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ENDORSED
FILED
ALAMEDA COUNTY
MAY 22 2019
CLERK OF THE SUPERIOR COURT
By Lanette Buiffin, Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 19019847

12 Case No.:

13 ANTHONY FERREIRO,

14 Plaintiff,

COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF

15 vs.

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

16 BED BATH & BEYOND, INC.,

17 Defendant.

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

20 BACKGROUND OF THE CASE

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

27 2. This complaint is a representative action brought by Plaintiff in the public interest
28 of the citizens of the State of California to enforce the People's right to be informed of the health
hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP), a toxic chemical found in Bin
Warehouse Fold-A-Totes sold and/or distributed by defendant Bed Bath & Beyond, Inc.
("BB&B" or "Defendant") in California.

1 3. DEHP is a harmful chemical known to the State of California to cause cancer and
2 reproductive toxicity. 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 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 distributes and/or offers for sale in California,
18 without a requisite exposure warning, Bin Warehouse Fold-A-Totes (the “Products”) that expose
19 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
28

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 BB&B, through its business, effectively imports, distributes, sells,
9 and/or offers the Products for sale or use in the State of California, or it implies by its conduct
10 that it imports, distributes, sells, and/or offers the Products for sale or use in the State of
11 California.

12 12. Plaintiff alleges that defendant BB&B 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
28

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

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 distributor, and/or retailer
26 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 August 16, 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. The Product can be expected to emit
9 gas phase DEHP into the air and accumulate DEHP at the surface over the lifetime of the
10 Product. Dermal absorption of DEHP can occur through direct skin contact when the Product is
11 contacted with bare hands. If the Product is folded and stored or transported in a carrier, DEHP
12 that leaches from the item may contaminate other articles contained within the carrier or storage
13 area that are subsequently handled, worn, or consumed by the user. Finally, while mouthing of
14 the Product does not seem likely, some amount of exposure through ingestion can occur by
15 touching the Product with subsequent touching of the user's hand to mouth.

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

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

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

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

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

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff demands judgment against Defendant and requests the
3 following relief:

- 4 A. That the court assess civil penalties against Defendant in the amount of
5 \$2,500 per day for each violation in accordance with Health and Safety
6 Code § 25249.7(b);
7 B. That the court preliminarily and permanently enjoin Defendant mandating
8 Proposition 65 compliant warnings on the Product;
9 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
10 D. That the court grant any further relief as may be just and proper.

11 Dated: May 21, 2019

BRODSKY & SMITH, LLC

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