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FILED

JUL 15 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

WHITNEY R. LEEMAN, PH.D.,
Plaintiff,
v.
LOWE'S COMPANIES, INC.; KRISTUS,
INC.; and DOES 1-150, inclusive,
Defendants.

Case No. CIV1600122
**FIRST AMENDED COMPLAINT FOR
CIVIL PENALTIES AND INJUNCTIVE
RELIEF**
(Health & Safety Code § 25249.5 *et seq.*)

NATURE OF THE ACTION

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2 1. This Complaint is a representative action brought by plaintiff WHITNEY R.
3 LEEMAN, PH.D. in the public interest of the citizens of the State of California to enforce the
4 People’s right to be informed of the health hazards caused by exposures to di(2-
5 ethylhexyl)phthalate (“DEHP”), a toxic chemical found in vinyl/PVC oil suction hoses sold by
6 defendants in California.

7 2. By this Complaint, plaintiff seeks to remedy defendants’ continuing failure to
8 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code
9 section 6300 et seq. who purchase, use or handle defendants’ products about the risks of
10 exposure to DEHP present in and on vinyl/PVC oil suction hoses manufactured, distributed, and
11 offered for sale or use throughout the State of California. Individuals not covered by
12 California’s Occupational Safety Health Act, Labor Code section 6300 et seq. who purchase,
13 use or handle defendants’ products are referred to hereinafter as “consumers”.

14 3. Detectable levels of DEHP are found in and on the vinyl/PVC oil suction hoses
15 that defendants manufacture, distribute, and offer for sale to consumers and other individuals
16 throughout the State of California.

17 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
18 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”), “[n]o person in the course of
19 doing business shall knowingly and intentionally expose any individual to a chemical known to
20 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
21 warning to such individual . . .” Health & Safety Code § 25249.6.

22 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
23 DEHP as a chemical known to cause birth defects and other reproductive harm. DEHP became
24 subject to the “clear and reasonable warning” requirements of the act one year later on October
25 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
26 25249.10(b).

1 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
2 State of California.

3 13. Defendant KRISTUS, INC. (“KRISTUS”) is a person in the course of doing
4 business within the meaning of Health and Safety Code sections 25249.6 and 25249.11.

5 14. KRISTUS manufactures, imports, distributes, sells, and/or offers the PRODUCTS
6 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
7 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

8 15. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each a
9 person in the course of doing business within the meaning of Health and Safety Code sections
10 25249.6 and 25249.11.

11 16. MANUFACTURER DEFENDANTS research, test, design, assemble, fabricate,
12 and manufacture, or imply by their conduct that they research, test, design, assemble, fabricate,
13 and manufacture one or more of the PRODUCTS offered for sale or use in the State of
14 California.

15 17. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each a person
16 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
17 and 25249.11.

18 18. DISTRIBUTOR DEFENDANTS distribute, exchange, transfer, process, and
19 transport one or more of the PRODUCTS to individuals, businesses, or retailers for sale or use
20 in the State of California.

21 19. Defendants DOES 101-150 (“RETAILER DEFENDANTS”) are each a person in
22 the course of doing business within the meaning of Health and Safety Code sections 25249.6
23 and 25249.11.

24 20. RETAILER DEFENDANTS offer the PRODUCTS for sale to individuals in the
25 State of California.

26 21. At this time, the true names of defendants DOES 1 through 150, inclusive, are
27 unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to
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1 Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis
2 alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences
3 alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

4 22. LOWE'S COMPANIES, KRISTUS, MANUFACTURER DEFENDANTS,
5 DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall, where appropriate,
6 collectively be referred to as "DEFENDANTS."

7 VENUE AND JURISDICTION

8 23. Venue is proper in Marin County Superior Court, pursuant to Code of Civil
9 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
10 because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of
11 wrongful conduct occurred, and continue to occur, in this county, and/or because
12 DEFENDANTS conducted, and continue to conduct, business in Marin County with respect to
13 the PRODUCTS.

14 24. The California Superior Court has jurisdiction over this action pursuant to
15 California Constitution Article VI, section 10, which grants the Superior Court "original
16 jurisdiction in all causes except those given by statute to other trial courts." The statute under
17 which this action is brought does not specify any other basis of subject matter jurisdiction.

18 25. The California Superior Court has jurisdiction over DEFENDANTS based on
19 plaintiff's information and good faith belief that each defendant is a person, firm, corporation or
20 association that is a citizen of the State of California, has sufficient minimum contacts in the
21 State of California, and/or otherwise purposefully avails itself of the California market.
22 DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by
23 California courts consistent with traditional notions of fair play and substantial justice.

24 FIRST CAUSE OF ACTION

25 **(Violation of Proposition 65 - Against All Defendants)**

26 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
27 Paragraphs 1 through 25, inclusive.
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1 27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
2 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
3 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
4 harm.”

5 28. Proposition 65 states, “[n]o person in the course of doing business shall
6 knowingly and intentionally expose any individual to a chemical known to the state to cause
7 cancer or reproductive toxicity without first giving clear and reasonable warning to such
8 individual . . .” Health & Safety Code § 25249.6.

9 29. On August 20, 2015, plaintiff served a sixty-day notice of violation, together with
10 the requisite certificate of merit, on LOWES, KRISTUS, and certain public enforcement
11 agencies alleging that, as a result of DEFENDANTS’ sales of the PRODUCTS containing
12 DEHP, purchasers and users in the State of California were being exposed to DEHP resulting
13 from their reasonably foreseeable use of the PRODUCTS, without the individual purchasers and
14 users first having been provided with a “clear and reasonable warning” regarding the harms
15 associated with such exposures, as required by Proposition 65.

16 30. DEFENDANTS have engaged in the manufacture, importation, distribution, sale,
17 and offering of the PRODUCTS for sale or use in violation of Health and Safety Code section
18 25249.6, and DEFENDANTS’ violations have continued to occur beyond their receipt of
19 plaintiff’s sixty-day notice of violation. As such, DEFENDANTS’ violations are ongoing and
20 continuous in nature, and will continue to occur in the future.

21 31. After receiving plaintiff’s sixty-day notice of violation, none of the appropriate
22 public enforcement agencies have commenced and diligently prosecuted a cause of action
23 against DEFENDANTS under Proposition 65 to enforce the alleged violations that are the
24 subject of plaintiff’s notice of violation.

25 32. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
26 offer for sale or use in California cause exposures to DEHP as a result of the reasonably
27 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
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1 consumers and other individuals in California are not exempt from the “clear and reasonable”
2 warning requirements of Proposition 65, yet DEFENDANTS provide no warning.

3 33. DEFENDANTS knew or should have known that the PRODUCTS they
4 manufactured, imported, distributed, sold, and offered for sale or use in California contained
5 DEHP.

6 34. DEHP is present in or on the PRODUCTS in such a way as to expose individuals
7 to DEHP through dermal contact and/or ingestion during reasonably foreseeable use.

8 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
9 continues to cause, consumer exposures to DEHP, as defined by title 27 of the California Code
10 of Regulations, section 25602(b).

11 36. DEFENDANTS had knowledge that the normal and reasonably foreseeable use of
12 the PRODUCTS exposed individuals to DEHP through dermal contact and/or ingestion.

13 37. DEFENDANTS intended that exposures to DEHP from the reasonably
14 foreseeable use of the PRODUCTS would occur by their deliberate, non-accidental participation
15 in the manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or
16 use to consumers and other individuals in California.

17 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers and other individuals in California who were or who would become exposed to
19 DEHP through dermal contact and/or ingestion resulting from their use of the PRODUCTS.

20 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
21 directly by California voters, individuals exposed to DEHP through dermal contact and/or
22 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a “clear
23 and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable harm
24 for which they have no plain, speedy, or adequate remedy at law.

25 40. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
26 above-described acts, DEFENDANTS are liable for a maximum civil penalty of \$2,500 per day
27 for each violation.

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