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ALAMEDA COUNTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 GABRIEL ESPINOSA,
11 Plaintiff,
12 vs.
13 PETSMART HOME OFFICE, INC.,
14 Defendant.

Case No.: RG18929032

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

15 Plaintiff Gabriel Espinosa ("Plaintiff"), by and through his attorneys, alleges the
16 following cause of action in the public interest of the citizens of the State of California.

17 **BACKGROUND OF THE CASE**

18 1. Plaintiff brings this representative action on behalf of all California citizens to
19 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
20 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
21 "[n]o person in the course of doing business shall knowingly and intentionally expose any
22 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
23 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

24 2. This complaint is a representative action brought by Plaintiff in the public interest
25 of the citizens of the State of California to enforce the People's right to be informed of the health
26 hazards caused by exposure di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in Top
27 Paw backpack carriers sold and/or distributed by defendant PetSmart Home Office, Inc.
28 ("PetSmart" or "Defendant") in California.

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COMPLAINT FOR CIVIL PENALTIES AND INJUNCTIVE RELIEF – VIOLATION OF
HEALTH & SAFETY CODE §25249.5

BY FAX

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

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 or threaten to violate” the statute. Health & Safety
16 Code § 25249.7.

17 6. Plaintiff alleges that Defendant manufactures, distributes and/or offers for sale in
18 California, without a requisite exposure warning, Top Paw backpack carriers (the “Products”)
19 that expose persons to DEHP.

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

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

26 9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring
27 Defendant to provide purchasers or users of the Products with required warnings related to the
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1 dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety
2 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 PetSmart, through its business, effectively manufactures, imports,
9 distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies
10 by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale
11 or use in the State of California.

12 12. Plaintiff alleges that defendant PetSmart is a “person” in the course of doing
13 business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

14 **VENUE AND JURISDICTION**

15 13. Venue is proper in the County of Alameda because one or more of the instances
16 of wrongful conduct occurred, and continue to occur in this county and/or because Defendant
17 conducted, and continues to conduct, business in the County of Alameda with respect to the
18 Products.

19 14. This Court has jurisdiction over this action pursuant to California Constitution
20 Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those
21 given by statute to other trial courts. Health and Safety Code § 25249.7 allows for the
22 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
23 this Court has jurisdiction over this lawsuit.

24 15. This Court has jurisdiction over Defendant because Defendant is either a citizen
25 of the State of California, has sufficient minimum contacts with the State of California, is
26 registered with the California Secretary of State as foreign corporations authorized to do business
27 in the State of California, and/or has otherwise purposefully availed itself of the California
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1 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
2 consistent and permissible with traditional notions of fair play and substantial justice.

3 **SATISFACTION OF NOTICE REQUIREMENTS**

4 16. On July 17, 2018, Plaintiff gave notice of alleged violation of Health and Safety
5 Code § 25249.6 (the "Notice") to Defendant concerning the exposure of California citizens to
6 DEHP contained in the Products without proper warning, subject to a private action to Defendant
7 and to the California Attorney General's office and the offices of the County District attorneys
8 and City Attorneys for each city with a population greater than 750,000 persons wherein the
9 herein violations allegedly occurred.

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

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

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

21 **FIRST CAUSE OF ACTION**

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

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

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

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

1 23. The Product does not comply with the Proposition 65 warning requirements.

2 24. Plaintiff, based on his best information and belief, avers that at all relevant times
3 herein, and at least since May 23, 2018, continuing until the present, that Defendant has
4 continued to knowingly and intentionally expose California users and consumers of the Product
5 to DEHP without providing required warnings under Proposition 65.

6 25. The exposures that are the subject of the Notice result from the purchase,
7 acquisition, handling and recommended use of the Product. Consequently, the primary route of
8 exposure to these chemicals is through dermal absorption. Users may be exposed to DEHP by
9 dermal absorption through direct skin contact with the Product during routine use when the
10 Product is manipulated with bare hands. If the Product is handled with wet hands or the plastic
11 is wet, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP
12 permeation. DEHP can be absorbed to the surface of pets in the carrier that are subsequently
13 handled by the user. If the Product is stored or transported in a carrier, DEHP that leaches from
14 the item may contaminate other articles contained within these closed spaces that are
15 subsequently handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the
16 Product does not seem likely, some amount of exposure through ingestion can occur by touching
17 the product with subsequent touching of the user's hand to mouth.

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

21 27. Defendant has knowledge that the normal and reasonably foreseeable use of the
22 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
23 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale
24 and offering of the Products to consumers in California

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

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

