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ENDORSED
FILED
ALAMEDA COUNTY
OCT 26 2012
CLERK OF THE SUPERIOR COURT
By RGILL Deputy

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

15 RUSSELL BRIMER,

16 Plaintiff,

17 v.

18 AMERICAN TOMBOW, INC.; and DOES 1-
19 150, inclusive,

20 Defendants.

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Case No. RG12 65 3 7 6 5

**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
5 vinyl/PVC pen pouches 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 vinyl/PVC pen
8 pouches manufactured, distributed and offered for sale or use to consumers throughout the State of
9 California.

10 3. The vinyl/PVC pen pouches that defendants manufacture, distribute and offer for sale
11 to consumers throughout the State of California contain DEHP at levels which require a warning.

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

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

22 6. Defendants manufacture, distribute and sell vinyl/PVC pen pouches that contain
23 levels of DEHP, including, but not limited to, the *Tombow Dual Brush Pens, #56163 (#0 85014*
24 *56163 I)*, for which a warning is required under Proposition 65. All such vinyl/PVC pen pouches
25 containing DEHP are referred to collectively hereinafter as “PRODUCTS.”

26 7. Defendants’ failure to warn consumers and/or other individuals in the State of
27 California about their exposure to the LISTED CHEMICAL in conjunction with defendants’ sale of
28 the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder of such

1 conduct as well as civil penalties for each violation. (Cal. Health & Safety Code § 25249.7(a) &
2 (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 PRODUCTS
5 with the required warning regarding the health hazards of the LISTED CHEMICAL. (Cal. Health
6 & Safety Code § 25249.7(a).)

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

9 **PARTIES**

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

14 11. Defendant AMERICAN TOMBOW, INC. ("AMERICAN TOMBOW") is a person
15 in the course of doing business within the meaning of California Health & Safety Code § 25249.11.

16 12. Defendant AMERICAN TOMBOW manufactures, distributes and offers the
17 PRODUCTS for sale or use in the State of California, or implies by its conduct that it manufactures,
18 distributes and offers the PRODUCTS for sale or use in the State of California.

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

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

25 15. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons in
26 the course of doing business within the meaning of California Health & Safety Code § 25249.11.

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1 California, or otherwise purposefully avails itself of the California market. DEFENDANTS'
2 purposeful availment renders the exercise of personal jurisdiction by California courts consistent
3 with traditional notions of fair play and substantial justice.

4 **FIRST CAUSE OF ACTION**

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

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

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

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

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

23 28. DEFENDANTS have engaged in the manufacture, distribution and offering of the
24 PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and such
25 violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day notice of
26 violation. Plaintiff further alleges that DEFENDANTS’ violations are ongoing and continuous in
27 nature and, as such, will continue to occur in the future.

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1 29. After receiving the claims asserted in the sixty-day notice of violation, the appropriate
2 public enforcement agencies have failed to commence and diligently prosecute a cause of action
3 against DEFENDANTS under Proposition 65.

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

7 31. DEFENDANTS knew or should have known that the PRODUCTS they
8 manufactured, distributed and/or offered for sale or use in California contain the LISTED
9 CHEMICAL.

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

12 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
13 continues to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are defined
14 by Cal. Code Regs., tit. 27, § 25602(b).

15 34. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of the
16 PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact and/or
17 ingestion.

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

22 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
23 consumers and/or other individuals in the state of California who were or who could become
24 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the reasonably
25 foreseeable use of the PRODUCTS.

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

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

3 38. As a consequence of the above-described acts, DEFENDANTS are liable for a
4 maximum civil penalty of \$2,500 per day for each violation pursuant to California Health & Safety
5 Code § 25249.7(b).

6 39. As a consequence of the above-described acts, California Health & Safety Code
7 § 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 California Health & Safety Code § 25249.7(b), assess
12 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation alleged
13 herein;
- 14 2. That the Court, pursuant to California Health & Safety Code § 25249.7(a),
15 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering
16 the PRODUCTS for sale or use in California without first providing “clear and/or reasonable
17 warnings” as defined by Cal. Code Regs., tit. 27, § 25601, as to the harms associated with exposure
18 the LISTED CHEMICAL;
- 19 3. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and
- 20 4. That the Court grant such other and further relief as may be just and proper.

21 Dated: October 26, 2012

22 Respectfully Submitted,
23 THE CHANLER GROUP

24 By: 
25 Laralei S. Paras
26 Attorneys for Plaintiff
27 RUSSELL BRIMER
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