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FILED

OCT 27 2016

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

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 OLD DUTCH INTERNATIONAL, LTD.,
BEVERAGES & MORE, INC., BEVMO
15 HOLDINGS, LLC, BED BATH & BEYOND,
16 INC. AND DOES 1-150,

17 Defendants.

Case No. _____

CIV 1603916 1

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in the
3 public interest of the citizens of the State of California, to enforce the People’s right to be informed of
4 the presence of Lead, a toxic chemicals found in certain copper mugs, pitchers, canisters, colanders
5 and trays, with handles or other components made with brass, 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 course
9 of doing business shall knowingly and intentionally expose any individual to a chemical known to
10 the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning
11 to such individual. . . .” (*Cal. Health & Safety Code § 25249.6.*)

12 3. On February 27, 1987, the State of California identified and listed Lead as a chemical
13 known to cause birth defects and other reproductive harm. Lead became subject to the warning
14 requirement one year later and was therefore subject to the “clear and reasonable warning”
15 requirements of Proposition 65, beginning on February 27, 1988. (*27 CCR § 27001 (c); Cal. Health &*
16 *Safety Code § 25249.8.*)

17 4. Lead shall hereinafter be referred to as the “LISTED CHEMICAL.”

18 5. Significant levels of each LISTED CHEMICAL have been discovered in or on Old
19 Dutch International, Ltd. branded copper mugs, pitchers, canisters, colanders and trays, made with
20 brass handles or other components, that defendants manufacture, distribute, and/or offer for sale to
21 consumers throughout the State of California. These products with brass components include, but
22 are not limited to, 2 oz., 14 oz., 16 oz., 20 oz. and 32oz straight and round sided Moscow Mule mugs
23 with brass handles (including, but not limited to #418, #428, #OS428, #OS428H, #429H, #437, #440,
24 #OS440, #440H, #442, #483, #499H), copper pitchers with brass handles (including but not limited to
25 #809, #1203), canisters with brass handles (including but not limited to #1243), colanders with brass
26 handles (including but not limited to #870) and trays with brass handles (including but not limited
27 to #250). All such Old Dutch International, Ltd. brand products with brass components containing
28 the LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

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

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

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

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

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

12 18. 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 Code
14 of Civil Procedure Section 474. Plaintiff is informed and believes, and on that basis alleges, that each
15 of the fictitiously named defendants is responsible for the acts and occurrences herein alleged.
16 When ascertained, their true names shall be reflected in an amended complaint.

17 19. OLD DUTCH INTERNATIONAL, LTD., BEVERAGES & MORE, INC., BEVMO
18 HOLDINGS, LLC, BED BATH & BEYOND, INC., MANUFACTURER DEFENDANTS,
19 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate, collectively
20 be referred to hereinafter as “DEFENDANTS”.

21 **VENUE AND JURISDICTION**

22 20. 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 County
25 of Marin and/or because DEFENDANTS conducted, and continue to conduct, business in this
26 County with respect to the PRODUCTS.

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

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

3 22. 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 the
6 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 23. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein,
12 Paragraphs 1 through 22, inclusive.

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

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

21 26. On March 22, 2016, Davia served OLD DUTCH INTERNATIONAL, LTD.,
22 BEVERAGES & MORE, INC., BEVMO HOLDINGS, LLC, BED BATH & BEYOND INC. and various
23 public enforcement agencies with a valid and compliant Proposition 65 sixty-day notice of violation
24 (“60-Day Notice”), together with a valid, requisite Certificate of Merit stating that as a result of the
25 DEFENDANTS’ manufacture, distribution and sales of the PRODUCTS, purchasers and users in the
26 State of California are being exposed to LISTED CHEMICAL resulting from the reasonably
27 foreseeable uses of the PRODUCTS, without the individual workers, purchasers and users first
28 having been provided with a “clear and reasonable warning” regarding such toxic exposures.

1 27. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the
2 PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and
3 plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or offering of
4 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 has
5 continued to occur beyond DEFENDANTS' receipt of plaintiff's 60-Day Notice. Plaintiff further
6 alleges and believes that such violations will continue to occur into the future.

7 28. After receipt of the claims asserted in the 60-Day Notice, the appropriate public
8 enforcement agencies have failed to commence and diligently prosecute a cause of action against
9 DEFENDANTS under Proposition 65.

10 29. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
11 California by DEFENDANTS, contain the LISTED CHEMICAL.

12 30. DEFENDANTS knew or should have known that the PRODUCTS contained the
13 LISTED CHEMICAL.

14 31. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
15 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
16 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a consequence of
17 the packing, shipping, unpacking, display and daily organization and movement of PRODUCTS as
18 well as the reasonably foreseeable use of the PRODUCTS.

19 32. DEFENDANTS knew or should have known that the packing, shipping, unpacking,
20 display and daily organization and movement of PRODUCTS as well as the reasonably foreseeable
21 use of the PRODUCTS exposes individuals to the LISTED CHEMICAL through dermal contact
22 and/or ingestion and/or inhalation.

23 33. DEFENDANTS' participation in the manufacture, distribution and/or offer for sale or
24 use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.

25 34. DEFENDANTS failed to provide a "clear and reasonable warning" to those
26 employees, consumers and/or other individuals in the State of California who were or who could
27 become exposed to the LISTED CHEMICAL during the reasonably foreseeable retail receipt, display
28 and organization of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

1 35. Contrary to the express policy and statutory prohibition of Proposition 65, employees
2 and individuals exposed to the LISTED CHEMICAL through dermal contact and/or ingestion
3 and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS, sold by
4 DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to suffer,
5 irreparable harm, for which harm they have no other plain, speedy or adequate remedy at law.

6 36. As a consequence of the above-described acts, DEFENDANTS are liable for a
7 maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to California
8 Health & Safety Code Section 25249.7(b).

9 37. As a consequence of the above-described acts, California Health & Safety Code
10 Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
11 DEFENDANTS.

12 **PRAYER FOR RELIEF**

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

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

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


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

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

23 Dated: October 26, 2016

Respectfully submitted,

24 SHEFFER LAW FIRM

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26 By: 
27 Gregory M. Sheffer
28 Attorneys for Plaintiff
SUSAN DAVIA