1 2 3 4 5 6 7 8	Gregory M. Sheffe SHEFFER LAW FI 81 Throckmorton A Mill Valley, CA 94 Telephone: 415.3 Facsimile: 415.388 Attorneys for Plain SUSAN DAVIA	Ave., Suite 202 941 888.0911 .9911 ntiff SUPERIOR COURT OF	FEB 09 2016 FEB 09 2016 JAMES M. KIM, Court Executive Officer MARIN COUNTY SUPERIOR COURT By: J. Chen, Deputy
9		UNLIMITED C	CIVIL JURISDICTION
10			Case No. 1600503
11	SUSAN DAVIA,		Case No.
12	Plair	ntiff,	COMPLAINT FOR CIVIL PENALTIES AND
13	v.		INJUNCTIVE RELIEF
14	BPS DIRECT, LLC DOES 1-150,	, BASS PRO SHOPS and	(Cal. Health & Safety Code § 25249.6 et seq.)
15	Defendants.		
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
		COMPLAINT FOR CIVIL PEN	ALTIES AND INJUNCTIVE RELIEF

жÌ,

NATURE OF THE ACTION

1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in the public interest of the citizens of the State of California, to enforce the People's right to be informed of the presence of Di(2-ethylhexl)phthalate ("DEHP") and Diisononyl phthalate ("DINP"), toxic chemicals found in certain PVC rain wear and decoy cord manufactured, distributed and/or otherwise sold by defendants in California.

2. Under California's Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code Section 25249.6 et seq. ("Proposition 65"), "No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual." (*Cal. Health & Safety Code* § 25249.6.)

3. 12 On October 24, 2003, the State listed Di(2-ethylhexl)phthalate as a chemical known 13 to cause birth defects and other reproductive harm. DEHP became subject to the warning 14 requirement one year later and was therefore subject to the "clear and reasonable warning" 15 requirements of Proposition 65, beginning on October 24, 2004. (27 CCR § 27001(c); Cal. Health 16 & Safety Code § 25249.8.) On December 20, 2013, the State listed Diisononyl phthalate as a 17 chemical known to cause cancer. DINP became subject to the warning requirement one year 18 later and was therefore subject to the "clear and reasonable warning" requirements of 19 Proposition 65, beginning on December 20, 2014. (27 CCR § 27001(b); Cal. Health & Safety Code 20 § 25249.8.)

21 4. DEHP and DINP shall hereinafter be referred to, collectively, as the "LISTED 22 CHEMICAL."

23 5. Significant levels of DEHP have been discovered in or on vinyl/PVC components of rain wear that defendants manufacture, distribute, and/or offer for sale to consumers 24 25 throughout the State of California including, but not limited to, Bass Pro Shops Adult PVC 26 Rainsuit (#1789870). All such rain wear comprised of vinyl/PVC materials containing DEHP 27 shall hereinafter be referred to as "PRODUCT 1." Significant levels of DINP have been discovered in or on PVC decoy cord that defendants manufacture, distribute, and/or offer for

1

2

3

4

5

6

7

sale to consumers throughout the State of California including, but not limited to, Red Head PVC Decoy Cord. All such PVC decoy cord containing DINP shall hereinafter be referred to as "PRODUCT 2." PRODUCT 1 and PRODUCT 2 shall collectively be referred to hereafter as "PRODUCTS".

6. Defendants' failure to warn employees, consumers and/or other individuals in the State of California about their exposures to the LISTED CHEMICAL in conjunction with defendants' sale of the PRODUCTS is a violation of Proposition 65.

7. For defendants' violations of Proposition 65, plaintiff seeks preliminary and permanent injunctive relief to compel defendants to provide employees handling the PRODUCTS and purchasers or users of the PRODUCTS with the required warning regarding the health hazards of the LISTED CHEMICAL. (*Cal. Health & Safety Code § 25249.7(a).*)

8. Plaintiff also seeks civil penalties against defendants for their violations of Proposition 65, as provided for by California Health & Safety Code Section 25249.7(b).

PARTIES

9. Plaintiff SUSAN DAVIA is a citizen of the State of California who is dedicated to protecting the health of California citizens through the elimination or reduction of toxic exposures from consumer products, and brings this action in the public interest pursuant to California Health & Safety Code Section 25249.7.

10. Based upon publicly available information, plaintiff is informed and believes, and thereupon alleges, that each defendant BPS DIRECT, LLC and BASS PRO SHOPS is a person doing business within the meaning of California Health & Safety Code Section 25249.11.

11. Based upon publicly available information, plaintiff is informed and believes, and thereupon alleges, that each defendant BPS DIRECT, LLC and BASS PRO SHOPS is legally responsible for the manufacture, distribution, and/or offer of the PRODUCTS for sale or use in the State of California or implies by its conduct that it manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of California.

27 12. Defendants DOES 1-50 ("MANUFACTURER DEFENDANTS") are each persons
28 doing business within the meaning of California Health & Safety Code Section 25249.11.

13. MANUFACTURER DEFENDANTS engage in the process of research, testing, designing, assembling, fabricating and/or manufacturing, or imply by their conduct that they engage in the process of research, testing, designing, assembling, fabricating, and/or manufacturing, one or more of the PRODUCTS for sale or use in the State of California.

14. Defendants DOES 51-100 ("DISTRIBUTOR DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

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

16. Defendants DOES 101-150 ("RETAIL DEFENDANTS") are each persons doing business within the meaning of California Health & Safety Code Section 25249.11.

12 17. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the13 State of California.

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

19 19. BPS DIRECT, LLC, BASS PRO SHOPS, MANUFACTURER DEFENDANTS,
20 DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where appropriate,
21 collectively be referred to hereinafter as "DEFENDANTS".

22

1

2

3

4

5

6

7

8

9

10

11

VENUE AND JURISDICTION

23 20. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
24 Procedure Sections 394, 395, and 395.5, because this Court is a court of competent jurisdiction,
25 because one or more instances of wrongful conduct occurred, and continues to occur, in the
26 County of Marin and/or because DEFENDANTS conducted, and continue to conduct, business
27 in this County with respect to the PRODUCTS.

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

22. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that each defendant is a person, firm, corporation or association that either are citizens of the State of California, have sufficient minimum contacts in the State of California, or otherwise purposefully avail themselves of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

<u>FIRST CAUSE OF ACTION</u> (Violation of Proposition 65 - Against All Defendants)

23. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, Paragraphs 1 through 22, inclusive.

24. In passing Proposition 65, the citizens of the State of California expressed their intent through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986 that they must be "informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm."

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

26. On October 1, 2015, and October 29, 2015, valid and compliant Proposition 65 sixty-day notices of violation (collectively, "Notice 1"), together with valid, requisite Certificates of Merit, were provided to BPS DIRECT, LLC, BASS PRO SHOPS and various public enforcement agencies stating that as a result of the DEFENDANTS' manufacture, distribution and sales of PRODUCT 1, workers, purchasers and users in the State of California are being exposed to DEHP resulting from the reasonably foreseeable uses of PRODUCT 1, without the

individual workers, purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures.

27. On October 20, 2015, a valid and compliant Proposition 65 sixty-day notice of violation ("Notice 2"), together with a valid, requisite Certificate of Merit, was provided to BPS DIRECT, LLC, BASS PRO SHOPS and various public enforcement agencies stating that as a result of the DEFENDANTS' manufacture, distribution and sales of PRODUCT 2, workers, purchasers and users in the State of California are being exposed to DINP resulting from the reasonably foreseeable uses of PRODUCT 2, without the individual workers, purchasers and users first having been provided with a "clear and reasonable warning" regarding such toxic exposures.

28. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 and plaintiff is informed and believes that DEFENDANTS' manufacture, distribution, and/or offering of the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6 has continued to occur beyond DEFENDANTS' receipt of plaintiff's Notice 1 and Notice 2. Plaintiff further alleges and believes that such violations will continue to occur into the future.

29. After receipt of the claims asserted in the Notice 1 and Notice 2, the appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action against DEFENDANTS under Proposition 65.

30. The PRODUCT 1 manufactured, distributed, and/or offered for sale or use in California by DEFENDANTS, contains DEHP. The PRODUCT 2 manufactured, distributed, and/or offered for sale or use in California by DEFENDANTS, contains DINP.

31. DEFENDANTS knew or should have known that the PRODUCT 1 contained DEHP and PRODUCT 2 contained DINP.

32. The LISTED CHEMICAL is present in or on the relevant PRODUCTS in such a
way as to expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27
CCR Section 25602(b), through dermal contact and/or ingestion and/or inhalation during or as

_5

a consequence of the packing, shipping, unpacking, display and daily organization and movement of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

33. DEFENDANTS knew or should have known that the packing, shipping, unpacking, display and daily organization and movement of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS exposes individuals to the relevant LISTED CHEMICAL through dermal contact and/or ingestion and/or inhalation.

34. DEFENDANTS' participation in the manufacture, distribution and/or offer for sale or use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.

35. DEFENDANTS failed to provide a "clear and reasonable warning" to those employees, consumers and/or other individuals in the State of California who were or who could become exposed to the LISTED CHEMICAL during the reasonably foreseeable retail receipt, display and organization of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

36. Contrary to the express policy and statutory prohibition of Proposition 65,
employees and individuals exposed to the LISTED CHEMICAL through dermal contact and/or
ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS,
sold by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue
to suffer, irreparable harm, for which harm they have no other plain, speedy or adequate
remedy at law.

37. As a consequence of the above-described acts, DEFENDANTS are liable for a
maximum civil penalty of \$2,500 per day for each violation of Proposition 65 pursuant to
California Health & Safety Code Section 25249.7(b).

38. As a consequence of the above-described acts, California Health & Safety Code Section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

///

28

24

25

26

27

1

2

3

4

5

6

7

8

9

10

11

12

13

14

1	PRAYER FOR RELIEF		
2	Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as		
3	follows:		
4	1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),		
5	assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation		
6	alleged herein;		
7	2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),		
8	preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or		
9	offering the PRODUCTS for sale or use in California, without providing "clear and reasonable		
10	warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to the		
11	LISTED CHEMICAL;		
12	3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and		
13	4. That the Court grant such other and further relief as may be just and proper.		
14	Dated: February 9, 2016 Respectfully submitted,		
15	SHEFFER LAW FIRM		
16	050		
17 18	By: Gregory M. Sheffer Attorneys for Plaintiff		
19	SUSAN DAVIA		
20			
21			
22			
23			
24			
25			
26			
27			
28			
	7		

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF

Ш