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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: Yolanda Smith, Deputy

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

11 ANTHONY FERREIRO,
12 Plaintiff,
13 vs.
14 BASS PRO OUTDOOR WORLD, L.L.C.
15 and BPS DIRECT, LLC,
16 Defendants.

CASE NO. **RG 16829471**
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**
*(Violation of Health & Safety Code §25249.5
et seq.)*

BY FAX

17 Plaintiff Anthony Ferreiro ("Plaintiff" or "Ferreiro"), by and through his attorneys,
18 alleges the following cause of action in the public interest of the citizens of the State of
19 California.

20 **BACKGROUND OF THE CASE**

- 21 1. Plaintiff brings this representative action on behalf of all California citizens to
22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
23 at the Health and Safety Code § 25249.5 *et seq.* ("Proposition 65"), which reads, in relevant part,
24 "[n]o person in the course of doing business shall knowingly and intentionally expose any
25 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.
- 27 2. This complaint is a representative action brought by Plaintiff in the public interest
28 of the citizens of the State of California to enforce the People's right to be informed of the health
hazards caused by exposure to the chemicals Di(2-ethylhexyl) phthalate (DEHP) and/or

1 Diisononyl Phthalate (DINP) that are found in the following products that are sold and/or
2 distributed by defendants Bass Pro Outdoor World L.L.C., and BPS Direct LLC (collectively,
3 “Bass Pro” or “Defendants”) in California: (a) Tactical Fly Fishing System – PVC Rolltop
4 Pouch, UPC No. 0 92229 622378, (b) Beretta Standard Hearing Muffs, UPC No. 082442092195,
5 and (c) Heavy Duty Rod Holder, UPC No. 033548352386 (collectively, the “Products”).

6 3. DEHP and DINP are harmful chemicals known to the State of California to cause
7 reproductive toxicity and/or cancer. On January 1, 1988 and December 20, 2013, respectively,
8 the State of California listed DEHP and DINP as chemicals known to the State to cause cancer
9 and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs.
10 Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the
11 State of California listed DEHP as a chemical known to cause developmental male reproductive
12 toxicity.

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, the Products in California containing DEHP
25 and/or DINP.

26 7. Defendants’ failure to warn consumers and other individuals in California of the
27 health hazards associated with exposure to DEHP and/or DINP in conjunction with the sale,
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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 Products with the required warnings related to
7 the dangers and health hazards associated with exposure to DEHP and DINP pursuant to Health
8 and Safety 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. Defendants are related entities that operate fishing and hunting equipment,
15 outdoor clothing, camping and hiking supplies, firearms, and outdoor goods retail stores.
16 Through their businesses, Defendants effectively manufacture, import, distribute, sell, and/or
17 offer the Products for sale or use in the State of California, or they imply by their conduct that
18 they manufacture, import, distribute, sell, and/or offer the Products for sale or use in the State of
19 California.

20 12. Defendant BPS Direct, LLC maintains a registered agent for service of process at
21 c/o The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street,
22 Wilmington, DE 19801.

23 13. Defendant Bass Pro Outdoor World, LLC maintains a registered agent for service
24 of process at c/o CT Corporation System, 120 South Central Avenue, Springfield, MO 63105.

25 14. Defendants are each a "person" in the course of doing business within the
26 meaning of Health & Safety Code §§ 25249.6 and 25249.11.

27 **VENUE AND JURISDICTION**

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1 General's office and the offices of the County District attorneys and City Attorneys for each city
2 with a population greater than 750,000 persons wherein the herein violations allegedly occurred.

3 20. Notice 1, Notice 2, and Notice 3 are collectively referred to herein as, the
4 "Notice".

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

10 22. After receiving the Notice, and to Plaintiff's best information and belief, none of
11 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
12 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
13 are the subject of the Notice of violation.

14 23. Plaintiff is commencing this action more than sixty (60) days from the date of her
15 Notice to Defendants, as required by law.

16 **FIRST CAUSE OF ACTION**

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

18 24. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 23 of
19 this complaint as though fully set forth herein.

20 25. Defendants have, at all times mentioned herein, acted as a manufacturer,
21 distributor, and/or retailer of the Product.

22 26. The Products contain DEHP and/or DINP, hazardous chemicals found on the
23 Proposition 65 list of chemicals known to be hazardous to human health.

24 27. The Products do not comply with the Proposition 65 warning requirements.

25 28. Plaintiff, based on his best information and belief, avers that at all relevant times
26 herein, and at least since September 25, 2015, continuing until the present, that Defendants have
27 continued to knowingly and intentionally expose California users and consumers of the Products
28 to DEHP and/or DINP without providing required warnings under Proposition 65.

1 29. The exposures that are the subject of the Notice result from the purchase,
2 acquisition, handling and recommended use of the product. Consequently, the primary route of
3 exposure to these chemicals in the Products is as follows:

4 (a) The primary route of exposure to these chemicals in the Beretta Standard
5 Hearing Muffs is through direct skin exposure. The black vinyl ear pad cover of these earmuffs
6 are likely to be in constant contact with the user's head/ears during normal use and direct skin
7 exposure is likely to occur. Direct skin exposure through direct contact with the black vinyl ear
8 pad cover of the earmuffs and the user's hands is possible during application, removal, and
9 manipulation of the earmuffs. Should the wearer's skin perspire underneath the black vinyl ear
10 pad cover, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP
11 permeation and this may be relevant for other HMWP such as DINP. The black vinyl ear pad
12 cover can be expected to emit gas phase DINP into the air over the lifetime of the product. This
13 gas-phase DINP can potentially be inhaled as the earmuff is in the vicinity of the user's facial
14 area. Finally, while mouthing of the product does not seem likely, some amount of exposure
15 through ingestion can occur by handling the product with subsequent touching of the users hand
16 to mouth.

17 (b) The primary route of exposure to these chemicals in the Tactical Fly
18 Fishing System – PVC Rolltop Pouch is through dermal exposure of DEHP through direct
19 contact with the user's bare hands when the pouch is affixed to the user, handled, or when items
20 are placed in or retrieved from the pouch during its expected use whereby the user may reach
21 into the pouch with wet hands or the pouch may be come wet from contact with natural waters.
22 As aqueous DEHP skin permeation rates are faster than neat permeation, skin permeation rates
23 can potentially increase for DEHP with the use of this product. The product is expected to leach
24 gas phase DEHP over its lifetime and will leach DEHP at higher rates if the pouch is used in
25 elevated temperatures. Finally, while mouthing of the product does not seem likely, some
26 amount of exposure through ingestion can occur by handling the product withy subsequent
27 touching of the user's hand to mouth.

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1 (c) The primary route of exposure to these chemicals in the Heavy Duty Rod
2 Holder is through dermal exposure. Dermal exposure of DEHP through direct contact with the
3 user's bare hands when the rod holder is affixed to or removed from items (such as a boat or a
4 dock as suggested by the manufacturer's product description) by the user, handled, or when
5 fishing rods are placed in or retrieved from the rod holder during its expected use. It is expected
6 that circumstances would arise during normal expected use whereby the user may come into
7 contact with the PVC coating with wet hands or PVC coating may become wet from contact with
8 natural waters. As aqueous DEHP skin permeation rates are faster than neat permeation, skin
9 permeation rates can potentially increase for DEHP with the use of this product. The product is
10 expected to leach gas-phase DEHP over its lifetime and will leach DEHP at higher rates if the
11 rod holder is used in elevated temperatures. Finally, while mouthing of this product does not
12 seem likely, some amount of exposure through ingestion can occur by handling the product with
13 subsequent touching of the user's hand to mouth.

14 30. Plaintiff, based on his best information and belief, avers that such exposures will
15 continue every day until clear and reasonable warnings are provided to purchasers and users of
16 the Products or until these known toxic chemicals are removed from the Products.

17 31. Defendants have knowledge that the normal and reasonably foreseeable use of the
18 Products expose individuals to DEHP and/or DINP, and Defendants intend that exposure to
19 DEHP and DINP will occur by their deliberate, non-accidental participation in the manufacture,
20 importation, distribution, sale and offering of the Products to consumers in California

21 32. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
22 Complaint.

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

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

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PRAYER FOR RELIEF

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

- 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: August 31, 2016

BRODSKY & SMITH, LLC

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Attorneys for Plaintiff

11. Nothing herein shall limit or otherwise affect the right of a Producing Party from disclosing documents, data or information that such Party designated as Confidential Information, or that are obtained by a non-designating Party by means other than under this Confidentiality Agreement, for any purpose.

12. Nothing in this Agreement shall prevent the Parties from obtaining any relevant and non-privileged document, data, information or writing in the course of civil discovery.

13. The terms of this Agreement shall survive any settlement or judgment in any litigation between the Parties.

14. The Parties understand that any documents, data or information, if any, concerning vendors, agents, customers, licensees, distributors, affiliated companies and purchasing and sales information exchanged are competition sensitive.

15. Nothing herein is intended to be, or shall be construed as, an appearance on the part of Complete Medical Supplies or their counsel in any litigation or administrative proceeding.

CONSENT TO TOLLING

The parties further expressly agree that, in order to pursue an informal resolution of the Proposition 65 Dispute, any and all applicable time limitations (whether arising from statutes, equitable principles, or otherwise under common law) relating to the Notices, and the legal claims arising therefrom, were and are tolled until December 1, 2016, or until either Party provides at least two weeks written notice to the other Party of termination of this tolling period. During this tolling period, no time shall be considered to pass, lapse, or accrue with respect to any statutes of limitation or other time-based defense of any kind whatsoever.

Dated: September __, 2016

BRODSKY & SMITH LLC

By: _____
Evan J. Smith
Attorneys for Anthony Ferreiro

Dated: September 2, 2016

PILLSBURY WINTHROP SHAW PITTMAN
LLP

By: 
Corrie Plant
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