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FILED

DEC 14 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: J. Chen, Deputy

6
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 BPS DIRECT, LLC (dba BASS PRO SHOPS),
BASS PRO OUTDOOR WORLD, LLC and
15 DOES 1-150,

16 Defendants.

Case No. CIV 1600503

**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 the
3 public interest of the citizens of the State of California, to enforce the People’s right to be informed
4 of the presence of Di(2-ethylhexyl)phthalate (“DEHP”) and Diisononyl phthalate (“DINP”), toxic
5 chemicals found in certain PVC rain wear and decoy cord manufactured, distributed and/or
6 otherwise sold by defendants in California.

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

12 3. On October 24, 2003, the State listed Di(2-ethylhexyl)phthalate as a chemical known to
13 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 chemical
17 known to cause cancer. DINP became subject to the warning requirement one year later and was
18 therefore subject to the “clear and reasonable warning” requirements of Proposition 65, beginning
19 on December 20, 2014. (*27 CCR § 27001(b); Cal. Health & Safety Code § 25249.8.*)

20 4. DEHP and DINP shall hereinafter be referred to, collectively, as the “LISTED
21 CHEMICAL.”

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

1 Decoy Cord. All such PVC decoy cord containing DEHP and DINP shall hereinafter be referred to
2 as "PRODUCT 2." PRODUCT 1 and PRODUCT 2 shall collectively be referred to hereafter as
3 "PRODUCTS".

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

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

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

13 **PARTIES**

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

18 10. Based upon publicly available information, plaintiff is informed and believes, and
19 thereupon alleges, that defendant BPS DIRECT, LLC does business in the State of California as
20 Bass Pro Shops.

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

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

3 13. Defendants DOES 1-50 (“MANUFACTURER DEFENDANTS”) are each persons
4 doing business within the meaning of California Health & Safety Code Section 25249.11.

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

9 15. Defendants DOES 51-100 (“DISTRIBUTOR DEFENDANTS”) are each persons doing
10 business within the meaning of California Health & Safety Code Section 25249.11.

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

14 17. Defendants DOES 101-150 (“RETAIL DEFENDANTS”) are each persons doing
15 business within the meaning of California Health & Safety Code Section 25249.11.

16 18. RETAIL DEFENDANTS offer of the PRODUCTS for sale to individuals in the State
17 of California.

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

23 20. BPS DIRECT, LLC, BASS PRO OUTDOOR WORLD, LLC, MANUFACTURER
24 DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAIL DEFENDANTS shall, where
25 appropriate, collectively be referred to hereinafter as “DEFENDANTS”.

26 **VENUE AND JURISDICTION**

27 21. Venue is proper in the Marin County Superior Court, pursuant to Code of Civil
28 Procedure Sections 394, 395, and 395.5, because this Court is a court of competent jurisdiction,

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, business in
3 this County with respect to the PRODUCTS.

4 22. The California Superior Court has jurisdiction over this action pursuant to California
5 Constitution Article VI, Section 10, which grants the Superior Court “original jurisdiction in all
6 causes except those given by statute to other trial courts.” The statute under which this action is
7 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 or
10 association that either are citizens of the State of California, have sufficient minimum contacts in
11 the State of California, or otherwise purposefully avail themselves of the California market.
12 DEFENDANTS’ purposeful availment renders the exercise of personal jurisdiction by California
13 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 intent
19 through the preamble to the Safe Drinking Water and Toxic Enforcement Act of 1986 that they
20 must be “informed about exposures to chemicals that cause cancer, birth defects, or other
21 reproductive harm.”

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

26 27. On October 1, 2015, and October 29, 2015, valid and compliant Proposition 65 Sixty-
27 Day Notices of Violation (collectively, “Notice 1”), together with valid, requisite Certificates of
28 Merit, were provided to BPS DIRECT, LLC and various public enforcement agencies stating that as

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

5 28. On October 20, 2015, a valid and compliant Proposition 65 sixty-day notice of
6 violation, together with a valid, requisite Certificate of Merit, was provided to BPS DIRECT, LLC
7 and various public enforcement agencies stating that as a result of the DEFENDANTS'
8 manufacture, distribution and sales of PRODUCT 2, workers, purchasers and users in the State of
9 California are being exposed to DINP resulting from the reasonably foreseeable uses of PRODUCT
10 2, without the individual workers, purchasers and users first having been provided with a "clear
11 and reasonable warning" regarding such toxic exposures.

12 29. On March 22, 2016, a valid and compliant Proposition 65 sixty-day notice of
13 violation, together with a valid, requisite Certificate of Merit, was provided to BPS DIRECT, LLC
14 and various public enforcement agencies stating that as a result of the DEFENDANTS'
15 manufacture, distribution and sales of PRODUCT 2, workers, purchasers and users in the State of
16 California are being exposed to DEHP and DINP resulting from the reasonably foreseeable uses of
17 PRODUCT 2, without the individual workers, purchasers and users first having been provided
18 with a "clear and reasonable warning" regarding such toxic exposures.

19 30. The October 20, 2015, and March 22, 2016, Notices of Violation regarding PRODUCT
20 2 shall hereafter be collectively referred to as "Notice 2."

21 31. On June 7, 2016, Davia served a valid and compliant supplemental Proposition 65
22 sixty-day notice of violation, together with a valid, requisite Certificate of Merit, BPS DIRECT,
23 LLC, BASS PRO OUTDOOR WORLD, LLC and various public enforcement agencies stating that
24 as a result of the DEFENDANTS' manufacture, distribution and sales of PRODUCT 1 and
25 PRODUCT 2, workers, purchasers and users in the State of California are being exposed to DEHP
26 and DINP resulting from the reasonably foreseeable uses of PRODUCT 1 and PRODUCT 2,
27 without the individual workers, purchasers and users first having been provided with a "clear and
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1 reasonable warning” regarding such toxic exposures. The June 7, 2016, Notice shall be hereafter
2 referred to as “Notice 3.”

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

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

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

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

17 36. The LISTED CHEMICAL is present in or on the relevant PRODUCTS in such a way
18 as to expose individuals to the LISTED CHEMICAL, as such exposure is defined by 27 CCR
19 Section 25602(b), through dermal contact and/or ingestion and/or inhalation during or as a
20 consequence of the packing, shipping, unpacking, display and daily organization and movement
21 of PRODUCTS as well as the reasonably foreseeable use of the PRODUCTS.

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

26 38. DEFENDANTS’ participation in the manufacture, distribution and/or offer for sale
27 or use of PRODUCTS to individuals in the State of California was deliberate and non-accidental.
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1 39. DEFENDANTS failed to provide a “clear and reasonable warning” to those
2 employees, consumers and/or other individuals in the State of California who were or who could
3 become exposed to the LISTED CHEMICAL during the reasonably foreseeable retail receipt,
4 display and organization of PRODUCTS as well as the reasonably foreseeable use of the
5 PRODUCTS.

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

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

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

18 **PRAYER FOR RELIEF**

19 Wherefore, plaintiff prays for judgment against DEFENDANTS, and each of them, as
20 follows:

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

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

- 1 3. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and
- 2 4. That the Court grant such other and further relief as may be just and proper.

3 Dated: October 18, 2016

Respectfully submitted,

SHEFFER LAW FIRM

By: 

Gregory M. Sheffer
Attorneys for Plaintiff
SUSAN DAVIA

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