ENDORGED FILED Evan J. Smith, Esquire (SBN 242352) ALAMPDA COUNTY Ryan P. Cardona, Esquire (SBN 302113) APR 102017 BRODSKY & SMITH, LLC 9595 Wilshire Blvd., Ste. 900 OLEAK OF THE SUPERIOR COUR. Beverly Hills, CA 90212 Telephone: (877) 534-2590 By Lanette Buffin, Deputy Facsimile: (310) 247-0160 5 Attorneys for Plaintiff 6 7 SUPERIOR COURT OF THE STATE OF CALIFORNIA 8 COUNTY OF ALAMEDA 9 ANTHONY FERREIRO, 11 Plaintiff, COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELEIF 12 VS. (Violation of Health & Safety Code §25249.5 13 GREENBRIER INTERNATIONAL. et seq.) INC. and DOLLAR TREE STORES, 14 INC., 15 Defendants. 16 Plaintiff Anthony Ferreiro ("Plaintiff" or "Ferreiro"), 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. 19 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 seg ("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 of the citizens of the State of California to enforce the People's right to be informed of the health hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in

COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF HEALTH & SAFETY CODE §25249.5

headphones/ear muffs manufactured, sold and/or distributed by defendants Greenbrier International, Inc. ("Greenbrier") and/or Dollar Tree Stores, Inc. ("Dollar Tree") (Greenbrier and Dollar Tree are collectively referred to herein as, "Defendants") in California.

- 3. DEHP is a harmful chemical known to the State of California to cause cancer and reproductive toxicity. On January 1, 1988 the State of California listed DEHP as a chemical known to the State to cause cancer and it has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical known to cause developmental male reproductive toxicity. *Id*.
- 4. Proposition 65 requires all businesses with ten (10) or more employees that operate within California or sell products therein to comply with Proposition 65 regulations. Included in such regulations is the requirement that businesses must label any product containing a Proposition 65-listed chemical with a "clear and reasonable" warning before "knowingly and intentionally" exposing any person to it.
- 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin the actions of a defendant which "violate or threaten to violate" the statute. Health & Safety Code § 25249.7.
- 6. Plaintiff alleges that Defendants produce, manufacture, distribute, import, sell, and/or offer for sale in California, without the required warning, Tool Bench Noise Reduction Ear Muff, UPC No. 6 39277 08412 5 (the "Product") that contain DEHP.
- 7. Defendants' failure to warn consumers, and other individuals in California of the health hazards associated with exposure to DEHP in conjunction with the sale, manufacture, and/or distribution of the Product is a violation of Proposition 65 and subjects Defendants to the enjoinment and civil penalties described herein.
- 8. Plaintiff seeks civil penalties against Defendants for their violations of Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

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

PARTIES

- 10. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).
- 11. Defendant Greenbrier is a mid-sized nondurable goods wholesaler in Chesapeake, Virginia. It has 200 full time employees and generates an estimated \$22.1 million in annual revenue. Through its business, Greenbrier effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Greenbrier can be served care of its registered agent for service of process at c/o Corporate Creations Network, Inc., 3411 Silverside Road, #104 Rodney Building, Wilmington, DE 19810.
- 12. Defendant Dollar Tree is an American chain of discount variety stores that sells items for \$1 or less. A Fortune 500 company, Dollar Tree is headquartered in Chesapeake, Virginia and operates 13,600 stores throughout the 48 contiguous U.S. states and Canada. Through its business, Dollar Tree effectively manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of California. Dollar Tree can be served care of its registered agent for service of process at c/o Corporate Creations Network, Inc., 1430 Truxton Ave., 5th Floor, Bakersfield, CA 93301.
- 13. Defendants Greenbrier and Dollar Tree are each a "person" in the course of doing business within the meaning of Health & Safety Code §§ 25249.6 and 25249.11.

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VENUE AND JURISDICTION

- 14. Venue is proper in the County of Alameda because one or more of the instances of wrongful conduct occurred, and continue to occur in this county and/or because Defendants conducted, and continue to conduct, business in the County of Alameda with respect to the Product.
- 15. This Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore, this Court has jurisdiction over this lawsuit.
- 16. This Court has jurisdiction over Defendants because they have sufficient minimum contacts with the State of California, and/or have otherwise purposefully availed themselves of the California market. Such purposeful availment has rendered the exercise of jurisdiction by California courts consistent and permissible with traditional notions of fair play and substantial justice.

SATISFACTION OF NOTICE REQUIREMNTS

- 17. On November 29, 2016, Plaintiff gave notice of alleged violation of Health and Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California citizens to DEHP contained in the Product without proper warning, subject to a private action to Defendants, and to the California Attorney General's office and the offices of the County District attorneys and City Attorneys for each city with a population greater than 750,000 persons wherein the herein violations allegedly occurred.
- 18. The Notice complied with all procedural requirements of Proposition 65 including the attachment of a Certificate of Merit affirming that Plaintiff's counsel had consulted with at least one person with relevant and appropriate expertise who reviewed relevant data regarding DEHP exposure, and that counsel believed there was meritorious and reasonable cause for a private action.

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- 19. After receiving the Notice, and to Plaintiff's best information and belief, none of the noticed appropriate public enforcement agencies have commenced and diligently prosecuted a cause of action against Defendants and/or Dollar Tree, Inc. under Proposition 65 to enforce the alleged violations which are the subject of Plaintiff's notice of violation.
- Plaintiff is commencing this action more than sixty (60) days from the date of the

FIRST CAUSE OF ACTION

(By Plaintiff against Defendants for the Violation of Proposition 65)

- Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 20 of
- Defendants have, at all times mentioned herein, acted as a manufacturer,
- The Product contains DHEP, a hazardous chemical found on the Proposition 65
 - The Product does not comply with the Proposition 65 warning requirements.
- Plaintiff, based on his best information and belief, avers that at all relevant times herein, and at least since November 1, 2016, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Product to DEHP without providing required warnings under Proposition 65.
- The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the product. Consequently, the primary route of exposure to these chemicals is through direct skin exposure. The inner car pad of these ear muffs are likely to be in constant contact with the user's head/ears during normal use and direct skin exposure is likely to occur. Direct skin exposure through direct contact with the inner ear pad of the ear muffs and the user's hands is possible during application, removal, and manipulation of the ear muffs. Should the wearer's skin perspire underneath the inner ear pad, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. The inner ear pad can be expected to emit gas phase DEHP into the air over the lifetime of the product. Gas

phase DEHP can be emitted into the ear canal during normal use of the product. This gas phase DEHP can potentially permeate skin and membranes of the eardrum, middle ear, and inner ear. Finally, while mouthing of the product does not seem likely, some amount of exposure through ingestion can occur by handling the product with subsequent touching of the user's hand to mouth.

- 27. Plaintiff, based on his best information and belief, avers that such exposures will continue every day until clear and reasonable warnings are provided to Product purchasers and users or until this known toxic chemical is removed from the Product.
- 28. Defendants have knowledge that the normal and reasonably foreseeable use of the Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur by their deliberate, non-accidental participation in the manufacture, importation, distribution, sale and offering of the Product to consumers in California.
- 29. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this Complaint.
- 30. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above described acts, Defendant are liable for a maximum civil penalty of \$2,500 per day per violation.
- 31. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically authorized to grant injunctive relief in favor of Plaintiff and against Defendant.

PRAYER FOR RELIEF

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

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

1	Dated: April 10, 2017 BR	ODSKY, & SMITH, LLC
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