

FILED

JAN 13 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF MARIN
9 UNLIMITED CIVIL JURISDICTION

10
11 SUSAN DAVIA,

12 Plaintiff,

13 v.

14 ULINE CORPORATION, TINGLEY RUBBER
CORPORATION and DOES 1-150,

15 Defendants.

Case No. CIV 1504315

**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**

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

Action Filed: November 30, 2015

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in
3 the public interest of the citizens of the State of California, to enforce the People’s right to be
4 informed of the presence of Di(2-ethylhexyl)phthalate (“DEHP”) and Tris(chloroethyl) phosphate
5 (“TCEP”), toxic chemicals found in certain PVC rain wear manufactured, distributed and/or
6 otherwise sold by defendants in California.

7 2. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986,
8 California Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”), “No person in the
9 course of doing business shall knowingly and intentionally expose any individual to a chemical
10 known to the state to cause cancer or reproductive toxicity without first giving clear and
11 reasonable warning to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

12 3. On October 24, 2003, the State of California listed Di(2-ethylhexyl)phthalate as a
13 chemical known to cause birth defects and other reproductive harm. DEHP became subject to
14 the warning requirement one year later and was therefore subject to the “clear and reasonable
15 warning” requirements of Proposition 65, beginning on October 24, 2004. (*27 CCR § 27001(c);*
16 *Cal. Health & Safety Code § 25249.8.*)

17 4. On April 1, 1992, California identified and listed Tris(chloroethyl) phosphate as a
18 chemical known to cause cancer. TCEP became subject to the “clear and reasonable warning”
19 requirements of the Act one year later on April 1, 1993. (*Cal. Code Regs., Tit. 27, § 27001(c);*
20 *Health & Safety Code §§ 25249.8 & 25249.10(b).*)

21 5. DEHP and TCEP shall hereinafter, collectively, be referred to as “LISTED
22 CHEMICAL.”

23 6. Significant levels of each LISTED CHEMICAL have been discovered in or on
24 vinyl/PVC components of rain wear that defendants manufacture, distribute, and/or offer for
25 sale to consumers throughout the State of California including, but not limited to, Tingley
26 Durascrim Deluxe PVC Rainwear (#081138562066). All such rain wear comprised of vinyl/PVC
27 materials containing the LISTED CHEMICAL shall hereinafter be referred to as the
28 “PRODUCTS.”

1 7. Defendants’ failure to warn employees, consumers and/or other individuals in
2 the State of California about their exposures to the LISTED CHEMICAL in conjunction with
3 defendants’ sale of the PRODUCTS is a violation of Proposition 65.

4 8. For defendants’ violations of Proposition 65, plaintiff seeks preliminary and
5 permanent injunctive relief to compel defendants to provide employees handling the
6 PRODUCTS and purchasers or users of the PRODUCTS with the required warning regarding
7 the health hazards of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

8 9. Plaintiff also seeks civil penalties against defendants for their violations of
9 Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

10 **PARTIES**

11 10. Plaintiff SUSAN DAVIA is a citizen of the State of California who is dedicated to
12 protecting the health of California citizens through the elimination or reduction of toxic
13 exposures from consumer products, and brings this action in the public interest pursuant to
14 California Health & Safety Code Section 25249.7.

15 11. Based upon publicly available information, plaintiff is informed and believes, and
16 thereupon alleges, that defendants TINGLEY RUBBER CORPORATION and ULINE
17 CORPORATION are each a person doing business within the meaning of California Health &
18 Safety Code Section 25249.11.

19 12. Based upon publicly available information, plaintiff is informed and believes, and
20 thereupon alleges, that defendants TINGLEY RUBBER CORPORATION and ULINE
21 CORPORATION are each legally responsible for the manufacture, distribution, and/or offer of
22 the PRODUCTS for sale or use in the State of California or imply by their conduct that they
23 manufacture, distribute, and/or offer the PRODUCTS for sale or use in the State of California.

24 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons
25 doing business within the meaning of California Health & Safety Code Section 25249.11.

26 14. MANUFACTURER DEFENDANTS engage in the process of research, testing,
27 designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they
28

1 engage in the process of research, testing, designing, assembling, fabricating, and/or
2 manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

3 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
4 doing business within the meaning of California Health & Safety Code Section 25249.11.

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

8 17. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
9 business within the meaning of California Health & Safety Code Section 25249.11.

10 18. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the
11 State of California.

12 19. At this time, the true names of Defendants DOES 1 through 150, inclusive, are
13 unknown to plaintiff, who therefore sues said defendants by their fictitious name pursuant to
14 Code of Civil Procedure Section 474. Plaintiff is informed and believes, and on that basis
15 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
16 herein alleged. When ascertained, their true names shall be reflected in an amended complaint.

17 20. TINGLEY RUBBER CORPORATION, ULINE CORPORATION,
18 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL
19 DEFENDANTS shall, where appropriate, collectively be referred to hereinafter as
20 “DEFENDANTS”.

21 **VENUE AND JURISDICTION**

22 21. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
23 Procedure Sections 394, 395, and 395.5, because this Court is a court of competent jurisdiction,
24 because one or more instances of wrongful conduct occurred, and continues to occur, in the
25 County of Marin and/or because DEFENDANTS conducted, and continue to conduct, business
26 in this County with respect to the PRODUCTS.

27 22. The California Superior Court has jurisdiction over this action pursuant to
28 California Constitution Article VI, Section 10, which grants the Superior Court “original

1 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
2 which this action is brought does not specify any other basis of subject matter jurisdiction.

3 23. The California Superior Court has jurisdiction over DEFENDANTS based on
4 plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
5 association that either are citizens of the State of California, have sufficient minimum contacts in
6 the State of California, or otherwise purposefully avail themselves of the California market.
7 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
8 courts consistent with traditional notions of fair play and substantial justice.

9 **FIRST CAUSE OF ACTION**
10 **(Violation of Proposition 65 - Against All Defendants)**

11 24. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 23, inclusive.

13 25. In passing Proposition 65, the citizens of the State of California expressed their
14 intent through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986 that
15 they must be “informed about exposures to chemicals that cause cancer, birth defects, or other
16 reproductive harm.”

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

21 27. On September 2, 2015, a valid and compliant Proposition 65 sixty-day notice of
22 violation (“60-Day Notice”), together with a valid requisite Certificate of Merit, was provided to
23 ULINE CORPORATION and various public enforcement agencies stating that as a result of the
24 DEFENDANTS’ manufacture, distribution and sales of the PRODUCTS, workers, purchasers
25 and users in the State of California are being exposed to DEHP resulting from the reasonably
26 foreseeable uses of the PRODUCTS, without the individual workers, purchasers and users first
27 having been provided with a “clear and reasonable warning” regarding such toxic exposures.
28

1 28. On October 1, 2015, and on October 29, 2015, plaintiff served additional valid and
2 compliant Proposition 65 sixty-day notices of violation (“Supplemental 60-Day Notice”),
3 together with valid requisite Certificates of Merit, to ULINE CORPORATION, TINGLEY
4 RUBBER CORPORATION and various public enforcement agencies stating that as a result of
5 the DEFENDANTS’ manufacture, distribution and sales of the PRODUCTS, workers,
6 purchasers and users in the State of California are being exposed to DEHP and TCEP resulting
7 from the reasonably foreseeable uses of the PRODUCTS, without the individual workers,
8 purchasers and users first having been provided with a “clear and reasonable warning”
9 regarding such toxic exposures.

10 29. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
11 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
12 and plaintiff is informed and believes that DEFENDANTS’ manufacture, distribution, and/or
13 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code
14 Section 25249.6 has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day
15 Notices. Plaintiff further alleges and believes that such violations will continue to occur into the
16 future.

17 30. After receipt of the claims asserted in the 60-Day Notices, the appropriate public
18 enforcement agencies have failed to commence and diligently prosecute a cause of action
19 against DEFENDANTS under Proposition 65.

20 31. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
21 California by DEFENDANTS, contain the LISTED CHEMICAL.

22 32. DEFENDANTS knew or should have known that the PRODUCTS contained the
23 LISTED CHEMICAL.

24 33. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
25 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
26 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a
27 consequence of the packing, shipping, unpacking, display and daily organization and
28 movement of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

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

4 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
5 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
6 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
7 warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to the
8 LISTED CHEMICAL;

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

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

11 Dated: January 11, 2016

Respectfully submitted,

SHEFFER LAW FIRM

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14 By: 

Gregory M. Sheffer
Attorneys for Plaintiff
SUSAN DAVIA