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FILED

JAN 25 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Chais, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

14 MARK MOORBERG,

15 Plaintiff,

16 v.

17 BERRY PLASTICS GROUP, INC.; BERRY
18 PLASTICS CORPORATION; and DOES 1-
19 150, inclusive,

20 Defendants.

) Case No. CIV 1600281

) **COMPLAINT FOR CIVIL PENALTIES**
) **AND INJUNCTIVE RELIEF**

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

1 **NATURE OF THE ACTION**

2 1. This Complaint is a representative action brought by plaintiff MARK
3 MOORBERG in the public interest of the citizens of the State of California to enforce the
4 People’s right to be informed of the health hazards caused by exposures to di(2-
5 ethylhexyl)phthalate (“DEHP”), a toxic chemical found in vinyl/PVC electrical tape sold by
6 defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code §
9 6300 *et seq.*, who purchase, use, or handle defendants’ products, about the risks of exposures to
10 DEHP present in and on the vinyl/PVC electrical tape defendants manufacture, distribute, and
11 offer for sale or use throughout the State of California. Individuals not covered by California’s
12 Occupational Safety Health Act, Labor Code § 6300 *et seq.*, who purchase, use or handle
13 defendants’ products, are referred to hereinafter as “consumers.”

14 3. Detectable levels of DEHP are found in and on the vinyl/PVC electrical tape that
15 defendants manufacture, distribute, and offer for sale to consumers throughout the State of
16 California.

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

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

26 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
27 hazard warnings in California, vinyl/PVC electrical tape that contains DEHP including, but not
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1 limited to, the *Berry Plastics Corporation Electrical Tape*, #1088276, UPC #0 75427 77701 9.
2 All vinyl/PVC electrical tape containing DEHP and sold in California by defendants is referred
3 to hereinafter as the “PRODUCTS.”

4 7. Defendants’ failure to warn consumers in the State of California of the health
5 hazards associated with exposures to DEHP in conjunction with defendants’ sales of the
6 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
7 enjoinder of such conduct as well as civil penalties for each violation. Health & Safety Code
8 §§ 25249.7(a) & (b)(1).

9 8. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
10 permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with
11 the required warning regarding the health hazards associated with exposures to DEHP. Health
12 & Safety Code § 25249.7(a).

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

15 **PARTIES**

16 10. Plaintiff MARK MOORBERG is a citizen of the State of California who is
17 dedicated to protecting the health of California citizens through the elimination or reduction of
18 toxic exposures from consumer products; and he brings this action in the public interest
19 pursuant to Health and Safety Code § 25249.7(d).

20 11. Defendant BERRY PLASTICS GROUP, INC. (“BERRY GROUP”) is a person
21 in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
22 25249.11.

23 12. BERRY GROUP 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 13. Defendant BERRY PLASTICS CORPORATION (“BERRY CORPORATION”)
2 is a person in the course of doing business within the meaning of Health and Safety Code §§
3 25249.6 and 25249.11.

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

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

11 16. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
12 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
13 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
14 sale or use in California.

15 17. Defendants DOES 51-100 (the “DISTRIBUTOR DEFENDANTS”) are each a
16 person in the course of doing business within the meaning of Health and Safety Code §§
17 25249.6 and 25249.11.

18 18. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
19 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
20 retailers for sale or use in the State of California, or each implies by its conduct that it
21 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
22 individuals, businesses, or retailers for sale or use in the State of California.

23 19. Defendants DOES 101-150 (the “RETAILER DEFENDANTS”) are each a
24 person in the course of doing business within the meaning of Health and Safety Code §§
25 25249.6 and 25249.11.

26 20. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
27 individuals in the State of California.
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1 **FIRST CAUSE OF ACTION**

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

3 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 25, inclusive.

5 27. 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 28. 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 29. On June 26, 2015, plaintiff served a sixty-day notice of violation, together with
14 the accompanying certificate of merit, on BERRY GROUP, BERRY CORPORATION, the
15 California Attorney General’s Office, and the requisite public enforcement agencies alleging
16 that, as a result of DEFENDANTS’ sales of the PRODUCTS, consumers in the State of
17 California are being exposed to DEHP resulting from their reasonably foreseeable use of the
18 PRODUCTS, without the consumers first receiving a “clear and reasonable warning” regarding
19 the harms associated with exposures to DEHP, as required by Proposition 65.

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

25 31. After receiving plaintiff’s sixty-day notice of violation, no public enforcement
26 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
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1 under Proposition 65 to enforce the alleged violations that are the subject of plaintiff's notice of
2 violation.

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

8 33. DEFENDANTS know or should know that the PRODUCTS they manufacture,
9 import, distribute, sell, and offer for sale in California contain DEHP.

10 34. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
11 through dermal contact and/or ingestion during reasonably foreseeable use.

12 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
13 continues to cause, consumer exposures to DEHP, as defined by Title 27 of the California Code
14 of Regulations, § 25602(b).

15 36. DEFENDANTS know that the normal and reasonably foreseeable use of the
16 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

17 37. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
18 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
19 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
20 consumers in California.

21 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
22 consumers in California who have been or will be exposed to DEHP through dermal contact
23 and/or ingestion resulting from their use of the PRODUCTS.

24 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
25 directly by California voters, consumers exposed to DEHP through dermal contact and/or
26 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sell without a "clear
27 and reasonable" health hazard warning have suffered, and continue to suffer, irreparable harm
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1 for which they have no plain, speedy, or adequate remedy at law.

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

5 41. As a consequence of the above-described acts, Health and Safety Code
6 § 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
7 DEFENDANTS.

8 **PRAYER FOR RELIEF**

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

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

13 2. That the Court, pursuant to Health and Safety Code § 25249.7(a), preliminarily
14 and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the
15 PRODUCTS for sale or use in California without a “clear and reasonable warning” in
16 accordance with Title 27 of the California Code of Regulations § 25601 *et seq.*, regarding the
17 harms associated with exposures to DEHP;

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

22 4. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

23 5. That the Court grant such other and further relief as may be just and proper.
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1 Dated: January 25, 2016

Respectfully submitted,
THE CHANLER GROUP

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3 By: Kimberly Gates
4 Kimberly Gates
Attorneys for Plaintiff
5 MARK MOORBERG
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