

**ENDORSED
FILED
ALAMEDA COUNTY**

**NOV 20 2012
CLERK OF THE SUPERIOR COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

RG12656923

RUSSELL BRIMER,

Plaintiff,

v.

W. W. GRAINGER, INC.; and DOES 1-150,
inclusive,

Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

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2 1. This Complaint is a representative action brought by plaintiff RUSSELL
3 BRIMER in the public interest of the citizens of the State of California to enforce the People’s
4 right to be informed of the presence of di(2-ethylhexyl)phthalate (“DEHP”), a toxic chemical
5 found in hand tool grips and vinyl/PVC rainwear sold in California, and lead, a toxic chemical
6 found in hand tool grips.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn California citizens about the risk of exposure to DEHP and/or lead present in and on the
9 hand tool grips and vinyl/PVC rainwear manufactured, imported, distributed, sold, and/or
10 offered for sale or use to consumers throughout the State of California.

11 3. Detectable levels of DEHP and/or lead are commonly found in and on the hand
12 tool grips and vinyl/PVC rainwear that defendants manufacture, import, distribute, sell, and/or
13 offer for sale to consumers throughout the State of California.

14 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
15 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
16 doing business shall knowingly and intentionally expose any individual to a chemical known to
17 the state to ca

18 5. use cancer or reproductive toxicity without first giving clear and reasonable
19 warning to such individual” Health & Safety Code § 25249.6.

20 6. Pursuant to Proposition 65, on February 27, 1987, and October 24, 2003,
21 California identified and listed lead and DEHP, respectively, as chemicals known to cause birth
22 defects and other reproductive harm. Lead and DEHP became subject to the “clear and
23 reasonable warning” requirements of the act one year later on February 27, 1988, and October
24 24, 2004, respectively. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8
25 & 25249.10(b). Lead and DEHP are referred to hereinafter as the “LISTED CHEMICALS.”

26 7. Defendants manufacture, distribute, import, sell, and/or offer for sale hand tool
27 grips and vinyl/PVC rainwear containing DEHP and/or lead as follows:
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1 a. Defendants manufacture, distribute, import, sell, and/or offer for sale
2 vinyl/PVC rainwear containing DEHP without a warning, including, but not limited to,
3 the *Condor PVC Construction Rain Coat with Detachable Hood, #5AD49C*.

4 b. Plaintiff is informed and believes, and upon such information and belief,
5 alleges that defendants manufacture, distribute, import, sell, and/or offer for sale products
6 with hand tool grips containing DEHP and lead without a warning, and that such products
7 are sold under brand names other than the private label brand name "Westward."

8 8. All such vinyl/PVC rainwear containing DEHP, described above in paragraph
9 6(a), and all such hand tool grips containing DEHP and lead, described above in paragraph 6(b),
10 shall hereinafter be referred to as the "PRODUCTS."

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

16 10. 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 the LISTED
19 CHEMICALS. Health & Safety Code § 25249.7(a).

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

22 **PARTIES**

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

1 13. Defendant W. W. GRAINGER, INC. (“GRAINGER”) is a person in the course of
2 doing business within the meaning of Health and Safety Code section 25249.11.

3 14. GRAINGER manufactures, imports, distributes, sells, and/or offers the
4 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
5 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
6 State of California.

7 15. Each of defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) is a
8 person in the course of doing business within the meaning of Health and Safety Code section
9 25249.11.

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

14 17. Each of defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) is a
15 person in the course of doing business within the meaning of Health and Safety Code
16 section 25249.11.

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

20 19. Each of defendants DOES 101-150 (“RETAILER DEFENDANTS”) is a person
21 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

22 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
23 State of California.

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

3 22. GRAINGER, MANUFACTURER DEFENDANTS, DISTRIBUTOR
4 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
5 referred to as "DEFENDANTS."

6 **VENUE AND JURISDICTION**

7 23. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil
8 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
9 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
10 wrongful conduct occurred, and continue to occur, in Alameda County, and/or because
11 DEFENDANTS conducted, and continue to conduct, business in this county with respect to the
12 PRODUCTS.

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

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

23 **FIRST CAUSE OF ACTION**

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

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

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

5 28. Proposition 65 states, “No person in the course of doing business shall knowingly
6 and intentionally expose any individual to a chemical known to the state to cause cancer or
7 reproductive toxicity without first giving clear and reasonable warning to such individual”
8 Health & Safety Code § 25249.6.

9 29. On August 31, 2012, plaintiff’s supplemental sixty-day notice of violation,
10 together with the requisite certificate of merit, was provided to GRAINGER and certain public
11 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
12 containing the LISTED CHEMICALS, purchasers and users in the State of California were
13 being exposed to the LISTED CHEMICALS resulting from their reasonably foreseeable use of
14 the PRODUCTS, without the individual purchasers and users first having been provided with a
15 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

16 30. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
17 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
18 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
19 plaintiff’s supplemental sixty-day notice of violation. As such, DEFENDANTS’ violations are
20 ongoing and continuous in nature, and will continue to occur in the future.

21 31. After receiving plaintiff’s supplemental sixty-day notice of violation, the
22 appropriate public enforcement agencies have failed to commence and diligently prosecute a
23 cause of action against DEFENDANTS under Proposition 65.

24 32. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
25 or use in California by DEFENDANTS contain the LISTED CHEMICALS such that they
26 require a “clear and reasonable” warning under Proposition 65.
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1 33. DEFENDANTS knew or should have known that the PRODUCTS they
2 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
3 CHEMICALS.

4 34. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
5 to expose individuals to the LISTED CHEMICALS through dermal contact and/or ingestion
6 during reasonably foreseeable use.

7 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
8 continue to cause, consumer exposures to the LISTED CHEMICALS, as such exposures are
9 defined by title 27 of the California Code of Regulations, section 25602(b).

10 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
11 of the PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact
12 and/or ingestion.

13 37. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from
14 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-
15 accidental participation in the manufacture, importation, distribution, sale, and/or offering of the
16 PRODUCTS for sale or use to individuals in the State of California.

17 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and other individuals in the State of California who were or who would become
19 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the
20 reasonably foreseeable uses of the PRODUCTS.

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