

1 Brian C. Johnson, State Bar No. 235965  
2 Josh Voorhees, State Bar No. 241436  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
6 Berkeley, CA 94710-2565  
7 Telephone: (510) 848-8880  
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff  
10 RUSSELL BRIMER

**ENDORSED**

2017 JUN 15 A 11: 26

David H. Yamasaki, Clerk of the Superior Court  
County of Santa Clara, California  
By: L. Barajas Deputy Clerk

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 SANTA CLARA COUNTY

13 UNLIMITED CIVIL JURISDICTION

14 RUSSELL BRIMER,

15 Plaintiff,

16 v.

17 WALGREEN CO.; EAST WEST  
18 DISTRIBUTING CO.; and DOES 1-150,  
19 inclusive,

20 Defendants.

Case No. 112CV226582

**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 of the presence of di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical  
5 found in pouches sold in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to  
7 warn California citizens about the risk of exposure to DEHP present in and on the pouches  
8 manufactured, distributed, and/or offered for sale or use to consumers throughout the state of  
9 California.

10 3. High levels of DEHP are commonly found in and on the pouches that defendants  
11 manufacture, distribute, and/or offer for sale to consumers throughout the state of California.

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

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

22 6. Defendants manufacture, distribute, and/or sell pouches that contain excessive  
23 levels of DEHP, including, but not limited to, the *Penway Carry-All Pouch, Item 595804 (#0*  
24 *49022 31872 4)*. All such pouches containing DEHP are referred to collectively hereinafter as  
25 "PRODUCTS."

26 7. Defendants' failure to warn consumers and/or other individuals in the state of  
27 California about their exposure to the LISTED CHEMICAL in conjunction with defendants'  
28

1 sale of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder  
2 of such conduct as well as civil penalties for each violation. (Cal. Health & Safety Code  
3 § 25249.7(a) & (b)(1).)

4 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and  
5 permanent injunctive relief to compel defendants to provide purchasers or users of the  
6 PRODUCTS with the required warning regarding the health hazards of the LISTED  
7 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 by California Health & Safety Code § 25249.7(b).

10 **PARTIES**

11 10. Plaintiff RUSSELL BRIMER is a citizen of the state of California who is  
12 dedicated to protecting the health of California citizens through the elimination or reduction of  
13 toxic exposures from consumer products, and he brings this action in the public interest  
14 pursuant to California Health & Safety Code § 25249.7(d).

15 11. Defendant WALGREEN CO. ("WALGREEN") is a person in the course of doing  
16 business within the meaning of California Health & Safety Code § 25249.11.

17 12. Defendant WALGREEN manufactures, distributes, and/or offers the PRODUCTS  
18 for sale or use in the state of California, or implies by its conduct that it manufactures,  
19 distributes, and/or offers the PRODUCTS for sale or use in the state of California.

20 13. Defendant EAST WEST DISTRIBUTING CO. ("EAST WEST") is a person in  
21 the course of doing business within the meaning of California Health & Safety Code §  
22 25249.11.

23 14. Defendant EAST WEST manufactures, distributes, and/or offers the PRODUCTS  
24 for sale or use in the state of California, or implies by its conduct that it manufactures,  
25 distributes, and/or offers the PRODUCTS for sale or use in the state of California.

1           15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each  
2 persons in the course of doing business within the meaning of California Health & Safety Code  
3 § 25249.11.

4           16. MANUFACTURER DEFENDANTS engage in the process of researching,  
5 testing, designing, assembling, fabricating, and/or manufacturing, or imply by their conduct that  
6 they engage in the process of researching, testing, designing, assembling, fabricating, and/or  
7 manufacturing, one or more of the PRODUCTS for sale or use in the state of California.

8           17. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons  
9 in the course of doing business within the meaning of California Health & Safety Code  
10 § 25249.11.

11           18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or  
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 persons in  
15 the course of doing business within the meaning of California Health & Safety Code  
16 § 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 § 474. Plaintiff is informed and believes, and on that basis alleges, that  
22 each of the fictitiously named defendants is responsible for the acts and occurrences alleged  
23 herein. When ascertained, their true names shall be reflected in an amended complaint.

24           22. WALGREEN, EAST WEST, MANUFACTURER DEFENDANTS,  
25 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,  
26 collectively be referred to as “DEFENDANTS.”  
27  
28

1 **VENUE AND JURISDICTION**

2 23. Venue is proper in the Santa Clara County Superior Court, pursuant to Code of  
3 Civil Procedure §§ 394, 395, and 395.5, because this Court is a court of competent jurisdiction,  
4 because one or more instances of wrongful conduct occurred and continue to occur in Santa  
5 Clara County, and/or because DEFENDANTS conducted and continue to conduct business in  
6 this county with respect to the PRODUCTS.

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

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

17 **FIRST CAUSE OF ACTION**

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

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

21 27. The citizens of the State of California have expressly stated in The Safe Drinking  
22 Water and Toxic Enforcement Act of 1986, California Health & Safety Code § 25249.6 *et seq.*  
23 that they must be informed “about exposures to chemicals that cause cancer, birth defects and  
24 other reproductive harm.” (Cal. Health & Safety Code § 25249.6.)

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

1 cancer or reproductive toxicity without first giving clear and reasonable warning to such  
2 individual ...” (*Id.*)

3 29. On or about March 29, 2012, plaintiff’s sixty-day notice of violation, together  
4 with the requisite certificate of merit, was provided to WALGREEN, EAST WEST and certain  
5 requisite public enforcement agencies stating that, as a result of the DEFENDANTS’ sales of  
6 the PRODUCTS containing the LISTED CHEMICAL, purchasers and users in the state of  
7 California were being exposed to the LISTED CHEMICAL resulting from the reasonably  
8 foreseeable use of the PRODUCTS, without the individual purchasers and users first having  
9 been provided with a “clear and reasonable warning” regarding such toxic exposures, as  
10 required by Proposition 65.

11 30. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of  
12 the PRODUCTS for sale or use in violation of California Health & Safety Code § 25249.6 and  
13 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day  
14 notice of violation. Plaintiff further alleges that DEFENDANTS’ violations are ongoing and  
15 continuous in nature and, as such, will continue to occur in the future.

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

19 32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
20 California by DEFENDANTS contain the LISTED CHEMICAL in amounts above the  
21 allowable state limits, such that they require a “clear and reasonable” Proposition 65 warning.

22 33. DEFENDANTS knew or should have known that the PRODUCTS they  
23 manufactured, distributed, and/or offered 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.  
27  
28



1           1.     That the Court, pursuant to California Health & Safety Code § 25249.7(b), assess  
2 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 § 25249.7(a),  
5 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or  
6 offering the PRODUCTS for sale or use in California without first providing “clear and  
7 reasonable warnings” as defined by Cal. Code Regs., tit. 27, § 25601, as to the harms associated  
8 with exposure the 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: June 13, 2012

12 Respectfully Submitted,  
13 THE CHANLER GROUP

14 By: 

15 Brian C. Johnson  
16 Attorneys for Plaintiff  
17 RUSSELL BRIMER  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28