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ENDORSED  
FILED  
ALAMEDA COUNTY

OCT 15 2015

CLERK OF THE SUPERIOR COURT  
By D. Oliver, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

10 GABRIEL ESPINOSA,  
11 Plaintiff,  
12 vs.  
13 DANCO INC., ORCHARD SUPPLY  
14 HARDWARE STORES  
15 CORPORATION, and ORCHARD  
16 SUPPLY COMPANY, LLC,  
17 Defendants.

CASE NO.: *Rs* 15789612  
JUDGE  
DEPT.:

COMPLAINT FOR CIVIL PENALTIES  
AND INJUNCTIVE RELIEF  
(Violation of Health & Safety Code §25249.5  
*et seq.*)

BY FAX

18  
19 Plaintiff Gabriel Espinosa ("Plaintiff" or "Espinosa"), by and through his attorneys,  
20 alleges the following cause of action in the public interest of the citizens of the State of  
21 California.

22 BACKGROUND OF THE CASE

23 1. Plaintiff brings this representative action on behalf of all California citizens to  
24 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified  
25 at the Health and Safety Code § 25249.5 *et seq* ("Proposition 65"), which reads, in relevant part,  
26 "[n]o person in the course of doing business shall knowingly and intentionally expose any  
27 individual to a chemical known to the state to cause cancer or reproductive toxicity without first  
28 giving clear and reasonable warning to such 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 exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in  
4 faucet hoses sold and/or distributed by defendants Danco, Inc. ("Danco") and Orchard Supply  
5 Hardware Stores Corporation, and Orchard Supply Company, LLC (collectively, "OSH")  
6 (Danco and OSH are collectively referred to herein as, "Defendants") in California.

7           3.       DEHP is a harmful chemical known to the State of California to cause both cancer  
8 and reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical  
9 known to the State to cause cancer. On October 24, 2003, the State of California DEHP as a  
10 chemical known to cause reproductive toxicity, and DEHP has come under the purview of  
11 Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety  
12 Code §§ 25249.8 & 25249.10(b).

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

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

23           6.       Plaintiff alleges that Defendants produce, manufacture, distribute, import, sell,  
24 and/or offer for sale, without the required warning, faucet hoses in California containing DEHP.  
25 These products include, but are not limited to, *Danco Universal Kitchen Sink Spray Heads and*  
26 *Hoses, UPC# 0 3715580762 8* (the "Product").

27           7.       Defendants' failure to warn consumers, workers, and other individuals in  
28 California of the health hazards associated with exposure to DEHP in conjunction with the sale,

1 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects  
2 Defendants to the enjoinder and civil penalties described herein.

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

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

9 **PARTIES**

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

14 11. Defendant Danco is one of the largest plumbing repair, replacement and remodel  
15 suppliers in the home improvement industry. Through its business, Danco effectively  
16 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of  
17 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or  
18 offers the Product for sale or use in the State of California. Danco maintains a registered agent  
19 for service of process at c/o The Company Corporation, 2711 Centerville Road, Suite 400  
20 Wilmington, DE 19808. Danco is a "person" in the course of doing business within the  
21 meaning of Health & Safety Code §§ 25249.6 and 25249.11.

22 12. Defendant Orchard Supply Hardware Stores Corporation is an American retailer  
23 of home improvement and gardening products that is headquartered in San Jose, California.  
24 Through its business, Orchard Supply Hardware Stores Corporation effectively manufactures,  
25 imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it  
26 implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product  
27 for sale or use in the State of California. Orchard Supply Hardware Stores Corporation can be  
28 served care of its agent for service of process, c/o CT Corporation System, 818 West Seventh

1 Street, 2<sup>nd</sup> Floor, Los Angeles, CA 90017. Orchard Supply Hardware Stores Corporation is a  
2 “person” in the course of doing business within the meaning of Health & Safety Code §§  
3 25249.6 and 25249.11.

4 13. Defendant Orchard Supply Company, LLC is an American retailer of home  
5 improvement and gardening products that is headquartered in San Jose, California. Through its  
6 business, Orchard Supply Company, LLC effectively manufactures, imports, distributes, sells,  
7 and/or offers the Product for sale or use in the State of California, or it implies by its conduct that  
8 it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of  
9 California. Orchard Supply Company, LLC can be served care of its agent for service of  
10 process, c/o Corporation Service Company, 2711 Centerville Road, Suite 400, Wilmington, DE  
11 19808. Orchard Supply Company, LLC is a “person” in the course of doing business within the  
12 meaning of Health & Safety Code §§ 25249.6 and 25249.11

13 14. Upon information and belief, Plaintiff avers that at all relevant times herein, each  
14 Defendant was a person doing business within the meaning of Health and Safety Code §  
15 25249.11(b).

#### 16 VENUE AND JURISDICTION

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

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

26 17. This Court has jurisdiction over Defendants because they are either citizens of the  
27 State of California, have sufficient minimum contacts with the State of California, are registered  
28 with the California Secretary of State as foreign corporations authorized to do business in the

1 State of California, and/or have otherwise purposefully availed themselves of the California  
2 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts  
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

5 18. On June 3, 2015, Plaintiff gave notice of alleged violation of Health and Safety  
6 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to  
7 DEHP contained in the Product without proper warning, subject to a private action to Defendants  
8 and to the California Attorney General's office and the offices of the County District attorneys  
9 and City Attorneys for each city with a population greater than 750,000 persons wherein the  
10 herein violations allegedly occurred.

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

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

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

22 **FIRST CAUSE OF ACTION**

23 **(By Plaintiff against Defendants for the Violation of Proposition 65)**

24 22. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 21 of  
25 this complaint as though fully set forth herein.

26 23. Defendants have, at all times mentioned herein, acted as manufacturers,  
27 distributors, and/or retailers of the Product.

28

1           24.     The Product contains DEHP, a hazardous chemical found on the Proposition 65  
2 list of a chemical known to be hazardous to human health.

3           25.     The Product does not comply with the Proposition 65 warning requirements.

4           26.     Plaintiff, based on his best information and belief, avers that at all relevant times  
5 herein, and at least since May 12, 2015, continuing until the present, that Defendants have  
6 continued to knowingly and intentionally expose California users and consumers of the Product  
7 to DEHP without providing required warnings under Proposition 65.

8           27.     The exposures that are the subject of the Notice result from the purchase,  
9 acquisition, handling and recommended use of the product. Consequently, the primary route of  
10 exposure to these chemicals is through dermal absorption. Dermal absorption through direct  
11 contact with the hose cord, dermal absorption of water containing DEHP that has leached from  
12 the hose, and ingestion of DEHP due to the discharged water from the sink sprayer. Direct  
13 dermal exposure through the user's hands is likely to occur when the user manipulates the spray  
14 hose. Another route of dermal exposure is through DEHP that has leached into the water passing  
15 through the spray hose. This water containing DEHP is discharged from the spray head and can  
16 be absorbed through the surface area of the user's exposed skin that come into contact with the  
17 water. If water is held static inside the pressurized spray hose, levels of DEHP will continue to  
18 increase in the water contained within the hose. Finally, while direct mouthing of the product  
19 does not seem likely, indirect exposure can occur if discharged water containing DEHP is  
20 ingested directly or absorbed to kitchen items. Water containing DEHP can be expected to leave  
21 DEHP residues absorbed on the surface of items washed using the kitchen sink sprayer. When  
22 these items are used during eating or drinking, direct ingestion of DEHP residues is possible.

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

26           29.     Defendants have knowledge that the normal and reasonably foreseeable use of the  
27 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur  
28

1 by their deliberate, non-accidental participation in the manufacture, importation, distribution,  
2 sale and offering of the Product to consumers in California

3 30. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this  
4 Complaint.

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

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

10  
11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendants and requests the  
13 following relief:

- 14  
15 A. That the court assess civil penalties against Defendants in the amount of  
16 \$2,500 per day for each violation in accordance with Health and Safety  
17 Code § 25249.7(b);
- 18 B. That the court preliminarily and permanently enjoin Defendants  
19 mandating Proposition 65 compliant warnings on the Product;
- 20 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 21 D. That the court grant any further relief as may be just and proper.

22 Dated: October 14, 2015

BRODSKY & SMITH, LLC

23 By:   
24 \_\_\_\_\_

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