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ENDORSED
FILED
ALAMEDA COUNTY
FEB 06 2014
CLERK OF THE SUPERIOR COURT
By Anita Dhir Deputy

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

12 DR. WHITNEY R. LEEMAN,
13 Plaintiff,

14 v.

15 HBC HOLDINGS, LLC; HOWARD BERGER
16 CO., LLC; and DOES 1-150, inclusive,
17 Defendants.

Case No. **RG 14713050**
**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 DR. WHITNEY R.
3 LEEMAN 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 hearing protection with vinyl/PVC ear cushions 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 the hearing
8 protection with vinyl/PVC ear cushions manufactured, distributed, and offered for sale or use to
9 consumers throughout the State of California.

10 3. Detectable levels of DEHP are commonly found in and on the hearing protection
11 with vinyl/PVC ear cushions that defendants manufacture, distribute, and offer for sale to
12 consumers throughout the State of California.

13 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
14 Health and Safety Code section 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). DEHP is referred to hereinafter as the "LISTED CHEMICAL."

23 6. Defendants manufacture, distribute, import, sell, and/or offer for sale hearing
24 protection with vinyl/PVC ear cushions containing DEHP as follows:

25 a. Defendants manufacture, distribute, import, sell, and/or offer for sale
26 hearing protection with vinyl/PVC ear cushions containing DEHP without a warning,
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1 including, but not limited to, the *KC Professional Personal Safety Set (Ear Protection)*,
2 *PPK4-34010, UPC #0 75877 25907 3*.

3 7. All such hearing protection with vinyl/PVC ear cushions containing DEHP,
4 described above in paragraph 6(a), shall hereinafter be referred to as the "PRODUCTS."

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

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

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

16 **PARTIES**

17 11. Plaintiff DR. WHITNEY R. LEEMAN is a citizen of the State of California who
18 is dedicated to protecting the health of California citizens through the elimination or reduction
19 of toxic exposures from consumer products; and she brings this action in the public interest
20 pursuant to Health and Safety Code section 25249.7(d).

21 12. Defendant HBC HOLDINGS, LLC ("HBC HOLDINGS") is a person in the
22 course of doing business within the meaning of Health and Safety Code section 25249.11.

23 13. HBC HOLDINGS manufactures, imports, distributes, sells, and/or offers the
24 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
25 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
26 State of California.

1 14. Defendant HOWARD BERGER CO., LLC (“HOWARD BERGER”) is a person
2 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

3 15. HOWARD BERGER 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 16. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each
8 persons in the course of doing business within the meaning of Health and Safety Code section
9 25249.11.

10 17. 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 18. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
15 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

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

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

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

23 22. At this time, the true names of defendants DOES 1 through 150, inclusive, are
24 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
25 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
26 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
27 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.
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1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

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

7 30. On November 15, 2013, plaintiff’s sixty-day notice of violation, together with the
8 requisite certificate of merit, was provided to HBC HOLDINGS and certain public enforcement
9 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing the
10 LISTED CHEMICAL, purchasers and users in the State of California were being exposed to the
11 LISTED CHEMICAL resulting from their reasonably foreseeable use of the PRODUCTS,
12 without the individual purchasers and users first having been provided with a “clear and
13 reasonable warning” regarding such toxic exposures, as required by Proposition 65.

14 31. On November 15, 2013, plaintiff’s sixty-day notice of violation, together with the
15 requisite certificate of merit, was provided to HOWARD BERGER and certain public
16 enforcement agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS
17 containing the LISTED CHEMICAL, purchasers and users in the State of California were being
18 exposed to the LISTED CHEMICAL resulting from their reasonably foreseeable use of the
19 PRODUCTS, without the individual purchasers and users first having been provided with a
20 “clear and reasonable warning” regarding such toxic exposures, as required by Proposition 65.

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

26 33. After receiving plaintiff’s sixty-day notice of violation, the appropriate public
27 enforcement agencies have failed to commence and diligently prosecute a cause of action
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1 against DEFENDANTS under Proposition 65.

2 34. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
3 or use in California by DEFENDANTS contain the LISTED CHEMICAL such that they require
4 a “clear and reasonable” warning under Proposition 65.

5 35. DEFENDANTS knew or should have known that the PRODUCTS they
6 manufacture, import, distribute, sell, and offer for sale or use in California contain the LISTED
7 CHEMICAL.

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

11 37. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
12 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
13 defined by title 27 of the California Code of Regulations, section 25602(b).

14 38. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
15 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact
16 and/or ingestion.

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

21 40. DEFENDANTS failed to provide a “clear and reasonable warning” to those
22 consumers and other individuals in the State of California who were or who would become
23 exposed to the LISTED CHEMICAL through dermal contact and/or ingestion during the
24 reasonably foreseeable uses of the PRODUCTS.

25 41. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
26 directly by California voters, individuals exposed to the LISTED CHEMICAL through dermal
27 contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold
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1 by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to
2 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

3 42. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
4 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
5 for each violation.

6 43. As a consequence of the above-described acts, Health and Safety Code
7 section 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 Health and Safety Code section 25249.7(b), assess
12 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

13 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
14 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
15 offering the PRODUCTS for sale or use in California without first providing a "clear and
16 reasonable warning" as defined by title 27 of the California Code of Regulations, section 25601
17 *et seq.*, as to the harms associated with exposures the LISTED CHEMICAL;

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

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

20 Dated: February 6, 2014

21 Respectfully Submitted,
22 THE CHANLER GROUP

23 By: _____

24 Jonathan A. Bornstein
25 Attorneys for Plaintiff
26 DR. WHITNEY R. LEEMAN
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