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By: D. OLIVER, Deputy

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

11 GABRIEL ESPINOSA,
12 Plaintiff,
13 v.
14 CASH 'N CARRY OFFICE PRODUCTS,
15 INC.,
16 Defendant.

Case No.: **RG17852407**
**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**
(Violation of Health & Safety Code §25249.5
et seq.)

BY FAX

17 Plaintiff Gabriel Espinosa, 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 Gabriel Espinosa ("Plaintiff" or "Espinosa"), 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.

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 Better Office Products storage and reusable office bags and/or organizers that are sold,
5 distributed and/or purchased for sale by defendant Cash ‘N Carry Office Products, Inc. (“Cash
6 ‘N Carry” or “Defendant”) in California.

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

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

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

23 6. Plaintiff alleges that Defendant purchases for sale, distributes, imports, sells,
24 and/or offers for sale in California, without the required warning, Better Office Products clear
25 office storage bags and organizers that contain 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, and/or
28

1 distribution of the Products 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 Cash 'N Carry, a California corporation, is an office supply retailer
15 that purchases for sale, imports, distributes, sells, and/or offers the Products for sale or use in the
16 State of California, or it implies by its conduct that it imports, distributes, sells, and/or offers the
17 Products for sale or use in the State of California. Defendant Cash 'N Carry maintains a
18 registered agent for service of process at c/o Dan Israely, 5680 Sawtelle Blvd., Culver City, CA
19 90230.

20 12. Defendant Cash 'N Carry is a "person" in the course of doing business within the
21 meaning of Health & Safety Code sections 25249.6 and 25249.11.

22 **VENUE AND JURISDICTION**

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

27 14. This Court has jurisdiction over this action pursuant to California Constitution
28 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those

1 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
2 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
3 this Court has jurisdiction over this lawsuit.

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

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 16. On October 7, 2016, Plaintiff gave notice of alleged violation of Health and
12 Safety Code § 25249.6 (collectively, the "Notice") to Cash 'N Carry concerning the exposure of
13 California citizens to DEHP contained in the Products without proper warning, subject to a
14 private action to Cash 'N Carry and to the California Attorney General's office and the offices of
15 the County District attorneys and City Attorneys for each city with a population greater than
16 750,000 persons wherein the herein violations allegedly occurred.

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

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

26 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
27 Notice to Cash 'N Carry, as required by law.

28

1
2 **FIRST CAUSE OF ACTION**

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

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

6 21. Defendant has, at all times mentioned herein, acted as distributor, and/or retailer
7 of the Products.

8 22. The Products contain DEHP, a hazardous chemical found on the Proposition 65
9 list of chemicals known to be hazardous to human health.

10 23. The Products do not comply with the Proposition 65 warning requirements.

11 24. Plaintiff, based on his best information and belief, avers that at all relevant times
12 herein, and at least since September 14, 2016 continuing until the present, that Cash 'N Carry has
13 continued to knowingly and intentionally expose California users and consumers of the Products
14 to DEHP without providing required warnings under Proposition 65.

15 25. The exposures that are the subject of the Notice results from the purchase,
16 acquisition, handling and recommended use of the product. Consequently, the primary route of
17 exposure to these chemicals is through dermal absorption for both children and adults. Dermal
18 absorption of DEHP can occur through direct skin contact with the zippered pouch during
19 routine use when the pouch is grasped, opened, or manipulated with bare hands. The product
20 can be expected to emit gas phase DEHP into the air over the lifetime of the product.
21 Concentration of gas phase DEHP can potentially be absorbed to the surface of the interior
22 contents of the pouch which can include, among other things, office items such as pens and
23 pencils. When handled, these items can provide an indirect source of dermal transfer of DEHP
24 to the user's bare hands. If the pouch is stored or transported in a carrier or a drawer, DEHP that
25 leaches from the pouch may contaminate other articles contained within the carrier bag or drawer
26 that are subsequently handled by the user. Finally, while mouthing of the product does not seem
27 likely, some amount of exposure through ingestion can occur by touching the product with
28 subsequent touching of the user's hand to mouth, or if the interior contents should become

1 contaminated with DEHP that has leached from the clutch and these contents subsequently come
2 into contact with the user's mouth or are ingested.

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

6 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
7 Products exposes individuals to DEHP, and Defendant intends that exposures to DEHP will
8 occur by their deliberate, non-accidental participation in the manufacture, importation,
9 distribution, sale and offering of the Products to consumers in California

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

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

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


16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
18 following relief:

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

26 Dated: March 9, 2017

BRODSKY & SMITH, LLC

27 By: 
28 Evan J. Smith (SBN242352)

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