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ENDORSED
FILED
ALAMEDA COUNTY

OCT 15 2015

CLERK OF THE SUPERIOR COURT
By Xian-Xii Bowie

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 MARTHA VELARDE,
11 Plaintiff,
12 vs.
13 SAS SAFETY CORPORATION and
14 KMART CORPORATION,
15 Defendants.

CASE NO.: RG 15789607
JUDGE
DEPT.:
COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF
(Violation of Health & Safety Code §25249.5
et seq.)

BY FAX

19 Plaintiff Martha Velarde ("Plaintiff" or "Velarde"), by and through her attorneys, alleges
20 the following cause of action in the public interest of the citizens of the State of California.

21 BACKGROUND OF THE CASE

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

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 earmuffs sold and/or distributed by defendants SAS Safety Corporation (“SAS”) and KMart
5 Corporation (“KMart”) (SAS and KMart are collectively referred to herein as, “Defendants”) in
6 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, earmuffs in California containing DEHP.
25 These products include, but are not limited to, *Foldable Earmuffs, UPC# 7 8131106110 1* (the
26 “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 SAS, principally located at 3031 Gardenia Ave., Long Beach, CA
15 90807, offers head-to-toe safety products and solutions for respiratory, hearing, eyes, hands,
16 body, face, first-aid kits, absorbents, spill containment, and other crucial safety accessories.
17 Through its business, SAS effectively manufactures, imports, distributes, sells, and/or offers the
18 Product for sale or use in the State of California, or it implies by its conduct that it manufactures,
19 imports, distributes, sells, and/or offers the Product for sale or use in the State of California.
20 SAS maintains a registered agent for service of process at c/o Corporate Creations Network, Inc.,
21 1430 Truxtun Avenue, 5th Floor, Bakersfield, CA 93301. SAS is a "person" in the course of
22 doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

23 12. Defendant Kmart, a wholly owned subsidiary of Sears Holdings Corporation, is a
24 mass merchandising company. Through its business, Kmart effectively manufactures, imports,
25 distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies
26 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale
27 or use in the State of California. Kmart can be served care of its agent for service of process, c/o
28 The Corporation Company, 30600 Telegraph Road, Suite 2345, Bingham Farms, MI 48025.

1 Kmart is a “person” in the course of doing business within the meaning of Health & Safety Code
2 §§ 25249.6 and 25249.11.

3 **VENUE AND JURISDICTION**

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

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

13 15. This Court has jurisdiction over Defendants because they are either citizens of the
14 State of California, have sufficient minimum contacts with the State of California, are registered
15 with the California Secretary of State as foreign corporations authorized to do business in the
16 State of California, and/or have otherwise purposefully availed themselves of the California
17 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
18 consistent and permissible with traditional notions of fair play and substantial justice.

19 **SATISFACTION OF NOTICE REQUIREMENTS**

20 16. On July 21, 2015, Plaintiff gave notice of alleged violation of Health and Safety
21 Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California citizens to
22 DEHP contained in the Product without proper warning, subject to a private action to Defendants
23 and to the California Attorney General’s office and the offices of the County District attorneys
24 and City Attorneys for each city with a population greater than 750,000 persons wherein the
25 herein violations allegedly occurred.

26 17. The Notice complied with all procedural requirements of Proposition 65 including
27 the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted with at
28 least one person with relevant and appropriate expertise who reviewed relevant data regarding

1 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a
2 private action.

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

7 19. Plaintiff is commencing this action more than sixty (60) days from the date of her
8 notice to Defendants, as required by law.

9 **FIRST CAUSE OF ACTION**

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

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

13 21. Defendants have, at all times mentioned herein, acted as manufacturers,
14 distributors, and/or retailers of the Product.

15 22. The Product contains DEHP, a hazardous chemical found on the Proposition 65
16 list of a chemical known to be hazardous to human health.

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

18 24. Plaintiff, based on her best information and belief, avers that at all relevant times
19 herein, and at least since June 28, 2015, continuing until the present, that Defendants have
20 continued to knowingly and intentionally expose California users and consumers of the Product
21 to DEHP without providing required warnings under Proposition 65.

22 25. The exposures that are the subject of the Notice result from the purchase,
23 acquisition, handling and recommended use of the product. Consequently, the primary route of
24 exposure to these chemicals is through direct skin exposure through direct contact with the black
25 vinyl portion of the earmuffs and the user's hands is possible during application, removal, and
26 manipulation of the earmuffs. Should the wearer perspire underneath the earmuffs, skin
27 permeation rates can potentially increase as aqueous DEHP skin permeation rates are faster than
28 neat DEHP permeation. DEHP in headphones and hearing protection aids has been reported to

1 induce contact dermatitis although the association between DEHP and atopic dermatitis has
2 never been elucidated as a multitude of chemicals are present in headphones that come into
3 contact with human skin. Finally, while mouthing of the product does not seem likely, some
4 amount of exposure through ingestion can occur by handling the product with subsequent
5 touching of the users hand to mouth.

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

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

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

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

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

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
22 following relief:

- 23 A. That the court assess civil penalties against Defendants in the amount of
24 \$2,500 per day for each violation in accordance with Health and Safety
25 Code § 25249.7(b);
- 26 B. That the court preliminarily and permanently enjoin Defendants
27 mandating Proposition 65 compliant warnings on the Product;
- 28 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.

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D. That the court grant any further relief as may be just and proper.

Dated: October 14, 2015

BRODSKY & SMITH, LLC

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