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OCT 26 2017

By: ERICA RAMIREZ, Clerk

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

11 GABRIEL ESPINOSA,
12 Plaintiff,
13 v.
14 AAW PRODUCTS, INC.,
15 Defendant.

Case No.: **RG17880265**

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

16
17 Plaintiff Gabriel Espinosa ("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.

19 **BACKGROUND OF THE CASE**

20
21 1. Plaintiff brings this representative action on behalf of all California citizens to
22 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
23 at the Health and Safety Code § 25249.5 *et seq* ("Proposition 65"), which reads, in relevant part,
24 "[n]o person in the course of doing business shall knowingly and intentionally expose any
25 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
26 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

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

BY FAX

1 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
2 MagnoGrip Magnetic Tool Pouches manufactured, sold and/or distributed in California by
3 defendant AAW Products Inc. doing business as MagnoGrip Inc. and MDG Tools Inc. (“AAW”
4 or “Defendant”) 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 DEHP 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.

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 manufactures, distributes, imports, sells, and/or
22 offers for sale in California, without the required Proposition 65 exposure warning, MagnoGrip
23 Magnetic Tool Pouches (“Product” or “Products”) that contain DEHP.

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

28

1 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
2 65 in accordance with Health and Safety Code § 25249.7(b).

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

7 **PARTIES**

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

12 11. Defendant effectively manufactures, imports, distributes, sells, and/or offers the
13 Products for sale or use in the State of California, or it implies by its conduct that it
14 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
15 California.

16 12. Defendant AAW is a "person" in the course of doing business within the meaning
17 of Health & Safety Code sections 25249.6 and 25249.11.

18 **VENUE AND JURISDICTION**

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

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

28

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 May 2, 2016, Plaintiff gave notice of alleged violation of Health and Safety
9 Code § 25249.6 (the “Notice”) to AAW concerning the exposure of California citizens to DEHP
10 contained in the Products without proper warning, subject to a private action to AAW and to the
11 California Attorney General’s office and the offices of the County District attorneys and City
12 Attorneys for each city with a population greater than 750,000 persons wherein the herein
13 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 DEHP 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 AAW under Proposition 65 to enforce the alleged violations which are
22 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 AAW, 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 Products contain DEHP, a hazardous chemical found on the Proposition 65
4 list of chemicals known to be hazardous to human health.

5 23. The Products do 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 March 20, 2017, continuing until the present, that AAW has continued
8 to knowingly and intentionally expose California users and consumers of the Products to DEHP
9 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 dermal absorption. Users may potentially be exposed to
13 DEHP by dermal absorption through direct skin contact with the bag during routine use when the
14 black plastic surface of the bag is handled with bare hands. When held in contact with clothing,
15 DEHP from the black plastic can absorb to clothes and these clothes will become a source of
16 dermal exposure. The product can be expected to emit gas phase DEHP into the air over the
17 lifetime of the product. If the tool pouch is stored or transported in a carrier, DEHP that leaches
18 from the tool pouch may contaminate other articles contained within these closed spaces are
19 subsequently handled, worn, mouthed, or consumed. DEHP building supplies contained within
20 the tool pouch that are subsequently handled, or possibly mouthed by the user. Finally, while
21 direct mouthing of the product does not seem likely, some amount of exposure through ingestion
22 can occur by touching the product with subsequent touching of the user's hand to mouth.

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

26 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
27 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur

28

1 by their deliberate, non-accidental participation in the manufacture, importation, distribution,
2 sale and offering of the Product to consumers in California

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

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

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

9
10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
12 following relief:

- 13 A. That the court assess civil penalties against Defendant in the amount of
14 \$2,500 per day for each violation in accordance with Health and Safety
15 Code § 25249.7(b);
16
17 B. That the court preliminarily and permanently enjoin Defendant mandating
18 Proposition 65 compliant warnings on the Product;
19
20 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
21
22 D. That the court grant any further relief as may be just and proper.

21 Dated: October 26, 2017

BRODSKY & SMITH, LLC

22 By: 

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