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MARGARET J. DOWN

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

11 KAREN CALACIN,

12 Plaintiff,

13 v.

14 NATIONAL STORES, INC. dba
15 FALLAS,

16 Defendant.

Case No.: RG17856134

Dept. 518

**AMENDED COMPLAINT FOR CIVIL
PENALTIES AND INJUNCTIVE RELIEF**

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

BY FAX

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

27 2. This amended complaint is a representative action brought by Plaintiff in the
28 public interest of the citizens of the State of California to enforce the People's right to be

1 informed of the health hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic
2 chemical found in belts, travel/cosmetic bags/cases, and mattress protectors sold, distributed
3 and/or purchased for sale by defendant National Stores, Inc. dba Fallas (“Fallas” or “Defendant”)
4 in California.

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

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

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

21 6. Plaintiff alleges that Defendant purchases for sale, distributes, imports, sells,
22 and/or offers for sale in California, without the required warning, belts, travel/cosmetic
23 bags/cases, and mattress protectors, including but not limited to (1) Black Belt, UPC No.
24 00830912, Fallas Receipt: 830912, (2) Perry Ellis Travel Kits, UPC No. 0 77979 83287 1, and
25 (3) Cambridge Classics Water Proof Mattress Pads, TXLPADSWP (the “Products”) that contain
26 DEHP.

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

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. She brings
13 this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

14 11. Defendant Fallas, a California Corporation with more than 350 locations in
15 twenty-two states and Puerto Rico, purchases for sale, imports, distributes, sells, and/or offers the
16 Products 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 Products for sale or use in the State of
18 California. Defendant Fallas maintains a registered agent for service of process at c/o Michael
19 Fallas, 15001 S. Figueroa Street, Gardena, CA 90248.

20 12. Defendant Fallas is a “person” in the course of doing business within the meaning
21 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 November 18, 2016, December 16, 2016, and April 20, 2017, Plaintiff gave
12 notice of alleged violation of Health and Safety Code § 25249.6 (collectively, the “Notices”) to
13 Fallas concerning the exposure of California citizens to DEHP contained in the Products without
14 proper warning, subject to a private action to Fallas and to the California Attorney General’s
15 office and the offices of the County District attorneys and City Attorneys for each city with a
16 population greater than 750,000 persons wherein the herein violations allegedly occurred.

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

22 18. After receiving the Notices, 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 Fallas under Proposition 65 to enforce the alleged violations which are
25 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 Notices to Fallas, as required by law.

28

FIRST CAUSE OF ACTION

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

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

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

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

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

24. Plaintiff, based on her best information and belief, avers that at all relevant times herein, and at least since November 1, 2016 continuing until the present, that Fallas has continued to knowingly and intentionally expose California users and consumers of the Products to DEHP without providing required warnings under Proposition 65.

25. The exposures that are the subject of the Notices result from the purchase, acquisition, handling and recommended use of the product. Consequently, the primary route of exposure to DEHP in the travel/cosmetic bags/cases is through dermal absorption through direct contact. Users may potentially be exposed to DEHP by dermal absorption through direct skin contact with the interior of the travel bag during routine use when the bag is manipulated with bare hands. The product can be expected to emit gas phase DEHP into the air over the lifetime of the product. Concentrations of gas phase DEHP can be expected to building within the small, enclosed interior of the travel bag. This gas phase DEHP can potentially be absorbed to the surface of the interior contents which, according to the manufacturer's label include "travel essentials or electronics and cords." When handled, these items can provide an indirect source of dermal transfer of DEHP to the user's hands when the contents are grasped with bare hands. Should the user manipulate the travel bag or contaminated inner contents with wet hands, or the travel bag or its contents become wet, aqueous DEHP skin permeation rates are faster than neat DEHP permeation. For instance, exposure to low molecular weight phthalates was reported in urinary metabolites after male showering. If the travel bag is stored or transported in a carrier,

1 DEHP that leaches from the travel bag may contaminate other articles contained within the
2 carrier bag that are subsequently handled or worn by the user. Finally, while mouthing of the
3 product does not seem likely, some amount of exposure through ingestion can occur by touching
4 the product with subsequent touching of the user's hand to mouth, or if the interior contents of
5 one of the containers is contaminated with DEHP and comes into contact with the user's mouth.

6 26. The primary route of exposure to DEHP in the belts sold and/or distributed by
7 Fallas is through direct skin exposure. Direct dermal exposure through the hands is likely to
8 occur when the user puts on or takes off the belt. Indirect exposure is likely to occur through the
9 transfer of DEHP to articles of clothing that the belt comes into contact with and subsequent
10 handling of contaminated clothing by the user. Finally, while mouthing of the product does not
11 seem likely, some amount of exposure through ingestion can occur by handling the product
12 during use with subsequent touching of the user's hands to mouth.

13 27. The primary route of exposure to DEHP in the mattress pads sold and/or
14 distributed by Fallas is through direct dermal exposure. Direct dermal exposure through the
15 user's hands is possible during installation of the mattress pad. Indirect exposure to DEHP is
16 possible through exposed skin during sleep. The product can be expected to emit gas phase
17 DEHP into the air over the lifetime of the product. This gas phase DEHP can potentially be
18 inhaled or can be absorbed to dust that can be resuspended and potentially ingested. During use,
19 the gas phase DEHP is likely to be generated within the proximity of the user's nasal and oral
20 breathing area that can be inhaled during sleep. DEHP vapor will also be present in the
21 proximity of the user's eyes that may cause eye irritation. The eyes are particularly sensitive to
22 chemicals. For instance, decreased human corneal endothelial cell line B4G12 proliferation was
23 observed for DBP, BBP, and DEHP, and cell toxicity was observed for DBP and BBP. Finally,
24 while mouthing of the product does not seem likely, some amount of exposure through ingestion
25 can occur by touching the product, with subsequent touching of the user's hand to mouth.

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

Attorneys for Plaintiff

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