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ENDORSED
FILED
ALAMEDA COUNTY

NOV 02 2017

CLERK OF THE SUPERIOR COURT



6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF ALAMEDA

BY FAX

9 GABRIEL ESPINOSA,

10 Plaintiff,

11 v.

12 E.S. RITCHIE & SONS, INC., WEST
13 MARINE, INC.,

14 Defendants.

15 Case No.:

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

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

18 Plaintiff Gabriel Espinosa ("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
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.

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People's right to be informed of the health
27 hazards caused by exposure to Diisononyl phthalate (DINP), a toxic chemical found in Ritchie
28 Wet Notes Waterproof Notebooks manufactured, sold and/or distributed in California by

1 defendants E.S. Ritchie & Sons, Inc. (“ES Ritchie”) and West Marine, Inc. (“West Marine”)
2 (collectively, the “Defendants”) in California.

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 and DINP has come under the purview of Proposition 65 regulations since that
6 time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b).

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

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

17 6. Plaintiff alleges that Defendants manufacture, distribute, import, sell, and/or offer
18 for sale in California, without the required Proposition 65 exposure warning, Ritchie Wet Notes
19 Waterproof Notebooks (“Product” or “Products”) that contain DINP.

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

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

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

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 ES Ritchie effectively manufactures, imports, distributes, sells, and/or
9 offers the Products for sale or use in the State of California, or it implies by its conduct that it
10 manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the State of
11 California. Defendant ES Ritchie is a “person” in the course of doing business within the
12 meaning of Health & Safety Code sections 25249.6 and 25249.11.

13 12. Defendant West Marine effectively manufactures, imports, distributes, sells,
14 and/or offers the Products for sale or use in the State of California, or it implies by its conduct
15 that it manufactures, imports, distributes, sells, and/or offers the Product for sale or use in the
16 State of California. Defendant West Marine is a “person” in the course of doing business within
17 the meaning 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 Defendants
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.

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

SATISFACTION OF NOTICE REQUIREMENTS

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

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

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

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

FIRST CAUSE OF ACTION

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

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

3 21. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,
4 and/or retailer of the Product.

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

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

8 24. Plaintiff, based on his best information and belief, avers that at all relevant times
9 herein, and at least since April 26, 2017, continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Products
11 to DINP without providing required warnings under Proposition 65.

12 25. The exposures that are the subject of the Notice result from the purchase,
13 acquisition, handling and recommended use of the product. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption. Users may potentially be exposed to
15 DINP by dermal absorption through direct skin contact with the yellow plastic during routine
16 handling of the notebook with bare hands. If the notebook becomes wet or is handled with wet
17 hands, aqueous HMWP skin permeation rates have been reported to be faster than neat HMWP
18 permeation. The product can be expected to emit gas phase DINP into the air over the lifetime
19 of the product. DINP that leaches from the yellow plastic may contaminate items contained
20 within the notebook that are subsequently handled such as paper and writing implements. If the
21 notebook is stored or transported in a carrier, DINP that leaches from the notebook may
22 contaminate other articles contained within the storage area or carrier that are subsequently
23 handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the product does
24 not seem likely, some amount of exposure through ingestion can occur by touching the yellow
25 plastic or contaminated notebook pages with subsequent touching of the user's hand to mouth.
26 For instance, the user may moisten their fingers when turning pages of the notebook.

27
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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. Defendants have knowledge that the normal and reasonably foreseeable use of the
5 Product exposes individuals to DINP, and Defendants intend 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, Defendants are liable for a maximum civil penalty of \$2,500 per day per
12 violation.

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

15
16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
18 following relief:


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

BRODSKY & SMITH, LLC

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