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FILED
ALAMEDA COUNTY

MAR 13 2018

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,

Plaintiff,

v.

OCTOROSE, LLC,

Defendant.

Case No.:

RG18896499

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

BY FAX

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

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 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in Soft

1 Glass Alike PVC Protectors (the “Products”) sold and/or distributed for sale in California by
2 defendant OctoRose, LLC (“OctoRose” or “Defendant”).

3 3. DINP is a harmful chemical known to the State of California to cause cancer. On
4 December 20, 2013, the State of California listed DINP as a chemical known to the State to
5 cause cancer thereby causing DINP to come under the purview of Proposition 65 regulations
6 since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
7 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 imports, distributes, sells and/or offers for sale in
19 California, without the required Proposition 65 exposure warning, the Products that contain
20 DINP.

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

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

27 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
28 Defendant to provide purchasers or users of the Products with the required exposure warnings

1 related to the dangers and health hazards associated with exposure to DINP pursuant to Health
2 and Safety Code § 25249.7(a).

3 **PARTIES**

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

8 11. Defendant OctoRose, through its business, effectively imports, distributes, sells,
9 and/or offers the Products for sale or use in the State of California, or it implies by its conduct
10 that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the
11 State of California.

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

14 **VENUE AND JURISDICTION**

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

19 14. This Court has jurisdiction over this action pursuant to California Constitution
20 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
21 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
22 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
23 this Court has jurisdiction over this lawsuit.

24 15. This Court has jurisdiction over Defendant because it is either a citizen of the
25 State of California, has sufficient minimum contacts with the State of California, is registered
26 with the California Secretary of State as foreign corporations authorized to do business in the
27 State of California, and/or has otherwise purposefully availed itself of the California market.
28

1 Such purposeful availment has rendered the exercise of jurisdiction by California courts
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On March 24, 2017, Plaintiff gave notice of alleged violation of Health and Safety
5 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
6 DINP contained in the Products without proper warning, subject to a private action to Defendant
7 and to the California Attorney General's office and the offices of the County District attorneys
8 and City Attorneys for each city with a population greater than 750,000 persons wherein the
9 herein violations allegedly occurred.

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

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

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

21 **FIRST CAUSE OF ACTION**

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

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

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

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

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

2 24. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since October 20, 2016, continuing until the present, that Defendant has
4 continued to knowingly and intentionally expose California users and consumers of the Products
5 to DINP without providing required warnings under Proposition 65.

6 25. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the product. Consequently, the primary route of
8 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to
9 DINP by dermal absorption through direct skin contact when the pad is manipulated with bare
10 hands. Should the pad be handled when it is wet or with wet hands, aqueous HMWP skin
11 permeation rates have been reported to be faster than neat HMWP permeation. Items placed on
12 top of the pad in contact with the pad are likely to absorb DINP that leaches from the pad. The
13 contaminated articles will continue to be a source of dermal exposure to DINP when handled,
14 and in the case of food items or items that are mouthed, ingestion of DINP is possible. It has
15 been reported that the emission rate of phthalates from surfaces is substantially enhanced in the
16 presence of particles where the particles rapidly sorb phthalates from the gas phase allowing
17 more to be emitted from the vinyl surface. Finally, while mouthing of the product does not seem
18 likely, some amount of exposure through ingestion can occur by handling the product with
19 subsequent touching of the user's hand to mouth.

20 26. Plaintiff, based on his best information and belief, avers that such exposures will
21 continue every day until clear and reasonable warnings are provided to the purchasers and users
22 of the Products, or until these known toxic chemicals are removed from the Products.

23 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
24 Products exposes individuals to DINP, and Defendant intends that exposures to DINP will occur
25 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale
26 and offering of the Products to consumers in California.

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

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

30. 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 Defendant and requests the following relief:

- A. That the court assess civil penalties against Defendant 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 Defendant 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.

Dated: March 13, 2018

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