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ENDORSED
FILED

2013 MAY 30 P 3: 16

David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California
By: A. Ramirez
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,) Case No. 113CV242949
)
Plaintiff,)
)
v.) **FIRST AMENDED COMPLAINT FOR**
) **CIVIL PENALTIES AND INJUNCTIVE**
) **RELIEF**
DALER-ROWNEY USA LIMITED; DICK)
BLICK HOLDINGS, INC.; DICK BLICK) (Health & Safety Code. § 25249.6 *et seq.*)
RETAIL, INC.; and DOES 1-150, inclusive,)
)
Defendants.)

BY FAX

1 **NATURE OF THE ACTION**

2 1. This First Amended Complaint is a representative action brought by plaintiff
3 Russell Brimer in the public interest of the citizens of the State of California to enforce the
4 People's right to be informed of the presence of di(2-ethylhexyl)phthalate ("DEHP"), a toxic
5 chemical found in vinyl/PVC brush cases/pouches sold in California.

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

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

15 4. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
16 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
17 subject to the "clear and reasonable warning" requirements of the act one year later on October
18 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
19 25249.10(b).

20 5. Defendants manufacture, distribute, and sell vinyl/PVC brush cases/pouches that
21 contain DEHP in levels that require a warning under Proposition 65 including, but not limited
22 to, *Round LH Brush Case Leatherette, Item Number: 0v07248000000* and *Robert Simmons*
23 *Expression Teacher Selection Premium Quality Brush Set, #265500002 (#0 38372 02040 1)*.
24 All such vinyl/PVC brush cases/pouches containing DEHP are collectively referred to
25 hereinafter as "PRODUCTS."

26 6. Defendants' failure to warn consumers and other individuals in the State of
27 California about their exposure to DEHP in conjunction with defendants' sales of the
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1 PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder of such
2 conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) &
3 (b)(1).

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

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

10 PARTIES

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

15 10. Defendant Daler-Rowney USA Limited ("DALER-ROWNEY") is a person in the
16 course of doing business within the meaning of Health and Safety Code section 25249.11.

17 11. DALER-ROWNEY manufactures, distributes, and/or offers the PRODUCTS for
18 sale or use in the State of California, or implies by its conduct that it manufactures, distributes,
19 and/or offers the PRODUCTS for sale or use in the State of California.

20 12. Defendant Dick Blick Holdings, Inc. ("DBH") is a person in the course of doing
21 business within the meaning of Health and Safety Code section 25249.11.

22 13. DBH 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 14. Defendant Dick Blick Retail, Inc. ("DBR") is a person in the course of doing
26 business within the meaning of Health and Safety Code section 25249.11.

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1 15. DBR manufactures, distributes, and/or offers the PRODUCTS for sale or use in the
2 State of California, or implies by its conduct that it manufactures, distributes, and/or offers the
3 PRODUCTS for sale or use in the State of California.

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

7 17. 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 18. 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 section 25249.11.

13 19. 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 20. 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 section 25249.11.

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

20 22. 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 section 474. Plaintiff is informed and believes, and on that basis
23 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
24 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

25 23. DALER-ROWNEY, DBH, DBR, MANUFACTURER DEFENDANTS,
26 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
27 collectively be referred to as "DEFENDANTS."
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1 **VENUE AND JURISDICTION**

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

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

11 26. 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 27. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 26, inclusive.

21 28. 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 29. 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 30. On September 25, 2012, plaintiff’s 60-Day Notice of Violation (the “Notice”),
4 together with the requisite Certificate of Merit, was provided to DALER-ROWNEY and certain
5 public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
6 PRODUCTS containing DEHP, purchasers and users in the State of California were being
7 exposed to DEHP resulting from the reasonably foreseeable uses of the PRODUCTS, without
8 the individual purchasers and users first having been provided with a “clear and reasonable
9 warning” regarding such toxic exposures, as required by Proposition 65.

10 31. On February 22, 2013, plaintiff’s Supplemental 60-Day Notice of Violation (the
11 “Supplemental Notice”), together with the requisite Certificate of Merit, was provided to
12 DALER-ROWNEY, DBH, DBR and certain public enforcement agencies stating that, as a
13 result of DEFENDANTS’ sales of the PRODUCTS containing DEHP, purchasers and users in
14 the State of California were being exposed to DEHP resulting from the reasonably foreseeable
15 uses of the PRODUCTS, without the individual purchasers and users first having been provided
16 with a “clear and reasonable warning” regarding such toxic exposures, as required by
17 Proposition 65. The Notice and Supplemental Notice shall collectively be referred to
18 hereinafter as the “Notices.”

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

24 33. After receiving the claims asserted in the Notices, the appropriate public
25 enforcement agencies have failed to commence and diligently prosecute a cause of action
26 against DEFENDANTS under Proposition 65.
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1 34. The PRODUCTS manufactured, distributed, and offered for sale or use in
2 California by DEFENDANTS contain DEHP in amounts above the allowable state limits, such
3 that they require a “clear and reasonable” warning under Proposition 65.

4 35. DEFENDANTS knew or should have known that the PRODUCTS they
5 manufactured, distributed, and offered for sale or use in California contained DEHP.

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

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

11 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
12 of the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

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

17 40. 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 DEHP through dermal contact and/or ingestion during the reasonably foreseeable
20 uses of the PRODUCTS.

21 41. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
22 directly by California voters, individuals exposed to DEHP through dermal contact and/or
23 ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by
24 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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