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ALAMEDA COUNTY

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1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 ANTHONY FERREIRO,
13 Plaintiff,
14 vs.

15 BRIGGS MEDICAL SERVICE
16 COMPANY, THE HOME DEPOT, INC.,
17 and HOME DEPOT, U.S.A., INC.,
18 Defendants.

CASE NO.: RG 15784540

JUDGE

DEPT.:

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Violation of Health & Safety Code §25249.5
et seq.)

BY FAX

19 Plaintiff Anthony Ferreiro, by and through his attorneys, alleges the following cause of
20 action in the public interest of the citizens of the State of California.

21 BACKGROUND OF THE CASE

22 1. Plaintiff Anthony Ferreiro ("Plaintiff" or "Ferreiro"), brings this representative
23 action on behalf of all California citizens to enforce relevant portions of Safe Drinking Water
24 and Toxic Enforcement Act of 1986, codified at the Health and Safety Code § 25249.5 et seq
25 ("Proposition 65"), which reads, in relevant part, "[n]o person in the course of doing business
26 shall knowingly and intentionally expose any individual to a chemical known to the state to
27 cause cancer or reproductive toxicity without first giving clear and reasonable warning to such
28 individual ..." Health & Safety Code § 25249.6.

1 2. This complaint is a representative action brought by Plaintiff in the public interest
2 of the citizens of the State of California to enforce the People's right to be informed of the health
3 hazards caused by exposures to Diisononyl phthalate ("DINP"), a toxic chemical found in hand
4 held shower heads, sold, and/or distributed by defendants Briggs Medical Service Company
5 ("Briggs"), The Home Depot, Inc. ("Home Depot"), and/or Home Depot, U.S.A., Inc. ("Home
6 Depot USA") (collectively referred to herein as, "Defendants") in California.

7 3. DINP is a harmful chemical, known to cause cancer. DINP has been listed on the
8 Proposition 65 list of chemicals since December 20, 2013 and it has come under the purview of
9 Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety
10 Code §§ 25249.8 & 25249.10(b).

11 4. Proposition 65 requires all businesses with ten (10) or more employees that
12 operate within California or sell products therein to comply with Proposition 65 regulations.
13 Included in such regulations is the requirement that businesses must label any product containing
14 a Proposition 65-listed chemical with a "clear and reasonable" warning before knowingly or
15 intentionally exposing any person to it.

16 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
17 to be imposed upon defendants in a civil action for violations of Proposition 65. *Health & Safety*
18 *Code* § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
19 the actions of a defendant which "violate or threaten to violate" the statute. *Health & Safety*
20 *Code* § 25249.7.

21 6. Plaintiff alleges that Defendants distribute, manufacture, produce, import, sell,
22 and/or offer for sale, without the required warning, hand held shower heads in California
23 containing DINP. These products include, but are not limited to, the *Health Smart Hand Held*
24 *Shower, UPC # 0 412981 1583 0, Item # 523-1583-1900HS, 921-1583-1900HS* (the "Product").

25 7. Defendants' failure to warn consumers, workers, and other individuals in
26 California of the health hazards associated with exposure to DINP in conjunction with the sale,
27 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects
28 Defendants to the enjoinder and civil penalties described herein.

8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendants to provide purchasers or users of the Product with the required warnings related to the dangers and health hazards associated with exposure to DINP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

10. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

11. Defendant Briggs, doing business in California at all relevant times herein, is principally located in Iowa, and offers for sale various home healthcare, medical records, and obstetrics products. Through said business, Briggs effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Briggs can be served at c/o United States Corporation Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808. Briggs is a person in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

12. Defendant Home Depot, a Delaware Corporation with its headquarters located in Atlanta, Georgia, operates a chain of retail stores, and through that business effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Home Depot can be served at c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE 19808. Home Depot is a person in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

1 13. Defendant Home Depot USA, a Delaware Corporation with its headquarters
2 located in Atlanta, Georgia, operates a chain of retail stores, and through that business effectively
3 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in California, or
4 it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product
5 for sale or use in the State of California. Home Depot can be served at c/o CSC-Lawyers
6 Incorporation Service, 2710 Gateway Oaks Drive, Suite 150N, Sacramento, CA 95833. Home
7 Depot is a person in the course of doing business within the meaning of Health & Safety Code
8 sections 25249.6 and 25249.11.

9 14. Upon information and belief, Plaintiff avers that each Defendant acted as an
10 employee, servant, or agent of each other Defendant at all times relevant to this action. Plaintiff
11 further avers that in conducting the activities alleged in this Complaint, all Defendants acted
12 within the scope of their agency or similarly situated relationship as toward one another.
13 Therefore all Defendants acted with consent, permission, and authorization of each other in
14 relation to all acts related to the scope of this Complaint.

15 15. Upon information and belief, Plaintiff avers that at all relevant times herein, each
16 Defendant was a person doing business within the meaning of Health and Safety Code §
17 25249.11(b) and that each and every Defendant had ten (10) or more employees at all relevant
18 times.

19 **VENUE AND JURISDICTION**

20 16. Venue is proper in the County of Alameda, because one or more of the instances
21 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants
22 conducted, and continue to conduct, business in the County of Alameda with respect to the
23 Product.

24 17. This Court has jurisdiction over this action pursuant to California Constitution
25 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
26 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
27 enforcement of violations of Proposition 65 in any Court of competent jurisdiction, therefore,
28 this Court has jurisdiction over this lawsuit.

1 18. This Court has jurisdiction over the Defendants as each Defendant either is a
2 citizen of the State of California, has sufficient minimum contacts with the State of California, is
3 registered with the California Secretary of State as foreign corporations authorized to do business
4 in the State of California, and/or have otherwise purposefully availed themselves of the
5 California market. Such purposeful availment has rendered the exercise of jurisdiction by
6 California courts consistent and permissible with traditional notions of fair play and substantial
7 justice.

8 **SATISFACTION OF NOTICE REQUIREMENTS**

9 19. On May 21, 2015, Plaintiff gave notice of alleged violation of Health and Safety
10 Code § 25249.6 to Defendants concerning the exposure of California citizens to DINP contained
11 in the Product without proper warning, subject to a private action to Defendants and to the
12 California Attorney General's office and the offices of the County District attorneys and City
13 Attorneys for each city with a population greater than 750,000 persons wherein the herein
14 violations allegedly occurred.

15 20. The notice complied with all procedural requirements of Proposition 65 including
16 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
17 least one person with relevant and appropriate expertise who reviewed relevant data regarding
18 DINP exposure, and that counsel believed there was meritorious and reasonable cause for a
19 private action.

20 21. After receiving Plaintiff's notice, and to Plaintiff's best information and belief,
21 none of the noticed appropriate public enforcement agencies have commenced and diligently
22 prosecuted a cause of action against Defendants under Proposition 65 to enforce the alleged
23 violations which are the subject of Plaintiff's notice of violation.

24 22. Plaintiff is commencing this action more than sixty (60) days from the date of his
25 amended notice to Defendants, as required by law.

26 **FIRST CAUSE OF ACTION**

27 **(By Plaintiff against all Defendants for the Violation of Proposition 65)**
28

1 23. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 22 of
2 this complaint as though fully set forth herein.

3 24. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,
4 and/or retailer of the Product.

5 25. The Product contains DINP, a hazardous chemical found on the Proposition 65
6 list of a chemical known to be hazardous to human health.

7 26. The Product does not comply with the Proposition 65 warning requirements.

8 27. Plaintiff, based on his best information and belief, avers that at all relevant times
9 hereto, and at least since March 17, 2015 continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Product
11 to DINP without providing required warnings under Proposition 65.

12 28. The exposures that are the subject of this Complaint result from the purchase,
13 acquisition, handling and recommended use of the Product. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption through direct contact with the shower
15 cord, dermal absorption of shower water containing DINP that has leached from the hose, and
16 ingestion of discharged water containing DINP. Skin exposure through the user's hands is likely
17 to occur when the user manipulates the shower cord. Another route of dermal exposure is
18 through DINP that has leached into the shower water passed through the shower cord. This
19 water containing DINP is discharged from the shower head and can be absorbed through the
20 entire surface area of the user's body.

21 29. Plaintiff, based on his best information and belief, avers that such exposures will
22 continue every day until clear and reasonable warnings are provided to Product purchasers and
23 users or until this known toxic chemical is removed from the product.

24 30. Defendants have knowledge that the normal and reasonably foreseeable use of the
25 Product exposes individuals to DINP, and Defendants intend that exposures to DINP will occur
26 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
27 sale and offering of the Product to consumers in California

28

31. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this Complaint without success.

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

33. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant and requests the following relief:

- A. That the court assess civil penalties against each and every Defendant in the amount of \$2,500 per day for each violation in accordance with Health and Safety Code § 25249.7(b);
- B. That the court preliminarily and permanently enjoin all Defendants mandating Proposition 65 compliant warnings on the Products;
- C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- D. That the court grant any further relief as may be just and proper.

Dated: September 3, 2015

BRODSKY & SMITH, LLC

By:

Evan J. Smith (SBN242352)

Ryan P. Cardona (SBN302113)

9595 Wilshire Boulevard, Suite 900

Beverly Hills, CA 90212

Telephone: (877) 534-2590

Facsimile: (310) 247-0160

Attorneys for Plaintiff