

ENDORSED
FILED
San Francisco County Superior Court

JUL 18 2018

CLERK OF THE COURT
BY: NEYL WEBB
Deputy Clerk

Laralei Paras, State Bar No. 203319
Kimberly Gates, State Bar No. 282369
THE CHANLER GROUP
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565
Telephone: (510) 848-8880
Facsimile: (510) 848-8118
E-mail: laralei@chanler.com
E-mail: kimberly@chanler.com

Attorneys for Plaintiff
RUSSELL BRIMER

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,

Plaintiff,

v.

AHLBORN EQUIPMENT, INC.; and DOES
1-150, inclusive,

Defendants.

CGC-18-568198
Case No. _____

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6

7
8
9
10
11
12
13

14
15
16

17
18
19
20
21

22
23
24
25
26

6. Defendants manufacture, import, sell and distribute for sale, without health hazard warnings in California, hearing protection with vinyl/PVC ear cushions that contain DEHP including, but not limited to, the *Personal Safety Kit, PPK4, UPC #7 56580 01404 2*, referred to, hereinafter, as the “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) and 25249.7(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 § 25249.7(b), Plaintiff also seeks civil penalties against defendants for their violations of Proposition 65.

PARTIES

10. Plaintiff RUSSELL BRIMER 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 he brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

11. Defendant AHLBORN EQUIPMENT, INC. ("AHLBORN EQUIPMENT") is a person in the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and 25249.11.

12. AHLBORN EQUIPMENT 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. 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 §§ 25249.6
3 and 25249.11.

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

8 15. 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 §§ 25249.6 and
10 25249.11.

11 16. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
12 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
13 retailers for sale or use in the State of California, or each implies by its conduct that it distributes,
14 exchanges, transfers, processes, and transports one or more of the PRODUCTS to individuals,
15 businesses, or retailers for sale or use in the State of California.

16 17. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in
17 the course of doing business within the meaning of Health and Safety Code §§ 25249.6 and
18 25249.11.

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

21 19. At this time, the true names of defendants DOES 1 through 150, inclusive, are
22 unknown to Plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
23 Code of Civil Procedure § 474. Plaintiff is informed and believes, and on that basis allege, that
24 each of the fictitiously named defendants is responsible for the acts and occurrences alleged
25 herein. When ascertained, their true names shall be reflected in an amended complaint.
26
27
28

1 20. AHLBORN EQUIPMENT, MANUFACTURER DEFENDANTS,
2 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where
3 appropriate, be referred to collectively as the "DEFENDANTS."

4 **VENUE AND JURISDICTION**

5 21. Venue is proper in the Superior Court for the County of San Francisco pursuant to
6 Code of Civil Procedure §§ 393, 395, and 395.5, because this Court is a court of competent
7 jurisdiction, because Plaintiff seeks civil penalties against DEFENDANTS, because one or more
8 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
9 DEFENDANTS conducted, and continue to conduct, business in San Francisco with respect to
10 the PRODUCTS.

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

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

21 **FIRST CAUSE OF ACTION**

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

23 24. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
24 Paragraphs 1 through 23, inclusive.

25 25. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
26 Enforcement Act of 1986, the People of California expressly declared their right "[t]o be
27
28

1 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
2 harm.”

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

7 27. On January 17, 2018, Plaintiff served a sixty-day notice of violation, together
8 with the accompanying certificate of merit, on AHLBORN EQUIPMENT, the California
9 Attorney General’s Office, and the requisite public enforcement agencies alleging that, as a result
10 of DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California are being
11 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
12 the consumers first receiving a “clear and reasonable warning” regarding the harms associated
13 with exposures to DEHP, as required by Proposition 65.

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

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

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

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

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

5 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
6 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code
7 of Regulations, § 25602(b).

8 34. DEFENDANTS know that the normal and reasonably foreseeable use of the
9 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

10 35. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
11 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
12 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
13 consumers in California.

14 36. DEFENDANTS failed to provide a "clear and reasonable warning" to those
15 consumers in California who have been, or who will be, exposed to DEHP through dermal
16 contact and/or ingestion resulting from their use of the PRODUCTS.

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

22 38. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above-
23 described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty of
24 \$2,500 per day for each violation.

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

28

1
2
3 **PRAYER FOR RELIEF**

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

- 5 1. That the Court, pursuant to Health and Safety Code § 25249.7(b), assess
6 civil penalties against DEFENDANTS, and each of them, in the amount of
7 \$2,500 per day for each violation;
8 2. That the Court, pursuant to Health and Safety Code § 25249.7(a),
9 preliminarily and permanently enjoin DEFENDANTS from
10 manufacturing, distributing, or offering the PRODUCTS for sale or use in
11 California without first providing a "clear and reasonable warning" in
12 accordance with title 27 of the California Code of Regulations, section
13 25601 *et seq.*, regarding the harms associated with exposures to DEHP;
14 3. That the Court, pursuant to Health and Safety Code § 25249.7(a), issue
15 preliminary and permanent injunctions mandating that DEFENDANTS
16 recall all PRODUCTS currently in the chain of commerce in California
17 without a "clear and reasonable warning" as defined by California Code of
18 Regulations title 27, § 25601 *et seq.*;
19 4. That the Court grant Plaintiff his reasonable attorneys' fees and costs of
20 suit; and
21 5. That the Court grant such other and further relief as may be just and
22 proper.

23 Dated: July 18, 2018

Respectfully submitted,

24 THE CHANLER GROUP

25 By: K. gates
26 Kimberly Gates
27 Attorneys for Plaintiff
28 RUSSELL BRIMER