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ENDORSED
FILED
San Francisco County Superior Court

APR 25 2019

CLERK OF THE COURT
BY: KALENE APOLONIO
Deputy Clerk

5 Attorneys for Plaintiff the Center for Advanced Public Awareness, Inc.

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF SAN FRANCISCO

9 CENTER FOR ADVANCED PUBLIC
10 AWARENESS, INC., in the public interest,

11 Plaintiff,

12 vs.

13 MADE FOR RETAIL, INC., a Minnesota
14 Corporation; and DOES 1 through 50,
inclusive,

15 Defendants.
16

Case Number: CGC-19-575495

COMPLAINT FOR INJUNCTIVE RELIEF
AND CIVIL PENALTIES

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement Act
of 1986 (Health and Safety Code § 25249.5 et
seq.)

17 Plaintiff the Center for Advanced Public Awareness, Inc., ("CAPA"), in the public interest,
18 alleges as follows as to matters within its own knowledge, and on information and belief as to all
19 other matters:

20 INTRODUCTION

21 1. This action seeks to remedy the alleged failure of defendants Made for Retail, Inc.
22 ("Made for Retail" or "Defendant") and DOES 1-50 (collectively "Defendants") to warn
23 consumers in California that they are being exposed to Di-(2-ethylhexyl) phthalate ("DEHP"), a
24 substance known to the State of California to cause cancer and developmental/reproductive
25 toxicity. Plaintiff alleges such exposures have occurred through the manufacture, distribution,
26 sale and consumer use of Made for Retail's Flasks, UPC No: 810655083576 and SKU#
27 234020385 ("Product(s)"), which are imported, sold and/or distributed for sale in California by
28

COMPLAINT

BY FAX
ONE LEGAL LLC

1 Made for Retail (the "Products"). California consumers are directly exposed to DEHP through
2 the touching of the components of the Products. In addition, DEHP transferred to the hand is
3 then ingested through hand to mouth contact.

4 2. Pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
5 Safety Code Section 25249.5 *et seq.* (hereinafter "Proposition 65"), it is unlawful for businesses
6 to knowingly and intentionally expose individuals in California to chemicals known to the State
7 to cause cancer and/or birth defects or other reproductive harm above the safe harbor levels,
8 which include the No Significant Risk Levels ("NSRLs") and/or Maximum Allowable Dose
9 Levels ("MADLs") without providing "clear and reasonable" warnings to individuals prior to
10 their exposure.

11 3. Despite the fact that Defendant's Products allegedly expose consumers to levels of DEHP
12 above the listed NSRLs and MADLs, Plaintiff contends that Defendant failed to provide any
13 warnings whatsoever about the carcinogenic hazards associated with DEHP exposure.
14 Moreover, Defendant's manufacture, packaging, distribution, marketing, and/or sales of the
15 Products without the required health hazard warnings, causes consumers to be involuntarily,
16 unknowingly and unwittingly exposed to levels of DEHP that violate Proposition 65. Thus,
17 Defendant's conduct subjects them to civil penalties and injunctive relief.

18 **JURISDICTION AND VENUE**

19 4. This Court has jurisdiction over this action pursuant to Cal. Health & Safety Code §
20 25249.7, which allows enforcement in any court of competent jurisdiction. The California
21 Superior Court has jurisdiction over this action pursuant to California Constitution Article VI,
22 Section 10, which grants the Superior Court "original jurisdiction in all cases except those given
23 by statute to other trial courts." The statute under which this is brought does not specify any other
24 court with jurisdiction.

25 5. This Court has jurisdiction over Defendants because they are business entities that do
26 sufficient business, have sufficient minimum contacts or otherwise intentionally avails themselves
27 of the California market through the sale, marketing, or use of the Products in the California
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1 market and/or by having such other contact with California so as to render the exercise of
2 jurisdiction over them by the California courts consistent with traditional notions of fair play and
3 substantial justice.

4 6. Venue is proper in this Court because, upon information and belief, one or more of the
5 violations arise in San Francisco County.

6 **THE PARTIES**

7 7. CAPA is a non-profit corporation organized under the laws of California acting in the
8 interest of the general public seeking to further, among other causes, the protection of the
9 environment, awareness of dangerous chemicals in consumer products, and corporate
10 accountability. CAPA is a "person" within the meaning of Cal. Health & Safety Code §
11 25249.11(a) and brings this enforcement action in the public interest pursuant to Cal. Health &
12 Safety Code § 25249.7(d).

13 8. CAPA is informed and believes, and thereon alleges, that defendant Made for Retail is a
14 Minnesota corporation who supplies consumer products to various retail stores in the state of
15 California. Made for Retail is a "person in the course of doing business" within the meaning of
16 Cal. Health & Safety Code § 25249.11(b).

17 9. CAPA is unaware of the true names or capacities of the Defendants sued herein under the
18 fictitious names DOES 1-50, but prays for leave to amend and serve such fictitiously named
19 Defendants pursuant to California Code of Civil Procedure § 474, once their names and capacities
20 become known.

21 10. CAPA is informed and believes, and thereon alleges, that each and all of the acts and
22 omissions alleged herein were performed by, or are attributable to, Defendants and DOES 1-50,
23 each acting as the agent for the other, with legal authority to act on the other's behalf. Upon
24 information and belief, the acts of Defendants were in accordance with, and represent the official
25 policies of Defendants.

26 11. At all times herein mentioned, upon information and belief, the Defendants, and each of
27 them, ratified each and every act or omission complained of herein. At all times herein
28

1 mentioned, upon information and belief, Defendants, and each of them, aided and abetted the acts
2 and omissions of each and all the other Defendants proximately causing the damages herein
3 alleged.

4 12. CAPA is informed and believes, and thereon alleges, that each of Defendants are in some
5 manner intentionally, negligently, or otherwise responsible for the acts, omissions, occurrences,
6 and transactions alleged herein.

7 STATUTORY AND REGULATORY BACKGROUND

8 13. The People of the State of California declared in Proposition 65 their right "[t]o be
9 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
10 harm." (Section 1(b) of Initiative Measure, Proposition 65).

11 14. To effectuate this goal, Proposition 65 requires that individuals be provided with a "clear
12 and reasonable warning" before being exposed to substances listed by the State of California as
13 causing cancer or reproductive toxicity. Cal. Health and Safety Code §25249.6 states, in pertinent
14 part:

15 No person in the course of doing business shall knowingly and
16 intentionally expose any individual to a chemical known to the
17 state to cause cancer or reproductive toxicity without first giving
18 clear and reasonable warning to such individual....

19 15. A product exposure to a chemical is one that "results from a person's acquisition,
20 purchase, storage, consumption, or other reasonably foreseeable use of a product" 27 C.C.R.
21 §25600(h).

22 16. Proposition 65 provides that any "person who violates or threatens to violate" the statute
23 may be enjoined in a court of competent jurisdiction. Cal. Health & Safety Code §25249.7. The
24 phrase "threaten to violate" is defined to mean creating "a condition in which there is a substantial
25 probability that a violation will occur" Cal. Health & Safety Code §25249.11(e). Violators are
26 liable for civil penalties of up to \$2,500 per day for each violation of the Act. Cal. Health &
27 Safety Code §25249.7.

28 17. On October 24, 2003, the State of California officially listed DEHP as a chemical known
to cause cancer. On October 24, 2004, one year after it was listed as a chemical known to cause

1 cancer and reproductive/developmental toxicity, DEHP became subject to the clear and reasonable
2 warning requirement regarding under Proposition 65. 27 C.C.R. §27001(c); Cal. Health & Safety
3 Code §25249.10(b). Due to the toxicity of DEHP, the California Office of Environmental Health
4 Hazard Assessment ("OEHHA") set the NSRL for exposure to DEHP at 310 micrograms per day
5 and a MADL of 410 micrograms per day for oral ingestion.

6 **STATEMENT OF RELEVANT FACTS**

7 18. CAPA purchased the Product in August 2018.

8 19. To test Defendant's Products for phthalates, CAPA engaged a well-respected and
9 accredited testing laboratory to determine the amount of DEHP contained in the Product pursuant
10 to testing methods adopted by the Federal Consumer Products Safety Commission. The testing
11 revealed that the Product had levels of DEHP that Plaintiff believes would result in exposure of
12 DEHP to consumers far higher than the limit proscribed by the NSRL and MADL.

13 20. Plaintiff alleges that Defendants' Products contain sufficient quantities of DEHP such that
14 individuals who handle the Products are exposed to significant amounts of DEHP through the
15 average and intended use of the Products. For example, ordinary consumers absorb DEHP
16 through the skin when they touch, use, and/or handle the Products. Ordinary consumers also
17 ingest DEHP via hand to mouth contact after they touch, use, or handle the Products and then
18 touch their mouths or other objects that are then placed in their mouths.

19 21. Plaintiff alleges that Defendants know and intend that consumers will use the products in
20 manner stated above, and that they will be exposed to any chemicals such as DEHP that exist in
21 the Products.

22 22. At all times relevant to this action, Defendants, therefore, have knowingly and
23 intentionally exposed the users, consumers and/or handlers of the Products to DEHP without first
24 giving a clear and reasonable warning to such individuals.

25 23. CAPA is informed and believes, and thereon alleges, that Defendants have, since August
26 2018, and continuing through the present, exposed consumers to DEHP without providing clear
27 and reasonable warnings regarding the cancer hazards of DEHP.
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1 24. As a proximate result of acts by Defendants, as persons in the course of doing business
2 within the meaning of Health & Safety Code §25249.11, Plaintiff alleges they have subjected
3 consumers to violative exposures through the normal and foreseeable use of the Products.

4 25. Any person acting in the public interest has standing to enforce violations of Proposition
5 65 provided that such person has supplied the requisite public enforcers with a valid 60-Day
6 Notice of Violation and such public enforcers are not diligently prosecuting the action with such
7 time. Cal. Health & Safety Code §25249.7(d).

8 26. On October 15, 2018, CAPA provided a "60-Day Notice of Violations of California Health
9 & Safety Code Section 25249.5 et seq." ("Notice") to the California Attorney General, the District
10 Attorneys of every county in California, and the City Attorneys of every California city with a
11 population greater than 750,000. Defendants were also provided a copy of the Notice. The Notice
12 included, *inter alia*, the following information: the name, address, and telephone number of the
13 noticing individual; the name of the alleged violator; the statute violated; the approximate time
14 period during which violations occurred; and descriptions of the violations including the
15 chemicals involved, the routes of toxic exposure, and the specific product or type of product
16 causing the violations. The Notice package to Defendants also included the most recent version of
17 Appendix A, the Final Adopted Regulatory Text for Title 27 of the California Code of
18 Regulations, Section 5903 as amended. In compliance with California Health & Safety Code §
19 25249.7(d) and 11 C.C.R. §3102, CAPA provided factual information – on a confidential basis –
20 to the Attorney General sufficient to satisfy basis for the Certificate of Merit, including the testing
21 performed by CAPA, and/or its litigation consultants, and the facts, studies, or other data
22 supporting the Certificate.

23 27. After expiration of the sixty (60) day notice period, the appropriate public enforcement
24 agencies have failed to commence and diligently prosecute a cause of action under California
25 Health & Safety Code §25249.5 *et seq.* against Defendants based on the allegations herein.

1 28. CAPA has engaged in good faith efforts to resolve the claims alleged herein prior to filing
2 this complaint, and as a result, the parties have reached a consent judgment that they intend to file
3 with the Court to resolve the claims in this lawsuit.

4 **FIRST CAUSE OF ACTION**

5 **(Injunctive Relief Pursuant to Cal. Health & Safety Code §25249.5 *et seq.*)**

6 29. CAPA incorporates by reference and re-alleges as if fully stated herein the material
7 allegations set out in paragraphs 1 through 28, inclusive.

8 30. By committing the acts alleged in this Complaint, Plaintiff alleges that Defendants at all
9 times relevant to this action, and continuing through the present, have violated California Health
10 & Safety Code §25249.6 by, in the course of doing business, knowingly and intentionally
11 exposing individuals in California to chemicals known to the State of California to cause cancer or
12 reproductive toxicity without first giving clear and reasonable warnings to such persons who use,
13 consume or handle the Products containing DEHP, pursuant to California Health & Safety Code
14 §§25249.6 and 25249.11(f).

15 31. By the above-described acts, Plaintiff alleges Defendants have violated California Health
16 & Safety Code §25249.6 and are therefore subject to preliminary and permanent injunctions
17 ordering Defendants to stop violating Proposition 65, to provide warnings to all present and future
18 customers, and to provide warnings to Defendants' past customers who purchased or used the
19 Products without receiving a clear and reasonable warning.

20 32. An action for injunctive relief under Proposition 65 is specifically authorized by California
21 Health & Safety Code §25249.7(a).

22 33. Plaintiff alleges that Defendants actions in selling the Products without clear and
23 reasonable warnings will irreparably harm the citizens of the State of California, for which harm
24 they have no plain, speedy, or adequate remedy at law.

25 34. In the absence of preliminary and then permanent injunctive relief, Plaintiff alleges that
26 Defendants will continue to create a substantial risk of irreparable injury by continuing to cause
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1 consumers to be involuntarily, unknowingly and unwittingly exposed to DEHP through the use,
2 consumption and/or handling of the Products.

3 **SECOND CAUSE OF ACTION**

4 **(Civil Penalties Pursuant to Cal. Health & Safety Code §25249.5 *et seq*)**

5 35. CAPA incorporates by reference and re-alleges as if fully stated herein the material
6 allegations set out in paragraphs 1 through 34, inclusive.

7 36. By committing the acts alleged in this Complaint, Plaintiff alleges Defendants at all times
8 relevant to this action, and continuing through the present, have violated California Health &
9 Safety Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
10 individuals in California to chemicals known to the State of California to cause cancer or
11 reproductive toxicity without first giving clear and reasonable warnings to such persons who use,
12 consume or handle the Products containing DEHP, pursuant to California Health & Safety Code
13 §§25249.6 and 25249.11(f).

14 37. By engaging in the above-described acts, Plaintiff alleges Defendants are liable, pursuant
15 to California Health & Safety Code §25249.7(b), for a civil penalty of up to \$2,500 per day per
16 violation for each unlawful exposure to DEHP from the Products in an amount in excess of \$1
17 million.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, CAPA prays for relief and judgment against Defendants, and each of
20 them, as follows:

21 **As to the Causes of Action**

22 1. A preliminary and permanent injunction, pursuant to California Health &
23 Safety Code Code §25249.7(a), enjoining Defendants, their agents, employees, assigns and all
24 persons acting in concert or participating with Defendants, from manufacturing, distributing,
25 marketing or selling the Products in California without either reformulating the Products or
26 providing a clear and reasonable warning, within the meaning of Proposition 65, that the users
27 and/or handlers of the Products are exposed to DEHP;
28

1 2. An Order pursuant to California Health & Safety Code §25249.7(a)
2 compelling Defendants to use best methods to identify and locate each individual who purchased
3 the Products during the statutory period, and to provide a warning to such person that the use of
4 the Products will expose them to chemicals known to cause cancer;


5 3. An assessment of civil penalties pursuant to California Health & Safety
6 Code §25249.7(b) against Defendants in the amount of \$2,500 per day for each violation of
7 Proposition 65, in an amount to be determined at trial;

8 4. For an award to CAPA of its reasonable attorneys' fees and costs of suit
9 incurred herein; and

10 5. For such equitable or other relief as the Court may deem just and proper.

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12 Dated: April 24, 2019

KAWAHITO LAW GROUP APC

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15 By: 
16 James Kawahito
17 Attorneys for Plaintiff
18 CENTER FOR ADVANCED PUBLIC
19 AWARENESS
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