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ENDORSED
FILED
Superior Court of California
County of San Francisco

JUL 01 2015

CLERK OF THE COURT
BY: GARY FELICIANO
Deputy Clerk

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

RUSSELL BRIMER,

Plaintiff,

v.

A.J. WHOLESALE DISTRIBUTORS, INC.;
and DOES 1-150, inclusive,

Defendants.

CGC-15-546663
Case No. _____

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Health & Safety Code § 25249.5 *at seq.*)

1 NATURE OF THE ACTION

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 health hazards caused by exposures to: (i) di(2-ethylhexyl)phthalate
5 (“DEHP”), a toxic chemical found in ear muffs with vinyl/PVC components, sold by defendants
6 in California.; and (ii) lead, a toxic chemical found in ear muffs, sold by defendants in
7 California.

8 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
9 warn California citizens and other individuals about the risks of exposure to DEHP and lead
10 present in and on ear muffs with vinyl/PVC components, manufactured, distributed, and offered
11 for sale or use to consumers and other individuals throughout the State of California.

12 3. Detectable levels of DEHP are found in and on the ear muffs with vinyl/PVC
13 components that defendants manufacture, distribute, and offer for sale to consumers and other
14 individuals throughout the State of California.

15 4. Detectable levels of lead are found in and on the ear muffs that defendants
16 manufacture, distribute, and offer for sale to consumers and other individuals throughout the
17 State of California.

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

23 6. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
24 DEHP as a chemical known to cause birth defects and reproductive harm. DEHP became
25 subject to the “clear and reasonable warning” requirements of the act one year later on October
26 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
27 25249.10(b).

1 14. Defendant A.J. WHOLESAL E DISTRIBUTORS, INC. (“A.J.”) is a person in the
2 course of doing business within the meaning of Health and Safety Code sections 25249.6 and
3 25249.11.

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

7 16. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
8 person in the course of doing business within the meaning of Health and Safety Code sections
9 25249.6 and 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 sections 25249.6
16 and 25249.11.

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

20 20. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
21 the course of doing business within the meaning of Health and Safety Code sections 25249.6
22 and 25249.11.

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

25 22. At this time, the true names of defendants DOES 1 through 150, inclusive, are
26 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
27 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
28

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 23. A.J., MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS,
4 and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as
5 “DEFENDANTS.”

6 **VENUE AND JURISDICTION**

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

13 25. 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 26. 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.

1 **FIRST CAUSE OF ACTION**

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

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

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

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

13 30. On March 31, 2015, plaintiff served a sixty-day notice of violation, together with
14 the requisite certificate of merit, on A.J. and certain public enforcement agencies alleging that,
15 as a result of DEFENDANTS’ sales of the PRODUCTS containing the LISTED CHEMICALS,
16 purchasers and users in the State of California were being exposed to the LISTED
17 CHEMICALS resulting from their reasonably foreseeable use of the PRODUCTS, without the
18 individual purchasers and users first having been provided with a “clear and reasonable
19 warning” regarding the harms associated with such exposures, as required by Proposition 65.

20 31. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
21 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’
22 violations have continued beyond their receipt of plaintiff’s sixty-day notice of violation.
23 DEFENDANTS’ violations are ongoing and continuous in nature, and, as such, will continue in
24 the future.

25 32. After receiving plaintiff’s sixty-day notice of violation, none of the appropriate
26 public enforcement agencies have commenced and diligently prosecuted a cause of action
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1 against DEFENDANTS under Proposition 65 to enforce the alleged violations that are the
2 subject of plaintiff's notice of violation.

3 33. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
4 offer for sale or use in California cause exposures to the LISTED CHEMICALS as a result of
5 the reasonably foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS
6 and endured by consumers and other individuals in California are not exempt from the "clear
7 and reasonable" warning requirements of Proposition 65, yet DEFENDANTS provide no
8 warning.

9 34. DEFENDANTS knew or should have known that the PRODUCTS they
10 manufactured, imported, distributed, sold, and offered for sale or use in California contained the
11 LISTED CHEMICALS.

12 35. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
13 to expose individuals to the LISTED CHEMICALS through dermal contact and/or ingestion
14 during reasonably foreseeable use.

15 36. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
16 continues to cause, consumer exposures to the LISTED CHEMICALS, as defined by title 27 of
17 the California Code of Regulations, section 25602(b).

18 37. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
19 the PRODUCTS exposed individuals to the LISTED CHEMICALS through dermal contact
20 and/or ingestion.

21 38. DEFENDANTS intended that exposures to the LISTED CHEMICALS from the
22 reasonably foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental
23 participation in the manufacture, importation, distribution, sale, and offering of the PRODUCTS
24 for sale or use to consumers and other individuals in California.

25 39. DEFENDANTS failed to provide a "clear and reasonable warning" to those
26 consumers and other individuals in California who were or who would become exposed to the
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1 LISTED CHEMICALS through dermal contact and/or ingestion resulting from their use of the
2 PRODUCTS.

3 40. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
4 directly by California voters, individuals exposed to the LISTED CHEMICALS through dermal
5 contact and/or ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold
6 without a “clear and reasonable” health hazard warning, have suffered, and continue to suffer,
7 irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

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

14 **PRAYER FOR RELIEF**

15 Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

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

19 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
20 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
21 offering the PRODUCTS for sale or use in California without first providing a “clear and
22 reasonable warning” in accordance with title 27 of the California Code of Regulations, section
23 25601 *et seq.*, regarding the harms associated with exposures to the LISTED CHEMICALS;

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

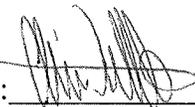
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- 4. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 5. That the Court grant such other and further relief as may be just and proper.

Dated: July 1, 2015

Respectfully Submitted,
THE CHANLER GROUP

By: 
Chris Tuttle
Attorneys for Plaintiff
RUSSELL BRIMER