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FILED

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KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Dale, Depury

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION

12 RUSSELL BRIMER,
13 Plaintiff,
14 v.
15 BERWIND CONSUMER PRODUCTS LLC;
16 ELMER'S PRODUCTS, INC.; and DOES 1-
17 150, inclusive,
Defendants.

) Case No. CIV 13 02 373

) **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 Di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in
5 vinyl/PVC pen pouches sold in California.

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

10 3. High levels of DEHP are commonly found in and on vinyl/PVC pen pouches that
11 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 § 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 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
21 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
22 25249.10(b).

23 6. Defendants Berwind Consumer Products LLC and Elmer's Products, Inc.
24 manufacture, cause to be manufactured, distribute, cause to be distributed, import, cause to be
25 imported, sell and/or otherwise offer for sale in California vinyl/PVC pen pouches, containing
26 DEHP. Defendants Berwind Consumer Products LLC and Elmer's Products, Inc. also
27 manufacture, cause to be manufactured, distribute, cause to be distributed, import, cause to be
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1 imported, sell and/or otherwise offer for sale in California the *Bienfang Watercolor Brush Pens*,
2 *P15L112 (#0 79946 07801 5)*, containing DEHP. All such vinyl/PVC pen pouches containing
3 DEHP, are hereinafter collectively referred to as "PRODUCTS."

4 7. Defendants' failure to warn consumers and other individuals in the State of
5 California not covered by California's Occupational Health Act, Labor Code § 6300 et seq.
6 about their exposure to DEHP in conjunction with defendants' sales of the PRODUCTS is a
7 violation of Proposition 65, and subjects defendants to enjoinder of such conduct as well as
8 civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

9 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
10 permanent injunctive relief to compel defendants to provide purchasers or users of the
11 PRODUCTS with the required warning regarding the health hazards of DEHP. Health & Safety
12 Code § 25249.7(a).

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

15 PARTIES

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

20 11. Defendant Berwind Consumer Products LLC ("Berwind") is a person in the
21 course of doing business within the meaning of Health and Safety Code § 25249.11.

22 12. Berwind manufactures, distributes, and/or offers the PRODUCTS for sale or use in
23 the State of California, or implies by its conduct that it manufactures, distributes, and/or offers
24 the PRODUCTS for sale or use in the State of California.

25 13. Defendant Elmer's Products, Inc. ("Elmer's") is a person in the course of doing
26 business within the meaning of Health and Safety Code § 25249.11.

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1 14. Elmer's 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
3 the PRODUCTS for sale or use in the State of California.

4 15. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
5 persons in the course of doing business within the meaning of Health and Safety Code
6 § 25249.11.

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

11 17. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person
12 in the course of doing business within the meaning of Health and Safety Code § 25249.11.

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

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

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

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

25 22. BERWIND, ELMER'S, MANUFACTURER DEFENDANTS, DISTRIBUTOR
26 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
27 referred to as "DEFENDANTS."

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1 **VENUE AND JURISDICTION**

2 23. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
3 Procedure §§ 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because one or more instances of wrongful conduct occurred, and continue to occur, in the
5 County of Marin, and/or because DEFENDANTS conducted, and continue to conduct, business
6 in this county with respect to the PRODUCTS.

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

11 25. The California Superior Court has jurisdiction over DEFENDANTS based on
12 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
13 association that is a citizen of the state of California, has sufficient minimum contacts in the
14 state of California, and/or otherwise purposefully avails itself of the California market.
15 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
16 California courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

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

19 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 25, inclusive.

21 27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
22 Enforcement Act of 1986, the People of California expressly declare their right "[t]o be
23 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
24 harm."

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

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

10 30. DEFENDANTS have engaged in the manufacture, distribution, and offering of
11 the PRODUCTS for sale or use in violation of Health and Safety Code § 25249.6, and such
12 violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s Notice. As
13 such, DEFENDANTS’ violations are ongoing and continuous in nature, and will continue to
14 occur in the future.

15 31. After receiving the claims asserted in the Notice, the appropriate public
16 enforcement agencies have failed to commence and diligently prosecute a cause of action
17 against DEFENDANTS under Proposition 65.

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

21 33. DEFENDANTS knew or should have known that the PRODUCTS they
22 manufactured, distributed, and offered for sale or use in California contained DEHP.

23 34. DEHP is present in or on the PRODUCTS in such a way as to expose individuals
24 through dermal contact and/or ingestion during reasonably foreseeable use.

25 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
26 continue to cause, consumer exposures and workplace exposures to DEHP, as such exposures
27 are defined by California Code of Regulations title 27, § 25602(b).

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1 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
2 of the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

3 37. DEFENDANTS intended that such exposures to DEHP from the reasonably
4 foreseeable uses of the PRODUCTS would occur by their deliberate, non-accidental
5 participation in the manufacture, distribution, and offering of the PRODUCTS for sale or use to
6 individuals in the State of California.

7 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
8 consumers and other individuals in the State of California who were or who would become
9 exposed to DEHP through dermal contact and ingestion during the reasonably foreseeable uses
10 of the PRODUCTS.

11 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
12 directly by California voters, individuals exposed to DEHP through dermal contact and
13 ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by
14 DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
15 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

19 41. As a consequence of the above-described acts, Health and Safety Code
20 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
21 DEFENDANTS.
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PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

Dated: May 31, 2013

Respectfully Submitted,
THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
RUSSELL BRIMER