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ENDORSED
FILED
San Francisco County Superior Court

JAN 15 2019

CLERK OF THE COURT
BY: NEYL WEBB
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN FRANCISCO

11 UNLIMITED CIVIL JURISDICTION

12
13 LAURENCE VINOCUR,

14 Plaintiff,

15 v.

16 THE SCOTTS COMPANY LLC; THE SCOTTS
17 MIRACLE-GRO COMPANY; and
18 DOES 1-150, inclusive,

19 Defendants.

Case No.

CGC-19-572802

**COMPLAINT FOR CIVIL PENALTIES
AND INJUNCTIVE RELIEF**

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

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2. By this Complaint, plaintiff seeks to remedy defendants' continuing failure to warn individuals not covered by California's Occupational Safety Health Act, Labor Code section 6300 *et seq.*, who purchase, use or handle defendants' products, about the risks of exposure to DEHP present in and on vinyl hopper covers that are manufactured, distributed, and offered for sale or use throughout the State of California. Individuals not covered by California's Occupational Safety Health Act, Labor Code section 6300 *et seq.*, who purchase, use or handle defendants' products, are referred to hereinafter as "consumers."

4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.6 *et seq.* (Proposition 65), “[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.

6. Defendants manufacture, distribute, import, sell, and offer for sale without health hazard warnings in California, vinyl hopper covers including, but not limited to, the *Scotts Pro EdgeGuard Broadcast Spreader, 1000245, UPC #0 32247 75901 4*. All such vinyl hopper

1 covers containing DEHP that are manufactured, distributed, sold, or offered for sale by
2 defendants in the State of California are referred to collectively hereinafter as "PRODUCTS."

3 7. Defendants' failure to warn consumers and other individuals in the State of
4 California of the health hazards associated with exposures to DEHP in conjunction with
5 defendants' sales of the PRODUCTS are violations of Proposition 65, and subject defendants,
6 and each of them, to enjoinder of such conduct as well as civil penalties for each violation.
7 Health & Safety Code § 25249.7(a) and (b)(1).

8 8. For defendants' violations of Proposition 65, plaintiff seeks preliminary and
9 permanent injunctive relief to compel defendants to provide consumers of the PRODUCTS with
10 the required warning regarding the health hazards associated with exposures to DEHP. Health
11 & Safety Code § 25249.7(a).

12 9. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
13 penalties against defendants for their violations of Proposition 65.

14 PARTIES

15 10. Plaintiff LAURENCE VINOCUR is a citizen of the State of California who is
16 dedicated to protecting the health of California citizens through the elimination or reduction of
17 toxic exposures from consumer products, and he brings this action in the public interest
18 pursuant to Health and Safety Code section 25249.7(d).

19 11. Defendant THE SCOTTS COMPANY LLC (SCOTTS) is a person in the course
20 of doing business within the meaning of Health and Safety Code sections 25249.6 and
21 25249.11.

22 12. SCOTTS manufactures, imports, distributes, sells, and/or offers the PRODUCTS
23 for sale or use in the State of California, or implies by its conduct that it manufactures, imports,
24 distributes, sells, and/or offers the PRODUCTS for sale or use in the State of California.

25 13. Defendant THE SCOTTS MIRACLE-GRO COMPANY (MIRACLE-GRO) is a
26 person in the course of doing business within the meaning of Health and Safety Code
27 sections 25249.6 and 25249.11.

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1 14. MIRACLE-GRO manufactures, imports, distributes, sells, and/or offers the
2 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
3 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
4 State of California.

5 15. Defendants DOES 1-50 (MANUFACTURER DEFENDANTS) are each a person
6 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
7 and 25249.11.

8 16. MANUFACTURER DEFENDANTS, and each of them, research, test, design,
9 assemble, fabricate, and manufacture, or each implies by its conduct that it researches, tests,
10 designs, assembles, fabricates, and manufactures one or more of the PRODUCTS offered for
11 sale or use in California.

12 17. Defendants DOES 51-100 (DISTRIBUTOR DEFENDANTS) are each a person
13 in the course of doing business within the meaning of Health and Safety Code sections 25249.6
14 and 25249.11.

15 18. DISTRIBUTOR DEFENDANTS, and each of them, distribute, exchange,
16 transfer, process, and transport one or more of the PRODUCTS to individuals, businesses, or
17 retailers for sale or use in the State of California, or each implies by its conduct that it
18 distributes, exchanges, transfers, processes, and transports one or more of the PRODUCTS to
19 individuals, businesses, or retailers for sale or use in the State of California.

20 19. Defendants DOES 101-150 (RETAILER DEFENDANTS) are each a person in
21 the course of doing business within the meaning of Health and Safety Code sections 25249.6
22 and 25249.11.

23 20. RETAILER DEFENDANTS, and each of them, offer the PRODUCTS for sale to
24 individuals in the State of California.

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21. At this time, the true names of defendants DOES 1 through 150, inclusive, are unknown to plaintiff, who, therefore, sues said defendants by their fictitious names pursuant to Code of Civil Procedure section 474. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants is responsible for the acts and occurrences alleged herein. When ascertained, their true names shall be reflected in an amended complaint.

22. SCOTTS, MIRACLE-GRO, MANUFACTURER DEFENDANTS, DISTRIBUTOR DEFENDANTS, and RETAILER DEFENDANTS shall hereinafter, where appropriate, be referred to collectively as the “DEFENDANTS.”

VENUE AND JURISDICTION

23. Venue is proper in the Superior Court for the County of San Francisco pursuant to Code of Civil Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction, because plaintiff seeks civil penalties against DEFENDANTS, because one or more instances of wrongful conduct occurred, and continue to occur, in this county, and/or because DEFENDANTS conducted, and continue to conduct, business in San Francisco with respect to the PRODUCTS.

24. The California Superior Court has jurisdiction over this action pursuant to California Constitution Article VI, section 10, which grants the Superior Court “original jurisdiction in all causes except those given by statute to other trial courts.” The statute under which this action is brought does not specify any other basis of subject matter jurisdiction.

25. The California Superior Court has jurisdiction over DEFENDANTS based on plaintiff's information and good faith belief that DEFENDANTS are each a person, firm, corporation or association that is a citizen of the State of California, has sufficient minimum contacts in the State of California, and/or otherwise purposefully avails itself of the California market. DEFENDANTS' purposeful availment renders the exercise of personal jurisdiction by California courts consistent with traditional notions of fair play and substantial justice.

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1 **FIRST CAUSE OF ACTION**

2 **(Violation of Proposition 65 - Against All Defendants)**

3 26. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
4 Paragraphs 1 through 25, inclusive.

5 27. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
6 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
7 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
8 harm.”

9 28. Proposition 65 states, “[n]o person in the course of doing business shall
10 knowingly and intentionally expose any individual to a chemical known to the state to cause
11 cancer or reproductive toxicity without first giving clear and reasonable warning to such
12 individual . . .” Health & Safety Code § 25249.6.

13 29. On May 31, 2018, plaintiff served a 60-Day Notice of Violation, the “Notice”,
14 together with the requisite certificate of merit, on SCOTTS, MIRACLE-GRO, the California
15 Attorney General’s Office, and the requisite public enforcement agencies alleging that, as a
16 result of DEFENDANTS’ sales of the PRODUCTS, consumers in the State of California are
17 being exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS,
18 without the consumers first receiving a “clear and reasonable warning” regarding the harms
19 associated with exposures to DEHP, as required by Proposition 65.

20 30. DEFENDANTS manufacture, import, distribute, sell, and offer the PRODUCTS
21 for sale or use in violation of Health and Safety Code section 25249.6, and DEFENDANTS’
22 violations have continued beyond their receipt of plaintiff’s Notice. As such, DEFENDANTS’
23 violations are ongoing and continuous in nature and, unless enjoined will continue in the future.

24 31. After receiving plaintiff’s Notice, no public enforcement agency has commenced
25 and diligently prosecuted a cause of action against DEFENDANTS under Proposition 65 to
26 enforce the alleged violations that are the subject of plaintiff’s Notice.

27 32. The PRODUCTS that DEFENDANTS manufacture, import, distribute, sell, and
28 offer for sale or use in California cause exposures to DEHP as a result of the reasonably

1 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANTS and endured by
2 consumers and other individuals in California are not exempt from the “clear and reasonable”
3 warning requirements of Proposition 65, yet DEFENDANTS provide no warning.

4 33. DEFENDANTS knew or should have known that the PRODUCTS they
5 manufacture, import, distribute, sell, and offer for sale in California contain DEHP.

6 34. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
7 through dermal contact and/or ingestion during reasonably foreseeable use.

8 35. The normal and reasonably foreseeable use of the PRODUCTS has caused, and
9 continues to cause, consumer product exposures to DEHP, as defined by title 27 of the
10 California Code of Regulations, section 25600.1(e).

11 36. DEFENDANTS know that the normal and reasonably foreseeable use of the
12 PRODUCTS exposes individuals to DEHP through dermal contact and/or ingestion.

13 37. DEFENDANTS intend that exposures to DEHP from the reasonably foreseeable
14 use of the PRODUCTS will occur by their deliberate, non-accidental participation in the
15 manufacture, importation, distribution, sale, and offering of the PRODUCTS for sale or use to
16 consumers in California.

17 38. DEFENDANTS failed to provide a “clear and reasonable warning” to those
18 consumers in California who have been, or who will be, exposed to DEHP through dermal
19 contact and/or ingestion resulting from their use of the PRODUCTS.

20 39. Contrary to the express policy and statutory prohibition of Proposition 65 enacted
21 directly by California voters, consumers exposed to DEHP through dermal contact and/or
22 ingestion as a result of their use of the PRODUCTS that DEFENDANTS sold without a “clear
23 and reasonable” health hazard warning, have suffered, and continue to suffer, irreparable harm
24 for which they have no plain, speedy, or adequate remedy at law.

25 40. Pursuant to Health and Safety Code section 25249.7(b), as a consequence of the
26 above-described acts, DEFENDANTS, and each of them, are liable for a maximum civil penalty
27 of \$2,500 per day for each violation.

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41. As a consequence of the above-described acts, Health and Safety Code section 25249.7(a) also specifically authorizes the Court to grant injunctive relief against DEFENDANTS.

PRAYER FOR RELIEF

Wherefore, plaintiff prays for judgment against DEFENDANTS as follows:

1. That the Court, pursuant to Health and Safety Code section 25249.7(b), assess civil penalties against DEFENDANTS, and each of them, in the amount of \$2,500 per day for each violation;

2. That the Court, pursuant to Health and Safety Code section 25249.7(a), preliminarily and permanently enjoin DEFENDANTS from manufacturing, distributing, or offering the PRODUCTS for sale or use in California without first providing a “clear and reasonable warning” in accordance with title 27 of the California Code of Regulations, section 25600 *et seq.*, regarding the harms associated with exposures to DEHP;

3. That the Court, pursuant to Health and Safety Code section 25249.7(a), issue preliminary and permanent injunctions mandating that DEFENDANTS recall all PRODUCTS currently in the chain of commerce in California without a “clear and reasonable warning” as defined by California Code of Regulations title 27, section 25600 *et seq.*;

4. That the Court grant plaintiff his reasonable attorneys' fees and costs of suit; and

5. That the Court grant such other and further relief as may be just and proper.

Dated: January 15, 2019

Respectfully submitted,
THE CHANLER GROUP

By:

Laralei S. Paras
Attorneys for plaintiff
LAURENCE VINOCUR