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ENDORSED
FILED
ALAMEDA COUNTY
JUL 30 2018

CLERK OF THE SUPERIOR COURT,
By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

18914736

10 HECTOR VELARDE,

11 Plaintiff,

12 vs.

13 KMART CORPORATION, STANLEY
14 BLACK & DECKER, INC.,

15 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

16 Plaintiff Hector Velarde ("Plaintiff"), by and through her attorneys, alleges the following
17 cause of action in the public interest of the citizens of the State of California.

18 **BACKGROUND OF THE CASE**

19 1. Plaintiff brings this representative action on behalf of all California citizens to
20 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
21 at the Health and Safety Code § 25249.5 et seq. ("Proposition 65"), which reads, in relevant part,
22 "[n]o person in the course of doing business shall knowingly and intentionally expose any
23 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
24 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 di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in
28 Black & Decker earmuffs sold and/or distributed by defendants Stanley Black & Decker, Inc.

1 (“Stanley Black & Decker”) and Kmart Corporation (“Kmart”) (collectively, “Defendants”) in
2 California.

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

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

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

19 6. Plaintiff alleges that Defendants distribute, sell and/or offer for sale in California,
20 without a requisite exposure warning, Black & Decker earmuffs (the “Products”) that expose
21 persons to DEHP.

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

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

28

1 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
2 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
3 this Court has jurisdiction over this lawsuit.

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

11 **SATISFACTION OF NOTICE REQUIREMENTS**

12 16. On March 13, 2018, Plaintiff gave notice of alleged violations of Health and
13 Safety Code § 25249.6 (the “Notice”) to Defendants concerning the exposure of California
14 citizens to DEHP contained in the Products without proper warning, subject to a private action to
15 Defendants and to the California Attorney General’s office and the offices of the County District
16 attorneys and City Attorneys for each city with a population greater than 750,000 persons
17 wherein the herein violations allegedly occurred.

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

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

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

FIRST CAUSE OF ACTION

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

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

21. Defendants have, at all times mentioned herein, acted as a distributor and/or retailer of the Products.

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

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

24. Plaintiff, based on his best information and belief, avers that at all relevant times herein, and at least since August 7, 2017, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Products to DEHP without providing required warnings under Proposition 65.

25. The exposures that are the subject of the Notice result from the purchase, acquisition, handling and recommended use of the Product. Consequently, the primary route of exposure to these chemicals is through direct skin contact. The product can be expected to emit gas phase DEHP into the air and accumulate DEHP at the surface over the lifetime of the product. The headband of these ear muffs are likely to be in constant contact with the user's scalp and hair during normal use and direct skin exposure is likely to occur. Direct skin exposure through direct contact with the headband of the ear muffs and the user's hands is possible during application, removal, and manipulation of the ear muffs. Should the wearer's scalp perspire or become wet underneath the headband, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. Although the association between DEHP and atopic dermatitis has never been elucidated, as a multitude of chemicals are present in headphones that come into contact with human skin, DEHP in headphones and hearing protection aids has been reported to induce contact dermatitis. If the ear muffs are stored or transported in a carrier, DEHP that leaches from the black plastic may contaminate other articles contained within the storage area or carrier that are subsequently handled, worn, mouthed, or

1 ingested by the user. Finally, while mouthing of the product does not seem likely, some amount
2 of exposure through ingestion can occur by handling the product with subsequent touching of the
3 user's hand to mouth.

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

7 27. Defendants have knowledge that the normal and reasonably foreseeable use of the
8 Product exposes individuals to DEHP, and Defendants intend that exposures to DEHP will occur
9 by their deliberate, non-accidental participation in the importation, distribution, sale and offering
10 of the Products to consumers in California

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

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

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

17 **PRAYER FOR RELIEF**

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

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

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28 Dated: July 27, 2018

BRODSKY & SMITH, LLC

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