

FILED

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JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION

12 SUSAN DAVIA,

13 Plaintiff,

14 v.

15 ACE HARDWARE CORPORATION and
16 DOES 1-150,

17 Defendants.

Case No. CIV 1600145 =

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

(*Cal. Health & Safety Code § 25249.6 et seq.*)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff SUSAN DAVIA, in
3 the public interest of the citizens of the State of California, to enforce the People’s right to be
4 informed of the presence of Di(2-ethylhexyl)phthalate (“DEHP”), toxic chemicals found in certain
5 PVC rain wear manufactured, distributed and/or otherwise sold by defendants in California.

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

11 3. On October 24, 2003, the State listed Di(2-ethylhexyl)phthalate as a chemical known
12 to cause birth defects and other reproductive harm. DEHP became subject to the warning
13 requirement one year later and was therefore subject to the “clear and reasonable warning”
14 requirements of Proposition 65, beginning on October 24, 2004. (*27 CCR § 27001(c); Cal. Health*
15 *& Safety Code § 25249.8.*)

16 4. DEHP shall hereinafter be referred to as the “LISTED CHEMICAL.”

17 5. Significant levels of each LISTED CHEMICAL have been discovered in or on
18 vinyl/PVC components of rain wear that defendants manufacture, distribute, and/or offer for
19 sale to consumers throughout the State of California including, but not limited to, Boulder
20 Creek Vinyl Rainsuit (#811412016240). All such rain wear comprised of vinyl/PVC materials
21 containing the LISTED CHEMICAL shall hereinafter be referred to as the “PRODUCTS.”

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

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

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

3 **PARTIES**

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

8 10. Based upon publicly available information, plaintiff is informed and believes, and
9 thereupon alleges, that defendant ACE HARDWARE CORPORATION is a person doing
10 business within the meaning of California Health & Safety Code Section 25249.11.

11 11. Based upon publicly available information, plaintiff is informed and believes, and
12 thereupon alleges, that defendant ACE HARDWARE CORPORATION is legally responsible for
13 the manufacture, distribution, and/or offer of the PRODUCTS for sale or use in the State of
14 California or implies by its conduct that it manufactures, distributes, and/or offers the
15 PRODUCTS for sale or use in the State of California.

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

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

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

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

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

FIRST CAUSE OF ACTION
(Violation of Proposition 65 - Against All Defendants)

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

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

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

13 26. On October 1, 2015, and October 29, 2015, valid and compliant Proposition 65
14 sixty-day notices of violation (“60-Day Notice”), together with valid, requisite Certificates of
15 Merit, were provided to ACE HARDWARE CORPORATION and various public enforcement
16 agencies stating that as a result of the DEFENDANTS’ manufacture, distribution and sales of
17 the PRODUCTS, workers, purchasers and users in the State of California are being exposed to
18 LISTED CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS, without
19 the individual workers, purchasers and users first having been provided with a “clear and
20 reasonable warning” regarding such toxic exposures.

21 27. DEFENDANTS have engaged in the manufacture, distribution, and/or offering of
22 the PRODUCTS for sale or use in violation of California Health & Safety Code Section 25249.6
23 and plaintiff is informed and believes that DEFENDANTS’ manufacture, distribution, and/or
24 offering of the PRODUCTS for sale or use in violation of California Health & Safety Code
25 Section 25249.6 has continued to occur beyond DEFENDANTS’ receipt of plaintiff’s 60-Day
26 Notice. Plaintiff further alleges and believes that such violations will continue to occur into the
27 future.

1 28. After receipt of the claims asserted in the 60-Day Notice, the appropriate public
2 enforcement agencies have failed to commence and diligently prosecute a cause of action
3 against DEFENDANTS under Proposition 65.

4 29. The PRODUCTS manufactured, distributed, and/or offered for sale or use in
5 California by DEFENDANTS, contain the LISTED CHEMICAL.

6 30. DEFENDANTS knew or should have known that the PRODUCTS contained the
7 LISTED CHEMICAL.

8 31. The LISTED CHEMICAL is present in or on the PRODUCTS in such a way as to
9 expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR Section
10 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a
11 consequence of the packing, shipping, unpacking, display and daily organization and
12 movement of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

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

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

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

25 35. Contrary to the express policy and statutory prohibition of Proposition 65,
26 employees and individuals exposed to the LISTED CHEMICAL through dermal contact and/or
27 ingestion and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS,
28 sold by DEFENDANTS without a "clear and reasonable warning", have suffered, and continue

1 to suffer, irreparable harm, for which harm they have no other plain, speedy or adequate
2 remedy at law.

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

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

9 **PRAYER FOR RELIEF**

10 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
11 follows:

12 1. That the Court, pursuant to California Health & Safety Code Section 25249.7(b),
13 assess civil penalties against DEFENDANTS in the amount of \$2,500 per day for each violation
14 alleged herein;

15 2. That the Court, pursuant to California Health & Safety Code Section 25249.7(a),
16 preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or
17 offering the PRODUCTS for sale or use in California, without providing "clear and reasonable
18 warnings" as defined by 27 CCR Section 25601, as to the harms associated with exposures to the
19 LISTED CHEMICAL;

20 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

21 4. That the Court grant such other and further relief as may be just and proper.

22 Dated: January 13, 2016

Respectfully submitted,

23 SHEFFER LAW FIRM

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25 By: 
26 Gregory M. Sheffer
27 Attorneys for Plaintiff
28 SUSAN DAVIA