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MARK MOORBERG

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

MARK MOORBERG,

Plaintiff,

v.

ROCKING P, INC.; RIVER'S EDGE
PRODUCTS; BIG 5 SPORTING GOODS
CORPORATION; and DOES 1 -100,
inclusive,

Defendants.

Case No. CGC - 14 - 541137

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff MARK MOORBERG ("PLAINTIFF") in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of Di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in Back Scratchers with Vinyl/PVC Grips sold in California. DEHP is a toxic chemical used to treat vinyl/PVC, which is used in a variety of products.

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

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 Back
3 Scratchers with Vinyl/PVC Grips manufactured, distributed, and offered for sale or use to
4 consumers throughout the State of California.

5 3. Detectable levels of DEHP are commonly found in and on Back Scratchers 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,
8 are exposed to DEHP in the products through various routes of exposure: (i) through inhalation
9 when DEHP are released from Back Scratchers with Vinyl/PVC Grips; (ii) through dermal
10 exposure when DEHP from Back Scratchers with Vinyl/PVC Grips accumulate in ambient
11 particles that are subsequently touched by such individuals; and (iii) through ingestion when
12 such particles are 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 ROCKING P, INC. ("ROCKING P") manufactures, distributes,
24 imports, sells and/or offers for sale in California Back Scratchers with Vinyl/PVC Grips
25 containing DEHP without a warning including, but not limited to, Rivers Edge Products Bear
26 Back Scratcher, *Stock No. 916, UPC #6 43323 916001*.

27 8. Defendant RIVER'S EDGE PRODUCTS ("RIVER'S EDGE") manufactures,
28 distributes, imports, sells and/or offers for sale in California Back Scratchers with Vinyl/PVC

1 Grips containing DEHP without a warning including, but not limited to, Rivers Edge Products
2 Bear Back Scratcher, *Stock No. 916, UPC #6 43323 916001*.

3 9. Defendant BIG 5 SPORTING GOODS CORPORATION ("BIG 5") manufactures,
4 distributes, imports, sells and/or offers for sale in California Back Scratchers with Vinyl/PVC
5 Grips containing DEHP without a warning including, but not limited to, Rivers Edge Products
6 Bear Back Scratcher, *Stock No. 916, UPC #6 43323 916001*.

7 10. All products containing the LISTED CHEMICALS as listed in paragraph 7
8 through 9 above, shall hereinafter be referred to as the "PRODUCTS."

9 11. Although Defendants expose infants, children, and other people to the LISTED
10 CHEMICALS in the PRODUCTS, Defendants provides no warnings about the carcinogenic
11 hazards associated with exposures to the LISTED CHEMICALS. DEFENDANTS' failures to
12 warn consumers and other individuals and workers (specifically those not subject to
13 California's Occupational Health Act, Labor Code section 6300 et seq. or exempted under the
14 out-of-state manufacturer rule) in the State of California about their exposures to the LISTED
15 CHEMICALS in conjunction with DEFENDANTS' sales of the PRODUCTS, is a violation of
16 Proposition 65, and subjects DEFENDANTS to enjoinder of such conduct as well as civil
17 penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

18 12. As a result of DEFENDANTS' violations of Proposition 65, PLAINTIFF seeks
19 preliminary and permanent injunctive relief to compel Defendants to provide purchasers or
20 users of the PRODUCTS with the required warning regarding the health hazards of the
21 LISTED CHEMICAL in the PRODUCTS. Health & Safety Code § 25249.7(a).

22 13. Pursuant to Health and Safety Code section 25249.7(b), PLAINTIFF also seeks
23 civil penalties against DEFENDANTS for their violations of Proposition 65.

24 25 PARTIES

26 14. Plaintiff MARK MOORBERG ("PLAINTIFF"), is a citizen of the State of
27 California who is dedicated to protecting the health of California citizens through the
28

1 elimination or reduction of toxic exposures from consumer products; and he brings this action
2 in the public interest pursuant to Health and Safety Code section 25249.7(d).

3 15. Defendant ROCKING P, INC. ("ROCKING P") is a person in the course of
4 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

5 16. ROCKING P manufactures, imports, distributes, sells, and/or offers the
6 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
7 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
8 State of California.

9 17. Defendant RIVER'S EDGE PRODUCTS ("RIVER'S EDGE") is a person in the
10 course of doing business within the meaning of Health and Safety Code sections 25249.6 and
11 25249.11.

12 18. RIVER'S EDGE manufactures, imports, distributes, sells, and/or offers the
13 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
14 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
15 State of California.

16 19. Defendant BIG 5 SPORTING GOODS CORPORATION ("BIG 5") is a person
17 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
18 and 25249.11.

19 20. BIG 5 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
20 sale or use in the State of California, or implies by its conduct that it manufactures, imports,
21 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

22 21. Defendants DOES 1 -100 are each persons in the course of doing business within
23 the meaning of Health and Safety Code section 25249.11(b), which manufacture, distribute,
24 sell, and/or offer the PRODUCTS for sale in the State of California. At this time, the true
25 names and capacities of defendants DOES 1 through 100, inclusive, are unknown to
26 PLAINTIFF, who, therefore, sues said defendants by their fictitious names pursuant to Code of
27 Civil Procedure section 474. PLAINTIFF is informed and believes, and on that basis alleges,
28 that each of the fictitiously named defendants is responsible for the acts and occurrences

1 alleged herein. When ascertained, their true names and capacities shall be reflected in an
2 amended complaint.

3 22. ROCKING P, RIVER'S EDGE, BIG 5 and Defendants DOES 1 -100 are
4 collectively referred to herein as "DEFENDANTS."

5 **VENUE AND JURISDICTION**

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

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

16 25. The California Superior Court has jurisdiction over DEFENDANTS based on
17 PLAINTIFF'S information and good faith belief that each of the DEFENDANTS is a person,
18 firm, corporation, or association that is a citizen of the State of California, has sufficient
19 minimum contacts in the State of California, and/or otherwise purposefully avails itself of the
20 California market. DEFENDANTS' purposeful availment of California as a marketplace for
21 the PRODUCTS renders the exercise of personal jurisdiction by California courts over
22 DEFENDANTS 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 re-alleges and incorporates by reference, as if fully set forth herein,
26 Paragraphs 1 through 22, inclusive.

27 27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and
28 Toxic Enforcement Act of 1986, the People of California expressly declared their right "[t]o be

1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

3 28. 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 29. On May 21, 2014, PLAINTIFF’S sixty-day notice of violation, together with the
8 requisite certificate of merit, was provided to ROCKING P, RIVER’S EDGE, BIG 5 and
9 certain public enforcement agencies stating that, as a result of DEFENDANTS’ sales of the
10 PRODUCTS containing DEHP, purchasers and users in the State of California were being
11 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
12 the individual purchasers and users first having been provided with a “clear and reasonable
13 warning” regarding such toxic exposures, as required by Proposition 65.

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

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

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

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

1 34. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as
2 to expose individuals to the LISTED CHEMICAL through dermal contact, ingestion, and/or
3 inhalation during reasonably foreseeable use of the PRODUCTS including through workplace
4 exposure to the PRODUCTS.

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

8 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
9 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact,
10 ingestion, and/or inhalation.

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

15 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
16 consumers and other individuals in the State of California who were or who would become
17 exposed to the LISTED CHEMICAL through dermal contact, ingestion, and/or inhalation
18 during the reasonably foreseeable uses of the PRODUCTS including through workplace
19 exposure to the PRODUCTS.

20 39. Contrary to the express policy and statutory prohibition of Proposition 65
21 enacted directly by California voters, individuals exposed to the LISTED CHEMICAL through
22 dermal contact, ingestion, and/or inhalation resulting from the reasonably foreseeable uses of
23 the PRODUCTS including through workplace exposure to 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.

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

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

PRAYER FOR RELIEF

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

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

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

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

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

and

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

Dated: August 14, 2014

Respectfully Submitted,

MOSCONE EMBLIDGE SATER & OTIS LLP

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By: *SL Iriki*
Steven L. Iriki
Attorneys for Plaintiff MARK MOORBERG

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