1 2 3 4 5 6 7 8 9 10 11 12	COUNTY UNLIMITED C	THE STATE OF CALIFORNIA OF ALAMEDA TO SEP 28 AM 10: 12 OLERK OF THE SUPERIOR COURT M. SALCIDO. DEPUT
12	MICHAEL DIPIRRO,	Case No. <b>RG157</b> 87396
13	Plaintiff,	COMPLAINT FOR CIVIL PENALTIES
15	v.	AND INJUNCTIVE RELIEF
16	TOPS PRODUCTS; R.R. DONNELLEY & SONS COMPANY; STAPLES, INC.; and	(Health & Safety Code. § 25249.6 et seq.)
17	DOES 1-150, inclusive,	BY FAX
18	Defendants.	
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		
	COMPLAINT FOR CIVIL PEN	ALTIES AND INJUNCTIVE RELIDE

1 2

3

4

5

6

7

8

9

### **NATURE OF THE ACTION**

1. This Complaint is a representative action brought by plaintiff MICHAEL DIPIRRO in the public interest of the citizens of the State of California to enforce the People's right to be informed of the presence of di(2-ethylhexyl)phthalate ("DEHP") and Diisononyl phthalate ("DINP"), toxic chemicals found in binders sold in California.

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

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

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

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

6. Pursuant to Proposition 65, on December 20, 2013, California identified and listed
DINP as a chemical known to cause cancer. DINP became subject to the "clear and reasonable
warning" requirements of the act one year later on December 20, 2014. Cal. Code Regs. tit. 27,
§ 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). DEHP and DINP are referred to
hereinafter as the "LISTED CHEMICALS."

7. Defendants manufacture, distribute, and sell binders, including, but not limited to, 2 the Cardinal 1" 11X17 ClearVue Slant-D Ring Binder, White (#22112) (UPC #083086221149), 3 that contain DEHP and/or DINP in levels that require a warning under Proposition 65. All such binders containing DEHP and/or DINP are referred to collectively hereinafter as "PRODUCTS."

8. Defendants' failure to warn consumers and other individuals in the state of California about their exposure to the LISTED CHEMICALS in conjunction with defendants' sales of the PRODUCTS is a violation of Proposition 65, and subjects defendants to enjoinment of such conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) & (b)(1).

10 9. For defendants' violations of Proposition 65, plaintiff seeks preliminary and 11 permanent injunctive relief to compel defendants to provide purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED 12 13 CHEMICALS. Health & Safety Code § 25249.7(a).

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

## PARTIES

Plaintiff MICHAEL DIPIRRO is a citizen of the state of California who is 11. 18 dedicated to protecting the health of California citizens through the elimination or reduction of 19 toxic exposures from consumer products; and he brings this action in the public interest 20 pursuant to Health and Safety Code section 25249.7(d).

21 12. Defendant TOPS PRODUCTS ("TOPS") is a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.

13. TOPS manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

28

1

4

5

6

7

8

9

14

15

16

14. Defendant R.R. DONNELLEY & SONS COMPANY ("R.R. DONNELLEY") is a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.

15. R.R. DONNELLEY manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the state of California.

Defendant STAPLES, INC. ("STAPLES") is a person in the course of doing 16. business within the meaning of Health and Safety Code section 25249.11.

17. STAPLES distributes, and/or offers the PRODUCTS for sale or use in the state of California, or implies by its conduct that it distributes, and/or offers the PRODUCTS for sale or use in the state of California.

Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each 18. persons in the course of doing business within the meaning of Health and Safety Code section 25249.11.

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

20. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.

21. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and/or transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use in the state of California.

22. Defendants DOES 101-150 ("RETAILER DEFENDANTS") are each a person in the course of doing business within the meaning of Health and Safety Code section 25249.11.

23. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the state of California.

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

25. TOPS, R.R. DONNELLEY, STAPLES, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate, collectively be referred to as "DEFENDANTS."

#### VENUE AND JURISDICTION

26. Venue is proper in the Alameda County Superior Court, pursuant to Code of Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction, because one or more instances of wrongful conduct occurred, and continue to occur, in Alameda County, and/or because DEFENDANTS conducted, and continue to conduct, business in this county with respect to the PRODUCTS.

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

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

# FIRST CAUSE OF ACTION

## (Violation of Proposition 65 - Against All Defendants)

29. Plaintiff realleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 28, inclusive.

30. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986, the People of California expressly declare their right "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm."

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

3 32. On April 21, 2015, plaintiff's sixty-day notice of violation, together with the 4 requisite certificate of merit, was provided to TOPS, R.R. DONNELLEY, STAPLES and 5 certain public enforcement agencies stating that, as a result of DEFENDANTS' sales of the 6 PRODUCTS containing the LISTED CHEMICALS, purchasers and users in the state of 7 California were being exposed to the LISTED CHEMICALS resulting from the reasonably 8 foreseeable uses 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 9 required by Proposition 65.

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

After receiving the claims asserted in the sixty-day notice of violation, the
appropriate public enforcement agencies have failed to commence and diligently prosecute a

1 cause of action against DEFENDANTS under Proposition 65. 35. The PRODUCTS manufactured, distributed, and offered for sale or use in 2 3 California by DEFENDANTS contain the LISTED CHEMICALS in amounts above the allowable state limits, such that they require a "clear and reasonable" warning under Proposition 4 5 65. 36. DEFENDANTS knew or should have known that the PRODUCTS they 6 7 manufacture, distribute, and offer for sale or use in California contain the LISTED 8 CHEMICALS. 9 37. The LISTED CHEMICALS are present in or on the PRODUCTS in such a way as 10 to expose individuals through dermal contact and/or ingestion during reasonably foreseeable 11 use. 12 38. The normal and reasonably foreseeable uses of the PRODUCTS have caused, and 13 continue to cause, consumer exposures to the LISTED CHEMICALS, as such exposures are 14 defined by California Code of Regulations title 27, section 25602(b). 15 39. DEFENDANTS had knowledge that the normal and reasonably foreseeable uses 16 of the PRODUCTS expose individuals to the LISTED CHEMICALS through dermal contact 17 and/or ingestion. 18 40. DEFENDANTS intended that such exposures to the LISTED CHEMICALS from 19 the reasonably foreseeable uses of the PRODUCTS would occur by their deliberate, non-20 accidental participation in the manufacture, distribution, and offering of the PRODUCTS for 21 sale or use to individuals in the state of California. 22 41. DEFENDANTS failed to provide a "clear and reasonable warning" to those 23 consumers and other individuals in the state of California who were or who would become 24 exposed to the LISTED CHEMICALS through dermal contact and/or ingestion during the 25 reasonably foreseeable uses of the PRODUCTS. 26 42. Contrary to the express policy and statutory prohibition of Proposition 65 enacted 27 directly by California voters, individuals exposed to the LISTED CHEMICALS through dermal 28

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.

43. 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.

44. 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 the LISTED CHEMICALS;

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

Dated: September 25, 2015

Respectfully Submitted, BUSH & HENRY

By: Mar

Jennifer Henry Attorneys for Plaintiff MICHAEL DIPIRRO