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ENDORSED
FILED
ALAMEDA COUNTY

SEP 03 2015

CLERK OF THE SUPERIOR COURT
By Ciceli Johnson
Deputy

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

12 GABRIEL ESPINOSA,
13 Plaintiff,
14 vs.
15 FERNCO, INC.,
16 Defendant.

CASE NO.: RG15784535

JUDGE

DEPT.:

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

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

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18
19 Plaintiff Gabriel Espinosa, 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 Gabriel Espinosa ("Plaintiff" or "Espinosa"), 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 exposure to Diisononyl phthalate (“DINP”), a toxic chemical found in
4 couplings sold and/or distributed by defendant Fernco, Inc. (“Fernco” or “Defendant”) in
5 California.

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

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

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

20 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
21 and/or offers for sale, without the required warning, couplings in California containing DINP.
22 These products include, but are not limited to, *Proflex 2” CI Couplings, UPC # 018578015807,*
23 *3000-22, C40 0815584* (the “Product”).

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

28

1 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

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

7 **PARTIES**

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

12 11. Defendant, a Michigan corporation, designs, manufactures, and sells plumbing
13 products. Through its business, Fernco effectively manufactures, imports, distributes, sells,
14 and/or offers the Product for sale or use in the State of California, or it implies by its conduct that
15 it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
16 California. Fernco maintains a registered agent for service of process at c/o Christopher Cooper
17 at 300 S. Dayton Street, Davison, MI 48423. Fernco is a "person" in the course of doing
18 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

19 12. Upon information and belief, Plaintiff avers that at all relevant times herein,
20 Defendant was a person doing business within the meaning of Health and Safety Code §
21 25249.11(b).

22 **VENUE AND JURISDICTION**

23 13. Venue is proper in the County of Alameda because one or more of the instances
24 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
25 conducted, and continues to conduct, business in the County of Alameda with respect to the
26 Product.

27 14. This Court has jurisdiction over this action pursuant to California Constitution
28 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those

1 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
2 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
3 this Court has jurisdiction over this lawsuit.

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

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 16. On June 17, 2015, Plaintiff gave notice of alleged violation of Health and Safety
12 Code § 25249.6 to Defendant concerning the exposure of California citizens to DINP contained
13 in the Product without proper warning, subject to a private action to Defendant and to the
14 California Attorney General's office and the offices of the County District attorneys and City
15 Attorneys for each city with a population greater than 750,000 persons wherein the herein
16 violations allegedly occurred.

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

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

26 19. Plaintiff is commencing this action more than sixty (60) days from the date of his
27 notice to Defendant, as required by law.

28 **FIRST CAUSE OF ACTION**

1 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

2 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
3 this complaint as though fully set forth herein.

4 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
5 and/or retailer of the Product.

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

8 23. The Product does not comply with the Proposition 65 warning requirements.

9 24. Plaintiff, based on his best information and belief, avers that at all relevant times
10 herein, and at least since May 12, 2015 continuing until the present, that Defendant has
11 continued to knowingly and intentionally expose California users and consumers of the Product
12 to DINP without providing required warnings under Proposition 65.

13 25. The exposures that are the subject of this notice result from the purchase,
14 acquisition, handling and recommended use of the product. Consequently, the primary route of
15 exposure to these chemicals is through dermal absorption through direct skin contact with the
16 product during installation. Skin exposure through the user's hands is likely to occur when the
17 user installs the coupling without adequate glove protection. Should the coupling be used to vent
18 air into an indoor environment, exposure to gas-phase DINP that has leached from the inside of
19 the coupling into the air stream is possible. If the coupling is installed in a space that is
20 accessible to interior air circulation DINP exposure is possible as the coupling will slowly emit
21 DINP into the air or DINP can be absorbed to other media such as dust over the lifetime of the
22 product. Finally, while mouthing of the product does not seem likely, some amount of exposure
23 through ingestion can occur by handling the product during use and removal with subsequent
24 touching of the user's hand to mouth.

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

28

1 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
2 Product exposes individuals to DINP, and Defendant intends that exposures to DINP will occur
3 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
4 sale and offering of the Product to consumers in California

5 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
6 Complaint.

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

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


11
12 **PRAYER FOR RELIEF**

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

- 15 A. That the court assess civil penalties against Defendant 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 Defendant mandating
19 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

23 Dated: September 3, 2015

BRODSKY & SMITH, LLC

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