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ENDORSED  
FILED  
AT ALAMEDA COUNTY

OCT 22 2019

CLERK OF THE SUPERIOR COURT

By Roni Gill  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

**HG 19040036**

10 GABRIEL ESPINOSA,  
11 Plaintiff,  
12 vs.  
13 SWINTON AVENUE TRADING LTD.,  
14 OFFICE DEPOT, INC.,  
15 Defendants.

Case No.:

**COMPLAINT FOR CIVIL PENALTIES AND  
INJUNCTIVE RELIEF**

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

16 Plaintiff Gabriel Espinosa ("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), a toxic chemical found in  
28 Office Depot branded pencil pouches/cases sold and/or distributed by defendants Swinton

By Fax

1 Avenue Trading, Ltd. (“Swinton”) and Office Depot, Inc. (“Office Depot”) (collectively,  
2 “Defendants”) in 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, Office Depot branded pencil pouches/cases  
21 (the “Products”) 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



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 October 24, 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**

1                                   **(By Plaintiff against Defendants for the Violation of Proposition 65)**

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

4           21.     Defendants have, at all times mentioned herein, acted as a manufacturer,  
5 distributor, and/or retailer of the Product.

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

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

9           24.     Plaintiff, based on his best information and belief, avers that at all relevant times  
10 herein, and at least since October 24, 2018, continuing until the present, that Defendants have  
11 continued to knowingly and intentionally expose California users and consumers of the Product  
12 to DEHP without providing required warnings under Proposition 65.

13           25.     The exposures that are the subject of the Notice result from the purchase,  
14 acquisition, handling and recommended use of the Product. Consequently, the primary route of  
15 exposure to these chemicals is through dermal absorption. Users may be exposed to DEHP by  
16 dermal absorption through direct skin contact with the Product when it is handled.  
17 Concentrations of gas phase DEHP can be expected to build within the Product. Items placed in  
18 the Product can absorb DEHP and these items can be subsequently handled, held in direct  
19 contact with skin, mouthed, or ingested. If the Product is stored or transported in a carrier, DEHP  
20 that leaches from the Product may contaminate other articles contained within these closed  
21 spaces that are subsequently handled, worn, mouthed, or ingested by the user. Finally, while  
22 mouthing of the Product does not seem likely, some amount of exposure through ingestion can  
23 occur by touching the Product with subsequent touching of the user's hand to mouth or if DEHP  
24 contaminated pencils are mouthed.

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

28

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

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

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

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

11 **PRAYER FOR RELIEF**

12 WHEREFORE, Plaintiff demands judgment against Defendants and requests the  
13 following relief:

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

21 Dated: October 22, 2019

BRODSKY & SMITH, LLC

22 By: \_\_\_\_\_

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