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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

14 MARK MOORBERG,

15 Plaintiff,

16 v.

17 ELMER'S PRODUCTS, INC.; and DOES
18 1 -100, inclusive,

19 Defendants.

Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

21 **NATURE OF THE ACTION**

22 1. This Complaint is a representative action brought by plaintiff MARK
23 MOORBERG ("PLAINTIFF") in the public interest of the citizens of the State of California to
24 enforce the People's right to be informed of the presence of Di(2-ethylhexyl)phthalate
25 ("DEHP"), a toxic chemical found in cutting tools with vinyl/PVC grips sold in California.
26 DEHP is a toxic chemical used to treat vinyl/PVC, which is used in a variety of products.
27
28

ENDORSED
FILED
San Francisco County Superior Court
AUG 14 2014
CLERK OF THE COURT
ELIAS BUTT
Deputy Clerk

1 2. By this Complaint, PLAINTIFF seeks to remedy Defendants continuing failures
2 to warn California citizens about the risk of exposure to DEHP present in and on cutting tools
3 with vinyl/PVC grips manufactured, distributed, and offered for sale or use to consumers
4 throughout the State of California.

5 3. Detectable levels of DEHP are commonly found in and on cutting tools with
6 vinyl/PVC grips that Defendants manufacture, distribute, and offer for sale to consumers
7 throughout the State of California. Individuals in California, including infants and children, are
8 exposed to DEHP in the products through various routes of exposure: (i) through inhalation
9 when DEHP are released from cutting tools with vinyl/PVC grips; (ii) through dermal exposure
10 when DEHP from cutting tools with vinyl/PVC grips accumulate in ambient particles that are
11 subsequently touched by such individuals; and (iii) through ingestion when such particles are
12 brought into contact with the mouth.

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
15 of doing business shall knowingly and intentionally expose any individual to a chemical known
16 to 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 cancer. DEHP became subject to the “clear and
20 reasonable warning” requirements of the Act one year later on October 24, 2004. Cal. Code
21 Regs., Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

22 6. DEHP is hereinafter referred to as the “LISTED CHEMICAL.”

23 7. Defendant ELMER’S PRODUCTS, INC. (“ELMER’S”) manufactures,
24 distributes, imports, sells and/or offers for sale in California cutting tools with vinyl/PVC grips
25 containing DEHP without a warning including, but not limited to, X-Acto Precision Instruments
26 X200 Knife, X3724,, *UPC #0 79946 37240 3*.

27 8. All products containing the LISTED CHEMICALS as listed in paragraph 7
28 above, shall hereinafter be referred to as the “PRODUCTS.”

1 DEFENDANTS consistent with traditional notions of fair play and substantial justice.

2 **FIRST CAUSE OF ACTION**

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

4 20. PLAINTIFF re-alleges and incorporates by reference, as if fully set forth herein,
5 Paragraphs 1 through 19, inclusive.

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

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

14 23. On May 21, 2014, PLAINTIFF’S sixty-day notice of violation, together with the
15 requisite certificate of merit, was provided to ELMER’S and certain public enforcement
16 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing
17 DEHP, purchasers and users in the State of California were being exposed to DEHP resulting
18 from their reasonably foreseeable use of the PRODUCTS, without the individual purchasers
19 and users first having been provided with a “clear and reasonable warning” regarding such
20 toxic exposures, as required by Proposition 65.

21 24. 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
25 and continuous in nature, and will continue to occur in the future.

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

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

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

7 28. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as
8 to expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
9 inhalation during reasonably foreseeable use of the PRODUCTS including through workplace
10 exposure to the PRODUCTS.

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

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

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

21 32. 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, ingestion, and/or inhalation
24 during the reasonably foreseeable uses of the PRODUCTS including through workplace
25 exposure to the PRODUCTS.

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

1 the PRODUCTS including through workplace exposure to the PRODUCTS sold by
2 DEFENDANTS without a “clear and reasonable warning,” have suffered, and continue to
3 suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

7 35. As a consequence of the above-described acts, Health and Safety Code
8 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
9 DEFENDANTS.

10 **PRAYER FOR RELIEF**

11 Wherefore, plaintiffs pray for judgment against DEFENDANTS, and each of them, as
12 follows:

13 1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess
14 civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation;

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

20 3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue
21 preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS
22 currently in the chain of commerce in California without a “clear and reasonable warning” as
23 defined by California Code of Regulations title 27, section 25601 *et seq.*,

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1 4. That the Court grant PLAINTIFF his reasonable attorneys' fees and costs of suit;

2 and

3 5. That the Court grant such other and further relief as may be just and proper.

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5 Dated: August 13, 2014

Respectfully Submitted,

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MOSCONE EMBLIDGE SATER & OTIS LLP

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By:  _____

Steven L. Iriki

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Attorneys for Plaintiff MARK MOORBERG

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