic  
12 exposures from consumer products; and he brings this action in the public interest pursuant to  
13 Health and Safety Code section 25249.7(d).

14 11. Defendant ZEBRA PEN CORP. ("ZEBRA PEN") is a person in the course of doing  
15 business within the meaning of Health and Safety Code section 25249.11.

16 12. ZEBRA PEN manufactures, imports, distributes, sells, and/or offers the PRODUCTS  
17 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,  
18 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

19 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons  
20 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

21 14. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate, and  
22 manufacture, or imply by their conduct that they research, test, design, assemble, fabricate, and  
23 manufacture one or more of the PRODUCTS offered for sale or use in the State of California.

24 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person in  
25 the course of doing business within the meaning of Health and Safety Code section 25249.11.

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

1 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in the  
2 course of doing business within the meaning of Health and Safety Code section 25249.11.

3 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the State  
4 of California.

5 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are  
6 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to  
7 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis alleges,  
8 that each of the fictitiously named defendants is responsible for the acts and occurrences alleged  
9 herein. When ascertained, their true names shall be reflected in an amended complaint.

10 20. ZEBRA PEN, MANUFACTURER DEFENDANTS, DISTRIBUTOR  
11 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred  
12 to as “DEFENDANTS.”

13 **VENUE AND JURISDICTION**

14 21. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil  
15 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,  
16 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of  
17 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because  
18 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the  
19 PRODUCTS.

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

24 23. The California Superior Court has jurisdiction over DEFENDANTS based on  
25 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or  
26 association that is a citizen of the State of California, has sufficient minimum contacts in the State  
27 of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS’

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

3 **FIRST CAUSE OF ACTION**

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

5 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,  
6 Paragraphs 1 through 23, inclusive.

7 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic  
8 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be informed  
9 about exposures to chemicals that cause cancer, birth defects, or other reproductive harm.”

10 26. Proposition 65 states, “[n]o person in the course of doing business shall knowingly  
11 and intentionally expose any individual to a chemical known to the state to cause cancer or  
12 reproductive toxicity without first giving clear and reasonable warning to such individual . . . .”  
13 Health & Safety Code § 25249.6.

14 27. On March 8, 2012, plaintiff’s sixty-day notice of violation, together with the requisite  
15 certificate of merit, was provided to ZEBRA PEN and certain public enforcement agencies stating  
16 that, as a result of DEFENDANTS’ sales of the PRODUCTS containing the LISTED CHEMICAL,  
17 purchasers and users in the State of California were being exposed to the LISTED CHEMICAL  
18 resulting from their reasonably foreseeable use of the PRODUCTS, without the individual  
19 purchasers and users first having been provided with a “clear and reasonable warning” regarding  
20 such toxic exposures, as required by Proposition 65.

21 28. DEFENDANTS have engaged in the manufacture, importation, distribution, sale, and  
22 offering of the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6,  
23 and DEFENDANTS’ violations have continued to occur beyond their receipt of plaintiff’s sixty-day  
24 notice of violation. As such, DEFENDANTS’ violations are ongoing and continuous in nature, and  
25 will continue to occur in the future.

26 29. After receiving plaintiff’s sixty-day notice of violation, the appropriate public  
27 enforcement agencies have failed to commence and diligently prosecute a cause of action against  
28 DEFENDANTS under Proposition 65.

1           30.    The PRODUCTS manufactured, imported, distributed, sold, and offered for sale or  
2 use in California by DEFENDANTS contain the LISTED CHEMICAL such that they require a  
3 “clear and reasonable” warning under Proposition 65.

4           31.    DEFENDANTS knew or should have known that the PRODUCTS they  
5 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED  
6 CHEMICAL.

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

10          33.    The normal and reasonably foreseeable uses of the PRODUCTS have caused, and  
11 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are defined  
12 by title 27 of the California Code of Regulations, section 25602(b).

13          34.    DEFENDANTS had knowledge that the normal and reasonably foreseeable uses of  
14 the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact and/or  
15 ingestion.

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

20          36.    DEFENDANTS failed to provide a “clear and reasonable warning” to those  
21 consumers and other individuals in the State of California who were or who would become  
22 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the  
23 reasonably foreseeable uses of the PRODUCTS.

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

1 38. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the  
2 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day for  
3 each violation.

4 39. As a consequence of the above-described acts, Health and Safety Code  
5 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against  
6 DEFENDANTS.

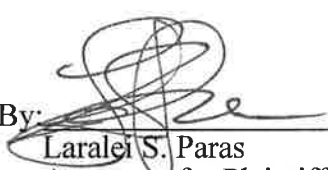
7 **PRAYER FOR RELIEF**

8 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

- 9 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil  
10 penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;
- 11 2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily  
12 and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the  
13 PRODUCTS for sale or use in California without first providing a “clear and reasonable warning”  
14 as defined by title 27 of the California Code of Regulations, section 25601 *et seq.*, as to the harms  
15 associated with exposures the LISTED CHEMICAL;
- 16 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and  
17 4. That the Court grant such other and further relief as may be just and proper.

18 Dated: December 10, 2012

19 Respectfully Submitted,  
20 THE CHANLER GROUP

21 By:   
22 Laralei S. Paras  
23 Attorneys for Plaintiff  
24 RUSSELL BRIMER  
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