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FILED

MAR - 6 2013

KIM TURNER, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Dale, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

RUSSELL BRIMER,
Plaintiff,
v.
PILOT CORPORATION OF AMERICA;
and DOES 1-150, inclusive,
Defendants.

) Case No. CIV 13 00 99 1
)
)
) **COMPLAINT FOR CIVIL PENALTIES**
) **AND INJUNCTIVE RELIEF**
)
) (Health & Safety Code. § 25249.6 *et seq.*)
)
)
)

BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff Russell Brimer in
3 the public interest of the citizens of the State of California to enforce the People's right to be
4 informed of the presence of di(2-ethylhexyl)phthalate ("DEHP"), a toxic chemical found in
5 vinyl/PVC pen 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 vinyl/PVC pen
8 pouches manufactured, distributed, and offered for sale or use to consumers throughout the
9 State of California.

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

15 4. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
16 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
17 subject to the "clear and reasonable warning" requirements of the act one year later on October
18 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
19 25249.10(b).

20 5. Defendants manufacture, distribute, and sell vinyl/PVC pen pouches that contain
21 DEHP in levels that require a warning under Proposition 65 including, but not limited to, the
22 *Pilot G2 Retractable Gel Ink Rolling Ball (#0 72838 31128 3)*. All such vinyl/PVC pen
23 pouches containing DEHP are referred to collectively hereinafter as "PRODUCTS."

24 6. Defendants' failure to warn consumers and other individuals in the State of
25 California about their exposure to DEHP in conjunction with defendants' sales of the
26 PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinder of such
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1 conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) &
2 (b)(1).

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

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

9 **PARTIES**

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

14 10. Defendant Pilot Corporation of America ("PILOT") is a person in the course of
15 doing business within the meaning of Health and Safety Code section 25249.11.

16 11. PILOT manufactures, distributes, and/or offers the PRODUCTS for sale or use in
17 the State of California, or implies by its conduct that it manufactures, distributes, and/or offers
18 the PRODUCTS for sale or use in the State of California.

19 12. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each
20 persons in the course of doing business within the meaning of Health and Safety Code section
21 25249.11.

22 13. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
23 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
24 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
25 California.

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1 27. DEFENDANTS have engaged in the manufacture, distribution, and offering of
2 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
3 such violations have continued to occur beyond DEFENDANTS' receipt of plaintiff's Notice.
4 As such, DEFENDANTS' violations are ongoing and continuous in nature, and will continue to
5 occur in the future.

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

9 29. The PRODUCTS manufactured, distributed, and offered for sale or use in
10 California by DEFENDANTS contain DEHP in amounts above the allowable state limits, such
11 that they require a "clear and reasonable" warning under Proposition 65.

12 30. DEFENDANTS knew or should have known that the PRODUCTS they
13 manufactured, distributed, and offered for sale or use in California contained DEHP.

14 31. DEHP is present in or on the PRODUCTS in such a way as to expose individuals
15 through dermal contact and/or ingestion during reasonably foreseeable use.

16 32. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
17 continue to cause, consumer exposures to DEHP, as such exposures are defined by California
18 Code of Regulations title 27, section 25602(b).

19 33. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
20 of the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

21 34. DEFENDANTS intended that such exposures to DEHP from the reasonably
22 foreseeable uses of the PRODUCTS would occur by their deliberate, non-accidental
23 participation in the manufacture, distribution, and offering of the PRODUCTS for sale or use to
24 individuals in the State of California.

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35. DEFENDANTS failed to provide a "clear and reasonable warning" to those consumers and other individuals in the State of California who were or who would become exposed to DEHP through dermal contact and/or ingestion during the reasonably foreseeable uses of the PRODUCTS.

36. Contrary to the express policy and statutory prohibition of Proposition 65 enacted directly by California voters, individuals exposed to DEHP through dermal contact and/or ingestion resulting from the reasonably foreseeable use of the PRODUCTS sold by DEFENDANTS without a "clear and reasonable warning," have suffered, and continue to suffer, irreparable harm for which they have no plain, speedy, or adequate remedy at law.

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

38. 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 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" as defined by California Code of Regulations title 27, section 25601 *et seq.*, as to the harms associated with exposures to DEHP;

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- 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 4. That the Court grant such other and further relief as may be just and proper.

Dated: March 6, 2013

Respectfully Submitted,
THE CHANLER GROUP

By: 

Troy C. Bailey
Attorneys for Plaintiff
RUSSELL BRIMER