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ALAMEDA COUNTY

APR 24 2016

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Attorneys for Plaintiff the Center for Advanced Public Awareness, Inc.

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

CENTER FOR ADVANCED PUBLIC
AWARENESS, INC., in the public interest,

Plaintiff,

vs.

WALMART, INC. and DOES 1 through 50,
inclusive,

Defendants.

Case Number: **RG18918249**

**COMPLAINT FOR INJUNCTIVE RELIEF
AND CIVIL PENALTIES**

**Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement Act
of 1986 (Health and Safety Code § 25249.5 et
seq.)**

**FILE BY
FAX**

1 Plaintiff the Center for Advanced Public Awareness, Inc. ("CAPA"), in the public interest,
2 alleges as follows as to matters within their own knowledge, and on information and belief as to
3 all other matters:

4 **INTRODUCTION**

5 1. This action seeks to remedy the alleged failure of Defendant Walmart, Inc. ("Walmart"
6 or "Defendant"), and DOES 1-50 (collectively "Defendants") to warn consumers in California
7 that they are being exposed to Diisononyl Phthalate ("DINP"), a substance known to the State of
8 California to cause cancer. Such exposures have occurred, and continue to occur, through the
9 manufacture, distribution, sale and consumer use of the Hyper Tough Extension Cord SKU#
10 23232 or UPC #781756232326 (the "Products"). California consumers are directly exposed to
11 DINP through the touching of the cord. In addition, DINP transferred to the hand is then
12 ingested through hand to mouth contact.

13 2. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
14 Safety Code Section 25249.5 *et seq.* (hereinafter "Proposition 65"), it is unlawful for businesses
15 to knowingly and intentionally expose individuals in California to chemicals known to the State
16 to cause cancer and/or birth defects or other reproductive harm above the safe harbor levels,
17 which include the No Significant Risk Levels ("NSRLs") and/or Maximum Allowable Dose
18 Levels ("MADLs") without providing "clear and reasonable" warnings to individuals prior to
19 their exposure.

20 3. Despite the fact that Walmart's Products allegedly expose consumers to levels of DINP
21 above the listed NSRLs, it failed to provide any warnings whatsoever about the carcinogenic
22 hazards associated with DINP exposure. Moreover, Walmart's continued manufacture,
23 packaging, distribution, marketing, and/or sales of the Products without the required health
24 hazard warnings, causes consumers to be involuntarily, unknowingly and unwittingly exposed to
25 levels of DINP that violate Proposition 65. Thus, Defendant's conduct subjects them to civil
26 penalties and injunctive relief.

1 **JURISDICTION AND VENUE**

2 4. This Court has jurisdiction over this action pursuant to Cal. Health & Safety Code §
3 25249.7, which allows enforcement in any court of competent jurisdiction. The California
4 Superior Court has jurisdiction over this action pursuant to California Constitution Article VI,
5 Section 10, which grants the Superior Court “original jurisdiction in all cases except those given
6 by statute to other trial courts.” The statute under which this is brought does not specify any other
7 court with jurisdiction.

8 5. This Court has jurisdiction over Defendants because they are business entities that do
9 sufficient business, have sufficient minimum contacts or otherwise intentionally avail themselves
10 of the California market through the sale, marketing, or use of the Products in the California
11 market and/or by having such other contact with California so as to render the exercise of
12 jurisdiction over them by the California courts consistent with traditional notions of fair play and
13 substantial justice.

14 6. Venue is proper in this Court because, upon information and belief, one or more of the
15 violations arise in Alameda County.

16 **THE PARTIES**

17 7. CAPA is a non-profit corporation organized under the laws of California acting in the
18 interest of the general public seeking to further, among other causes, the protection of the
19 environment, awareness of dangerous chemicals in consumer products, and corporate
20 accountability. CAPA is a “person” within the meaning of Cal. Health & Safety Code §
21 25249.11(a) and brings this enforcement action in the public interest pursuant to Cal. Health &
22 Safety Code § 25249.7(d).

23 8. CAPA is informed and believes, and thereon alleges, that Defendant Walmart is a Florida
24 entity, which has shipped numerous products for sale into the state of California. Walmart is a
25 “person in the course of doing business” within the meaning of Cal. Health & Safety Code §
26 25249.11(b).

1 9. CAPA is unaware of the true names or capacities of the Defendants sued herein under the
2 fictitious names DOES 1-50, but prays for leave to amend and serve such fictitiously named
3 Defendants pursuant to California Code of Civil Procedure § 474, once their names and capacities
4 become known.

5 10. CAPA is informed and believes, and thereon alleges, that each and all of the acts and
6 omissions alleged herein were performed by, or are attributable to, Defendants and DOES 1-50,
7 each acting as the agent for the other, with legal authority to act on the other's behalf. Upon
8 information and belief, the acts of Defendants were in accordance with, and represent the official
9 policies of Defendants.

10 11. At all times herein mentioned, upon information and belief, the Defendants, and each of
11 them, ratified each and every act or omission complained of herein. At all times herein
12 mentioned, upon information and belief, Defendants, and each of them, aided and abetted the acts
13 and omissions of each and all the other Defendants proximately causing the damages herein
14 alleged.

15 12. CAPA is informed and believes, and thereon alleges, that each of Defendants are in some
16 manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences,
17 and transactions alleged herein.

18 **STATUTORY AND REGULATORY BACKGROUND**

19 13. The People of the State of California declared in Proposition 65 their right "[t]o be
20 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
21 harm." (Section 1(b) of Initiative Measure, Proposition 65).

22 14. To effectuate this goal, Proposition 65 requires that individuals be provided with a "clear
23 and reasonable warning" before being exposed to substances listed by the State of California as
24 causing cancer or reproductive toxicity. Cal. Health and Safety Code §25249.6 states, in pertinent
25 part:

26 No person in the course of doing business shall knowingly and
27 intentionally expose any individual to a chemical known to the
28 state to cause cancer or reproductive toxicity without first giving
clear and reasonable warning to such individual....

1 15. A product exposure to a chemical is one that “results from a person’s acquisition,
2 purchase, storage, consumption, or other reasonably foreseeable use of a product” 27 C.C.R.
3 §25600(h).

4 16. Proposition 65 provides that any “person who violates or threatens to violate” the statute
5 may be enjoined in a court of competent jurisdiction. Cal. Health & Safety Code §25249.7. The
6 phrase “threaten to violate” is defined to mean creating “a condition in which there is a substantial
7 probability that a violation will occur” Cal. Health & Safety Code §25249.11(e). Violators are
8 liable for civil penalties of up to \$2,500 per day for each violation of the Act. Cal. Health &
9 Safety Code §25249.7.

10 17. On December 20, 2013, the State of California officially listed DINP as a chemical known
11 to cause cancer. On December 20, 2014, on year after it was listed as a chemical known to cause
12 cancer, DINP became subject to the clear and reasonable warning requirement regarding cancer
13 under Proposition 65. 27 C.C.R. §27001(c); Cal. Health & Safety Code §25249.10(b). Due to the
14 toxicity of DINP, the California Office of Environmental Health Hazard Assessment (“OEHHA”)
15 set the NSRL for exposure to DINP at 146 micrograms per day.

16 **STATEMENT OF RELEVANT FACTS**

17 18. CAPA purchased the Product at a Walmart Store.

18 19. To test the Product for phthalates, CAPA engaged a well-respected and accredited testing
19 laboratory to determine the amount of DINP contained in the product pursuant to testing methods
20 adopted by the Federal Consumer Products Safety Commission. The testing revealed the that
21 Product had levels of DINP that would result in exposure of DINP to consumers far higher than
22 the limit proscribed by the NSRL.

23 20. Walmart’s Products contain sufficient quantities of DINP such that individuals who handle
24 the Products are exposed to significant amounts of DINP through the average and intended use of
25 the Products. For example, ordinary consumers absorb DINP through the skin when they touch,
26 use, or handle the Products. Ordinary consumers also directly ingest DINP when they put the
27 Products in their mouth during normal use. Consumers also ingest DINP via hand to mouth
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1 contact after they touch, use, or handle the Products and then touch their mouths or other objects
2 that are then placed in their mouths.

3 21. Walmart knows and intends that consumers will use the products in the manner stated
4 above, and that they will be exposed to chemicals such as DINP that exist in the Products.

5 22. At all times relevant to this action, Defendant has knowingly and intentionally exposed the
6 users, consumers and/or handlers of the Products to DINP without first giving a clear and
7 reasonable warning to such individuals.

8 23. CAPA is informed and believes, and thereon alleges, that Defendants have, and continuing
9 through the present, exposed consumers to DINP without providing clear and reasonable warnings
10 regarding the cancer hazards of DINP.

11 24. As a proximate result of the acts by Defendants, as persons in the course of doing business
12 within the meaning of Health & Safety Code §25249.11, they have subjected consumers to
13 violative exposures through the normal and foreseeable use of the Products.

14 25. Any person acting in the public interest has standing to enforce violations of Proposition
15 65 provided that such person has supplied the requisite public enforcers with a valid 60-Day
16 Notice of Violation and such public enforcers are not diligently prosecuting the action with such
17 time. Cal. Health & Safety Code §25249.7(d).

18 26. On March 12, 2018, CAPA provided a “60-Day Notice of Violation of California Health &
19 Safety Code Section 25249.5 et seq.” (“Notice”) to the California Attorney General, the District
20 Attorneys of every county in California, and the City Attorneys of every California city with a
21 population greater than \$750,000.00. Defendant was also provided a copy of the Notice. The
22 Notice included, *inter alia*, the following information: the name, address, and telephone number of
23 the noticing individual; the name of the alleged violator; the statute violated; the approximate time
24 period during which violations occurred; and descriptions of the violations including the
25 chemicals involved, the routes of toxic exposure, and the specific product or type of product
26 causing the violations. The Notice package to Defendant also included the most recent version of
27 Appendix A, the Final Adopted Regulatory Text for Title 27 of the California Code of
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1 Regulations, Section 5903 as amended. In compliance with California Health & Safety Code §
2 25249.7(d) and 11 C.C.R. §3102, CAPA, Plaintiff provided factual information – on a confidential
3 basis – to the Attorney General sufficient to satisfy basis for the Certificate of Merit, including the
4 testing performed by CAPA, and/or its litigation consultants, and the facts, studies, or other data
5 supporting the Certificate.

6 27. After expiration of the sixty (60) day notice period, the appropriate public enforcement
7 agencies have failed to commence and diligently prosecute a cause of action under California
8 Health & Safety Code §25249.5 *et seq.* against Defendant based on the allegations herein.

9 28. CAPA has engaged in good faith efforts to resolve the claims alleged herein prior to filing
10 this complaint, but has not heard from Walmart.

11 **FIRST CAUSE OF ACTION**

12 **(Injunctive Relief Pursuant to Cal. Health & Safety Code §25249.5 *et seq*)**

13 29. CAPA incorporates by reference and re-alleges as if fully stated herein the material
14 allegations set out in paragraphs 1 through 28 inclusive.

15 30. By committing the acts alleged in this Complaint, Defendant at all times relevant to this
16 action, and continuing through the present, has violated California Health & Safety Code
17 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals in
18 California to chemicals known to the State of California to cause cancer or reproductive toxicity
19 without first giving clear and reasonable warnings to such persons who use, consume or handle the
20 Products containing DINP, pursuant to California Health & Safety Code §§25249.6 and
21 25249.11(f).

22 31. By the above-described acts, Defendant has violated California Health & Safety Code
23 §25249.6 and is therefore subject to preliminary and permanent injunctions ordering Defendant to
24 stop violating Proposition 65, to provide warnings to all present and future customers, and to
25 provide warnings to Defendant's past customers who purchased or used the Products without
26 receiving a clear and reasonable warning.

1 32. An action for injunctive relief under Proposition 65 is specifically authorized by California
2 Health & Safety Code §25249.7(a).

3 33. Defendant's actions in selling the Products without clear and reasonable warnings will
4 irreparably harm the citizens of the State of California, for which harm they have no plain, speedy,
5 or adequate remedy at law.

6 34. In the absence of preliminary and then permanent injunctive relief, Defendant will
7 continue to create a substantial risk of irreparable injury by continuing to cause consumers to be
8 involuntarily, unknowingly and unwittingly exposed to the DINP through the use, consumption
9 and/or handling of the Products.

10 **SECOND CAUSE OF ACTION**

11 **(Civil Penalties Pursuant to Cal. Health & Safety Code §25249.5 et seq)**

12 35. CAPA incorporates by reference and re-alleges as if fully stated herein the material
13 allegations set out in paragraphs 1 through 34, inclusive.

14 36. By committing the acts alleged in this Complaint, Defendant at all times relevant to this
15 action, and continuing through the present, has violated California Health & Safety Code
16 §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals in
17 California to chemicals known to the State of California to cause cancer or reproductive toxicity
18 without first giving clear and reasonable warnings to such persons who use, consume or handle the
19 Products containing DINP, pursuant to California Health & Safety Code §§25249.6 and
20 25249.11(f).

21 37. By engaging in the above-described acts, Defendant is liable, pursuant to California Health
22 & Safety Code §25249.7(b), for a civil penalty of up to \$2,500 per day per violation for each
23 unlawful exposure to DINP from the Products in an amount in excess of \$1 million.

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PRAYER FOR RELIEF

WHEREFORE, CAPA prays for relief and judgment against Defendant follows:

As to the Causes of Action

1. A preliminary and permanent injunction, pursuant to California Health & Safety Code Code §25249.7(a), enjoining Defendant, tts agents, employees, assigns and all persons acting in concert or participating with Defendant, from manufacturing, distributing, marketing or selling the Products in California without either reformulating the Products or providing a clear and reasonable warning, within the meaning of Proposition 65, that the users and/or handlers of the Products are exposed to DINP;

2. An Order pursuant to California Health & Safety Code §25249.7(a) compelling Defendant to use best methods to identify and locate each individual who purchased the Products during the statutory period, and to provide a warning to such person that the use of the Products will expose them to chemicals known to cause cancer;


3. An assessment of civil penalties pursuant to California Health & Safety Code §25249.7(b) against Defendant in the amount of \$2,500 per day for each violation of Proposition 65, in an amount to be determined at trial;

4. For an award to CAPA of its reasonable attorneys' fees and costs of suit incurred herein; and

5. For such equitable or other relief as the Court may deem just and proper.

Dated: August 24, 2018

KAWAHITO LAW GROUP APC

By: 
James Kawahito
Attorneys for Plaintiff
CENTER FOR ADVANCED PUBLIC
AWARENESS, INC.