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ENDORSED
FILED
ALAMEDA COUNTY

FEB 05 2016

CLERK OF THE SUPERIOR COURT
By JAMIE MORAS
Deputy

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

11 HECTOR VELARDE,

12 Plaintiff,

13 vs.

14 PULL'R HOLDING COMPANY, LLC,

15 Defendant.

CASE NO.:

RG16802902

JUDGE

DEPT.:

COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF

(Violation of Health & Safety Code §25249.5
et seq.)

BY FAX

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19 Plaintiff Hector Velarde, by and through his attorneys, alleges the following cause of
20 action in the public interest of the citizens of the State of California.

21 **BACKGROUND OF THE CASE**

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

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 Diisononyl phthalate (“DINP”), a toxic chemical found in tool
4 bags sold and/or distributed by defendant Pull’R Holding Company, LLC (“Pull’R” or
5 “Defendant”) in California.

6 3. DINP is a harmful chemical known to the State of California to cause cancer. On
7 December 20, 2013, the State of California listed DINP as a chemical known to cause cancer and
8 it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.
9 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

10 4. Proposition 65 requires all businesses with ten (10) or more employees that
11 operate within California or sell products therein to comply with Proposition 65 regulations.
12 Included in such regulations is the requirement that businesses must label any product containing
13 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
14 intentionally” exposing any person to it.

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
17 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
18 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety
19 Code § 25249.7.

20 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
21 and/or offers for sale, without the required warning, tool bags in California containing DINP.
22 These products include, but are not limited to, *Craftsman 12” Large Mouth Tool Bags, UPC No.*
23 *7 21415 81027 4* (the “Product”).

24 7. Defendant’s failure to warn consumers, workers, and other individuals in
25 California of the health hazards associated with exposure to DINP in conjunction with the sale,
26 manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects
27 Defendant to the enjoinder and civil penalties described herein.

28

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

6 15. This Court has jurisdiction over Defendant because it is either is a citizen of the
7 State of California, has sufficient minimum contacts with the State of California, is registered
8 with the California Secretary of State as foreign corporations authorized to do business in the
9 State of California, and/or has otherwise purposefully availed itself of the California market.
10 Such purposeful availment has rendered the exercise of jurisdiction by California courts
11 consistent and permissible with traditional notions of fair play and substantial justice.

12 **SATISFACTION OF NOTICE REQUIREMENTS**

13 16. On April 20, 2015, Martha Velarde gave notice of alleged violation of Health and
14 Safety Code § 25249.6 to Sears Brands Management Corporation, Sears Corporation, Sears
15 Holdings Corporation, Sears Holdings, Inc., Sears Holdings Management Corporation
16 (collectively, “Sears”) concerning the exposure of California citizens to DINP contained in the
17 Product without proper warning, subject to a private action to Defendant and to the California
18 Attorney General’s office and the offices of the County District attorneys and City Attorneys for
19 each city with a population greater than 750,000 persons wherein the herein violations allegedly
20 occurred.

21 17. An amended 60-day Notice of Violation dated June 22, 2015 was issued by
22 Martha Velarde to Sears. A second-amended 60-day Notice of Violation dated July 8, 2015 was
23 issued by Martha Velarde to Sears and Pull’R. Finally, Hector Velarde provided Sears, Pull’R,
24 and the requisite public enforcement agencies with a document entitled “Notice of Violation of
25 California Health & Safety Code § 25249.5, *et seq.*” dated November 20, 2015. Collectively, the
26 four Notices of Violation are referred to herein as the “Notices.”

27 18. The Notices complied with all procedural requirements of Proposition 65
28 including the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted

1 with at least one person with relevant and appropriate expertise who reviewed relevant data
2 regarding DINP exposure, and that counsel believed there was meritorious and reasonable cause
3 for a private action.

4 19. After receiving the Notices, and to Plaintiff's best information and belief, none of
5 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
6 a cause of action against Defendant under Proposition 65 to enforce the alleged violations which
7 are the subject of Plaintiff's notice of violation. Plaintiff is commencing this action more than
8 sixty (60) days from the date of his notice to Defendant, as required by law.

9 **FIRST CAUSE OF ACTION**

10 **(By Plaintiff against Defendant 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. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
14 and/or retailer of the Product.

15 22. The Product contains DINP, 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 his best information and belief, avers that at all relevant times
19 herein, and at least since April 1, 2015 continuing until the present, that Defendant has continued
20 to knowingly and intentionally expose California users and consumers of the Product to DINP
21 without providing required warnings under Proposition 65.

22 25. The exposures that are the subject of this notice result from the purchase,
23 acquisition, handling and recommended use of the product. Consequently, the primary route of
24 exposure to DINP is through dermal absorption through direct contact with the black plastic
25 webbing of the Craftsman Large Mouth Tool Bag, dermal absorption from tools that have been
26 in direct contact with the black plastic webbing, and ingestion of construction dust that can be
27 contaminated with DINP due to the black plastic webbing. Another route of dermal exposure to
28 DINP is to chemical that has leached onto tools or other items that are in contact with the black

1 plastic webbing and then are grasped by the user's bare hand. If the tool bag is used in a
2 construction setting, fine construction dust (e.g. sheetrock, sawdust) in contact with the black
3 plastic webbing can absorb DINP and this dust can potentially be resuspended in the air and
4 ingested. Finally, while mouthing of the product does not seem likely, some amount of exposure
5 through ingestion can occur by handling the product with subsequent touching of the users hand
6 to mouth.

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

10 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
11 Product exposes individuals to DINP, and Defendant intends that exposures to DINP will occur
12 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
13 sale and offering of the Product to consumers in California

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

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

20
21 **PRAYER FOR RELIEF**

22 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
23 following relief:

24 A. That the court assess civil penalties against Defendant in the amount of
25 \$2,500 per day for each violation in accordance with Health and Safety
26 Code § 25249.7(b);

27 B. That the court preliminarily and permanently enjoin Defendant mandating
28 Proposition 65 compliant warnings on the Product;

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- 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: February 5, 2016

BRODSKY & SMITH, LLC
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