

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

ENDORSED
FILED
ALAMEDA COUNTY
FEB -6 2018

CLERK OF THE SUPERIOR COURT,
By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,

11 Plaintiff,

12 vs.

13 NEW WAVE MANUFACTURING,
14 INC.,

15 Defendant.

Case No.:

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

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

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

20 **BACKGROUND OF THE CASE**

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

1 hazards caused by exposure to Di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
2 New Wave Swim Buoys sold and/or distributed by defendant New Wave Manufacturing, Inc.
3 (“Defendant”) in California.

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

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

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

20 6. Plaintiff alleges that Defendant manufactures, distributes, imports, sells and/or
21 offers for sale in California, without the requisite exposure warning, New Wave Swim Buoys
22 (the “Products”) that expose persons to DEHP.

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

27 8. Plaintiff seeks civil penalties against Defendant for its violations of Proposition
28 65 in accordance with Health and Safety Code § 25249.7(b).

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 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, through its business, 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. Plaintiff alleges that defendant 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.

15. This Court has jurisdiction over Defendant because it is either a citizen of the State of California, has sufficient minimum contacts with the State of California, is registered with the California Secretary of State as foreign corporations authorized to do business in the

1 State of California, and/or has otherwise purposefully availed itself of the California market.
2 Such purposeful availment has rendered the exercise of jurisdiction by California courts
3 consistent and permissible with traditional notions of fair play and substantial justice.

4 **SATISFACTION OF NOTICE REQUIREMENTS**

5 16. On May 17, 2017, Plaintiff gave notice of alleged violation of Health and Safety
6 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
7 DEHP contained in the Products without proper warning, subject to a private action to Defendant
8 and to the California Attorney General's office and the offices of the County District attorneys
9 and City Attorneys for each city with a population greater than 750,000 persons wherein the
10 herein violations allegedly occurred.

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

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

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

22 **FIRST CAUSE OF ACTION**

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

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

26 21. Defendant have, at all times mentioned herein, acted as manufacturer, distributor,
27 and/or retailer of the Product.
28

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

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

4 24. Plaintiff, based on his best information and belief, avers that at all relevant times
5 herein, and at least since April 21, 2017, continuing until the present, that Defendant has
6 continued to knowingly and intentionally expose California users and consumers of the Product
7 to DEHP without providing required warnings under Proposition 65.

8 25. The exposures that are the subject of this notice result from the purchase,
9 acquisition, handling and recommended use of the product. Consequently, the primary route of
10 exposure to these chemicals is through dermal exposure. Users, which in this case of this
11 product also includes infants and small children, may potentially be exposed to DEHP by dermal
12 absorption through direct skin contact with the blue plastic strip during routine use when the dry
13 bag compartment is opened or closed with bare hands. Dermal exposure to DEHP from the blue
14 strip may also occur when the swim buoy is used as a float in open water. If the blue strip
15 becomes wet or is handled with wet hands, aqueous DEHP skin permeation rates have been
16 reported to be faster than neat DEHP permeation. The product can be expected to emit gas phase
17 DEHP into the air over the lifetime of the product. If the swim buoy is stored or transported in a
18 carrier, DEHP that leaches from the blue plastic may contaminate other articles contained within
19 these closed spaces that are subsequently handled, worn, mouthed, or ingested by the user.
20 Finally, while mouthing of the product does not seem likely, some amount of exposure through
21 ingestion can occur by touching the product with subsequent touching of the user's hand to
22 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 have knowledge that the normal and reasonably foreseeable use of the
27 Product exposes individuals to DEHP, and Defendant intend 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 **PRAYER FOR RELIEF**

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

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

19 Dated: February 6, 2018

BRODSKY & SMITH, LLC

20 By: 

21 Evan J. Smith (SBN242352)

22 Ryan P. Cardona (SBN302113)

23 9595 Wilshire Boulevard, Suite 900

24 Beverly Hills, CA 90212

25 Telephone: (877) 534-2590

26 Facsimile: (310) 247-0160

27 *Attorneys for Plaintiff*