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**ENDORSED
FILED
ALAMEDA COUNTY**

DEC 28 2015

CLERK OF THE SUPERIOR COURT
Alma Carrera
Alma Carrera, Plaintiff

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
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12 Plaintiff,

13 vs.

14 MERC ACQUISITIONS INC. and BED
15 BATH & BEYOND, INC.,
16
17 Defendants.

CASE NO.: RG 15798078

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 -
COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF
HEALTH & SAFETY CODE §25249.5

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”) and Di(2-ethylhexyl) phthalate
4 (“DEHP”), toxic chemicals found in vacuum hoses sold and/or distributed by defendants Merc
5 Acquisitions, Inc. t/a Cirrus. (“Cirrus”) and Bed Bath & Beyond, Inc. (“BB&B”) (collectively,
6 “Defendants”) in California.

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

11 4. DEHP is a harmful chemical known to the State of California to cause cancer and
12 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical
13 known to the State to cause cancer and it has come under the purview of Proposition 65
14 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
15 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
16 known to cause developmental male reproductive toxicity. *Id.*

17 5. Proposition 65 requires all businesses with ten (10) or more employees that
18 operate within California or sell products therein to comply with Proposition 65 regulations.
19 Included in such regulations is the requirement that businesses must label any product containing
20 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
21 intentionally” exposing any person to it. Proposition 65 allows for civil penalties of up to
22 \$2,500.00 per day per violation to be imposed upon defendants in a civil action for violations of
23 Proposition 65. Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of
24 competent jurisdiction to enjoin the actions of a defendant which “violate or threaten to violate”
25 the statute. Health & Safety Code § 25249.7.

26 6. Plaintiff alleges that Defendants produce, manufacture, distribute, import, sell,
27 and/or offer for sale, without the required warning, vacuum hoses in California containing DINP
28

1 and DEHP. These products include, but are not limited to, *Cirrus Bagless Cyclonic Upright*
2 *Vacuum hoses, UPC No. 094922 34248 5* (the “Product”).

3 7. Defendants’ failure to warn consumers and other individuals in California of the
4 health hazards associated with exposure to DINP and DEHP in conjunction with the sale,
5 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects
6 Defendants to the enjoinder and civil penalties described herein.

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

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

13 **PARTIES**

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

18 11. Defendant Cirrus designs, manufactures, and sells vacuum products. Through its
19 business, Cirrus effectively manufactures, imports, distributes, sells, and/or offers the Product for
20 sale or use in the State of California, or it implies by its conduct that it manufactures, imports,
21 distributes, sells, and/or offers the Product for sale or use in the State of California. Cirrus
22 maintains a registered agent for service of process at c/o Thomas P. Bianco at 300 1933
23 Highland Road, Twinsburg, OH 44087. Cirrus is a “person” in the course of doing business
24 within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

25 12. Defendant BB&B is an American chain of domestic merchandise retail stores that
26 sell goods primarily for the bedroom and bathroom, as well as kitchen and dining room.
27 Through its business, BB&B effectively manufactures, imports, distributes, sells, and/or offers
28 the Product for sale or use in the State of California, or it implies by its conduct that it

1 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
2 California. BB&B maintains a registered agent for service of process at c/o The Prentice-Hall
3 Corporation System, Inc., 2710 Gateway Oaks, Dr., Suite 150N, Sacramento, CA 95833. BB&B
4 is a “person” in the course of doing business within the meaning of Health & Safety Code
5 sections 25249.6 and 25249.11.

6 VENUE AND JURISDICTION

7 13. Venue is proper in the County of Alameda because one or more of the instances
8 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants
9 conducted, and continue to conduct, business in the County of Alameda with respect to the
10 Product.

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

16 15. This Court has jurisdiction over Defendants because each is either a citizen of the
17 State of California, has sufficient minimum contacts with the State of California, is registered
18 with the California Secretary of State as foreign corporations authorized to do business in the
19 State of California, and/or has otherwise purposefully availed itself of the California market.
20 Such purposeful availment has rendered the exercise of jurisdiction by California courts
21 consistent and permissible with traditional notions of fair play and substantial justice.

22 SATISFACTION OF NOTICE REQUIREMENTS

23 16. On July 7, 2015, Plaintiff gave notice of alleged violation of Health and Safety
24 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
25 DINP and DEHP contained in the Product without proper warning, subject to a private action to
26 Defendants and to the California Attorney General’s office and the offices of the County District
27 attorneys and City Attorneys for each city with a population greater than 750,000 persons
28 wherein the herein violations allegedly occurred.

1 of vacuum attachments. Exposure is also possible through leaching of DEHP and DINP into the
2 air passed through the flexible hose during vacuuming. The DEHP and DINP containing exhaust
3 air is discharged from the vacuum exhaust during the use and the vapor phase DEHP and DINP
4 can potentially be ingested by the user or absorbed to the HEPA filter of the upright vacuum.
5 DEHP and DINP from the flexible hose can absorb onto dust, soils, or debris passing through the
6 hose which potentially can be resuspended in the air and ingested during removal, emptying, and
7 cleaning of the handheld vacuum canister. Finally, while mouthing of the product does not seem
8 likely, some amount of exposure through ingestion can occur by handling the product with
9 subsequent touching of the users hand to mouth.

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

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

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

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

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

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24 **PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
26 following relief:
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- A. That the court assess civil penalties against Defendants 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 Defendants mandating Proposition 65 compliant warnings on the Product;
- 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: December 28, 2015

BRODSKY & SMITH, LLC

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