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5 SUSAN DAVIA

**FILED**

MAR 14 2019

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

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 FOR THE COUNTY OF MARIN

9 UNLIMITED CIVIL JURISDICTION

10  
11 SUSAN DAVIA,

12 Plaintiff,

13 v.

14 BED BATH & BEYOND INC., LIBERTY  
15 PROCUREMENT CO. INC. AND DOES 1-  
150,

16 Defendants.

Case No. CIV1900955

**FIRST AMENDED 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 their right to be informed  
4 of the presence of Di(2-ethylhexyl)phthalate (“DEHP”) and di(isononyl)phthalate (DINP), toxic  
5 chemicals found in certain SALT branded hangers with vinyl coating manufactured,  
6 distributed and/or otherwise sold by defendants BED BATH & BEYOND INC. and LIBERTY  
7 PROCUREMENT CO. INC. in California.

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

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

18 4. On December 20, 2013, the State listed diisononyl phthalate (“DINP”) as a  
19 chemical known to cause cancer. DINP became subject to the warning requirement one year  
20 later and was therefore subject to the “clear and reasonable warning” requirements of  
21 Proposition 65, beginning on December 20, 2014. (*27 CCR § 27001(c); Cal. Health & Safety Code*  
22 *§ 25249.8.*)

23 5. DEHP and DINP shall hereinafter, collectively, be referred to as the “LISTED  
24 CHEMICAL.”

25 6. Significant levels of the LISTED CHEMICAL have been discovered in or on  
26 vinyl/PVC coating or other components of SALT branded clothing and accessory hangers  
27 (including, but not limited to, SALT 5-Tier Swing Arm Trouser Hanger, SALT Set of 3 Trouser  
28 Hangers and SALT 6-Tier Blouse Tree) that defendants BED BATH & BEYOND INC. and

1 LIBERTY PROCUREMENT CO. INC. manufacture, distribute, and/or offer for sale to  
2 consumers throughout the State of California. All such identified clothing and accessory  
3 hanger products containing the LISTED CHEMICAL shall hereinafter be referred to as the  
4 "PRODUCTS."

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

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

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

14 **PARTIES**

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

19 11. Based upon publicly available information, plaintiff is informed and believes, and  
20 thereupon alleges, that each defendant BED BATH & BEYOND INC. and LIBERTY  
21 PROCUREMENT CO. INC. is a person doing business within the meaning of California Health  
22 & Safety Code Section 25249.11.

23 12. Based upon publicly available information, plaintiff is informed and believes, and  
24 thereupon alleges, that defendants BED BATH & BEYOND INC. and LIBERTY  
25 PROCUREMENT CO. INC. are legally responsible for the manufacture, distribution, and/or  
26 offer of the PRODUCTS for sale or use in the State of California or implies by its conduct that it  
27 manufactures, distributes, and/or offers the PRODUCTS for sale or use in the State of  
28 California.



1 because one or more instances of wrongful conduct occurred, and continues to occur, in the  
2 County of Marin and/or because DEFENDANTS conducted, and continue to conduct,  
3 business in this County with respect to the PRODUCTS.

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

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

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

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

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

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

26 27. On June 7, 2016, a valid and compliant Proposition 65 60-Day Notice of Violation  
27 ("60-Day Notice") and the requisite Certificate of Merit were provided to BED BATH &  
28 BEYOND INC., LIBERTY PROCUREMENT CO. INC. and various public enforcement agencies

1 stating that as a result of the DEFENDANTS' manufacture, distribution and sales of the  
2 PRODUCTS, workers, purchasers and users in the State of California are being exposed to  
3 LISTED CHEMICAL resulting from the reasonably foreseeable uses of the PRODUCTS,  
4 without the individual workers, purchasers and users first having been provided with a "clear  
5 and reasonable warning" regarding such toxic exposures.

6 28. On October 11, 2016, a valid and compliant Supplemental Proposition 65 60-Day  
7 Notice of Violation ("60-Day Notice") and the requisite Certificate of Merit were provided to  
8 BED BATH & BEYOND INC., LIBERTY PROCUREMENT CO. INC. and various public  
9 enforcement agencies stating that as a result of the DEFENDANTS' manufacture, distribution  
10 and sales of the PRODUCTS, workers, purchasers and users in the State of California are being  
11 exposed to LISTED CHEMICAL resulting from the reasonably foreseeable uses of the  
12 PRODUCTS, without the individual workers, purchasers and users first having been provided  
13 with a "clear and reasonable warning" regarding such toxic exposures.

14 29. On August 2, 2016, Plaintiff Susan Davia and defendants BED BATH & BEYOND  
15 INC. and LIBERTY PROCUREMENT CO. INC. entered in an agreement specifically tolling  
16 and suspending accrual of any period of limitations relating to defendants' alleged violations  
17 of Proposition 65 as referenced in the June 7, 2016, and October 11, 2016, Notices. The tolling  
18 agreement has remained in effect until March 12, 2019.

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

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

1           32. The PRODUCTS manufactured, distributed, and/or offered for sale or use in  
2 California by DEFENDANTS, contain the LISTED CHEMICAL.

3           33. DEFENDANTS knew or should have known that the PRODUCTS contained the  
4 LISTED CHEMICAL or have imputed knowledge that the PRODUCTS contained the LISTED  
5 CHEMICAL.

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

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

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

18           37. DEFENDANTS failed to provide a "clear and reasonable warning" to those  
19 consumers and/or other individuals in the State of California who were or who could become  
20 exposed to the LISTED CHEMICAL during the reasonably foreseeable retail receipt, display  
21 and organization of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.  
22 To the extent DEFENDANTS later attempted to provide some possible warnings regarding the  
23 PRODUCTS and their LISTED CHEMICAL content, the manner of transmission of such  
24 warnings were not reasonable, and the actual warning messages employed by DEFENDANTS  
25 were not sufficiently clear to communicate the warning to the exposed individuals.

26           38. Contrary to the express policy and statutory prohibition of Proposition 65,  
27 individuals exposed to the LISTED CHEMICAL through dermal contact and/or ingestion  
28 and/or inhalation resulting from the reasonably foreseeable use of the PRODUCTS, sold by

1 DEFENDANTS without a "clear and reasonable warning", have suffered, and continue to  
2 suffer, irreparable harm, for which harm they have no other plain, speedy or adequate remedy  
3 at law.

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

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

10 **PRAYER FOR RELIEF**

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

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

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

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

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

23 Dated: March 12, 2019

Respectfully submitted,

24 SHEFFER LAW FIRM

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