

1 Josh Voorhees, State Bar No. 241436
2 Harris A. Weinstein, State Bar No. 282166
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

Attorneys for Plaintiff
RUSSELL BRIMER

ENDORSED

2013 MAR 15 2:44

D. Weinstein
County Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11 UNLIMITED CIVIL JURISDICTION

113CV243043

12 RUSSELL BRIMER,

13 Plaintiff,

14 v.

15 PETCO ANIMAL SUPPLIES, INC.; and
16 DOES 1-150, inclusive,

Defendants.

) Case No. _____

) **COMPLAINT FOR CIVIL PENALTIES**
) **AND INJUNCTIVE RELIEF**

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

BY FAX

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 photo frames and aquarium nets
5 with vinyl/PVC handles sold in California and di(2-ethylhexyl)phthalate (“DEHP”), a toxic
6 chemical found in aquarium nets with vinyl/PVC handles and vinyl/PVC raincoats sold in
7 California.

8 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
9 warn California citizens about the risk of exposure to lead present in and on photo frames and
10 aquarium nets with vinyl/PVC handles, and DEHP present in and on aquarium nets with
11 vinyl/PVC handles and vinyl/PVC raincoats, manufactured, distributed, and offered for sale or
12 use to consumers throughout the State of California.

13 3. 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
16 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
17 warning to such individual . . .” Health & Safety Code § 25249.6.

18 4. 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
21 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
22 25249.10(b).

23 5. Pursuant to Proposition 65, on February 27, 1987, California identified and listed
24 lead as a chemical known to cause birth defects and other reproductive harm. Lead became
25 subject to the “clear and reasonable warning” requirements of the act one year later on February
26 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
27 25249.10(b).

1 6. Defendants manufacture, distribute, and sell photo frames and aquarium nets with
2 vinyl/PVC handles that contain lead in levels that require a warning under Proposition 65
3 including, but not limited to, *\$1 Deals Photo Frame, SKU# 1389734 (#8 00443 14068 0)* and
4 *Petco Aquarium Net, SKU #1190962 (#8 00443 10611 2)*. Defendants also manufacture,
5 distribute, and sell aquarium nets with vinyl/PVC handles and vinyl/PVC raincoats that contain
6 DEHP in levels that require a warning under Proposition 65 including, but not limited to, *Petco*
7 *Aquarium Net, SKU #1190962 (#8 00443 10611 2)* and *Petco Raincoat For Dogs, SKU*
8 *#1344854 (#8 00443 12211 2)*. All such photo frames and aquarium nets with vinyl/PVC
9 handles containing lead and aquarium nets with vinyl/PVC handles and vinyl/PVC raincoats
10 containing DEHP are collectively referred to hereinafter as “PRODUCTS.”

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

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

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

PARTIES

22
23 10. Plaintiff Russell Brimer is a citizen of the State of California who is dedicated to
24 protecting the health of California citizens through the elimination or reduction of toxic
25 exposures from consumer products; and he brings this action in the public interest pursuant to
26 Health and Safety Code section 25249.7(d).

27
28

1 11. Defendant Petco Animal Supplies, Inc. (“PETCO”) is a person in the course of
2 doing business within the meaning of Health and Safety Code section 25249.11.

3 12. PETCO manufactures, distributes, and/or offers the PRODUCTS for sale or use in
4 the State of California, or implies by its conduct that it manufactures, distributes, and/or offers
5 the PRODUCTS for sale or use in the State of California.

6 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each
7 persons in the course of doing business within the meaning of Health and Safety Code section
8 25249.11.

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

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

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

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

20 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
21 State of California.

22 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are
23 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
24 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
25 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
26 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
27
28

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

5 27. On May 24, 2012, plaintiff’s 60-Day Notice of Violation (the “Notice”), together
6 with the requisite Certificate of Merit, was provided to PETCO and certain public enforcement
7 agencies stating that, as a result of DEFENDANTS’ sales of photo frames containing lead,
8 purchasers and users in the State of California were being exposed to lead resulting from the
9 reasonably foreseeable uses of the photo frames, without the individual purchasers and users
10 first having been provided with a “clear and reasonable warning” regarding such toxic
11 exposures, as required by Proposition 65.

12 28. On December 20, 2012, plaintiff’s Supplemental 60-Day Notice of Violation (the
13 “Supplemental Notice”), together with the requisite Certificate of Merit, was provided to
14 PETCO and certain public enforcement agencies stating that, as a result of DEFENDANTS’
15 sales of the PRODUCTS containing lead and DEHP, purchasers and users in the State of
16 California were being exposed to lead and DEHP resulting from the reasonably foreseeable uses
17 of the PRODUCTS, without the individual purchasers and users first having been provided with
18 a “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.
19 The Notice and Supplemental Notice shall collectively be referred to hereinafter as the
20 “Notices.”

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

1 30. After receiving the claims asserted in the Notices, the appropriate public
2 enforcement agencies have failed to commence and diligently prosecute a cause of action
3 against DEFENDANTS under Proposition 65.

4 31. The PRODUCTS manufactured, distributed, and offered for sale or use in
5 California by DEFENDANTS contain lead and DEHP in amounts above the allowable state
6 limits, such that they require a “clear and reasonable” warning under Proposition 65.

7 32. DEFENDANTS knew or should have known that the PRODUCTS they
8 manufactured, distributed, and offered for sale or use in California contained lead and DEHP.

9 33. Lead and DEHP are present in or on the PRODUCTS in such a way as to expose
10 individuals through dermal contact and/or ingestion during reasonably foreseeable use.

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

14 35. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
15 of the PRODUCTS exposed individuals to lead and DEHP through dermal contact and/or
16 ingestion.

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

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

25 38. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
26 directly by California voters, individuals exposed to DEHP and lead through dermal contact
27 and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by
28

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

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

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


9 **PRAYER FOR RELIEF**

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

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

20
21 Dated: March 12, 2013

Respectfully Submitted,
THE CHANLER GROUP

22
23 By: 
24 Harris A. Weinstein
25 Attorneys for Plaintiff
26 RUSSELL BRIMER
27
28