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FILED
ALAMEDA COUNTY

JUL 28 2015

CLERK OF THE SUPERIOR COURT

By Donnan Phelan Deputy

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

MICHAEL DIPIRRO,

Plaintiff,

v.

SWAN PRODUCTS, LLC; LOWE'S
COMPANIES, INC.; LOWE'S HIW, INC.;
and DOES 1-150, inclusive,

Defendants.

Case No. _____

RG15779713

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

(Health & Safety Code. § 25249.6 *et seq.*)

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

BY FAX

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff MICHAEL
3 DIPIRRO 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”) and Diisononyl
5 phthalate (“DINP”), toxic chemicals found in garden hoses 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 and DINP present in and on the
8 garden hoses manufactured, distributed, and offered for sale or use to consumers throughout the
9 state of California.

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

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

18 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
19 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
20 subject to the “clear and reasonable warning” requirements of the act one year later on October
21 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
22 25249.10(b). Pursuant to Proposition 65, on December 20, 2013, California identified and
23 listed DINP as a chemical known to cause cancer. DEHP became subject to the “clear and
24 reasonable warning” requirements of the act one year later on December 30, 2014. Cal. Code
25 Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). DEHP and DINP are
26 referred to hereinafter as the “LISTED CHEMICALS.”
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1 13. Defendants LOWE'S COMPANIES, INC. and LOWE'S HIW, INC.;

2 ("LOWE'S") are each a person in the course of doing business within the meaning of Health

3 and Safety Code section 25249.11.

4 14. LOWE'S manufactures, distributes, and/or offers the PRODUCTS for sale or use

5 in the state of California, or implies by its conduct that it manufactures, distributes, and/or offers

6 the PRODUCTS for sale or use in the state of California.

7 15. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each

8 persons in the course of doing business within the meaning of Health and Safety Code section

9 25249.11.

10 16. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,

11 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,

12 and manufacture one or more of the PRODUCTS offered for sale or use in the state of

13 California.

14 17. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person

15 in the course of doing business within the meaning of Health and Safety Code section 25249.11.

16 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or

17 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use

18 in the state of California.

19 19. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in

20 the course of doing business within the meaning of Health and Safety Code section 25249.11.

21 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the

22 state of California.

23 21. At this time, the true names of defendants DOES 1 through 150, inclusive, are

24 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to

25 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis

26 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences

27 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

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

5 29. On April 4, 2015, plaintiff’s sixty-day notice of violation, together with the
6 requisite certificate of merit, was provided to SWAN, LOWE’S and certain public enforcement
7 agencies stating that, as a result of DEFENDANTS’ sales of the PRODUCTS containing the
8 LISTED CHEMICALS, purchasers and users in the state of California were being exposed to
9 the LISTED CHEMICALS resulting from the reasonably foreseeable uses of the PRODUCTS,
10 without the individual purchasers and users first having been provided with a “clear and
11 reasonable warning” regarding such toxic exposures, as required by Proposition 65.

12 30. DEFENDANTS have engaged in the manufacture, distribution, and offering of
13 the PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
14 such violations have continued to occur beyond DEFENDANTS’ receipt of plaintiff’s sixty-day
15 notice of violation. As such, DEFENDANTS’ violations are ongoing and continuous in nature,
16 and will continue to occur in the future.

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

20 32. The PRODUCTS manufactured, distributed, and offered for sale or use in
21 California by DEFENDANTS contain the LISTED CHEMICALS in amounts above the
22 allowable state limits, such that they require a “clear and reasonable” warning under Proposition
23 65.

24 33. DEFENDANTS knew or should have known that the PRODUCTS they
25 manufacture, distribute, and offer for sale or use in California contain the LISTED
26 CHEMICALS.

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1 34. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as
2 to expose individuals through dermal contact and/or ingestion during reasonably foreseeable
3 use.

4 35. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and
5 continue to cause, consumer exposures to the LISTED CHEMICALS, as such exposures are
6 defined by California Code of Regulations title 27, section 25602(b).

7 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses
8 of the PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact
9 and/or ingestion.

10 37. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from
11 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-
12 accidental participation in the manufacture, distribution, and offering of the PRODUCTS for
13 sale or use to individuals in the state of California.

14 38. DEFENDANTS failed to provide a "clear and reasonable warning" to those
15 consumers and other individuals in the state of California who were or who would become
16 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the
17 reasonably foreseeable uses of the PRODUCTS.

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

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

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