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FILED BY FAX

ALAMEDA COUNTY

November 29, 2012

CLERK OF
THE SUPERIOR COURT
By Alicia Espinoza, Deputy

CASE NUMBER:
RG12658015

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

PETER ENGLANDER,
Plaintiff,
v.
BOSTON AMERICA CORP. and DOES 1-150,
Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff Peter Englander, 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 Di(2ethylhexyl)phthalate (“DEHP”), a toxic chemical found in
5 certain of defendant’s tape measure products manufactured, distributed and/or otherwise sold
6 by defendants in California.

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

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

17 4. DEHP shall hereinafter be referred to as “LISTED CHEMICAL.”

18 5. Significant levels of the LISTED CHEMICAL have been discovered in or on
19 certain adhesive bandages that defendants manufacture, distribute, and/or offer for sale to
20 consumers throughout the State of California including, but not limited to, Hello Kitty
21 Bandages, Item SIL-34067 (#6 11508 17248 1).

22 6. All such bandages containing the LISTED CHEMICAL shall hereinafter be
23 referred to as the “PRODUCTS”.

24 7. Defendants’ failure to warn consumers and/or other individuals in the State of
25 California about their exposures to the LISTED CHEMICAL in conjunction with defendants’
26 sale of the PRODUCTS is a violation of Proposition 65.

27 8. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
28 permanent injunctive relief to compel defendants to provide purchasers or users of the

1 PRODUCTS with the required warning regarding the health hazards of the LISTED
2 CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

3 9. Plaintiff also seeks civil penalties against defendants for their violations of
4 Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

5 **PARTIES**

6 10. Plaintiff Peter Englander is a citizen of the State of California who is dedicated to
7 protecting the health of California citizens through the elimination or reduction of toxic
8 exposures from consumer products, and brings this action in the public interest pursuant to
9 California Health & Safety Code Section 25249.7.

10 11. Defendants BOSTON AMERICA CORP. ("BOSTON AMERICA") is a person
11 doing business within the meaning of California Health & Safety Code Section 25249.11.

12 12. Defendant BOSTON AMERICA manufactures, distributes, and/or offers the
13 PRODUCTS for sale or use in the State of California or implies by its conduct that it
14 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of
15 California.

16 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
17 doing business within the meaning of California Health & Safety Code Section 25249.11.

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

22 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons
23 doing business within the meaning of California Health & Safety Code Section 25249.11.

24 16. 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
26 in the State of California.

27 17. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing
28 business within the meaning of California Health & Safety Code Section 25249.11.

1 18. RETAIL DEFENDANTS offer the PRODUCTS for sale to individuals in the State
2 of California.

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

9 20. BOSTON AMERICA, MANUFACTURER DEFENDANTS, DISTRIBUTOR
10 DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively be referred
11 to hereinafter as "DEFENDANTS".

12 **VENUE AND JURISDICTION**

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

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

22 23. The California Superior Court has jurisdiction over DEFENDANTS based on
23 plaintiff's information and good faith belief that each defendant is a person, firm, corporation
24 or association that either are citizens of the State of California, have sufficient minimum
25 contacts in the State of California, or otherwise purposefully avail themselves of the California
26 market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
27 California courts consistent with traditional notions of fair play and substantial justice.

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1 **FIRST CAUSE OF ACTION**

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

3 24. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 23, inclusive.

5 25. In passing Proposition 65, the citizens of the State of California expressed their
6 intent through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986
7 that they must be “informed about exposures to chemicals that cause cancer, birth defects, or
8 other reproductive harm.”

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

13 27. On June 15, 2012, a sixty-day notice of violation (“60-Day Notice”), together with
14 the requisite Certificate of Merit, was provided to BOSTON AMERICA and various public
15 enforcement agencies stating that as a result of the DEFENDANTS’ sales of the PRODUCTS,
16 purchasers and users in the State of California are being exposed to DEHP resulting from the
17 reasonably foreseeable uses of the PRODUCTS, without the individual purchasers and users
18 first having been provided with a “clear and reasonable warning” regarding such toxic
19 exposures.

20 28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering
21 of the PRODUCTS for sale or use in violation of California Health & Safety Code Section
22 25249.6 and DEFENDANTS’ manufacture, distribution, and/or offering of the PRODUCTS for
23 sale or use in violation of California Health & Safety Code Section 25249.6 has continued to
24 occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day Notice. Plaintiff further alleges and
25 believes that such violations will continue to occur into the future.

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

1 30. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
2 California by DEFENDANTS, contain the LISTED CHEMICAL.

3 31. DEFENDANTS knew or should have known that the PRODUCTS contained the
4 LISTED CHEMICAL.

5 32. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
6 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
7 25602(b), through dermal contact and/or ingestion during the reasonably foreseeable use of
8 the PRODUCTS.

9 33. DEFENDANTS knew or should have known that the reasonably foreseeable use
10 of the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact
11 and/or ingestion.

12 34. DEFENDANTS' participation in the manufacture, distribution and/or offer for
13 sale or use of PRODUCTS to individuals in the State of California was deliberate and non-
14 accidental.

15 35. DEFENDANTS failed to provide a "clear and reasonable warning" to those
16 consumers and/or other individuals in the State of California who were or who could become
17 exposed to the LISTED CHEMICAL during the reasonably foreseeable use of the PRODUCTS.

18 36. Contrary to the express policy and statutory prohibition of Proposition 65,
19 individuals exposed to the LISTED CHEMICAL through dermal contact and/or ingestion
20 resulting from the reasonably foreseeable use of the PRODUCTS, sold by DEFENDANTS
21 without a "clear and reasonable warning", have suffered, and continue to suffer, irreparable
22 harm, for which harm they have no other plain, speedy or adequate remedy at law.

23 37. As a consequence of the above-described acts, DEFENDANTS are liable for a
24 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to
25 California Health & Safety Code Section 25249.7(b).

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

1 PRAYER FOR RELIEF

2 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
3 follows:

4 1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),
5 assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
6 alleged herein;

7 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
8 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
9 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
10 warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to
11 the LISTED CHEMICAL;

12 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

13 4. That the Court grant such other and further relief as may be just and proper.
14

15 Dated: November 29, 2012

Respectfully submitted,

16 THE CHANLER GROUP

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18 By: 

19 Gregory M. Sheffer
20 Attorneys for Plaintiff
21 PETER ENGLANDER
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