

1 Evan J. Smith, Esquire (SBN 242352)
2 Ryan P. Cardona, Esquire (SBN 302113)
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212
6 Telephone: (877) 534-2590
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

**ENDORSED
FILED
ALAMEDA COUNTY**

JUL 03 2019

CLERK OF THE SUPERIOR COURT
By *Jamie Thomas*
JAMIE THOMAS, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
11 Plaintiff,
12 vs.
13 KOHL'S CORPORATION, BLUE
14 WAVE PRODUCTS, INC.,
15 Defendants.

Case No.: **RG19025662**

**COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF**

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

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

BACKGROUND OF THE CASE

18
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) and diisononyl phthalate
28 (DINP), toxic chemicals found in (a) Vinyl Repair Kits, UPC # 6 7287520000 9, SKU #

Filed By Fax

1 99460919, (b) Hathaway Control Spin Table Tennis 2 Player Racket & Ball Sets, UPC #
2 672875903177, SKU # 61288724, and (c) Blue Wave Waterproof Pool & Beach Totes, UPC #
3 672875 50054 3, SKU # 99469135 sold and/or distributed by defendants Kohl's Corporation
4 ("Kohl's") and Blue Wave Products, Inc. ("Blue Wave") (collectively, "Defendants") in
5 California.

6 3. DEHP and DINP are harmful chemicals known to the State of California to cause
7 cancer and, in the case of DEHP, reproductive toxicity as well. On January 1, 1988, and on
8 December 20, 2013, the State of California listed DEHP and DINP as chemicals known to the
9 State to cause cancer and each chemical has come under the purview of Proposition 65
10 regulations since that time. Cal. Code Regs. Tit. 27, § 27001(c); Health & Safety Code §§
11 25249.8 & 25249.10(b). On October 24, 2003, the State of California listed DEHP as a chemical
12 known to cause reproductive toxicity.

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

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

23 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
24 California, without a requisite exposure warning, (a) Vinyl Repair Kits, UPC # 6 7287520000 9,
25 SKU # 99460919, (b) Hathaway Control Spin Table Tennis 2 Player Racket & Ball Sets, UPC #
26 672875903177, SKU # 61288724, and (c) Blue Wave Waterproof Pool & Beach Totes, UPC #
27 672875 50054 3, SKU # 99469135 (the "Products") that expose persons to DEHP and/or DINP.

28

1 from the item may contaminate other articles contained within these closed spaces that are
2 subsequently handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the
3 product does not seem likely, some amount of exposure through ingestion can occur by touching
4 the product with subsequent touching of the user's hand to mouth.

5 26. The primary route of exposure to these chemicals in the Vinyl Repair Kit is
6 through dermal absorption. Users may be exposed to DINP by dermal absorption through direct
7 skin contact with the clear vinyl during routine use when the plastic is manipulated with bare
8 hands. If the plastic is handled with wet hands or the plastic is wet, such as during use in a vinyl
9 pool, aqueous HMWP skin permeation rates have been reported to be faster than neat HMWP
10 permeation. If the patch kit is stored or transported in a carrier, DINP that leaches from the item
11 may contaminate other articles contained within these closed spaces that are subsequently
12 handled, worn, mouthed, or ingested by the user. Finally, while mouthing of the product does not
13 seem likely, some amount of exposure through ingestion can occur by touching the product with
14 subsequent touching of the user's hand to mouth.

15 27. The primary route of exposure to these chemicals in the Hathaway Control Spin
16 Table Tennis 2 Player Racquet and Ball Set is through dermal absorption. Users may be exposed
17 to DEHP by dermal absorption through direct skin contact with the clear plastic during routine
18 use when the case is manipulated with bare hands. Concentrations of gas phase DEHP can be
19 expected to build within the enclosed interior of the table tennis case. This gas phase DEHP can
20 potentially be absorbed to the surface of the interior contents, included but not limited to table
21 tennis rackets and balls, that are subsequently handled by the user. If the table tennis set is stored
22 or transported in a carrier, DEHP that leaches from the item may contaminate other articles
23 contained within these closed spaces that are subsequently handled, worn, mouthed, or ingested
24 by the user. Finally, while mouthing of the product does not seem likely, some amount of
25 exposure through ingestion can occur by touching the product with subsequent touching of the
26 user's hand to mouth.

1 28. 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 29. Defendant has knowledge that the normal and reasonably foreseeable use of the
5 Product exposes individuals to DEHP, and Defendant intends that exposures to DEHP will occur
6 by its deliberate, non-accidental participation in the manufacture, importation, distribution, sale
7 and offering of the Products to consumers in California.

8 30. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
9 Complaint.

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

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

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
16 following relief:

- 17 A. That the court assess civil penalties against Defendant in the amount of
18 \$2,500 per day for each violation in accordance with Health and Safety
19 Code § 25249.7(b);
20 B. That the court preliminarily and permanently enjoin Defendant mandating
21 Proposition 65 compliant warnings on the Product;
22 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
23 D. That the court grant any further relief as may be just and proper.

24 Dated: July 3, 2019

BRODSKY & SMITH, LLC

25 By: 

26 Evan J. Smith (SBN242352)

27 Ryan P. Cardona (SBN302113)

28 9595 Wilshire Boulevard, Suite 900

Beverly Hills, CA 90212

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff