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ENDORSED
FILED
San Francisco County Superior Court

JUN 17 2015

CLERK OF THE COURT

BY: DENNIS TOYAMA
Deputy Clerk

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

13 RUSSELL BRIMER,

14 Plaintiff,

15 v.

16 DONNA LOREN LLC; JUMP SHOT
17 SPORTSWEAR INC.; TUESDAY MORNING
18 CORPORATION; TUESDAY MORNING,
19 INC.; and DOES 1-150, inclusive,

20 Defendants.

Case No. CGC-15-546425

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

By Fax

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 health hazards caused by exposures to di(2-ethylhexyl)phthalate
5 (“DEHP”), a toxic chemical found in vinyl/PVC earphone cords sold by defendants in
6 California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn California citizens and other individuals about the risks of exposure to DEHP present in
9 and on vinyl/PVC earphone cords manufactured, distributed, and offered for sale or use to
10 consumers and other individuals throughout the State of California.

11 3. Detectable levels of DEHP are found in and on the vinyl/PVC earphone cords that
12 defendants manufacture, distribute, and offer for sale to consumers and other individuals
13 throughout the State of California.

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

19 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
20 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
21 subject to the “clear and reasonable warning” requirements of the act one year later on October
22 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
23 25249.10(b).

24 6. Defendants manufacture, distribute, import, sell, and offer for sale without a
25 health hazard warning in California, vinyl/PVC earphone cords containing DEHP that require a
26 warning under Proposition 65 including, but not limited to, the *Design by Prestigex Wallet Case*
27 *with Earphones, #1399104, UPC #6 78091 17259 5*, hereinafter the “PRODUCTS.”
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1 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
2 State of California.

3 15. Defendant TUESDAY MORNING CORPORATION (“TUESDAY MORNING”)
4 is a person in the course of doing business within the meaning of Health and Safety Code
5 sections 25249.6 and 25249.11.

6 16. TUESDAY MORNING manufactures, imports, distributes, sells, and/or offers the
7 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
8 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
9 State of California.

10 17. Defendant TUESDAY MORNING, INC. (“TUESDAY”) is a person in the course
11 of doing business within the meaning of Health and Safety Code sections 25249.6 and
12 25249.11.

13 18. TUESDAY manufactures, imports, distributes, sells, and/or offers the
14 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
15 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
16 State of California.

17 19. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
18 person in the course of doing business within the meaning of Health and Safety Code sections
19 25249.6 and 25249.11.

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

24 21. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
25 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
26 and 25249.11.

27 22. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and
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1 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
2 in the State of California.

3 23. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
4 the course of doing business within the meaning of Health and Safety Code sections 25249.6
5 and 25249.11.

6 24. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
7 State of California.

8 25. At this time, the true names of defendants DOES 1 through 150, inclusive, are
9 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
10 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
11 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
12 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

13 26. DONNA, JUMP SHOT, TUESDAY MORNING, TUESDAY,
14 MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER
15 DEFENDANTS shall, where appropriate, collectively be referred to as “DEFENDANTS.”

16 **VENUE AND JURISDICTION**

17 27. Venue is proper in San Francisco County Superior Court, pursuant to Code of
18 Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent
19 jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one or more
20 instances of wrongful conduct occurred, and continue to occur, in this county, and/or because
21 DEFENDANTS conducted, and continue to conduct, business in San Francisco County with
22 respect to the PRODUCTS.

23 28. The California Superior Court has jurisdiction over this action pursuant to
24 California Constitution Article VI, section 10, which grants the Superior Court “original
25 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
26 which this action is brought does not specify any other basis of subject matter jurisdiction.
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1 34. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
2 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS'
3 violations have continued beyond their receipt of plaintiff's sixty-day notice of violation.
4 DEFENDANTS' violations are ongoing and continuous in nature, and, as such, will continue in
5 the future.

6 35. After receiving plaintiff's sixty-day notice of violation, none of the appropriate
7 public enforcement agencies have commenced and diligently prosecuted a cause of action
8 against DEFENDANTS under Proposition 65 to enforce the alleged violations that are the
9 subject of plaintiff's notice of violation.

10 36. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
11 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
12 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
13 consumers and other individuals in California are not exempt from the "clear and reasonable"
14 warning requirements of Proposition 65, yet DEFENDANTS provide no warning.

15 37. DEFENDANTS knew or should have known that the PRODUCTS they
16 manufactured, imported, distributed, sold, and offered for sale or use in California contained
17 DEHP.

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

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

23 40. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
24 the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

25 41. DEFENDANTS intended that exposures to DEHP from the reasonably
26 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation
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1 in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or
2 use to consumers and other individuals in California.

3 42. DEFENDANTS failed to provide a “clear and reasonable warning” to those
4 consumers and other individuals in California who were or who would become exposed to
5 DEHP through dermal contact and/or ingestion resulting from their use of the PRODUCTS.

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

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

14 45. As a consequence of the above-described acts, Health and Safety Code
15 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
16 DEFENDANTS.

17 **PRAYER FOR RELIEF**

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

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

22 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
23 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
24 offering the PRODUCTS for sale or use in California without first providing a “clear and
25 reasonable warning” in accordance with title 27 of the California Code of Regulations, section
26 25601 *et seq.*, regarding the harms associated with exposures DEHP;

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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.;

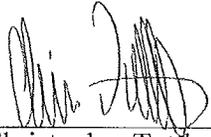
4. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

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

Dated: June 17, 2015

Respectfully Submitted,

THE CHANLER GROUP

By: 

Christopher Tuttle
Attorneys for Plaintiff
RUSSELL BRIMER