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ENDORSED
FILED
ALAMEDA COUNTY
JUL 08 2016
CLERK OF THE SUPERIOR COURT

Anita Dhir

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 GABRIEL ESPINOSA,
11 Plaintiff,
12 vs.
13 L.C. INDUSTRIES, INC. t/a LCI
14 BRANDS and STEIN MART HOLDING
15 CORP. t/a STEIN MART,
Defendants.

Case No.: *RG16822618*
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**
**(Violation of Health & Safety Code §25249.5
et seq.)**

16 Plaintiff Gabriel Espinosa (“Plaintiff” or “Espinosa”), by and through his attorneys,
17 alleges the following cause of action in the public interest of the citizens of the State of
18 California.

BY FAX

BACKGROUND OF THE CASE

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

1 mouthpieces sold and/or distributed by defendants L.C. Industries, Inc. t/a LCI Brands (“LCI
2 Brands”), and Stein Mart Holding Corp. t/a Stein Mart (“Stein Mart”) (collectively,
3 “Defendants”) in California.

4 3. DEHP is a harmful chemical known to the State of California to cause cancer and
5 reproductive toxicity. On January 1, 1988 the State of California listed DEHP as a chemical
6 known to the State to cause cancer and it has come under the purview of Proposition 65
7 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
8 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
9 known to cause developmental male reproductive toxicity. *Id.*

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 Defendants produce, manufacture, distribute, import, sell,
21 and/or offer for sale, without the required warning, mouthpieces that are an accessory to neck
22 rests, in California containing DEHP. These products include, but are not limited to, *Lewis N.*
23 *Clark Original Neck Rest Inflatable Pillow, UPC No. 029275045202* (the “Product”).

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

28

1 8. Plaintiff seeks civil penalties against Defendants for their violations of
2 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

3 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
4 Defendants to provide purchasers or users of the Product with the required warnings related to
5 the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety
6 Code § 25249.7(a).

7 **PARTIES**

8 10. Plaintiff is a citizen of the State of California acting in the interest of the general
9 public to promote awareness of exposures to toxic chemicals in products sold in California and
10 to improve human health by reducing hazardous substances contained in such items. He brings
11 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

12 11. Defendant LCI Brands designs, manufactures, and sells travel gear and apparel.
13 Through its business, LCI Brands effectively manufactures, imports, distributes, sells, and/or
14 offers the Product for sale or use in the State of California, or it implies by its conduct that it
15 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
16 California. LCI Brands maintains a registered agent for service of process at c/o Norman T.
17 Finkel, 222 S Riverside Plz #2100, Chicago, Illinois 60606.

18 12. Defendant Stein Mart is an American upscale, boutique-style men and women's
19 department store chain based in Jacksonville, Florida. Through its business, Stein Mart
20 effectively imports, distributes, sells, and/or offers the Product for sale or use in the State of
21 California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or
22 offers the Product for sale or use in the State of California. Stein Mart maintains a registered
23 agent for service of process at c/o F&L Corp., One Independent Drive, Ste. 1300, Jacksonville,
24 FL 32207.

25 13. 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**

1 14. Venue is proper in the County of Alameda because one or more of the instances
2 of wrongful conduct occurred, and continue to occur in this county and/or because Defendants
3 conducted, and continue to conduct, business in the County of Alameda with respect to the
4 Product.

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

10 16. This Court has jurisdiction over Defendants because they each have sufficient
11 minimum contacts with the State of California, and/or have otherwise purposefully availed
12 themselves of the California market. Such purposeful availment has rendered the exercise of
13 jurisdiction by California courts consistent and permissible with traditional notions of fair play
14 and substantial justice.

15 **SATISFACTION OF NOTICE REQUIREMENTS**

16 17. On March 24, 2016, Plaintiff gave notice of alleged violation of Health and Safety
17 Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to
18 DEHP contained in the Product without proper warning, subject to a private action to Defendants
19 and to the California Attorney General's office and the offices of the County District attorneys
20 and City Attorneys for each city with a population greater than 750,000 persons wherein the
21 herein violations allegedly occurred.

22 18. The Notice complied with all procedural requirements of Proposition 65 including
23 the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at
24 least one person with relevant and appropriate expertise who reviewed relevant data regarding
25 DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a
26 private action.

27 19. After receiving the Notice, and to Plaintiff's best information and belief, none of
28 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted

1 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
2 are the subject of Plaintiff's notice of violation.

3 20. Plaintiff is commencing this action more than sixty (60) days from the date of his
4 notice to Defendant, as required by law.

5 **FIRST CAUSE OF ACTION**

6 **(By Plaintiff against Defendants for their Violation of Proposition 65)**

7 21. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 20 of
8 this complaint as though fully set forth herein.

9 22. Defendants have, at all times mentioned herein, acted as a manufacturer,
10 distributor, and/or retailer of the Product.

11 23. The Product contains DEHP, a hazardous chemical found on the Proposition 65
12 list of chemicals known to be hazardous to human health.

13 24. The Product does not comply with the Proposition 65 warning requirements.

14 26. Plaintiff, based on his best information and belief, avers that at all relevant times
15 herein, and at least since February 23, 2016, continuing until the present, that Defendants have
16 continued to knowingly and intentionally expose California users and consumers of the Product
17 to DEHP without providing required warnings under Proposition 65.

18 27. The exposures that are the subject of this notice result from the purchase,
19 acquisition, handling and recommended use of the product. Consequently, the primary route of
20 exposure to these chemicals is through dermal exposure. The potential exists for dermal
21 exposure of DEHP through direct contact with the user's bare hands when the mouthpiece of the
22 neck rest is manipulated or through bare skin on the user's face and neck when the pillow is
23 used. If the neck rest is stored or transported in a carrier, DEHP that leaches from the neck rest
24 mouthpiece may contaminate other articles contained within the carrier bag that are subsequently
25 handled by the user. During inflation, it is likely that direct mouthing of the product will occur
26 which will result in some amount of DEHP ingestion.

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

4 29. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
6 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
7 sale and offering of the Product to consumers in California

8 30. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
9 Complaint.

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

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

15 **PRAYER FOR RELIEF**

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

- 18 A. That the court assess civil penalties against Defendants in the amount of
19 \$2,500 per day for each violation in accordance with Health and Safety
20 Code § 25249.7(b);
21 B. That the court preliminarily and permanently enjoin Defendants
22 mandating Proposition 65 compliant warnings on the Product;
23 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
24 D. That the court grant any further relief as may be just and proper.

25 Dated: July 8, 2016

BRODSKY & SMITH, LLC

26 By: 
27 _____

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