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ENDORSED
FILED
ALAMEDA COUNTY

AUG 27 2018

CLERK OF THE SUPERIOR COURT

- By Lanette Buffin, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO.

11 Plaintiff,

12 vs.

13 MESSINGSCHLAGER GMBH & CO.
14 KG, WALMART, INC.,

15 Defendants.

Case No.:

9032851
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.

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 M-
28 Wave (phone) armbands sold and/or distributed by defendants Messingschlager GmbH & Co.

1 KG (“Messingschlager”) and Walmart, Inc. (“Walmart”) (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 it 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 manufacture, distribute and/or offer for sale in
20 California, without a requisite exposure warning, M-Wave (phone) armbands (the “Products”)
21 that expose 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

9. Plaintiff also seeks injunctive relief, preliminarily and permanently, requiring Defendants to provide purchasers or users of the Products with required warnings related to the dangers and health hazards associated with exposure to DEHP pursuant to Health and Safety Code § 25249.7(a).

PARTIES

10. Plaintiff is a citizen of the State of California acting in the interest of the general public to promote awareness of exposures to toxic chemicals in products sold in California and to improve human health by reducing hazardous substances contained in such items. He brings this action in the public interest pursuant to Health and Safety Code § 25249.7(d).

11. Defendant Messingschlager, through its business, effectively manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Messingschlager is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

12. Defendant Walmart, through its business, effectively manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California, or it implies by its conduct that it manufactures, imports, distributes, sells, and/or offers the Products for sale or use in the State of California. Plaintiff alleges that defendant Walmart is a “person” in the course of doing business within the meaning of Health & Safety Code sections 25249.6 and 25249.11.

VENUE AND JURISDICTION

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

14. This Court has jurisdiction over this action pursuant to California Constitution Article VI, § 10, which grants the Superior Court original jurisdiction in all causes except those

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

10 **SATISFACTION OF NOTICE REQUIREMENTS**

11 16. On August 27, 2018, Plaintiff gave notice of alleged violation of Health and
12 Safety Code § 25249.6 (the "Notice") to Defendants concerning the exposure of California
13 citizens to DEHP contained in the Products without proper warning, subject to a private action to
14 Defendants and to the California Attorney General's office and the offices of the County District
15 attorneys and City Attorneys for each city with a population greater than 750,000 persons
16 wherein the herein violations allegedly occurred.

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

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

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

28 **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 either the manufacturers, distributors, and/or retailers of the Product.

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 Product does 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 27, 2018, continuing until the present, that Defendants have continued to knowingly and intentionally expose California users and consumers of the Product 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 dermal absorption. Users may be exposed to DEHP by dermal absorption through direct skin contact with the Product during expected use when the Product is worn on the arm, grasped, or manipulated with bare hands. If the Product becomes wet due to precipitation or sweat and is handled, aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP permeation. DEHP that leaches from the Product can contaminate a smart phone contained within the phone pocket that is subsequently handled. When a smart phone is removed from the Product and used, dermal absorption of DEHP is possible when the user manipulates the phone or holds the cell phone against an ear. If the Product is stored or transported in a carrier, DEHP that leaches from the Product may contaminate other articles contained within these closed spaces are subsequently handled, worn, mouthed, or consumed. Finally, while mouthing of the Product does not seem likely, some amount of exposure through ingestion can occur by touching the Product with subsequent touching of the user's hand to mouth, through touching the DEHP contaminated smartphone screen after it is

1 removed from the Product with subsequent touching of the user's hand to mouth, or if the phone
2 surface is contaminated with DEHP and comes into contact with the user's mouth during use.

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

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

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

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

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

16 **PRAYER FOR RELIEF**

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

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

26
27 Dated: August 27, 2019

BRODSKY & SMITH, LLC

28 By: 

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