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**ENDORSED
FILED
ALAMEDA COUNTY
MAY 11 2017**

**CLERK OF THE SUPERIOR COURT
By Lanette Buffin, Deputy**

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

11 ANTHONY FERREIRO,
12 Plaintiff,

13 v.

14 GUNTERSVILLE BREATHABLES, INC.,
15 Defendant.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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

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BACKGROUND OF THE CASE

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

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

1 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in Frog
2 Toggs' chest waders manufactured, sold and/or distributed in California by defendant
3 Guntersville Breathables, Inc. ("Guntersville Breathables" or "Defendant") in California.

4 3. DINP is a harmful chemical known to the State of California to cause cancer. On
5 December 20, 2013, the State of California listed DINP as a chemical known to the State to
6 cause cancer and it has come under the purview of Proposition 65 regulations since that time.
7 Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

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

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

18 6. Plaintiff alleges that Defendant produces, manufactures, distributes, imports, sells,
19 and/or offers for sale in California, without the required warning, Frogg Toggs' chest waders,
20 including its Rana II PVC Chest Waders, UPC No. 6 47484 04981 3 ("Product" or "Products"),
21 that contain DINP.

22 7. Defendant's failure to warn consumers and other individuals in California of the
23 health hazards associated with exposure to DINP in conjunction with the sale, manufacture,
24 and/or distribution of the Product is a violation of Proposition 65 and subjects Defendant to the
25 enjoinder and civil penalties described herein.

26 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
27 65 in accordance with Health and Safety Code § 25249.7(b).

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9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendant to provide purchasers or users of the Product with the required warnings related to the dangers and health hazards associated with exposure to DINP 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 Guntersville Breathables, which also operates under the name Frogg Toggs, wholesales and distributes apparel products including, but not limited to, jackets, ponchos, snow shells, pants, hats, umbrella, and kid's suits. Through its business, Guntersville Breathables 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.

12. Defendant Guntersville Breathables is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

13. 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 Defendant conducted, and continues to conduct, business in the County of Alameda with respect to the Product.

14. 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.

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

7 **SATISFACTION OF NOTICE REQUIREMENTS**

8 16. On February 27, 2017, Plaintiff gave notice of alleged violation of Health and
9 Safety Code § 25249.6 (the "Notice") to Guntersville Breathables concerning the exposure of
10 California citizens to DINP contained in the Product without proper warning, subject to a private
11 action to Guntersville Breathables and to the California Attorney General's office and the offices
12 of the County District attorneys and City Attorneys for each city with a population greater than
13 750,000 persons wherein the herein violations allegedly occurred.

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

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

23 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
24 Notice to Guntersville Breathables, as required by law.

25 **FIRST CAUSE OF ACTION**

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

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

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

3 22. The Product contains DINP, a hazardous chemical found on the Proposition 65
4 list of chemicals known to be hazardous to human health.

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

6 24. Plaintiff, based on his best information and belief, avers that at all relevant times
7 herein, and at least since January 26, 2017, continuing until the present, that Guntersville
8 Breathables has continued to knowingly and intentionally expose California users and consumers
9 of the Product to DINP without providing required warnings under Proposition 65.

10 25. The exposures that are the subject of the Notice result from the purchase,
11 acquisition, handling and recommended use of the product. Consequently, the primary route of
12 exposure to these chemicals is through direct skin exposure. The inside of the leg, chest, and
13 suspenders portion of the waders likely to be in constant contact with either bare, exposed skin or
14 the user's clothing. The inside of the PVC boot portion of the waders are likely to be in contact
15 with the user's feet, socks, or shoes. If any part of the waders are worn over bare exposed skin,
16 direct skin exposure is likely to occur. Additionally, the dermal transport of DINP through the
17 user's hands can occur when fitting and removing the waders. Should the wearer's skin perspire
18 inside the waders, or the interior of the waders become wet from precipitation or water, aqueous
19 HMWP skin permeation rates have been reported to be faster than neat HMWP permeation.
20 Clothing worn within the waders are likely to absorb DINP. The contaminated articles will
21 continue to be a source of dermal transfer after the waders are removed. If the waders are stored
22 or transported in a carrier, DINP that leaches from the waders may contaminate other articles
23 contained within the carrier that are subsequently handled, worn, or consumed by people.
24 Finally, while mouthing of the product does not seem likely, some amount of exposure through
25 ingestion can occur by handling the product with subsequent touching of the user's hand to
26 mouth.

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

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

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

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

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

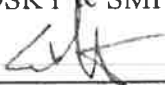
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15 **PRAYER FOR RELIEF**

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

- 18 A. That the court assess civil penalties against Defendant in the amount of
19 \$2,500 per day for each violation in accordance with Health and Safety
20 Code § 25249.7(b);
21 B. That the court preliminarily and permanently enjoin Defendant mandating
22 Proposition 65 compliant warnings on the Product;
23 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
24 D. That the court grant any further relief as may be just and proper.
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26 Dated: May 11, 2017

BRODSKY & SMITH, LLC

27 By: 
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