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CLERK OF THE COURT
COUNTY OF SANTA CLARA
BY _____ DEPUTY

v. Taylor

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2 Brian Johnson, State Bar No. 235965
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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA
15 UNLIMITED CIVIL JURISDICTION

16 **17 CV 320767**

17 PETER ENGLANDER,

Case No. _____

18 Plaintiff,

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

19 v.

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

20 SMS AUDIO, LLC; TOYS "R" US, INC.; and
21 DOES 1-15, inclusive,

22 Defendants.

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6. Defendants manufacture, distribute, import, sell, and offer for sale without health hazard warnings in California, headphones with vinyl/PVC components that contain DEHP including, but not limited to, *KidzSafe My Design Headphones, Model No: KS-GDIY-ROH-PNK-PP, #56300915, UPC #8 12184 01317 8*. All such headphones with vinyl/PVC components containing DEHP are referred to collectively hereinafter as “PRODUCTS.”

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

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

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

PARTIES

10. Plaintiff PETER ENGLANDER, is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products; and brings this action in the public interest pursuant to Health and Safety Code section 25249.7(d).

11. Defendant SMS AUDIO, LLC (“SMS AUDIO”) is a person in the course of doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

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

1 13. Defendant TOYS “R” US, INC. (“TOYS “R” US”) is a person in the course of
2 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

3 14. TOYS “R” US manufactures, imports, distributes, sells, and/or offers the
4 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
5 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
6 State of California.

7 15. Defendants DOES 1-5 (“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 16. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
11 assemble, fabricate, and manufacture, or imply by their conduct that they research, test, design,
12 assemble, fabricate, and manufacture one or more of the PRODUCTS offered for sale or use in
13 California.

14 17. Defendants DOES 6-10 (“DISTRIBUTOR 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 18. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
18 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
19 retailers for sale or use in the State of California, or imply by their conduct that they distribute,
20 exchange, transfer, process, and transport one or more of the PRODUCTS to individuals,
21 businesses, or retailers for sale or use in the State of California.

22 19. Defendants DOES 11-15 (“RETAILER DEFENDANTS”) are each a person in
23 the course of doing business within the meaning of Health and Safety Code sections 25249.6
24 and 25249.11.

25 20. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
26 individuals in the State of California.

27 21. At this time, the true names of defendants DOES 1 through 15, inclusive, are
28 unknown to plaintiff who, therefore, sues said defendants by their fictitious names pursuant to

1 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
2 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
3 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

4 22. SMS AUDIO, TOYS “R” US, MANUFACTURER DEFENDANTS,
5 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where
6 appropriate, be referred to collectively as the “DEFENDANTS.”

7 **VENUE AND JURISDICTION**

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

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

18 25. The California Superior Court has jurisdiction over DEFENDANTS based on
19 plaintiff’s information and good faith belief that DEFENDANTS are each a person, firm,
20 corporation or association that is a citizen of the State of California, has sufficient minimum
21 contacts in the State of California, and/or otherwise purposefully avails itself of the California
22 market. DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by
23 California courts consistent with traditional notions of fair play and substantial justice.

24 **FIRST CAUSE OF ACTION**

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

26 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
27 Paragraphs 1 through 25, inclusive.
28

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

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

9 29. On August 1, 2017, Plaintiff served a sixty-day notice of violation, together with
10 the accompanying certificate of merit, on SMS AUDIO, TOYS “R” US, the California Attorney
11 General, and all other requisite public enforcement agencies alleging that, as a result of
12 DEFENDANTS’ sales of the PRODUCTS, consumers and other individuals in California are
13 being exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS,
14 without these consumers and other individuals first receiving a “clear and reasonable warning”
15 regarding the harms associated with exposures to DEHP, as required by Proposition 65.

16 30. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
17 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’
18 violations have continued beyond their receipt of Plaintiff’s sixty-day notice of violation. As
19 such, DEFENDANTS’ violations are ongoing and continuous in nature and, unless enjoined
20 will continue in the future.

21 31. After receiving Plaintiff’s sixty-day notice of violation, no public enforcement
22 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
23 under Proposition 65 to enforce the alleged violations that are the subject of Plaintiff’s notice of
24 violation.

25 32. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
26 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
27 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
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1 consumers in California are not exempt from the “clear and reasonable” warning requirements
2 of Proposition 65, yet DEFENDANTS provide no clear and reasonable warning.

3 33. DEFENDANTS knew or should have known that the PRODUCTS they
4 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

5 34. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
6 and other individuals through dermal contact and/or ingestion during reasonably foreseeable
7 use.

8 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
9 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code
10 of Regulations, section 25602(b).

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

13 37. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
14 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
15 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale to
16 consumers in California.

17 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and other individuals in California who have been, or who will be, exposed to DEHP
19 through dermal contact and/or ingestion resulting from their use of the PRODUCTS.

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

25 40. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
26 above-described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty
27 of \$2,500 per day for each violation.
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41. As a consequence of the above-described acts, Health and Safety Code section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment against DEFENDANTS as follows:

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

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

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

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: December 19, 2017

Respectfully submitted,
THE CHANLER GROUP

By:

Brian Johnson
Attorneys for Plaintiff
PETER ENGLANDER