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FILED

OCT 28 2015

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Chais, Deputy

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION

12 MARK MOORBERG

13 Plaintiff,

14 v.

15 BENTEX GROUP, INC.; and DOES 1-150,
16 inclusive,

17 Defendants.

Case No. CW 15 03 939

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff MARK
3 MOORBERG in the public interest of the citizens of the State of California to enforce the
4 People’s right to be informed of the health hazards caused by exposures to Lead, a toxic
5 chemical found in tumblers with exterior designs sold by defendants in California.

6 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
7 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code
8 section 6300 et seq., who purchase, use or handle defendants’ products, about the risks of
9 exposure to Lead present in and on tumblers with exterior designs manufactured, distributed,
10 and offered for sale or use throughout the State of California. Individuals not covered by
11 California’s Occupational Safety Health Act, Labor Code section 6300 et seq. who purchase,
12 use or handle defendants’ products are referred to hereinafter as “consumers”.

13 3. Detectable levels of Lead are found in and on the tumblers with exterior designs
14 that defendants manufacture, distribute, and offer for sale without a warning to consumers
15 throughout the State of California.

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

21 5. Pursuant to Proposition 65, on February 27, 1987, California identified and listed
22 lead as a chemical known to cause birth defects (and other reproductive harm). Lead became
23 subject to the “clear and reasonable warning” requirements of the act one year later on February
24 27, 1988. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
25 25249.10(b).

26 6. Defendants manufacture, distribute, import, sell, and offer for sale without health
27 hazard warnings in California, tumblers with exterior designs containing Lead including, but not
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1 limited to, *INdecor Home Design Four Piece Decorative Ceramic Set (Tumbler)*, RN # 19109,
2 UPC #0 24054 21418 3. All tumblers with exterior designs containing Lead are referred to
3 collectively hereinafter as "PRODUCTS."

4 7. Defendants' failure to warn consumers in the State of California of the health
5 hazards associated with exposures to Lead in conjunction with defendants' sales of the
6 PRODUCTS are violations of Proposition 65, and subject defendants, and each of them, to
7 enjoinder of such conduct as well as civil penalties for each violation. Health & Safety Code
8 § 25249.7(a) & (b)(1).

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

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

15 PARTIES

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

20 11. Defendant BENTEX GROUP, INC. ("BENTEX") is a person in the course of
21 doing business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

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

25 13. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each a
26 person in the course of doing business within the meaning of Health and Safety Code sections
27 25249.6 and 25249.11.

1 14. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
2 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
3 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
4 California.

5 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons
6 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
7 and 25249.11.

8 16. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and
9 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
10 in the State of California.

11 17. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
12 the course of doing business within the meaning of Health and Safety Code sections 25249.6
13 and 25249.11.

14 18. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
15 State of California.

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

21 20. BENTEX, MANUFACTURER DEFENDANTS, DISTRIBUTOR
22 DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be
23 referred to as “DEFENDANTS.”

24 **VENUE AND JURISDICTION**

25 21. Venue is proper in Marin County Superior Court, pursuant to Code of Civil
26 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
27 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
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1 wrongful conduct occurred, and continue to occur, in this county, and/or because
2 DEFENDANTS conducted, and continue to conduct, business in Marin County with respect to
3 the PRODUCTS.

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

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

14 **FIRST CAUSE OF ACTION**

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

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

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

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

26 27. On June 26, 2015, plaintiff served a sixty-day notice of violation, together with
27 the requisite certificate of merit, on BENTEX and certain public enforcement agencies alleging
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1 that, as a result of DEFENDANTS' sales of the PRODUCTS containing Lead, consumers in the
2 State of California were being exposed to Lead resulting from their reasonably foreseeable use
3 of the PRODUCTS, without the consumers first having been provided with a "clear and
4 reasonable warning" regarding the harms associated with such exposures, as required by
5 Proposition 65. Exposures to Lead from the reasonably foreseeable use of the PRODUCTS have
6 been occurring without the clear and reasonable warning required by Proposition 65, dating as
7 far back as June 26, 2012.

8 28. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
9 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS'
10 violations have continued beyond their receipt of plaintiff's sixty-day notice of violation.
11 DEFENDANTS' violations are ongoing and continuous in nature and, as such, will continue in
12 the future.

13 29. After receiving plaintiff's sixty-day notice of violation, no public enforcement
14 agency has commenced and diligently prosecuted a cause of action against DEFENDANTS
15 under Proposition 65 to enforce the alleged violations that are the subject of plaintiff's notice of
16 violation.

17 30. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
18 offer for sale or use in California cause exposures to Lead as a result of the reasonably
19 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
20 consumers in California are not exempt from the "clear and reasonable" warning requirements
21 of Proposition 65, yet DEFENDANTS provide no warning.

22 31. DEFENDANTS knew or should have known that the PRODUCTS they
23 manufacture, import, distribute, sell, and offer for sale or use in California contain Lead.

24 32. Lead is present in or on the PRODUCTS in such a way as to expose consumers to
25 Lead through dermal contact and/or ingestion during reasonably foreseeable use.
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1 33. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
2 continues to cause, consumer exposures to Lead, as defined by title 27 of the California Code of
3 Regulations, section 25602(b).

4 34. DEFENDANTS know that the normal and reasonably foreseeable use of the
5 PRODUCTS exposes consumers to Lead through dermal contact and/or ingestion.

6 35. DEFENDANTS intend that exposures to Lead from the reasonably foreseeable
7 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
8 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
9 consumers in California.

10 36. DEFENDANTS failed to provide a “clear and reasonable warning” to those
11 consumers in California who were or who would become exposed to Lead through dermal
12 contact and/or ingestion resulting from their use of the PRODUCTS.

13 37. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
14 directly by California voters, consumers exposed to Lead through dermal contact and/or
15 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sell without a “clear
16 and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable harm
17 for which they have no plain, speedy, or adequate remedy at law.

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

21 39. As a consequence of the above-described acts, Health and Safety Code
22 section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against
23 DEFENDANTS.

24 **PRAYER FOR RELIEF**

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

4 2. That the Court, pursuant to Health and Safety Code section 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 a "clear and
7 reasonable warning" in accordance with title 27 of the California Code of Regulations, section
8 25601 *et seq.*, regarding the harms associated with exposures to Lead;


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

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

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

15 Dated: October 27, 2015

16 Respectfully Submitted,
17 THE CHANLER GROUP

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19 By: 
20 Warren M. Klein
21 Attorneys for Plaintiff
22 MARK MOORBERG