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FILED
WCS
2016 APR 18 P 3:16
David H. Young, Clerk of the Superior Court
Courtroom 300, Santa Clara County Courthouse
San Jose, CA 95134
D. CAO-NGUYEN

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,

v.

FAM, LLC; MARIKA, LLC; and DOES 1-
150, inclusive,
Defendants.

Case No. **16CV294024**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code § 25249.6 *et 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 about exposures to di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical
5 that is found in vinyl/PVC exercise balls that are sold in California.

6 2. By this Complaint, Plaintiff seeks to remedy Defendants' continuing failure to
7 warn individuals not covered by California's Occupational Safety Health Act, Labor Code
8 section 6300 et seq., who purchase, use or handle Defendants' products, about the risks of
9 exposure to DEHP, vinyl/PVC exercise balls manufactured, distributed, and offered for sale or
10 use throughout the State of California. Individuals not covered by California's Occupational
11 Safety Health Act, Labor Code section 6300 et seq., who purchase, use or handle Defendants'
12 products, are referred to hereinafter as "CONSUMERS".

13 3. Detectable levels of DEHP are commonly found in and on components of
14 vinyl/PVC exercise balls that Defendants import, manufacture, distribute, ship, sell and/or offer
15 for sale to CONSUMERS throughout the State of California.

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

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

26 6. Defendants manufacture, distribute, import, sell, and offer for sale without
27 warning in California, vinyl/PVC exercise balls containing the LISTED CHEMICAL,
28 including, but not limited to, *The Balance Collection Core Ball Raspberry, B1801-01*. All such

1 vinyl/PVC exercise balls containing the LISTED CHEMICAL are referred to collectively
2 hereinafter as the "PRODUCTS."

3 7. Defendants' failure to warn consumers and other individuals in California of the
4 harms associated with exposures to the LISTED CHEMICAL in conjunction with Defendants'
5 sales of the PRODUCTS containing the LISTED CHEMICAL constitute violations of
6 Proposition 65, and subject Defendants to enjoinder of such conduct, as well as civil penalties
7 for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

8 8. For Defendants' violations of Proposition 65, Plaintiff seeks preliminary and
9 permanent injunctive relief to compel Defendants to provide purchasers or users of the
10 PRODUCTS with the required warning regarding the health hazards associated with exposures
11 to the LISTED CHEMICAL. Health & Safety Code § 25249.7(a).

12 9. Pursuant to Health and Safety Code section 25249.7(b), Plaintiff also seeks civil
13 penalties against Defendants, and each of them, for each violation of Proposition 65.

14 **PARTIES**

15 10. Plaintiff RUSSELL BRIMER is a citizen of the State of California who is
16 dedicated to protecting the health of California citizens through the elimination or reduction of
17 harmful exposures to toxic chemicals from consumer products. He brings this action in the
18 public interest pursuant to Health and Safety Code section 25249.7(d).

19 11. Defendant FAM, LLC ("FAM") is a person in the course of doing business within
20 the meaning of Health and Safety Code sections 25249.6 and 25249.11.

21 12. FAM manufactures, imports, distributes, sells, and/or offers the PRODUCTS for
22 sale or use in the State of California, or it implies by its conduct that it manufactures, imports,
23 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

24 13. Defendant MARIKA, LLC ("MARIKA") is a person in the course of doing
25 business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

26 14. MARIKA manufactures, imports, distributes, sells, and/or offers the PRODUCTS
27 for sale or use in the State of California, or it implies by its conduct that it manufactures, imports,
28 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

1 15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
2 person in the course of doing business within the meaning of Health and Safety Code sections
3 25249.6 and 25249.11.

4 16. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
5 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
6 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
7 California.

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

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

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

17 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
18 State of California.

19 21. At this time, the true names of defendants DOES 1 through 150, inclusive, are
20 unknown to Plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
21 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
22 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
23 alleged herein. When ascertained, their true names shall be reflected in an amended Complaint.

24 22. FAM, MARIKA, MANUFACTURER DEFENDANTS, DISTRIBUTOR
25 DEFENDANTS, and RETAILER DEFENDANTS are hereinafter collectively referred to as
26 “DEFENDANTS.”

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1 VENUE AND JURISDICTION

2 23. Venue is proper in the County of Santa Clara, pursuant to Code of Civil
3 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because Plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
5 wrongful conduct occurred, and continue to occur, in this county, and/or because
6 DEFENDANTS conducted, and continue to conduct, business in Santa Clara County with
7 respect to the PRODUCTS.

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

12 25. The California Superior Court has jurisdiction over DEFENDANTS based on
13 Plaintiff’s information and good faith belief that each defendant is a person, firm, corporation or
14 association that is a citizen of the State of California, has sufficient minimum contacts in the
15 State of California, and/or otherwise purposefully avails itself of the California market.
16 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
17 California courts consistent with traditional notions of fair play and substantial justice.

18 FIRST CAUSE OF ACTION

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

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

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

26 28. Proposition 65 states, “[n]o person in the course of doing business shall
27 knowingly and intentionally expose any individual to a chemical known to the state to cause

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1 cancer or reproductive toxicity without first giving clear and reasonable warning to such
2 individual” Health & Safety Code § 25249.6.

3 29. On January 29, 2016, Plaintiff’s sixty-day notice of violation, together with the
4 requisite certificate of merit, was provided to DEFENDANTS and certain public enforcement
5 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing the
6 LISTED CHEMICAL, consumers, and other individuals in the State of California were being
7 exposed to the LISTED CHEMICAL resulting from their reasonably foreseeable use of the
8 PRODUCTS, without the individual purchasers and users first having received a “clear and
9 reasonable warning” regarding such toxic exposures, as required by Proposition 65.

10 30. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
11 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
12 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
13 Plaintiff’s sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing and
14 continuous in nature, and will continue to occur in the future.

15 31. After receiving Plaintiff’s sixty-day notice of violation, the appropriate public
16 enforcement agencies have failed to commence and diligently prosecute a cause of action
17 against DEFENDANTS under Proposition 65.

18 32. The PRODUCTS manufactured, imported, distributed, sold, and offered for sale
19 or use in California by DEFENDANTS contain the LISTED CHEMICAL in such a way that the
20 reasonably foreseeable uses of these products result in exposures that require a “clear and
21 reasonable” warning under Proposition 65.

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

25 34. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
26 expose individuals through dermal contact and/or ingestion during reasonably foreseeable use.

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1 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
2 continue to cause, consumer exposures to the LISTED CHEMICAL, as such exposures are
3 defined by title 27 of the California Code of Regulations, section 25602(b).

4 36. DEFENDANTS have knowledge that the normal and reasonably foreseeable uses
5 of the PRODUCTS expose individuals to the LISTED CHEMICAL through dermal contact
6 and/or ingestion.

7 37. DEFENDANTS intend for such exposures to the LISTED CHEMICAL from the
8 reasonably foreseeable uses of the PRODUCTS to occur by their deliberate, non-accidental
9 participation in the manufacture, distribution, sale, and offering of the PRODUCTS for sale or
10 use to individuals in the State of California.

11 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
12 consumers and other individuals in California not covered by California’s Occupational Safety
13 Health Act, Labor Code section 6300 et seq. who have been, or will be, exposed to the LISTED
14 CHEMICAL.

15 39. Contrary to the express policy and statutory prohibitions of Proposition 65
16 enacted directly by California voters, consumers, and other individuals exposed to the LISTED
17 CHEMICAL through dermal contact and/or ingestion, resulting from the reasonably foreseeable
18 uses of the PRODUCTS sold by DEFENDANTS without a “clear and reasonable warning,”
19 have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or
20 adequate remedy at law.

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

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

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1 **PRAYER FOR RELIEF**

2 Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

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

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

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

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

13 Dated: April 12, 2016

14 Respectfully Submitted, >

15 THE CHAMBER GROUP

16
17 By _____

O’Neil G. Dennis
Attorneys for Plaintiff
RUSSELL BRIMER