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ENDORSED
FILED
ALAMEDA COUNTY

DEC 15 2016

CLERK OF THE SUPERIOR COURT



6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
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10
11 ANTHONY FERREIRO,
12 Plaintiff,
13 v.
14 SKIL-CARE CORPORATION,
15 Defendant.

Case No.: **RG 16842503**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

16
17 Plaintiff Anthony Ferreiro, by and through his attorneys, alleges the following cause of
18 action in the public interest of the citizens of the State of California.

19 **BACKGROUND OF THE CASE**

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

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 Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
4 *Skil-Care* wheelchair cushions sold and/or distributed by defendant Skil-Care Corporation
5 (“Skil-Care” or “Defendant”) in California.

6 3. DEHP is a harmful chemical known to the State of California to cause cancer and
7 reproductive toxicity. On January 1, 1988, the State of California listed DEHP as a chemical
8 known to the State to cause cancer and it has come under the purview of Proposition 65
9 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
10 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
11 known to cause reproductive toxicity.

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

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

22 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
23 and/or offers for sale, without the required warning, *Skil-Care Econo-Gel Wheelchair Cushions*,
24 Item No. 751155, UPC No. 671509141206 (“Product” or “Products”) in California containing
25 DEHP.

26 7. Defendant’s failure to warn consumers and other individuals in California of the
27 health hazards associated with exposure to DEHP in conjunction with the sale, manufacture,
28

1 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the
2 enjoinder and civil penalties described herein.

3 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
4 65 in accordance with Health and Safety Code § 25249.7(b).

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

9 PARTIES

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

14 11. Defendant Skil-Care is a suppliers of medical supplies and healthcare products.
15 Through its business, Skil-Care effectively manufactures, imports, distributes, sells, and/or offers
16 the Product for sale or use in the State of California, or it implies by its conduct that it
17 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
18 California.

19 12. Defendant Skil-Care is a “person” in the course of doing business within the
20 meaning of Health & Safety Code sections 25249.6 and 25249.11.

21 VENUE AND JURISDICTION

22 13. Venue is proper in the County of Alameda because one or more of the instances
23 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
24 conducted, and continues to conduct, business in the County of Alameda with respect to the
25 Product.

26 14. This Court has jurisdiction over this action pursuant to California Constitution
27 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
28 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
2 this Court has jurisdiction over this lawsuit.

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

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On July 12, 2016, Plaintiff gave notice of alleged violation of Health and Safety
11 Code § 25249.6 (the "Notice") to Skil-Care concerning the exposure of California citizens to
12 DEHP contained in the Product without proper warning, subject to a private action to Skil-Care
13 and to the California Attorney General's office and the offices of the County District attorneys
14 and City Attorneys for each city with a population greater than 750,000 persons wherein the
15 herein violations allegedly occurred.

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

21 18. After receiving the Notice, and to Plaintiff's best information and belief, none of
22 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
23 a cause of action against Skil-Care under Proposition 65 to enforce the alleged violations which
24 are the subject of Plaintiff's notice of violation.

25 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
26 Notice to Skil-Care, as required by law.

27 **FIRST CAUSE OF ACTION**

28 **(By Plaintiff against Defendant for the Violation of Proposition 65)**

1 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
2 this complaint as though fully set forth herein.

3 21. Defendant has, at all times mentioned herein, acted as manufacturer, distributor,
4 and/or retailer of the Product.

5 22. The Product contains DEHP, a hazardous chemical found on the Proposition 65
6 list of chemicals known to be hazardous to human health.

7 23. The Product does not comply with the Proposition 65 warning requirements.

8 24. Plaintiff, based on his best information and belief, avers that at all relevant times
9 herein, and at least since May 19, 2016 continuing until the present, that Skil-Care has continued
10 to knowingly and intentionally expose California users and consumers of the Product to DEHP
11 without providing required warnings under Proposition 65.

12 25. The exposures that are the subject of the Notice result from the purchase,
13 acquisition, handling and recommended use of the product. Consequently, the primary route of
14 exposure to these chemicals is through dermal exposure. During normal expected use,
15 wheelchair cushion will be in contact with the user's buttocks and the back of the user's legs and
16 the vinyl covering will be in contact with either bare, exposed skin or the user's clothing. The
17 contaminated articles of clothing will continue to be a source of dermal transfer after the user is
18 not in contact with the seat cushion. Should the wearer's skin perspire against the seat cushion
19 or the seat cushion become wet due to contact with water or due to incontinence, aqueous DEHP
20 skin permeation rates have been reported to be faster than neat DEHP permeation. The
21 wheelchair cushion can be expected to emit gas phase DEHP into the air over the lifetime of the
22 product. This gas phase DEHP can potentially be inhaled or can be absorbed to dust that can be
23 resuspended and potentially ingested. Finally, while mouthing of the product does not seem
24 likely, some amount of exposure through ingestion can occur by handling the product with
25 subsequent touching of the user's hand to mouth.

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

